ORAL ARGUMENT NOT YET SCHEDULED

NO. 24-5144

In The

United States Court of Appeals

For The District of Columbia Circuit

LINDA MARTIN,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, **et al.,**

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cv-00618-APM)

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

At the heart of the government's response brief lies an unstated premise: That the Federal Bureau of Investigation (FBI) can deprive Linda Martin and other owners of the specific factual and legal information they need to intelligently respond to the government's forfeiture notice because some of them might learn that information at some later point. That premise is unstated because it is prohibited. *See Gete v. INS,* 121 F.3d 1285, 1293 (9th Cir. 1997).

Half the government's brief argues that the Court cannot question that premise. It says the case should be dismissed, either as moot because the FBI returned Linda's money, or for lack of exhaustion before the FBI itself. Those arguments are wrong. The FBI's admittedly strategic choice to try to moot the case shows why the case survives under the inherently transitory exception. And the exhaustion argument fails because there is no administrative process to exhaust.

On the merits, the government quibbles with the weight of authority (including a directly on-point case from the Ninth Circuit), but provides no persuasive authority of its own. At bottom, its argument is that "anemic" notices just don't matter. Even if the notices

don't contain specific factual and legal information, owners might figure out how to trigger a judicial proceeding where they may ultimately get that information. The FBI's suggestion, however, runs squarely into the well-pleaded allegations of the complaint, which state that these anemic notices *do* deprive owners of the information they need. Due to the short window in which owners must act, failing to detail the specific factual and legal reasons for the forfeiture means they cannot knowingly and intelligently choose their next steps. That's exactly why Linda is here. The FBI sent her a constitutionally deficient notice. Left without the information she needed, Linda attempted to navigate her options, ultimately submitting a petition because it was the only option that mentioned returning an owner's property. But as a result, Linda lost access to her property for over two years. While she was lucky enough to have her property returned, if nothing changes, a putative class of owners will continue to be deprived because of the FBI's deficient notices. This Court has every authority to let their claims proceed. And it should.

Below, Linda explains why her class-action claims are live, not moot (Part I). Then, how exhaustion was not required since no remedies

exist (Part II). And, lastly, how she adequately pleaded her due-process claims and why this Court should accordingly reverse and remand the District Court's final judgment dismissing those claims under Rule 12(b)(6) and denying her class-certification motion as moot (Part III).

ARGUMENT

I. The District Court rightly rejected the government's mootness arguments.

To start, the District Court properly rejected the government's argument that, by returning her savings, the FBI mooted Linda's class-action claims. JA458–61; *contra* Br. for Appellees ("Resp. Br.") 27–34. The District Court correctly applied the inherently transitory exception to mootness.

Under the inherently transitory exception, a plaintiff representing a putative class may continue pursuing an otherwise-moot claim when there is "uncertainty about whether a claim will remain alive long enough for a district court to certify the class" and at least "some class members will retain a live claim." JA460–61 (quoting *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010), and *J.D. v. Azar*, 925 F.3d 1291, 1310 (D.C. Cir. 2019)). Here, both conditions were met. First, it was "by no means certain" that any claim would reach class certification since the

FBI has the unilateral authority to return seized property and can do so at any time. Here, after holding Linda's life savings for over two years, the FBI returned it weeks after she brought suit. JA460–61 (applying *Azar*, 925 F.3d at 1310). Second, at least "some class members will retain a live claim throughout the proceedings" since the FBI has given hundreds, if not thousands, of people these same deficient notices. *See* JA461. Thus, the District Court applied the inherently transitory exception and allowed Linda's claims to proceed. *See* JA458–61; JA472.

The District Court's ruling finds support in other cases. For example, it followed other courts applying the exception in class actions challenging civil forfeiture. JA460 (citing, among other cases, *Sparger-Withers v. Taylor*, 628 F. Supp. 3d 821, 829 (S.D. Ind. 2022) (in turn stating government's return of seized property in the middle of forfeiture proceedings justified applying the exception since the government could "moot out any individual plaintiff who brings a case of this sort")); *see also Serrano v. Customs & Border Patrol*, 975 F.3d 488, 492 n.1 (5th Cir. 2020) (per curiam); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694, 703 (E.D. Pa. 2015); *Smith v. City of*

Chicago, 273 F.R.D. 413, 415 (N.D. Ill 2011)).[1] Additionally, the ruling also accords with the Supreme Court's recent reminder that, when the government stops its allegedly wrongful conduct to avoid a lawsuit challenging that conduct, it faces a "formidable burden" to show mootness. *Cf. FBI v. Fikre*, 601 U.S. 234, 241 (2024).

To this, the government responds that the exception shouldn't apply because Linda could have sued two years earlier than she did. Resp. Br. 31. Two years, the government says, would have been long enough for a court to resolve class certification. *Id*. Therefore, to the government, it's Linda's "delay" that caused her claim to become moot. *See id.*

But the District Court already rejected this argument. JA460. And for good reason, as it ignores reality. If Linda had brought suit earlier, the FBI would have just returned her property to moot this action earlier as well. That's why the exception applies whenever there is "uncertainty" about whether "any individual plaintiff ***who brings*** a case of this sort" will reach class certification. *See Sparger-Withers*, 628

[1] Of these, the government mentions only *Serrano* in its discussion of the inherently transitory exception. *See* Resp. Br. 33.

F. Supp. 3d at 829 (emphasis added). Indeed, the government itself concedes that the exception applies where "there [i]s no way for [any] plaintiff to avoid having her claim mooted before the court [i]s able to rule on her motion for class certification." *See* Resp. Br. 31 (cleaned up). And that's what happened here. Linda's forfeiture languished for almost two years at the FBI. Then, within weeks of suing, the FBI returned her savings to moot this action. It is not Linda's delay, but rather the FBI's unilateral control, which justifies applying the exception here.

The government also responds that the District Court erred by putting an evidentiary burden on the government to disprove the exception applies. Resp. Br. 30. But the District Court didn't do that. Instead, the court found that the "short timeline" in Linda's case and the FBI's unilateral authority (in all cases) to return seized property meant the exception should apply. If the government had evidence to show that wasn't the case, it could have offered it. But it didn't. JA460; Dist. Ct. ECF 20 at 1–6 (failing to rebut Linda's evidence). The District Court did not erroneously shift the burden to the government simply by

relying on Linda's evidence and then noting the government offered none in response. JA460.[2]

After that, the government suggests the exception shouldn't apply because the FBI returned Linda's savings as part of its "litigation strategy." Resp. Br. 32–33 (citing *Genesis Healthcare v. Symczyk*, 569 U.S. 66, 76–77 (2013)). But that admission, that the FBI deliberately returned Linda's funds to moot this case, is reason enough to reject the FBI's position. Although the DC Circuit has not yet adopted the "picking off" exception to mootness, numerous circuits have rejected attempts to strategically moot out individual claims to frustrate class-wide review. *E.g.*, *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. Unit A July 1981); *Richardson v. Bledsoe*, 829 F.3d 273, 286 (3d Cir. 2016) ("[W]e reaffirm the validity of the picking off exception."); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (upholding exception and noting that "a claim transitory by its

[2] The Court could use Linda's evidence for a class-wide determination because it is undisputed that the FBI's forfeiture notice practices are uniform nationwide. *See* JA052, JA068–69, JA085, JA307, JA311, JA313, JA318, JA319, JA327.

very nature and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review").

Nor does *Genesis Healthcare* change any of this. In that case, which arose under the FLSA, the plaintiff rejected an offer of judgment that fully satisfied her sole claim for damages. 569 U.S. at 76. By contrast, Linda here moved for class certification under FRCP Rule 23 and, unlike the plaintiff in *Genesis Healthcare*, sought declaratory and injunctive relief for both herself and the broader class. JA033–34, ¶¶ D–G; *see also Genesis Healthcare*, 569 U.S. at 77 (contrasting "claims for injunctive relief" with "a claim for damages [which] cannot evade review"). That is relief that the FBI could not and did not provide. Whatever *Genesis Healthcare* may say about FLSA plaintiffs seeking damages who turn down their full measure of requested relief under Rule 68, it says nothing about the FBI's ability to strategically moot cases by giving owners less than what they demand.

The government's final move is to argue that this Court lacks jurisdiction because Linda did not appeal the District Court's class-certification denial. Resp. Br. 34–38. But that's just wrong, and rests on a misunderstanding of the Supreme Court's decision in *Alvarez v.*

Smith, 558 U.S. 87 (2009). Resp. Br. 35. When *Alvarez* was decided, Federal Rule of Appellate Procedure 3 required parties to identify each separate district court order being appealed.[3] But the rules have since eliminated that trap for the unwary: Fed. R. App. P. 3(c)(4) currently provides that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." Linda plainly satisfied FRAP 3(c)(4) by appealing the District Court's final judgment. *See* JA472; *see also* Wright & Miller, 16A Fed. Prac. & Proc. Juris. § 3949.4 (5th ed. 2024 update) (citing, *inter alia*, *Martinez v. Bureau of Prisons*, 444 F.3d 620, 623 (D.C. Cir. 2006)).

Below, Linda moved for class certification before the District Court, and the parties briefed the matter, The court denied that motion as moot only because it granted the government's motion to dismiss. Upon remand, the District Court will therefore be free to revisit class certification. JA472. And if the government is arguing that it was improper for the District Court to resolve the merits and class

[3] This is also true for *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 336 (1980). Resp. Br. 33.

certification together, it is wrong. *Jones v. Dufek*, 830 F.3d 523, 528 n.5 (D.C. Cir. 2016) ("Because the district court properly found that [the] claims fail on their merits, it also denied [the] motion for class certification as moot.").

II. Linda was not required to exhaust administrative remedies because the FBI offers none.

As the opening brief explained, the District Court should not have dismissed for failure to exhaust administrative remedies because there were no remedies to exhaust. Br. 28, 57; *see also* JA018–21, Compl. ¶¶ 76–88. The government responds two ways. First, it says this Court cannot even consider Linda's exhaustion arguments because she forfeited them. Resp. Br. 23, 43–45. Second, it says two inapposite cases required Linda to exhaust her remedies, which any reasonable person would have known how to do. *Id.* at 38–43, 45. Neither argument saves the District Court's erroneous ruling.

A. Since Linda properly presented her claim that exhaustion was not required, she did not "forfeit" any argument in support.

The government argues Linda forfeited her argument that the FBI offers no administrative remedies to exhaust. This is wrong on the law and the record.

First, the government errs on the record. The record shows that, before the District Court, Linda explained why, for numerous reasons, exhaustion before the FBI wasn't required. Over the course of several pages, Linda explained how the FBI's forfeiture proceedings create "an unreasonable or indefinite timeframe for administrative action"; how the FBI could not give the type of declaratory and injunctive relief Linda was seeking; and how Linda's challenge was "to the adequacy of the agency procedure itself." Dist. Ct. ECF 18 at 24–28. On appeal, Linda can clarify those explanations and cite additional support for why exhaustion is not required.

Second, the government errs on the law. Simply put, parties forfeit *claims*, not arguments in support of claims. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). So, a party may "refine and clarify its analysis" on appeal, *Teva Pharms., USA, Inc. v. Leavitt*, 548 F.3d 103, 105 (D.C. Cir. 2008), including by "citing 'additional support for his side of an issue upon which the district court did rule, much like citing a case for the first time on

appeal,'" *see, e.g.*, *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 100 (D.C. Cir. 2015). The FBI is therefore wrong in suggesting that Linda is barred from raising another reason for why exhaustion was not required.

B. The government's preferred cases are inapposite and do not require exhaustion.

The government goes back to *Malladi Drugs* and *Colon-Calderon* to argue that exhaustion was required here. According to the government, Linda should have sent a letter to the paralegal named in the notice, or perhaps filed a petition and raised her due-process challenge before the agency, or maybe filed a claim and sought more information in judicial forfeiture. But none of those options would have cured the injury caused by the FBI's deficient notices, which accrued the moment Linda received it. When Linda received that notice, she had 30 days to act to save her property, but the notice failed to give her the specific facts she needed to do so intelligently. To that, the government says Linda should have acted anyway, even if she was ignorant of why any of this was happening and even though some of the government's proposed actions (like somehow challenging the constitutionality of the FBI's notices before the agency itself) are impossible.

Indeed, a look at the government's preferred cases shows they do not apply here. Unlike Linda, the plaintiffs in those cases weren't challenging the constitutional adequacy of the agency's notices. For instance, in *Malladi Drugs & Pharmaceuticals, Ltd. v. Tandy*, the issue was whether the DEA should aggregate the value of drug shipments when moving for forfeiture. There, the DEA seized four shipments of drugs and moved for administrative forfeiture of each shipment, even though the aggregate value of the four shipments exceeded the $500,000 threshold that triggers mandatory judicial forfeiture. When the plaintiff received the notices, it filed petitions with the DEA but later complained about the agency's decision not to aggregate the value of Malladi's four shipments. *See* 552 F.3d 885, 889 (D.C. Cir. 2009). This "open and fact-specific question" was one "that agency expertise is best suited to consider in the first instance." *Id.* at 891. And of course, once Malladi received the notices and saw that the DEA had disaggregated the shipments and moved for administrative forfeiture on each, it had an easy way out: file a claim. But in failing to do that, Malladi wasn't entitled to a second bite at the apple.

The challenge there was thus different from Linda's, who says that the lack of specific legal and factual bases for the FBI's actions left her unable to intelligently respond. *See* JA018, Compl. ¶ 76; JA021, Compl. ¶ 88. There is no point requiring exhaustion then, both because this case does not involve FBI expertise and because there was no path by which Linda and other owners could timely get the information they needed. *See* JA014, JA018, Compl. ¶¶ 49, 76.

This case also is not controlled by *Colon-Calderon v. DEA*, 218 F. App'x 1 (D.C. Cir. 2007) (unpublished), where the plaintiff wanted the DEA to return his money and only raised lack of notice at the eleventh hour in the wrong kind of motion filed in the wrong court. Colon-Calderon's cash was seized at an airport in New York by the DEA. *See* Resp.'s Br., *Colon-Calderon v. DEA*, 2006 WL 3761323, at *4–5 (Dec. 15, 2006). After failing to respond to the notices, he filed an untimely petition with DEA and argued his money was legitimate. *See id.* When the DEA denied his petition, he requested reconsideration before the agency and lost. *Id.* Then, Colon-Calderon bypassed the district court and sought review directly in this Court, asking for an order that DEA grant his petition. 218 F. App'x at 1. Only after the DEA moved to

dismiss the erroneous appeal did Colon-Calderon argue for the first time that he never received DEA's notice. *See* 2006 WL 3761323, at *8. But it was too late to raise this argument, which should have been brought before the district court under Section 983(e). *See id.* at *9–10; *Colon-Calderon*, 218 F. App'x at 1. Notably, Colon-Calderon never argued he didn't understand the legal or factual reasons that his money was in jeopardy, let alone contend that the DEA's forfeiture notices were the cause of his ignorance. *See* Pet.'s Br., *Colon-Calderon v. DEA*, 2006 WL 3694215, at *3 (Dec. 12, 2006). It therefore has no bearing on this case.

Neither *Malladi Drugs* nor *Colon-Calderon* demand exhaustion here. As Linda has articulated both in her opening brief and here, exhaustion simply cannot be required when there is no available remedy to exhaust, and the issue goes to the constitutional adequacy of the agency's notices. Accordingly, the District Court's ruling dismissing Linda's claims for failure to exhaust should be reversed. So should the District Court's ruling on the merits.

III. When the government finally reaches the merits, it fails to change the fact that the District Court should be reversed because Linda plausibly alleged the FBI violates due process by sending property owners forfeiture notices that lack any specific legal or factual reason for the forfeiture.

As Linda' opening brief explained, this Court should reverse the District Court's 12(b)(6) ruling, vacate the class-action denial, and remand this case for further proceedings. Br. 29–55. Linda adequately pleaded that the FBI's notices omit "specific legal or factual reasons the FBI believes justify seizing or forfeiting" property and that violates due process because that omission leaves property owners unable to "understand the nature of the government's proceedings against" them, or "even begin to prepare an effective and meaningful response to defend [their] rights." *See* JA028, Compl. ¶¶ 135–36. The FBI's violation is confirmed by *Gete v. INS*, 121 F.3d 1285 (9th Cir. 1997), which held that forfeiture notices must include "the exact reasons" for forfeiture, otherwise property owners cannot "prepare reasonably informed petitions for remission" or "respond[] effectively to the . . . accusations of criminal wrongdoing that underlie a forfeiture," Br. 42–43 (quoting *Gete*, 121 F.3d at 1297, 1298). The FBI's violation is also confirmed by this Court's precedent, Br. 34–39, and by additional out-of-circuit

precedent, Br. 39–44.[4] Rejecting these authorities, the District Court granted the government's motion to dismiss based on a case saying due process does not require local police to give detailed advice about publicly available information. Br. 52–55 (discussing *City of West Covina v. Perkins*, 525 U.S. 234 (1999)).

The government tries to defend the decision below in three ways. First, it fights Linda's allegations, which is not permitted at this stage. Second, lacking cases in support of its position, the government tries to chip away at the weight of authority against it. Resp. Br. 50–51. Third, the government raises (but retreats from) the District Court's reliance on *City of West Covina*. *Id.* at 46, 57–58. Linda addresses these in turn below.

[4] The violation is also confirmed by history. Br. 30–34. The government grabs a handful of notices to argue some notices were not as detailed as those identified in Linda's opening brief. *See* Resp. Br. 58–59. That may be so, but the government misses the point that, even if there were some variation historically, notices allowed "interested parties [to] figure[] out the grounds for these forfeitures." *Id.* at 59. This is precisely why courts back to the founding have explained that an essential component of due process is adequate notice. *See* Br. 32 (citing *The Hoppet*, 11 U.S. (7 Cranch) 389, 394–95 (1813) (Marshall, C.J.)).

A. The government is bound by Linda's well-pleaded allegations and cannot rely on its own preferred version of the facts.

It bears repeating Linda's central allegations here, which control over the government's alternate version of the facts. *See Ralls Corp. v. CFIUS*, 758 F.3d 296, 314–15 (D.C. Cir. 2014).

When the FBI seizes property and initiates administrative forfeiture, it sends individuals a forfeiture notice.[5] That notice does not give property owners "key context"—the specific legal or factual reasons—for the forfeiture. *See* JA018, Compl. ¶ 76. But it requires that property owners respond within 30 days. If the property owner fails to respond, they lose their property forever. If they are confused by the notice, there is no way to contact the FBI except by filing a petition. JA014, Compl. ¶ 49; JA036–37. And because the notice fails to give the specific legal or factual reasons for the forfeiture, property owners cannot investigate for themselves what is going on or even get meaningful advice from a lawyer. *See* JA018–21, Compl. ¶¶ 76–90. In

[5] The government wrongly suggests this case reaches FBI's publication notices. *See* Resp. Br. 51. But Linda's complaint makes clear that her injury arose due to the deficient notice that she received in the mail, not whatever notice the FBI posts.

short, the notices omit basic information that property owners need to defend their rights meaningfully and intelligently. JA028–29, JA031, Compl. ¶¶ 135–37, ¶¶ 149–51.

The notice gives two ways to respond: a petition or a claim. JA014, Compl. ¶ 49. But if a property owner responds by filing a petition, their property is automatically forfeited to the FBI. JA015, Compl. ¶ 52. The only thing the property owner can appeal to after that is the FBI's generosity. 28 C.F.R. § 9.5(a)(4). That is precisely what happened to Linda.

When Linda received her notice, she had no idea what to do. She did her best to understand the "confusing" document. JA014, Compl. ¶ 50. Linda had no idea, "because the Notice did not inform her," that the FBI had taken her savings in a dragnet, unconstitutional raid the agency planned months in advance. *See* JA016–17, Compl. ¶¶ 60–65; *Snitko v. United States*, 90 F.4th 1250 (9th Cir. 2024) (holding that the FBI violated both a search warrant and the Fourth Amendment rights of Linda and hundreds of other property owners by conducting a criminal search of their safe-deposit boxes). She filed a petition because that was the only part of the Notice that referred to "the 'return' of

property." *See* JA017, Compl. ¶ 65. In the ensuing two years that the FBI continued to hold her savings for forfeiture, the agency never told Linda why. JA017–18, Compl. ¶¶ 66–73.

Turning to the notice's other option, filing a "claim," if the property owner goes that route, the FBI has two options. First, it can return the property to avoid any further attention. 28 C.F.R. § 8.7. Or, second, the FBI can send property to the U.S. Attorney's Office for the U.S. Government to litigate against the property owner. In that litigation against the U.S. Government, the property owner will bear an evidentiary burden—one alien to American tradition—to prove they are an "innocent owner." *See* 18 U.S.C. § 983(d).

Returning to Linda's situation specifically, she filed a petition, not a claim. JA015, JA016–17, Compl. ¶¶ 52, 60–65. So, Linda lost her property rights without ever learning anything more from the FBI about what it was doing to her property than what was in the forfeiture notice. She sued because that violates due process, and she sued on behalf of a nationwide class because the FBI does it to everybody when it seizes property for forfeiture. When Linda sued, the FBI had held her savings for roughly two years. But after she sued, the FBI decided

within weeks to return her money. JA446. After the FBI returned Linda's savings, the government moved to dismiss this case as moot. JA457–58.

Linda's allegations control over the government's preferred version of the facts. And that version could not be any more different: According to the government, property owners never must "disprove" anything to get their property. Resp. Br. 58. According to the government, the notices it sends provide all the information property owners would need to defend their property. *Id.* at 48. And according to the government, even if the notices don't actually provide that information, any "reasonable person" would automatically know they could flesh out the notice by mailing "a request for more information . . . either together with or separate from an actual claim or petition . . . ." *Id.* at 45.

To be sure, the government can adduce evidence and attempt to prove these points at summary judgment. But it can't simply assert its own set of facts on a motion to dismiss. Instead, it must "treat the complaint's factual allegations as true and grant[] plaintiff the benefit of all inferences that can be derived from the facts alleged." *Ralls Corp.*,

758 F.3d at 314–15 (cleaned up). Because both the government and the District Court failed to heed *Ralls* by addressing the actual allegations of Linda's complaint, this Court should reverse and remand.

B. The government offers no cases to support its position, so it instead quibbles with authorities Linda cited to show the government owes adequate notice before it deprives people of property.

The government offers no cases supporting the idea that the FBI can avoid telling people the specific factual and legal reasons it is trying to forfeit their property so long as some of them might somehow get a hearing. Resp. Br. 50–51. The government instead tries first to distinguish cases Linda cited from this Court, saying all they require is a hearing before the final deprivation. *Id.* at 52–53. But that is wrong.

This Court's cases may not have directly addressed forfeiture notices, but they are clear that "adequate notice lies at the heart of due process." *Gray Panthers v. Schweiker*, 652 F.2d 146, 168 (D.C. Cir. 1980) ("*Gray Panthers I*"). For example, in *Gray Panthers I*, this Court held that due process required that Medicare beneficiaries receive the "specific reasons for the denial" of their benefits beforehand, and that Medicare failed to meet that standard when it was not clear from the "cryptic notice" which of two bases for denial applied. *Gray Panthers I*,

652 F.3d at 168–69. So, too, in *Gray Panthers II*, which explained that notice for these same beneficiaries must be adequate *up front* and can't be cured by requiring "supplementation through action by [the] recipient." *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983) (citing *Vargas v. Trainor*, 508 F.2d 485, 489–90 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975)). Similarly, in *Reeve Aleutian Airways, Inc. v. United States*, this Court upheld the government's decision to revoke an airline's participation in a federal program specifically because the notice told the airline "explicitly what the dispute was about" and, thus, "avoid[ed] serious risk of erroneous deprivation." 982 F.2d 594, 599–600 (D.C. Cir. 1993).

Ralls Corp. v. CFIUS followed this trend, as the government agrees, and required that a Chinese-owned company receive "the factual basis for the action" before it was divested of windfarms. 758 F.3d at 318 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)); *see also* Br. 37–39. And *Ralls* further recognized that later hearings aren't a cure for earlier deprivations. That case involved two orders that interfered with Ralls' property ownership—one by CFIUS, which was temporary; and the other by the President, which was permanent. This Court remanded

for further consideration whether CFIUS's *temporary* order violated due process. *Id.* 325 & n.23. It did that even though the CFIUS order would always either expire, or be followed with more process. *Id.* at 323. In other words, the availability of more process down the line did not excuse CFIUS's failure to provide adequate notice at the outset.

Lastly, as the government agrees, *Esparraguera v. Department of the Army* reiterated that the government must give "the factual basis for" the deprivation "*before* final deprivation of a property interest." 101 F.4th 28, 40 (D.C. Cir. 2024); *see also* Resp. Br. 55–56. To be sure, the case does not cover the waterfront here. However, its holding that the government must give notice and an opportunity to be heard before the final deprivation helps Linda because she alleges the FBI notices fail to do that whenever a property owner defaults or responds to the notice with a petition. JA015, Compl. ¶ 52; 28 C.F.R. § 9.5(a)(4). When that happens, like with the demotion in *Esparraguera*, the property owner loses their rights before they know "the factual basis" for the deprivation. *See* 101 F.4th at 40.

At bottom, the cases from this Court do not say the government can take people's property, send them meaningless notices, and then

defend those notices by claiming that owners might subsequently get the specific factual and legal information they needed at step one.

After attacking this Court's cases, the government next turns to the numerous out-of-circuit precedent that support Linda's position. Failing to provide any out-of-circuit precedent of its own, the government attempts to distinguish and minimize Linda's cases.

The government first takes aim at *Gete v. INS*, 121 F.3d 1285 (9th Cir. 1997), which directly conflicts with both the government's position and the District Court's holding. In that case, the Ninth Circuit held that the INS violated due process by issuing constitutionally deficient administrative forfeiture notices, which could not be justified by pointing at other potentially available constitutional processes, such as the option for judicial forfeiture proceedings. *See id.* at 1293.

The government attempts to distort *Gete*'s holding, claiming it holds that federal agencies must provide adequate notices, but only if owners have the chance to contest the forfeiture before the agency. Resp. Br. at 56–57. But nothing in the Ninth Circuit's opinion supports this distinction without a difference. *Gete* plainly says providing owners with the specific factual and legal information for an attempted

forfeiture "would go a long way toward preventing" erroneous deprivations of property. 121 F.3d at 1298. And nothing in *Gete* suggests that providing owners deficient fact and law-free notices is fine if, by filing a petition, those owners relinquish their ability to challenge their property's forfeitability. Indeed, since filing a petition extinguishes an owner's rights under the FBI's administrative forfeiture scheme—unlike the INS's scheme in *Gete*—the need for those specific facts and law is, if anything, more pressing here.

The government likewise summarily rejects decisions from the Second and Seventh Circuits that are on all fours here. The government agrees that in *Kapps v. Wing*, 404 F.3d 105 (2d Cir. 2005), and in *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), the plaintiffs needed "information to decide whether to seek a hearing" on the government's denial of their benefits. Resp. Br. 57. These plaintiffs are exactly like Linda. She alleged she was "forced to decide how to respond" (if at all) without basic information she needed in order to respond meaningfully and intelligently. JA018–21, Compl. ¶¶ 77–89. The government never explains why *Kapps* and *Vargas* do not apply directly to these binding allegations.

And then the government entirely ignores the district court's injunction in *Snitko*. Br. 43–44. In that case, which concerned the same FBI raid in which Linda's own savings were seized, the district court in the Central District of California enjoined the FBI from administratively forfeiting property belonging to the named plaintiffs. The court applied *Gete* and held that the FBI's "anemic notices" violated property owners' "right to due process of law" by purporting to take their property, "without explanation," aside from referencing "the entire [forfeiture] statute and regulations[]." *Snitko v. United States*, 2021 WL 3139707, at *2–3 (C.D. Cal. June 22, 2021). The "anemic" notices excoriated by that court are the very same notices at issue in this case. Br. 43–44; *see* JA036–37. In response to this, the government represents that "[i]n light of the ongoing litigation, the FBI held in abeyance all uncontested administrative forfeitures." Resp. Br. 12. It did not do so in a vacuum, but with an eye to the district court's holding. In any event, how the FBI responded to the court's injunction does not alter the fact that that injunction was in keeping with both *Gete* and the consensus of caselaw from across the nation.

Accordingly, none of the cases from this Circuit or others supports the government's view that the FBI can continue sending deficient notice and leaving property owners to take affirmative steps to learn why their property is in jeopardy. So, the government naturally reaches for cases addressing other issues. This fails, too.

Specifically, the government tries to incorporate inapposite cases about whether a forfeiture hearing is timely. Resp. Br. 61–63. Neither case says agencies can do what the FBI does so long as property owners are "afforded the option of electing to resolve the dispute through judicial forfeiture." *Id.* at 62. The government's first case, *United States v. Von Neumann*, 474 U.S. 242 (1986), merely says that typical deadlines in judicial forfeiture do not apply in the Customs and Border Protection's petition process, *see id.* at 249. In other words, it has no bearing on this case whatsoever. And in the second case, *Culley v. Marshall*, 601 U.S. 377 (2024), the Supreme Court held only that where there was a timely forfeiture hearing, there was no separate need for a pre-forfeiture-hearing preliminary hearing, *see id.* at 387. Again, completely inapposite. At bottom, neither *Von Neumann* nor *Culley*

comes close to saying the FBI can continue sending anemic notices since property owners can ask for a hearing.

C. The District Court erred by instead following *City of West Covina*, and the government errs to the extent it still relies on that case.

As Linda explained in the opening brief, *City of West Covina v. Perkins* simply does not apply here. Br. 52–55. The government all but concedes this by never defending the District Court's reliance on the case. Instead, the government explains the case was unimportant, comprising just "two sentences" in the memorandum opinion. Resp. Br. 57–58. In sum, the parties appear to agree now that *City of West Covina* does not control.

The government nonetheless tries to lump Linda in with the property owner in that case by saying neither of them had to prove anything to get their property back. Resp. Br. 58. But this conflicts with Linda's complaint. *See* Part III.A above. And with the notices, which direct people to submit supporting evidence. JA036–37. As well as with the FBI's own regulations. 28 C.F.R. § 9.3(c) (obligating property owners to submit supporting evidence to show their ownership, such as "evidence establishing the source of funds for seized currency or the

source of funds used to purchase the seized asset"). And, lastly, with Congressional statute requiring a property owner to prove she is an "innocent owner." 18 U.S.C. § 983(d)(1) ("The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence."). The property owner in *City of West Covina* didn't face any of that. He instead was entitled to get the property back simply by filing a motion for it. As a result, and for the reasons Linda has already explained, the District Court erred by following *City of West Covina v. Perkins*. Br. 52–55.

CONCLUSION

For the foregoing reasons and those laid out in the opening brief, Linda respectfully asks this Court to enter an order reversing and remanding the District Court's final judgment for further proceedings.

Dated: January 22, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,111 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 with a 14-point Century Schoolbook font.

Dated: January 22, 2025

/s/ Robert M. Belden
Robert M. Belden

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2025, I filed the foregoing Brief of Appellant with the Clerk of the United States Court of Appeals for the D.C. Circuit via the CM/ECF system, which will notify all participants in the case who are registered CM/ECF users.

Dated: January 22, 2025

/s/ Robert M. Belden
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