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

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CORPORATE DISCLOSURE STATEMENT

Megaupload Limited's parent corporation is Vestor Limited. Megapay Limited's parent corporations are Vestor Limited and Megamedia Limited. Megamedia Limited's parent corporation is Vestor Limited. Neither Megastuff Limited nor Vestor Limited has a parent corporation. No publicly held corporation owns 10% or more of any of these companies' stock.

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INTRODUCTION

In a separate criminal case, the government indicted several foreign defendants on copyright-related allegations. Instead of following typical extradition procedures—bringing the defendants to the United States pursuant to international law and then proving its case at trial before seeking forfeiture—the government took a much more aggressive approach. It brought this civil forfeiture case against foreign property owned by the defendants and others (collectively, "Claimants") and, relying on the seldom-used "fugitive disentitlement" statute, argued that the owners' claims to their foreign property should be stricken and the property immediately forfeited. According to the government, Claimants' participation in extradition proceedings—and failure to immediately leave their homes, families, and businesses to travel to the United States—rendered them "fugitives" seeking "to avoid … prosecution." 28 U.S.C. §2466(a)(1) (Addendum-A-2).

Accepting this argument, the district court disentitled Claimants from defending their rights to their property, based solely on their "non-appearance" in the separate criminal case and the government's allegation that they are thereby "fugitives." Without any hearing on the merits, the court then adjudged the property—all located abroad—immediately forfeited. In so doing, however, the court committed several reversible errors.

For starters, this Court's precedent makes control over the defendant property a prerequisite to exercising *in rem* jurisdiction, and the district court lacked control over this foreign property. Further, the Claimants are foreign citizens and residents who would not be in the United States regardless of the criminal case. Yet, relying on both a misreading of §2466's intent requirement and an improper assessment of an undeveloped evidentiary record, the court held that Claimants' intent necessarily was "to avoid prosecution." Finally, even if these hurdles could be overcome, allowing the government to seize Claimants' property without an adversarial hearing would be unconstitutional. Claimants have been convicted of no crime; they are asserting established procedural and substantive rights abroad; and the government has never proved that their property should be forfeited.

In sum, the decision below upsets fundamental jurisdictional principles, misapplies the fugitive disentitlement statute, and violates both due process and the Supremacy Clause. If affirmed, that decision would hand the government unprecedented power. By stacking allegations of fugitive status on top of allegations of forfeitability, the government would obtain a roving worldwide license to indict residents of foreign countries who have never lived or worked in the United States and to take their foreign property—all without proving any wrongdoing. That is not how our justice system works. The judgments below should be vacated and the case either dismissed or remanded for trial on the merits.

JURISDICTIONAL STATEMENT

The district court exercised subject-matter jurisdiction under 28 U.S.C. §§ 1345 and 1355(a). Because the court entered final judgments of forfeiture under Fed. R. Civ. P. 54(b), this Court has jurisdiction under 28 U.S.C. §1291. The district court's orders granting the government's motions to strike were entered on February 27 and March 13, 2015, the orders of forfeiture on March 27 and April 7, and the final judgments on April 15. Claimants-Appellants filed a notice of appeal on April 3, and an amended notice on April 22 after entry of the final judgments.

STATEMENT OF ISSUES

I. Whether the district court erred in asserting *in rem* jurisdiction over millions of dollars of Claimants' real and personal property located entirely overseas and over which the court lacked actual or constructive control.

II. Whether the district court erred in disentitling Claimants from defending their property under the fugitive disentitlement statute, based on its finding that they declined to enter the United States "to avoid criminal prosecution" (28 U.S.C. §2466(a)(1)), even though Claimants have lived their entire lives overseas, have families, residences, and businesses located overseas, and are lawfully opposing extradition.

III. Whether, if the fugitive disentitlement statute applies, the court's decision to disentitle Claimants from defending property that the government seeks to have forfeited and entering judgment without a hearing on the merits of their defense violates Claimants' rights under the Fifth Amendment's Due Process Clause or, in the case of Claimants with treaty-based rights, the Supremacy Clause.

IV. Whether the district court erred in dismissing most of Mona Dotcom's claims for lack of standing.

STATEMENT OF THE CASE

A. The government's 2012 criminal copyright indictments

This civil *in rem* forfeiture proceeding arises from criminal indictments entered in 2012. The government charged several foreign residents and corporations—Finn Batato, Julius Bencko, Kim Dotcom, Sven Echternach, Bram van der Kolk, Mathias Ortmann, Megaupload Limited, and Vestor Limited—with crimes related to operation of a cloud-storage website, Megaupload.com. JA-1955. "In summary, the government allege[d] that the indicted defendants operated a scheme known as the 'Mega Conspiracy,' an international criminal conspiracy to profit from criminal copyright infringement and launder the proceeds." *Id*.

According to the complaint, "Megaupload.com was a commercial website and service operated by the Mega Conspiracy that reproduced and distributed copies of popular copyrighted content." JA-25. The government alleges that the "Mega Conspiracy's PayPal, Inc. account was utilized to receive payments from the Eastern District of Virginia and elsewhere for premium Megaupload.com subscriptions," and "to pay Carpathia Hosting in the Eastern District of Virginia and Leaseweb in the Netherlands" for server space. JA-34, 1963. According to the government, the defendant property—foreign houses, vehicles, bank accounts, and personal property—is all forfeitable as illegal proceeds of an international conspiracy to infringe copyrights.

B. The Claimants, the government's efforts to restrain their overseas assets, and the foreign courts' responses

Soon after the indictments were entered, and on the government's request, New Zealand authorities arrested Batato, Dotcom, Ortmann, and van der Kolk, who were released on conditions of bail and remain in New Zealand. JA-1955-56. Extradition proceedings are pending for those Claimants, none of whom is a U.S. citizen or has resided in this country. JA-1969, 1973. Other than a five-day visit by van der Kolk in 2009, there is no evidence that any of them has ever set foot in this country. *Id.* Nor is there any evidence that either Bencko or Echternach—who remain in their countries of citizenship (Slovakia and Germany, respectively), and have never resided in the U.S.—has ever visited the country. JA-1956, 1974, 1976. None of these individuals—all Claimants here—has appeared in the separate criminal action, which remains pending below.

In April 2012, the New Zealand High Court registered two restraining orders issued by the district court against New Zealand assets alleged to be proceeds of the conspiracy. JA-1956. "The assets that were subject to the restraining orders included $10m [NZD] in government bonds," two houses (worth approximately $4 million), and certain personal property (worth approximately $5 million). JA-2107, 163.

The New Zealand courts released from those restraints $6 million (NZD) to cover monthly living allowances and legal expenses for Kim Dotcom, his wife

Mona, and van der Kolk. JA-1956, 2107. By March 2015, when "[a]pproximately $5.4m of the bonds ha[d] been used," the New Zealand courts determined that another $700,000 should be released "to meet immediate legal and living expenses." JA-2107, 2115-16. And in April 2015 and again in June 2015, after the district court entered its forfeiture judgments, the New Zealand courts granted further variances to give the Dotcoms "access to the balance of the government bonds currently restrained to meet reasonable living expenses and legal expenses" stemming from the extradition and U.S. proceedings. JA-2119, 2172.[1]

The New Zealand courts continue to express concern "that the position currently taken by the US"—"that any funds repatriated to the US to pay legal advisers will be subject to the forfeiture order"—"is having the effect of frustrating the orders that [the New Zealand courts have] made" to provide funds for U.S.-based advisers in "the defence of the extradition proceedings." JA-2173-74. Thus, the courts recently required the New Zealand authorities to take "[u]rgent steps … to obtain instructions [from the United States] on the exclusion of US legal expenses from the forfeiture order." JA-2174.

[1] While the initial 2012 restraining orders expired under New Zealand law in April 2015, the restrained assets remained "subject to [an] interim freezing order by agreement" in another case brought by several film studios. JA-2122 & n.4.

The government also registered restraints in 2012 in Hong Kong. JA-1871-72. There too, Claimants "have made claims … and gotten funds released" for living and legal expenses. JA-1872.

C. Proceedings below

In July 2014, more than two years after it brought the criminal case, the government filed this civil forfeiture action against property located entirely in Hong Kong and New Zealand, contending that the assets "constitute proceeds of the conspiracy." JA-1954, 1955.

1. The district court's grant of the government's motion to strike the claims of all Claimants except Mona Dotcom

Claimants filed timely claims to the property and moved to dismiss or stay the forfeiture action. Invoking the fugitive disentitlement statute, 28 U.S.C. §2466, the government moved to strike all claims (other than those of Mona Dotcom). Without considering Claimants' motion to dismiss, the Court granted the motion to strike and disentitled Claimants (other than Mona Dotcom) from defending their ownership interests. JA-1954-84.

After determining that it had subject-matter jurisdiction, the district court considered whether it had *in rem* jurisdiction over the foreign property. Relying on 28 U.S.C. §1355(b)(2)—which provides for venue in certain district courts when foreign property is sought—the court held that it had *in rem* jurisdiction regardless of its "constructive or actual control of the res." JA-1962 (quotation omitted).

And because the complaint "alleg[ed] that the conspiracy utilized over 525 servers located within the Eastern District of Virginia, and received payments from within this district and elsewhere to a PayPal account," the court reasoned that there were "minimum contacts between this jurisdiction and the defendant assets." JA-1963.

Turning to fugitive disentitlement, the court acknowledged that, "[a]t common law, courts generally did not consider as 'fugitives' persons who had never previously entered the United States." JA-1965. Citing §2466, however, the court held that even "a person who has never entered the United States" can be disentitled as a "fugitive," provided he "deliberately avoided prosecution." JA-1965-67. According to the court, the government did not have to show that avoiding prosecution was the person's "sole, principal, or dominant intent"—only that he had "a specific intent to avoid criminal prosecution." JA-1968. The court deemed it sufficient to establish intent that several New Zealand Claimants have exercised their legal rights to contest extradition and that others had avoided traveling to countries where they could be extradited. JA-1972-77.

Having found that the government had satisfied the prerequisites to disentitlement under §2466, the court conducted a discretionary analysis. It rejected the government's argument that it would "suffer significant prejudice" from "dissipation of the assets" pursuant to the foreign courts' orders, since "release of the assets has occurred pursuant to the legal processes of those nations." JA-1978-79. The

court also rejected Claimants' constitutional arguments and found no conflict between any applicable treaties and §2466. JA-1979-81. Specifically, the court rejected Claimants' due process argument that disentitlement deprives them of the right to be heard, relying on a decision stating that "statutory disentitlement is itself preceded by notice and hearing" and that "such disentitlement does not impose a punishment but rather creates an adverse presumption that a claimant can defeat by entering an appearance in a related criminal case." JA-1979 n.21. Finally, the court concluded that disentitling Claimants would not "unduly interfere with litigation occurring" in New Zealand and Hong Kong, and thus disentitled all Claimants (other than Mona Dotcom) "from litigating the civil forfeiture complaint." JA-1982-83.

Having found §2466 to apply, the court never considered Claimants' position that U.S. criminal copyright law does not recognize secondary liability. And since Claimants' cloud-storage business employs technology "capable of substantial lawful use" (*Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005)), the actions of users around the world who used Megaupload.com to store and share content of their choosing formed the heart of the government's case. Nor did the court consider Claimants' arguments challenging the extraterritorial application of U.S. copyright law or the traceability of the assets here.

2. The district court's ruling on Mona Dotcom's claims

The government also moved to strike the claims of Mona Dotcom—Kim Dotcom's wife, who resides in New Zealand and has not been implicated in any crime—for lack of standing. JA-1988. She and Kim are divorcing, and she asserts "a 50% marital interest in certain assets identified in" the complaint as "belonging to Kim." JA-1988 & n.3.

The district court largely granted the government's motion to strike Mona Dotcom's claims, holding that most of those claims were based "only [on] a marital interest that has not yet ripened," and thus that she lacked a current "interest in the property." JA-1994-96. The court held that Mona Dotcom *did* have standing, however, to contest forfeiture of a piece of real property and a vehicle in which she has a current "lawful possessory interest." JA-1996.

D. The district court's entry of a final Rule 54(b) judgment

After disentitling the other Claimants and striking most of Mona Dotcom's claims, the court granted the government's motions for default judgment as to all assets other than those covered by Mona Dotcom's two remaining claims. Pursuant to Rule 54(b), the court later entered final judgments of forfeiture. JA-2070-72. Claimants timely appealed.

STANDARD OF REVIEW

This Court applies *de novo* review to the district court's legal determinations of jurisdiction (*ePlus Tech., Inc. v. Aboud,* 313 F.3d 166, 176 (4th Cir. 2002)), constitutionality (*Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 375 (4th Cir. 2013)), and standing (*Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 631 n.2 (4th Cir. 2007)). Likewise, the Court "review[s] the legal applicability of §2466 to … forfeiture claim[s] *de novo*." *Collazos v. United States*, 368 F.3d 190, 195 (2d Cir. 2004). If §2466 applies, the Court "review[s] the district court's decision to order disentitlement for abuse of discretion." *Id*.

SUMMARY OF ARGUMENT

The district court's legal and factual analyses were fundamentally flawed, and its forfeiture judgments must be vacated.

I. Most fundamentally, the district court was without jurisdiction.

I.A. First, the court lacked *in rem* jurisdiction over the defendant property. Without "exclusive custody and control over the property," courts lack "jurisdiction … to adjudicate rights in it that are binding against the world," and there is no Article III "case or controversy." *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 955, 964 (4th Cir. 1999) ("*Titanic I*"). Yet all the property here is located overseas—far beyond the district court's control. And even assuming, *arguendo*, that "constructive control" could itself support *in rem* jurisdiction, such control is absent here: the foreign courts have not adhered to the district court's restraints on the property.

I.B. Even if the court had exclusive control over the property, however, the Constitution requires minimum contacts between the defendant property and Virginia. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 224 (4th Cir. 2002). To confer jurisdiction in the Internet context, the defendant must have had "the manifest intent of engaging in business or other interactions within [Virginia] in particular"; acts such as "set[ting] up a semi-interactive website that was accessible from [Virginia]," "maintain[ing] a relationship with [a Virginia] web hosting company," and receiving financial contributions are insufficient. *Carefirst*

of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 398, 400-01 (4th Cir. 2003). The only contacts alleged by the government are insufficient.

II. The district court also erred legally and factually in deciding that the fugitive disentitlement statute, 28 U.S.C. §2466, applies to these Claimants.

II.A. First, in conflict with the D.C. Circuit's decision in *United States v. $6,976,934.65, Plus Interest*, 554 F.3d 123 (D.C. Cir. 2009), the district court refused to require the government to show that Claimants' principal intent in remaining in their homes was "to avoid criminal prosecution." 28 U.S.C. §2466(a)(1). Instead, the court simply required a showing that Claimants had a "specific intent" not to travel to the U.S. to participate in the proceedings. But since the statute *separately* requires the government to show both notice and that the claimant declined "to enter or reenter the United States to submit to its jurisdiction," the district court's reading would nullify the statute's requirement that the Claimants acted "to avoid criminal prosecution." *Id*.

II.B. Second, even under a broader reading of §2466, the government failed to show that Claimants intended to avoid prosecution. These Claimants have never been U.S. citizens or residents. They live and work abroad, and have many reasons to remain with their families and businesses—reasons that apply regardless of any criminal action.

II.C. Third, even if the government had shown an intent to avoid prosecution, the district court abused its discretion in disentitling Claimants. "[F]ugitive disentitlement is a severe sanction that courts should not lightly impose" (*Mastro v. Rigby*, 764 F.3d 1090, 1096 (9th Cir. 2014) (quotations omitted)), yet the court below rushed to apply it at the threshold, striking Claimants' initial submissions.

III. Interpreting §2466 to permit the government to take Claimants' property without a hearing on the merits would violate the Constitution.

III.A. First, "[t]he fundamental requirement of due process is the opportunity to be heard." *Doolin Sec. Sav. Bank, FSB v. FDIC*, 53 F.3d 1395, 1402 (4th Cir. 1995) (quotation omitted). Under the decision below, however, Claimants will never receive a hearing on the merits of the government's forfeiture case.

Recognizing that due process ordinarily guarantees a person's "right to a hearing to contest the forfeiture of his property," 140 years of Supreme Court precedents strictly limit the "fugitive disentitlement" doctrine to convicted criminals who escape from custody after appealing their conviction. *Degen v. United States*, 517 U.S. 820, 822-23 (1996). Those circumstances are absent here. This action was initiated by the government, not Claimants. They have not been convicted of anything. Their non-appearance in the criminal case does not affect the enforceability of any judgment here, where they can defend their property rights through counsel. Nor did Claimants flee—they simply remained in their homes overseas.

For that, they were deprived of all ability to contest the government's taking of their property. But the Supreme Court "ha[s] held it unconstitutional to use disentitlement similar to this." *Id*. at 828. And if §2466 somehow authorized disentitlement here, then the Court would need to invalidate that application of the statute. Congress cannot "enact a statute conferring the right to condemn" property "without any opportunity whatever of being heard." *Hovey v. Elliott*, 167 U.S. 409, 417 (1897); *see also McVeigh v. United States*, 78 U.S. 259, 267 (1870); *United States v. $40,877.59 in U.S. Currency*, 32 F.3d 1151, 1152 (7th Cir. 1994).

III.B. Further, the court's disentitlement of Claimant Echternach violates the Supremacy Clause, which provides that a later-enacted treaty trumps any statute that conflicts with the treaty. Echternach is protected by the German Mutual Legal Assistance Treaty, which prohibits the courts from imposing penalties or other coercive measures for a failure to answer a summons.

IV. Finally, the court erred in holding that Mona Dotcom lacked standing to assert claims to most of the defendant property. The New Zealand courts have already held that she "has an interest in Mr. Dotcom's restrained property under the Property (Relationships) Act 1976." JA-1619. This interest suffices to confer Article III standing.

ARGUMENT

I. The district court lacked *in rem* jurisdiction.

The district court erred in concluding that it had *in rem* jurisdiction. Without exception, the defendant property is located in foreign countries, outside the district court's exclusive jurisdiction. Under this Court's precedents—which the court below never analyzed—district courts may exercise *in rem* jurisdiction over such property only if two prerequisites are satisfied.

First, "[o]nly 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" and therefore satisfy Article III's "case or controversy" requirement. *Titanic I*, 171 F.3d at 964. But the property here is in New Zealand and Hong Kong—outside the district court's control.

Second, under "[t]he Due Process clause," "a federal court [may] exercise personal jurisdiction over a defendant only if that defendant has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"—a rule that equally "applies to actions *in rem*." *Harrods*, 302 F.3d at 224 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The district court reasoned that Claimants "allegedly reproduced and stored infringing files on … servers in Virginia" (JA-1963), but this Court has repeatedly dismissed "as 'de minimis' the level of contact

created by the connection between an out-of-state defendant and a web server located within a forum"—even where a website receives payments from users in the State. *Carefirst*, 334 F.3d at 402.

The district court thus lacked *in rem* jurisdiction.

A. The court lacked exclusive control over the defendant property.

1. "An *in rem* action … depends on the court's having jurisdiction over the *res* … named as defendant." *Titanic I*, 171 F.3d at 964. Without "exclusive custody and control over the property," the court cannot do what an *in rem* action requires—"adjudicate rights in [the property] that are binding against the world." *Id.* And without power to "bind others who may have possession" (*id.*), "no case or controversy exists" and any forfeiture order is an unconstitutional advisory opinion. *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 435 F.3d 521, 530 (4th Cir. 2006) ("*Titanic II*"); *see Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants" (quotations omitted)).

Thus, to have jurisdiction of an *in rem* action, the court must have either "actual or constructive possession" of the property. *Titanic I*, 171 F.3d at 964. Here, however, the district court did not have actual possession of the property. Nor could it have had constructive possession, as it is undisputed that the court did not have even "a portion of [the property] within its jurisdiction." *Id.* at 967.

Although "[t]he ultimate resolution" of a question involving property outside the court's jurisdiction "could only occur" when the property is "brought within the [court's] jurisdiction," this Court has recognized "constructive" jurisdiction in limited circumstances. *Id.* In *Titanic I*, the Court held that constructive jurisdiction of the *Titanic* wreck—located in international waters—was appropriate provided the court had "a portion of [the wreck] within its jurisdiction." *Id*.

This Court has refused, however, "to define a constructive *in rem* jurisdiction over personal property located within the sovereign limits of other nations." *Titanic II*, 435 F.3d at 530. Thus, the court in *Titanic II* "did not have constructive *in rem* jurisdiction over" artifacts "separated from the wreck and taken to France," "because constructive *in rem* jurisdiction applied only to the *Titanic* wreck lying in international waters." *Id.* After all, "the limits of *in rem* jurisdiction, as traditionally understood, are defined by the effective limits of sovereignty," and "Article III … do[es] not amount to an attempt by the United States to extend its sovereignty over" foreign property. *Titanic I*, 171 F.3d at 965, 961. Because "the assets [here] are located either in Hong Kong or New Zealand" (JA-1954), the district court had neither actual nor constructive possession of them, and lacked *in rem* jurisdiction.

2. It is no answer to say that the district court had constructive possession because a foreign court *might* enforce a forfeiture order entered below, once presented for foreign registration. As discussed, this Court refuses "to define a con-

structive *in rem* jurisdiction over personal property located within the sovereign limits of other nations." *Titanic II*, 435 F.3d at 530. And although other courts deciding forfeiture cases have found constructive jurisdiction where the government could "demonstrat[e] that the [foreign] government will turn over at least a portion of the seized funds to the United States" (*United States v. All Funds on Deposit in any Accounts Maintained in Names of Meza or De Castro*, 63 F.3d 148, 154 (2d Cir. 1995)), those cases are inapplicable here.

First, this Court has never adopted this speculative view of *in rem* jurisdiction. And for good reason—U.S. courts have no power to bind other countries' courts. Constructive possession generally exists only when the court "ha[s] the power to exercise dominion and control over an item." *United States v. Penniegraft*, 641 F.3d 566, 572 (4th Cir. 2011) (quotations omitted).

What matters to *in rem* jurisdiction is not *the Executive's* ability to recover assets abroad—let alone by lobbying foreign authorities to cooperate—but *the court's* power over those assets. United States courts lack such power. And "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

Second, there is no reason to adopt this novel theory of constructive possession here, as it is doubtful that the foreign courts would enforce this Court's forfei-

ture judgment—especially if based on fugitive disentitlement. Courts that recognize constructive possession assign the government the "burden of demonstrating that the [foreign] government will turn over at least a portion of the" property "to the United States." *Meza*, 63 F.3d at 154. In *Meza*, the Second Circuit found constructive possession only because "[e]very action of the British law enforcement officials has been in direct response to requests from federal authorities," reflecting a "history of demonstrated cooperation" and providing "assurance that a judgment of forfeiture … would be enforced in England." *Id.* at 153-54.

Here, by contrast, the government cannot demonstrate that the New Zealand or Hong Kong courts will necessarily turn over the property. As the district court acknowledged, these courts "may or may not choose to register an order of forfeiture issued by this court." JA-1982. Most likely, they would not.

Indeed, the New Zealand courts recently *enjoined* "the Commissioner of Police" from "apply[ing] to register the [U.S.] forfeiture orders," because "authorising the registration application to proceed" may deprive Claimants "of any ability to defend the extradition or to pursue their appeals against the forfeiture order." JA-2220. Emphasizing that "the consequences of registration … may well be more permanent and more serious than" "they were understood to be by Judge O'Grady," the New Zealand court explained that "a request for assistance" that "require[s] the Central Authority to ride roughshod over New Zealand's own laws

or legal norms" is unenforceable under domestic law. JA-2199, 2207. As the court further explained, New Zealand "law knows no principle of fugitive disentitlement"—"[s]uch harshness has no place in [New Zealand] law." JA-2197 (quotations omitted). Thus, the court held that Claimants presented a "substantial position" that "authorising the registration and enforcement of orders made in what New Zealand would regard as a breach of natural justice would (necessarily) involve unlawful steps." JA-2199, 2220.

Moreover, nothing in this case's history suggests that the foreign courts would necessarily follow U.S. forfeiture orders here. By the government's own account, the foreign courts are *not* adhering to the district court's orders, and "[m]illions of dollars in restrained assets have already been released." Dkt. 48-2 at 1. Even before the forfeiture order (but after the assets were restrained), nearly half of the restrained assets in New Zealand were released. *Supra* at 6-8. Hong Kong likewise released "restrained" assets to cover Claimants' living and legal expenses. *Id.* And in repeated orders *after* the court below entered its forfeiture order and the U.S. government sought to register it, the New Zealand court has released Kim Dotcom's assets to him as necessary to satisfy all legal expenses and reasonable living expenses. *Supra* at 7. Obviously, these orders conflict with the judgment below, which adjudged the assets forfeited. Put simply, the district court lacks constructive control over the property, and thus lacks *in rem* jurisdiction.

3. Although some courts have held that the foreign country's "compliance and cooperation determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders" (*United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 in Banco Espanol de Credito, Spain*, 295 F.3d 23, 27 (D.C. Cir. 2002)), that extreme reading of §1355 cannot be squared with either the statute's text or Article III's "case or controversy" requirement.

Section 1355 (*see* Addendum A-1) provides for subject-matter jurisdiction, venue, and service of process in forfeiture cases involving foreign property. Subsection (a) confers "original jurisdiction" over forfeiture actions. Subsection (b) provides for venue of a forfeiture proceeding involving property "located in a foreign country" "in the United States District court for the District of Columbia," "the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred," or "any other district where venue for the forfeiture action or proceeding is specifically provided." And subsection (d) provides that "[a]ny court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property."

As the Second Circuit held in *Meza*, nothing in §1355 suggests "that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdic-

tion." 63 F.3d at 152. "[I]t long has been understood that a valid seizure of the res is a prerequisite to the initiation of an *in rem* civil forfeiture proceeding." *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 84 (1992) (emphasis omitted). Thus, "to institute and perfect proceedings *in rem*," "the thing should be actually or constructively within the reach of the Court." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 57 (1993) (quoting *The Brig Ann*, 13 U.S. 289, 291 (1815)). Section 1355 does not purport to alter this longstanding constitutional requirement. Nor could it.

Some courts have seized on subsection (d)'s reference to "[a]ny court with jurisdiction over a forfeiture action pursuant to subsection (b)" as evidence that the statute abrogates settled *in rem* jurisdictional principles. *E.g.*, *Banco Espanol*, 295 F.3d at 26. But "jurisdiction over a forfeiture *action*" refers to subject-matter jurisdiction—not *in rem* jurisdiction, which is concerned with jurisdiction over the *res*. The reference to subsection (b) merely clarifies that an appropriate court—one with subject-matter jurisdiction and where venue is proper—can serve process nationwide. "[B]y allowing nationwide service of process," "§1355(d) clearly provides districts courts with the required control over property located within the United States." *Meza*, 63 F.3d at 152. But "[a]bsent any degree of control over property located in a foreign country," "a district court's forfeiture order directed against such property would be wholly unenforceable." *Id.* Section 1355's text

does not alter the settled rule that, to exercise *in rem* jurisdiction, courts must have actual or constructive possession of the *res*.

4. If there were any doubt in this regard, this Court would need to construe §1355 "to avoid serious constitutional doubts." *United States v. Joshua*, 607 F.3d 379, 388 n.5 (4th Cir. 2010). Without actually or constructively possessing the foreign property, the district court would have "no power to enforce its decree." *Brig Ann*, 13 U.S. at 291. Indeed, according to the courts that have apparently jettisoned the control prerequisite to *in rem* jurisdiction, a U.S. court would even have jurisdiction over property located in countries that expressly refuse to enforce U.S. forfeiture orders. This result would implicate a "traditional, theoretical concern[] of jurisdiction: enforceability of judgments." *Republic Nat'l Bank*, 506 U.S. at 87.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quotations omitted). Article III restricts the federal "judicial power" to "'cases' and 'controversies.'" *Id.* at 95. To "constitute a case or controversy," the parties' rights must "be directly affected to a specific and substantial degree by the [court's] decision," which must be "a definitive adjudication of the disputed" issue—one not "subject to revision by some other and more authoritative agency." *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 261-62 (1933).

Any decision here, however, would be "subject to revision by" foreign courts. Thus, interpreting §1355 to abrogate settled limits on *in rem* jurisdiction and to create jurisdiction even where the district court lacks actual or constructive possession of the property would put the courts in the position of issuing forbidden advisory opinions that lack any binding effect. Because "[t]he dignity of a court derives from the respect accorded its judgments" (*Degen*, 517 U.S. at 828), this Court should not interpret §1355 in that manner.

In sum, because the district court had neither actual nor constructive control of the property at issue, it lacked *in rem* jurisdiction. Even assuming that constructive control could derive from foreign cooperation, the government has not shown a likelihood of foreign enforcement. Because jurisdiction over the defendant "is an essential element of … jurisdiction," "the court [here] is powerless to proceed to an adjudication." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quotations omitted). The judgments below should be vacated and the case dismissed.

B. The defendant property lacks minimum contacts with Virginia.

Even if the district court had exclusive control over the property, it would still lack *in rem* jurisdiction given the lack of minimum contacts between the property and Virginia. The district court concluded otherwise in a footnote, asserting that "§1355(b)(2) only allows a forfeiture action concerning property located in a foreign country to be brought in a district court where any of the acts giving rise to

the forfeiture occurred," and that this requirement "serves much the same function as the minimum contacts test." JA-1964 n.10. The court erred.

The minimum contacts requirement "applies to actions *in rem*." *Harrods*, 302 F.3d at 224 (brackets omitted). Because district courts may only "exercise … *in rem* jurisdiction to the same extent as courts in the state where the district court is located," the issue is whether the *res* has "sufficient contacts with the Commonwealth of Virginia to justify the exercise of *in rem* jurisdiction by the courts of Virginia." *Id*. at 224. Relevant factors include: "(1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in [Virginia]; (2) whether the plaintiffs' claims arise out of those activities directed at [Virginia]; and (3) whether the exercise of personal jurisdiction would be constitutionally 'reasonable.'" *Carefirst*, 334 F.3d at 397.

The district court erred in assuming that minimum contacts existed so long as "some act giving rise to the forfeiture" allegedly occurred "within the judicial district." JA-1964 n.10. For a court "to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a *substantial connection* with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added). First, "the relationship must arise out of contacts that the defendant *himself* creates with the forum State." *Id.* at 1122 (quotations omitted). Second, the "'minimum contacts' analysis looks to the defendant's contacts with the forum

State itself, not the defendant's contacts with persons who reside there." *Id.* Applying these principles, this Court and others have consistently held that an entity's web-mediated transactions with a State's residents do not themselves support personal jurisdiction. *E.g.*, *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 715 (4th Cir. 2002) (no jurisdiction over a website operator that "did not direct its electronic activity specifically at any target in Maryland").

In *Carefirst*, for example, minimum contacts were lacking between Maryland and a defendant that "set up a semi-interactive website that was accessible from Maryland" and "maintained a relationship with [a] Maryland web hosting company." 334 F.3d at 398. Although the website "ma[de] it possible for a user to exchange information with the host computer" and accepted financial contributions from users, "it did not … direct electronic activity into Maryland with the manifest intent of engaging in business or other interactions within that state in particular." *Id.* at 400-01. Instead, because it was "generally accessible" to all users, "the website fail[ed] to furnish a Maryland contact adequate to support personal jurisdiction." *Id.* at 401 (collecting similar cases); *see also, e.g.*, *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (no jurisdiction over producer of Internet content where its website did not "manifest an intent to target and focus on Virginia readers"); *Burleson v. Toback*, 391 F. Supp. 2d 401, 415 (M.D.N.C. 2005) (where the defendant's Internet business accepted advertising payments from the

forum State (North Carolina), no minimum contacts existed, as the site "d[id] not indicate a manifest intent to target North Carolina" but rather "individuals interested in miniature horses all over the world").

Moreover, "the level of contact created by the connection between an out-of-state defendant and a web server located within a forum" is "de minimis" and not "sufficient to ground specific jurisdiction." *Carefirst*, 334 F.3d at 402. "It is unreasonable to expect that, merely by utilizing servers owned by a Maryland-based company, [the defendant] should have foreseen that it could be haled into a Maryland court." *Id.* So too here.

The government has not alleged any specific connection between the overseas assets here and any alleged criminal acts that happened in Virginia, or indeed elsewhere in the United States. And the government's vague allegations of transactions involving an unspecified amount of business with an unspecified number of consumers in "the Eastern District of Virginia and elsewhere" (JA-34)—some unspecified fraction (possibly none) of whom may have exchanged infringing copyrighted files via the Megaupload website—cannot provide the "minimum contacts" necessary for a federal court in Virginia to exercise jurisdiction over all of the defendant assets located overseas. Neither can the mere use of "a web server located within [Virginia]." *Carefirst*, 334 F.3d at 402. The government has not shown "concrete evidence of online exchanges between [Megaupload] and [Virginia] res-

idents" sufficient to establish "the manifest intent of engaging in business or other interactions within [Virginia] in particular." *Id.* at 401.

Thus, this case should be dismissed for lack of *in rem* jurisdiction.

II. The district court erred in finding that the fugitive disentitlement statute applies and disentitles Claimants from defending their rights to millions of dollars of property.

Nor can the district court's application of the fugitive disentitlement statute withstand scrutiny. Establishing fugitive disentitlement under §2466 requires the government to prove five elements, only the fifth of which is at issue here: "(1) a warrant or similar process has issued in a criminal case for the claimant's apprehension; (2) the claimant had notice or knowledge of the warrant or process; (3) the criminal case is related to the forfeiture action; (4) the claimant is not confined or otherwise held in custody in another jurisdiction; and (5) the claimant has deliberately avoided criminal prosecution by leaving the United States, declining to enter or reenter the country, or otherwise evading the criminal court's jurisdiction." *$6,976,934.65*, 554 F.3d at 128. Because a motion to strike is akin to a motion "to dismiss the claim" or for summary judgment (JA-1966-67), all reasonable inferences must be drawn against the government. *$6,976,934.65*, 554 F.3d at 132. And even if every statutory requirement is met, "whether to order disentitlement" is discretionary. *Collazos*, 368 F.3d at 198.

Striking the claims here based on fugitive disentitlement was improper for multiple reasons. First, the district court applied the wrong standard in concluding that Claimants intended "to avoid criminal prosecution" under §2466(a)(1). Second, under any standard, the government failed to show intent. Finally, even if the government had shown intent to avoid prosecution, the court abused its discretion in disentitling Claimants on these facts.

A. A desire to avoid prosecution must be Claimants' principal intent.

First, the district court applied the wrong legal standard in analyzing Claimants' intent in remaining abroad. Section 2466(a)(1) requires the government to prove that the Claimants evaded the court's jurisdiction "in order to avoid criminal prosecution." This Court has not addressed that requirement. But as the D.C. and Sixth Circuits have held, the statute's "plain language" "require[s] the government to show that avoiding prosecution is *the* reason [the defendant] has failed to enter the United States." *$6,976,934.65*, 554 F.3d at 132; *accord United States v. Salti*, 579 F.3d 656, 664 (6th Cir. 2009). "[M]ere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy the statute"; rather, "[t]he alleged fugitive must have 'declined to enter or reenter' the country in order to avoid prosecution." *$6,976,934.65*, 554 F.3d at 132. Thus, the desire to avoid prosecution must be at least the principal, if not the sole, reason for Claimants' decision to remain overseas.

Citing Second Circuit authority, however, the district court refused to require that avoiding prosecution was Claimants' "sole, principal, or dominant intent." JA-1968 (quoting *United States v. Technodyne LLC*, 753 F.3d 368, 383 (2d Cir. 2014)). Instead, the court held that any form of "specific intent," analyzed under "the totality of the circumstances," satisfies the statute. *Id.*

The statute's text cannot be squared with a mere "specific intent" requirement. Generally, "'specific intent' means the intent to accomplish the precise act with which one is later charged." *Technodyne*, 753 F.3d at 383 (quotations, brackets omitted). Thus, in the context of §2466 and claimants residing abroad, proving "specific intent" requires only a showing that the claimants (1) had notice of the U.S. proceeding yet (2) failed to travel to the U.S. to participate. But the statute *separately* requires the government to show both that the claimant (1) had "notice or knowledge" of the proceeding, and (2) failed "to enter or reenter the United States to submit to its jurisdiction." 28 U.S.C. §2466(a)(1).

In other words, the "specific intent" reading nullifies the statutory requirement that the Claimants acted "in order to avoid criminal prosecution." *Id.* "[B]y requiring that … evasion must have been '*in order to* avoid criminal prosecution,'" "[t]he plain language of §2466 mandates [a] showing" that the desire to avoid prosecution was at least the claimant's *principal* intent in remaining abroad. *$6,976,934.65*, 554 F.3d at 132 (emphasis added). Any other reading would vio-

late "one of the most basic interpretive canons[:] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotations, brackets omitted).

Notably, even the Second Circuit in *Technodyne* appeared to demand more to show intent than did the court below. In distinguishing *$6,976,934.65*, the Second Circuit cited the D.C. Circuit's statement that the criminal defendant "'did not wish to reenter the United States *regardless* of any pending criminal charges'"—such that "the government had not shown that [the defendant], in remaining outside of the United States in and after 2006, had *any* intent to avoid criminal prosecution." 753 F.3d at 384 (quoting *$6,976,934.65*, 554 F.3d at 132)). Here too, the government should at least be required to show intent in a bottom-line sense—*i.e.*, that these Claimants would have come to the United States but for the indictment and their intent to avoid it. Yet no such showing was required or made below.

B. Claimants lacked the requisite intent to avoid prosecution.

Second, under any reasonable formulation of the intent standard, the government failed to show that Claimants remained in their homes "to avoid criminal prosecution." 28 U.S.C. §2466(a)(1).

1. To find the requisite intent, the district court improperly drew all inferences in favor of the government (the moving party) and principally relied on

Claimants' opposition to extradition. *E.g.*, JA-1973 ("Batato and Ortmann … are opposing extradition"; "Van der Kolk is obviously opposing extradition"), 1976 (Echternach "has remained in Germany in order to avoid extradition"), 1977 ("Bencko is deliberately refusing to travel outside of Slovakia in order to avoid the risk of extradition"). But Claimants have a perfect "legal right" to "oppos[e] the government's request for extradition," and their opposition to extradition does not explain *why* they have not entered the United States. *United States v. Any & All Funds on Deposit in Account No. 40187-22751518*, 2015 WL 1546350, *3 (D.D.C. Apr. 6, 2015); *see also United States v. Bohn*, 2011 WL 4708799, *2 (W.D. Tenn. June 27, 2011). That Claimants oppose extradition simply confirms that they (1) have notice and (2) refuse to enter the United States. It does not prove intent.

Moreover, Claimants had legitimate reasons to oppose extradition. They have lived their entire lives overseas, are employed overseas, and ran their companies overseas. Claimants' businesses, like their families and residences, are all located abroad. As explained in Claimants' uncontroverted declarations, by remaining at home, Claimants are simply continuing their pre-prosecution status quo—which they have many valid reasons to continue. *E.g.*, JA-559 (Batato founded a business, married, and started a family in New Zealand); JA-557 (Dotcom resided,

owned a home, worked, and founded a political party in New Zealand);[2] JA-561 (Ortmann's "long-term professional plans and commitments … include[] working as Systems Architect, for Mega Limited, a New Zealand company in Auckland"); JA-563 (van der Kolk worked and resided in New Zealand and planned to expand his family there, before indictment); JA-564 (Echternach works in Germany, where he is a citizen); JA-566 (Bencko works in Slovakia, where he is a citizen).

The government's actions in Claimants' *home* countries have given Claimants other legitimate reasons to remain there. For instance, the government's actions in New Zealand would "allow[] NZ authorities to sell any seized assets associated with Megaupload"—unless Claimants are there to contest that result. Darren Palmer & Ian J. Warren, *Global Policing and the Case of Kim Dotcom*, 2(3) Int'l J. Crime Just. & Soc. Democracy 105, 108 (2013). Further, as Echternach's German counsel has explained, Echternach's "absence [from Germany] could lead to" a "default judgment," or potentially even "a German arrest warrant" in proceedings related to these charges. JA-1975 (quoting JA-1434). According to the district court, this uncontroverted testimony "fall[s] short of supporting an argument that Echternach is in custody or confinement in Germany." *Id*. But whether a claimant is "held in custody in another jurisdiction" is a separate issue from his

[2] Even the district court acknowledged that Dotcom "has other reasons for remaining in New Zealand besides avoiding criminal prosecution." JA-1971.

intent in remaining abroad. *$6,976,934.65*, 554 F.3d at 128. And the fact that Echternach fears arrest in Germany if he leaves amply demonstrates that his intent is not to avoid prosecution.

2. The district court also cited certain statements of Kim Dotcom on social media "indicat[ing] that he is only willing to face prosecution in this country on his own terms," and would want to retain access to enough "money to pay for a defence … and funds to support [himself and his co-defendants] and their families." JA-1970, 1972. But that does not remotely establish that his intent—let alone his motivating intent—is to avoid prosecution.

3. Further, it makes no sense to read the fugitive disentitlement statute to apply based on the exercise of a right affirmatively protected by international agreements signed by the United States. Under the *Charming Betsy* canon of interpretation, U.S. statutes must be construed "consistent with our obligations under international law." *Kofa v. INS*, 60 F.3d 1084, 1090 (4th Cir. 1995) (citing *Murray v. The Charming Schooner Betsy*, 6 U.S. 64, 118 (1804)). Indeed, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Charming Betsy*, 6 U.S. at 118.

Here, the United Nations Convention Against Transnational Organized Crime (UNCTOC), ratified by the United States in 2005 and to which New Zealand is a party, provides that "[a]ny person regarding whom [extradition] proceed-

ings are being carried out … shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in … which that person is present." 2225 U.N.T.S. 209, art. 16, § 13 (JA-767). Moreover, the United States-New Zealand Treaty on Extradition provides that "the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by" "the laws of the requested Party." 22 U.S.T. 1, art. IX (1970). Thus, binding treaties guarantee the New Zealand Claimants their right to contest extradition.

Yet, as the New Zealand court recently recognized, "[t]he application of the fugitive disentitlement doctrine to a person who is exercising a bi-laterally recognised right to defend an eligibility hearing, with the result that he is deprived of the financial means to mount that defence, is to put that person on the horns of a most uncomfortable and" seemingly "unconstitutional dilemma." JA-2199-200. Worse, after using the extradition proceedings to obtain default judgments without a hearing on the merits, the United States is citing those judgments to support the merits of its foreign extradition requests. In short, holding §2466's intent requirement satisfied merely because a person is exercising his domestic rights in pending extradition proceedings is fundamentally inconsistent with both the UNCTOC and the United States-New Zealand extradition treaty. It is implausible that Congress, in enacting that provision, meant to impair these treaty-based rights.

4. Courts in similar circumstances have consistently refused to find an intent to avoid prosecution. In *$6,976,934.65*, for example, the D.C. Circuit considered the intent of the majority shareholder of a foreign corporation running a web-based business in remaining abroad, where he had lived before being indicted. 554 F.3d at 125. Citing the text of §2466, the court emphasized that the claimant's "mere notice" and "a refusal to enter the United States" do "not satisfy the statute." *Id.* at 132. Likewise, the claimant's "renunciation of his U.S. citizenship is insufficient." *Id.* Indeed, although the claimant appeared on television and "acknowledge[d] the pending criminal complaint and that he would likely be arrested if he returned to the United States," the court emphasized that this "video also suggests that [the claimant] did not wish to reenter the United States regardless of any pending criminal charges." *Id.* In particular, his statement, "I don't mind not going back to the States" sufficed to defeat intent to avoid prosecution—particularly since he was entitled to the benefit of all reasonable inferences. *Id.*

A recent decision involving similar facts held that §2466 "is inapplicable" where a foreign resident "who has never lived in the United States and was outside the country when the indictment was issued" simply "moved to specially appear" and "contested extradition." *Account No. 40187-22751518*, 2015 WL 1546350, *3-4. As the court recognized, the claimant was not "made a fugitive by opposing the government's request for extradition in the criminal case or requesting a stay,"

for "[s]he has a legal right to do both." *Id*. at *3. Thus, "[w]ithout demonstrating that [the claimant] had intended to return to the United States before she learned of the indictment, the mere fact that she has been to this country in the past does not establish that she is refusing to return in order to escape criminal liability," and §2466 does not apply. *Id.* at *4. As other cases confirm, that reasoning supports reversal here.[3]

Because Claimants presented numerous legitimate reasons for remaining in the countries where they live and work, and the government presented no evidence that they intend to avoid prosecution, the judgments below should be vacated.

C. The district court abused its discretion in applying disentitlement.

Even if §2466's prerequisites had been satisfied, the district court should have exercised its discretion not to apply the statute. "[F]ugitive disentitlement is a severe sanction that courts should not lightly impose." *Mastro*, 764 F.3d at 1096 (quotations omitted). Moreover, "[a] non-fugitive foreign defendant"—especially one who has "surrendered himself to the authorities in the country in which he re-

[3] *E.g.*, *United States v. All Funds on Deposit at Old Mut. of Bermuda Ltd.*, 2014 WL 1758208, *6-7 (S.D. Tex. May 1, 2014) (no intent where the claimant "has always lived in Mexico" and there was "no evidence regarding whether [the claimant] regularly traveled to the United States prior to his indictment"); *United States v. The Pub. Warehousing Co. K.S.C.*, 2011 WL 1126333, *4 (N.D. Ga. Mar. 28, 2011) (no intent where the claimant "presented evidence that it remains outside the United States because it has no reason to be here"); *Bohn*, 2011 WL 4708799, *9 (no intent where the claimant was "in Vanuatu long before he was charged … and there is no evidence that he ever left the United States to avoid prosecution").

sides and in which his relevant conduct physically occurred"—"is simply in a different position from that of a domestic defendant seeking more ordinary relief." *In re Hijazi*, 589 F.3d 401, 409-10 (7th Cir. 2009).

Particularly given the government's weak showing of an intent to avoid prosecution—as opposed to an intent to remain with their families, homes, and businesses—there is no reason to disentitle Claimants. Instead, the case should proceed in the ordinary course: The government must prove its case in adversarial litigation, with Claimants represented by counsel. Because "[t]he dignity of a court" and "respect accorded its judgments" are "eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits," there is no reason to apply the "most severe" "sanction of disentitlement" here. *Degen*, 517 U.S. at 828.

D. At a minimum, this Court should construe the fugitive disentitlement statute to avoid the due process violations that would likely result from the government's reading of the statute.

Finally, as explained below, striking the claims here violates due process by depriving Claimants of their property without a hearing. At a minimum, the "serious constitutional doubts" about that result warrant reading §2466 to "avoid" applying disentitlement here. *Joshua*, 607 F.3d at 388 n.5; *see Daccarett-Ghia v. CIR*, 70 F.3d 621, 629 n.9 (D.C. Cir. 1995) (reversing disentitlement to avoid the "constitutional issues … implicated by dismissal").

III. Application of fugitive disentitlement violates the Constitution.

A. 28 U.S.C. §2466 infringes Claimants' due process rights.

Reversal is independently warranted because the decision below stripped Claimants of their property without due process. "The fundamental requisite of due process of law is the opportunity to be heard" (*Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quotations omitted)), and that includes the opportunity to "present every available defense" (*Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Thus, due process ordinarily guarantees a person's "right to a hearing to contest the forfeiture of his property." *Degen*, 517 U.S. at 822. Under limited circumstances, the Supreme Court has allowed the use of fugitive disentitlement to dismiss a fugitive's direct criminal appeal. But it has repeatedly refused to expand this harsh doctrine further—and has rejected its use in civil forfeiture cases. *Degen*, 517 U.S. at 828.

Nonetheless, citing §2466, the district court deprived Claimants—foreign citizens who are not "fugitives" in any sense of the word—of all ability to contest the government's seizure of their property. Disentitlement here was not limited to an appeal (which, unlike a trial, is not a constitutional necessity). Rather, based on Claimants' decisions to remain in their foreign homes and not appear in a *different* case, the court eviscerated Claimants' right to defend themselves against *the government's* action. Without considering Claimants' motion to dismiss—let alone providing an adversarial hearing—the Court disentitled them from defending their

undisputed property interests. Thus, by cobbling together conclusory allegations, the government got to take Claimants' property—forever.

Claimants can never challenge the merits of the government's case. Even if Claimants eventually appear for the criminal trial and prevail, it will be too late—the forfeiture judgments will be final and the government can keep the property, without proving forfeitability. This cannot be the law. Depriving Claimants of all opportunity to be heard in this government-initiated suit violates due process.

1. Based on due process concerns, the Supreme Court has narrowly circumscribed fugitive disentitlement.

"The fugitive disentitlement doctrine began as an equitable doctrine of criminal appellate procedure … used to dismiss the appeal of a convicted criminal who became a fugitive during the pendency of his appeal." *$40,877.59*, 32 F.3d at 1152. Thus, the doctrine was initially limited to direct appeals by criminal defendants who "purposefully escaped from lawful custody." *United States v. Snow*, 748 F.2d 928, 930 (4th Cir. 1984). Indeed, the Supreme Court has *never* approved the application of fugitive disentitlement outside of these confines:

- A criminal appeal
- where the defendant-appellant had been convicted in the same proceeding being appealed, and
- the defendant-appellant sought affirmative relief but subsequently escaped or jumped bail.

See Smith v. United States, 94 U.S. 97 (1876); *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Allen v. Georgia*, 166 U.S. 138, 141 (1897); *Eisler v. United States*, 338 U.S. 189, 190 (1949); *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970); *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 242 (1993).

It is not mere happenstance that the fugitive disentitlement doctrine has been strictly limited. The Court's decisions sanctioning the doctrine have taken care to respect due process and to apply the "most severe" "sanction of disentitlement" only as an unavoidable last resort. *Degen*, 517 U.S. at 828.

First, because "a convicted criminal has no constitutional right to an appeal" (*Goeke v. Branch*, 514 U.S. 115, 119 (1995)), having an appeal dismissed does not violate any constitutional right. Second, because "a defendant's flight operates as an affront to the dignity of the court's proceedings," disentitlement may be appropriate—but only where the defendant's conduct has "an impact on the appellate process sufficient to warrant an appellate sanction." *Ortega-Rodriguez*, 507 U.S. at 246, 249. Third, where a defendant flees "during the pendency of his [own] appeal," that flight is "tantamount to waiver" of that appeal. *Id.* at 240. Fourth, and most importantly, the traditional rationale for disentitlement is that the appellate court has "no assurance that any judgment it issued would prove enforceable" against "an escaped defendant." *Id.* at 239-40.

Some lower courts have "expanded the doctrine, using it in civil suits against a fugitive from a separate criminal case who seeks affirmative relief," or "in civil forfeiture proceedings to bar fugitives from defending against the confiscation of their property." *$40,877.59*, 32 F.3d at 1153. But in cases spanning 140 years, the Supreme Court has consistently refused to expand the doctrine beyond the confines of a direct criminal appeal initiated by a defendant who then flees.

For instance, in *McVeigh v. United States*, 78 U.S. 259 (1870), "the Supreme Court ruled that a[Confederate rebel] had the right to defend his property in a forfeiture proceeding initiated by the government." *$40,877.59*, 32 F.3d at 1153-54. In particular, the Court held that "the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken"—which "in effect den[ied] the respondent a hearing"—simply because he remained in Richmond and allegedly in active rebellion. 78 U.S. at 267. Provided the claimant could be sued in that court, he had the right to "defend there": "[t]he liability and the right are inseparable." *Id*. Indeed, the Court emphasized that "[a] different result would be a blot upon our jurisprudence and civilization" and "contrary to the first principles of the social compact." *Id*.

Likewise, in an even more thorough rejection of disentitlement outside of direct criminal appeals, the Supreme Court in *Hovey* held that it violated due process to "strike [a defendant's] answer" and to deny his right to defend his property as

"punish[ment] for contempt." 167 U.S. at 413. As the Court reiterated, "[t]he fundamental conception of a court of justice is condemnation only after hearing." *Id.* at 413-14. Notice is insufficient, as "notice is only for the purpose of affording the party an opportunity of being *heard*." *Id.* at 415 (emphasis added). Tracing this principle from Roman law to the Magna Carta, Blackstone, and the Fifth Amendment, the Court explained that "due process" requires "a right to be heard in one's defense." *Id.* at 417. Finding no "plainer illustration … of taking property of one and giving it to another without hearing," the Court held that defendants could not be disentitled for contempt. *Id.* at 419, 447.

More recently, in *United States v. Sharpe*, 470 U.S. 675 (1985), the Supreme Court refused to disentitle a defendant whose conviction had been reversed by this Court and who became a fugitive after certiorari was granted. Proceedings initiated by the government and those initiated by the fugitive are "very different cases," the Court held, and applying the doctrine where the government initiates the proceeding "is not supported by our precedents." *Id.* at 681 n.2. Where the government's proceeding puts the individual's property at stake, the "equitable principle" of disentitlement "is wholly irrelevant." *Id*.

Similarly, the Court in *Ortega-Rodriguez* reiterated that disentitlement requires a "connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response." 507 U.S. at

244. There, the Court refused to permit "dismissal of an appeal of a defendant who flees the jurisdiction of a district court, and is recaptured before he invokes the jurisdiction of the appellate tribunal." *Id.* at 242. Such a defendant's "fugitive" status "has no connection to the course of appellate proceedings." *Id.* at 246. The Court thus rejected the "faulty premise that any act of judicial defiance, whether or not it affects the appellate process, is punishable by" disentitlement. *Id.* at 250.

Finally, the Court in *Degen* refused to extend the doctrine "to allow a court in a civil forfeiture suit to enter judgment against a claimant because he is a fugitive from, or otherwise is resisting, a related criminal prosecution." 517 U.S. at 823. Noting that due process secures an individual's "right to a hearing to contest the forfeiture of his property," the Court concluded that "disentitlement was unjustified." *Id.* at 822, 825. Unlike in contexts where disentitlement can be appropriate, "[t]here is no risk … of delay or frustration in determining the merits of the government's forfeiture claims or in enforcing the resulting judgment." *Id.* at 825.

Although the government could theoretically suffer harm from the claimant's absence from the separate criminal case due to "differences between the discovery privileges available … in each case," district courts have "means to resolve these dilemmas without resorting to a rule forbidding all participation by the absent claimant." *Id.* at 825-26. And although there are legitimate interests in "redress[ing] the indignity visited upon the District Court by [the defendant's] ab-

sence from the criminal proceeding, and … deter[ring] flight," "disentitlement is too blunt an instrument for advancing them" and "would be an arbitrary response to the conduct it is supposed to redress." *Id.* at 828.

2. Under the Supreme Court's precedents, §2466 deprives Claimants of their due process right to be heard.

There is one difference between this case and *Degen*: The district court there relied on its *inherent* authority to disentitle the Claimants, whereas the district court here relied on a statute. But that difference is constitutionally irrelevant.

Although the Court in *Degen* declined to decide "whether enforcement of a disentitlement rule under proper authority would violate due process" (*id.*), it pointedly remarked that "[t]he right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there," and that the Court's previous decisions "have held it unconstitutional to use disentitlement similar to this." *Id.* Nor is that surprising. In prohibiting the government from taking property "without due process of law," the Fifth Amendment draws no distinction between legislative and judicial action. And under the principles of *Degen* and the Supreme Court's other disentitlement cases, §2466, at least as applied here, unquestionably works an unconstitutional deprivation of Claimants' property.

Hovey—which, again, held that due process barred disentitling a defendant as a sanction for contempt (*supra* at 44-45)—posed this very situation: "If the legislative department … 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?" 167 U.S. at 417. The Court's answer? Such a statute would "undoubtedly" violate the Constitution. *Id.* Because "[t]he fundamental guaranty of due process is absolute," the fact that the "power to strike … was authorized by … statute" "furnishes no ground for taking this case out of the ruling in *Hovey*." *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350 (1909).

As these authorities confirm, disentitlement can violate due process whether it occurs under a judicial or legislative rule. A person claiming ownership of property in defense of a civil forfeiture case loses all ability to contest the government's case. Yet "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Doolin*, 53 F.3d at 1402 (quotations omitted). "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking," and "[t]hat protection is of particular importance here, where the government has a direct pecuniary interest in the outcome." *Good*, 510 U.S. at 55-56. That is why claimants in *in rem* proceedings are "entitled to an adversary hearing before a final judgment of forfeiture" (*id.* at 59)—a hearing Claimants were denied.

Unlike the contexts in which the Supreme Court has approved of fugitive disentitlement—where "the party seeking relief" through "an appeal" "is a fugi-

tive" (*Degen*, 517 U.S. at 824)—Claimants here are defending their property in a government-initiated action. "[I]t is very different to bar a fugitive from affirmatively seeking relief" and "to bar a fugitive from defending civil claims brought against him." *FDIC v. Pharaon*, 178 F.3d 1159, 1162 (11th Cir. 1999). Permitting the court to adjudge Claimants' property forfeited "without any hearing whatever[] is … to convert the court exercising such an authority into an instrument of wrong." *Hovey*, 167 U.S. at 414. Thus, courts cannot "rely on the fugitive from justice doctrine to dismiss a civil forfeiture action merely because the party is a fugitive from, or otherwise is resisting, a related criminal prosecution." *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d 584, 596 (4th Cir. 2002) (quotations, brackets omitted). If §2466 authorizes taking Claimants' property without an adversarial hearing, it violates due process.

3. Several circuits' decisions confirm that §2466, as applied below, is unconstitutional.

Several circuits have expressed "serious questions" as to whether fugitive disentitlement can constitutionally be applied "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." *Friko Corp. v. CIR*, 26 F.3d 1139, 1142-43 (D.C. Cir. 1994). As of 1999, the Eleventh Circuit could not find "any federal cases[] applying or upholding the application of the fugitive disentitlement doctrine in a civil

case to strike a defendant's answer and enter judgment against him," and it refused to sanction such an expansion. *Pharaon*, 178 F.3d at 1162. The First Circuit has likewise refused to apply the doctrine "to justify the seizure" of claimed property in a civil forfeiture case. *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636, 643 (1st Cir. 1988). And the Sixth Circuit has held disentitlement in civil forfeiture cases unconstitutional, given its consequences for "those who may have a legitimate, innocent interest in exonerating the defendant property." *United States v. $83,320*, 682 F.2d 573, 576 (6th Cir. 1982).

The most thorough decision holding that disentitlement in civil forfeiture cases is unconstitutional comes from the Seventh Circuit, and its reasoning applies fully to §2466. Synthesizing the Supreme Court's disentitlement decisions, that court limited disentitlement to cases where the alleged fugitive, not the government, "initiates the proceedings." *$40,877.59*, 32 F.3d at 1154. Expanding the doctrine to cases where the fugitive is "in a defensive position" would violate due process "by barring his right to defend." *Id.* "[N]otwithstanding an individual's status," his "constitutional right to defend is inseparable from the liability to suit." *Id.* at 1153; *accord Degen*, 517 U.S. at 828. And in civil forfeiture proceedings, the claimant "is not in court as the initiator of the action, but rather is defending that action." *$40,877.59*, 32 F.3d at 1154; *see Pole No. 3172*, 852 F.2d at 643; *cf. Societe Internationale v. Rogers*, 357 U.S. 197, 210 (1958) (the "substantial consti-

tutional questions" associated with striking a pleading are "accented" where the defendant is not "invoking the aid of a court," but instead is "protesting against a [governmental] seizure").

Applying *Hovey* and "a long line of [Supreme Court] authority," the Seventh Circuit found "no distinction" between finding a defendant criminally "guilty by default because of his fugitive status" and taking a person's property "in a civil proceeding" without a hearing. *$40,877.59*, 32 F.3d at 1154-55 (quoting *Hovey*, 167 U.S. at 419). "To strike the defendant's answer in the civil case 'would be as flagrant a violation of the rights of the citizen as striking the defendant's answer in the criminal case'" and would "'destroy great constitutional safeguards.'" *Id.* at 1155 (quoting *Hovey*, 167 U.S. at 419) (brackets omitted).

In civil forfeiture cases, "the real injustice is that the government is allowed to confiscate property on mere allegation" that "the property is related to the alleged crime." *Id.* "[W]ith artful pleading, the government could confiscate all of a fugitive's property," and "even the property of some individuals who prove to be non-fugitives." *Id*. Even if the claimants later proved their innocence in the criminal trial, it would be too late—the government would have already taken their property permanently. And although a "mere postponement of the judicial enquiry is not a denial of due process," where "property rights are involved" there must be an "adequate" "opportunity given for the ultimate judicial determination of the lia-

bility." *GTE S., Inc. v. Morrison*, 199 F.3d 733, 744 (4th Cir. 1999) (citation omitted). The court below denied Claimants that opportunity based on §2466.

In short, while there is "no constitutional right to an appeal" (*Goeke*, 514 U.S. at 119), the Constitution *does* guarantee an "inherent right of defense" (*Hovey*, 167 U.S. at 443; *see Good*, 510 U.S. at 53). Thus, fugitive disentitlement is "valid when applied at the appellate level in the same case from which the defendant-appellant is a fugitive." *$40,877.59*, 32 F.3d at 1156. But "when the district court applies the doctrine, it in fact renders a judgment without a consideration of the evidence": "[t]he status quo is altered, property is redistributed, and all without any hearing whatsoever on the merits"—even though "[a] hearing is only a slight burden on the government." *Id.* That violates due process.

4. Section 2466's unprecedented expansion of disentitlement to those who have never been in the United States confirms its unconstitutionality.

Section 2466 goes beyond the common-law fugitive disentitlement doctrine in an unprecedented way that makes it even more clearly unconstitutional. At common law, the doctrine was limited to an actual "fugitive"—one who "purposely leaves the jurisdiction or decides not to return to it, in order to avoid prosecution." *United States v. Eng*, 951 F.2d 461, 464 (2d Cir. 1991). The sponsors of §2466 and Justice Department officials presenting the bill "opined on several occasions … that the provision simply reinstated th[is] common law doctrine." *Col-*

lazos, 368 F.3d at 206-07 (Katzmann, J., concurring). But §2466 purports to "reach[] much further," covering even "non-citizens who have never entered the United States." *Id.* at 206. These non-citizens are not "fugitives" under the common-law definition—or in any other sense.[4] Section 2466 is thus far afield from the doctrine approved by the Supreme Court, which disentitled only a "convicted defendant who has sought review [and] escapes." *Molinaro*, 396 U.S. at 366.

Even lower courts expanding the doctrine to disentitle claimants "have required a substantial nexus between a litigant's fugitive status and the issue before the court." *Jaffe*, 294 F.3d at 596-97. Here, it is undisputed that there is no nexus between Claimants' "fugitive" status and this proceeding. Claimants are foreign residents who would not be in the United States anyway, and did not "escape" or otherwise obtain "fugitive" status due to any U.S. proceeding. Moreover, even indulging the fiction that merely not appearing makes one a "fugitive," such persons are only "fugitives" from their criminal cases—not from their civil cases, where they can be fully represented by counsel. *$40,877.59*, 32 F.3d at 1156; *Daccarett-Ghia*, 70 F.3d at 627. By taking property from Claimants who are in nowise "fugitives" without a hearing, §2466 violates due process.

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[4] *E.g.*, American Heritage Dictionary of the English Language 709 (4th ed. 2000) (defining "fugitive" as "[o]ne who flees"); Webster's II New College Dictionary 451 (1999) (same).

5. This Court should not follow the one circuit to uphold §2466.

The district court dismissed Claimants' due process argument in one sentence in a footnote, citing a decision (*Collazos*) of the only circuit that has upheld §2466's constitutionality. JA-1979 n.21. But *Collazos* relied on reasoning from an earlier Second Circuit decision (*Eng*) that was explicitly rejected in *Degen*, 517 U.S. at 823. *See* 368 F.3d at 202. Moreover, *Collazos* did not address the due process concerns analyzed in *$40,877.59*, or consider how expanding the definition of "fugitive" beyond its common-law meaning affects the due process analysis. Instead, *Collazos* focused on whether disentitlement under §2466 could be characterized "as punishment"—a term mentioned once in *Degen* when discussing another case. *Id.* at 203. And it is untenable to suggest that due process is not violated because §2466 does not impose "punishment."

First, the Supreme Court itself has said that "[u]se of the dismissal sanction" following disentitlement *is* a "punishment"—and one that "should not be wielded indiscriminately." *Ortega-Rodriguez*, 507 U.S. at 247-48 & n.17. Indeed, the Supreme Court has "recognized that statutory *in rem* forfeiture imposes punishment." *Austin v. United States*, 509 U.S. 602, 614 (1993). And it is hard to imagine a more fitting term than "punishment" for taking a person's property, without a hearing, based on mere allegations of wrongdoing.

In any event, whether dismissal based on disentitlement should be characterized as "punishment" is largely irrelevant. None of the Supreme Court's rationales supporting the fugitive disentitlement doctrine applies here. Enforceability is the "first" rationale: "so long as the party cannot be found, the judgment on review may be impossible to enforce." *Degen*, 517 U.S. at 824. But that rationale is inapplicable here. Assuming *arguendo* "the property is in the court's control," any judgment should be "fully enforceable" regardless of Claimants' fugitive status. *$40,877.59*, 32 F.3d at 1156; *see Pole No. 3172*, 852 F.2d at 643.

Second, the doctrine rests "in part on a 'disentitlement' theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment." *Ortega-Rodriguez*, 507 U.S. at 240. But the waiver rationale does not apply here. Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n*, 301 U.S. 292, 307 (1937). Rather, "courts indulge every reasonable presumption against waiver" of "constitutional rights." *Fuentes v. Shevin*, 407 U.S. 67, 94 & n.31 (1972) (quotations omitted). Such waivers must be "knowing and voluntary." *United States v. Robinson*, 744 F.3d 293, 298 (4th Cir. 2014).

Nothing about Claimants' conduct indicates an affirmative, knowing waiver of their constitutional rights. It is one thing to characterize a criminal defendant's "flight" from an optional appeal that he initiated as a "waiver" of rights in that pro-

ceeding, and quite another to find a "waiver" in a claimant's remaining in his home country—and cooperating with its authorities—after a foreign government files suit against his property. *See $40,877.59*, 32 F.3d at 1154. If neither the non-appearance and active rebellion of the Confederate claimant in *McVeigh* (78 U.S. at 267) nor the escape of the defendant in *Ortega-Rodriguez* "waived" any constitutional rights, then surely Claimants' decisions to remain overseas and decline to appear in a separate case cannot be considered a "waiver" of their rights to contest forfeiture in a case where they can be fully represented by counsel.

Finally, the court in *Collazos* erred in suggesting that, under the Supreme Court's decision in *Hammond Packing*, §2466 is constitutional because it simply creates a "presumption" against a claimant who fails to appear in a separate criminal case. 368 F.3d at 204. The Supreme Court there upheld a trial court's striking of a defendant's answer after he refused to obey an order requiring him to produce documents and witnesses. The Court justified the strike based on a "presumption that the refusal to produce" material evidence "was but an admission of the want of merit in the asserted defense." 212 U.S. at 339-42, 351. As the Court has since explained, however, due process bars courts from striking the answer of defendants whose "behavior … will not support the *Hammond Packing* presumption." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982).

Here, Claimants' failure to appear in a *separate* action is irrelevant to the merit of their forfeiture claims. That is particularly clear given *McVeigh*—where the defendant failed to appear, remained in enemy territory, and was alleged to be a Confederate rebel (78 U.S. at 261), but could not be disentitled based on a presumption that he was in fact a rebel. Claimants' failure to leave their homes and appear in a *separate* criminal case by no means signals that they lack meritorious defenses to civil forfeiture.

Just as "a court in a criminal proceeding [cannot] deny to the accused all right to be heard," courts in civil forfeiture cases may not "tak[e] property of one and giv[e] it to another without hearing." *Hovey*, 167 U.S. at 419. If Claimants cannot be disentitled in the criminal case from which they are actually alleged to be fugitives, then surely they cannot be disentitled in a separate forfeiture case in which they are prepared to participate. Yet that is exactly what the decision below permits. At a minimum, this Court should read §2466 to "avoid" the "serious constitutional doubts" created by that decision. *Joshua*, 607 F.3d at 388 n.5. The judgments below should be vacated.

B. Disentitling Claimant Echternach violates the Supremacy Clause.

Under the Supremacy Clause, treaties and statutes are both considered "the supreme law of the land." U.S. Const. art. VI, cl. 2. "[W]here the two conflict, the

latter in time prevails." *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575-76 (4th Cir. 1983); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

Here, Claimant Echternach, a German citizen living in Germany, is protected by the German Mutual Legal Assistance Treaty ("MLAT"), which was signed in 2003, ratified in 2007, and took effect in 2009—all after §2466 was enacted in 2000. T.I.A.S. No. 09-1018; Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106–185, § 14, 114 Stat. 202 (2000). Under the MLAT, "[a] person who is not a national or resident of the Requesting State and who does not answer a summons to appear in the Requesting State … shall not by reason thereof be liable to any penalty or be subjected to any coercive measures." Art. 4, cl. 4 (JA-823). Echternach has "never been a citizen or permanent resident of the United States," which is the "Requesting State." JA-564.

Citing *Collazos*, the district court concluded that "fugitive disentitlement is not necessarily a penalty or coercive measure." JA-1981. But under Supreme Court precedent, "[u]se of the dismissal sanction" following disentitlement *is* a "punishment." *Ortega-Rodriguez*, 507 U.S. at 247-48 & n.17. Indeed, by any fair measure, taking away a claimant's foreign property without affording him legal processes simply because he failed to rush to a requesting country to which he otherwise has no connection is a "penalty." And even if it were not, it would plainly be a "coercive measure" imposed by "the Requesting State" due to his failure to

"answer a summons to appear." Less drastic forms of legal coercion—such as subpoenas "to obtain documentary information"—are considered "coercive measures" under international law. Bruce Zagaris, *The Procedural Aspects of U.S. Tax Policy Towards Developing Countries*, 35 Geo. Wash. Int'l L. Rev. 331, 357-58 (2003). Thus, applying fugitive disentitlement to Echternach is inconsistent with, and trumped by, the later-in-time MLAT. The court's judgments as to Echternach's claims should be vacated.

IV. The district court erred in striking Mona Dotcom's claims.

Finally, the district court erred in striking the claims of Claimant Mona Dotcom. Mona, Kim Dotcom's estranged wife, timely filed her own claim, asserting a 50% "marital interest" in restrained assets otherwise held in Kim's name. JA-102-08. These assets include bank accounts, and other real and personal property, in New Zealand and Hong Kong.

On the government's motion for judgment on the pleadings, the district court struck Mona's claim, ruling that her "marital interest" is not "ripe" and therefore does not "satisfy Article III standing." JA-1995-96.[5] That was error.

[5] Two assets are not at issue in this appeal—a vehicle (JA-481) and the house in which Mona resides (JA-1944-45). While striking her martial interest in both assets, the district court recognized that Mona's possessory interest in those properties gives her standing. JA-1996-97. Her claims to those assets remain pending below.

"[T]o establish Article III standing," Mona simply had to show "a colorable ownership, possessory or security interest" in these assets. *United States v. Munson*, 477 F. App'x 57, 62 (4th Cir. 2012); *see* Stefan D. Cassella, *Asset Forfeiture Law in the United States*, § 10-3(b), at 416 & n.25 (2d ed. 2013) (collecting circuit cases adopting "colorable interest" test). Whether a claimant has a "colorable interest" turns on state or foreign law. *Id.* § 10-4, at 421 & n.38. The same choice-of-law rule applies to any "marital interests" that may be asserted. *Id*. § 10-5(i), at 443; *see also United States v. Schifferli*, 895 F.2d 987, 989 n.* (4th Cir. 1990) (assessing wife's standing under South Carolina law). Mona claimed her 50% "marital interest" under the New Zealand Property (Relationships) Act 1976 ("NZ-PRA"). JA-102-08. Thus, New Zealand law—particularly the NZ-PRA (JA-1201-353)—governs whether Mona has a "colorable interest" in the restrained assets.

To make her showing under the NZ-PRA, Mona submitted an order issued by the New Zealand High Court, after a contested hearing, finding that she "has an interest in Mr. Dotcom's restrained property under [that statute]." JA-1619-20. The Commissioner of Police, who otherwise opposed Mona's application for relief, acknowledged this interest. JA-1619. Further, Mona submitted an expert affidavit under Rule 44.1 analyzing her "marital interest" in the restrained assets and demonstrating that, under the NZ-PRA, she has a presumptive 50% interest in all

"relationship property." JA-1915, 1918-19. This evidence easily establishes a colorable interest in the restrained assets—and thus Article III standing.

The district court, however, concluded otherwise. It credited the government's counter-affidavits and expert analysis and relied on an unreported and later-reversed trial court ruling that in turn relied on a since-superseded statute for the proposition that Mona's "marital interest" in "relationship property" under the NZPRA "crystallizes only in the event of a future Court order or compromise" dividing "relationship property." JA-1993-94 (quotations omitted). The court then ruled that Mona lacked standing because she had not yet reached a compromise with Kim, or obtained an order, dividing their "relationship property."

That ruling must be reversed. Any dispute created by the government's evidence merely raises an issue for further adjudication on a full record. Yet the court went outside the pleadings and adjudicated this issue in the face of conflicting evidence. Mona's claim should be remanded for further proceedings.

CONCLUSION

Because the district court lacked *in rem* jurisdiction over the defendant property, its forfeiture judgments should be vacated and the case dismissed. Alternatively, the orders of disentitlement and judgments should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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JULY 1, 2015

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Steffen N. Johnson, an attorney, certify that I have complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains 13,998 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: July 1, 2015

/s Steffen N. Johnson
Steffen N. Johnson

CERTIFICATE OF SERVICE

I, Steffen N. Johnson, an attorney, certify that on this day the foregoing Brief for Claimants-Appellants was served electronically on all parties via CM/ECF.

Dated: July 1, 2015

s/ Steffen N. Johnson
Steffen N. Johnson

ADDENDUM

STATUTORY PROVISIONS

28 U.S.C. §1355

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

(b)(1) A forfeiture action or proceeding may be brought in—

> **(A)** the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or
>
> **(B)** any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District court for the District of Columbia.

(c) In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond.

(d) Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.

28 U.S.C. §2466

(a) A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person—

(1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution--

(A) purposely leaves the jurisdiction of the United States;

(B) declines to enter or reenter the United States to submit to its jurisdiction; or

(C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and

(2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.

(b) Subsection (a) may be applied to a claim filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation is a person to whom subsection (a) applies.