No. 26-91

In the Supreme Court of the United States

RICHARD STUART ROSS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); or as amici, *e.g.*, *Fischer v. United States*, 603 U.S. 480 (2024); *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021); *McDonnell v. United States*, 579 U.S. 550 (2016). The proper resolution of this case is a matter of utmost concern to the ACLJ, its members, and supporters of its sister organization, ACLJ Action, Inc., because of their commitment to holding the government accountable to protect the rule of law. The ACLJ regularly engages the Freedom of Information Act ("FOIA") and litigates against agencies overextending FOIA exemptions to evade the statute's text and spirit, including successfully challenging an improperly asserted presidential communications privilege. *See Am. Ctr. for Law & Justice v. Dep't of State*, 535 F. Supp. 3d 23, 28 (D.D.C. 2021). The ACLJ is likewise concerned here that fee shifting statutes be interpreted appropriately and in a way reflective of constitutional rights.

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. In accordance with Rule 37.2, counsel of record for all parties received notice of amicus's intention to file this brief at least 10 days prior to the due date.

SUMMARY OF ARGUMENT

The Second Circuit's decision rests on a critical analytical error: applying case law interpreting the term "prevailing party" to a statute with the distinct language "substantially prevails". The court below applied *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), which construed the phrase "prevailing party" as a term of art requiring a judgment, to the Civil Asset Forfeiture Reform Act's ("CAFRA") distinct "substantially prevails" language. The court below thereby neglected to conduct the "careful and critical examination" this Court has required before applying one statute and language's interpretive rules to another. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252, 253-54 (2010).

Had the panel conducted that examination, it would have discovered that "substantially prevails" is not a synonym for "prevailing party." To the contrary, it is a phrase Congress borrowed from the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), where it has carried a uniform, settled meaning for twenty-six years: a claimant "substantially prevails" when its litigation is a substantial cause of the government's voluntary capitulation. From 1974 through April 2000, when CAFRA was enacted, every federal court of appeals to address the question applied this "catalyst" theory to FOIA's "substantially prevailed" language. Under *Lorillard v. Pons*, 434 U.S. 575 (1978), and *Perrin v. United States*, 444 U.S. 37 (1979), Congress is presumed to have incorporated that settled meaning when it borrowed the same phrase for CAFRA. *Buckhannon*, decided a year after

CAFRA's enactment, cannot retroactively rewrite what Congress meant.

The *Buckhannon* decision, from its opening lines, explicitly focused on the meaning of a particular "term," namely, "prevailing party." 532 U.S. at 600. This case involves the different term, "substantially prevails," used in CAFRA, FOIA, and other statutes. When courts misread *Buckhannon*'s construction of "prevailing party" to eliminate the catalyst standard from "substantially prevails" in FOIA, Congress acted to correct those court rulings by clarifying the statutory term. The OPEN Government Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, amended FOIA to make explicit that a complainant "has substantially prevailed" when the agency voluntarily changes its position in response to litigation. Congress described that amendment as a *clarification*, not a change, of existing law. S. Rep. No. 110-59, at 6 (2007) ("This section clarifies that *Buckhannon*'s holding does not and should not apply to FOIA litigation."). A clarification confirms what the law always was.

The panel below turned this history on its head. In footnote 13, the panel held that the 2007 FOIA amendment *hurt* petitioner Ross here, reasoning that Congress "knows how to authorize attorney fee awards in the absence of a favorable judicial ruling," and chose not to do so for CAFRA. Pet. App. 30a. n.13. But this inference gets the interpretive question backwards. The 2007 amendment does not show that catalyst fees require express authorization; it shows that "substantially prevails" already carried that meaning before some courts (mistakenly) read *Buckhannon* as disrupting it. In 2007, there was no judicial mischief for Congress to amend in CAFRA because *Buckhannon* had not yet been widely applied to CAFRA; the amendment was a targeted fix for a misapplication of *Buckhannon* to FOIA. Congress's silence on CAFRA reflects the absence of a CAFRA problem to correct in 2007, not acquiescence in extending *Buckhannon*'s judgment requirement to a statute with different terminology enacted before *Buckhannon* was decided.

This question is exceptionally important. "[R]ights in property are basic civil rights[.]" *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). Fee recovery under CAFRA is a key mechanism that makes that right enforceable, because the seizure itself strips owners of the means to hire counsel. But the decision below lets the government defeat CAFRA's mandatory fee guarantee, through a procedural choice it alone controls, rendering illusory CAFRA's promise to make innocent property owners "whole after wrongful government seizures." H.R. Rep. No. 106-192, at 11 (1999).

ARGUMENT

I. THE TERM "SUBSTANTIALLY PREVAILS" IS DISTINCT FROM THE TERM "PREVAILING PARTY" AND HAS NEVER REQUIRED A JUDGMENT AS A CONDITION FOR RECOVERING ATTORNEY FEES.

The Second Circuit held that a claimant does not "substantially prevail" under CAFRA unless he obtains relief that is "judicially sanctioned" and "enduring." Pet. App. 32a n. 14, 36a. It reached that conclusion by reasoning that because both "prevailing party" and "substantially prevails" contain the verb "prevail," this Court's construction of the former phrase in *Buckhannon* "usefully informs" construction of the latter phrase. Pet. App. 28a-29a n.12. That reasoning skipped the antecedent question of what the phrase that Congress chose meant when Congress chose it.

The answer is not obscure. "Substantially prevailed" was not a phrase Congress invented for CAFRA. It was a term Congress had used in federal fee-shifting statutes since 1974, and by April 2000 it had received twenty-six years of uniform construction in the federal courts of appeals. Under that settled construction, a claimant substantially prevailed when his litigation was reasonably necessary and had a substantial causative effect on obtaining the relief he sought, whether or not a court ever entered judgment in his favor. *Vermont Low Income Advoc. Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976); *see also Church of Scientology v. United States Postal Serv.*, 700 F.2d 486, 491-92 (9th Cir. 1983). Congress is presumed to have known that construction and to have adopted it, because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation." *Lorillard*, 434 U.S. at 580-81.

A. "Substantially Prevails" had a settled catalyst-inclusive meaning when Congress enacted CAFRA in April 2000, and Congress is presumed to have incorporated that meaning.

The Freedom of Information Act as enacted in 1966 contained no fee-shifting provision. Congress added one in the 1974 Amendments, Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561, 1562, providing that a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E).

The phrase was a deliberate legislative choice among competing formulations. As Judge Friendly recounted two years later, the House Committee on Government Operations had originally proposed in 1972 to award fees only "if the court issues an injunction or order"; the House-passed bill would have awarded fees where the United States "as litigant, has not prevailed[]"; and the Senate bill introduced the "substantially prevailed" language that the Conference Committee ultimately adopted. *Vermont Low Income Advoc. Council, Inc.*, 546 F.2d at 512-13. Congress thus considered and rejected a formulation expressly conditioning fees on a court order, and settled instead on "substantially prevailed."

Congress used the identical phrase in the Privacy Act of 1974, 5 U.S.C. § 552a(g)(2)(B), (g)(3)(B), enacted weeks later, and courts have consistently construed the two provisions together. Twenty-six years after that, Congress used the identical phrase again in

CAFRA. 28 U.S.C. § 2465(b)(1). The presumption is that Congress adopted the phrase's settled meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing . . . interpretations."). That presumption applies with particular force here, because Congress did not merely borrow a similar phrase. It borrowed the *identical* phrase, for the *identical* purpose (shifting fees against the United States), in the *identical* posture, where the government holds what the claimant seeks and can turn it over at any time.

From the first decisions construing the 1974 amendments through CAFRA's enactment in April 2000, the courts of appeals were unanimous. A claimant substantially prevailed if his lawsuit caused the government to give him what he sought. No court order, consent decree, or judgment was necessary.

The Second Circuit was the first to so hold. In *Vermont Low Income Advocacy Council*, Judge Friendly held that "under the bill as enacted a judgment is not an absolute prerequisite to such an award," and explained why: "Congress clearly did not mean that where an FOIA suit had gone to trial and developments made it apparent that the judge was about to rule for the plaintiff, the Government could abort any award of attorney fees by an eleventh hour tender of the information requested." 546 F.2d at 513. The governing test was whether "the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information." *Id.*

The D.C. Circuit reached the same conclusion the following year in *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364-66 (D.C. Cir. 1977), and again in *Foster v. Boorstin*, 561 F.2d 340, 342 (D.C. Cir. 1977), holding that "a court order compelling disclosure . . . is not . . . a prerequisite to an award of attorneys' fees under FOIA." It reaffirmed the rule in *Chesapeake Bay Foundation v. Department of Agriculture*, 11 F.3d 211 (D.C. Cir. 1993); *see Oil, Chem. & Atomic Workers Int'l Union v. DOE*, 288 F.3d 452, 454 (D.C. Cir. 2002) [hereinafter "OCAW"] (quoting *Chesapeake Bay Found.*, 11 F.3d at 216) ("So long as the 'litigation substantially caused the requested records to be released,' the FOIA plaintiff could recover attorney's fees even though the district court had not rendered a judgment in the plaintiff's favor.").

Every other circuit to address the question agreed. *See Maynard v. C.I.A.*, 986 F.2d 547, 568 (1st Cir. 1993); *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978); *Lovell v. Alderete*, 630 F.2d 428, 432 (5th Cir. 1980); *Detroit Free Press v. Department of Justice*, 73 F.3d 93, 98 (6th Cir. 1996); *Miller v. United States Department of State*, 779 F.2d 1378, 1389 (8th Cir. 1985); *Church of Scientology*, 700 F.2d at 492; *Aviation Data Serv. v. FAA*, 687 F.2d 1319, 1321 (10th Cir. 1982); *Gowan v. United States Dep't of the Air Force*, 148 F.3d 1182, 1195 (10th Cir. 1998). Not one court of appeals held otherwise. Not one suggested that "substantially prevailed" required a judgment. This rule, under which a plaintiff can recover a fee award if it "achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct[,]" was known as the "catalyst theory." *Buckhannon*, 532 U.S. at 601. The rule was so well settled that before this Court decided *Buckhannon* in 2001, it had been the uniform law of every circuit to consider it for a quarter century.

Such uniformity did not exist with regard to the phrase "prevailing party." The Fourth Circuit, sitting en banc in *S-1 & S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir. 1994), held that "[a] person may not be a 'prevailing party' . . . except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought . . . ."

But the Fourth Circuit did embrace the uniform rule as to the phrase "substantially prevailing." Five years after *S-1 & S-2*, the same court applied the catalyst framework without hesitation to the phrase "substantially prevailed." In *Reinbold v. Evers*, 187 F.3d 348 (4th Cir. 1999), a Privacy Act fee case, the court held:

> To prove that he has substantially prevailed, Reinbold must establish that his Privacy Act claim was reasonably necessary and substantially caused the requested records to be released . . . . In other words, to determine whether Reinbold substantially prevailed, in the absence of a final judgment in his favor, is a question of causation[.]

Id. at 363 (citing *Gowan*, 148 F.3d at 1195; *Chesapeake Bay Found.*, 11 F.3d at 216; *Maynard*, 986 F.2d at 568). *Reinbold* did not distinguish *S-1 & S-2*, or even cite it, because no distinction was needed. The two phrases were understood to occupy different ground, and a court that had refused to award fees absent a judgment under "prevailing party" applied a causation test (expressly contemplating recovery "in the absence of a final judgment") under "substantially prevailed." *Id.*

When Congress uses a term that has already received a settled judicial construction, it is presumed to adopt that construction, whether the term appears in a reenactment of the same statute or is carried over into a new one. *See Bragdon*, 524 U.S. at 632 ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing . . . interpretations.") "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," and "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard*, 434 U.S. at 580-81. This Court has applied the same principle as recently as 2022: "Where Congress employs a term of art ""obviously transplanted from another legal source,"' it "'brings the old soil with it.""' *George v. McDonough*, 596 U.S. 740, 746 (2022) (quoting *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019)).

The timing shows that Congress could not have understood the phrase to require a judgment. Congress enacted CAFRA on April 25, 2000. This Court decided *Buckhannon* on May 29, 2001, thirteen months *later*. Under the "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning[]" at the time of enactment, the meaning that governs is the meaning "substantially prevails" carried in April 2000. *Perrin v. United States*, 444 U.S. at 42; *accord Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 277 (2018). In April 2000, that meaning was uniform, settled, and catalyst-inclusive.

The courts that have extended *Buckhannon* to CAFRA, including the panel below, have thus made a chronological error. They have read a 2001 decision construing a different phrase backward into a statute Congress wrote in 2000, displacing the meaning the phrase actually had when Congress selected it. Whatever import *Buckhannon* has for the term "prevailing party," it could not alter what Congress meant a year earlier.

B. The Second Circuit's inference from the 2007 FOIA amendment inverts the correct statutory analysis.

The panel below did confront the FOIA connection, in a single footnote, and rejected it. Pet. App. 30a n.13. Its reasoning was that Congress's 2007 amendment to FOIA, which made explicit that a complainant "substantially prevail[s]" through "a voluntary or unilateral change in position by the agency[,]" applies expressly "[f]or purposes of" FOIA alone. From that, the panel concluded that

> [w]here Congress has thus shown that it knows how to authorize attorney fee awards in the absence of a favorable

> judicial ruling, based simply on a catalyst theory, and where it has expressly cabined that authority to FOIA proceedings, a court cannot itself extend that catalyst theory to other statutes with a "substantially prevails" requirement.

Pet. App. 30a n.13. That inference depends entirely on a premise the panel never examined: that the 2007 amendment created something new. The legislative history refutes that premise.

The OPEN Government Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525, was enacted to correct a judicial misreading. The Senate Report is explicit: the provision "responds to the Supreme Court's ruling in *Buckhannon*[,]" and "clarifies that *Buckhannon*'s holding does not and should not apply to FOIA litigation." S. Rep. No. 110-59, at 6 (2007). The sponsor said the same on the floor: "The bill clarifies that *Buckhannon* does not apply to FOIA cases." 153 Cong. Rec. S15701-04 (daily ed. Dec. 14, 2007) (statement of Sen. Leahy).

Congress used the word "clarifies" because the courts of appeals had, after *Buckhannon*, begun reading FOIA's "substantially prevailed" standard to require a judgment, a reading that departed from a quarter century of settled construction. *See OCAW*, 288 F.3d at 456-57 (D.C. Cir. 2002); *Union of Needletrades, Indus. & Textile Emps. v. INS*, 336 F.3d 200, 206-08 (2d Cir. 2003). Congress corrected the *judicial* error and thereby preserved the original *statutory* rule. The panel read that clarification as though it were an alteration. But an amendment that preserves meaning cannot simultaneously be evidence that the meaning never existed. If anything, the 2007 amendment is confirmation of what "substantially prevailed" meant before *Buckhannon*, and therefore of what it meant in April 2000, when Congress wrote it into CAFRA.

The panel's negative inference also assumes that Congress in 2007 surveyed the field of "substantially prevails" statutes, chose to fix FOIA, and deliberately left CAFRA alone. The legislative record shows nothing of the kind. The 2007 amendment was a targeted response to a specific, documented problem in FOIA litigation. The Senate Report and floor statements address only FOIA. S. Rep. No. 110-59, at 1, 6 (2007); 153 Cong. Rec. S15701-04 (daily ed. Dec. 14, 2007) (statement of Sen. Leahy); 153 Cong. Rec. S10986-90 (daily ed. Aug. 3, 2007) (statements of Sens. Leahy, Kyl, and Cornyn); 153 Cong. Rec. H16788-92 (daily ed. Dec. 18, 2007) (House debate). The Department of Justice submission reprinted in the record identifies the problem by name, citing *OCAW* and *Union of Needletrades*, the two FOIA decisions that had extended Buckhannon. S. Rep. No. 110-59, at 20 (2007) (Department of Justice Views Letter (Mar. 26, 2007), reprinted as an attachment to the Additional Views of Sen. Kyl) ("[A] number of recent court of appeals decisions . . . have applied *Buckhannon* to reject the catalyst theory as a basis for FOIA attorneys' fee awards. *See OCAW*, 288 F.3d 452 (D.C. Cir. 2002); *Union of Needletrades v. INS*, 336 F.3d 200 (2d Cir. 2003)."). CAFRA, its provisions, or civil forfeiture are not mentioned anywhere in the Senate Report or the floor debates in either chamber.

That is unsurprising, because in 2007 no relevant body of CAFRA attorney fees case law existed for Congress to correct. By the time the OPEN Government Act took effect on December 31, 2007, no court of appeals had squarely[2] held that *Buckhannon* governs CAFRA's attorney-fee "substantially prevails" standard, and only a single, unpublished district court order had applied *Buckhannon*'s framework to that provision at all. *United States v. $13,275.21 in United States Currency*, No. SA-06-CA-171-XR, 2007 WL 316455 (W.D. Tex. Jan. 31, 2007). By contrast, two courts of appeals had extended *Buckhannon* to FOIA in published opinions five and four years earlier, generating precisely the controversy Congress addressed.

Congress's silence about CAFRA in 2007 therefore reflects the absence of a CAFRA controversy, not a judgment about CAFRA's meaning. This Court has cautioned against inferring approval of a judicial interpretation from Congress's failure to disturb it, because silence is equally consistent with simple inattention or inaction. "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander v.*

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2 Two courts of appeals had touched on the question by 2007, but neither squarely held that *Buckhannon* governs CAFRA's fee provision. The Ninth Circuit applied *Buckhannon*'s framework to § 2465(b)(1)'s "substantially prevails" standard, but as to the interest subsection, not the fee subsection at issue here. *See Ohel Rachel Synagogue v. United States*, 482 F.3d 1058, 1063-64 (9th Cir. 2007). And the Second Circuit's discussion of the fee provision was dictum: it stated it was merely "inclined to agree" with the Ninth Circuit's approach, without deciding the question. *See United States v. Khan*, 497 F.3d 204, 208-09 & n.7 (2d Cir. 2007).

Sandoval, 532 U.S. 275, 292 (2001) (citation omitted). That is doubly true where, as here, Congress was not presented with the interpretation at all.

Carried to its conclusion, the panel's reasoning would mean that "substantially prevails" now requires a judgment in every federal statute except FOIA, not because Congress ever said so, but because Congress once corrected a court that said so about FOIA. Under that rule, each act of legislative clarification implicitly muddies every statute with identical or similar language which Congress does not simultaneously clarify. This would place the burden on Congress comprehensively to re-legislate the meaning of settled terms every time a court departs from them with regard to a particular statute. This Court has rejected that approach. "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (citation and internal quotation marks omitted), *superseded by statute on other grounds as recognized in CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *see Helvering v. Hallock*, 309 U.S. 106, 119-21 (1940).

The panel's premise, that a catalyst-inclusive reading of "substantially prevails" requires express congressional authorization, is also refuted by the decisions of courts that have reached that reading on their own, in statutes Congress has never amended. Most recently, a federal district court held that this Court's decisions in *Hardt* and *Lackey* foreclosed applying *Buckhannon*'s "prevailing party" standard to the "substantially prevails" language of § 16 of the Clayton Act, 15 U.S.C. § 26, and that no final judgment on the merits was required. *FTC v. Kroger Co.*, No. 3:24-cv-00347, 2026 WL 560125, at *8-9, *11 (D. Or. Feb. 27, 2026). Years earlier, and without the benefit of *Hardt*, a district court reached the same conclusion under the Clean Water Act, reasoning from the statute's text that "to 'substantially prevail' a party would need to obtain a somewhat lesser degree of relief than if they were to 'prevail[,]'" and that "while the *Buckhannon* reasoning may apply to the latter term, it does not apply to the former; leaving the catalyst theory intact for substantially prevailing parties." *United States v. Board of County Commissioners of Hamilton County*, No. 1:02-cv-00107, 2005 WL 2033708, at *12, *14-15 (S.D. Ohio Aug. 23, 2005); *accord Ohio Valley Environmental Coalition, Inc. v. Wheeler*, 387 F. Supp. 3d 654, 656-58 (S.D.W. Va. 2019). Congress has never amended the Clayton Act or the Clean Water Act to authorize catalyst recovery. Those courts nonetheless read "substantially prevails" to mean what it says. The panel below reached the opposite result on the theory that such a reading is unavailable absent an express amendment, a theory these decisions disprove.

C. *Hardt v. Reliance Standard* confirms the panel's analytical method was wrong.

The petition explains at length why *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242 (2010), forecloses grafting the "prevailing party" term of art onto a statute from which it is "conspicuously absent[,]" *id.* at 252. Amicus does not repeat that argument. One observation bears emphasis.

Hardt and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009), read together, establish a method: before applying one statute's interpretive gloss to another, a court must undertake a "careful and critical examination[]" of the statute before it. *Gross*, 557 U.S. at 174. The panel below did not undertake that examination. It observed that both phrases contain the word "prevail" and proceeded from there. Pet. App. 29a n.12. It did not ask what "substantially prevails" meant when Congress adopted it, did not consult the decisions construing it, and did not cite *Hardt* at all in an opinion deciding a question *Hardt* directly addresses. Had the panel undertaken that examination, it would have found what Parts A and B show: a phrase with a settled, catalyst-inclusive meaning at the time of CAFRA's enactment, and a 2007 amendment that confirms rather than displaces that meaning.

II. THE QUESTION PRESENTED IS IMPORTANT: THE DECISION BELOW HANDS THE GOVERNMENT A TOOL TO NULLIFY CAFRA'S ATTORNEY FEE PROVISION AT WILL.

A. Protection of property against arbitrary government seizure is a fundamental civil right.

Property rights are civil rights. This Court has rejected as "a false one" any "dichotomy between personal liberties and property rights." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right," and "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Id.* "That rights in property are basic civil rights has long been recognized." *Id.*

That recognition is older than the Republic. Blackstone wrote that "[s]o great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 William Blackstone, *Commentaries on the Laws of England* *135 (1765). Lord Camden held in 1765 that "[b]y the laws of England, every invasion of private property, be it ever so minute, is a trespass," *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765), a decision this Court has "described as a 'monument of English freedom' undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law with regard to search and seizure." *United States v. Jones*, 565 U.S. 400, 405 (2012) (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)); *see also Boyd v. United States*, 116 U.S. 616, 626-27 (1886).

And Madison warned that "where an excess of power prevails, property of no sort is duly respected," with the consequence that "no man is safe in his opinions, his person, his faculties, or his possessions." James Madison, *Property*, Nat'l Gazette (Mar. 29, 1792), *reprinted in* 14 The Papers of James Madison 266, 267 (Robert A. Rutland et al. eds., 1983).

In *Tyler v. Hennepin County*, 598 U.S. 631 (2023), a unanimous Court held that a county could not "use the toehold of the tax debt to confiscate more property than was due," *id.* at 639, and traced that limitation to Magna Carta, to Blackstone, and to founding-era practice. *Id.* at 639-42. Critically for present purposes, *Tyler* held that a government may not evade a constitutional protection by manipulating the legal categories through which property is defined: a State cannot "sidestep the Takings Clause by disavowing traditional property interests," *id.* at 638 (quoting *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998)), because the Clause "would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022), *quoted in Tyler*, 598 U.S. at 638.

And in *Timbs v. Indiana*, 586 U.S. 146 (2019), the Court held the Excessive Fines Clause applicable to the States and enforceable against civil in rem forfeitures, observing that "[e]xorbitant tolls undermine other constitutional liberties," that fines have historically been "employed in a measure out of accord with the penal goals of retribution and deterrence," and that this risk is acute because "fines are a source of revenue" while other punishments "cost a State money." *Id.* at 151-52 (citation and internal quotation marks omitted).

Members of this Court have applied these concerns to modern forfeiture specifically. *See Culley v. Marshall*, 601 U.S. 377, 416 (2024) (Gorsuch, J., joined by Thomas, J., concurring) (asking "[w]hy does a Nation so jealous of its liberties tolerate expansive new civil forfeiture practices that have 'led to egregious and well-chronicled abuses'") (quoting *Leonard v. Texas*, 580 U.S. 1178, 1180 (2017)); *Leonard*, 580 U.S. at 1178 (Thomas, J., statement respecting the denial of certiorari) (questioning "whether modern civil-forfeiture statutes can be squared with the Due Process Clause and our Nation's history").

Congress legislated against this background. CAFRA was enacted to "make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures." H.R. Rep. No. 106-192, at 11 (1999).

B. Fee recovery is what makes that protection real; the decision below allows the government to nullify it at will.

A right to recover wrongfully seized property is worth only as much as the owner's practical ability to assert it. This Court has long recognized that without fee-shifting, "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam); *see City of Riverside v. Rivera*, 477 U.S. 561, 576-78 (1986) (plurality opinion).

Forfeiture presents that problem in its most acute form, because the seizure itself takes the assets the owner would use to hire counsel. Congress understood this. The House Report records that forfeitures are rarely challenged for reasons that have "nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle." H.R. Rep. No. 106-192, at 14 (1999).

The remedy Congress chose reflects how essential it considered this problem. CAFRA does not provide that a court "may" award fees to a claimant who substantially prevails. It provides that "the United States *shall* be liable." 28 U.S.C. § 2465(b)(1)(A) (emphasis added). Nor did Congress give the government the escape hatch it provided under the Equal Access to Justice Act, where fees may be denied if "the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). Under CAFRA, a claimant who substantially prevails recovers without conditions.

The decision below subjugates that guarantee to the government's control. Under the rule the panel adopted, whether a claimant recovers fees turns not on what he achieved but on how the government chose to end the case. A claimant who obtains the return of his property following a dismissal with prejudice may recover. *See United States v. Moore*, No. 23-10971 (11th Cir. Aug. 20, 2025) (per curiam) (unpublished). A claimant who obtains the return of his property following a dismissal without prejudice may not. *See United States v. $32,820.56 in United States Currency*, 838 F.3d 930, 936-37 (8th Cir. 2016); Pet. App. 34a-36a. The claimant's outcome is identical. The difference is a procedural election the government makes unilaterally, and which it may make at the moment it perceives it is about to lose.

That is not a theoretical concern. In *Buckhannon*, this Court described the risk that defendants would strategically moot litigation to avoid fees as "entirely speculative and unsupported by any empirical evidence." 532 U.S. at 608. Whatever the force of that observation in 2001 as to the statutes referenced in *Buckhannon*, the cases have supplied a contrary collection of evidence regarding CAFRA. *See, e.g., United States v. $70,670.00 in United States Currency*, 929 F.3d 1293 (11th Cir. 2019); *$32,820.56*, 838 F.3d 930; *United States v. $8,040.00 in United States Currency*, No. 6:21-cv-6323, 2025 WL 2043417 (W.D.N.Y. July 21, 2025), *appeal docketed*, No. 25-2169 (2d Cir. Sept. 8, 2025); Pet. App. 1a-51a. The government itself has reduced the practice to guidance: the Treasury Executive Office for Asset Forfeiture instructs that a claimant substantially prevails through "a dismissal with prejudice, summary judgment, or judgment on the merits," while "declination, settlement, or dismissal without prejudice" are "generally not considered to be substantially prevailing." TEOAF Directive No. 36 (Jan. 22, 2013). Judge Friendly identified this precise maneuver in 1976 and said Congress "clearly did not mean" to permit it. *Vermont Low Income Advocacy Council*, 546 F.2d at 513. A mandatory fee provision that the opposing party may nullify at its election does not make anyone whole.

* * *

When Congress wrote "substantially prevails" into CAFRA in April 2000, the phrase had carried a settled meaning in the federal courts for twenty-six years: a claimant substantially prevails when his litigation causes the government to give back what it took, whether or not a judgment is ever entered. Congress is presumed to have adopted that meaning, and *Buckhannon*, decided thirteen months later, construing a different phrase, did not change it. Congress's 2007 clarification of FOIA confirms that understanding rather than displacing it, and Congress's silence as to CAFRA reflects only that the misreading had not yet reached CAFRA when Congress acted.

CONCLUSION

This Court should interpret "substantially prevails" in CAFRA in light of the meaning the identical phrase has always carried under FOIA and grant the petition for a writ of certiorari.

Respectfully submitted,

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