No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal district court may, in the exercise of its "inherent" or "supervisory" powers, invoke the "fugitive disentitlement" doctrine to bar a citizen and resident of a foreign country from offering *any* defense against the government's confiscation of millions of dollars worth of his property, merely because the property owner has not traveled to the United States to confront a criminal indictment in a wholly separate case.

RULE 14.1 STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Karyn Degen, claimant

Real Property Located at Incline Village, et al., defendants (for a complete list of the defendant properties, see App., *infra*, 33a-36a)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-16a) is reported at 47 F.3d 1511. The opinion of the United States District Court for the District of Nevada (App., *infra*, 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on May 5, 1995 (App., *infra*, 38a-39a), and a petition for a writ of certiorari is accordingly due on August 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." Pertinent provisions of 21 U.S.C. § 881(a) and of the Supplemental Rules for Certain Admiralty and Maritime Claims are set forth in the appendix. App., *infra*, 40a.

STATEMENT

In this civil forfeiture action, the United States government confiscated millions of dollars worth of petitioner's real and personal property without allowing him *any* opportunity to be heard in defense. The deprivation of petitioner's property was based on nothing more than an unreviewed finding of probable cause made by a federal magistrate in an *ex parte* proceeding. The Ninth Circuit approved this breathtaking assertion of prosecutorial authority by applying the "fugitive disentitlement" doctrine, according to which — in the Ninth Circuit and elsewhere — a federal court may invoke its "inherent" or "supervisory" powers to "disentitle" alleged fugitives from justice from seeking judicial relief of any kind. Without requiring any showing that Brian Degen had fled from the United States or departed with an intent to avoid prosecution, the Ninth Circuit reasoned that merely because petitioner, a Swiss national, currently resides in Switzerland and has failed to return to the United States to face criminal charges in a separate case, he is a fugitive from justice. On that basis, the court of appeals sustained the district court's decision striking petitioner's claim and ordering that his property be summarily forfeited to the government — without regard to petitioner's numerous (and quite substantial) defenses on the merits.

1. The government commenced this civil forfeiture action on October 24, 1989, against certain real and personal property owned by petitioner Brian J. Degen and his wife, Karyn Degen. According to the government's skeletal complaint, the Degens' property — which includes real property in California, Nevada, and Hawaii estimated by the government to be worth more than $5.5 million —

is forfeitable under 21 U.S.C. § 881(a)(6) because it was "purchased or acquired" by petitioner between 1973 and 1989 "in part or in total" with funds that were "the proceeds of exchanges of controlled substances or funds traceable to" such exchanges. Court of Appeals Excerpt of Record ("ER") 423, 472-94. The government further asserted that the Degens' real property was "used or intended to be used to commit or to facilitate the commission of a controlled substances violation" and was therefore "subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7)." ER 424. In support of its complaint, the government filed an affidavit of a Drug Enforcement Agency (DEA) agent, alleging that Ciro Mancuso and petitioner were part of a marijuana smuggling operation and recounting various alleged instances of smuggling by Mancuso, petitioner, or both. ER 474-94. The affidavit relied heavily on information obtained from confidential informants.

On the strength of the complaint and DEA affidavit, the government, in an *ex parte* proceeding before a federal magistrate on October 24, 1989, obtained a warrant authorizing the seizure of the Degens' property. On the same day that the government commenced this forfeiture action and obtained authorization to seize the Degens' property, a federal grand jury in Nevada returned an indictment charging petitioner, Mancuso, and others with distribution of marijuana, money laundering, and other violations of law.

Petitioner and his wife timely filed separate verified claims to their property and verified answers to the government's complaint. ER 404, 412; Court of Appeals Supplemental Excerpt of Record ("SER") 2, 9. In his sworn answer, petitioner "denie[d] that he purchased or acquired the properties referenced in the Complaint * * * from 1973 through 1989 by paying for them in part or in total with the proceeds of exchanges of controlled substances or funds traceable to exchanges of controlled substances." ER 414. He also denied the government's claim that the property had been used to commit or to facilitate the commission of a controlled substances violation (and thus were forfeitable under 21 U.S.C. § 881(a)(7)). ER 414, 423-24. Petitioner raised eight affirmative defenses, including that the government's claims, which rested on allegations dating back to the late 1960s, were barred by the applicable five-year statute of limitations. See ER 415-16. He also challenged the legality

of the *ex parte* seizure of his property, arguing that the complaint and affidavit failed to establish probable cause. ER 416.

On May 2, 1990, the government filed a motion to strike the claims and answers of both Brian and Karyn Degen, and in the alternative for summary judgment. ER 380-90. The government maintained that Brian Degen (a Swiss citizen) was "a federal fugitive" because he was "living in Switzerland and has no intention of returning to the United States" to face the pending criminal charges. ER 380, 383. Invoking the Ninth Circuit's decisions in *United States* v. *$129,374 in United States Currency*, 769 F.2d 583 (1985), cert. denied, 474 U.S. 1086 (1986), and *Conforte* v. *Commissioner*, 692 F.2d 587 (1982), the government argued that as a fugitive, petitioner was precluded under the "fugitive disentitlement" doctrine from offering any defense to the government's efforts to take his property.

Brian and Karyn Degen filed a joint opposition to the government's motion. ER 291-379. In it, they explained in considerable detail (see ER 301-16) that the properties had been purchased *not* with the proceeds of illegal drug trafficking but rather with profits from some twenty years of their work in a variety of real estate and construction ventures, with rental income from real estate and business properties, with profits from the Degens' storage business in Hawaii, with money inherited by Karyn Degen, and with capital contributions and investments from Brian Degen's affluent parents (who "own a building construction business in Sacramento and have been involved in real estate investment and building construction for many years" (ER 302-03)). The Degens provided extensive documentary support for these claims, including copies of deeds, escrow statements, cancelled checks, and bank account records. See ER 331-79.

In opposing the government's motions, petitioner also observed that there is "a substantial split among the lower courts" concerning whether "the * * * disentitlement doctrine can be extended to a civil forfeiture action." ER 294 (citing *United States* v. *$83,320 in United States Currency*, 682 F.2d 573 (6th Cir. 1982), and *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988), as cases holding the doctrine inapplicable). In addition, petitioner

argued that he was not a fugitive because he "did not leave the U.S. with knowledge of [a] pending criminal * * * action" (ER 295); that none of the purposes underlying the disentitlement doctrine would be served by applying it to him (ER 295, 298-99, 326); that it would violate due process to apply the fugitive disentitlement doctrine to deprive him of property without any opportunity to be heard (ER 298, 316-26); and that disentitlement would be grossly inequitable in this case because the government was "recklessly claim[ing] property that is patently not subject to forfeiture" (ER 300; see also ER 299).

2. On December 31, 1990, the district court granted the government's motion in relevant part and ordered petitioner's claim stricken. App., *infra*, 17a-26a. See also *id*. at 27a-29a. At the outset, it rejected petitioner's argument that he is not a fugitive.[1] "[W]hether Brian left before or after the indictment," the court explained, "is irrelevant": "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution." *Id*. at 18a. Rather, it was enough that petitioner is in a foreign country and has failed to return to face charges of which he is aware. *Ibid*. See also *id*. at 23a ("In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction.").

The court also rejected petitioner's claim that the disentitlement doctrine is inapplicable to this civil forfeiture proceeding. App., *infra*, 18a-20a. The court recognized that the doctrine originated in the context of appeals from criminal convictions but pointed out that the Ninth Circuit had since extended the doctrine to the civil context. *Id*. at 18a-19a. The district court concluded that petitioner was disentitled from defending against the forfeiture, and accordingly it refused to consider petitioner's "many pages" of detailed and well-documented "assertions that he acquired the property in question with legitimate funds," explaining that those claims "may well be true" but

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[1] The record establishes that petitioner moved to Switzerland well before the October 1989 indictment. ER 290, 394; App., *infra*, 2a, 5a, 18a, 20a.

could not be considered because Degen was disentitled from offering any defense. *Ibid*.[2]

3. The court of appeals affirmed, holding that the disentitlement doctrine bars petitioner from offering any defense to the government's confiscation of his property. App., *infra*, 1a-16a. The court acknowledged that the fugitive disentitlement doctrine was developed by this Court in the context of direct criminal appeals, where "a criminal defendant fled after being convicted, and the Court held that his escape `disentitle[d him] to call upon the resources of the Court for [the] determination of his' direct appeal." *Id*. at 3a (quoting *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970)). Despite these limited origins, the court explained, the doctrine "applies in more contexts that just direct criminal appeals" and has been "extended" by the circuit courts "to disentitle fugitives from participating in *civil proceedings* related to the criminal cases they have fled." App., *infra*, 4a (emphasis added). "More specifically," the panel continued, the courts of appeals have applied the doctrine "on a regular basis * * * in the context of civil forfeiture claims." *Ibid*. (citing cases). To be sure, the court acknowledged, this case requires a further extension of the disentitlement doctrine because in previous Ninth Circuit cases, "the claimants ha[d] fled after being convicted in a related criminal proceeding" whereas petitioner had not been convicted of the crimes charged in the indictment. *Id*. at 5a. The court concluded, however, that distinction "does not * * * compel a finding that the fugitive disentitlement doctrine does not apply" because:

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[2] On December 2, 1992, almost two years after the district court ordered petitioner's claim stricken, the government filed a second motion for summary judgment against Karyn Degen. App., *infra*, 3a, 8a, 27a-29a; ER 89. In support of that motion, the government filed three new affidavits of Ciro Mancuso, Michael McCreary, and Catherine Bryant. App., *infra*, 3a; see ER 67-88. When Karyn failed to file a responsive memorandum as required by Nevada Local Rule 140-6, the district court on June 23, 1993, entered summary judgment in the government's favor. App., *infra*, 3a, 9a-10a, 30a. The district court entered an amended final judgment on August 17, 1993. *Id*. at 32a-37a; ER 3-5, 15.

> The doctrine rests on the premise that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *Ortega-Rodriguez*[v. *United States*], 113 S. Ct. [1199,] 1206 [(1993)] (internal quotations and citation omitted). Although Brian has not been arrested or tried, he has certainly "demonstrated disrespect" for the district court *by refusing to submit to its jurisdiction in the criminal action*.

Ibid. (emphasis added).

Having concluded that the disentitlement doctrine is fully applicable to this case, the panel went on to uphold the district court's conclusion that Brian Degen is a fugitive within the meaning of the doctrine. App., *infra*, 5a. In the panel's view, the fact that Degen knew "in December 1990" (when the district court ordered his claim stricken) that "he had been indicted in Nevada but refused to return" was sufficient to qualify him as a fugitive from justice. *Ibid*.[3]

4. On May 5, 1995, the court of appeals denied Degen's petition for rehearing and suggestion for rehearing en banc. App. *infra*, 38a-39a. The panel did, however, add a footnote to its opinion making clear that the disentitlement doctrine was being applied to petitioner in derogation of his constitutional rights. *Id*. at 8a n.2, 39a. The court of appeals explained that "[w]hile this appeal was pending," this Court issued its decision in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), and that "[i]f not for Brian's fugitive status, the rule of *Good* would apply to this case." App., *infra*, 8a n.2, 39a. The panel held, however, that "the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his property" under *Good*. *Ibid*.

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[3] The court of appeals also rejected the argument that petitioner lost any fugitive status he might have had when he was taken into the custody of Swiss authorities who were acting at the behest of U.S. prosecutors. App., *infra*, 5a-7a. In rejecting that argument, the court observed that, even if Degen were currently "incarcerated in a foreign jurisdiction," that would "not preclude application of the fugitive disentitlement doctrine." *Id*. at 7a.

REASONS FOR GRANTING THE PETITION

This case involves an assertion of prosecutorial authority that strikes at the very heart of the constitutional guarantee of due process of law. In this civil forfeiture proceeding, the United States government succeeded in depriving petitioner and his wife of real and personal property worth — by the government's own estimation — more than $5 million, without allowing petitioner *any opportunity whatsoever* to be heard in defense. The Ninth Circuit approved this result by relying on an old doctrine of criminal appellate procedure known as "fugitive disentitlement," according to which a federal court may, in the exercise of its "inherent" or "supervisory" powers, dismiss the direct appeal from a criminal conviction if the appellant escapes from prison, jumps bond, or otherwise flees from the court's jurisdiction. Following (indeed, *extending*) established circuit precedent, the court of appeals invoked this doctrine in the very different context of a civil forfeiture proceeding, and did so notwithstanding the fact that the government had made no showing that petitioner departed the United States with the intent to avoid prosecution. On the contrary, the Ninth Circuit held that petitioner is a fugitive from justice and thus deserving of the sanction of disentitlement merely because he resides in a foreign country and has failed to travel to this country to face charges.

The petition should be granted to resolve what the Solicitor General recently described as a "longstanding conflict in the circuits" that "may call for review by this Court in an appropriate case." U.S. Br. in Opp. 16, *Alvarez* v. *United States*, Nos. 94-636 and -943 (Jan. 11, 1995). As explained below, the courts of appeals have provided sharply conflicting answers to the question whether the fugitive disentitlement doctrine may ever be invoked in a civil forfeiture action to prevent a property owner from offering a defense of his property. This case provides an appropriate vehicle to clarify this important and recurring issue of federal law. Further review is also warranted because the Ninth Circuit's decision is fundamentally wrong.

A. As The Solicitor General Has Previously Acknowledged, The Circuits Are Deeply Divided Over Whether The "Fugitive Disentitlement Doctrine" May Be Invoked In A Civil Forfeiture Proceeding To Bar A Property Owner From Defending Against The Government's Confiscation Of Property.

Only seven months ago, in *Alvarez* v. *United States*, Nos. 94-636 and 94-943, the Solicitor General acknowledged the "longstanding conflict in the circuits" on the question whether the disentitlement doctrine may be invoked to prevent a claimant from defending against the forfeiture of his property. U.S. Br. in Opp. 16. That concession — which the government added "may call for review by the Court in an appropriate case"(*ibid*.) — was entirely correct: While the Second, Third, Eighth, Ninth, Tenth and Eleventh Circuits have upheld the disentitlement doctrine in forfeiture actions, the First, Sixth, and Seventh Circuits have flatly rejected it. This case is an appropriate vehicle for resolving that conflict.

1. The decision below reflects the Ninth Circuit's typically broad application of the disentitlement doctrine. See App., *infra*, 4a. Almost thirteen years ago, in *Conforte* v. *Commissioner*, 692 F.2d 587, 589 (1982), the Ninth Circuit rejected the argument that the doctrine applies "only to appeals of criminal convictions" and disentitled a taxpayer from appealing a tax court's judgment of deficiency. The disentitlement doctrine, the court explained, "should apply with greater force in civil cases where an individual's liberty is not at stake." *Ibid*. Three years later, the Ninth Circuit applied the doctrine in a civil forfeiture action to bar intervention by a fugitive property owner's successor-in-interest. See *United States* v. *$129,374 in United States Currency*, 769 F.2d 583, 587-90 (1985), cert. denied, 474 U.S. 1086 (1986). In so ruling, the Ninth Circuit acknowledged that the Sixth Circuit had reached a conflicting decision on the question, and expressly "decline[d] to adopt the Sixth Circuit's reasoning." *Id*. at 589; see also *id*. at 587.

The Second Circuit has also held that the fugitive disentitlement doctrine may be applied in a civil forfeiture proceeding. In *United States* v. *$45,940 in United States Currency*, 739 F.2d 792 (2d Cir.

1984), the court of appeals acknowledged that this Court had "never extended" the fugitive disentitlement doctrine "to civil matters relating to the criminal fugitive." *Id.* at 797. Nonetheless, the Second Circuit upheld the district court's disentitlement of a property owner from seeking to recover property forfeited to the government. In the Second Circuit's view, the property claimant "waived his right to due process in the civil forfeiture proceeding by remaining a fugitive." *Id.* at 798. See also *United States* v. *Eng*, 951 F.2d 461, 464-67 (1991) (disentitling a claimant who was incarcerated in a foreign country); *id*. at 465, 466-67 (attempting to distinguish contrary First and Sixth Circuit authority).

The Tenth Circuit recently sided with the Second and Ninth Circuits. In *United States* v. *Timbers Preserve, Routt County, Colorado*, 999 F.2d 452 (1993), the court upheld the denial of a fugitive property owner's motion to set aside a default judgment forfeiting real property to the government. The court acknowledged that previous Tenth Circuit decisions had applied the fugitive disentitlement doctrine "only in the criminal context" and that "[t]he Supreme Court has not applied the disentitlement doctrine in the civil context." *Id*. at 453. Nevertheless, relying on Second and Ninth Circuit decisions approving such an extension, the Tenth Circuit held that the doctrine could be applied in a civil forfeiture action. *Id*. at 453-54, 456.

The Eleventh Circuit has taken the same view, applying the doctrine to bar an owner of real property from defending the government's forfeiture of the property. *United States* v. *One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214, 1215-17 (1989). The Eleventh Circuit held that the trial court had no duty to "take testimony and make a finding of probable cause that the allegations in the forfeiture complaint were true," because, in the court's view, the claimant had "waived his right to due process in the civil forfeiture proceeding" and could "remedy any hardship by simply submitting himself to the authority of the courts." *Id*. at 1217 (internal quotations omitted). In reaching this conclusion, the Eleventh Circuit pointedly refused to follow the Sixth Circuit's "contrary conclusion" (*id*. at 1216 n.4).

The Third and Eighth Circuits have also endorsed the view that disentitlement may be employed in civil forfeiture cases. In *United States* v. *Contents of Accounts Nos. 3034504504 and 144-07143 At Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974 (1992), the Third Circuit, citing *Eng*, observed in dictum: "[W]e believe the holding of the United States Court of Appeals for the Second Circuit that fugitive disentitlement does apply in forfeiture proceedings is persuasive." *Id*. at 986 n.9. District courts in the Third Circuit have used the disentitlement doctrine against property owners in several forfeiture cases. See *id.* at 976, 986 & n.9 (explaining that district court relied on this ground); *United States* v. *All Monies in Account No. 400 6050975 00*, 1992 U.S. Dist. LEXIS 16930 (E.D. Pa. Nov. 4, 1992). In an unpublished decision, the Eighth Circuit affirmed a district court's use of the disentitlement doctrine to dismiss a fugitive's claim to property in a civil forfeiture proceeding. *United States* v. *One Parcel of Real Property Described as Lot 156 and the South Three Feet of Lot 157, Valley View Estates*, 1992 U.S. App. LEXIS 29278, at *3-*4 (8th Cir. 1992) (per curiam) (acknowledging intercircuit conflict), aff'g in pertinent part 776 F. Supp. 482, 484 (W.D. Mo. 1991) ("The doctrine applies equally as well in civil forfeiture cases as it does in criminal cases."). But see 8th Cir. Rule 28A(k) (limiting citation of unpublished decisions).

2. By contrast, the Sixth, First, and Seventh Circuits have refused to apply the fugitive disentitlement doctrine in civil forfeiture proceedings. In *United States* v. *$83,320 in United States Currency*, 682 F.2d 573 (1982), the Sixth Circuit declined to "extend the reasoning" of the disentitlement cases involving criminal appeals, a context the court regarded as "distinguishable," "to an appeal from a forfeiture judgment brought when a claimant to the defendant property is a fugitive from justice in a related criminal proceeding." *Id*. at 576. The court explained:

> In a [civil] forfeiture proceeding * * * the individual accused of the related criminal violation is not necessarily the only individual with a direct, litigable interest in the outcome of the forfeiture action. * * * The escape of the criminal defendant should not be raised as a bar to those who may have a legitimate, innocent interest in exonerating the defendant property from its wrongdo-

> ing. If the currency in the present case, for example, derived from a legitimate business, as is alleged by the claimant, then creditors and employees of that business might well have an interest in the funds irrespective of the criminal conduct of the claimant or his escape from custody.

Ibid.

In *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636 (1988), the First Circuit likewise refused to permit the use of the disentitlement doctrine in a civil forfeiture case. The court of appeals gave three reasons for its holding. First, it explained that "[o]ne of the main considerations" animating the disentitlement doctrine — the lack of mutuality that arises whenever a fugitive seeks relief but is unwilling to be bound by an adverse decision — "does not arise" in a civil forfeiture action because the claimant cannot "avoid the rigors of an adverse determination by failing to appear." *Id*. at 643 (internal citations omitted). Second, the court explained that the government had failed to demonstrate, as it must, that the civil forfeiture action was "closely related to the criminal matter from which the applicant is a fugitive." *Id*. at 643-44. Third, "there is no evidence that [the claimant] had notice of this [*i.e.*, the forfeiture] proceeding, and elected not to defend it." *Id*. at 644.[4] This was important, the court explained, because without such evidence there is no basis for concluding that the claimant was "acting willfully and hiding from the [forfeiture] court while asking it to resolve his claims." *Ibid*. Unless the fugitive is "purposely avoiding" the court entertaining *the forfeiture action* or "flauting [sic] *its* processes," the claimant "should be treated * * * like any other absent civil litigant." *Ibid*. Although based in part on the circumstances of the case, much of the First Circuit's reasoning applies with equal force to most if not all civil forfeiture actions.

Most recently, the Seventh Circuit flatly held that the disentitlement doctrine is "inappropriate when applied by a district court to civil forfeitures." *United States* v. *$40,877.59 in U.S. Currency*, 32

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[4] This was true because the fugitive's claim in the district court, and appeal to the First Circuit, had been advanced by a person to whom he had previously granted a power of attorney. See 852 F.2d at 638.

F.3d 1151, 1156 (1994).[5] The Seventh Circuit noted that the disentitlement doctrine was developed by this Court "as an equitable doctrine of criminal appellate procedure," and has never been applied by this Court in "any case in which the doctrine was used by a district court in a civil forfeiture proceeding to bar a fugitive from asserting a claim to the property." *Id*. at 1152-53. Nevertheless, the court observed, "[s]ome circuits have expanded the doctrine, using it in civil suits against a fugitive from a separate criminal case who seeks *affirmative relief* from the court," and "[f]our circuits" — the Second, Ninth, Tenth, and Eleventh — "have expanded the doctrine further, upholding its use by district courts in civil forfeiture proceedings to bar fugitives from *defending against* the confiscation of their property by the United States government." *Id*. at 1153 (emphasis added). In contrast, the Seventh Circuit observed, the Sixth Circuit "has disallowed the use of the doctrine in civil forfeitures" and the First Circuit has "rejected the use of the doctrine in [a] particular case." *Id*. at 1153. In siding with the First and Sixth Circuits,[6] the Seventh Circuit concluded that application of the disentitlement doctrine in a forfeiture case would violate the Due Process Clause of the Fifth Amendment,[7] conflict with numerous decisions of this Court

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[5] In the past year, the Seventh Circuit has twice reaffirmed this holding. See *United States* v. *$32,420 in United States Currency*, 1994 U.S. App. LEXIS 31628, *2-*5 & n.1 (7th Cir. Nov. 7, 1994) (unreported) (explaining that Seventh Circuit's position "may represent the minority opinion in the circuits" and that the Sixth Circuit also "disallow[s] the use of the fugitive disentitlement doctrine in civil forfeiture cases generally"); *United States* v. *Michelle's Lounge*, 39 F.3d 684, 690 (7th Cir. 1994) (explaining that "the disentitlement doctrine is inapplicable in civil forfeiture proceedings").

[6] Recognizing "the possibility that [its] opinion creates tension between the circuits," the panel decided *sua sponte* to circulate its decision "among all judges in active service pursuant to Seventh Circuit Rule 40(f)." 32 F.3d at 1153 n.1. "No judge" of that circuit, however, "favored a rehearing en banc." *Ibid*.

[7] A California appellate court has adopted a similar analysis in a different civil context. See *Doe* v. *Superior Court (Polanski)*, 222 Cal. App. 3d 1406, 1408-11, 272 Cal Rptr. 474, 474-77 (2d Dist. App. 1992) (Due Process Clause

(including the disentitlement cases of *United States* v. *Sharpe*, 470 U.S. 675 (1985), and *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993)), and effectively nullify statutory rights and remedies prescribed in the forfeiture laws by Congress.[8]

3. Not surprisingly, this fundamental conflict in the circuits has not gone unnoticed. As explained above, the conflict has been expressly acknowledged by the Second, Seventh, Eighth, Ninth, and Eleventh Circuits. Recently it was duly noted by the Sixth Circuit as well. *In re Prevot*, 1995 U.S. App. LEXIS 17014, at *17-26 & n.10 (July 14, 1995). The district courts have likewise noted the conflict, see, *e.g.*, *United States* v. *Certain Real Property and Premises*

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of fourteenth amendment forbids application of fugitive disentitlement doctrine to strike answer of defendant in civil action for damages).

[8] The remaining circuits — D.C., Fourth and Fifth — have not directly ruled on the doctrine's applicability to civil forfeiture actions. Notably, however, the D.C. Circuit, which traditionally has given an expansive reading to the doctrine, see *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982), recently suggested that it would apply the doctrine much more narrowly in the future. In *Friko Corp.* v. *Commissioner of Internal Revenue*, 26 F.3d 1139 (1994), the D.C. Circuit vacated and remanded for reconsideration in light of *Ortega-Rodriguez* a Tax Court order disentitling an alleged fugitive from petitioning for reconsideration of a tax deficiency. *Id.* at 1142-43. Pointing to this Court's statement in *Ortega-Rodriguez* that there must be "`some connection' * * * between the fugitive status of the litigant and the court invoking the doctrine," Judge Randolph queried what that connection might be since the indictment from which the taxpayer allegedly was a fugitive was pending not in the District of Columbia, but in federal court in New Jersey. *Id.* at 1143 (quoting 113 S. Ct. at 1205-06 & n.15). Quoting the First Circuit's decision in *Pole No. 3172*, the D.C. Circuit observed that the taxpayer's appeal "raises serious questions regarding * * * whether the [disentitlement] doctrine applies when the fugitive is in effect defending against governmental action rather than using the courts affirmatively in an attempt `to reap the benefit of the judicial process without subjecting himself to an adverse determination.'" *Id.* at 1142-43 (quoting 852 F.2d at 643-45).

Known as 218 Panther Street, Newfoundland, Pa., 745 F. Supp. 118 (E.D.N.Y. 1990), aff'd, 951 F.2d 461 (2d Cir. 1991); *United States* v. *$182,980.00 U.S. Currency*, 727 F. Supp. 1387, 1388 (D. Colo. 1990); *Korkala* v. *United States Customs Service*, 1989 U.S. Dist. LEXIS 7902, at *13 (D.N.J. 1989); *United States* v. *Collins*, 651 F. Supp. 1177, 1179 (S.D. Fla. 1987), as have academic commentators, see, *e.g.*, John G. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1458-59 & n.101 (1988) (the "courts of appeal are in conflict" on issue); 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 9.04[5], at 9-68.19 to 9-70 (Matthew Bender 1991 & Cum. Supp. June 1995) (noting and describing conflict).

The deep conflict in the circuits shows no sign whatsoever of abating. On the contrary, as explained above, the Seventh Circuit panel that decided *$40,877.59* decided *sua sponte* to circulate that decision to the entire court; not a single judge voted to rehear the case en banc. See note 6, *supra*. Conversely, the Ninth Circuit in this case refused petitioner's request that it rehear the panel's decision en banc to reconsider, in light of *$40,877.59* and other authorities, that circuit's longstanding rule permitting use of the disentitlement doctrine in this context. Not a single judge on the Ninth Circuit asked for a vote on this issue. App., *infra*, 39a. Further review by this Court is accordingly warranted.

4. The government would be hard-pressed to deny either the existence of the conflict or its significance. In opposing Brian Degen's rehearing petition in the Ninth Circuit, the government "readily acknowledge[d]" that the panel's decision conflicts with the Seventh Circuit's decision in *$40,877.59*. U.S. Resp. 2-3. The Solicitor General, moreover, recently told this Court that *$40,877.59* only "deepens a longstanding conflict in the circuits over the government's ability to invoke the doctrine at all in such a case." U.S. Br. in Opp. 16, *Alvarez* v. *United States*, Nos. 94-636 and -943 (filed Jan. 11, 1995). The Solicitor General also frankly conceded that this "longstanding conflict in the circuits" "may call for review by this Court in an appropriate case." *Ibid*.

This is such a case.[9] It squarely presents the issue for this Court's decision. In addition, the Ninth Circuit, in denying rehearing, candidly acknowledged that application of the disentitlement doctrine to petitioner had the effect of nullifying his due process rights, under *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), to a hearing to contest the initial seizure of his property. App., *infra*, 8a n.2, 39a. The case accordingly also presents the issue whether a federal district court may rely on its "inherent" or "supervisory" powers to vitiate rights conferred by the United States Constitution.

B. The Ninth Circuit's Decision Is Manifestly Incorrect And At Odds With Many Of This Court's Decisions.

Further review is also warranted to correct the Ninth Circuit's analysis, which is flawed in numerous respects. The Ninth Circuit's use of the disentitlement doctrine stretches that doctrine well beyond the limits recognized by this Court or sanctioned by the doctrine's purposes. The decision below is also irreconcilable with a substantial number of this Court's decisions.

1. The disentitlement doctrine is an equitable doctrine of appellate procedure articulated originally by this Court. It holds, quite simply, that "an appellate court may dismiss the appeal of a [criminal] defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez*, 113 S. Ct. at 1203. The Court has identified various rationales for the doctrine: (1) an appellate court cannot enforce an unfavorable judgment against a fugitive (*Smith* v. *United States*, 94 U.S. 97 (1876)); (2) a fugitive's "escape * * *

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[9] None of the factors that formed the basis of the government's successful opposition to certiorari in *Alvarez* (see 115 S. Ct. 1092 (Feb. 21, 1995)) is present here. In *Alvarez*, the petitioners had never challenged, in the lower courts, the applicability *vel non* of the fugitive disentitlement doctrine to civil forfeiture actions; had focused instead on various "fact-bound contentions" that "do not merit further review"; had failed to contest the district court's conclusion that they were "fugitives"; and had failed to cite "any of the prior conflicting authority" on this question and, at least in the *Alvarez* petition (No. 94-636), to "note[] the existence of the Seventh Circuit's decision" in *$40,877.59*. U.S. Br. in Opp. 9-11, 15-17.

disentitles [him] to call upon the resources of the Court for determination of his claims" (*Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam)); and (3) disentitlement serves a "deterrent function and advances an interest in efficient, dignified appellate practice" (*Ortega-Rodriguez*, 113 S. Ct. at 1204-05).

Despite the very limited context in which this Court has applied the disentitlement doctrine,[10] several courts of appeals have greatly expanded the doctrine, holding that a defendant who is a fugitive from justice in a criminal case may be disentitled from seeking *affirmative* relief in a *separate civil* action. What is more, some courts of appeals have extended the doctrine even further, holding that a fugitive from a criminal conviction may be disentitled even from *defending* against the confiscation of his property in a separate forfeiture proceeding initiated by the government. And even though the cases in which this Court has applied the disentitlement doctrine all have involved persons already convicted of crimes, the courts of appeals (including the Ninth Circuit in this case) have wielded the sanction of disentitlement against persons who have never been arrested, tried or convicted, and whose innocence accordingly must be presumed.

The Ninth Circuit's use of the disentitlement doctrine in this case runs afoul of the limits articulated in two of this Court's disentitlement decisions: *United States* v. *Sharpe*, 470 U.S. 675 (1985), and *Ortega-Rodriguez*. In *Sharpe*, the Court granted the government's certiorari petition to review a judgment reversing the respondents' criminal conviction. After certiorari had been granted, the respondents became fugitives. The Court refused to vacate the judgment

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[10] This Court's disentitlement cases share three important features: 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 *Ortega-Rodriguez*, 113 S. Ct. 1199; *Molinaro*, 396 U.S. 365; *Eisler* v. *United States*, 338 U.S. 189 (1949); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith*, 94 U.S. 97. See also *Goeke* v. *Branch*, 115 S. Ct. 1275 (1995) (per curiam).

and remand with instructions to dismiss the appeals on disentitlement grounds, however, because such action "is not supported by our precedents." *Id*. at 681 n.2. The disentitlement doctrine, the Court explained,

> concerns the situation in which a fugitive defendant is the party *seeking review here*. In those *very different* cases, dismissal of the petition or appeal is based on the equitable principle that a fugitive from justice is "disentitled" to *call upon this Court* for a review of his conviction. This equitable principle is wholly irrelevant when the defendant has had his conviction nullified and the *government* seeks review here.

Id. at 681-82 n.2 (emphases added) (citations omitted). Thus, in the only one of this Court's disentitlement cases in which the fugitive was *not* making an affirmative demand upon the judicial system, the Court refused to apply the doctrine.

Under *Sharpe*, the disentitlement doctrine applies *only* where the fugitive is the one affirmatively seeking judicial action. Thus, assuming, *arguendo*, that the doctrine can be extended to *civil* cases at all, it surely does not apply where, as here, the alleged fugitive is not making a demand for judicial action but merely *defending* against a suit by the government to take his property. See *$40,877.59*, 32 F.3d at 1154; *Pole No. 3172*, 852 F.2d at 643; *Societe Internationale* v. *Rogers*, 357 U.S. 197, 210-11 (1958); *Friko*, 26 F.3d at 1142; see also App., *infra*, 24a (petitioner "clearly has the status of a defendant"). But see *Eng*, 951 F.2d at 466 ("Who initiates the proceedings * * * is not a relevant consideration for purposes of the disentitlement doctrine").

The Ninth Circuit's decision is also inconsistent with this Court's reasoning in *Ortega-Rodriguez*. In that case, the Court held that an appellate court may not dismiss the appeal of a defendant who becomes a fugitive *after* his conviction but who is recaptured *before* the filing of his appeal, because the defendant's fugitivity lacks sufficient connection to the appellate process. 113 S. Ct. at 1205-10. To reach that result, the *Ortega-Rodriguez* Court looked to the purposes animating the doctrine and considered whether those purposes would be served by application to this new situation. The "enforceability" concern underlying the disentitlement doctrine, the

Court reasoned, is not present when a defendant is recaptured before invoking the appellate process: Whatever the appellate court decides, its judgment will be fully enforceable. *Id*. at 1206. Likewise, in the present case, the enforceability concern is completely absent: Any judgment in this forfeiture action, whether for or against petitioner, would be "fully enforceable since the property is in the court's control." See *$40,877.59*, 32 F.3d at 1156; *Pole No. 3172*, 852 F.2d at 643.

The Court in *Ortega-Rodriguez* also reasoned that the interest in the "efficient operation" of the appellate process "will not be advanced by dismissal of appeals filed after former fugitives are recaptured." 113 S. Ct. at 1206. Any delay occasioned by the fugitive's escape, the Court explained, would affect proceedings only in the *district court*. This insistence that disentitlement be used to safeguard the integrity only of the *sanctioning court*'s own processes demonstrates why the doctrine has no place in civil forfeiture actions.[11] Petitioner's alleged fugitivity in the criminal case "does not threaten the integrity of the forfeiture proceeding," and his presence is not "needed to conduct an adversarial hearing [nor could it be] compelled in a civil action even if he were not a fugitive." *$40,877.59*, 32 F.3d at 1156; accord *Pole No. 3172*, 852 F.2d at 644.

2. Not only is the Ninth Circuit's holding inconsistent with *Sharpe* and *Ortega-Rodriguez*, but it runs afoul of the Due Process Clause of the Fifth Amendment, as well as various of this Court's due process cases. See U.S. Const. amend. V ("No person shall * * *

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[11] Relatedly, *Ortega* held that the interest in protecting the "dignity" of the appellate court did not justify dismissal of the recaptured fugitive's appeal, because at most it was "the authority of the *District Court*, not the *Court of Appeals*," that the fugitive defendant might have "flouted." 113 S. Ct. at 1207 (emphasis added); see also *ibid*. (an appellate court may not "sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings"). That consideration also weighs against use of disentitlement in civil forfeiture actions. See *$40,877.59*, 32 F.3d at 1156 ("the fugitive's disrespectful conduct is to another court in another action"); *Pole No. 3172*, 852 F.2d at 644.

be deprived of life, liberty, or property, without due process of law."). This Court has consistently held that due process requires "some form of hearing * * * before an individual is finally deprived of a property interest" and that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation omitted). By operation of the fugitive disentitlement doctrine, however, petitioner has been deprived of all right to be heard in defense of his property.

The Ninth Circuit's holding is also at odds with this Court's recent decision in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 498-505 (1993). In that case, the Court held that the Fifth Amendment's Due Process Clause confers on an owner of real property the right to a hearing before the property may be seized — even temporarily. The disentitlement doctrine works, if anything, a *more* severe due process violation than the violation identified in *Good*. As the Seventh Circuit has explained, in rejecting disentitlement in the forfeiture context, "[i]f a probable cause warrant, issued *ex parte*, is not sufficient to temporarily deprive an owner of the use of his property until a full hearing is held, then clearly it is an insufficient basis on which to justify a permanent loss by forfeiture." *$40,877.59*, 32 F.3d at 1155.[12]

The Ninth Circuit's decision also cannot be reconciled with a line of this Court's cases recognizing a fundamental *right to defend* rooted in the Due Process Clause. *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259 (1870); *Windsor* v. *McVeigh*, 93 U.S. 274 (1876); *Hovey* v. *Elliott*, 167 U.S. 409 (1897). As the Seventh Circuit correctly observed, these cases stand for the principle that "notwithstanding an individual's *status*, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him; * * * the constitutional right to defend is inseparable from

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[12] In denying rehearing, the panel in this case made clear that "[i]f not for Brian's fugitive status, the rule of *Good* would apply to this case." App., *infra*, 39a. It held, however, that "the fugitive disentitlement doctrine precludes Brian" from asserting his rights under *Good* — effectively stripping him of his due process rights. *Ibid.*

the liability to suit." *$40,877.59*, 32 F.3d at 1153 (emphasis added).[13]

Nor can petitioner be said to have "waived" his due process rights. Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U.S. 292, 307 (1937). Exactly the opposite is true: "in the civil no less than the criminal area, courts indulge every reasonable presumption *against* waiver." *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotation omitted) (emphasis added). Moreover, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Petitioner's actions (or, more accurately, his inaction) with regard to the *criminal* case simply cannot be construed as an intentional relinquishment of his due process rights in *this* case.

3. The Ninth Circuit's holding also 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. *E.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988); *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985); *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209 (1958). Applied in the context of a civil forfeiture action, the fugitive disentitlement doctrine — an equitable doctrine of appellate procedure developed by federal appellate courts in their supervisory capacity (*Goeke* v. *Branch*, 115 S. Ct. 1275 (1995) (per curiam); *Ortega-Rodriguez*, 113 S. Ct. at 1205)) — has precisely this forbidden effect. Rule C(6) of the Supplemental Rules for

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[13] Thus, in *McVeigh* v. *United States*, the Court held that it was error, in a proceeding brought by the government to forfeit the property of a Confederate rebel actively engaged in the Civil War, to strike the rebel soldier's claim. Because the government was seeking to take the claimant's property, the Court explained, the claimant's "legal status" was irrelevant: "Whatever may be the extent of the disability of an alien enemy *to sue* in the courts of the hostile country, it is clear that he is liable to *be* sued, and this carries with it the right to use all the means and appliances of defence." 78 U.S. at 267 (emphases added; citation omitted).

Certain Admiralty and Maritime Claims confers on any "claimant of property that is the subject of an action in rem" the right to file a "claim" and "answer" to the government's forfeiture complaint. See App., *infra*, 40a. Similarly, the applicable forfeiture statute "does not authorize the forfeiture of property simply because the owner is a fugitive" (*$40,877.59*, 32 F.3d at 1155-56) but rather only upon enumerated grounds that have not been proven here. See 21 U.S.C. §§ 881(a)(6) & (7) (see App., *infra*, 40a). And, of course, the Fifth Amendment stands as a barrier to all governmental deprivations of property without due process of law. The "inherent" or "supervisory" power of the federal courts is not a license to nullify rights afforded by Congress or by the Constitution.[14]

4. This case provides a compelling illustration of the dangers of permitting the government to invoke disentitlement in the civil forfeiture context. *First*, petitioner's property was seized on the basis of only "minimal evidence that it was illegally used or obtained." *$40,877.59*, 32 F.3d at 1157. The government's conclusory complaint (ER 420-26) was supported by a single affidavit of a DEA agent (ER 472-94), which in turn consisted of hearsay and multiple hearsay from unnamed, confidential informants. See ER 472-94.[15]

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[14] In previous cases, the Ninth Circuit opined that the fugitive disentitlement doctrine "should apply with greater force in civil cases where an individual's liberty is not at stake." *Conforte*, 692 F.2d at 589; *$129,374*, 769 F.2d at 588. This analysis overlooks two contrary principles: (1) the Due Process Clause protects against deprivations of property, not just of liberty; and (2) an appellate court's exercise of its supervisory power to dismiss a fugitive defendant's *criminal appeal* does not violate due process because "a convicted criminal has no constitutional right to an appeal." *Goeke*, 115 S. Ct. at 1277 (internal quotations omitted); *Estelle* v. *Dorrough*, 420 U.S. 534, 536-37 (1975). By contrast, taking a person's property without affording him any hearing clearly *does* implicate due process.

[15] More than a year after the trial court ordered petitioner's claims stricken, the government submitted three affidavits in support of its second motion for summary judgment against Karyn Degen. See ER 67-78 (Declarations of Michael McCreary, Catherine Bryant, and Ciro Mancuso); note 2, *supra*. Because those affidavits were not before the district court when it ruled on the government's motion to strike Brian Degen's claims, they obviously

Second, the government's own submissions in the court below strongly suggest, if not conclusively establish, that this forfeiture action is barred by the applicable five-year statute of limitations (19 U.S.C. § 1621). This action was commenced in October of 1989. Yet the government conceded below that all but one of the Degens' parcels of real property named in the complaint (and alleged to be forfeitable because purchased with drug proceeds) were acquired by petitioner *before* 1981. U.S. Br. Appellee 23. In view of this dispositive defense and the extensive documentation submitted to the trial court by petitioner demonstrating his legitimate ownership of the subject property, the government would not prevail on the merits of this forfeiture action.[16]

Third, as was true of the disentitled property owner in the Seventh Circuit's decision in *$40,877.59*, petitioner's "fugitive status is questionable." 32 F.3d at 1156-57. Petitioner "has been indicted but not tried or convicted of any criminal charges." App., *infra*, 5a. It is undisputed that he departed the United States well before he was indicted, and the government has not shown (or been required to show) that he left with any intent to avoid prosecution. The Ninth Circuit concluded that petitioner is a fugitive because he resides in a

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cannot be considered for the purpose of assessing the government's case against Brian. In any event, the affidavits are of exceedingly dubious value. See note 16, *infra*.

[16] As for the government's ability to prevail on the *criminal* charges against petitioner, suffice it to say that in the only case brought to trial against petitioner's numerous co-indictees, the government recently suffered a "stunning defeat" at the hands of a Nevada jury. 5 *The DOJ Alert* 14 (Apr. 3, 1995); see generally Howard Mintz, *Fort Reno's Obsession*, The American Lawyer 54-61 (May 1995). In acquitting Patrick Hallinan on all charges after only six hours of deliberations, see *S.F. Lawyer is Acquitted in Drug Ring Case*, Los Angeles Times, Mar. 8, 1995, at A3, the jury evidently rejected as incredible the central testimony of the government's star witness, Ciro Mancuso. See *Jury Acquits Hallinan of All Charges*, S.F. Chronicle, Mar. 8, 1995, at A1 ("Jury foreman John Tonner commented after the verdict that Mancuso `would make a good used-car salesman. He lies a lot.'").

foreign country and has failed to return to the United States to face criminal charges that he learned of while living abroad. App., *infra*, 5a.

The Ninth Circuit's sweeping definition of fugitivity cannot be reconciled with the ordinary meaning of the word "fugitive" (which is derived from the verb "to flee")[17] or with the fact that disentitlement is a *sanction* imposed for some sort of *wrongful* conduct.[18] The Ninth Circuit's expansive definition, moreover, is symptomatic of the distortions that can arise when (as in the civil cases applying the disentitlement doctrine) the federal courts go about crafting a whole body of law pursuant to their "inherent" or "supervisory" powers. The Ninth Circuit's opinion is not an isolated example of this phenomenon; indeed, the disentitlement doctrine has spawned a vast array of case law, as courts struggle to mold and shape (out of whole cloth) the new federal common law of disentitlement. See, *e.g.*, *BCCI Holdings (Luxembourg), Society Anonyme* v. *Pharaon*, 1995 WL 231330, at *4 (S.D.N.Y. 1995) (in civil RICO action between private parties, disentitling fugitive defendant who "flouted the authority of other courts" from obtaining discovery but not from defending the lawsuit).

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[17] See *Webster's New World Dictionary of American English* 544 (3d College ed. 1989) (defining "fugitive" as "a person who flees or has fled from danger, justice, etc."); see also 18 U.S.C. § 921(a)(15) (defining term "fugitive from justice" for purposes of various federal firearms provisions as "any person who has *fled* from any State *to avoid prosecution for a crime* or to avoid giving testimony in any criminal proceeding") (emphasis added). Compare *$40,877.59*, 32 F.3d at 1156 ("[T]o be a fugitive, [a] defendant must flee the state with the intent to avoid prosecution.").

[18] In *Ortega-Rodriguez*, the Court made clear that disentitlement is a "*sanction* [in the form of] dismissal." 113 S. Ct. at 1207 (emphasis added). When applied in a civil forfeiture proceeding, that sanction is especially punitive in nature. See *Austin* v. *United States*, 113 S. Ct. 2801, 2810-12 (1993) (forfeiture pursuant to 21 U.S.C. § 881(a)(7) constitutes punishment sufficient to trigger Excessive Fines Clause). Thus, petitioner has not simply been *deprived of property*: He has been *assessed a multimillion-dollar punishment*.

The necessary consequence of the Ninth Circuit's holding is to free the government from virtually every restraint — whether based in the Constitution, the forfeiture statutes, or the procedural rules governing forfeiture actions — with respect to property owned by a claimant who is a "fugitive" (a term that itself knows almost no boundaries in the disentitlement context). The government may prevail on the basis of a facially defective complaint (see *Pole No. 3172*, 852 F.2d at 638-43) or on claims that are plainly time-barred (as here); may obtain the forfeiture of property that is beyond the district court's *in rem* jurisdiction (as was alleged in *Alvarez*); and may even succeed in confiscating property that it asserts (but could not prove) is related to the criminal proceeding from which the fugitive has absconded (*$40,877.59*, 32 F.3d at 1155).[19]

The government "already enjoys a tremendous procedural advantage under the forfeiture laws." *$40,877.59*, 32 F.3d at 1156. It need only show probable cause to believe that property was used to promote illegal activity; the claimant then bears the burden of proving that the property was not involved in any illegal activity. 19 U.S.C. § 1615. Not content with its existing advantage, however, the government now seeks to remove the only obstacle remaining in the path of its forfeiture juggernaut: the right of a property owner to his day in court to defend against an unlawful forfeiture. The Court should not permit this unwarranted expansion of the government's forfeiture power, particularly in view of the government's "direct

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[19] See *$40,877.59*, 32 F.3d at 1155-56 ("The forfeiture act * * * does not authorize the forfeiture of property simply because the owner is a fugitive, but by using a combination of the forfeiture laws and the fugitive disentitlement doctrine, the government is allowed to do just that."); *Pole No. 3172*, 852 F.2d at 643 ("We refuse to condone a rule that essentially allows the government to go through the missing persons list and seize all the property of everyone who fails to respond to a forfeiture complaint, without even showing the court that it reasonably believes the property is forfeitable as Congress intended it to do."); but cf. *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (per curiam) (in upholding dismissal of fugitive's complaint under Freedom of Information Act, rejecting argument that "[o]nly Congress, not the judiciary, may establish exceptions to the Act's disclosure commands"), cert. denied, 455 U.S. 1002 (1982).

pecuniary interest in the outcome" of forfeiture proceedings. *Good*, 114 S. Ct. at 502 & n.2; see also *id*. at 515 (Thomas, J., concurring in part and dissenting in part) (expressing "distrust of the Government's aggressive use of broad civil forfeiture statutes").

C. The Issues Presented Are Important And Recurring.

This case raises vitally important issues of federal law. The disentitlement doctrine, as applied by the court below, poses fundamental constitutional questions regarding the government's authority to confiscate property without permitting the owner *any* opportunity to be heard. Equally significant is the related and squarely presented question whether the federal courts, pursuant to their "inherent" or "supervisory" authority, may nullify rights conferred by Congress and by the Constitution. And, of course, the case offers this Court an opportunity to provide much-needed guidance concerning the proper use, if any, of the disentitlement doctrine in civil actions.

These issues arise with considerable frequency. The fugitive disentitlement doctrine is routinely invoked in civil forfeiture actions, and the government has become increasingly emboldened by its successes to push the doctrine to new and more expansive limits.[20]

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[20] See, *e.g.*, *United States* v. *Michelle's Lounge*, 39 F.3d 684 (7th Cir. 1994); *$40,877.59*, 32 F.3d 1151; *Timbers Preserve*, 999 F.2d 452; *United States* v. *Contents of Accounts Nos. 3034508504 and 144-07143 At Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974 (3d Cir. 1992); *Eng*, 951 F.2d 461, aff'g, 745 F. Supp. 118 (E.D.N.Y. 1990); *United States* v. *Twenty Cashier's Checks*, 897 F.2d 1567 (11th Cir. 1990); *7707 S.W. 74th Lane*, 868 F.2d 1214; *United States* v. *One Residential Property Located At 450 Ocean Drive, PH-3, Juno Beach, Fla.*, 1989 WL 140904 (9th Cir. 1989); *Pole No. 3172*, 852 F.2d 636; *$45,940*, 739 F.2d 792; *$83,320*, 682 F.2d 573; *United States* v. *$470,371.76 U.S. Currency, More or Less*, 1993 WL 88226 (S.D.N.Y. 1993); *United States* v. *All Monies in Account No. 400 6050975 00*, 1992 U.S. Dist. LEXIS 16930 (E.D. Pa. Nov. 4, 1992); *United States* v. *All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984 (E.D.N.Y. 1992); *United States* v. *United States Currency in Amount of $294,600*, 1992 WL 170924 (E.D.N.Y. 1992); *United States* v. *One Parcel of Real Property Described as Lot 156 and the South Three Feet of Lot 157, Valley View Estates*, 776 F. Supp. 482 (W.D. Mo. 1991), aff'd in unpublished opinion, 1992 U.S. App. LEXIS 29278 (8th Cir.

There is, moreover, good reason to believe that the doctrine is applied with far greater frequency than even the many reported forfeiture decisions would suggest, especially in those circuits (such as the Second, Ninth, and Eleventh) where this practice has long been approved. For example, in the decision that gave rise to the *Alvarez* petition, the Eleventh Circuit summarily affirmed a district court judgment striking the claims of various property owners on the strength of the fugitive disentitlement doctrine. *United States* v. *Certain Funds In The United Kingdom*, Nos. 92-2294, -2295, -2920, 93-2424 (11th Cir. Apr. 13, 1994) (per curiam), reprinted in Appendix to Pet. for Certiorari, *Alvarez* v. *United States*, No. 94-636. In another unreported decision, the Ninth Circuit similarly upheld a judgment of forfeiture of a home on the basis of the disentitlement doctrine. See *United States* v. *Real Property at 11205 McPherson Lane, Ojai, California*, 1994 U.S. App. LEXIS 20658 (9th Cir.), cert. dismissed, 115 S. Ct. 536 (1994) (Rule 46 dismissal). In addition, both the Seventh and the Tenth Circuits recently have issued unpublished decisions that turned on this issue. See note 5, *supra*; *United States* v. *Sanders*, 1995 U.S. App. LEXIS 3999, *4-*5 (8th Cir. Feb. 28, 1995). In short, the reported cases — which by themselves are quite substantial — understate the true incidence of this questionable use of disentitlement.

The Court's resolution of the issues presented in this case will also shed light on the propriety of using the disentitlement doctrine in other civil contexts. The disentitlement doctrine has been invoked in a wide array of civil contexts, including in other settings where

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1992) (per curiam); *United States* v. *$182,980.00 U.S. Currency*, 727 F. Supp. 1387 (D. Colo. 1990); *United States* v. *Certain Real Property Located at 760 S.W. 1st Street, Miami, Florida*, 702 F. Supp. 575 (W.D.N.C. 1989); *United States* v. *Collins*, 651 F. Supp. 1177 (S.D. Fla. 1987); *United States* v. *One Lot of U.S. Currency Totalling $506,537.00*, 628 F. Supp. 1473 (S.D. Fla. 1986).

property is temporarily restrained,[21] in civil rights actions under 42 U.S.C. § 1983,[22] in deficiency and other actions under the tax laws,[23] in immigration cases,[24] and in a variety of other cases.[25] See generally *In re Prevot*, 1995 U.S. App. LEXIS 17014, at *17-26 (6th

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[21] See, *e.g.*, *In re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993) (dismissing fugitive's appeal from restraining order to preserve availability of assets granted pursuant to RICO, 18 U.S.C. § 1963(d)(1)); *United States* v. *Eagleson*, 874 F. Supp. 27 (D. Mass. 1994) (applying disentitlement doctrine to prevent hearing on the merits of RICO restraining order).

[22] See, *e.g.*, *Perko* v. *Bowers*, 945 F.2d 1038 (8th Cir.), cert. denied, 503 U.S. 939 (1992); *Ali* v. *Sims*, 788 F.2d 954 (3d Cir. 1986); *Broadway* v. *City of Montgomery*, 530 F.2d 657 (5th Cir. 1976); *Andra* v. *Erickson*, 1995 U.S. Dist. LEXIS 8555 (D. Mont. May 31, 1995); *Griffin* v. *City of New York Correctional Com'r*, 882 F. Supp. 295 (E.D.N.Y. 1995); *Mayberry* v. *Robinson*, 427 F. Supp. 297 (M.D. Pa. 1977); *Siebert* v. *Johnston*, 381 F. Supp. 277 (E.D. Okl. 1974).

[23] See, *e.g.*, *Friko Corp.* v. *Commissioner of Internal Revenue*, 26 F.3d 1139 (D.C. Cir. 1994); *Schuster* v. *United States*, 765 F.2d 1047 (11th Cir. 1985); *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982); *Pecoraro* v. *C.I.R.*, 1995 WL 311334 (T.C. 1995); *Daccarett-Ghia* v. *C.I.R.*, 1994 WL 675537 (T.C. 1994); *Edelman* v. *C.I.R.*, 103 T.C. 705 (T.C. 1994); *Coninck* v. *C.I.R.*, 100 T.C. 495 (T.C. 1993); *Gruevski* v. *C.I.R.*, 59 T.C.M. (CCH) 842 (T.C. 1990); *Smith* v. *C.I.R.*, 57 T.C.M. (CCH) 864 (T.C. 1989); *Berkery* v. *C.I.R.*, 90 T.C. 259 (T.C. 1988).

[24] See, *e.g.*, *Bar-Levy* v. *United States Dep't of Justice, I.N.S.*, 990 F.2d 33 (2d Cir. 1993); *Arana* v. *United States Immigration & Naturalization Serv.*, 673 F.2d 75 (3d Cir. 1982) (per curiam); *Singh* v. *Schiltgen*, 1995 WL 311966 (N.D. Cal. 1995); *Singh* v. *Reno*, 1994 WL 721469 (N.D. Cal. 1994).

[25] See, *e.g.*, *Aamco Transmissions, Inc.* v. *Martin*, 647 F.2d 164, 164 (6th Cir. 1981) (dismissing fugitive's appeal from judgment in civil action ordering specific performance of settlement agreement); *United Elec., Radio and Mach. Workers of America* v. *163 Pleasant Street Corp.*, 960 F.2d 1080, 1097 (1st Cir. 1992) (appeal from grant of preliminary injunction under ERISA); *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (per curiam) (action under Freedom of Information Act), cert. denied, 455 U.S. 1002 (1982).

Cir. July 14, 1995) (collecting cases). With increasing frequency, private litigants are attempting to follow the government's example by using the disentitlement doctrine against their absent opponents. See, *e.g.*, *Pharaon*, 1995 WL 231330 (disentitling fugitive from defending against civil RICO claim).

The issue is ripe for this Court's review. Indeed, the courts of appeals have suggested, more than once, the need for guidance from this Court. See, *Perko* 945 F.2d at 1039 ("Supreme Court has yet to define the reach of the [fugitive disentitlement] rule outside" of criminal appeals); *$40,877.59*, 32 F.3d at 1153 ("Supreme Court has not reviewed any case in which the doctrine was used by a district court in a civil forfeiture proceeding"). Further review is warranted.[26]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[26] The importance of this Court's guidance in this area, moreover, extends to state cases as well. See, *e.g.*, *State of Maryland Deposit Insurance Fund Corp.* v. *Billman*, 321 Md. 3, 580 A.2d 1044, 1046-49 (1990) (discussing federal disentitlement cases and collecting state cases applying doctrine); *Garcia* v. *Metro-Dade Police Dep't*, 576 So.2d 751, 752 (Fla. App. 1991) (citing federal authority in holding that claimant to property in civil forfeiture proceeding may be disentitled). See also note 7, *supra*.