No. 20-2251

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEREK MCCLELLAN, YVONNE SILVER,

Claimants-Appellants,

and

$69,490.50 IN UNITED STATES CURRENCY,

Defendant In Rem.

Appeal from the United States District Court for the District of South Carolina, The Honorable Henry M. Herlong, Jr. Presiding

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF CLAIMANTS-APPELLANTS AND REVERSAL

Caroline Grace Brothers
INSTITUTE FOR JUSTICE
901 N. Glebe Rd. Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321

Robert E. Johnson
INSTITUTE FOR JUSTICE
16781 Chagrin Blvd. #256
Shaker Heights, OH 44120
Phone: (703) 682-9320
Fax: (703) 682-9321
Email: rjohnson@ij.org

DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4), the Institute for Justice ("IJ") is a private, nonprofit civil liberties law firm. IJ is not a publicly held corporation and does not have any parent corporation. No publicly held corporation holds owns 10 percent or more of its stock. No publicly held corporation has a direct financial interest in the outcome of this litigation.

/s/ Robert E. Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Other Authorities

INTEREST OF THE *AMICUS*[1]

The Institute for Justice ("IJ") is a nonprofit, public interest law firm that litigates to uphold individuals' constitutional rights. Over the past decade, IJ has become the nation's leading advocate for ending civil forfeiture. Whereas *criminal* forfeiture allows government to take property only from convicted criminals, *civil* forfeiture allows government to take property from people who have not been charged with a crime (much less convicted). Using civil forfeiture, government can take citizens' money, vehicles, businesses, or even homes.

In addition to participating as an *amicus* in important civil forfeiture cases, IJ represents property owners in civil forfeiture proceedings. *E.g., Timbs v. Indiana*, 139 S. Ct. 682 (2019); *United States v. $107,702.66 in United States Currency*, No. 14-cv-295, 2016 WL 413093 (E.D.N.C. Feb. 2, 2016). IJ also represents property owners filing constitutional challenges to civil forfeiture programs. *E.g., Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694 (E.D. Pa. 2015).

---

[1] Both parties, through their respective counsel, have consented to the filing of this *amicus* brief. No person other than *amicus*, its counsel, or its members 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.

Beyond litigation, IJ publishes original research quantifying the problems posed by civil forfeiture. *E.g.*, Lisa Knepper, *et. al*, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3d ed. 2020).[2] IJ's research has been cited by courts, including by Justice Thomas in an opinion that questioned civil forfeiture's constitutionality. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

IJ is interested in this case because it raises important questions concerning the burden of proof in civil forfeiture cases. Congress has explicitly provided that the government—and not the property owner—bears the burden to prove forfeitability by a preponderance of the evidence. Yet courts all too often disregard that command. This case provides an important opportunity to affirm that the government is required to put forward affirmative evidence of wrongdoing in order to prevail in a civil forfeiture case.

SUMMARY OF ARGUMENT

This case is a prime example of an all-too-common phenomenon: Courts uphold civil forfeiture of large amounts of currency based on facts that—while perhaps distasteful—do not actually constitute proof of wrongdoing. In this case, Derek McClellan was found sleeping in a car, which had come to rest after running

---

[2] Available at https://bit.ly/34ycd7a (hereinafter "*Policing for Profit Third Edition*").

into a concrete pillar next to a gas station, with an open bottle of liquor and a single marijuana cigarette in the ash tray. Undeniably not a good scenario. But driving under the influence, recreational drug use, and poor judgment do not provide a basis for federal civil forfeiture. Under the correct legal standard, the district court's grant of summary judgment to the government was plainly error.

Federal law provides that the government—not the property owner—bears the burden to prove forfeitability by a preponderance of the evidence. Congress adopted this standard as part of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), and, in doing so, Congress expressly repudiated earlier precedents under which property owners were required to prove a legitimate source for seized funds. Under CAFRA's reforms, property owners do not have to prove anything to avoid forfeiture. Instead, the government must *affirmatively prove* wrongdoing—and must do so through something more than speculation and conjecture. The government's case here falls manifestly short of that standard: The government has not even said what crime it thinks occurred, much less presented actual evidence tying the seized funds to any such unspecified offense.

Unfortunately, while the decision here is plainly wrong, the decision is also part of a trend in which many (though by no means all) courts have disregarded CAFRA's reforms. Many courts uphold forfeiture based on nothing more than possession of a large amount of cash under less-than-ideal circumstances, and (like

the district court here) many of these courts uncritically cite and rely on pre-CAFRA case law. And that disregard for Congress's reform is made even worse by the serious constitutional concerns that arise when courts force property owners to effectively prove their innocence. This Court should take this case as an opportunity to reaffirm that Congress meant what it said when it placed the burden squarely on the government in civil forfeiture cases.

ARGUMENT

I. The Decision Below Disregards CAFRA's Reform Placing The Burden On The Government To Prove Forfeitability.

By federal law, in any "suit or action brought under any civil forfeiture statute" the "burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture." 18 U.S.C. § 983(c). That standard was an important part of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), Pub. L. No. 106-185, 114 Stat. 202, and it is designed to place the burden on the government to affirmatively prove the basis for forfeiture in civil forfeiture cases. The decision below disregards that important reform.

A. CAFRA Places The Burden On The Government To Prove The Basis For The Forfeiture.

CAFRA's change to the burden of proof was among its most important reforms. Prior to CAFRA, the government just had to establish probable cause that property was subject to forfeiture, and then the burden shifted to the property owner

to prove the opposite by a preponderance of the evidence. *See, e.g.*, *United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 111 (4th Cir. 1990). CAFRA abandoned that burden-shifting approach, instead placing the burden on the government to prove wrongdoing.

Congress recognized the importance of this reform. The House Report for CAFRA directly criticized the prior burden-shifting approach, explaining that "[a]llowing property to be forfeited upon a mere showing of probable cause can be criticized on many levels." H.R. Rep. No. 106-192 at 11 (1999). Among other things, the prevailing burden-shifting approach allowed the government to "deprive citizens of property based on the rankest of hearsay and the flimsiest evidence," which "clearly does not reflect the value of private property in our society." *Id.* at 11–12 (quoting *United States v. $12,390*, 956 F.2d 801, 811 (8th Cir. 1992) (Beam, J., dissenting)). Indeed, the House Report expressed concern that "probable cause is an unconstitutional standard," as it would be "'surprising were the Constitution to permit such an important decision to turn on a meager burden of proof.'" *Id.* at 12 (quoting *United States v. $49,576*, 116 F.3d 425, 429 (9th Cir. 1997)).

When the bill proceeded to the Senate, Senators emphasized CAFRA's change to the burden of proof. Senator Hatch, of Utah, introducing the legislation on the Senate floor, explained that the law as it stood prior to CAFRA "provide[d] inadequate protections for private property" because, among other things, "the

burden of proof is on the property owner to prove that the property is not subject to forfeiture." 146 Cong. Rec. 3,647, 3,654 (Mar. 27, 2000). Senator Leahy, of Vermont, likewise explained that under pre-CAFRA law "[a]ll the government must do is make an initial showing of probable cause," at which point "the property owner must then prove a negative," but that CAFRA would shift the burden to the government in order to "bring this law in line with our modern principles of due process and fair play." *Id.* at 3,655.[3]

And when the bill returned to the House for final passage, Representatives once again stressed its reform to the burden of proof. Representative Jackson-Lee, of Texas, stated that CAFRA "places the burden of proof where it belongs, with the government agency that performed the seizure" and in doing so "protects individuals from the difficult task of proving a negative." 146 Cong. Rec. 5,221, 5,233 (Apr. 11, 2000). Representative Sweeney, of New York, likewise stated that "the bill shifts the burden of proof in forfeiture cases from property owners to the government with the appropriate threshold of a preponderance of the evidence." *Id.* at 5,234. Representative Conyers, of Michigan, stated that "the shifting of the burden of proof is very important" and criticized prevailing rules under which property owners must

---

[3] The initial House bill had required the government to prove forfeitability by clear and convincing evidence, but Senator Leahy explained that Senate adopted a preponderance standard because it was "used in virtually all other civil cases." 146 Cong. Rec. at 3,655.

"prove that the property is not subject to forfeiture." *Id.* And Representative Udall, of Colorado, stated that the "bill shifts the burden of proof to the government, where it belongs," marking a "great improvement over the current law." *Id.* at 5,235.

B. Proof By A Preponderance Of The Evidence Requires More Than Speculation And Conjecture.

CAFRA's reforms imposed a preponderance of the evidence standard, under which the evidence must show that "the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993). Cases from a broad variety of contexts show that the preponderance standard requires actual evidence to establish liability, and thus cannot be met through speculation and conjecture.

For instance, in *Fitzgerald v. Manning*, 679 F.2d 341 (4th Cir. 1982), this Court considered a medical malpractice claim by a plaintiff who lost one of his lungs following a medical procedure. *Id.* at 351. The evidence established that the defendant had performed a medical procedure on the plaintiff, and, following that procedure, the plaintiff had suffered the complained-of injury. *Id.* at 345–46. But the Court nonetheless found the evidence insufficient to establish liability because the plaintiff's medical expert did not testify that the complained-of injury resulted from the defendant's conduct. *Id.* at 356. The Court explained that, "without such evidence, it would have been necessary, in order for the jury to find causation on the basis of the record, to have proceeded upon pure 'speculation and guess work.'" *Id.*

And the Court further noted that "there are many examples of the application of this rule in medical malpractice cases." *Id.* at 348.

Similarly, in *United States v. Jones*, 83 F.3d 416 (4th Cir. 1996) (table op.), this Court considered the requirement that the government at sentencing prove the quantity of drugs involved in a transaction by a preponderance of the evidence. The Court explained that the government was required to base this conclusion "on specific evidence" and "may not resort to speculation, surmise, or conjecture." *Id.* (quoting *United States v. Shonubi*, 998 F.2d 84, 90 (2d Cir. 1993)). The Court overturned the district court's findings to the extent that the district court "had to speculate," with the result that its conclusion was "missing a necessary link in the chain of permissible inferences" and was "not supported by the record." *Id.*

Numerous other cases are in accord. *See, e.g.*, *Cont'l Cas. Co. v. Burton*, 795 F.2d 1187, 1193 (4th Cir. 1986) ("speculation that [a defendant] might have been dishonest is not enough"); *Gairola v. Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985) (plaintiff must provide more than "a mere scintilla of evidence"); *Gauldin v. Va. Winn-Dixie, Inc.*, 370 F.2d 167, 169 (4th Cir. 1966) ("The determination of the real issue of the storekeeper's negligence must not be left to speculation and conjecture."); *Wyche v. Crown Cent. Petrol. Corp.*, 36 F.3d 1096 (4th Cir. 1994) (table op.) (negligence could not be proved by "speculation and conjecture"); *Miller v. United States*, 308 F. Supp. 2d 604, 611 (D. Md. 2004)

(plaintiff could not recover under Federal Tort Claims Act where evidence of liability was "speculative and inconclusive"); *Blount v. Davis*, No. 11-cv-00091, 2013 WL 2636261, at *4 (W.D. Va. June 12, 2013) (plaintiff could not recover from prison officials where the evidence of excessive force was "not entirely convincing one way or another"); *Dumont v. United States*, 80 F. Supp. 2d 576, 581 (D.S.C. 2000) (holding, in a medical malpractice suit, that plaintiff must provide "something more than evidence consistent with the plaintiff's theory" and "cannot rest on conjecture"). Outside the civil forfeiture context, speculation and conjecture do not suffice to establish liability by a preponderance of the evidence.

C. The Government In This Case Did Not Satisfy Its Burden Under CAFRA.

The district court's decision in this case cannot be reconciled with CAFRA's preponderance of the evidence standard. The district court granted summary judgment to the government on the theory that the government established—without even needing to hold a trial—that the subject currency was "furnished or intended to be furnished by any person in exchange for a controlled substance," constituted "proceeds traceable to such an exchange," or was "used or intended to be used to facilitate" a violation of the federal controlled substances laws. 21 U.S.C. § 881(a)(6); *see* J.A. 118–19. And yet the evidence showed nothing of the sort: It just showed that Derek made poor decisions and possessed a large amount of cash. On that basis alone, the district court's opinion placed the burden on Derek and his

girlfriend Yvonne Silver to prove their innocence. And, in doing so, the district court applied the very burden-shifting framework that CAFRA superseded.

1. The Government Did Not Even Identify The Alleged Offense Supposedly At Issue.

To begin with, the government (as opposed to the district court) has not even settled on the underlying criminal offense supposedly at issue in this case. As the district court explained, "[t]he Government argues that the Defendant Currency is connected to illegal drug trafficking, *or, alternatively*, it constitutes proceeds of trafficking in counterfeit goods." J.A. 112 (emphasis added); *see also* J.A. 11–12; D.E. 37-1 at 18. In other words, according to the government, the money might be connected to *either* illegal drugs or knock-off goods.

The government cannot possibly have met its burden to prove a criminal offense by a preponderance of the evidence when it has not settled on a theory of liability. "While it is clear that a plaintiff may plead alternative (even mutually inconsistent) factual theories in [its] complaint, it is axiomatic that the plaintiff may not continue to assert such theories at the summary judgment phase." *Armada de la Republica Argentina v. Yorkington Ltd. P'ship*, No. 92-cv-285, 1995 WL 46394, at *13 n.12 (D.D.C. Jan. 27, 1995). A plaintiff pursuing alternate theories may sometimes proceed past summary judgment, so long as the inconsistency is not "so egregious as to require disregarding [its] version of events entirely." *Kruis v. Allmine Paving, LLC,* No. 13-cv-25, 2014 WL 6775557, at *4 (N.D. W. Va. Dec. 2, 2014).

But even assuming the government might itself be able to *survive* summary judgment, it certainly cannot *prevail* at summary judgment when it has not settled on a coherent theory of what happened. "[A]ssessing credibility and choosing between conflicting versions of events are matters for the jury, not for the court on summary judgment." *Id.*

2. Possession Of A Large Amount Of Cash—Even By An Individual With A Criminal Record—Does Not Suffice To Meet CAFRA's Standard.

The district court granted summary judgment on the theory that the funds were tied to drug trafficking. *See* J.A. 118–19 & n.5. But the record does not contain any evidence that anyone was dealing drugs, much less that the funds are connected to any such hypothetical offense. The district court's contrary conclusion was based on the combination of the large amount of cash seized, the presence of a marijuana cigarette in the vehicle, and Derek's prior criminal history. J.A. 115, 118. But simple drug possession is not a basis for civil forfeiture. *See* 21 U.S.C. § 881(a)(6). And possession of a large amount of cash—even by an individual with a criminal record—cannot suffice to meet CAFRA's standard.

The First Circuit, in *United States v. Assorted Jewelry*, 833 F.3d 13 (1st Cir. 2016), found that the government could not meet its burden under CAFRA under circumstances that were far more incriminating than those at issue here. In that case, the claimant had actually admitted to being involved in drug offenses (which, of

course, is not the case here) and was found with significant amounts of jewelry in "close proximity" to the drugs. *Id.* at 16. But the First Circuit nonetheless found that the district court erred by granting summary judgment for the government, reasoning that physical proximity between the jewels and drugs did not necessarily establish a connection between the two. *Id.* Citing CAFRA, the First Circuit observed that "it was the government's congressionally-imposed burden to put together a summary judgment record that would tip the scale toward connecting the jewelry to the drug activity, and it failed to do so here." *Id.* at 17. That conclusion is even more applicable here, as Derek has not been shown to be engaged in any drug activity beyond possession of a single marijuana cigarette.

The Second Circuit's opinion in *United States v. Sum of $185,336.07 U.S. Currency*, 731 F.3d 189, 196–97 (2d Cir. 2013), also shows how far the government's case falls short. In that case (unlike here), the government had significant evidence linking the claimant to drug offenses and had in fact seized significant amounts of controlled substances from the claimant's home. But the Second Circuit found that evidence insufficient, as there was a temporal gap between the drug offenses and the deposit of the funds. *See id.* at 197. The Second Circuit emphasized that, "[u]nder CAFRA, the burden of proof now rests solely with the government to show by a preponderance of the evidence—rather than mere probable cause—that the property is subject to forfeiture." *Id.* at 196. Again, that conclusion

applies even more strongly here, where the government has not provided any evidence tying the funds to any criminal activity by Derek or Yvonne.

Finally, the Third Circuit's opinion in *United States v. Ten Thousand Seven Hundred Dollars*, 258 F.3d 215, 233 (3d Cir. 2001), although decided under the pre-CAFRA standard, is closely on point. In that case, the government seized over $30,000 from the occupants of a vehicle during a traffic stop and then argued that it had met the probable cause standard based on a variety of circumstantial factors, including "the large amount of currency and manner of packaging (rubber-banded in large bundles)." *Id.* at 299. But the Third Circuit declined to view a large amount of currency as inherently suspicious, treating it as a "neutral" factor. *Id.* at 232. And, "as for the manner of packaging," the Third Circuit found that evidence irrelevant absent "evidence that this method of storage is unique to the drug trade." *Id.* at 232–33. If such evidence was insufficient to meet the government's pre-CAFRA probable cause burden, it should be doubly insufficient today.

The Third Circuit, moreover, specifically rejected the argument that the government could meet its burden by pointing to a claimant's past criminal history. The Third Circuit explained: "[I]n our view, without additional credible evidence linking claimants, and thus, their currency, to drugs, claimants' prior convictions do not provide a sufficient temporal link to the drug trade to support the forfeiture of claimants' currency." 258 F.3d at 233. After all, "a man's debt to society cannot be

of infinite duration." *Id.* (marks and citation omitted). Again, if that was true before CAFRA, it is doubly true today.[4]

In fact, CAFRA's legislative history directly addresses—and disapproves—the kind of reasoning adopted by the district court here. Representative Henry Hyde noted that "Congress is very skeptical that a person's carrying of 'unreasonably large' quantities of cash is indicative of involvement in the drug trade," and that "'the whole notion that carrying cash is indicative of illegal conduct reflects class and cultural biases that are profoundly troubling.'" 146 Cong. Rec. at 5,230 (quoting *United States v. One Lot of U.S. Currency Totalling $14,665*, 33 F. Supp. 2d 47, 53–54 (D. Mass. 1998)). For those reasons, "the relative evidentiary contribution of cash in meeting a standard of proof, especially one raised above a mere probable cause, should rarely be significant." *Id.* Even Senator Jeff Sessions—whose remarks were generally much less critical of civil forfeiture—indicated that under CAFRA forfeiture would be appropriate if a person was found with "$50,000 in cash in the trunk of their car *along with maybe a few kilograms of cocaine*." 146 Cong Rec. at 3,657 (emphasis added). This history suggests that cash alone, even if combined with

---

[4] The district court's reliance on such evidence in this case also overlooks the fact that such evidence may not even be admissible under Federal Rule of Evidence 404, which provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

a recreational amounts of drugs, does not suffice to carry the government's burden to prove some basis for forfeiture.

The government will no doubt say that it is relying on "circumstantial" evidence, but at the end of the day that still raises the question: circumstantial evidence *of what*? If pressed, the government would be unable to say what kind of drugs it thinks are involved, where or when they were sold, the quantity of drugs it thinks were sold, or who supposedly sold them. Even under pre-CAFRA law, the Third Circuit recognized that invocations of "circumstantial evidence" do not excuse the government from its obligation to present evidence (in that case, under a probable cause standard) to support its "belief that an actual, rather than purely theoretical, connection exists between the currency in claimants' possession and the drug trade." *Ten Thousand Seven Hundred Dollars*, 258 F.3d at 225.[5] That reasoning is even more powerful after CAFRA; the "circumstantial evidence" the government relies on here is just the type of speculation and conjecture that courts find insufficient to meet the preponderance standard.

---

[5] The district court cited the Eleventh Circuit's statement that the government "does not need to show a relationship between the property and a particular drug transaction," *United States v. $242,484.00*, 389 F.3d 1149, 1160 (11th Cir. 2004), but because of the date of the seizure that decision was decided under the pre-CAFRA probable cause standard. *See id.* at 1151. In any event, even if that were the law, the government surely must at the very least introduce evidence to tie the seized property to a course of dealing in the specific *types* of transactions that it claims are at issue.

3. The District Court Improperly Placed The Burden On Derek And Yvonne To Prove Their Innocence.

Rather than putting the burden on the government to prove a connection to criminal activity, the district court shifted the burden to Derek and Yvonne to prove the opposite. Thus, the district court's grant of summary judgment rested on its conclusion that Derek and Yvonne had "failed to provide the court with sufficient evidence of income to prove that the Defendant Currency was earned legitimately." J.A. 116. That conclusion, however, is dubious on its facts and (more importantly) contrary to CAFRA.

On the facts, the district court was wrong to grant summary judgment on this issue, as there is at least sufficient evidence to create a jury question. The district court did not even mention evidence in the summary judgment record that Yvonne reported *gross* revenue (*i.e.*, revenue before expenses) of over $180,000 from 2016-2019 on her tax returns, including over $62,000 in revenue in just one year alone. *See* J.A. 35, 43, 48, 52. And, on top of that, the record also contains evidence that Derek inherited over $100,000 in 2014, which he then invested in Yvonne's business. J.A. 19–20.[6] Taken together, these facts would at the very least allow a

[6] The district court found that evidence irrelevant because Derek and Yvonne did not show "that money invested into [the business] some years ago is in any way connected to the money alleged to be profits today." J.A. 117 n.4. But on summary judgment the relevant question is simply whether a jury could draw such an inference, which it surely could.

jury to conclude that the funds at issue represent the working capital of Yvonne's business.

More to the point, that is simply the wrong question to be asking under CAFRA, as under CAFRA the burden is on the government to prove wrongdoing—not on property owners to prove the opposite. *See* 18 U.S.C. § 983(c) (the "burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture"). Assuming the district court was right to find that Derek and Yvonne have not fully accounted for the source of the funds (which, again, is hardly clear at the summary judgment stage), that could reflect a wide variety of factual scenarios. Not all of those factual scenarios involve unlawful activity at all, and, beyond that, not all unlawful activity provides a basis for civil forfeiture.[7] The government cannot meet its burden by casting doubt on Derek and Yvonne's version of events; the government must come forward with affirmative evidence to prove its case. And the government has failed to do that here.

Ultimately, the district court's reasoning in this case imposed precisely the kind of burden-shifting framework that CAFRA was meant to discard. Pre-CAFRA, it was enough for the government to simply raise some reason for suspicion that a

---

[7] For instance, in the event that Derek and Yvonne were not fully reporting their income on their tax reports (or were overstating their business expenses), they would be subject to back taxes and other possible penalties, but their funds would not be subject to civil forfeiture under the controlled substances laws.

crime might have occurred, and then the burden shifted to the property owner to show that the funds were legitimate. *See*, *e.g.*, *One Parcel*, 906 F.2d at 111. And that is exactly how the district court proceeded here: Having found that the government cast at least some suspicion on Derek and Yvonne, the district court put the burden on Derek and Yvonne to affirmatively prove their innocence. The district court thereby recreated the legal regime that CAFRA was enacted to overturn, and, in so doing, nullified a central provision of CAFRA's reform.

II. This Case Provides An Important Opportunity To Put Teeth Behind CAFRA's Preponderance Standard.

Because the district court in this case did not properly apply CAFRA's burden of proof, this Court should reverse the decision below. But that is not all: Given the importance of the issue, the Court should use this case as an opportunity to remind lower courts that CAFRA's preponderance standard must be applied according to its terms and cannot be ignored.

A. CAFRA's Reform, While Important, Has Been Unevenly Applied By The Courts.

Members of Congress repeatedly emphasized the importance of CAFRA's change to the burden of proof—calling it a "very important" reform, 146 Cong. Rec. at 5,234, and a "great improvement over the current law," *id.* at 5,235, that would "bring this law in line with our modern principles of due process and fair play," *id.* at 3,655. Yet this important reform has been unevenly applied.

Numerous courts—like the district court here—have continued to rely on vague and speculative theories of wrongdoing to shift the burden to property owners to prove their own innocence. Some courts continue to uphold forfeitures based only on possession of large amounts of currency under suspicious circumstances, and these courts (like the district court here, *see* J.A. 114, 115, 118) often cite and rely on earlier cases applying the pre-CAFRA probable cause standard. *See, e.g.*, *United States v. $252,300.00 in U.S. Currency*, 484 F.3d 1271, 1275 (10th Cir. 2007); *United States v. Funds in Amount of Thirty Thousand Six Hundred Seventy Dollars*, 403 F.3d 448, 468–70 (7th Cir. 2005).[8] And, more recently, some courts have even formalized a burden-shifting framework that looks remarkably like pre-CAFRA law: Government need only present circumstantial evidence suggesting guilt, and then the burden shifts to the property owner to present "rebuttal evidence of legitimate income or innocent ownership." *United States v. Real Prop. 10338 Marcy Rd. Nw.*, 938 F.3d 802, 811–12 (6th Cir. 2019). The decision below, while erroneous for all the reasons stated above, is thus by no means an isolated occurrence.

---

[8] *See also United States v. $15,795.00 in U.S. Currency*, 197 F. Supp. 3d 827, 836 (M.D.N.C. 2016); *United States v. $11,320.00 in U.S. Currency*, 880 F. Supp. 2d 1310, 1326 (N.D. Ga. 2012); *United States v. $21,055.00 in U.S. Currency*, 778 F. Supp. 2d 1099, 1105 (D. Kan. 2011); *United States v. $321,590.00 in U.S. Currency*, No. 08-cv-193, 2009 WL 1740596, at *14 (D. Neb. June 15, 2009); *United States v. $159,880.00 in U.S. Currency*, 387 F. Supp. 2d 1000, 1013 (S.D. Iowa 2005).

B. Requiring Property Owners To Prove Their Innocence Raises Serious Due Process Concerns.

The importance of this issue is further elevated by the fact that the decision below—and other decisions like it—also raises serious constitutional concerns.

The Supreme Court's decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), casts serious constitutional doubt on any legal regime that requires property owners to prove their own innocence. That case involved a Colorado scheme under which individuals who were convicted of a crime, but later had those convictions vacated or reversed, were required to prove their own innocence to obtain a refund of costs, fees, and restitution paid under the conviction. *Id.* at 1253–54. The Court explained that this system violates due process, as "the presumption of innocence lies at the foundation of our criminal law" and is both "axiomatic and elementary." *Id.* at 1255–56 (marks and citation omitted). A state "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Id.* at 1256 (emphasis in original). The same reasoning applies here: Without concrete evidence to establish wrongdoing, a court cannot presume a person "guilty enough" for the penalty of civil forfeiture.

Departure from the presumption of innocence also cannot be justified as an originalist matter. As Justice Thomas has explained, the historical evidence suggests that "forfeiture actions were in the nature of criminal proceedings," and there is "evidence that the government was historically required to prove its case beyond a

reasonable doubt." *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari). For instance, in *The Burdett*, 34 U.S. (9 Pet.) 682, 683 (1835), the Court explained that an action "to enforce a forfeiture of [a] vessel and all that pertains to her, for a violation of a revenue law" was "highly penal" and that, as a result, "the penalty should not be inflicted unless the infractions of the law shall be established beyond reasonable doubt." *See also Boyd v. United States*, 116 U.S. 616, 634 (1886) (explaining that forfeiture proceedings "are in their nature criminal"). The historical evidence suggests that the government in civil forfeiture cases should be held to the same reasonable doubt standard that applies in criminal cases; at a minimum, the government should be held to CAFRA's preponderance of the evidence standard.

Indeed, the decision below is particularly dubious given the Framers' high regard for property rights. The Framers' generation "saw the protection of property as vital to civil society." Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1, 27 (2016). Property was synonymous with freedom, because "[w]here property was concentrated in the hands of the king and aristocracy, only the king and aristocracy would be free." *Id.* at 42 (marks omitted). And the Supreme Court has likewise recognized that "[t]he great end for which men entered into society was to secure their property." *Boyd*, 116 U.S. at 627 (marks omitted). "Due protection of the rights of property has been regarded

as a vital principle of republican institutions," which is "founded in natural equity, and is laid down as a principle of universal law." *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235–36 (1897) (marks omitted). These principles are irreconcilable with a rule that requires property owners to prove their own innocence.

C. Law Enforcement Civilly Forfeits Billions Of Dollars In Property Every Year With Little Judicial Oversight.

The government's burden in civil forfeiture cases must also be applied with particular rigor because law enforcement agencies retain forfeited property—thus benefitting financially from the forfeiture. *See* 28 U.S.C. § 524(c). That financial incentive requires increased judicial scrutiny, and it has also led to an explosion of civil forfeiture.

The Supreme Court has held that greater judicial scrutiny is required where government benefits financially from taking property. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55–56 (1993), a case involving civil forfeiture, the Court held that the protections of due process are "of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *See also Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). Like all human institutions, government

agencies are motivated by incentives, and the incentives created by civil forfeiture are an invitation to abuse.

The impact of these financial incentives can be seen in the growth of civil forfeiture. Congress first allowed law enforcement agencies to profit directly from civil forfeitures in 1984, when it created the federal Asset Forfeiture Fund and directed the Attorney General to deposit all net forfeiture proceeds into the Fund for use by the Department of Justice and other federal law enforcement agencies. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. The introduction of this profit incentive has fueled an extraordinary increase in the use of civil forfeiture, as annual deposits in the federal Asset Forfeiture Fund have grown from $93.7 million in 1986 to $4.5 *billion* in 2014. *See* Dick M. Carpenter II, *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture* at 5 (2d ed. 2015).[9] The growth of civil forfeiture provides vivid confirmation that incentives matter.

Law enforcement officials have openly acknowledged the importance of this profit incentive. Government attorneys in New Mexico were caught on tape referring to forfeited property as "little goodies," and a government attorney in New Jersey admitted that flat screen televisions "are very popular with the police departments."

---

[9] Available at https://bit.ly/3rKTG0Z; *see also Policing for Profit Third Edition* at 16 (providing updated data showing that federal agencies have continued to make billions of dollars in annual forfeiture deposits in more recent years).

Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. Times (Nov. 9, 2014).[10] The same New Jersey attorney admitted that he is more likely to pursue forfeiture if the property would be useful to law enforcement: "If you want the car, and you really want to put it in your fleet, let me know—I'll fight for it." *Id.*

There also exist, unfortunately, countless examples of self-interested law enforcement agencies abusing civil forfeiture for their own pecuniary gain. *E.g., Leonard*, 137 S. Ct. at 848 ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses."); *id.* (listing examples); *see also Policing for Profit Third Edition* at 20–21, 29, 38. To give just a few examples: Police in Oklahoma seized $53,000 from the tour manager for a Christian band—money that was intended for an orphanage in Thailand. *See* Christopher Ingraham, *How police took $53,000 from a Christian band, an orphanage and a church*, Wash. Post (Apr. 25, 2016).[11] Customs and Border Protection took $41,000 that was intended to open a medical clinic in Nigeria. *See* Meagan Flynn, *She saved thousands to open a medical clinic in Nigeria. U.S. Customs took all of it at the airport.*, Wash. Post (May 9, 2018).[12]

---

[10] Available at https://nyti.ms/2Bkntb6.
[11] Available at https://wapo.st/2MVVZKn.
[12] Available at https://wapo.st/2wbaqTv.

And police in Wyoming seized over $91,000 from a touring musician who was planning to use the money to purchase a music studio. *See* German Lopez, *Wyoming police took an innocent man's $91,800*, Vox (Dec. 1, 2017).[13]

Fueled by financial incentives, civil forfeiture has grown into what amounts to a shadow criminal justice system, allowing government to punish thousands of alleged criminals without convicting anyone of a crime. That system raises serious constitutional concerns. At the very least, the Court should hold the government to the preponderance of the evidence burden that CAFRA imposed.

CONCLUSION

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

Dated: March 16, 2021

Respectfully submitted,

/s/ Robert E. Johnson

Caroline Grace Brothers
INSTITUTE FOR JUSTICE
901 N. Glebe Rd. Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321

Robert E. Johnson
INSTITUTE FOR JUSTICE
16781 Chagrin Blvd. #256
Shaker Heights, OH 44120
Phone: (703) 682-9320
Fax: (703) 682-9321
Email: rjohnson@ij.org

Counsel for Amicus Curiae

[13] Available at https://bit.ly/3s1HGss.

CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments) this brief contains 6,155 words.

This brief document complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14pt Times New Roman.

Dated: March 16, 2021

/s/ Robert E. Johnson
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2021, I caused this BRIEF FOR THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF CLAIMANTS-APPELLANTS to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the registered CM/ECF users.

/s/ Robert E. Johnson
Counsel for Amicus Curiae