No. 26-91

IN THE

Supreme Court of the United States

RICHARD STUART ROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF OF *AMICI CURIAE* LAW AND ECONOMICS SCHOLARS IN SUPPORT OF PETITIONER

Joshua S. Lipshutz
Counsel of Record
Sam Raymond
Cameron J.E. Pritchett
Connor P. Mui
Jesse Schupack
Ester Cross
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8217
jlipshutz@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are economists, law and economics scholars, and non-partisan, non-profit organizations who teach, conduct research, and publish on economics and law. *Amici Curiae* are interested in the application of sound economic theory in this Court's jurisprudence.

Donald J. Boudreaux is a Professor of Economics at George Mason University and former chairman of GMU's Economics Department. He has published extensively on the economics of competition and antitrust and on public-choice economics.

Abigail R. Hall is a Professor of Economics at the University of Tampa. She has published on political economy, policing, and civil asset forfeiture.

The James Madison Institute is one of the nation's oldest and largest nonprofit, nonpartisan research and educational organizations. The Institute's policy recommendations are rooted in the principles found in the U.S. Constitution—such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility. The Institute is a free-market policy organization focused on state-based issues. It has a strong interest in assisting the public and governments in rational economic decision-making.

Alexander Lundberg is an Assistant Professor at Northwestern University's Feinberg School of Medicine and an economist at the Buehler Center for Health

---

[1] Pursuant to this Court's Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for amici provided timely notice to all parties of their intent to file this *amicus* brief.

Policy and Economics. His research specialty is in Public Economics and Law and Economics.

Francesco Parisi is a Professor of Law at the University of Minnesota School of Law. He has published extensively on law and economics.

Reason Foundation is a national, non-partisan, and non-profit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as amicus curiae in cases raising significant constitutional or legal issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case entails competing interpretations of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), codified at 28 U.S.C. § 2465(b)(1)(A). As Richard Stuart Ross's petition for a writ of certiorari describes, the Second Circuit is now the fourth court of appeals to have interpreted the "substantially prevail[ing]" standard under CAFRA in a way that conflicts with this Court's precedents and that has caused confusion as to the proper resolution of several related questions.

As explained in the Petition, Congress chose not to limit attorney fees only to a "prevailing party," which is a term of art employed in other statutes. *See* Pet. at 1, 10. Yet multiple courts of appeals, including the Second

Circuit here, have erroneously equated CAFRA's fee-shifting language with a "prevailing party" provision.

Amici submit this brief because the Second Circuit's approach is flawed for an additional reason: ignoring the text of § 2465(b)(1)(A) negates the incentives crafted by CAFRA's fee -shifting provision. As explained below, economic theory suggests that fee shifting in this context would meaningfully deter the filing of inefficient and unmeritorious civil asset forfeiture actions, such as the one in this case —a practice that, as recent events indicate, is common nationwide. The Second Circuit's holding, however, eliminates this important constraint on meritless and wasteful civil asset forfeiture actions.

Amici respectfully request that the petition for a writ of certiorari be granted so the incentive structure adopted by Congress may be reestablished in the interests of efficiency and justice.

ARGUMENT

I. FEE SHIFTING DETERS INEFFICIENT FORFEITURE ACTIONS THAT MAY LACK A STRONG EVIDENTIARY BASIS AT THE TIME OF FILING.

Petitioner Richard Stuart Ross seeks review of a decision from the U.S. Court of Appeals for the Second Circuit regarding the scope of the fee-shifting provision in the Civil Asset Forfeiture Reform Act ("CAFRA"). CAFRA provides that any claimant who "substantially prevails" in a civil forfeiture action "shall" recover attorney fees. 28 U.S.C. § 2465(b)(1). Here, the U.S. Government initiated a civil forfeiture action against Petitioner. *United States v. Ross*, 161 F.4th 100, 105 (2d Cir. 2025). Yet even though the government (i) voluntarily dismissed the case and (ii) returned Petitioner's property, the Second Circuit concluded that Petitioner was nevertheless not entitled to fees under CAFRA. *Id.* at 115–21. That decision undermines the objective of broad fee-shifting statutes like the one codified in CAFRA.

"Fee shifting"—sometimes referred to as the "English rule"—has several desirable effects.

First, without fee shifting, *all* parties tend "toward overuse of the legal system," because potential litigants ordinarily do not "take into account that [their] suit will cause the [counter-party] and possibly the court to incur legal expenses as well." Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 578 (1997). Where available, fee shifting provides a counterweight to litigious impulses. Scholars agree that the English rule "promote[s] settlement, enhance[s] civil litigation, favor[s] more meritorious claims, [and] decrease[s] the number of nuisance lawsuits." Nuno Garoupa & Luciana Echazu, *Why Not Adopt a Loser-Pays-All Rule in Criminal Litigation?*, 32 INT'L REV. L. & ECON. 233, 233 (2012); *see also* Eric Helland & Jungmo Yoon, *Estimating Effects of English Rule on Litigation Outcomes*, 99 THE REV. OF ECON. & STATS. 678, 679 (2017) (modeling empirical data from Florida to show that the means and medians of both trial awards and settlement amounts are higher under the English rule than the American rule).

Second, fee shifting has a strong deterrent effect on weaker claims, without discouraging meritorious ones. *See* Emanuela Carbonara et al., *Rent-Seeking and Litigation: The Hidden Virtues of Limited Fee Shifting*, 11 REV. L. & ECON. 113 (2015) (finding that fee shifting reduces litigation, but not where the parties' positions have comparable merit, or where the government has the clear upper hand). Parties with legally tenuous claims are less likely to pursue them when they would be required to pay fees in the event of a loss. Thus, because of fee shifting, "[l]itigation is more concentrated on cases with more equal merits." *Id.* at 134.

Third, fee shifting also deters suits that are wasteful of party time and resources. Those suits are not necessarily meritless, but rather dispensable. For example, scholars have noted the deterrent effect on Negative Expected Value ("NEV") suits. An NEV lawsuit "is one in which the plaintiff would obtain a negative expected return from pursuing the suit all the way to judgment—that is, one in which the plaintiff's expected total litigation costs would exceed the expected judgment." Lucian A. Bebchuk & Alon Klement, *Negative-Expected-Value Suits* 1, *in* PROCEDURAL LAW AND ECONOMICS (Chris Sanchirico ed., 2011), https://ssrn.com/abstract=1534703. There are several reasons why, absent fee shifting, litigants might choose to pursue NEV suits—even unmeritorious ones. *See id.* at 2–7 (discussing factors such as asymmetrical information, the defendant's up-front cost to defend, the potential to gain new information through the litigation, and whether the plaintiff is a repeat player). These suits not only create inefficiency and waste in the system, but may also be undesirable on public policy grounds. *See id.* at 8 ("[W]ith respect to NEV suits that are frivolous, an NEV plaintiff's ability to extract a settlement offer might well have undesirable consequences."). Fortunately, fee shifting has proven to be "effective in reducing costs associated with nuisance suits." Amy Farmer & Paul Pecorino, *A Reputation for Being a Nuisance: Frivolous Lawsuits and Fee Shifting in a Repeated Play Game*, 18 INT'L REV. L. & ECON. 147, 147 (1998). Under the English rule, litigants will ordinarily avoid filing NEV suits, meaning that many inefficient or frivolous suits are never initiated. *See* Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982); Shavell, *Fundamental Divergence*, *supra*, at 576.

Fourth, fee shifting is particularly important in the context of forfeiture actions, such as the government's suit against Petitioner. It is apparent that the Department of Justice closely evaluates the net asset value of its forfeiture activities. *See* U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* ch. 1, § I.A, at 1-1 (2025) (stating that "[t]he Department must administer the Program in a fiscally responsible manner to minimize costs while maximizing the Program's ability to carry out these goals," and that "[p]rudent seizure and restraint planning minimizes or avoids the possibility that the government may inadvertently initiate forfeiture proceedings against properties that lead to net losses to the Department's Assets Forfeiture Fund (AFF)"). The lower courts' unchecked practice of allowing the government to dismiss meritless forfeiture actions without incurring the cost of fee shifting has allowed the government to continue to file NEV forfeiture suits, even when it lacks sufficient evidence to carry its burden of proving that seized property is tainted by some form of criminality.

The government's misaligned incentives are not merely a matter of theoretical conjecture; indeed, the dynamic described above was starkly on display in a case involving the government's search and seizure of safe deposit boxes held at US Private Vaults in Beverly Hills. *See Snitko v. United States*, 90 F.4th 1250, 1253 (9th Cir. 2024). Law enforcement had discussed seeking civil forfeiture of the contents of the safe deposit boxes in 2021, before obtaining a warrant. *Id.* That discussion preceded any assessment of whether there was probable cause to seize the safe deposit boxes. *Id.* at 1255. Even before any warrant was issued, law enforcement agents were instructed to bag any cash exceeding $5,000 found within any safe deposit box and to assign it a "forfeiture identification number." *Id.* at 1257. Once the warrant was issued and law enforcement executed the warrant, agents seized and inventoried the contents of over 700 safe deposit boxes. *Id.* When some of the owners of the safe deposit boxes objected, the government "initiated administrative forfeiture proceedings against any box contents that met a minimum monetary threshold of $5,000." *Id.* at 1257–58. The district court eventually enjoined those proceedings because the government's notice, "put bluntly, provide[d] no factual basis for the seizure of Plaintiffs' property." *Id.* at 1258. The government's conduct underlying *Snitko* establishes precisely the concerns of the economic literature. Knowing that it could avoid paying the fees of claimants whose cases proved to be meritorious by voluntarily dismissing them prior to a final judgment, law enforcement was incentivized to seek to forfeit funds that met a minimum financial threshold, even before determining whether there was probable cause to seize the funds.

Fee shifting serves to deter inefficient actions like in *Snitko*—just as it does in private litigation—because government actors are generally rational decision makers who respond to changed incentives.[2] *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1593 (2017) (finding that government officials respond to financial incentives, despite the fact "that public dollars, not personal ones, will be used to satisfy any financial obligation"); Dayna

---

[2] Critically, the owners of the funds whose assets had been unlawfully seized by the government were able to obtain their legal fees for bringing suit to require the government to return the funds. *Snitko v. United States*, 2024 WL 4436901, at *6 (C.D. Cal. Aug. 16, 2024). That is because owners' suit was covered by the Equal Access to Justice Act, which awards fees to "prevailing part[ies]," 28 U.S.C. § 2412. The Second Circuit in this case interpreted that Act to be more lenient than the CAFRA standard. *Ross*, 161 F.4th at 117 n.12.

B. Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act?*, 76 IND. L.J. 525, 582–83 (2001) (describing the empirical proof for the responsiveness of government officials to financial incentives); Brent Mast et al., *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 303 (2000) (stating that "like market entrepreneurs," law enforcement officials "will respond to relative prices"); *see also* Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2117 (2007) ("[P]olice respond to monetary incentives in ways predicted by theory….").

Thus, as in private litigation, economic theory predicts that a fee-shifting provision will increase the overall efficiency of forfeiture proceedings by selectively weeding out undesirable NEV suits before they are brought.

II. THE SALUTARY EFFECTS OF FEE SHIFTING ARE LOST IF THE GOVERNMENT KNOWS IT CAN AVOID PAYING FEES BY STRATEGICALLY DISMISSING UNMERITORIOUS SUITS WITHOUT PREJUDICE.

As the facts of this case demonstrate, CAFRA has not effectively deterred NEV suits in the civil asset forfeiture context. That is largely because the fee-shifting provision has been rendered toothless by many lower court decisions.

CAFRA provides for fee shifting in forfeiture actions: "[I]n any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for," *inter alia*, "reasonable attorney fees and other litigation costs reasonably incurred by the claimant." 28 U.S.C. § 2465(b)(1).

Congress was concerned that innocent property owners might be forced to "exhaust [their] financial assets in attorney's fees to fight for the return of property." 145 Cong. Rec. H4862 (June 24, 1999) (statement of Rep. Sheila Jackson Lee).[3] In response to this concern, it included a fee-shifting provision in the statute, which was intended to make successful claimants whole and curb abuse. *See id.* at H4852 (statement of Rep. Deborah Pryce that the fee-shifting provision would "put into check the possibility of government to unintentionally trample over the rights of innocent citizens.").

However, several lower courts have held that a dismissal without prejudice, even at an advanced stage of litigation, does not trigger CAFRA's "substantially prevail[ed]" provision. Notwithstanding that the property owners obtained dismissal and secured the return of the seized property, they are not considered prevailing parties.[4] The net effect is that "the

---

[3] As Representative Deborah Pryce summarized, "under [pre-CAFRA] law, if the owner succeeds in reclaiming his property, the government owes him nothing for his trouble; no apology, no interest, no compensation, nothing whatsoever." 145 Cong. Rec. H4852 (June 24, 1999). Senator Orrin G. Hatch also voiced concern that "[t]he costs of contesting a civil forfeiture of property can be substantial," and argued that "it is unfair for the property owner to have to incur attorney fees and costs when the government does not prevail in civil forfeiture actions." 145 Cong. Rec. S14629 (Nov. 16, 1999).

[4] *See, e.g*, *United States v. $32,820.56 in U.S. Currency*, 106 F. Supp. 3d 990, 997 (N.D. Iowa 2015); *United States v. Approximately $16,500.00 in U.S. Currency*, 113 F. Supp. 3d 776, 779–80 (M.D. Pa. 2015); *United States v. Any & All Funds on Deposit at JPMorgan Chase*, 2013 WL 5511348, at *1 (S.D.N.Y. Oct. 2, 2013); *United States v. 115-98 Park Lane S.*, 2012 WL 3861221, at *5 (E.D.N.Y. Sept. 5, 2012), *aff'd sub nom. United States v. Capital Stack Fund,*

government is free to press its case until it appears unwinnable, and then voluntarily dismiss it to avoid paying attorney's fees." Michael J. Keblesh, *Using Insurance to Regulate Civil Forfeiture*, 50 CREIGHTON L. REV. 455, 463 n.46 (2017).

When the government knows *ex ante* that it can ultimately escape attorney fees, even on the eve of defeat, the intended benefits of CAFRA's fee-shifting provision are eviscerated. The potential for attorney fees will not enter into the government's pre-suit cost-benefit analysis, and it may then prioritize reasons to bring inefficient or unmeritorious NEV suits. *See* Bebchuk & Klement, *supra*, at 2–7. As long as the civil asset forfeiture game offers real prizes and is essentially free to play, prosecutors have every reason to play it as often as they can. *Cf. Culley v. Marshall*, 601 U.S. 377, 396 (2024) (Gorsuch, J., concurring) ("Law enforcement agencies have become increasingly dependent on the money they raise from civil forfeitures."); *id.* at 405 (Sotomayor, J., dissenting) ("police agencies often have a financial incentive to seize as many cars as possible and try to retain them").

III. DETERRENCE OF NEGATIVE-EXPECTED-VALUE SUITS MAY BE DESIRABLE TO PROMOTE EFFICIENCY AND JUSTICE IN THE CIVIL ASSET FORFEITURE SYSTEM.

Even if unmeritorious NEV suits ultimately fail, the consequences for civil litigation are enormous.

First, the government has a strong incentive to prioritize claims against parties that lack resources. When the government does *not* bear the cost of litigation, economic models "suggest[] that prosecutors would prefer to prosecute poorer offenders as a rule."

LLC, 543 F. App'x 17 (2d Cir. 2013); *United States v. 2007 BMW 335i Convertible*, 648 F. Supp. 2d 944, 952 (N.D. Ohio 2009).

Nuno Garoupa & Francesco Parisi, *Should the Prosecutor Pay for Failure of Conviction?*, Minnesota Legal Studies Research Paper No. 12-42, at 13 (2012). That is because "[i]ndigent property owners . . . often lack the resources necessary to combat an unjust seizure of property,"[5] Andrew Crawford, Note, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and Its Impact on Indigent Property Owners*, 35 B.C. J.L. & SOC. JUST. 257, 272 (2015), particularly since they do not enjoy the right to counsel, *see Austin v. United States*, 509 U.S. 602, 608 n.4 (1993) (Sixth Amendment protections are confined to criminal prosecutions). Therefore, the government may be incentivized to pursue a forfeiture even if it is dubious on the merits because the litigation risk is discounted twice over: indigent defendants are unlikely to mount a resistance to the forfeiture and, even if they do, the government can simply walk away from the attempted forfeiture with no concern over having to pay the defendant's attorney fees. The government, no less than any private party, responds to incentives. *E.g., Timbs v. Indiana*, 586 U.S. 146, 154 (2019) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit . . . .") (citing *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)). Moreover, without the threat of paying

---

[5] This is especially true for seizures of relatively small amounts. "[E]ven when property owners are able to afford a lawyer, the government's seizure of modest amounts of cash and vehicles often make[s] it economically infeasible to hire a lawyer because legal fees often exceed the value of seized property." Louis S. Rulli, *Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places*, 72 ALA. L. REV. 531, 535 (2021); *see also* Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 33 (4th ed. Mar. 2026) ("In nearly all states with data, half of currency forfeitures were worth less than the cost of hiring an attorney.").

attorney fees, the government can also use litigation costs as settlement leverage. Indeed, empirical evidence demonstrates that the government "focuses much more heavily on drug forfeitures compared to white-collar forfeitures" in part "because white-collar forfeitures involve . . . sophisticated parties who are more likely to litigate." *See* Stephanie H. Didwania, *Asset Forfeiture and Inequality*, 77 STAN. L. REV. 159, 224 (2025); *see also* Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. LEGAL STUD. 189, 196 (2019) ("All else equal, police are less likely to focus their attention on groups with countervailing power.").

Further, data from 21 states showed that the median value of currency forfeiture is only about $1,200, and not the vast sums expected if forfeitures targeted major criminal operations. *See* Richard J.S. Peay, Note, *To Be Given to God: Contemporary Civil Forfeiture as a Taking*, 134 YALE L. J. 2578, 2634 (2025). As Justice Thomas has observed, this system "has led to egregious and well-chronicled abuses," and "forfeiture operations frequently target the poor and other groups least able to defend their interests"—those "most burdened by forfeiture." *Leonard v. Texas*, 580 U.S. 1178, 1179–80 (2017) (statement of Thomas, J., respecting the denial of certiorari); *see also* Peay, *supra*, at 2634.

The screening practices described in *Snitko* reflect the same orientation. The intended forfeitures there were aimed against safe deposit box contents meeting "a minimum monetary threshold of $5,000," 90 F.4th at 1257–58—a criterion keyed to the amount at stake rather than to any evidence of criminality. A threshold of that kind is what one would expect of an agency maximizing net revenue, rather than one allocating enforcement resources according to the strength of its proof.

Second, even when unmeritorious forfeiture actions fail, property owners may still not be made whole. For example, many innocent property owners will have to settle their claims for less than the total amount seized. *See* Bruce L. Benson, *Escalating the War On Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 296, 315–16 & n.59 (2009) (discussing forfeiture practices in Volusia County, Florida, where innocent property owners nonetheless settled "for 50% to 90% of their money"). The result is that innocent victims of civil asset forfeiture fail to contest the seizure of their property in the vast majority of cases. Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 12–13 (2d ed. Nov. 2015); OIG, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities* 28 (Mar. 2017), https://oig.justice.gov/archives/reports/2017/e1702.pdf (studying 100 seizures, totaling $6.5 million, and finding that only 14 property owners filed a petition or claim).

This state of affairs suggests that property rights are currently under-protected and that additional marginal deterrence of NEV forfeiture actions is warranted as a matter of both economics and justice.

CONCLUSION

Because lower courts have charted a course around CAFRA's fee-shifting provision, inefficient and unmeritorious forfeiture actions are not adequately deterred. Closure of this loophole would better protect the rights of innocent property owners and promote the just and efficient exercise of prosecutorial discretion.

Respectfully submitted,

Joshua S. Lipshutz
Counsel of Record
Sam Raymond
Cameron J.E. Pritchett
Connor P. Mui
Jesse Schupack
Ester Cross
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8217
jlipshutz@gibsondunn.com

Counsel for Amici Curiae

August 20, 2026