No. 16-612

In the Supreme Court of the United States

ROY LANGBORD, ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the government had not initiated a nonjudicial civil forfeiture when the government specifically disavowed any intent to initiate forfeiture proceedings and declined to return 1933 Double Eagles to petitioners on the ground that the 1933 Double Eagles are the property of the United States.

2. Whether the court of appeals correctly held that the government was permitted to seek a declaratory judgment that the 1933 Double Eagles are the property of the United States.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-82) is reported at 832 F.3d 170. The panel opinion of the court of appeals is reported at 783 F.3d 441. The opinion of the district court denying petitioners' post-trial motions and granting a declaratory judgment in favor of the government (Pet. App. 85-154) is reported at 888 F. Supp. 2d 606. The opinion and order of the district court denying petitioners' motion for judgment on the pleadings and for summary judgment (Pet. App. 157-165) is unreported. The opinion and order of the district court granting the government leave to file an amended complaint and denying petitioners' motion to dismiss (Pet. App. 166-192) is reported at 749 F. Supp. 2d 268. The opinion and order of the district court granting in part and denying in part the parties' cross-motions for sum-

mary judgment (Pet. App. 195-234) is reported at 645 F. Supp. 2d 381.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2016. The petition for a writ of certiorari was filed on October 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from the federal government's effort to recover valuable gold pieces worth tens of millions of dollars that were stolen from the United States Mint (Mint) in the 1930s. See Pet. App. 156.

1. The government may vindicate its property rights through various means, including a replevin or quiet title action, a claim for a declaratory judgment, or various forms of forfeiture. As relevant here, civil forfeiture encompasses proceedings through which a law enforcement agency can take title to real or personal property that was involved in a criminal offense. See generally 18 U.S.C. 981. "Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *United States* v. *Ursery*, 518 U.S. 267, 284 (1996).

Civil forfeiture can be accomplished through judicial or nonjudicial means. See, *e.g.*, Pet. App. 16 n.4. In a judicial forfeiture action under current law, the government files a civil action in rem against the property at issue "and then proves by a preponderance of the evidence that the property was derived from or was used to commit a crime." Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 1-4, at 14 (2d ed. 2013) (Cassella). The government generally must commence a judicial forfeiture proceeding

"within five years after the time when the alleged offense was discovered, or * * * within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later." 19 U.S.C. 1621.

In contrast, nonjudicial forfeiture (which is also referred to as "administrative" forfeiture) "is, in essence, a default proceeding that permits the efficient disposition of uncontested cases" by allowing "a federal law enforcement agency to forfeit property without any judicial involvement if it sends proper notice of the forfeiture action to potential claimants and no one files a claim." Cassella § 4-1, at 150. Congress has limited the types of property that are eligible for nonjudicial forfeiture and has excluded, among other things, property that is worth more than $500,000. See 19 U.S.C. 1607(a)(1), 1610. Even when property may be subject to nonjudicial forfeiture, the government may forgo that option and instead seek judicial forfeiture. Cassella § 7-4, at 256.

The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, amended certain procedures related to civil forfeiture. Under CAFRA, if the government initiates a "nonjudicial civil forfeiture proceeding under a civil forfeiture statute," it generally must give "interested parties" written notice within 60 days of seizing the property at issue. 18 U.S.C. 983(a)(1)(A)(i). A person "claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute" may then file a written claim with the government. 18 U.S.C. 983(a)(2)(A). The claim must be filed "not later than the deadline set forth in a personal notice letter" or, if the claimant does not receive such a letter, "not later

than 30 days after the date of final publication of notice of seizure." 18 U.S.C. 983(a)(2)(B).

If a claim is properly filed, the government cannot proceed by nonjudicial forfeiture. Instead, "[n]ot later than 90 days after a claim has been filed," the government must either file a complaint for judicial forfeiture "or return the property pending the filing of a complaint, except that a court * * * may extend the period for filing a complaint for good cause shown or upon agreement of the parties." 18 U.S.C. 983(a)(3)(A). If the government does not comply with those timing provisions, it "shall promptly release the property * * * and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense." 18 U.S.C. 983(a)(3)(B).

2. In 1933, the Mint produced 445,500 gold pieces known as "Double Eagles" in Philadelphia. Pet. App. 4. Before the Mint could distribute the 1933 Double Eagles, however, President Franklin Delano Roosevelt forbade U.S. banks from paying out gold. *Id.* at 4-5.[1] The Mint sent two of the unissued 1933 Double Eagles to the Smithsonian Institution. *Id.* at 5. Government records demonstrate that the Mint did not issue, release, or otherwise transfer any other 1933

[1] The "renowned sculptor[]" Augustus Saint-Gaudens designed the Double Eagles "at the request of President Theodore Roosevelt," and the gold pieces, which bear a face value of $20, were issued as currency for 25 years. Pet. App. 3-4. The 1933 Double Eagles do not qualify as "coins," however, because the Mint, at the President's direction, never monetized or issued them. See *id.* at 4 n.1 (acknowledging this argument without resolving the parties' dispute on this issue). Like the court of appeals, however, this brief sometimes "refer[s] to the 1933 Double Eagles as coins for ease of reference." *Ibid.*

Double Eagles. *Id.* at 91-105. Instead, the Mint carried out President Roosevelt's mandate by melting the Double Eagles that remained in its possession. *Id.* at 5.

Some 1933 Double Eagles were stolen from the Mint before they could be melted, however, and the United States has attempted to recover each one once the government has located it. See Pet. App. 5; see also, *e.g.*, *United States* v. *Barnard*, 72 F. Supp. 531, 532 (W.D. Tenn. 1947) (granting the government a writ of replevin for one 1933 Double Eagle that had fallen into private possession because the evidence showed that the coin had been stolen from the Mint). In 1945, the Secret Service determined that the Mint's cashier had stolen some 1933 Double Eagles and that the coins had been distributed by Philadelphia merchant Israel Switt, who is the father of petitioner Joan Langbord and the grandfather of petitioners Roy and David Langbord. Pet. App. 5; see *id.* at 106-107. Over the following decades, every 1933 Double Eagle that has surfaced has been "traced back to Switt." *Id.* at 113; see *id.* at 105-112 (summarizing evidence of Switt's involvement with the stolen Double Eagles).

In the 1990s, an English coin dealer brought a 1933 Double Eagle to the United States after obtaining it from a collection of coins previously owned by King Farouk in Egypt. Pet. App. 113-114. The government had mistakenly granted an export license for that Double Eagle in the 1940s, before it discovered that the gold piece was stolen. *Id.* at 113. The government seized the Double Eagle from the coin dealer and lengthy litigation ensued. *Id.* at 114. The government ultimately decided to settle the dispute in light of the "improvidently issued" export license. *Ibid.* Under

the terms of the settlement, title to that Double Eagle was awarded to the Mint, which agreed to monetize it, offer it for sale, and split the proceeds evenly with the coin dealer. *Ibid.* In 2002, the gold piece sold at a "widely publicized" auction for $7,590,020. *Id.* at 114-115; see *id.* at 5-6.

The day before that auction, petitioner Joan Langbord visited her safe deposit box. Pet. App. 115. About a year later, she visited her safe deposit box again and had it drilled open. *Ibid.* Petitioners claim that at that time she discovered ten 1933 Double Eagles in the bottom of the box. *Id.* at 116. Apparently hoping to arrange a settlement like the one the English coin dealer had negotiated, petitioners' attorney contacted the government and agreed to transfer the ten 1933 Double Eagles to the Mint for authentication while reserving "all rights and remedies." *Id.* at 6 (citation omitted).

In May 2005, the Mint determined that the coins were authentic. Pet. App. 6. The following month, the Mint notified petitioners that the government would not offer a monetary settlement. *Ibid.* Petitioners asked the Mint to reconsider, arguing that "there [was] no basis for the government to seek forfeiture of the . . . 1933 Double Eagles." *Ibid.* (brackets in original; citation omitted). The government responded by letter, stating that:

> [t]he United States Mint has no intention of seeking forfeiture of these ten Double Eagles because they are, and always have been, property belonging to the United States; this makes forfeiture proceedings entirely unnecessary. These Double Eagles never were lawfully issued but, instead, were taken out of the United States Mint at Philadelphia

> in an unlawful manner. Indeed, the Langbord family was legally obligated to return this property to the United States . . . and will not be able to establish based on any reliable or admissible evidence how they currently possess, or ever possessed, title to this United States Government property.

Id. at 6-7 (citation omitted).

"Although the Mint had disclaimed any intention of forfeiting the coins," petitioners sent the Mint what purported to be a "seized asset claim" under CAFRA's provisions governing nonjudicial civil forfeiture proceedings. Pet. App. 7. The Mint returned the claim without action, reiterating that "there [was] no basis for a forfeiture action." *Id.* at 199 (citation omitted).

3. Petitioners filed suit, alleging violations of the Constitution, CAFRA, and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and asserting common law claims for replevin and conversion. Pet. App. 8; see *id.* at 231.

a. As relevant here, the district court granted summary judgment to the government on petitioners' claim that the government had violated CAFRA's notice and claim procedures governing nonjudicial civil forfeiture proceedings. Pet. App. 202-205. The court explained that such a proceeding commences only "when the Government sends notice of the forfeiture proceeding to potential claimants." *Id.* at 202 (citation omitted). The court observed that it was "undisputed" that the government had not sent petitioners a notice of nonjudicial forfeiture but had instead expressly disclaimed any intent to pursue forfeiture. *Ibid.* The court therefore held that CAFRA's notice and timing requirements did not apply. *Ibid.* The court also noted that even if CAFRA's timing provisions for

nonjudicial forfeiture applied, the court could extend the period for filing a judicial forfeiture complaint "for good cause shown" to permit the government to pursue a judicial forfeiture action. *Id.* at 204 n.3.

The district court further concluded that petitioners were entitled to summary judgment on their constitutional claims because the government had seized the Double Eagles without obtaining a warrant and had not provided petitioners with a predeprivation hearing. Pet. App. 205-228. To remedy those violations, the court ordered the government to initiate a judicial forfeiture proceeding to recover the coins. *Id.* at 216, 228.[2]

b. In accordance with the district court's order, the government initiated a judicial forfeiture action. The court also permitted the government to amend its counterclaim to assert a claim for a declaratory judgment that it owned the 1933 Double Eagles. Pet. App. 166-191.

After a two-week trial, a jury returned a verdict for the government on the judicial forfeiture claim. Pet. App. 117. The district court rejected petitioners' challenges to the verdict, finding that "the jury heard more than sufficient evidence * * * that the disputed [19]33 Double Eagles were taken from the Mint and squirreled away by Switt and [petitioners] with the requisite criminal intent to satisfy" the applicable statute. *Id.* at 126-127; see *id.* at 153.

The district court further ruled in favor of the government on its declaratory judgment claim. Pet. App.

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[2] In addition, the district court rejected petitioners' claim under the APA and postponed ruling on their replevin and conversion claims until the judicial forfeiture proceeding was completed. Pet. App. 230-231.

145-153. The court observed that "a declaratory judgment in this case serves the valuable purpose of efficiently settling and clarifying the relative legal rights of the Government and [petitioners] with respect to the disputed coins" by "quiet[ing] title to the disputed Double Eagles to an extent the jury's verdict did not." *Id.* at 145, 147. "While the jury settled title under the forfeiture statute," the court observed that "the verdict reveals nothing about the relative priority of the Government's and [petitioners'] competing claims to the coins independent of CAFRA." *Id.* at 149. The court accordingly issued a declaration that:

> The disputed Double Eagles were not lawfully removed from the United States Mint and accordingly, as a matter of law, they remain the property of the United States, regardless of (1) the applicability of CAFRA to the disputed Double Eagles, (2) [petitioners'] state of mind with respect to the coins, or (3) how the coins came into [petitioners'] possession.

Id. at 153; see *ibid.* (holding that, "as the true owner of the stolen coins, the United States of America—as property owner, not prosecutor—has superior title vis-a-vis" petitioners).

4. On appeal, a divided panel of the court of appeals initially vacated the district court's judgment for the government, Pet. App. 13, but the court of appeals granted rehearing en banc and affirmed the district court's judgment, *id.* at 1-82.

a. The en banc court of appeals rejected petitioners' contention that CAFRA's timing provisions barred the judicial forfeiture action in which the government had prevailed. Pet. App. 14-23. Petitioners had argued that their 2005 letter to the Mint demand-

ing return of the Double Eagles constituted "a seized asset claim which started [18 U.S.C.] 983(a)(3)'s ninety-day period for the Government to file a [judicial] forfeiture complaint." *Id.* at 15. But the court found Section 983(a)(3)'s time limit inapplicable because a seized asset claim must "be directed to 'property seized *in a nonjudicial civil forfeiture proceeding*.'" *Ibid.* (quoting 18 U.S.C. 983(a)(2)(A)). The court explained that the government had not seized the Double Eagles in a nonjudicial civil forfeiture proceeding, but rather had instead determined that forfeiture was unnecessary because "it had merely repossessed its own property." *Id.* at 17. "[A]n assertion of ownership presupposes that the party already has title," the court observed, "[w]hile forfeiture is a process by which '[t]itle is instantaneously transferred to another.'" *Id.* at 18 (final set of brackets in original) (quoting *Black's Law Dictionary* 722 (9th ed. 2009)). Thus, the court concluded that the seized asset claim was an "incongruous[] response" to "the Government's assertion of ownership" because it "attempt[ed] to invoke protections afforded to those whose property is being forfeited—a different subject matter." *Ibid.*

The en banc court of appeals rejected petitioners' argument that the government had initiated a de facto nonjudicial forfeiture proceeding by seizing the coins. Pet. App. 18-23. The court explained that "seizures and forfeitures are not the same" because in a seizure "the government obtains *possession* while in [a forfeiture proceeding] it obtains *title*." *Id.* at 19. And "[i]t follows that a seizure alone does not initiate a forfeiture proceeding because it does not implicate a transfer of legal title." *Ibid.* The court declined to decide precisely when a nonjudicial forfeiture proceeding

commences, explaining that in this case "the Government took no steps to forfeit the 1933 Double Eagles." *Id.* at 23 n.8.

The en banc court of appeals observed that its holding would not allow the government to avoid CAFRA's procedural protections. Pet. App. 23 n.9. Those protections, the court explained, apply only "when the government invokes its forfeiture power." *Ibid.* When the government does not invoke that power but instead "pursues its ownership rights," the court noted that "[t]hose who dispute the government's claim of ownership have recourse to common law remedies, such as replevin, which were available long before CAFRA was enacted and which CAFRA did nothing to displace." *Ibid.*

The en banc court of appeals also rejected petitioners' challenge to the declaratory judgment. See Pet. App. 24-32. The court disagreed with petitioners' argument that the district court had abused its discretion by permitting the government to amend its counterclaim to assert a declaratory judgment claim. *Id.* at 30. The district court had concluded that the amendment would not "prejudice [petitioners], * * * place an unwarranted burden on the [c]ourt," or present an "undue delay." *Id.* at 31. The en banc court of appeals could identify "no reversible error in [that] discretionary decision." *Id.* at 32.

The en banc court of appeals further observed that the judicial forfeiture claim and the declaratory judgment claim turned on "independent legal theor[ies]." Pet. App. 25. While judicial forfeiture "could be considered the prosecutor's remedy" to confiscate property used to commit a crime, the declaratory judgment claim provided a mechanism for the government

"to regain possession of what it believed to be its own property." *Ibid.* (citation omitted). The court declined to hold that the government may be "prevent[ed] * * * from seeking a declaratory judgment in its capacity as a property owner, which would have the untenable effect of putting the United States in a worse position than a civilian property owner." *Id.* at 26.

b. Judge Jordan concurred in part and concurred in the judgment. Pet. App. 63-73. Although he expressed doubt about the majority's CAFRA analysis, *id.* at 64, he concluded that the declaratory judgment was properly issued and provided "an independent and adequate basis on which to affirm," *id.* at 72. He explained that "[e]ven if the government violated CAFRA, the fact that the disputed property (allegedly) belonged to it all along allowed it to seek a separate declaratory judgment in its capacity as the property's purported rightful owner." *Ibid.* "Given the unusual procedural and factual background of this case," he concluded that "any errors in the forfeiture proceeding did not infect the distinct declaratory judgment action," providing "an alternative basis for affirming the judgment of the District Court." *Id.* at 71-72.

c. Judge Rendell, joined by Judges McKee and Krause, dissented. Pet. App. 73-82. Although they disagreed with the majority's analysis, they acknowledged that petitioners' CAFRA claim might nevertheless fail based on the government's argument that the Double Eagles are ineligible for nonjudicial forfeiture because they are "'merchandise' whose value 'exceed[s] $500,000' and not 'monetary instrument[s].'" *Id.* at 80 (quoting 19 U.S.C. 1607(a), 1610). If the

government prevailed on that issue, the dissent explained, CAFRA's provisions governing nonjudicial forfeiture proceedings would not apply. See *id.* at 81 (describing this as a "threshold" issue "that cuts to the very applicability of CAFRA's nonjudicial forfeiture scheme"). The dissenting judges therefore would have remanded the case for the district court to determine whether "CAFRA's nonjudicial forfeiture scheme even applied." *Id.* at 82.

ARGUMENT

Petitioners challenge two of the en banc court of appeals' holdings: (1) that the government did not initiate a nonjudicial civil forfeiture proceeding and that CAFRA's time limits governing such proceedings accordingly did not apply; and (2) that the district court did not abuse its discretion in permitting the government, in its capacity as property owner, to pursue a declaratory judgment quieting title to the 1933 Double Eagles. Those holdings were correct; the court of appeal's decision does not conflict with any decision of this Court or another court of appeals; and this "unique" case (Pet. App. 63) would in any event be a poor vehicle to consider the questions presented because petitioners' claims fail on several alternative grounds. Further review is not warranted.

1. a. The en banc court of appeals correctly held that CAFRA's timing provisions were inapplicable in this case because the government did not initiate a nonjudicial civil forfeiture proceeding. See Pet. App. 23. CAFRA permits a person claiming "property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute" to "file a claim with the appropriate official," which generally obligates the government to initiate a judicial forfeiture proceeding

within 90 days. 18 U.S.C. 983(a)(2)(A) and (3)(A). As the court correctly explained, the statute "presupposes that a nonjudicial forfeiture is pending before a proper seized asset claim can be filed." Pet. App. 15-16 (footnote omitted). Thus, where the government has not commenced a nonjudicial civil forfeiture proceeding, a purported seized asset claim is "incongruous[]" and does not trigger CAFRA's timing provisions. *Id.* at 18; see, *e.g.*, *In re Funds on Deposit*, 919 F. Supp. 2d 169, 174 (D. Mass. 2012) (holding that CAFRA's deadlines do not apply where the government "ha[s] no intention to commence and has not commenced an administrative forfeiture proceeding"); *DWB Holding Co.* v. *United States*, 593 F. Supp. 2d 1271, 1272 (M.D. Fla. 2009) (similar).

As the en banc court of appeals recognized, the government did not commence a nonjudicial forfeiture proceeding in this case. Because the government was acting in its capacity as a property owner, rather than in its capacity as a law enforcer, "it was not obliged to initiate forfeiture proceedings against the 1933 Double Eagles" to "repossess[] its own property." Pet. App. 17. A forfeiture proceeding transfers title based on a finding of criminal activity. See, *e.g.*, *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 127 (1993) (opinion of Stevens, J.) ("Until the Government * * * win[s] * * * a judgment [of forfeiture], someone else owns the property."). But here, the government already held lawful title to the Double Eagles. Because petitioners had never obtained title in the stolen property, forfeiture proceedings were unnecessary for the gov-

ernment to "assert[] its ownership rights to the coins." Pet. App. 17.[3]

The government accordingly did not send a notice of forfeiture in this case that would trigger the right to file a seized asset claim. See 18 U.S.C. 983(a)(2)(A) and (B). Instead, the government notified petitioners that it "ha[d] no intention of seeking forfeiture of [the] Double Eagles because they are, and always have been, property belonging to the United States." Pet. App. 6 (citation omitted); see also *id.* at 199 (reiterating, in response to petitioners' purported seized asset claim, that "there is no basis for a forfeiture action"). As the en banc court of appeals correctly held, the government did not pursue a "nonjudicial civil forfeiture proceeding under a civil forfeiture statute" but instead expressly disclaimed any intent to do so, and CAFRA's 90-day deadline therefore did not apply. See 18 U.S.C. 983(a)(1)(A)(i) and (2)(A); Pet. App. 14-23.

b. Petitioners' arguments (Pet. 23-34) to the contrary lack merit.

Petitioners contend (Pet. 30-34) that the government initiated a nonjudicial forfeiture proceeding, notwithstanding its contrary statements and intent, by retaining the 1933 Double Eagles and claiming

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[3] As petitioners point out (Pet. 32-33 & n.9), Congress included theft of government property among over 200 federal statutes that may serve as a basis of forfeiture. But contrary to petitioners' suggestion, nothing *requires* the government to seek forfeiture, as opposed to asserting other rights as a property owner, when its property has been stolen. By including theft of government property in the forfeiture provision, Congress expanded rather than restricted the government's remedies because in forfeiture proceedings the government may recover not only the property itself but also the proceeds of the property if it has been sold.

ownership of them. But as the en banc court of appeals correctly explained, Pet. App. 22, a seizure alone does not initiate forfeiture. See, *e.g.*, *Dusenbery* v. *United States*, 534 U.S. 161, 163 (2002) (government "began the process of administratively forfeiting" property two years after seizing it). For example, the government does not initiate forfeiture when it seizes evidence for use in an investigation or trial. See generally *Warden* v. *Hayden*, 387 U.S. 294 (1967); see also *Celata* v. *United States*, 334 Fed. Appx. 801, 802 (9th Cir. 2009) (holding that CAFRA's time limitations did not apply to property seized pursuant to a search warrant because the government had "an independent [non-forfeiture] legal basis for retaining" the property).

The government instead commences a nonjudicial forfeiture "when [it] sends notice of the forfeiture proceeding to potential claimants." Cassella § 4-6, at 162; see also *Funds on Deposit*, 919 F. Supp. 2d at 174 ("An administrative forfeiture proceeding is commenced either when the Government sends individual notice to interested persons or when public notice of the seizure is published for three weeks.") (citations omitted); *United States* v. *$200,255 in U.S. Currency*, No. 05-cv-27, 2006 WL 1687774, at *5 (M.D. Ga. June 16, 2006) ("The agency's act of sending the appropriate notice is what begins the nonjudicial civil forfeiture proceeding."); 146 Cong. Rec. 5232 (2000) (statement of Rep. Hyde, CAFRA's sponsor, that a nonjudicial forfeiture begins when the government gives notice). The right to submit a seized asset claim follows from that notice. See 18 U.S.C. 983(a)(2)(B) (permitting a seized asset claim "not later than the deadline set forth in a personal notice letter" or, if the

claimant does not receive such a letter, "not later than 30 days after the date of final publication of notice of seizure"). And CAFRA's 90-day period for filing a judicial forfeiture complaint begins to run only after the government has given notice and a claimant has submitted a proper claim. See 18 U.S.C. 983(a)(3)(A).

Petitioners imply (Pet. 30) that the government gave "notice" pursuant to Section 983(a)(1)(A)(i) when it made "clear it intended to keep" the 1933 Double Eagles. But the en banc court of appeals correctly rejected that argument, holding that "a letter that explicitly *disavows* any intent to initiate a forfeiture," as the government's letter claiming ownership did, "surely cannot suffice" to trigger CAFRA's provisions. Pet. App. 17 n.5 (emphasis added). The government did not notify petitioners that it was conducting a "nonjudicial civil forfeiture proceeding under a civil forfeiture statute," 18 U.S.C. 983(a)(1)(A)(i); it instead notified them that it "ha[d] no intention of seeking forfeiture," Pet. App. 6.

More broadly, CAFRA's scheme does not contemplate that the government de facto commences a nonjudicial civil forfeiture proceeding any time it seizes property and asserts a claim of ownership. That understanding of CAFRA would displace the government's ability to choose among various remedies to vindicate its ownership rights. For example, the government might decide to pursue an action to quiet title. See, *e.g.*, *United States* v. *Clymore*, 245 F.3d 1195, 1200 (10th Cir. 2001) (per curiam). Alternatively, the government might pursue forfeiture as part of a criminal prosecution. See *United States* v. *White*, No. 13-436, 2014 WL 3898378, at *6 (D. Md. Aug. 7, 2014) (holding that CAFRA's deadlines did not apply where

the government planned to seek criminal forfeiture). Or the government might choose to forgo the streamlined procedures for nonjudicial forfeiture and instead file a judicial civil forfeiture complaint, which may be filed any time "within five years after the time when the alleged offense was discovered, or * * * within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later." 19 U.S.C. 1621. Petitioners' insistence that they could compel an *immediate* judicial forfeiture proceeding, in a matter in which the government did not seek nonjudicial forfeiture, runs counter to the statutory scheme and the various remedies the government has in its distinct capacities as a property owner and a law enforcer.[4]

It would be particularly inappropriate to infer that the government has commenced a nonjudicial civil forfeiture proceeding without providing express notice because many types of property are not even eligible for nonjudicial forfeiture. For example, the government generally cannot nonjudicially forfeit items worth more than $500,000. 19 U.S.C. 1607(a)(1), 1610. Thus, when the government seizes property worth

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[4] Notably, the government may and often does elect to seek judicial forfeiture when nonjudicial forfeiture also is an option, such as when the required notice in initiating nonjudicial forfeiture might jeopardize an ongoing investigation. The statute gives the government a reasonable period of time to determine whether to initiate a nonjudicial forfeiture proceeding, providing that notice of such a proceeding generally should be given within 60 days and that the period can be extended if specified conditions are satisfied. See 18 U.S.C. 983(a)(1)(A) and (C). Petitioners' interpretation of CAFRA would permit claimants to short-circuit the notice period provided by Congress by immediately filing a seized-asset claim following any seizure.

more than $500,000, a nonjudicial civil forfeiture *cannot* ensue; Congress has made that procedure unavailable and the government must instead proceed by judicial forfeiture or other means. See, *e.g.*, *DWB Holding*, 593 F. Supp. 2d at 1272 ("[B]ecause the amount seized exceeds $500,000.00, the [DEA] cannot initiate administrative proceedings against the funds and is therefore not required to give notice."); see also Pet. App. 80-82 (Rendell, J., dissenting) (observing that the 1933 Double Eagles at issue here might fit into that category and stating that she would remand to determine whether "CAFRA's nonjudicial forfeiture scheme even applied to" this case). The civil forfeiture statutes would lose coherence if courts could infer that the government was forfeiting property even where it expressly disclaimed doing so, but only as to some types of property and not as to others.

Petitioners err in contending (Pet. 30-34) that the decision below "nullif[ies]" CAFRA's procedural protections. As the en banc court of appeals correctly explained, CAFRA was designed to amend the procedures associated with civil forfeiture. Pet. App. 23 n.9. The statute's procedural provisions therefore apply only "when the government invokes its forfeiture power," and not when the government seeks to vindicate its ownership rights through other means. *Ibid.* Here, the government did not draw on its forfeiture authority, and, accordingly, it did not invoke the procedural protections of an inapplicable statutory scheme.

As the en banc court of appeals recognized, that does not leave litigants like petitioners without recourse. See Pet. App. 23 n.9. If the government seizes property under a claim of ownership without

proceeding by forfeiture, litigants have various avenues of redress. For example, a litigant could assert constitutional claims under the Fourth Amendment, the Due Process Clause, or the Just Compensation Clause. See *id.* at 227-228.[5] In addition, common law remedies like replevin "were available long before CAFRA was enacted," and "CAFRA did nothing to displace" them. *Id.* at 23 n.9; see *id.* at 230-231. Under some circumstances, claimants may also be able to proceed under Federal Rule of Criminal Procedure 41(g).

In this case, the judicial forfeiture and declaratory judgment proceedings gave petitioners ample opportunity to contest the government's claim to the 1933 Double Eagles. In those proceedings, the government carried its burden to prove that the "Double Eagles were taken from the Mint and squirreled away by Switt and [petitioners] with the requisite criminal intent." Pet. App. 126-127. The government further proved that "as the true owner of the stolen coins, the United States of America—as property owner, not prosecutor—has superior title vis-a-vis" petitioners. *Id.* at 153. Petitioners are wrong to suggest (Pet. 36) that they should nevertheless be awarded the stolen Double Eagles because the government failed to comply with a time limit governing nonjudicial forfeiture

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[5] Petitioners' reliance (Pet. 29) on *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), only underscores that there are constitutional remedies available when the government "seize[s] property" and "assert[s] ownership and control over" it. *Id.* at 52. That decision does not support an argument that litigants should be permitted to rely on CAFRA's time limits governing nonjudicial civil forfeiture proceedings where the government is not pursuing nonjudicial forfeiture.

proceedings when no such proceeding was ever commenced.

2. a. The en banc court of appeals also correctly affirmed the district court's judgment on the alternative and independent ground that the court properly issued a declaratory judgment that the "Double Eagles were not lawfully removed from the United States Mint" and therefore "remain the property of the United States, regardless of * * * the applicability of CAFRA." Pet. App. 153; see *id.* at 24-32. The court of appeals observed that the government sought a declaratory judgment in its distinct role as a property owner, *id.* at 25-26, and the court rejected petitioners' contention that the district court abused its discretion in permitting the government to amend its counterclaim to assert a declaratory judgment claim, *id.* at 30-32. That decision hinged on findings that the amendment would not prejudice petitioners, place an unwarranted burden on the court, or present an undue delay, *id.* at 31, and the court of appeals "s[aw] no reversible error in [the district court's] discretionary decision," *id.* at 32.

b. Petitioners briefly contend (Pet. 36) that the "the declaratory judgment claim should have been barred" and include that issue as a second question presented (Pet. i), but their arguments lack merit.

Petitioners assert (Pet. 36) that the declaratory judgment was improper because it "circumvent[ed]" CAFRA's "restrictions." But as the en banc court of appeals explained, "[w]hile the declaratory judgment action did turn on a similar factual predicate as the forfeiture claim (*i.e.*, that the coins were stolen or embezzled), it used this fact to establish an independent legal theory, namely, that the Government was

attempting to regain possession of what it believed to be its own property." Pet. App. 25; see *id.* at 72 (Jordan, J., concurring in part and concurring in the judgment) (observing that the government was properly permitted "to seek a separate declaratory judgment in its capacity as the property's purported rightful owner"). The declaratory judgment claim accordingly did not end-run procedural requirements that the government must meet when it acts as a sovereign law enforcer, but rather provided a mechanism for the government to vindicate its separate and distinct rights as the lawful owner of the 1933 Double Eagles.

Petitioners' suggestion that the government may be "prevent[ed] * * * from seeking a declaratory judgment in its capacity as a property owner" when it is the victim of theft "would have the untenable effect of putting the United States in a worse position than a civilian property owner." Pet. App. 26. Imagine, for example, that a valuable coin owned by a private museum was stolen from the U.S. mail. The government acting in its law enforcement capacity could seek under CAFRA to forfeit the coin because mail theft is a predicate for civil forfeiture. See 18 U.S.C. 981(a)(1)(C), 1956(c)(7). If the government failed to comply with CAFRA's timing requirements, it would be precluded from taking "any further action to effect the civil forfeiture of such property in connection with the underlying offense." 18 U.S.C. 983(a)(3)(B). But the private museum undoubtedly would retain all of its rights to bring a civil action against the thief for the return of the property. So too here: when the government acts in dual capacity (sovereign and property owner), it may proceed as property owner to seek a declaratory judgment "under a legal theory inde-

pendent of its forfeiture claim." Pet. App. 72 (Jordan, J., concurring in part and concurring in the judgment). Petitioners' suggestion that the United States has fewer remedies than other owners with respect to property stolen from it lacks merit. See U.S. Const. Art. IV, § 3, Cl. 2 (Property Clause).

Petitioners also argue (Pet. 37) that if the district court had found that the forfeiture proceeding was barred under CAFRA, it might have concluded that petitioners would be prejudiced if the government were permitted to amend its counterclaim to seek a declaratory judgment. But as Judge Jordan correctly concluded, "[g]iven the unusual procedural and factual background of this case, any errors in the forfeiture proceeding did not infect the distinct declaratory judgment action." Pet. App. 72. Petitioners' fact-bound claim that the district court abused its discretion in finding no prejudice does not warrant this Court's review.

3. Petitioners do not contend that the decision of the en banc court of appeals conflicts with the decision of any other circuit, and they do not show that the questions presented arise with any frequency. See Pet. App. 63 (stating that "[t]his case is unique for many reasons"). Petitioners assert (Pet. 27-29) that "courts and litigants have struggled to" determine what commences a nonjudicial forfeiture proceeding, but they cite only the opinions below to support that claim. In any event, the en banc court of appeals declined to address precisely what commences a nonjudicial forfeiture proceeding under CAFRA, holding on the facts of this case that the government "took *no* steps to forfeit the 1933 Double Eagles." Pet. App. 23 n.8 (emphasis added).

Petitioners suggest (Pet. 1-2 & n.2) that the en banc court of appeals' decision in this case could affect prosecutions of defendants for theft of government property, but they identify no such prosecution in which the questions presented here have arisen. The cases that petitioners cite only highlight the various means by which the government can proceed when its property has been wrongfully taken.[6]

4. In any event, this case would be an unsuitable vehicle to address petitioners' arguments about CAFRA because petitioners' claims fail on several alternative grounds.

First, as discussed above, "[e]ven if the government violated CAFRA, the fact that the disputed property (allegedly) belonged to it all along allowed it to seek a separate declaratory judgment in its capacity as the property's purported rightful owner," and the declaratory judgment that it is the lawful owner of the 1933 Double Eagles therefore provides "an inde-

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[6] See, *e.g.*, *United States* v. *Lee*, 833 F.3d 56 (2d Cir. 2016) (government recovered stolen property through criminal forfeiture), petition for cert. pending, No. 16-7317 (filed Dec. 19, 2016); *United States* v. *Dalalli*, 651 Fed. Appx. 389 (6th Cir.) (district court docket indicates that sentence included restitution), cert. denied, 137 S. Ct. 235 (2016); *United States* v. *Feaster*, 798 F.3d 1374 (11th Cir. 2015) (restitution); *United States* v. *Wilson*, 788 F.3d 1298 (11th Cir.) (district court docket indicates criminal forfeiture and restitution), cert. denied, 136 S. Ct. 518 (2015); *United States* v. *Loving*, 588 Fed. Appx. 494 (7th Cir. 2015) (district court docket indicates restitution); *United States* v. *Joseph*, 743 F.3d 1350 (11th Cir. 2014) (per curiam) (criminal forfeiture and restitution); *United States* v. *Lagrone*, 743 F.3d 122 (5th Cir. 2014) (restitution); *United States* v. *Sussman*, 709 F.3d 155 (3d Cir. 2013) (defendant returned property after charged with stealing it); *United States* v. *Bole*, 542 Fed. Appx. 665 (9th Cir. 2013) (district court docket indicates restitution).

pendent and adequate basis on which to affirm." Pet. App. 72 (Jordan, J., concurring in part and concurring in the judgment). Petitioners' factbound challenge to that alternative ground warrants no further review, and it suffices to support the judgment.

Second, CAFRA's time limits governing nonjudicial forfeiture proceedings are inapplicable in this case because the 1933 Double Eagles are not eligible for nonjudicial forfeiture. See Pet. App. 71 (Jordan, J., concurring in part and concurring in the judgment) (observing that "the CAFRA deadlines may not apply" because "the Double Eagles may be merchandise valued at over $500,000, instead of being monetary instruments, so they may be statutorily ineligible for nonjudicial forfeiture") (citing 19 U.S.C. 1607(a)); *id.* at 80-81 (Rendell, J., dissenting) (same).[7] Petitioners contend (Pet. 22 n.6) that the gold pieces are subject to nonjudicial forfeiture because they qualify as "monetary instruments," but the 1933 Double Eagles do not fit within that category because they were never issued as money and instead are "rare, uncirculated coins whose seemingly immense value derives from their status as collector's items." Pet. App. 81 (Ren-

[7] Petitioners mistakenly suggest (Pet. 22 n.6) that the government forfeited this argument. To the contrary, the government pressed the argument before the district court, the panel, and the en banc court of appeals. See Gov't Pet. for Reh'g 11; Gov't C.A. Br. 26 n.13; C.A. App. 627, 630-635, 896-899 (summary judgment briefing). Notably, the concurring judge and the dissenting judges recognized that the issue was properly presented and could provide an alternative basis on which to reject petitioners' CAFRA claims. Pet. App. 71 (Jordan, J., concurring in part and concurring in the judgment); *id.* at 80-82 (Rendell, J., dissenting).

dell, J., dissenting).[8] This "threshold" issue "cuts to the very applicability of CAFRA's nonjudicial forfeiture scheme," *ibid.*, and it could preclude the Court from reaching the questions presented.

Finally, the district court noted in its summary judgment opinion that, even if CAFRA applied, the court could find "good cause" to extend the 90-day deadline for the government to file a judicial forfeiture action following receipt of a seized asset claim. Pet. App. 204 n.3; see 18 U.S.C. 983(a)(3)(A) (authorizing courts to "extend the period for filing a" judicial forfeiture complaint "for good cause shown"). Good cause exists here because the government reasonably believed that its status as a property owner made it unnecessary to initiate forfeiture proceedings to transfer title to the Double Eagles. And it has now been established that the government is the rightful owner of the stolen 1933 Double Eagles. The court therefore could and should determine that the government's judicial forfeiture complaint was not time-barred regardless of the resolution of the questions presented here.

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[8] Petitioners also briefly contend (Pet. 23 n.6) that the 1933 Double Eagles could be subject to nonjudicial forfeiture under 19 U.S.C. 1607(a)(2), which applies to "merchandise the importation of which is prohibited." Petitioners waived that argument by failing to make it in the district court or in their opening brief on appeal. The argument in any event lacks merit because Section 1607(a)(2) is aimed at contraband, not at merchandise such as coinage and collectibles which may be imported.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2017