No. 15-1360

United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

FINN BATATO; BRAM VAN DER KOLK; JULIUS BENCKO; MATHIAS ORTMANN; SVEN ECHTERNACH; KIM DOTCOM; MEGAUPLOAD LIMITED; MEGAPAY LIMITED; VESTOR LIMITED; MEGAMEDIA LIMITED; MEGASTUFF LIMITED; MONA DOTCOM,
CLAIMANTS-APPELLANTS

AND

ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO, IN REM DEFENDANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NO. 14- CV-00969 HON. LIAM O'GRADY, PRESIDING

BRIEF *AMICI CURIAE* FOR THE CATO INSTITUTE AND INSTITUTE FOR JUSTICE IN SUPPORT OF CLAIMANTS-APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

Darpana Sheth
Institute for Justice
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9425
dsheth@ij.org

Ilya Shapiro
Counsel of Record
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Fourth Circuit Local Rule 26.1, *amici* make the following declarations:

The Cato Institute is a nonprofit public policy research foundation dedicated in part to the defense of constitutional liberties secured by law. The Institute for Justice is a nonprofit civil-liberties law firm. Neither organization has a parent corporation or issues shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amici*'s participation.

TABLE OF CONTENTS

CORPORATE & FINANCIAL DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

ARGUMENT FOR GRANTING PETITION 2

I. The Panel's Construction of U.S.C. § 1355 Expands *In Rem* Jurisdiction Outside of the Country Without a Clear Statement from Congress—and Raises Serious Doubts as to the Its Constitutionality 2

II. The Panel's Holding Ignores Fundamental Tenants of Due Process, Creating Dangerous Incentives for Law Enforcement. 5

CONCLUSION 9

CERTIFICATE OF COMPLIANCE 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Page(s)

Cases

Alvarez v. Smith, 558 U.S. 87 (2009) 1

Bennis v. Michigan, 516 U.S. 442 (1996) 1-2

Boddie v. Connecticut, 401 U.S. 371 (1971) 6

Diaz v. United States, 223 U.S. 442 (1912) 8

EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) 4

Florida v. Harris, 133 S. Ct. 1050 (2013) 1

Goss v. Lopez, 419 U.S. 565 (1975) 6

Grannis v. Ordean, 234 U.S. 385 (1914) 6

Henderson v. United States, 135 S. Ct. 1780 (2015) 1

Hovey v. Elliott, 167 U.S. 409, 414 (1897) 7, 8

Kaley v. United States, 134 S. Ct. 1090 (2014) 1

McVeigh v. United States, 78 U.S. 259 (1871) 7

NW Austin Municipal Util. Dist. No. One v. Holder, 557 U. S. 193 (2009) 4

R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir. 1999) 5

Republic Nat'l Bank of Miami v. United States, 506 U.S. 80 (1992) 3

United States v. All Funds on Deposit in Any Accounts Maintained in Names of Meza or De Castro, 63 F.3d 148 (2d Cir. 1995) 3

United States v. Batato, 2016 U.S. App. LEXIS 14861 (4th Cir. Aug. 12, 2016) 3, 5, 6

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 2, 9

Statutes

28 U.S.C. § 1355 2

28 U.S.C. § 2466 2

Other Authorities

Marian R. Williams, Jefferson E. Holcomb, et. al, *Policing for Profit*, Institute for Justice (Nov. 2015) 9

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to protecting property rights, both because individuals' control over their property is a tenet of personal liberty and because property rights are inextricably linked to all other rights. For this reason, IJ both litigates original cases to defend property rights and files *amicus* briefs in relevant cases.

The present case concerns *amici* because the federal government's aggressive use of forfeiture poses a grave threat to property rights and can cause irreparable injury when property is forfeited without any hearing. The strong pecuniary interest that law enforcement has in maximizing forfeiture proceeds has both distorted police and prosecutorial practices and, in many cases, led to the restraint or seizure of untainted assets.

---

[1] Pursuant to Fed. R. App. P. 29, both parties, through their respective counsel, have consented to the filing of this brief. Counsel for the parties did not author this brief in whole or in part and no person or entity other than *amici* and their members made a monetary contribution to fund its preparation or submission.

ARGUMENT FOR GRANTING PETITION

The panel's construction of 28 U.S.C. § 1355 expands federal jurisdiction and fundamentally alters the nature of a long standing doctrine of American law—*in rem* jurisdiction—with no clear statement from Congress. In addition, the panel's construction raises serious doubts as to the constitutionality of the statute ignoring this court's precedent. Further, the panel compounds this mistake by upholding 28 U.S.C. § 2466, which unconstitutionally cuts off the right to an essential constitutional protection—the due process of law—creating dangerous incentives for abuse by law enforcement.

I. The Panel's Construction of U.S.C. § 1355 Expands *In Rem* Jurisdiction Outside of the Country Without a Clear Statement from Congress—and Raises Serious Doubts as to Its Constitutionality

Amici agree with Petitioners that the text of 28 U.S.C. § 1355 does not eliminate the traditional requirement that a district court acquire "control" over the *res* to establish *in rem* jurisdiction. *See United States v. All Funds on Deposit in Any Accounts Maintained in Names of Meza or De Castro*, 63 F.3d 148, 152 (2d Cir. 1995) ("Although Congress certainly intended to streamline civil forfeiture proceedings by amending § 1355, even with respect to property located in foreign countries, we do not believe that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdiction.") Instead, Congress expanded courts' ability to serve process and gain control of the property. *See id*. at 153.

The plain meaning of the text cannot be read to establish extraterritorial general jurisdiction without making significant leaps in the statute's construction. As the panel conceded, § 1355(b) does not "explicitly state its…jurisdictional nature." *United States v. Batato*, 2016 U.S. App. LEXIS 14861, at *9 (4th Cir. Aug. 12, 2016). Further, this reading of § 1355(b) conflicts with Supreme Court precedent as to what is required to establish *in rem* jurisdiction. *See Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 84 (1992) ("[A] valid seizure of the *res* is a prerequisite to the initiation of an *in rem* civil forfeiture proceeding.") (emphasis omitted).

At best, § 1355(b) is ambiguous as to whether it expands federal jurisdiction. As the Supreme Court has held, however, fundamental rules of extraterritorial jurisdictional law cannot be changed absent a clear statement from Congress:

> It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. This canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.

EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (internal quotation marks and citations omitted). Because § 1355(b) does not speak clearly as to jurisdiction, the panel should have followed this fundamental rule of statutory construction and

construed § 1355(b) in such a way that does not expand *in rem* jurisdiction to anywhere in the world without control of the property.

The doctrine of constitutional avoidance "command[s] courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading." *Nw. Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 213 (2009) (Thomas, J., concurring in judgment in part and dissenting in part) (internal quotation marks omitted). The panel's construction of § 1355(b) raises serious doubts about the statute's constitutionality under Article III. Interpreting § 1355(b) to eliminate the control requirement of *in rem* jurisdiction, makes any opinion by the district court necessarily advisory. As Judge Floyd correctly recognized:

> In an *in rem* action, the district court cannot issue a judgment binding the *res* absent control of the *res*. Where, as here, a foreign sovereign controls the *res* because the *res* is located abroad, any *in rem* forfeiture order by a district court constitutes advice to the foreign sovereign regarding how it should vest title to the *res*.

Batato, 2016 U.S. App. LEXIS 14861, at *58 (Floyd, J., dissenting).

This Court's precedent agrees with Judge Floyd's: "Our own precedent recognizes the Article III limits of *in rem* jurisdiction . . . . What makes *in rem* actions problematic from an Article III standpoint is that 'judgments in them operate against anyone in the world claiming against that property.'" *Id*. at *58-59 (citing *R.M.S. Titanic, Inc. v. Haver,* 171 F.3d 943, 957(4th Cir. 1999)). Further:

> Without control of the property, the judgment cannot 'operate against anyone in the world' claiming interest in the defendant property . . . . Only if the court has exclusive custody and control over the property does it have jurisdiction over the property so as to be able to adjudicate rights in it that are binding against the world.

Id. at *59 (citing *R.M.S. Titanic*, 171 F.3d at 957).

The panel majority's interpretation of § 1355(b) raises serious doubts as to the provision's constitutionality—a serious concern that alone warrants rehearing.

II. The Panel's Holding Ignores Fundamental Tenants of Due Process, Creating Dangerous Incentives for Law Enforcement

In upholding 28 U.S.C. § 2466, the panel imperils fundamental principles of due process that protect individuals from arbitrary and unjust deprivations of property. Indeed, the panel dismissed these due-process concerns when it opined that "the guarantees of due process do not mean that 'the defendant in every civil case [must] actually have a hearing on the merits.'" *Batato*, 2016 U.S. App. LEXIS 14861, at *27-28 (citing *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). This misconstrues *Boddie*, in which the Supreme Court made clear that the "root requirement" of the Due Process Clause is that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie,* 401 U.S. at 378 (emphasis original). S*ee also Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("at the very minimum" due process "requires *some* kind of hearing") (emphasis original); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard").

Despite this clear line of case law making clear that the right to be heard is one of the fundamental protections against government encroachment, the panel upheld § 2466's statutory fugitive disentitlement doctrine—cutting off an individual's right to be heard before they even have a chance to present any defense or evidence.

In a property-forfeiture proceeding, the irreducible minimum of due process is a right to be heard and to present every available defense. The right to be heard in an action brought against oneself is fundamental, and it is irrelevant whether the claimants are foreign citizens—or even whether they are in open rebellion against the United States. *McVeigh v. United States*, 78 U.S. 259 (1871). Being a part of "natural justice," and the Constitution itself, *Hovey v. Elliott*, 167 U.S. 409, 414 (1897), the right to be heard cannot be denied by a mere statute. The Supreme Court further emphasized that the right to defend oneself against a legal action is fundamental to due process:

> To say that courts have inherent power to deny all right to defend an action and to render decrees *without any hearing whatever* is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Hovey, 167 U.S. at 414 (emphasis added). If a sentence is given against someone without "hearing him, or giving him an opportunity to be heard, [it] is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Id.*

But the Court did not just confine the judiciary's inherent powers with this language. *Hovey* emphasized that even a legislative act—such as § 2466—that denied the fundamental right to be heard cannot withstand constitutional scrutiny. ("If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution?"). *Id.* at 417.

It is axiomatic that a criminal defendant can't be summarily convicted because he refused to show up for trial—and certainly a statute allowing such a conviction would be unconstitutional. A defendant may be tried in absentia and thus give up the right to personally confront witnesses, but he is nevertheless entitled to a trial in which his lawyer can fully participate. *Diaz v. United States*, 223 U.S. 442, 455 (1912). In *Hovey*, the Court found "no distinction" between the due-process right to be heard in civil versus criminal cases: "If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject?" *Hovey*, 167 U.S. at 419. But § 2466 doesn't just unconstitutionally strip claimants of due-process rights; it creates a dangerous situation whereby the government can benefit by riding roughshod over the rights

of property owners. This makes the panel's decision to uphold the unconstitutional legislation of great and pressing importance.

Government serves as both the accuser and the beneficiary of property forfeiture; courts must take special care to ensure that the government doesn't illegitimately gain from squashing the claimants' due-process rights. As the Court said in *James Daniel Good*: "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making," and "[t]hat protection is of particular importance here, where the government has a direct pecuniary interest in the outcome." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56 (1993).

With the broad expansion of jurisdiction the panel adopted, the government's elimination of due-process rights via the fugitive-disentitlement doctrine is alarming. Under the panel's reading, anyone who has ever been online and happened to have payments routed through American servers could be subject to U.S. jurisdiction. Couple this *de facto* universal jurisdiction with the ability to invoke fugitive disentitlement in civil forfeiture proceedings, and this court could ratify a dangerous mix of perverse incentives and unchecked government profiteering. These concerns are hardly speculative. Over the course of the past two decades, it has become clear that forfeiture abuse is directly tied to whether law enforcement agencies and officials can profit from the seizures. This court

should not make it easier for further misuse to occur. *See* Marian R. Williams, Jefferson E. Holcomb, et. al, *Policing for Profit*, Institute for Justice (Nov. 2015).

The Supreme Court has only ratified the use of fugitive disentitlement in criminal appeals for certain limited purposes. Because those purposes can't be extended to fugitive disentitlement in civil forfeiture proceedings, § 2466 serves no purpose except to strip claimants of due-process rights.

CONCLUSION

The petition for rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

Darpana Sheth
Institute for Justice
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9425
dsheth@ij.org

Ilya Shapiro
Counsel of Record
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,102 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point font.

/s/ Ilya Shapiro
October 3, 2016

CERTIFICATE OF SERVICE

I hereby certify that, I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing (NEF) to the appropriate counsel.

/s/ Ilya Shapiro
October 3, 2016