No. 95-173

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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The Solicitor General has filed a "Brief in Opposition," but in truth it is more like a grudging acquiescence. Thus, the government concedes that the circuits are deeply divided on the question presented; that the legal issue is important and recurring; and that the question was squarely decided by the court below. Moreover, although the government asserts, at least for the record, that the court of appeals' decision is correct (Opp. 8), it never defends the decision, never responds (even in passing) to our detailed challenge to the disentitlement doctrine (Pet. 16-26), and never explains why any of the traditional rationales for the disentitlement doctrine (see Opp. 9 n.3) applies to the quite different context of a civil forfeiture action.

Struggling, however, to keep the case out of this Court, the government insists that, like *Alvarez* v. *United States*, cert. denied, 115 S. Ct. 1092 (1995), this is still not the "appropriate case" in which to resolve the question presented. It offers two reasons for that view. First, it asserts that petitioner failed to press his broad challenge to the disentitlement doctrine before the panel below (although the government (i) admits that the court of appeals *passed* on the question; (ii) admits that the issue was *fully briefed* in a rehearing petition; and (iii) ignores the fact that the panel *addressed* petitioner's rehearing challenge to the doctrine and amended its opinion to include a formal *rejection* on the merits). Second, it asserts that, because there is an inadequate factual record with regard to an argument that *we have not even made in the petition*, review is "inadvisable." The first contention is wholly unpersuasive; the second, downright frivolous. Further review is clearly warranted.

1. First things first: The government does not seriously dispute that this case is eminently certworthy. Indeed, it candidly admits at the outset (Opp. 8-11) that the court of appeals' decision, although consistent with decisions of the Second, Third, Tenth, and Eleventh Circuits, is in stark and acknowledged conflict with decisions of the First, Sixth, and Seventh Circuits. The decision below thus deepens still further what the Solicitor General termed only last January an already "deepen[ed]" and "longstanding conflict in the circuits." U.S.

Br. in Opp. 16, *Alvarez* v. *United States*, Nos. 94-636 and 94-943 (Jan. 11, 1995).[1]

Nor does the government dispute that the question presented is important. Opp. 9-11. Again, it could hardly have said otherwise, having told the Court in *Alvarez* that the issue "may call for review by this Court in an appropriate case." U.S. Br. in Opp., *Alvarez*, at 16. And the government's response (Opp. 10) confirms how frequently the disentitlement doctrine recurs: Just weeks ago, the D.C. Circuit, over the government's opposition, became the latest circuit to reject the disentitlement doctrine, this time in a tax assessment action

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[1] Although recognizing the conflict, the Solicitor General attempts to downplay it slightly, suggesting that the Sixth Circuit "has not had an opportunity to reconsider" its decision in *United States* v. *$83,320 in United States Currency*, 682 F.2d 573 (1982), and that it "apparently reserv[ed]" a possible reconsideration in *In re Prevot*, 59 F.3d 556, 564-565 & n.10 (1995). That is not so. True, the Sixth Circuit has not revisited its decision in *$83,320* — a decision the Solicitor General only last January cited as *conflicting with Ninth Circuit case law*, thus contributing to what the government aptly termed "a longstanding conflict in the circuits." U.S. Br. in Opp., *Alvarez*, at 16. But there is no reason to believe that the Sixth Circuit has entertained second thoughts about its *$83,320* decision. And nothing in *In re Prevot* suggests otherwise; to the contrary, in the very footnote cited by the Solicitor General, the Sixth Circuit noted that it was in conflict with other circuits (although in agreement with the Seventh Circuit in *$40,877.59*) and cast not the slightest doubt on the continued vitality of its precedent.

Elsewhere, the Solicitor General cites (Opp. 10) then-Justice Rehnquist's opinion in *Conforte* v. *CIR*, 459 U.S. 1309 (1983), denying an application for a stay, for the proposition that "`on a number of occasions' * * * the Court has previously denied certiorari" in civil cases involving the disentitlement doctrine. That brief, in-chambers opinion, decided shortly after the Sixth Circuit's decision in *$83,320*, does not cite the Sixth Circuit's decision, nor is there any indication that the fresh conflict was called to Justice Rehnquist's attention. What is more, since the denial of the stay in *Conforte*, the conflict in the circuits has, as the Solicitor General properly noted in *Alvarez*, "deepen[ed]" (U.S. Br. in Opp. 16), with the First and Seventh Circuits joining the Sixth Circuit in rejecting the disentitlement doctrine in forfeiture cases.

commenced in Tax Court. *Daccarett-Ghia* v. *Commissioner*, 1995 U.S. App. LEXIS 33106 (Nov. 28, 1995).[2]

Most striking of all, the government cannot bring itself even to say a kind word about the merits of the court of appeals' decision. To be sure, it breezily asserts, at the outset, that "[t]his Court has consistently held * * * that a defendant's status as a fugitive `disentitles [him] to call upon the resources of the Court for the determination of his claims.'" Opp. 8. But the government neglects to mention that in *each* of this Court's disentitlement cases, the doctrine was applied in the *very proceeding* from which the appellant had become a fugitive; the fugitive was seeking *affirmative relief* from the Court (reversal of a conviction); and the person was a "fugitive" in the core sense of the word (someone who had either escaped from custody or jumped bail, not someone who merely had failed to travel to the United States from his country of residence). See Pet. 17 n.10 (citing cases). This Court has *never* applied the doctrine in a context like the present: where the alleged "fugitive" is *defending* a forfeiture claim against his property. Indeed, in the only case presenting an analogous scenario, the Court pointedly *refused* to apply the disentitlement doctrine. See *United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985) (explaining that the doctrine has been applied only in cases where the alleged fugitive "is the party seeking review here").[3]

Finally, perhaps because it wishes to "keep its powder dry," the government never addresses our challenge to the merits of the disentitlement doctrine. As we have explained (Pet. 16-26), extend-

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[2] The government's use of the disentitlement doctrine (outside the First, Sixth, and Seventh Circuits) to confiscate the property of absent foreign nationals without affording the property owner an opportunity to be heard is likely to accelerate under Presidential Decision Directive 42, which was issued on October 21, 1995. PDD-42 directs the government to identify certain alleged criminals overseas and freeze their assets in the United States. *Wash. Post*, Nov. 5, 1995, H2.

[3] The government also marshals the various "rationales" for the disentitlement doctrine (Opp. 9 n.3), but never responds to our explanation (Pet. 18-19) why *none* of those rationales has the slightest application to civil forfeiture cases.

ing the doctrine to forfeiture cases conflicts with the reasoning of this Court's disentitlement cases, runs afoul of the Due Process Clause, contravenes this Court's cases recognizing a fundamental right to defend, and violates the principle, established in a line of this Court's cases, that the federal courts' "inherent" or "supervisory" powers may not be employed in derogation of statutory or constitutional rights. In the present case, moreover, this judge-made doctrine has worked a particular injustice, since, as the government makes no effort to deny, it precluded petitioner from raising any of several powerful defenses to the underlying forfeiture — including that the seizure was almost certainly time-barred, violated this Court's decision in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (a violation acknowledged by the Ninth Circuit (see Pet. App. 8a n.2)), and rested on a paltry showing of probable cause, based on witnesses whose trial testimony has already been rejected by the only jury to have heard it. See Pet. 23 n.16. The government devotes not a single sentence to any of these points.

2. Instead, the government asks (Opp. 12) the Court to deny certiorari because petitioner ostensibly "did not present the court of appeals with any general challenge to the applicability of the fugitive disentitlement doctrine in civil forfeiture cases until after the panel had rendered its decision." As a result, the government asserts, the panel "treated the general applicability of the doctrine in forfeiture cases as settled law." Opp. 13. And, although the government recognizes (Opp. 14) that petitioner presented "the general applicability" question in a rehearing petition, the government surmises (*ibid*.) that, "[a]t that late point in the proceedings, it is unlikely that either the panel or the full court would have considered the issue on the merits."

That contention is flawed at every turn. At the time of petitioner's appeal, it was the settled law of the Ninth Circuit that the disentitlement doctrine is, indeed, "generally applicable" to civil forfeiture cases. See *United States* v. *$129,374 in United States Currency*, 769 F.2d 583 (9th Cir. 1985), cert. denied, 474 U.S. 1086 (1986). The panel had no power to overrule that settled principle (*United States* v. *Lucas*, 963 F.2d 243, 247 (9th Cir. 1992)); indeed, it would have been sanctionable had petitioner told the panel it could do so. Thus, it is hardly surprising that the panel "treated the general applicability of the doctrine in forfeiture cases as settled law"

(Opp. 13); it *was* settled law, and had been for nearly ten years. It makes utterly no sense to say that petitioner should be denied review merely because he declined to make the fruitless gesture of challenging the general applicability of the disentitlement doctrine before the panel.

In any event, the *government* raised the general applicability of the doctrine before the panel (see Gov't C.A. Br. 14-16), and as the Solicitor General acknowledges, *the panel clearly passed on the issue*. In an extended discussion, the court of appeals explained the putative origins of the doctrine (Pet. App. 3a), noted that it had been applied "in more contexts than just direct criminal appeals" (*id*. at 4a), and stated that the doctrine "has been applied on a regular basis by this court and other circuits in the context of civil forfeiture claims" (*ibid*.). The court then extended its prior doctrine to cases, like petitioner's, in which the forfeiture claimant had been indicted but not yet tried and convicted. *Id*. at 5a.

Because the court below manifestly passed on the question presented, this Court — as the Solicitor General ultimately concedes (Opp. 13) — "undoubtedly has the discretion to review petitioner's current claim."[4] Indeed, in *United States* v. *Williams*, 504 U.S. 36 (1992), the government, on a far weaker record, sought (and secured) review of a legal issue (whether there is a duty to present exculpatory evidence to a grand jury) that it had not raised below, but on which the court of appeals had passed. Although the government had *never* raised the issue in the lower courts — not in the trial court, not before the panel, and not (so far as we can tell) in a rehearing petition — the Solicitor General told the Court: "That the issue in this case was decided by the court of appeals and is an important question of federal law *is sufficient to justify this Court's review*." U.S. Reply Br. (at the certiorari stage), *United States* v. *Williams*, at 5 n.6 (emphasis added). Moreover, the government emphasized the fact that it had urged the court of appeals not to extend the duty to present

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[4] See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (this Court's "traditional rule * * * permit[s] review of an issue not pressed so long as it has been passed upon"); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991) (rejecting Solicitor General's request to decline review, and to dismiss case as improvidently granted, where "the Court of Appeals, like the District Court before it, decided the substantive issue presented").

exculpatory evidence to the particular facts of the case; thus, it said, "[t]he court of appeals was not denied the opportunity to consider the issue [the government had] presented to this Court." *Id*. at 8. This Court agreed with the Solicitor General, explaining that the court of appeals had actually "decided the crucial issue" (504 U.S. at 43), and that the government had not acquiesced in the appropriateness of the general rule, even though it was constrained to accept it as "binding precedent" (*id*. at 44).

So here. The court of appeals clearly passed on the question whether the disentitlement doctrine generally applies to forfeiture proceedings. Moreover, like the government in *Williams*, petitioner strongly argued against extending the doctrine to this case. See Pet. C.A. Br. 30-32; Pet. C.A. Reply Br. 12-14. On that basis alone, there is more than sufficient reason, under *Williams*, to grant review

in this case.[5]

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[5] The government purports to distinguish *Williams* on three grounds. Opp. 13-14. First, it notes that petitioner challenged the disentitlement doctrine in the district court, and thus his failure to renew that challenge in the court of appeals must be treated as an "abandonment of that issue." Opp. 13. That makes no sense: the decision not to argue a point that the panel was powerless to accept cannot be an "abandonment" of the right to make the same argument before a court (either the en banc court of appeals or this Court) that *does* have the power to decide the question. Moreover, it is perverse to suggest that the government in *Williams* was *more* entitled to call upon this Court's review because it failed to raise the question presented *both* in the court of appeals *and* in the district court. In any event, as this Court noted in *Williams*, a litigant does not "abandon" a position merely by declining to "demand overruling of a squarely applicable, recent circuit precedent" (504 U.S. at 44).

Second, the government contends that petitioner is less deserving of certiorari than was the government in *Williams* because he failed "to call the panel's attention to the Seventh Circuit's recent decision in *$40,877.59*" (Opp. 13-14). The government concedes, in a footnote (Opp. 14 n.7), that *$40,877.59* had not even been decided by the time petitioner filed his reply brief in the court of appeals, but it urges that petitioner should be punished for not having "supplement[ed] the record" with a citation to the case by the time of oral argument (Opp. 14 n.7). The government does not explain how a citation to the *Seventh* Circuit's decision would have helped petitioner in the *Ninth* Circuit, which was bound by its own precedent rejecting the Seventh Circuit's position.

Finally, the government insists that, unlike petitioner, the United States had challenged the general applicability of the legal issue in a case other than *Williams* itself. But there was no separate case within which petitioner *could* have challenged the general applicability of the disentitlement doctrine to forfeiture cases (a proposition that was well settled in the Ninth Circuit some four years before petitioner was even indicted). And surely the government's institutional litigating advantage is no reason to deprive petitioner of the first and only opportunity he will have to present his legal challenge to the disentitlement doctrine.

But there is more. As the Solicitor General acknowledges (Opp. 14), petitioner did in fact raise the question presented in this case in a petition for rehearing and suggestion of rehearing en banc (something the government apparently never did in *Williams*).[6] And, while the Solicitor General opines that "[a]t that late point in the proceedings, it is unlikely that either the panel or the full court would have considered the issue on the merits" (Opp. 14), surely that is one of the very *purposes* of rehearing en banc — to review questions that the panel lacked the power to resolve. And, in this very case, the Solicitor General's hypothesis was proved false: in response to petitioner's rehearing petition, the panel added a footnote to its opinion (Pet. App. 8a n.2) in which it acknowledged the unconstitutionality of the seizure of petitioner's property and, *expressly addressing the merits of the disentitlement doctrine*, held that "the fugitive disentitlement doctrine precludes [petitioner] from contesting the government's seizure of his properties."

The short of the matter is this: petitioner urged the panel not to extend the disentitlement doctrine; the government raised the general applicability of the doctrine before the panel; the panel expressly passed on the issue in its original opinion; petitioner raised the general applicability himself at the rehearing stage (the first point at which something could be done about it); the government again defended the doctrine's general applicability on the merits (and made no suggestion of waiver); and the panel amended its opinion and expressly rejected petitioner's challenge to the doctrine on the merits (including petitioner's claim that the doctrine could not be applied in derogation of his constitutional right to due process of law). The government's suggestion that this is still not enough to warrant this Court's review is meritless.

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[6] Significantly, in responding to our rehearing petition, the government did *not* contend that petitioner was somehow precluded from raising the question on the ground that it had not first been presented to the panel. Instead, the government responded directly to petitioner's arguments for overruling Ninth Circuit law and defended the disentitlement doctrine on the merits. Gov't Resp. 2-4, 6-7, 10-12. Under these circumstances, the government has waived any right it might have had to make a waiver argument in this Court.

3. The government's second reason to deny certiorari is weaker still. With a tentativeness bordering on trepidation, the Solicitor General purports to identify a "*potentially* significant issue" that (i) "*may* be fairly included" in the question presented and that (ii) relates to a "*threshold* matter that *could* have a bearing on" this Court's decision: the issue whether petitioner, having been taken into custody and prosecuted by the Swiss at the instigation of the United States, was a "fugitive" within the meaning of the disentitlement doctrine. Opp. 15, 18 (emphasis added). According to the government, because the record on this issue is "factually and legally inadequate," and because that inadequacy is "primarily" petitioner's fault, it is "inadvisable" to grant further review in this case. *Id.* at 17-18.

That chain of logic would make even Mrs. Palsgraf blush. To begin with, our petition does not even *make* the argument that the government fears may have an inadequate factual record. Instead, the petition advances, first and foremost, the different and broader argument (Pet. 16-22) that the disentitlement doctrine cannot *ever* be applied in civil forfeiture cases: it works an unconstitutional deprivation of property; it nullifies rights conferred by Congress; it cannot be squared with several lines of this Court's cases; and it represents an unwarranted exercise of raw judicial power, wholly untethered to any constitutional, statutory, or traditional equitable authority. Second, the petition argues (Pet. 23-25) that a person (such as petitioner) who has not been convicted of any crime, has not been shown to have departed the United States with any intent to avoid arrest or prosecution, and has simply failed to return to the United States to face pending charges in a separate criminal case, is not a "fugitive" in any sense of that word.

Only if this Court rejects *both* of these arguments — by holding that the disentitlement doctrine may be applied in civil forfeiture ac-

tions and that petitioner qualifies as a fugitive even though he never "fled" in any meaningful sense of that word — would there be any occasion for this Court *even to reach* the narrow issue hypothesized by the government. Thus, the government is simply wrong in asserting that the narrow issue it identifies concerns a "threshold matter" (Opp. 18) that this Court must, or even should, resolve before addressing the two arguments identified in our petition.

Finally, even if the government is correct that (i) the narrow question it identifies hypothetically might be addressed if review is granted, (ii) the record is factually insufficient on the question of the United States government's instigation of the Swiss prosecution,[7] *and* (iii) the blame for this deficiency properly lies with petitioner,[8] the

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[7] Although the government maintains that the record is factually insufficient, it *admits* that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on conduct that formed the basis for the U.S. indictment." Opp. 16-17. Having conceded the truth of *the only fact relevant* to the argument about U.S. instigation of the Swiss proceedings, the Solicitor General (like any other litigant who makes such a concession) cannot now claim that the fact he admits is true finds insufficient support in the record evidence.

[8] Although the issue of assigning responsibility for the state of the record need not and should not be resolved at this stage (and may never need to be resolved), we cannot remain silent in the face of the government's assertion that petitioner is "primarily" to blame for this alleged defect. Opp. 16-17. The plain fact is that the court of appeals' inability to find "credible evidence" in the record was caused by the United States Attorney's false or misleading assertions in the courts below. The Solicitor General himself candidly, if gingerly, admits that the government's appellate brief contained false statements (*id.* at 17-18 n.11). And there is no doubt about that: For example, although the government now acknowledges that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment" (*id.* at 16-17), in its appellate brief the United States Attorney characterized petitioner's contention to that effect as "outlandish," "facially absurd," and "an imaginative attempt to blame the United States for [petitioner's] incarceration in Switzerland." Gov't C.A. Br. 15 n.9, 17. The brief went on to note that, "[w]hile living in Switzerland, [petitioner] has *apparently* run afoul of Swiss law" and that petitioner's arrest was "in connection with a *purely* Swiss Prosecution." *Id.* at 16 (emphasis added). To call those assertions, as the Solicitor General

proper course of action would *not* be for this Court to deny review altogether. If the government is right, then this Court should simply *decline to consider on the merits* petitioner's argument about U.S. instigation of the Swiss proceedings (assuming, of course, that petitioner elects to make such an argument). That approach, unlike the government's, would allow this Court to resolve the concededly important questions of federal law that *are squarely* presented by the petition — instead of denying review because of the presence of a narrow, factbound issue that is unlikely ever to arise.

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now does, merely "incorrect" (Opp. 17 n.11) is a euphemism, at best. Nor is the Solicitor General correct in suggesting that these misrepresentations were corrected at oral argument (Opp. 17-18 n.11); on the contrary, the government's lawyer told the panel that the United States had "never made" a request to the Swiss government for assistance in the United States' prosecution of petitioner (a copy of the tape of the oral argument has been lodged with the Clerk by the government).

The Solicitor General appears to suggest that this deplorable conduct is excused or immaterial to the state of the record because the government did not similarly mislead *the district court* (and he faults petitioner for failing to develop a fuller record there). But government counsel *also* misled the district court concerning the United States' role in the Swiss proceedings, and those misrepresentations ultimately persuaded the district court that the United States was simply not involved in petitioner's arrest in Switzerland. On January 8, 1993, the lawyer representing petitioner and his wife filed an affidavit stating that petitioner's Swiss lawyer had glimpsed a letter in petitioner's criminal dossier in Switzerland (from which copies could not be obtained) indicating that the United States government had urged the Swiss authorities to initiate a criminal action against Degen. Excerpt of Record ("ER") 59. In response to this allegation, the United States Attorney told the district court that this account of "the circumstances surrounding the arrest and detention of Brian DEGEN by Swiss authorities * * * is little more than a literary flight of fancy constructed out of conjecture and panic." ER 53. And when Judge Reed, at the close of a February 1, 1993 hearing, remarked that he "was not impressed by the representations that the United States government caused [the Swiss] criminal charges to be pressed against petitioner" (2/1/93 Tr. 40), the government's lawyer pointedly failed to speak up and correct the record. For any flaws in the record on this score, the government has only itself to blame.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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