RECORD NO. 15-2232

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MARLA M. BEDNAR; THOMAS G. BEDNAR,

Claimants – Appellants,

and

FUNDS CONTAINED IN THE BETTER BUSINESS CHECKING ACCOUNT NUMBERED 802070987; THE BUSINESS SWEEP ACCOUNT NUMBERED 802121715 AT CAPITAL BANK, UP TO $359,557.25 IN THE NAME OF MARLA BEDNAR, d/b/a MARLA ENTERPRISES,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

BRIEF OF *AMICI CURIAE* LYNDON McLELLAN AND CAROLE HINDERS IN SUPPORT OF REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 15-2232 Caption: United States of America v. Marla M. Bednar; Thomas G. Bednar

Pursuant to FRAP 26.1 and Local Rule 26.1,

LYNDON McLELLAN and CAROLE HINDERS
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Robert E. Johnson Date: December 21, 2015

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

****

I certify that on December 21, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Robert E. Johnson
(signature)

December 21, 2015
(date)

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INTEREST OF THE *AMICI*[1]

Carole Hinders and Lyndon McLellan are hard-working small business owners who had their entire bank accounts seized through civil forfeiture because they deposited cash in the bank in amounts under $10,000. Carole runs a restaurant in small-town Iowa, and Lyndon runs a convenience store in rural North Carolina. Both Carole and Lyndon fought for months, and at great expense, in order to prove their innocence, and both recovered their money after the government eventually agreed to give it back. In both cases—as in *this* case—the government then sought dismissal without prejudice in order to avoid its obligation to pay fees, costs, and interest under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA").

Carole and Lyndon have a direct and straightforward interest in the outcome of this appeal, as both are currently litigating to secure the fees, costs, and interest that they are entitled to under CAFRA. *See United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars and Fifty-Six Cents ($32,820.56) in U.S. Currency*, Nos. 15-2622 & 15-2624 (8th Cir.); *United States v. $107,702.66 in U.S. Currency Seized from Lumbee Guaranty Bank Account Number XXXX2495*, No. 7:14-cv-00295-F (E.D.N.C.).

[1] No person other than *amici* or their counsel contributed money intended to fund the preparation and submission of this brief. In addition, no party or party's counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief.

Carole and Lyndon submit this brief to bring the Court's attention to the national implications of this appeal. CAFRA's provision for fees, costs, and interest serves three vitally important public purposes: first, to create a financial disincentive for meritless forfeiture actions; second, to promote the availability of counsel for forfeiture claimants; and, third, to make forfeiture victims at least partly whole. But the government—in this and other cases—believes it has found a way to vitiate that protection, by seizing property without prior investigation and then seeking dismissal *without* prejudice if it later turns out the seizure was an error. The government's procedural gambit facilitates precisely the type of abuse of the civil forfeiture laws that CAFRA was designed to redress, and a decision from this Court approving or disapproving that course of procedure will have ramifications for civil forfeiture cases nationwide.

SUMMARY OF ARGUMENT

The government's procedural maneuvering in this case—and its relation to CAFRA's provision for fees, costs, and interest—can only be fully appreciated in the context of a broader pattern of law enforcement abuse that is facilitated and encouraged by the civil forfeiture laws. This brief is intended to open a window on that broader context.

Numerous cases follow the same pattern: Using the civil forfeiture laws, government takes property without meaningful prior investigation, based only on

suspicion of a crime. The government then forces property owners to incur significant expenses—including the expense to retain a lawyer—to preserve their property rights. The government seeks to negotiate settlement agreements, compelling property owners to cede their property or other legal rights to avoid the expense of litigation. And, finally, if and when property owners resist these strong-arm tactics, the government returns the property and seeks dismissal without prejudice in an attempt to avoid the government's statutory obligation to provide some limited recompense to make the property owner whole.

CAFRA's provision for fees, costs, and interest was designed to deter and redress precisely this kind of conduct by the government. Indeed, stories of abuse detailed in the legislative history follow this same pattern of "seize first, question later" law enforcement abuse.

The government's procedural maneuvering, approved by the court below, threatens to undermine CAFRA's reforms in at least three different ways. First, CAFRA's provision for fees, costs, and interest creates a financial disincentive for meritless seizures, yet the tactic adopted by the government would eliminate that disincentive by allowing the government to walk away from meritless seizures without financial consequence. Second, while CAFRA's fee-shifting provision provides an incentive for lawyers to take on forfeiture cases, this incentive would largely disappear if the government could so easily evade CAFRA's command.

And, third, while CAFRA's provision for fees, costs, and interest is designed to ensure that victims of meritless civil forfeiture actions are made whole, the government's tactic denies any recompense to individuals who have been forced to expend significant resources to recover property. Indeed, if the government's tactic were approved, the result would be absurd: Claimants who recovered their property after a final decision on the merits—perhaps based on a legal technicality or a close judgment call—would receive recompense, but victims of plainly meritless seizures who recovered their property prior to a final judgment would receive no recompense at all. That is not, and should not be, the law.

ARGUMENT

This brief opens by recounting the specific experiences of *amici* Carole Hinders and Lyndon McLellan, which closely parallel the experience of Appellants in this case. *Infra* 5-11. The brief then places *amici*'s stories—and this case—in the broader context of the government's "seize first, question later" approach to civil forfeiture. *Infra* 11-20. Finally, the brief closes by relating this broader context to Congress's aims in enacting CAFRA's provision for fees, costs, and interest. *Infra* 20-27. Congress legislated to address precisely these types of meritless forfeiture actions, and the government's conduct in this case threatens to fatally undermine Congress's legislative goals.

I. The Government Has Attempted To Use This Same Procedural Tactic In Other Cases Nationwide.

The government's conduct in this case is not unique; rather, it bears a striking resemblance to the government's treatment of *amici* Lyndon McLellan and Carole Hinders. Lyndon's case arose in the same judicial district as the instant case and was pursued by the same AUSA. Carole's case arose in small-town Iowa. In both cases, the government used the civil forfeiture laws to upend the lives of honest, hard-working small business-owners and then sought to walk away without facing any consequence for its actions.

A. Lyndon McLellan: Over $107,000 Seized From A Convenience Store In Rural North Carolina.

Lyndon McLellan grew up working in his parents' convenience store, and in 2001 he decided to go into that same line of business for himself.[2] He purchased a store in rural North Carolina, named it L&M Convenience Mart, and worked for

[2] Lyndon's story is detailed—with supporting citations and documentation—in his response to the government's motion for voluntary dismissal without prejudice. *See* Response of Claimants to Plaintiff's Motion for Voluntary Dismissal Without Prejudice, *United States v. $107,702.66 in U.S. Currency Seized from Lumbee Guaranty Bank Account Number XXXX2495*, No. 7:14-cv-00295-F (E.D.N.C. May 29, 2015) (Docket No. 23). The case was also widely reported in the press. *See, e.g.*, Shaila Dewan, *Rules Change on I.R.S. Seizures, Too Late for Some*, N.Y. Times, Apr. 30, 2015, *available at* http://nyti.ms/1Qdb31Z; Editorial, *IRS Should Admit Error in NC Forfeiture Case*, News & Observer, May 7, 2015, *available at* http://bit.ly/1NVULgD; Melissa Quinn, *The IRS Seized $107,000 From This North Carolina Man's Bank Account*, The Daily Signal, May 11, 2015, *available at* http://dailysign.al/1E48are.

years to grow the business. Today, L&M is a place where locals gather for meals (you can get a catfish sandwich for $2.75) and to see a friendly face.

Lyndon does a substantial cash business, and his niece is charged with depositing the business's cash receipts in the bank. Back in 2001, when the business first opened, a bank teller informed the niece that there was unspecified "paperwork" associated with transactions over $10,000. The niece, unaware of the precise nature of this "paperwork," but hoping to avoid time-consuming red tape at the bank, made it a habit to keep cash deposits under $10,000.

In July 2014, the government seized the entire bank account for L&M—over $107,000. The government did not speak to Lyndon or his niece about the bank deposits before applying for the warrant. Instead, the government obtained its seizure warrant via an *ex parte* affidavit filled out by a state police officer, who identified a series of deposits under $10,000 and concluded based on this pattern that Lyndon structured his deposits to evade federal bank reporting laws.

Over the following months, Lyndon incurred significant expenses trying to convince the government to return his money. Lyndon paid a retainer to hire a private attorney, and he also paid an accountant to audit his business so that he could demonstrate that his deposits were legitimately earned. Lyndon and his accountant presented the results of the audit at a meeting with attorneys for the government, but still the government refused to return the money it had seized.

In the course of these discussions with the government, Lyndon's attorney forwarded to the responsible AUSA a video clip in which Lyndon's case was discussed by Members of Congress at a congressional hearing. These Members of Congress were concerned that the government was continuing to pursue Lyndon's case even after the IRS's announcement, in October 2014, that it would no longer apply the structuring laws to cases like Lyndon's. The AUSA—who was also the AUSA responsible for Appellants' case—reacted to news of this congressional scrutiny with an email stating that publicity "doesn't help" and "just ratchets up feelings in the agency."[3] The AUSA offered to "return 50% of the money" and announced: "Your client needs to resolve this or litigate it."

Presented with a choice between a 50% settlement and litigation, Lyndon retained new *pro bono* counsel from the Institute for Justice and proceeded to litigation. But the government did not even allow the case to get to discovery. Less than two weeks after Lyndon filed his Answer to the Complaint, and less than two months after the government insisted on a 50% settlement, the government offered to return 100% of the money if Lyndon agreed to waive his right to attorney fees, costs, and interest, as well as any claim against the government relating to the

[3] A copy of this email is included as Exhibit C to Lyndon McLellan's response to the government's motion to dismiss without prejudice. *See United States v. $107,702.66 in U.S. Currency Seized from Lumbee Guaranty Bank Account Number XXXX2495*, No. 7:14-cv-00295-F (E.D.N.C. May 29, 2015) (Docket No. 23-3).

seizure. Lyndon declined that offer, explaining that he would not waive his legal rights in order to get back his lawfully-earned money.

The very next day, on May 13, 2015, the government filed a motion seeking to dismiss the complaint without prejudice. The government openly acknowledged in its subsequent filings that it had no intention of re-filing the case at another time, stating that "[t]his litigation is at end."[4] And the government identified no other basis—apart from a desire to avoid fees, costs, and interest under CAFRA—for seeking dismissal *without* prejudice. Lyndon opposed the government's motion, which currently remains pending before the district court.

B. Carole Hinders: Over $30,000 Seized From A Restaurant In Small-Town Iowa.

From 1977 until her recent retirement, Carole owned and operated Mrs. Lady's Mexican Food in Arnold's Park, Iowa.[5] Located near Spirit Lake—and

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[4] Plaintiff's Reply Mem. at 10, *United States v. $107,702.66 in U.S. Currency Seized from Lumbee Guaranty Bank Account Number XXXX2495*, No. 7:14-cv-00295-F (E.D.N.C. Jun. 12, 2015) (Docket No. 26).

[5] Carole's story is detailed—with supporting citations and documentation—in her opening brief before the United States Court of Appeals for the Eighth Circuit. *See* Appellant's Brief, *United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars and Fifty-Six Cents ($32,820.56) in U.S. Currency*, Nos. 15-2622 & 15-2624 (8th Cir. Sept. 17, 2015) (Docket No. 14). The story also was widely reported by the press. *See, e.g.*, Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times, Oct. 25, 2014, *available at* http://nyti.ms/1ztF1tx; Larry Salzman and Robert Everett Johnson, Op-Ed, *IRS Seizes First, Asks Questions Later*, Politico, Feb. 10, 2015, *available at* http://politi.co/1XX4UhD; Jason Clayworth, *Iowa Forfeiture Fight Gets Nation's Attention*, Des Moines Register, Apr. 4, 2015, *available at* http://dmreg.co/1NcftW7.

famous for its generously-portioned "insane tacos" and fluffy sopapillas—the restaurant was a beloved institution for locals and summer vacationers alike.

Because Mrs. Lady's only accepts cash and checks, Carole made frequent cash deposits. And Carole almost always made those deposits in amounts under $10,000. Carole developed this habit because her mother, years ago, told her that deposits over $10,000 required extra paperwork and hassle at the bank. Carole hoped to avoid what she believed to be unnecessary red tape. She had no idea that the paperwork she was avoiding was required by federal law.

In May 2013, the IRS seized the entire bank account for Mrs. Lady's—over $30,000. Carole had no prior warning that this money would be seized, and nobody from the government asked Carole why she was depositing money in amounts under $10,000. Instead, the government submitted an *ex parte* application for a seizure warrant based solely on an affidavit from an Iowa police officer identifying a pattern of under-$10,000 cash deposits.

For months, Carole attempted to persuade the government to return her money. Carole met with the government's attorneys and explained the benign reasons for her pattern of deposits, and she also produced business and accounting records showing that she had nothing to hide. Nevertheless, the government filed its forfeiture complaint in October 2013.

The case proceeded to litigation. A full 18 months after the seizure, the government took Carole's deposition and asked exactly the types of questions that the government should have asked *before* taking the money. Carole explained—not for the first time—that she was unaware of the bank's reporting obligations and believed that she was avoiding internal bank paperwork.

The day after this deposition, the government informed Carole's attorneys that it was dropping the forfeiture action. The government initially represented that it would seek dismissal *with* prejudice, and the parties agreed on that basis to postpone the scheduled deposition of the government agent who filled out the affidavit underlying the seizure. However, three days later, the government announced that it was seeking dismissal *without* prejudice.

After the district court granted dismissal without prejudice, the government turned around and argued that the fact that dismissal was without prejudice precluded an award of fees, costs, and interest under CAFRA. The district court agreed with the government—denying Carole's motion for fees, costs, and interest—and that decision is now on appeal to the Eighth Circuit.

Notably, Carole's attorneys spent over $70,000 in attorney time to recover the approximately $30,000 seized by the government. Carole was able to afford to fight to get her property back because she had the help of *pro bono* counsel from the Institute for Justice. Many property owners do not have the benefit of *pro bono*

counsel, however, and depend on the availability of fees under CAFRA to fund their efforts to recover seized property.

II. The Government's Conduct In These Cases Is Part Of A Broader Pattern Of "Seize First, Question Later" Law Enforcement.

Both *amici*'s experiences and the instant case arise within the context of a broader pattern that is facilitated and encouraged by the civil forfeiture laws. In addition to affording few protections to innocent property owners, civil forfeiture laws create a strong financial incentive to seize and forfeit property. The same agencies that seize and forfeit property can use it to fund their operations—without congressional appropriation.[6] As two former heads of the Department of Justice Asset Forfeiture Office explained, in an editorial in the *Washington Post*, this incentive has "led to the most extreme abuses: law enforcement efforts based upon what cash and property [law enforcement] could seize to fund themselves, rather than on an even-handed effort to enforce the law."[7] In other words, driven in part by a powerful profit motive, law enforcement has used the civil forfeiture laws to engage in a pattern of "seize first, question later" abuse of property owners.

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[6] *See* 18 U.S.C. § 981(e).

[7] John Yoder and Brad Cates, Op-Ed, *Government Self-Interest Corrupted a Crime-Fighting Tool Into an Evil*, Washington Post, Sept. 18, 2014, *available at* http://wapo.st/1OkDEiJ.

A. The Government Seizes Property Without Meaningful Prior Investigation.

Under the civil forfeiture laws, government can seize property based on mere suspicion that a crime has been committed. Many seizures occur without *any* judicial oversight, for instance when money is seized during a roadside stop.[8] Even in cases where a seizure is made pursuant to a warrant approved by a magistrate, the judge need only find probable cause to believe a crime occurred.[9] And in many cases, that determination of probable cause is made at an *ex parte* hearing where the property owner has no notice or opportunity to present a defense.[10] These procedures allow government to seize property based only on bare suspicion that a crime has occurred. And the government takes full advantage of that power.

The government's "seize first, question later" approach can be seen in numerous cases initiated under the structuring laws and subsequently litigated by the Institute for Justice. For instance:

- Mark Zaniewski, the proprietor of Metro Marathon service station, in Sterling Heights, Michigan, had his business's entire bank account—

[8] *See generally* Michael Sallah *et al.*, *Stop and Seize*, Washington Post, Sept. 6, 2014, *available at* http://wapo.st/1oQU4T1 (detailing "the spread of an aggressive brand of policing that has spurred the seizure of hundreds of millions of dollars in cash from motorists and others not charged with crimes").

[9] *See* Stefan D. Cassella, *Asset Forfeiture Law in the United States* 95-96 (2007) (defining probable cause as a "fair probability" that a crime has occurred).

[10] *See generally* Fed. R. Crim. P. 41.

over $33,000—seized by the IRS in March 2013.[11] Although Mark often deposited cash in amounts under $10,000, he also sometimes deposited more than $10,000; this pattern reflected the fact that he went to the bank every few days to deposit cash to cover vendor bills and to safeguard surplus cash. Eight months after the seizure, the government agreed to return all the money.

- Terry Dehko, the proprietor of Schott's Supermarket in Fraser, Michigan, had $35,651 taken from his store's bank account in January 2013 without any warning.[12] Had the government asked, it would have learned that Terry limited the size of deposits because his insurance policy only covered cash up to $10,000. Eleven months after the seizure, the government agreed to return the money.
- Jeffrey, Richard, and Mitchell Hirsch, the proprietors of Bi-County Distributors, Inc., on Long Island, New York, had over $446,000

[11] *See United States v. Thirty-Three Thousand Two Hundred Forty-Four Dollars and Eighty-Six Cents in U.S. Currency*, No. 13-cv-13990 (E.D. Mich.); *see also* Institute for Justice, *Taken: Federal Lawsuit in Michigan Challenges Forfeiture Abuse*, http://ij.org/case/miforf/.

[12] *See United States v. Thirty Five Thousand Six Hundred Fifty-One Dollars and Eleven Cents in U.S. Currency*, No. 4:13-cv-13118 (S.D. Mich.); *see also* George F. Will, Op-Ed, *The Heavy Hand of the IRS*, Washington Post, Apr. 30, 2014, *available at* http://wapo.st/1OcCXhj.

> seized by the IRS in May 2012.[13] After a series of banks closed their accounts, the Hirsch brothers were advised by their own accountant to keep cash deposits under $10,000 to reduce paperwork burdens for the bank. The government held the money for thirty-two months—over two-and-a-half years—before finally agreeing to return it.

In each of these cases, the government seized the money without any warning and without asking any questions prior to the seizure. Then, the government forced the property owners to fight for months or even years to get their property back.

This pattern is not limited to the structuring context. Consider the case of Charles Clarke, another client of the Institute for Justice.[14] Charles is a 24-year-old college student who spent over five years to save up $11,000 and then had the money seized by law enforcement at the Cincinnati/Northern Kentucky Airport. Government agents took the money because they claimed that it smelled like marijuana, and then they put the burden on Charles to prove that the money was legitimately earned. Almost two years after the seizure, although Charles has never

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[13] *See In the Matter of the Seizure of Four Hundred Forty Six Thousand Six Hundred Fifty One Dollars an Eleven Cents in U.S. Currency*, No. 14-mc-1288 (E.D.N.Y.); *see also* Erin Fuchs, *The IRS Has Been Holding This Guy's $447,000 For Two Years, And He's Never Been Charged With A Crime*, Business Insider, Nov. 6, 2014, *available at* http://read.bi/1ARkUGC.

[14] *See United States v. $11,0000.00 in U.S. Currency*, No. 14-cv-125-WOB-JGW (E.D. Ky.); *see also* German Lopez, *Why Police Could Seize A College Student's Life Savings Without Charging Him For a Crime*, Vox, Oct. 8, 2015, *available at* http://bit.ly/1GsM9ar.

been charged with any crime, the government still has the $11,000 and Charles is still enmeshed in civil forfeiture proceedings.[15] And more broadly, the *Washington Post* analyzed data obtained from the government through a FOIA request and identified thousands of cases where money was seized by the government and then ultimately returned to the property owner after months or even years.[16] This approach to law enforcement—taking money based only on suspicion, and forcing the property owner to litigate to get the money back—is endemic throughout the government's application of the civil forfeiture laws.

B. The Government Pressures Property Owners To Accept Extortionate Settlement Agreements.

This "seize first, question later" approach—in addition to subverting the fundamental principle that Americans are presumed innocent until proven guilty—makes it possible for the government to pressure even innocent property owners into extortionate settlement agreements. Often, the government will offer to return half or more of the money it has seized if the property owner agrees to forfeit the remainder. Faced with the prospect of years of litigation to recover

[15] *See, e.g.*, Christopher Ingraham, *Drug Cops Took a College Kid's Savings and Now 13 Police Departments Want a Cut*, Washington Post, Jun. 30, 2015, *available at* http://wapo.st/1HuYv5L.

[16] *See* Sallah, *supra* note 8. The *Post* examined 400 such cases and determined that, in a majority of cases, the property owners were black, Hispanic, or members of some other minority. *Id.*

money that they need to run their business, innocent property owners may conclude that the proffered settlement is an offer they cannot afford to refuse.

The experience of Randy and Karen Sowers is illustrative.[17] Randy and Karen, the proprietors of a Maryland dairy farm, had over $60,000 seized in February 2012 because they deposited cash receipts from farmers' markets in amounts under $10,000. As with all the other structuring victims mentioned in this brief, nobody from the government suggested that Randy and Karen were guilty of any crime, apart from depositing money in the wrong amounts. Nonetheless, the government proposed a settlement under which Randy and Karen would forfeit $29,500 in order to get the rest of their money back. Troublingly, the AUSA responsible for the case explained that he was offering Randy and Karen less favorable settlement terms because Randy had spoken about the seizure to the

[17] *See United States v. $62,936.04 in U.S. Currency*, No. 1:12-cv-01216-WDQ (D. Md.). Randy and Karen's story is detailed—with citations and supporting documentation—in a petition that they have filed with the Department of Justice seeking the return of their property. *See* Petition for Remission or Mitigation of Randy and Karen Sowers (DOJ July 2015), *available at* http://bit.ly/1CK3ux8. The Department of Justice has not yet ruled on that petition. In addition, Randy and Karen's story has been widely reported in the press. *See, e.g.*, Rachel Weiner, *Uncle Sam May Have Picked The Wrong Cash Cow*, Washington Post, Apr. 14, 2015, *available at* http://wapo.st/1czMEVi; Editorial, *The IRS's Ill-Gotten Gains*, The Wall Street Journal, July 15, 2015, *available at* http://on.wsj.com/1HR6xQ1.

press.[18] Randy and Karen agreed to that settlement because they needed the money to run their business, although they did not believe that they had done anything wrong.

Property owners like Randy and Karen choose to settle, rather than fight, because of the immense financial burdens that government seizures place on property owners. Using civil forfeiture, the government can take the entire working capital for a business or even a person's entire life savings based only on suspicion that the person has committed a crime. Deprived of those financial resources, property owners must find a way to continue to run their business or pay for the expenses of day-to-day life, while also paying a lawyer to assist with their case and funding other expenses that may arise in the course of the proceeding—such as the cost to have an accountant audit the business. If property owners are forced to fight a forfeiture proceeding to the very end, those costs are magnified. Even apart from the direct cost of litigation, property owners must factor in the cost of delay, as a forfeiture case may drag on for years before a resolution.[19] These financial

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[18] A copy of the AUSA's email is included as Exhibit K to Randy and Karen's petition for remission or mitigation, filed with the Department of Justice in July 2015. *See* note 17, *supra*.

[19] *See* Dick M. Carpenter II, Ph.D., and Larry Salzman, *Seize First, Question Later: The IRS and Civil Forfeiture* 19 (Feb. 2015), *available at* http://ij.org/report/seize-first-question-later/ (finding that, in the structuring context, the average forfeiture case took over one year to resolve, while the longest such case took over six and one half years).

pressures give the government extraordinary leverage to pressure property owners into settlements, and the government takes advantage of that reality.

The government made similar settlement offers to other Institute for Justice clients, only to return the property with no strings attached when it became clear that the property owners had access to *pro bono* counsel with the resources and willingness to put up a fight. In Lyndon's case, for instance, the government offered a 50% settlement by email in March 2015, before the Institute for Justice entered into the case, but then agreed to return the property in its entirety only two months later.[20] The government likewise indicated that it was willing to settle Carole's case on terms under which she would agree to forfeit some portion of the money, only to ultimately turn around and return everything it had seized.[21] Lyndon and Carole were able to reject these offers because they had the benefit of *pro bono* representation, but many property owners are not so fortunate.

Data obtained from the IRS through the Freedom of Information Act point to a broader pattern. The IRS seized more than $242 million for suspected structuring

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[20] *See* Christopher Ingraham, *How the IRS Seized a Man's Life Savings Without Ever Charging Him With a Crime*, Washington Post, May 15, 2015, *available at* http://wapo.st/1OUkPrd.

[21] *See* Declaration of Lawrence Salzman ¶ 9, *United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars and Fifty-Six Cents ($32,820.56) in U.S. Currency*, No. C13-4102-LTS (N.D. Iowa Feb. 2015) (Docket No. 32-2); *see also* Dewan, *supra* note 5 (reporting similar settlement offers made to Hirsch brothers by federal prosecutors on Long Island).

violations between 2005 and 2012, but of that amount nearly half—$116 million—ultimately was not forfeited.[22] In half of cases the IRS forfeited less than it seized, and in another 31 percent of cases the IRS did not forfeit *any* of the funds that it seized.[23] IRS data do not reveal the reason in any particular case why the IRS does not forfeit seized money. However, these data are suggestive, as they indicate that the IRS seizes substantially more money under the structuring laws than it can ultimately justify keeping.

This pattern of seizures and settlements also is not limited to the structuring context. An investigation by *The New Yorker* detailed how police coerced motorists to sign away their right to cash taken during roadside seizures—even threatening to bring criminal charges if the property owners would not agree to the forfeitures.[24] And an investigation by the *Washington Post* identified more than 1,000 cases in which property owners were forced to sign settlement agreements to recover money seized by the federal government.[25] The *Post* also detailed specific roadside seizure cases in which the government offered to drop forfeiture

[22] *Seize First*, *supra* note 19, at 20.
[23] *Id.*
[24] *See* Sarah Stillman, *Taken*, The New Yorker, Aug. 12, 2013.
[25] *See* Robert O'Harrow Jr. *et al.*, *They Fought the Law. Who Won?*, Washington Post, Sept. 8, 2014, *available at* http://wapo.st/1wet45B.

proceedings if the property owner agreed to forfeit a percentage of the property.[26] As in the structuring context, many property owners find that they have little choice but to agree to the government's terms to get their money back.

* * *

This overarching pattern—seizures based on scant evidence, followed by settlements motivated by economic necessity—should trouble anyone interested in the right to private property or the fair administration of the justice system. Undoubtedly this law enforcement tactic sweeps up some individuals who are guilty of a crime. But, as detailed above, this tactic also sweeps up individuals who have done nothing wrong and yet who cannot afford to bear the cost to prove their innocence. The government's conduct in this case is part of this larger pattern, and, as explained below, this pattern is also precisely what Congress sought to address when it enacted CAFRA's provision for fees, costs, and interest.

III. The Government Should Not Be Allowed To Evade Its Obligation Under CAFRA To Pay Fees, Costs, And Interest.

CAFRA's fee-shifting provision addresses the pattern of "seize first, question later" law enforcement detailed above in three primary ways: It creates a financial disincentive to meritless seizures; it helps to ensure that forfeiture victims

[26] As in structuring cases, the government often appears to view a 50/50 split as an appropriate resolution. The *Post* article details three separate cases in which the government offered to settle for the forfeiture of half the seized money. *Id.*

will have access to attorneys to help recover their property; and it provides some limited compensation to individuals who are wrongly targeted under the forfeiture laws. Those important reforms, however, are fatally undermined by the government's procedural maneuvering in this case.

A. CAFRA's Provision For Fees, Costs, And Interest Was Designed To Deter And Redress Precisely This Kind Of Abuse.

The legislative history for CAFRA reveals that Congress was well aware of the risk that government would seize money from innocent people—as well as the costs that such seizures might impose—and enacted CAFRA's fee-shifting provision in response to such concerns.

The legislative history details stories that fit the pattern of "seize first, question later" abuse detailed above. A man named Willie Jones, for instance, testified that federal agents seized $9,000 from him shortly after he paid for an airplane ticket with cash.[27] Jones ran a cash-based landscaping business and was on his way to purchase plants from vendors. Jones was unable to come up with the money necessary to contest the forfeiture, although he later brought and won a civil rights action against the government based on the seizure. The Judiciary

[27] H.R. Rep. 106-192, at 6-8 (1999).

Committee's report states that Jones's case "typifies the kind that this Committee is gravely concerned about—except that this time there was a happy ending."[28]

The Committee also heard about the story of Billy Munnerlyn, in which "there was no happy ending."[29] Munnerlyn told the committee how his airplane-charter business was ruined after his airplane was seized because he unwittingly flew a drug dealer from Arkansas to California. Munnerlyn was not charged with a crime, but he spent over $85,000 in legal fees to get his property back. Committee members heard how Munnerlyn's air-charter business went bankrupt as a result of his legal expenses and how he was working as a truck driver to make ends meet.

When CAFRA came to the floor, Representative Bob Barr of Georgia echoed these concerns when he stated that, "in some cases, law enforcement officers intentionally target citizens and seize their assets, because they know proving innocence under the constraints of the current law is extremely difficult if not impossible."[30] Representative Sheila Jackson-Lee of Texas likewise observed that a "property owner may exhaust his or her financial assets in attorney's fees to fight for the return of property" and explained that CAFRA's reforms "balance the scales so that innocent people have a level playing field on which to challenge

[28] *Id.* at 8.
[29] *Id.* at 9.
[30] 146 Cong. Rec. H2054 (daily ed. Apr. 11, 2000).

improper seizures."[31] In other words, CAFRA helps to correct the financial imbalance that drives "seize first, question later" law enforcement abuse by ensuring that property owners who are targeted in meritless forfeiture actions are made at least partly whole at the end of the process.

B. The Government's Procedural Maneuvering, If Allowed, Will Undermine CAFRA's Reforms And Lead To Absurd Results.

Amici will not repeat all the arguments for reversal ably presented by Appellants in their brief on the merits, but *amici* do wish to close this brief by underscoring the importance of this case to CAFRA's broader aims. Congress intended to address the pattern of "seize first, question later" abuse detailed in this brief, and yet the procedural tactic deployed by the government in this case threatens to render that reform ineffective and even absurd.

First, CAFRA is designed to create a financial disincentive to civil forfeiture, but that financial disincentive will not be effective if the government can evade CAFRA's command by returning property voluntarily before a decision on the merits. In the forfeiture context, the cases that actually arrive in a court of law are the veritable tip of the iceberg; the vast majority of cases are resolved before a

[31] *Id.* at H2052.

forfeiture complaint is even filed and so never even come before a judge.[32] If the government can always avoid fees by seeking dismissal without prejudice, the government can seize money from innocent individuals, attempt to coerce those individuals into an agreement to forfeit some portion of the seized property, and then walk away from the case without any financial consequence if the property owner decides to resist the government's demands. That is an open invitation to precisely the type of "seize first, question later" abuse described in this brief.

Second, while CAFRA strives to provide forfeiture victims with greater access to counsel, that reform will not function if the government can easily evade its obligation to pay attorney fees. Property owners who have had their entire bank account seized often cannot afford to pay for legal representation out of pocket. And forfeiture cases often cannot realistically be funded on a contingency basis, as the cost of litigation may easily dwarf the amount of property seized. In the structuring context, for instance, half of all seizures between 2005 and 2012 were of amounts under $34,000.[33] Even in Carole's case, where litigation did not proceed past discovery, attorneys on the case spent over $70,000 in attorney time

[32] *See* Dick M. Carpenter II, Ph.D., *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 13 (2d ed. Nov. 2015), *available at* http://ij.org/report/policing-for-profit/.

[33] *Seize First*, *supra* note 19, at 10.

to recover property worth approximately $33,000.[34] If even successful attorneys cannot count on a recovery under CAFRA's fee-shifting provision, property owners will find it difficult to locate attorneys willing to shoulder the significant cost of litigation.

Third, and finally, CAFRA is designed to make property owners at least partly whole, but that aim also will not be advanced if the government can so easily evade its obligations. Even before the government files a formal forfeiture complaint, a property owner may expend thousands of dollars in an attempt to prove his or her innocence and recover the seized property.[35] This is unavoidable: A property owner who does nothing in response to a seizure will see the property forfeited *automatically* through administrative proceedings; a property owner thus

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[34] Appellant's Brief, *United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars and Fifty-Six Cents ($32,820.56) in U.S. Currency* at 14, Nos. 15-2622 & 15-2624 (8th Cir. Sept. 17, 2015) (Docket No. 14).

[35] As detailed above, for instance, Lyndon McLellan incurred approximately $15,000 in attorney fees and accounting costs before the government filed its forfeiture complaint. *See* Response of Claimants to Plaintiff's Motion for Voluntary Dismissal Without Prejudice at 2, *United States v. $107,702.66 in U.S. Currency Seized from Lumbee Guaranty Bank Account Number XXXX2495*, No. 7:14-cv-00295-F (E.D.N.C. May 29, 2015) (Docket No. 23). Similarly, after the government seized the bank account of Jeffrey, Richard, and Mitchell Hirsch, the brothers spent over $25,000 to hire a Manhattan CPA firm to audit their business to prove that the money seized by the government was legitimately earned. *See* Testimony of Jeffrey Hirsch, House Ways and Means Subcommittee on Oversight at 4 (Feb. 11, 2015), *available at* http://1.usa.gov/1NJc0Q8. The Hirsch brothers spent all that money even though, in their case, the government *never* filed a forfeiture complaint.

has no real choice but to retain a lawyer following a seizure.[36] Beyond that, the government typically encourages settlement talks and may induce property owners to gather and produce extensive information as part of those negotiations.[37] While attorneys, accountants, and other professionals may agree to shoulder some of these costs pending an award of CAFRA fees, property owners also may be forced to bear at least some of the cost of litigation. If CAFRA's right to recover attorney fees and costs has no application in the vast numbers of cases that are resolved *before* a final decision on the merits, then forfeiture victims will find it difficult or impossible to recoup the cost of litigation at these critical but early stages of forfeiture proceedings.

The perverse effects of the government's procedural tactics are particularly stark in the context of CAFRA's provision for interest. When the government seizes currency, the government has the opportunity to place that money in an interest-bearing account. For that reason, CAFRA provides that the property owner is entitled to "interest actually paid to the United States from the date of seizure."[38] That provision serves two purposes: It compensates the property owner for the loss of use of the property, and it also compels the government to disgorge a profit that

[36] *See generally* 18 U.S.C. § 983 (setting out procedural steps to be followed prior to filing of forfeiture complaint).

[37] *See, e.g.*, Hirsch Testimony, *supra* note 35.

[38] 28 U.S.C. § 2465(b)(1)(C)(i).

rightly belongs to the property owner. Yet, through the procedural tactic at issue in this case, the government claims the right to seize an innocent person's property, earn money by investing that property over a period of months or even years, and then return the property while keeping the profits. That might fairly be described as a form of legalized theft.

If the government's procedural tactic is approved by this Court, CAFRA will not only fail to achieve Congress's stated goals, but also will lead to absurd results. Forfeiture claimants with the most meritorious cases—those who are able to convince the government that they are entitled to the voluntary return of their property—will not be entitled to any recompense under the law. But forfeiture claimants with possibly *less* meritorious claims—those who prevail on a legal technicality, or based on the resolution of a hotly disputed finding of fact—will be entitled to fees, cost, and interest. That is not what Congress intended, and it is not the law.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated: December 21, 2015

Respectfully submitted,

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Dated: December 21, 2015

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I hereby certify that on this 21st day of December , 2015, I caused this Brief of *Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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