No. 26-91

# In the Supreme Court of the United States

RICHARD STUART ROSS,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

**BRIEF OF THE CATO INSTITUTE AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**


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August 20, 2026

## QUESTION PRESENTED

1. Whether a civil-forfeiture defendant "substantially prevails" under 28 U.S.C. § 2465(b)(1) when he or she rebuffs the government by causing it to voluntarily dismiss a forfeiture action and return all claimed property it seized following litigation.

2. Whether the loss of a statutory right to attorneys' fees constitutes plain legal prejudice.

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## INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato scholars have published extensive research on the problematic practices of government and the Civil Asset Forfeiture Reform Act. Cato has also filed many *amicus curiae* briefs detailing the downsides of civil forfeiture—in particular, its impact on minority and low-income communities.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business

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[1] Pursuant to Supreme Court Rule 37, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person, other than *amici curiae* or its counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified of the filing of this brief.

association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

This case interests *amici* because it involves the government's use of last-minute dismissals without prejudice to avoid paying attorneys' fees for victims of improper civil forfeiture.

## STATEMENT AND SUMMARY OF ARGUMENT

Civil forfeiture laws permit law enforcement to seize property allegedly connected to criminal activity. Jefferson E. Holcomb et al., *Civil Asset Forfeiture Laws and Equitable Sharing Activity by the Police*, 17 CRIMINOLOGY & PUB. POL'Y 101, 102 (2018). These laws have been heavily scrutinized. *Id.*; *see Culley v. Marshall*, 601 U.S. 377, 397 (2024) (Gorsuch, J., concurring) ("So how is it that, in civil forfeiture, the government may confiscate property first and provide process later?"). Congress enacted the Civil Asset Forfeiture Reform Act (CAFRA) to curb erroneous forfeitures and make property owners whole "after wrongful government seizures," H.R. REP. NO. 106-192, at 11 (1999). Under CAFRA, an owner may recover reasonable attorneys' fees and other litigation costs if he "substantially prevails." 28 U.S.C. § 2465(b)(1)(A).

Richard Ross is an attorney who holds client funds in a trust account at a bank. Pet. App. 5a. On October 6, 2021, a business wired $29.6 million into that account after receiving a fraudulent email instructing it to do so. *Id.* The business soon discovered the fraudulent nature of the email and reported this to the authorities. *Id.* at 6a. Ross, believing the funds came from a client who settled a copyright matter, distributed them as instructed. *Id.* When the bank flagged the transaction for fraud, Ross directed it to recall all pending transfers. Cert. Br. 7. By acting promptly, Ross prevented the fraudster from stealing $1.5 million. *Id.*

But Ross's vigilance apparently did not matter to the government. It seized the entire contents of Ross's account—totaling over \$4.1 million—even though more than \$1.2 million was, according to the government's own warrant application, "unrelated" to the fraud. *Id.*; Pet. App. 68a–69a. In fact, that portion of the money was a combination of other client funds and proceeds from the sale of Ross's home. Pet. App. 9a. Nevertheless, the government proceeded to seek forfeiture of every last dollar in the account.

Over the course of more than a year of litigation, Ross incurred over \$100,000 in attorney's fees. Cert. Br. 8. He then requested that a stay on the case be lifted so that he could move for summary judgment. *Id.* In response, the government hastily moved to voluntarily dismiss the case without prejudice. *See id.* at 2, 8. Ross opposed this motion, warning that an unconditional dismissal without prejudice could circumvent CAFRA's fee-shifting provision and thereby cause prejudice—but the district court granted the motion anyway. *Id.* at 8–9. It then denied Ross's request for attorneys' fees. *Id.* at 9.

Ross appealed to the Second Circuit, which affirmed the district court's denial of fees. *Id.* at 9, 11. It held that because the district court dismissed the case without prejudice, "Ross cannot be said to have 'substantially prevail[ed]'." Pet. App. 50a. This petition follows.

This Court should grant the petition and reverse the decision below. Civil forfeiture hurts everyday Americans and small businesses. CAFRA—an overwhelmingly bipartisan package of reforms—aimed to "increase the due process safeguards for property owners whose property has been seized." H.R. REP. NO. 106-192, at 2. It allows owners to recover attorneys' fees if they successfully challenge a forfeiture. 28 U.S.C. § 2465(b)(1)(A). But in the 26 years since its enactment, the government has developed a litigation strategy that undermines CAFRA and leaves wronged owners less than whole.

Unfortunately, stories like Ross's are common. He is merely the latest in a long line of innocent victims who have been denied recovery despite CAFRA. In each case, the government litigated aggressively, then sought voluntary dismissal without prejudice once an innocent owner's likelihood of prevailing became clear.

Because the government engaged in gamesmanship to avoid fee-shifting, the district court erred in granting its motion to dismiss. When weighing a motion for voluntary dismissal without prejudice, courts must consider (1) whether the defendant would suffer plain legal prejudice or (2) non-exhaustive factors bearing on the plaintiff's conduct. Under either standard, the Second Circuit erred.

If the government voluntarily dismisses a forfeiture case to avoid losing it—as it did here—an owner should be able to recover. *See id.* This Court should disclaim the existence of the CAFRA loophole upon which the government relies to avoid paying innocent owners what they are rightfully due.

## ARGUMENT

### I. CAFRA'S PROMISE OF ATTORNEYS' FEES PROTECTS WRONGED AMERICANS AND SMALL BUSINESSES.

Civil forfeiture hurts everyday Americans and small businesses. It "has in recent decades become widespread and highly profitable," causing "egregious and well-chronicled abuses." *Leonard v. Texas*, 580 U.S. 1178, 1179–80 (2017) (Thomas, J., respecting denial of certiorari). By shifting attorneys' fees, CAFRA offers innocent property owners a way to fight back.

### A. Civil Forfeiture Hurts Everyday Americans.

Civil forfeiture has become a massive industry. Between 1986 and 2014, revenue from civil forfeitures skyrocketed by 4,667%. Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST., at 5 (2d ed. 2015).[2] In 2023, that amount reached $4.5 billion. Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST., at 6 (4th ed. 2026) [hereinafter "Knepper et al."].[3] The Department of Justice now forfeits around 40,000 assets annually. Stephanie Holmes Didwania, *Asset Forfeiture and Inequality*, 77 STAN. L. REV. 159, 164 (2025).

While it may seem like the government would prioritize highly lucrative assets, civil forfeiture actually revolves around the seizure of small amounts of currency. Money is easy to forfeit and seizure of small amounts of it is less likely to be challenged—in part due to the relative expense of securing legal representation. Knepper et al., *supra*, at 50. "From 2019 to 2023, currency accounted for an average of 75% of properties forfeited across 23 states that record such information." *Id.*; *see also* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 31–32 (2012) (discussing law enforcement's incentive to seek currency). The median amount of forfeited cash is just $1,678, far less than the cost of hiring counsel. Knepper et al., *supra*,

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[2] Available at https://tinyurl.com/2tx45nxh.

[3] Available at https://tinyurl.com/ybtc627a.

at 6 (across 24 states). "A straightforward state-court forfeiture case costs an estimated $3,300, nearly twice the median cash forfeiture." *Id.*

The government often prevails in the absence of pushback, even where it engages in patently abusive behavior. Consider the case of Eh Wah. Eh was managing a Burmese Christian rock band on a five-month tour of churches across the country when he was pulled over in Muskogee, Oklahoma for a broken taillight. *Highway Robbery in Muskogee*, INST. FOR JUST. (last visited Aug. 6, 2026).[4] He had money from the tour in his car—funds designated for Thai orphans and Christian Burmese refugees. *Id.* The sheriff's department interrogated Eh for six hours before releasing him but kept all of the cash. *Id.* The district attorney subsequently issued a baseless arrest warrant in an attempt to justify forfeiture of the money. *See id.* Only once counsel became involved were the charges against Eh dropped and the cash returned. *Id.*

While Eh was fortunate enough to secure pro bono counsel, many people targeted by forfeiture cannot afford to hire a lawyer. Even if a person can afford to fight, it often makes little sense to do so because attorneys can cost more than the value seized. That was the predicament facing Brian Moore, Jr. He was traveling to Los Angeles to pursue a new career after being honorably discharged from the Army. Knepper et al., *supra*, at 35. DEA agents stopped him at the airport, searched him, and seized the $8,500 he was relying on to start a new civilian life. *Id.* Unlike many people, Brian was able to hire an attorney and challenge the forfeiture. *Id.* Thanks to the assistance

[4] Available at https://tinyurl.com/4uaffv5v.

of counsel, the government ultimately agreed to return Brian's money—but by that point, he had racked up $15,200 in attorney's fees.[5] *Id.*

Indigent owners face an even steeper barrier to justice. For example, Rhonda Cox loaned her truck to her son for him to drive to a store. Jon Riches, *Civil Asset Forfeiture: Inverting Justice*, GOLDWATER INST. (Aug. 4, 2015).[6] While there, he was approached by Pinal County, Arizona deputies and questioned about stealing the truck bed cover. *Id.* They soon seized Rhonda's truck and refused to return it—even after she called, explained that she owned the truck, and said it was unconnected to any stolen property. *Id.* Rhonda could not afford an attorney. When she tried to challenge the forfeiture pro se, the county threatened *her* with attorneys' fees—forcing her to surrender. *Id.*

Predatory forfeiture practices do not impact all communities equally. The more non-white people in a district, the more likely it is to be targeted by federal prosecutors for cash forfeitures. Didwania, *supra*, at 219; *see also* Candace Caruthers, Note, *When the Cops Become the Robbers: The Impact of Asset Forfeiture on Blacks and How to Curtail Asset Forfeiture Abuses*, 62 HOW. L.J. 277, 290–91 (2018); Mica Doctoroff et al., *Civil Asset Forfeiture: Profiting from California's Most Vulnerable*, ACLU, at 3 (2016) ("Half of DEA seizures

[5] Much like Ross, Brian filed a motion to recover attorney's fees under CAFRA. The district court denied his motion, holding that he had not "substantially prevailed"—just like the courts held with regard to Ross. *United States v. $8,500.00 in United States Currency*, No. 1:21-CV-3847-TWT, 2023 U.S. Dist. LEXIS 248263, at *4–5 (N.D. Ga. Jan. 25, 2023).

[6] Available at https://tinyurl.com/3u3bchv4.

from California involved people with Latino surnames.");[7] C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago*, *Data Shows*, REASON (June 13, 2017).[8] Officials also focus predominantly on low-income areas. Jennifer McDonald & Dick M. Carpenter II, *Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims*, INST. FOR JUST., at 2 (2021).[9] Seizures are "concentrated in areas where most residents are people of color and poverty is high." *See The U.S. Commission on Civil Rights Disapproves of the Department of Justice's Civil Asset Forfeiture Policy*, USCCR, 2 (2017).[10]

There is "a financial incentive to target marginalized groups, such as low-income communities of color, who are less likely to have the resources to challenge the forfeiture in court." *Culley*, 601 U.S. at 406 (Sotomayor, J., dissenting). Minorities are less likely to have the cash on hand needed to contest a seizure. *Racial Differences in Economic Security: Non-Housing Assets*, U.S. DEP'T OF THE TREASURY (Jan. 10, 2023) ("The typical white household has nearly four times the amount of cash than the typical Black or Hispanic household.").[11] According to one study, "Those without a college degree were 82% less likely to get their property back." McDonald & Carpenter II, *supra*, at 3. By concentrating seizures in communities where residents are unlikely to fight back, the

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[7] Available at https://tinyurl.com/4etv5hhz.

[8] Available at https://tinyurl.com/2asfbm7c.

[9] Available at https://tinyurl.com/3euymmds.

[10] Available at https://tinyurl.com/yyxxnx54.

[11] Available at https://tinyurl.com/46yenydr.

government turns people's financial insecurity into a windfall for its own budgets.

Civil forfeiture is often a fight only the government can afford to win. A seizure can take away a person's car, house, or retirement account. It can stand between a family and its monthly rent, medication and grocery bills, or ride to work. By contrast, the government can readily bear the costs of litigation. *Especially* when it knows it can avoid paying for innocent owners' attorneys' fees. CAFRA was meant to level the battlefield—and its sidelining leaves ordinary people at great risk of government exploitation.

### B. Civil Forfeiture Hurts Small Businesses.

Civil forfeiture can pose an existential threat to America's 36 million small businesses. *New Advocacy Report Shows the Number of Small Businesses in the U.S. Exceeds 36 Million*, U.S. SMALL BUS. ADMIN., OFF. OF ADVOC. (June 30, 2025).[12] Such entities employ 46% of the private sector. *Id.* Yet many cannot afford to challenge a forfeiture without CAFRA fee-shifting.

"As a substantial source of employment and main actors in job creation, small businesses play a vital role in driving economic growth and community development." Rachel G. Ngo Ntomp, *The Small Business Dilemma*, 81 WASH. & LEE L. REV. 1939, 1942 (2025). "A weak or deteriorating small business threatens the whole economic well-being of any nation." *To Create the Small Business Administration and to Preserve Small Business Institutions and Free, Competitive Enterprise: Hearings on H.R. 4090 and H.R. 5141 Before the Comm. on Banking and Currency*,

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[12] Available at https://tinyurl.com/2hth2fpe.

83rd Cong. 11 (1953) (statement of William S. Hill, Rep. from Colorado).

Cash flow can be a challenge for small businesses. Holly Wade & Madeleine Oldstone, *Small Business Problems & Priorities*, NFIB RSCH. CTR., at 10 (11th ed. 2024).[13] They often have an average of just $12,100 on hand. Diana Farrell & Chris Wheat, *Cash is King: Flows, Balances, and Buffer Days*, JPMORGANCHASE (Sept. 1, 2016).[14] A quarter have less than 13 cash buffer days in reserve. *Id.* 39% do not have enough cash to survive a difficult month. Dean Kaplan, *51 Small Business Cash Flow Statistics and Financing Pain Points*, THE KAPLAN GRP. (Mar. 11, 2026).[15]

Many small businesses cannot survive a seizure: "if property is used as a business, its lack of availability for the time necessary to win a victory in court could have forced its owner into bankruptcy." H.R. REP. NO. 106-192, at 17.

Examples of civil forfeiture devastating small businesses abound:

- Willie Jones was traveling with $9,000 to buy nursery stock for his landscaping business. *Id.* at 6. Officers questioned him and ran his license, concluding that he was "clean," *id.* but they confiscated his cash due to a drug-dog alert. *Id.* at 7. Willie was released without being charged, but with no money, he could not buy new stock. *Id.*

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[13] Available at https://tinyurl.com/4subevy8.

[14] Available at https://tinyurl.com/4zzrfnwk.

[15] Available at https://tinyurl.com/27dujnhu.

- Billy Munnerlyn owned an air charter service and a businessman hired him for a routine flight. *Id.* at 8. After landing, DEA agents seized the passenger's luggage, along with $2.7 million inside. *Id.* The agents arrested both men and confiscated Billy's airplane. *Id.* Billy spent over $85,000 in legal fees trying to get his plane back. *Id.* A jury ordered that the plane be released, but the district court judge reversed the verdict. *Id.* Billy eventually settled, paying the government $7,000—only to discover that it had caused roughly $100,000 worth of damage to the plane. *Id.* Billy had to shutter his business and declare bankruptcy. *Id.* at 9.

- The IRS seized nearly $63,000 from the bank account of Maryland dairy farmer Randy Sowers.[16] Randy did most of his business at farmer's markets and frequently deposited cash in amounts under $10,000. Sibilla, *supra*. The IRS claimed that in doing so, he was trying to evade federal reporting requirements targeting drug traffickers and money launderers.[17] Randy was never charged with a crime, but it took him years to get his money back.[18]

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[16] Nick Sibilla, *Maryland Dairy Farmer Beats The IRS, Will Recover Nearly $30,000 Seized Through Civil Forfeiture*, FORBES (June 30, 2016, 11:47 AM EDT), https://tinyurl.com/57zp8dav.

[17] *Property Owners Ask Federal Government to Return Money Wrongly Seized Under Civil Forfeiture Laws*, INST. FOR JUST. (last visited Aug. 6, 2026), https://tinyurl.com/52b8hwhu.

[18] Sibilla, *supra*; U.S. Dep't of Just., Crim. Div., Petition for Remission and Mitigation, *United States v. $62,936.04 US. Currency* 1 (June 27, 2016), https://tinyurl.com/uc3a7s3d.

- Cristal Starling operated a food cart and saved up $8,000 hoping to buy a food truck.[19] Police seized the money from her home while investigating her boyfriend for drug trafficking.[20] Though Cristal's boyfriend was acquitted, police gave her money to the DEA.[21] She had to fight the forfeiture for years before prevailing.[22]

Like Randy, Billy, Willie, and Cristal, Ross bore the cost of a government seizure with no guarantee he would ever get his money back. The government held his seized funds for over a year. *See* Cert. Br. 8.

Stranded without access to seized funds, small businesses cannot make payroll, restock inventory, or invest in growth. Some do not survive the wait.

### C. CAFRA Provides Attorneys' Fees to Innocent Americans and Small Businesses.

Civil forfeiture empowers the government to strip people and businesses of their assets, then force them through a complicated, arduous, and expensive process to seek its return. *See* Knepper et al., *supra*, at 23–32, 39; Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 22, 28 (2017). Congress recognized the potential for abuse and drafted CAFRA to protect innocent owners. *See* H.R. REP. NO. 106-192, at 34. It was designed to

[19] *Woman Appeals to Get $8,000 Back After Police Seized It Without Charging Her with Any Crime*, INST. FOR JUST. (last visited Aug. 6, 2026), https://tinyurl.com/585zvjjj.

[20] *United States v. $8,040*, No. 6:21-CV-6323-CJS, 2025 U.S. Dist. LEXIS 138985, at *2 (W.D.N.Y. July 21, 2025).

[21] *Woman Appeals to Get $8,000 Back*, *supra*.

[22] *Id.*

strengthen "due process safeguards." *Id.* at 2. Among these, its fee-shifting provision entitles any owner who "substantially prevails" against the government to recover attorneys' fees. 28 U.S.C. § 2465(b)(1)(A).

This guarantee is what makes CAFRA's due-process protections meaningful in practice. Without it, innocent owners like Ross must weigh the cost of hiring counsel against the value of what was seized—and many would decide that the fight isn't worth it. Moreover, when owners cannot afford to challenge a seizure, the government faces no check and remains free to seize first and litigate—on favorable terms—later.

Innocent owners deserve a chance to fight back. CAFRA's fee-shifting guarantee should work as Congress intended.

## II. THE GOVERNMENT USES LAST-MINUTE DISMISSALS WITHOUT PREJUDICE TO AVOID PAYING ATTORNEYS' FEES.

The government gamesmanship on display in this case is commonplace. The government routinely initiates civil forfeiture actions and then moves belatedly for voluntary dismissals without prejudice to avoid paying attorneys' fees under CAFRA. *See, e.g.*, Order at 6, *United States v. 2002 BMW*, No. 4:05-cv-01155 (S.D. Tex. March 31, 2008); *United States v. $32,820.56*, 106 F. Supp. 3d 990, 995 (N.D. Iowa 2015); *United States v. Approximately $16,500.00*, 113 F. Supp. 3d 776, 784 (M.D. Pa. 2015); Order at 2–3, *United States v. $13,275.21*, No. 5:06-cv-00171-XR (W.D. Tex. Jan. 31, 2007). The Department of Justice's 2025 Asset Forfeiture Policy Manual specifically recognizes that "Attorneys' fees are not available to the claimant where the government . . . agrees to voluntary dismissal."[23]

This stratagem—and its injustice—is showcased by a 2016 case.[24] The government sought forfeiture of the life savings of North Carolina convenience store owner Lyndon McLellan.[25] Lyndon kept his personal savings in his store's bank account.[26] In December 2014, the government filed a complaint against Lyndon alleging the same sort of reporting-evasion as the Maryland dairy farmer described above.[27] It seized Lyndon's entire account—with the store's money and his personal savings.[28] It did so despite the IRS having released a policy months before stating that it would not apply the laws at issue to people, like Lyndon, whom it did not suspect of criminal activity.[29]

Over nine months after it seized Lyndon's business proceeds and life savings, the government filed a motion to dismiss without prejudice.[30] Lyndon's (pro bono) counsel challenged the motion, noting that he had already accrued $15,000 worth of attorneys' fees—

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[23] U.S. Dep't of Just., Asset Forfeiture Pol'y Manual at 11-1 (2025), https://tinyurl.com/5n8rcjwz.

[24] *United States v. $107,702.66*, No. 7:14-CV-00295-F, 2016 U.S. Dist. LEXIS 12211 (E.D.N.C. Feb. 2, 2016).

[25] Resp. of Claimants Lyndon B. McLellan and L&M Convient Mart, Inc. [sic] to Pl.'s Mot. for Voluntary Dismissal Without Prejudice at 1–2, *id.* (E.D.N.C. May 29, 2015).

[26] *Id.* at 2.

[27] Mot. for Voluntary Dismissal Without Prejudice at 1, *id.* (E.D.N.C. May 13, 2015).

[28] *See id.* at 4.

[29] *See id.* at 5.

[30] *See id.* at 1, 3.

and that the government had previously asked him to waive his right to attorneys' fees as a condition for the return of his money.[31] Only after Lyndon rejected this offer did the government seek dismissal without prejudice.[32]

Happily for Lyndon, the district court in his case did what the courts here declined to, seeing through the government's ruse and dismissing the case with prejudice.[33] It found that granting the government's motion would thwart "the right of a citizen to seek the relief Congress has afforded" in CAFRA—the right to be made whole.[34]

Without the sort of procedural protections CAFRA afforded Lyndon, the government has a strong incentive to seek forfeiture first and worry about the propriety of doing so later.[35] It typically faces low evidentiary burdens. Knepper et al., *supra*, at 16. Short deadlines for owners work in its favor, too: owners have just 35 days after receiving notice to file a claim. *Id.* at 23, 25. They have no right to counsel or trial by jury. Didwania, *supra*, at 176–77. Fee-shifting under CAFRA is one of the few potential advantages innocent owners enjoy.

Yet the government has found a way to escape its promise. When the government comes to believe an owner is likely to prevail, it moves for dismissal

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[31] *Id.*; Resp. of Claimants at 2, 12.

[32] *See id.* at 12–13.

[33] *$107,702.66*, 2016 U.S. Dist. LEXIS 12211, at *14.

[34] *Id.* at *4, *10 (quoting H.R. REP. NO. 106-192, at 11).

[35] *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic* Agenda, 65 U. CHI. L. REV. 35, 40 (1998).

without prejudice, walking away from a case it likely would have lost just in time to avoid having to foot the owner's bill. It simply awaits another chance to spin the "roulette wheel" of civil forfeiture against some other "innocent but hapless owners whose property"—like Ross's bank account—"is unforeseeably misused." *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring).

## III. THE LOWER COURT LET THE GOVERNMENT SIDESTEP CAFRA.

The Federal Rules of Civil Procedure are supposed to prevent the government gamesmanship at issue here. *See* FED. R. CIV. P. 41(a)(2). "Two lines of authority have developed with respect to the circumstances under which a dismissal without prejudice might be improper." *Camilli v. Grimes,* 436 F.3d 120, 123 (2d Cir. 2006). The first asks whether the defendant would suffer "plain legal prejudice," a threshold inquiry that bars an unconditional dismissal outright if satisfied. *Id.* (citation omitted). The second, more searching approach considers the non-exhaustive *Zagano* factors: "(1) the plaintiff's diligence in bringing the motion, (2) any undue vexatiousness on the plaintiff's part, (3) the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial, (4) the duplicative expense of relitigation, and (5) the adequacy of the plaintiff's explanation for the need to dismiss." *Id.* (citing *D'Alto v. Dahon Cal., Inc.*, 100 F.3d 281, 283 (2d Cir. 1996); *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990)); *see also Kwan v. Schlein*, 634 F.3d 224, 230 (2d Cir. 2011). Regardless of which approach the court applies, both lead to the same conclusion: the dismissal below was improper.

As to the first line of authority, the unconditional dismissal without prejudice caused Ross plain legal prejudice. Courts are split as to whether the inability to seek attorneys' fees under CAFRA is legal prejudice.[36] The Second Circuit fell on the wrong side. *See* Pet. App. 41a. It held that legal prejudice attaches only once a claimant "is in a position to demand on the pleadings an opportunity to seek affirmative relief" and is instead "being remitted to a separate action." *Id.* at 41a–42a (citation omitted).

This is overly technical. A more straightforward test defines legal prejudice as simply "prejudice to some legal interest, some legal claim, some legal argument." *Santa Rosa Mem'l Hosp. v. Kent*, 688 Fed. Appx. 492, 493 (9th Cir. 2017) (quoting *Smith v. Lenches*, 263 F.3d 972, 976 (9th Cir. 2001)). Courts adopting such a broader approach consider "the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been

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[36] *Compare United States v. Ito*, 472 Fed. App'x 841, 842 (9th Cir. 2012) ("The [claimants] suffered plain legal prejudice in losing their ability to move for attorney's fees."), *and $107,702.66*, 2016 U.S. Dist. LEXIS 12211, at *14 ("[A] voluntary dismissal without prejudice would likely preclude prevailing party status under CAFRA, depriving Claimants of their right to bring a claim under that statute . . . the court considers this likelihood of deprivation great enough to constitute a substantial legal prejudice.") *with $32,820.56,* 106 F. Supp. at 997 ("I cannot conclude that the Eighth Circuit would hold that a motion to dismiss without prejudice should be denied on grounds of legal prejudice simply because the non-moving party might someday prevail and obtain an award under a fee-shifting statute."), *and $8,040*, 2025 U.S. Dist. LEXIS 138985, at *17–18.

filed by the defendant." *Bridgeport Music, Inc. v. Universal-MCA Music Publ'g, Inc.*, 583 F.3d 948, 953 (6th Cir. 2009) (citation omitted).

Surely losing the chance to receive money to which one is statutorily entitled is within a normal understanding of legal prejudice. *See Santa Rosa Mem'l Hosp.*, 688 Fed. Appx. at 493; *cf. Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996) (looking to "the rights and defenses available to a defendant in future litigation").[37] Ross litigated this case for over a year before moving to lift the stay and proceed to summary judgment—incurring more than $100,000 in attorney's fees. Cert. Br. 8; Pet. App. 10a. Only then did the government ask to dismiss the case without prejudice—in order to extinguish Ross's chance of recovering attorneys' fees. Cert. Br. 8. He was prejudiced by the district court's acquiescence.

As to the second line of authority, the second and fifth *Zagano* factors—"any undue vexatiousness on the plaintiff's part" and "the adequacy of the plaintiff's explanation for the need to dismiss"—disfavor voluntary dismissal here. *See Camilli,* 436 F.3d at 123. "Vexatiousness refers to instances in which the case was brought to harass the defendant, or the plaintiff had ill-motive." *Paulino v. Taylor*, 320 F.R.D. 107, 110 (S.D.N.Y. 2017) (citations omitted). Courts have found ill motive where a plaintiff let the case proceed with no intention of providing discovery, thereby pressing

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[37] When considering other statutes, courts have held that depriving a claimant of attorneys' fees causes legal prejudice. *See Dental Health Servs. Inc. v. Miller*, No. C23-0383-KKE2024, 2024 U.S. Dist. LEXIS 48623, at *7 (W.D. Wash. Mar. 19, 2024) (Uniform Trade Secrets Act and the Defend Trade Secrets Act claims); *Prepared Food Photos, Inc. v. Pool World, Inc.*, 752 F. Supp. 3d 1230, 1231 (E.D. Wash. 2024) (copyright claims).

claims without having to support them. *Id.* The government did that here, pursuing the forfeiture action for over a year and forcing Ross to incur hefty litigation costs—only to abandon its claims as soon as Ross requested action in the case. The government pressed its case without ever having to prove it. That about-face indicates ill motive.

The government's delay further shows vexatiousness. Due process requires "a *timely* post-seizure forfeiture hearing," *Culley*, 601 U.S. at 384, because prolonged delays leave "the dispossessed property owner . . . deprived of a meaningful hearing at a meaningful time.'" *Id.* at 386 (quoting *United States v. $8,850*, 461 U.S. 555, 562–63 (1983)). Ross had to wait 16 months to receive a final judgment, Pet. App. 25a—including a full year in which the district court failed to act on his petition. Br. & Special App'x for Claimant-Appellant at *15, *United States v. Ross*, 161 F.4th 100 (2d Cir. 2025) (No. 24-1421). The government could have moved to dismiss the case at any time. *Id.* at *40. It chose to let a year pass. *Id.* These types of lengthy delays, while funds sit frozen, can financially decimate a property owner.

The fifth *Zagano* factor—the adequacy of the government's explanation—also favors Ross. *See Camilli,* 436 F.3d at 123. "Courts analyzing the fifth *Zagano* factor consider whether the explanation is 'reasonable.'" *Laurion v. PHH Mortg. Corp.*, 671 B.R. 342, 350 (D. Conn. 2025) (citation omitted). Here, the government stated that its motion to dismiss was based on "review of information and documentation obtained in connection with this matter." Br. of Appellee United States at *40, *United States v. Ross*, 161 F.4th 100 (2d Cir. 2025) (No 24-1421). This vague statement appears to be pretextual. At the very least, it is not "reasonable." *See Laurion*, 671 B.R. at 350 (citation omitted). It appears even less so against the backdrop of the government's systematic evasion of its responsibilities under CAFRA.

The decision below sanctioned government gamesmanship that deprived Ross of his attorneys' fees. This Court should lay that gambit to rest.

## CONCLUSION

Civil forfeiture is "a money-making scheme that preys on those least able to fight it." *Ingram v. Wayne Cnty.*, 81 F.4th 603, 623 (6th Cir. 2023) (Thapar, J., concurring), *overruled by Culley*, 601 U.S. 377. CAFRA at least gives innocent Americans and small businesses a way to fight back. The government's persistent efforts to evade it are a disgrace this Court should reject.

Respectfully submitted,

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August 20, 2026