

MEMORANDUM

TO: Libertarian National Committee

FROM: Oliver Hall

DATE: November 15, 2019

SUBJECT: Addendum to Special Counsel's Report Dated November 14, 2019

Introduction

This Addendum to the November 14, 2019 Special Counsel's Report is submitted for the purpose of providing members with notice that the Libertarian National Committee has received a request that it file a brief as *amicus curiae* in support of the petitioner's petition for certiorari in *United States v. Salgado*, No. 18-10312 (11th Cir. July 8, 2019). The request comes from petitioner's counsel, Dan Alban of the Institute for Justice. The Heritage Foundation is helping to coordinate the effort. The Heritage Foundation memo setting forth the request is reproduced below. Thereafter follow six proposed topics for potential amicus briefs that Dan Alban provided. Additionally, the 11th Circuit decision from which the petition arises is attached hereto.

The petition for certiorari has not been filed yet. It is due on November 19, 2019. Assuming the petition is filed on that date, **the deadline for filing amicus briefs will be December 19, 2019.**

Heritage Foundation Memorandum

TO: Legal Strategy Network

FROM: The Heritage Foundation

DATE: October 25, 2019

RE: Cert. Stage Amicus Request & Call – *United States v. Salgado* (Civil Asset Forfeiture Attorney Fees)

This case involves a civil asset forfeiture proceeding where the prevailing property owner was denied attorneys' fees under the Civil Asset Forfeiture Reform Act (CAFRA) because the case was dismissed without prejudice.

CAFRA provides that the government must pay attorneys' fees "in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails." The purpose of this provision, as indicated by the language of the bill that passed this into law, is for claimants to "make themselves whole after wrongful government seizure" and to provide a

disincentive for the government to file frivolous forfeiture lawsuits.

In 2015, Miladis Salgado's home was raided based on a confidential informant's false tip that her then-husband was a drug dealer. In addition to seizing approximately \$200,000 in cash and checks from her then-husband's garment importing business, the police found a separate bag in Miladis' closet containing \$15,000. Miladis had been saving this money to spend on her children, including for her teenage daughter's quinceañera.

The federal government ultimately attempted to forfeit both Miladis' and her now-ex-husband's money. During that forfeiture case, the police admitted in depositions that they had no evidence supporting any of their claims. With summary judgment in favor of Miladis and her ex-husband finally on the horizon two years after the seizure, it became clear that the government would not only need to return the money but would also be on the hook for Miladis' and her ex-husband's attorneys' fees. Realizing that it was about to lose the forfeiture lawsuit, the government leapt at the fact that a default judgment had been entered in a separate lawsuit involving her ex-husband's business (a contract dispute with a supplier) and asked the judge to dismiss the case without prejudice so that the money could be used to pay the default judgment. Miladis' money was not implicated in the contract dispute lawsuit.

Miladis' (and her ex-husband's) forfeiture attorney objected to the dismissal without prejudice and argued that the dismissal should be with prejudice. Nonetheless, the court granted the government's request to dismiss without prejudice. While doing so, the court ordered that any attempt by the government to refile the forfeiture action would result in an automatic award of costs.

Pursuant to the court's order, Miladis' money was returned to her, so she sought an award of attorneys' fees. Under any reasonable understanding of the term "substantially prevailing" party, she would qualify. After all, she obtained the full refund of her money, and she even obtained a court order barring the government from trying to seize her money again. Unfortunately, the court decided to follow the approach taken by most, but not all, circuits. The court ruled that the fact of dismissal without prejudice meant that Miladis could not obtain an award of attorneys' fees, and the Eleventh Circuit affirmed.

Miladis will petition the Supreme Court for review. The tentative questions presented are (1) Whether a claimant in a civil forfeiture lawsuit who successfully obtains the full return of the money seized from her, as well as a court order preventing any future forfeiture lawsuit against her money, is a "substantially prevailing" party and therefore entitled to an award of attorneys' fees and costs, even though the dismissal was entered without prejudice; and (2) Whether it was an abuse of discretion for the district court to dismiss the civil forfeiture lawsuit without prejudice two years after the claimant's money was seized and when it was clear that the civil forfeiture lawsuit would never be refiled.

This case may be of interest to the Supreme Court for several reasons. The Eleventh Circuit's ruling is in tension with the Supreme Court's recent opinion in *CRST Van Expedited v. EEOC* (2016), where it held that a favorable ruling on the merits is not required to be a "prevailing party"

in a non-forfeiture context. Moreover, there is a circuit-level disagreement over how much judicial relief is necessary for a claimant to qualify as a “substantially prevailing” party, and the unfortunate conflation of the “substantially prevailing” and “prevailing” standards is contrary to the statute’s plain text. Finally, the second question presented is also aided by a circuit split, albeit not a particularly deep one. Most circuits have relied on the broad discretion given to trial courts on this issue to affirm decisions to dismiss without prejudice in this situation. However, in its unpublished opinion in *United States v. Ito* (9th Cir. 2012), the Ninth Circuit disagreed, finding the district court’s dismissal without prejudice under similar circumstances to those at issue here to be an abuse of discretion.

-End-

Proposed Topics for Potential Amicus Briefs

1. How the legislative history shows the original purpose of CAFRA’s fees provision was to make victims whole, but that’s rarely happening in the current system
2. The original public meaning of “substantially prevail” from other statutes and case law
3. That when your money is seized, your primary goal is to obtain the return of your money and that alone should be considered “substantially prevailing”
4. The practical problem of the disparity in negotiating power when police seize someone’s money and then offer to split the money 50/50 as a settlement
5. The practical difficulty/impossibility of getting attorney’s fees in CAFRA cases under these standards and how that affects indigent claimants
6. The incentives created when judges allow law enforcement to evade financial responsibility for the harms they have caused as long as they move to voluntarily dismiss the lawsuit without prejudice – ideally signed by public choice or other economists/academics

Conclusion

I look forward to discussing this Addendum with the LNC during its next meeting. Should you have questions or need further information prior to that time, please contact me at 202-280-0898 or oliverbhall@gmail.com.