

No. 05-315

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**In the Supreme Court of the United States**

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DEEP SEA FISHERIES, INC. AND DEEP SEA  
HARVESTER, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### QUESTION PRESENTED

Whether crab taken, possessed, transported, or sold in violation of foreign law, and subsequently imported into the United States in violation of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.*, constitutes “contraband or other property that it is illegal to possess” under the Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. 981 *et seq.*, such that petitioners cannot assert an innocent owner defense to the government’s forfeiture action.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-12) is reported at 410 F.3d 1131. The opinion of the district court (Pet. App. 15-21) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on June 9, 2005. The petition for a writ of certiorari was filed on September 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

The United States filed an action seeking forfeiture, under the Lacey Act Amendments of 1981, 16 U.S.C. 3374(a)(1), of frozen blue king crab that was taken, pos-

sessed, transported, and sold in violation of the fishing and resource protection laws of the Russian Federation. Pet. App. 51-59. Petitioners filed a statement of interest claiming a property interest in the seized crab, based on a perfected security interest in the catch of the fishing vessels that had illegally harvested the crab. *Id.* at 16, 65. They raised an affirmative defense, under the “innocent owner” provision of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. 983(d), that they “did not know that the defendant crab was caught and/or transported in violation of Russian fishing laws.” Pet. App. 65. The district court rejected that defense, *id.* at 15-21, and the court of appeals, on interlocutory appeal under 28 U.S.C. 1292(b), affirmed. Pet. App. 1-12.

1. The Lacey Act of 1900, ch. 553, 31 Stat. 187, and the Black Bass Act of 1926, ch. 346, 44 Stat. 576, were enacted to curb trafficking in fish and wildlife illegally taken from their state or country of origin. See *United States v. McNab*, 331 F.3d 1228, 1238 (11th Cir. 2003), cert. denied, 540 U.S. 1177 (2004). By 1981, Congress recognized that those statutes were inadequate to control the growing and highly profitable trade in illegal fish and wildlife. See S. Rep. No. 123, 97th Cong., 1st Sess. 1-2 (1981). In response to those insufficiencies, Congress passed the Lacey Act Amendments of 1981. See Pub. L. No. 97-79, 95 Stat. 1073.<sup>1</sup>

The Lacey Act, as amended, makes it unlawful “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce \* \* \* any fish or

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<sup>1</sup> In addition to strengthening the statutes’ enforcement mechanisms, the Lacey Act Amendments of 1981 combined the Lacey Act of 1900 and Black Bass Act of 1926 into one cohesive statute. *McNab*, 331 F.3d at 1238 n.19.

wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.” 16 U.S.C. 3372(a)(2)(A). A person who knowingly violates that section is subject to criminal prosecution. 16 U.S.C. 3373(d).

In addition to criminal penalties, the Lacey Act provides for civil penalties, 16 U.S.C. 3373(a), and forfeitures, 16 U.S.C. 3374, to assist in the efforts to combat trade in illegal fish or wildlife. One of the Lacey Act’s most effective features, added as part of the 1981 amendments, is the strict liability forfeiture provision of 16 U.S.C. 3374(a)(1). That subsection provides in relevant part:

All fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased contrary to the provisions of section 3372 of this title \* \* \* shall be subject to forfeiture to the United States notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution included in section 3373 of this title.

16 U.S.C. 3374(a)(1). The government sought forfeiture in this case under that provision.

2. The government’s action, like all civil forfeiture actions commenced on or after August 23, 2000, is subject to the provisions of CAFRA. See *United States v. One Parcel of Real Prop. with Bldgs., Appurtenances and Improvements Known as 45 Claremont St., Located in the City of Central Falls, R.I.*, 395 F.3d 1, 3 n.2 (1st Cir. 2004). Among other things, CAFRA provides that “[a]n innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute.” 18 U.S.C. 983(d)(1). CAFRA further provides that “no person may assert an ownership interest under this subsection in



contraband or other property that it is illegal to possess.” 18 U.S.C. 983(d)(4).

3. Petitioners invoked CAFRA’s “innocent owner” provisions as an affirmative defense to the forfeiture action. The United States responded that those provisions were inapplicable here because the seized crab was subject to forfeiture under the Lacey Act as “contraband or other property that it is illegal to possess.” The government pointed out that, under the strict liability forfeiture provisions of the Lacey Act, 16 U.S.C. 3374(a) (as illuminated by the legislative history and case law interpreting that Act), fish or wildlife taken, possessed, transported, or sold in violation of foreign law and imported, transported, sold, received or acquired in interstate or foreign commerce, is treated as contraband. Therefore, if the United States could prove at trial that the seized crab was taken, transported, possessed, or sold in violation of Russian law, it would be contraband under the Lacey Act, preventing the assertion of an innocent owner defense under CAFRA.

4. The district court granted partial summary judgment in favor of the United States. Pet. App. 15. The district court found that the seized crab was contraband, thereby precluding petitioners from asserting CAFRA’s innocent owner defense upon proof of the alleged violations. *Id.* at 21. The court rejected petitioners’ argument that “contraband” includes only property that is inherently illegal to possess, reasoning that the “the term ‘contraband’, as used in CAFRA, includes both goods that are inherently illegal to possess and otherwise legal goods that have been imported or exported illegally.” *Id.* at 18. It relied on the common meaning of the term “contraband,” as defined in dictionaries and used in prior court cases, as well as the legislative histo-

ries of both CAFRA and the Lacey Act. *Ibid.* The district court rejected petitioners' motion for reconsideration, but certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 25.

5. The court of appeals accepted the appeal, Pet. App. 26, and affirmed the district court's order, *id.* at 12. The court of appeals did not reach the basis on which the district court had resolved the case, but instead relied on the alternate ground that, regardless of whether the seized crab is "contraband," it constitutes "other property that it is illegal to possess." *Id.* at 9. The court relied on the canon of statutory interpretation that a court shall "interpret the statutory phrase as a whole, giving effect to each word and not interpreting the provision so as to make other provisions meaningless or superfluous." *Id.* at 8. The court concluded that petitioners' proposed construction, which gave the term "contraband" and the phrase "other property it is illegal to possess" identical meanings, contravened that well-accepted principle. *Ibid.*

The court of appeals explained that Congress's use of the disjunctive term "or" to separate the phrases, and its use of the term "other" to modify the term "property," signified that items besides contraband would be exempted from the innocent owner defense. Pet. App. 8. Because the Lacey Act made it "unlawful for a person to 'import, . . . sell, receive [or] acquire . . . any fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law,'" the court concluded that the government could establish the crab was "property that it is illegal to possess." *Id.* at 10.

**ARGUMENT**

Petitioners challenge the court of appeals' conclusion that they cannot assert an innocent owner defense to the government's forfeiture action. The interlocutory posture of this case is a sufficient basis, by itself, to deny the petition for a writ of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). In any event, fish or wildlife illegally imported into the United States in violation of the Lacey Act constitutes contraband or, at the very least, "other property it is illegal to possess." CAFRA's innocent owner defense does not apply to forfeitures of such items. In the absence of a conflict, the court of appeals' correct decision does not warrant further review.

1. This Court's review of the court of appeals' interlocutory decision would be premature at this time. The court of appeals merely affirmed the district court's decision to strike petitioners' innocent owner defense. Pet. App. 12. The case will be remanded to the district court where the outstanding issues, such as the illegal character of the seized crab, will be adjudicated at trial. The court of appeals' decision will have a practical effect on the disposition of this case only if the district court ultimately enters a judgment of forfeiture, and the court of appeals affirms that judgment. Petitioners may seek review of the final judgment at that time. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Deferring review until final judgment will promote judicial efficiency by ensuring that all of petitioners' claims will be consolidated and presented in a single petition to this Court. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258-

259 n.59 (8th ed. 2002). In the context of this case, no countervailing factor counsels in favor of immediate review.

2. In any event, petitioners' arguments also fail on the merits. Petitioners contend (Pet. 14) they have a legitimate ownership interest in the seized crab because the exception from the innocent owner defense applies only to contraband *per se* or, in other words, property it is inherently unlawful to possess. That argument is mistaken.

Petitioners are incorrect in their assertion that "there is nothing remotely illegal about simply possessing king crab that, at some earlier point (perhaps several links prior in the distribution chain), may have been involved in a violation of a foreign fishing regulation, unless one has knowledge of the violation" (Pet. 7-8). The Lacey Act, by its unambiguous terms, makes it "unlawful for any person \* \* \* to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce \* \* \* any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. 3372(a)(2)(A). That Act therefore makes illegally imported crab an item unlawful to possess. See S. Rep. No. 123, 97th Cong., 1st Sess. 13 (1981) (comparing fish and wildlife subject to forfeiture under the Lacey Act to heroin).

Petitioners' argument also fails on its faulty premise that something must be criminal to be unlawful. See Pet. 11-12.<sup>2</sup> While it is true that petitioners cannot be

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<sup>2</sup> The fact that the district court arranged for the sale of the crab to a third party purchaser also does not, as petitioners contend (Pet. 12), establish the seized crab could be legally possessed. Rather, this sale reflects the district court's concern for a valuable perishable commodity

criminally prosecuted in the absence of knowledge of the product's improper origin, see 16 U.S.C. 3373(d), possession of the product is prohibited by the Lacey Act regardless of knowledge, see 16 U.S.C. 3372(a)(2)(A).<sup>3</sup> The Lacey Act designates a number of prohibited acts. See 16 U.S.C. 3372. The most relevant acts here are the unlawful importation, transportation, receipt, acquisition, or purchase of fish or wildlife illegally taken, possessed, transported, or sold in violation of foreign law. 16 U.S.C. 3372(a)(2)(A). Congress chose a variety of means to enforce the prohibition against such acts: criminal penalties, 16 U.S.C. 3373(d); civil penalties, 16 U.S.C. 3373(a); and forfeiture, 16 U.S.C. 3374. Each enforcement provision has its own requirements. The fact that the criminal penalties have a knowledge element does not mean that Section 3372(a)(2)(A)'s prohibition or Section 3374's forfeiture provisions require knowledge.

3. Even if fish or wildlife imported and acquired in violation of the Lacey Act were not illegal to possess, such items are subject to forfeiture without regard to CAFRA's innocent owner defense because they are contraband. As the district court found, "[i]n common usage, the word 'contraband' is used to mean illegally imported goods irrespective of whether the goods are inherently illegal." Pet. App. 18.

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whose character as contraband was cured through judicial action. There is nothing remarkable or unique about the judicial sale of such merchandise.

<sup>3</sup> In this regard, the seized crab is similar to cigarettes not bearing appropriate tax stamps. It is not necessarily criminal to possess unstamped cigarettes, but a police officer is nonetheless authorized to seize them as contraband. See, *e.g.*, N.Y. Tax Law § 1846 (McKinney 2004) (authorizing the seizure of cigarettes not bearing the appropriate tax stamps); Wash. Rev. Code § 82.24.130(1)(a) (2005) (same).

The term “contraband” as used in CAFRA must be given its common meaning because Congress did not define it within the statute. See *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning” at the time Congress enacted the statute). This Court often turns to dictionary definitions for guidance in determining the common usage or ordinary meaning of a term. See, e.g., *Smith v. United States*, 508 U.S. 223, 228-229 (1994). Here, the dictionary definitions make clear that the term contraband as used in CAFRA encompasses illegally imported goods such as the seized crab. See *Webster’s Third New International Dictionary* 494 (1993) (defining contraband as “[i]llegal or prohibited traffic” or “[g]oods or merchandise the importation, exportation, or sometimes possession of which is forbidden”); *Black’s Law Dictionary* 341 (8th ed. 2004) (defining “contraband” as “illegal or prohibited trade; smuggling” or “goods that are unlawful to import, export, or possess”); *The Random House Dictionary of the English Language* 441 (2d ed. 1987) (defining contraband as “anything prohibited by law from being imported or exported,” “goods imported or exported illegally,” or “illegal or prohibited trade; smuggling”). Those familiar dictionary definitions leave no doubt that contraband, as used in CAFRA, encompasses illegally imported goods.

The courts have consistently understood and treated illegally imported goods as contraband. See, e.g., *United States v. Pierce*, 224 F.3d 158, 166-167 (2d Cir. 2000) (defining illegally imported cigarettes and liquor as contraband); *United States v. Reveles*, 190 F.3d 678, 688 n.16 (5th Cir. 1999) (“The shipments, however, easily could have involved other contraband goods such as

illegally-imported ceramics.”); *United States v. Molt*, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979) (referring to unlawfully taken and imported foreign wildlife as contraband article); *United States v. Approximately 600 Sacks of Green Coffee Beans Seized from Café Rico, Inc.*, 381 F. Supp. 2d 57, 62 (D.P.R. 2005) (“Because the beans in this case are not from Puerto Rico and have not been properly imported into the country, they are contraband.”); *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 233 (S.D.N.Y. 1997) (“Goods such as the [antique gold platter] imported in violation of customs laws are contraband.”), aff’d, 184 F.3d 131 (2nd Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *United States v. Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 391 (S.D. Fla. 1993) (finding lobster tails harvested in violation of foreign law to be contraband). Congress presumably was aware of the courts’ longstanding understanding and use of the term “contraband” when it enacted CAFRA, see *Callanan v. United States*, 364 U.S. 587, 594 (1961), and Congress presumably intended the term to have the meaning generally accepted in the legal community at the time of enactment, see *Director, Office of Workers’ Comp. Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994).<sup>4</sup>

4. Petitioners contend (Pet. 21-24) that the district court’s construction of the term “contraband” will result

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<sup>4</sup> Because common usage demonstrates that the term “contraband” unambiguously applies to illegally imported goods, the Court need not delve into the legislative history. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“Our inquiry must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’”) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

in inconsistent treatment of goods seized in foreign, as opposed to domestic, commerce. They argue that, under the district court's definition of contraband, fish and wildlife illegally taken in Alaska, for example, could not be contraband because it was never imported into the United States. As the district court noted in its order denying reconsideration (Pet. App. 24), petitioners' argument rests on a misunderstanding of that court's ruling. Nothing in the district court's order suggested that the term "contraband" cannot include fish or wildlife taken in violation of state law. The district court simply stated that contraband includes illegally imported goods; it did not say that the definition was limited to these goods. Moreover, even if the term "contraband," as used by the district court, did not encompass fish and wildlife taken in violation of state law, the exception from the innocent owner defense would nevertheless apply to fish or wildlife taken in violation of state law because the fish or wildlife constitutes "other property it is illegal to possess."

5. Petitioners assert (Pet. 12-13) that the court of appeals overlooked pre-CAFRA case law decided under Federal Rule of Criminal Procedure 41(e) (now codified as Fed. R. Crim. P. 41(g)), which petitioners construe as distinguishing between contraband and property that cannot be legally possessed by the defendant. That assertion is without merit. The decisions that petitioners cite (Pet. 13) discuss the distinction between contraband *per se* and derivative contraband, addressing the due process requirement for a hearing before forfeiture of the latter but not the former. See *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001); *United States v. Farrell*, 606 F.2d 1341, 1344 (D.C. Cir. 1979); *Gilbert v. United States*, 291



F.2d 586, 595-596 (9th Cir. 1961), vacated on other grounds, 370 U.S. 650 (1962). There is no question about the adequacy of the process petitioners received. The decisions petitioners cite are neither controlling nor helpful in determining the issue in this case.

6. Petitioners speculate (Pet. 6) that the court of appeals' decision places the seafood industry in a less advantageous position in relation to forfeiture than any other industry. This disadvantage, petitioners suggest (Pet. 24-26), will lead to higher prices for consumers. Petitioners' fears of an industry-wide behavioral shift and consumer price increases are unfounded. The court's decision, which merely applied the plain terms of a 24-year-old congressional enactment, did not impose new obligations on the seafood industry. The court of appeals' decision, which does not conflict with any decision of another court of appeals, is therefore unlikely to have any adverse effect on industry behavior or consumer prices.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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