

Nos. 12-56922, 13-55555, 13-55556

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

**CHRISTOPHER KIM, AKA CHRIS KIM, AKA KJ KIM,
AKA KYUNG JOON KIM; et al.,**

Claimants-Appellees,

(full caption on next page)

On Appeal From the United States District Court
For the Central District of California

Case No. 2:04-cv-02788-ABC-PLA

**BRIEF OF AMICUS CURIAE OF NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS IN SUPPORT OF
APPELLEES AND URGING AFFIRMANCE**

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Caption cont'd:

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

**CHRISTOPHER KIM, AKA CHRIS KIM, AKA KJ KIM,
AKA KYUNG JOON KIM; et al.,**

Claimants-Appellees,

LAW OFFICE OF ERIC HONIG,

Intervenor-Appellee,

and

**475 MARTIN LANE, BEVERLY HILLS, CALIFORNIA, REAL
PROPERTY LOCATED AT, AKA SEAL A,**

Defendant.

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") submits the following corporate disclosure statement, as required by Fed. R. App. P. 26.1 and 29(c): NACDL is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

DATED: January 28, 2014

Respectfully submitted,

/s/ John D. Cline

John D. Cline

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INTEREST OF AMICI CURIAE

Amicus National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.¹

NACDL was founded in 1958. It has a nationwide membership of more than 10,000 and an affiliate membership of more than 35,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in the Supreme Court and the courts of appeals, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

¹ Counsel for amicus state that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

NACDL has decided to submit an amicus brief in this case because the government's interpretation of the Anti-Assignment Act, if adopted by the Court, would eviscerate the attorney's fees provision of the Civil Asset Forfeiture Reform Act ("CAFRA") and thus significantly weaken the protections that CAFRA affords persons whose property the government seizes and seeks to forfeit.

In accordance with Fed. R. App. P. 29(a), amicus states that all parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Department of Justice opposed CAFRA's fee award provision before Congress. Having lost that battle, it now invokes the Anti-Assignment Act in a rear-guard effort to accomplish through the courts what it could not achieve in the legislature. Its proposed application of the Act would thwart one of Congress' key purposes in enacting the CAFRA fee provision: to encourage competent counsel to represent claimants in civil forfeiture cases.

If the government's interpretation of the Anti-Assignment Act were correct, the Court would face a difficult choice between effecting Congress' intent in enacting CAFRA on one hand and complying with the Act on the other. But no such choice is necessary, because the government's interpretation of the Act is plainly wrong. Potential future CAFRA fee awards are not subject to the Anti-Assignment Act, because (1) a uniform line of cases holds that the defense of a

civil forfeiture case does not involve a claim against the government, but rather the assertion of an interest in property adverse to the interests asserted by the government, and (2) the Act applies only to claims that exist and are enforceable at the time of the assignment; a potential right to recover statutory attorney fees, contingent on the future outcome of a pending forfeiture case, does not constitute a "claim" within the meaning of the Act.

ARGUMENT

I. CONGRESS ENACTED THE CAFRA FEE PROVISION, OVER THE GOVERNMENT'S OBJECTION, TO ENSURE THE AVAILABILITY OF COMPETENT COUNSEL FOR PERSONS WHOSE PROPERTY THE GOVERNMENT SEIZES AND SEEKS TO FORFEIT.

Before CAFRA, persons who sought to challenge the government's efforts to forfeit their property faced a daunting task. Attorney fees could be recovered only under the Equal Access to Justice Act ("EAJA"), which sharply limits the circumstances under which a victorious litigant can recover fees from the government.² As a result, people of limited means rarely could hire an attorney to

² Under the EAJA, a prevailing party may recover attorney fees from the government only if the government's position was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A). In practice, this is a difficult standard to meet. According to DOJ, it paid only eleven fee awards under the EAJA in civil forfeiture cases in the five year period from 1994 to 1998. *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime, Hearing Before the Subcommittee on Criminal Justice Oversight of the Senate Committee on the Judiciary*, 106th Cong., 1st Sess. 111 (July 21, 1999) ["1999 Senate Hearing"]. In addition, the EAJA caps the hourly rate for attorney fees. *United States v. \$60,201*, 291 F. Supp. 2d 1126, 1129-30 (C.D. Cal. 2003).

contest the forfeiture of their property, and even persons who could afford an attorney often elected not to contest a forfeiture if the value of the property was less than the attorney fees necessary to recover it.

This difficulty retaining counsel--coupled with claimants' other procedural disadvantages and the enormous financial incentive that law enforcement agencies have to pursue forfeitures--led to well-documented abuses of the civil forfeiture statutes. As the Seventh Circuit put it, "We are certainly not the first court to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. \$506,231*, 125 F.3d 442, 454 (7th Cir. 1997) (quotation omitted); see, e.g., *United States v. Funds Held for Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) (same; noting the "corrupting incentives" of a forfeiture regime under which "the agency that conceives the jurisdiction and ground for seizures, and executes them, also absorbs their proceeds"); *United States v. \$191,910*, 16 F.3d 1051, 1069 n.37 (9th Cir. 1994) ("The government's direct pecuniary interest in the outcome of the proceeding makes us especially wary of official overreaching in this context.").³

³ For examples of government abuses of the civil forfeiture statutes, see, e.g., 1999 Senate Hearing at 5 (Sen. Leahy), 13 (Rep. Hyde), 77-84 (Samuel J. Buffone for NACDL), 86 (Roger Pilon for the Cato Institute); H. Rep. 192, 106th Cong., 1st Sess., at 6-11 (June 18, 1999); David Pimental, *Forfeiture Revisited: Bringing Principle to Practice in Federal Court*, 13 Nev. L.J. 1, 13-14, 25 (2012).

In 2000, "[i]n response to widespread criticism of th[e civil forfeiture] regime," *United States v. \$80,180*, 303 F.3d 1182, 1184 (9th Cir. 2002), an overwhelming, bipartisan majority in Congress enacted CAFRA. A key provision of the statute requires the government to pay the attorney fees of any civil forfeiture litigant who "substantially prevails." 28 U.S.C. § 2465(b)(1). Unlike the EAJA, CAFRA authorizes fee awards even when the government's litigation position was "substantially justified," and it imposes no hourly cap on fees. The CAFRA fee provision has two primary purposes: to make property owners whole when the government wrongfully seeks to forfeit their property, and to encourage competent counsel to represent claimants in civil forfeiture cases.

The Department of Justice vigorously opposed the CAFRA fee provision.⁴ Having lost before Congress, the government has fought tooth and nail since CAFRA's enactment to render that provision a nullity in the courts. As this case demonstrates, DOJ contests fee applications on every conceivable ground and,

⁴ During Congress' consideration of CAFRA, Sen. Leahy asked then-Deputy Attorney General Eric Holder: "Would [DOJ] object to a more automatic fee-shifting provision [than the EAJA] in civil forfeiture cases, such that a claimant who substantially prevailed would be entitled to reasonable attorney fees and other litigation costs reasonably incurred by the claimant?" Deputy AG Holder responded: "The Department of Justice opposes any revision of the [EAJA] to permit a person to recover from the government attorneys fees or other litigation costs in any case where the position of the United States was substantially justified." 1999 Senate Hearing, *supra* note 2, at 111; *see id.* ("We believe that the availability of attorney's fees under the [EAJA] provides the needed protection for innocent property owners in civil forfeiture cases.").

when it loses in the district court, it often appeals--sometimes repeatedly. It seeks through this strategy of attrition to thwart Congress' manifest intent.

The Anti-Assignment Act argument that the government makes here marks the latest and most extreme manifestation of DOJ's opposition to the CAFRA attorney fees provision.⁵ If the government's interpretation of the Anti-Assignment Act were correct, the CAFRA fee provision would be a dead letter, because no attorney could ever be assured that he would receive his fee if his client prevailed. Even if the attorney included an otherwise valid assignment of the potential CAFRA fee award in his retainer agreement with the claimant--as attorney Honig did here⁶--he would face the likelihood that the government would wait until it lost the forfeiture case, place a lien on the claimant's property (including the fee award) for a purported tax obligation, fine, or other alleged debt, and argue under the Act that the assignment was invalid against the government--thus effectively substituting itself for the attorney as the fee recipient. Few attorneys would be willing to run that risk.

⁵ The decision below is the first reported case to decide whether the government can use the Anti-Assignment Act to defeat the assignment of a potential CAFRA fee award. The government tried to assert the Anti-Assignment Act in its reply brief in a recent case before this Court, but the Court found the issue waived. *See United States v. \$186,416*, 722 F.3d 1173, 1176 n.1 (9th Cir. 2013).

⁶ This Court has recognized that CAFRA fee awards may be validly assigned by a claimant to his attorney. *See United States v. \$186,416*, 722 F.3d 1173, 1175-76 (9th Cir. 2013).

The government's proposed use of the Anti-Assignment Act would thus vitiate CAFRA's goal of encouraging competent counsel to represent claimants in civil forfeiture cases. As we demonstrate in the following Part, however, the conflict that the government posits between CAFRA and the Anti-Assignment Act does not exist, because the Act does not apply to the assignment of potential CAFRA fee awards. Because the Act does not apply, the assignments are valid, and attorney Honig's right to the fees prevails over the government's tax lien on claimants' property.

II. THE ANTI-ASSIGNMENT ACT DOES NOT APPLY TO ASSIGNMENTS OF POTENTIAL FUTURE CAFRA FEE AWARDS.

Given Congress' intent to ensure the availability of competent counsel to civil forfeiture claimants with potentially meritorious cases, it is implausible that it would have left those awards vulnerable to tax liens and other government claims through application of the Anti-Assignment Act. In fact, the statute does not apply to the assignment of potential CAFRA fee awards.

The Anti-Assignment Act covers only the assignment of "a claim against the United States Government." 31 U.S.C. § 3727(a)(1). A potential future CAFRA fee award is not such a claim for two reasons: (1) a uniform line of cases holds that the defense of a civil forfeiture case does not involve a claim against the government, but rather the assertion of an interest in property adverse to the interests asserted by the government, and (2) a second line of cases holds that a

potential future right to recover from the government--such as the potential CAFRA fee award assigned here--does not constitute a "claim" within the meaning of the Act.

A. The Defense of a Civil Forfeiture Case Does Not Involve a Claim Against the Government.

By its express language, the Anti-Assignment Act only governs the assignment of "a claim against the United States Government." 31 U.S.C. § 3727(a)(1). The courts consistently hold that the defense of a civil forfeiture action brought by the government against specified property is not a "claim against the government" and therefore is not subject to the requirements of the Act. *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 484 (6th Cir. 1993) ("[T]he Assignment of Claims Act was not designed to apply to forfeiture actions. . . . [T]here are no claims against the United States in a forfeiture in rem action brought by the United States."); *United States v. Thirteen Thousand Dollars in U.S. Currency*, 733 F.2d 581, 584 (8th Cir. 1984) ("As [the claimant] did not assign a claim against the United States to [assignee lawyers], but rather assigned his interest in property adverse to the interest held by the United States, compliance with the Assignment of Claims Act is not necessary.") (quotation omitted); *United States v. Currency Totaling \$48,318.08*, 609 F.2d 210, 213 (5th Cir. 1980) (same); *United States v. \$22,993*, 332 F. Supp. 1277, 1279 (E.D. La. 1971) (same).

Thirteen Thousand Dollars in U.S. Currency illustrates this point. The property owner in that case, Jeffrey Bulgatz, was stopped by federal agents at an airport because they suspected that he was about to break the conditions of his release. 733 F.2d at 583. The agents did not take Bulgatz into custody, but seized his bag, which contained \$13,000 in currency. *Id.* After the seizure, Bulgatz assigned his interest in the contents of the bag to his attorneys in consideration for their legal services in his upcoming criminal trial. *Id.* The government argued that the assignment was invalid under the Anti-Assignment Act, but the Eighth Circuit disagreed. It declared that Bulgatz did not assign a claim against the government, but rather "his 'interest in property adverse to the interest held by the United States.'" *Id.* at 584 (citations omitted).

If a claimant to property subject to a civil forfeiture proceeding by the United States may assign his rights in that property to pay his attorneys without violating the Anti-Assignment Act, it follows that potential CAFRA attorney fee awards that result from any civil forfeiture proceedings are similarly not subject to the Act. Just as the defense of a civil forfeiture action prosecuted by the government is not a "claim against the United States Government," nor are the potential statutory fee awards that flow from the successful defense of such a proceeding. *Cf. Marre v. United States*, 117 F.3d 297, 304-06 (5th Cir. 1997) (in

the context of government set-off claim, distinguishing fees derived from plaintiff's recovery from fees awarded by statute in addition to plaintiff's recovery).

B. Future, Potential Rights to Recover Statutory Attorney Fees Are Not Claims Against the Government.

For a second reason, a potential future statutory attorney fee award does not constitute "a claim against the United States Government" subject to the Anti-Assignment Act: the Act only governs "claims existing at the time of the transfer." *Rocky River Co. v. United States*, 169 Ct. Cl. 203, 206 (1965); see *In re Sterling Navigation Co., Ltd.*, 31 B.R. 619, 625 (S.D.N.Y. 1983) ("[A]n assignment which arose before the assignee's claim against the government does not come under the [Anti-Assignment] Act."); *Milliken v. Barrow*, 65 F. 888, 894-95 (E.D. La. 1895) (same). The Anti-Assignment Act thus does not apply to future, potential rights to recover from the government that may or may not come to fruition; it prohibits the assignment only of "claims against the United States which can be presented by the claimant to some department or officer of the United States for payment or may be prosecuted in the court of claims. The section simply forbids the assignment of such claims before their allowance." *Hobbs v. McLean*, 117 U.S. 567, 575 (1886), *quoted in Milliken*, 65 F. at 894.

Poorvu v. United States, 420 F.2d 993 (Ct. Cl. 1970), confirms this interpretation of the Act. In *Poorvu*, plaintiffs were assigned a government contract to construct a post office facility. See *id.* at 995-97. The court held that

the Anti-Assignment Act did not preclude plaintiffs from seeking reimbursement from the government for the cost of repairs resulting from the inadequacy of the plans submitted by the government, because those claims did not exist when plaintiffs were assigned the contract. *Id.* at 1003; *see also Milliken*, 65 F. at 893-95 (Anti-Assignment Act does not apply to assignment of future bounty on sugar crop that may or may not bear profit); *King v. United States*, 292 F. Supp. 767, 773-74 (D. Colo. 1968) (Anti-Assignment Act does not apply when widow of alleged presidential assassin assigned interest in rifle before the government took property interest in the rifle).

Just as in *Poorvu*, *Milliken*, and the other cited cases, any claim the Kim claimants had to future CAFRA fee awards did not yet exist when they made the assignment to the Honig Law Office. At that point, they had no fee award that they could "present[] . . . to some department or officer of the United States for payment or . . . prosecute[] in the court of claims." Rather, they had only a potential, future right to recover fees, contingent on the claimants prevailing against the government. As the district court recognized, "any distribution to Honig [was] dependent on the outcome of further litigation in this case." *United States v. 475 Martin Lane*, 727 F. Supp. 2d 876, 883 (C.D. Cal. 2010). Because no claim to a fee award "exist[ed] at the time of the transfer," the Anti-Assignment

Act does not apply to the assignments at issue here. *Rocky River Co.*, 169 Ct. Cl. at 206.

This outcome makes sense, because the assignment of future, potential rights to recover fees from the government does not risk the evils the Anti-Assignment Act was designed to prevent. The Act was created (1) "to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government"; and (2) "to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant." *United States v. Aetna*, 338 U.S. 366, 373 (1949); *see Milliken*, 65 F. at 893-95 (same). The assignment of future, potential rights, like the assignment of the potential CAFRA fee awards here, does not require the government to deal with multiple payments of claims. The fees are owed to one entity--the Honig Law Office. Nor is there any risk that the Law Office will buy multiple claims against the government in an effort to influence government officials. The Act simply does not apply to the assignments at issue here.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

DATED: January 28, 2014

Respectfully submitted,

/s/ John D. Cline

John D. Cline

Attorney for Amicus Curiae

NATIONAL ASSOCIATION OF

CRIMINAL DEFENSE LAWYERS

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3001 words.

/s/ John D. Cline
John D. Cline
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NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John D. Cline

John D. Cline