No. 99-1501

In the Supreme Court of the United States

DONALD G. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 19 U.S.C. 1615, as applicable before enactment of the Civil Asset Forfeiture Reform Act of 2000, once the government demonstrated probable cause to institute a forfeiture action, the burden of proof shifted to the claimant to avoid forfeiture. The question presented is whether that allocation of the burden of proof violates the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is unpublished, but the judgment is noted at 191 F.3d 461 (Table). The opinion of the district court (Pet. App. 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1999. The petition for rehearing was denied on December 10, 1999 (Pet. App. 40a-41a). The petition for a writ of certiorari was filed on March 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on two counts of illegal gambling, in violation of 18 U.S.C. 1955; one count of money laundering, in violation of 18 U.S.C. 1956; and 26 counts of engaging in monetary transactions in criminally-derived property, in violation of 18 U.S.C. 1957. The court of appeals affirmed. *United States* v. *Ford*, 184 F.3d 566 (6th Cir. 1999), cert. denied, 120 S. Ct. 1175 (2000). In a related civil proceeding, at issue here, the district court granted the motion of the United States for summary judgment of forfeiture as to four parcels of real property and two lots of currency. The court of appeals affirmed.

1. In 1989, petitioner and his then-wife, Margaret Ford, purchased four contiguous parcels of real property in Louisville, Kentucky. Petitioner built a large bingo hall on three of the parcels, which he intended to rent to charities seeking to conduct bingo games as a fund-raising activity. Under Kentucky law, "charitable gaming" can constitute a defense to prosecution for illegal gambling. Petitioner sold the bingo hall to Clay Ballinger, but after Ballinger defaulted on his payments in December 1991, petitioner reassumed ownership of the hall. Pet. App. 2a.

The Regular Veterans Association (RVA) is a national organization that supports veterans and members of the military. In late 1991, petitioner organized a post of the RVA (RVA Post #1), and registered it as an entity that would conduct charitable gaming in Louisville. Petitioner appointed long-time friends and family members as officers of RVA Post #1, and at its first meeting, petitioner loaned $50,000 to the Post. In

December 1991, RVA Post #1 began to sponsor bingo events at petitioner's bingo hall. Pet. App. 2a-3a; C.A. Br. 9-10.

In February 1992, petitioner purchased a meeting hall located directly across the street from the bingo hall. Petitioner paid $144,000 for the meeting hall (RVA hall). Later that month, petitioner sold the RVA hall to RVA Post #1 for $375,000. RVA Post #1 paid petitioner $75,000 in cash upon execution of the contract, and spent $74,000 to repair, renovate, and furnish RVA hall. RVA Post #1's only known source of income was proceeds from the gambling events it sponsored at petitioner's bingo hall. Pet. App. 3a.

From January 1, 1992, through August 28, 1992, local RVA posts sponsored gambling events at the bingo hall. Petitioner charged rent for each gaming session conducted at the bingo hall. The proceeds from the games and profits from the concession stand were deposited daily into the checking account of petitioner's closely held corporation, and only periodically distributed to the RVA posts. Petitioner also stashed large sums of the bingo proceeds in safe deposit boxes at various Louisville banks. Petitioner had no other known source of large sums of cash. Pet. App. 3a-4a.

2. Following an investigation by the Internal Revenue Service and local law enforcement, the United States filed a complaint seeking civil forfeiture of the bingo hall, RVA hall, a private residence, and six lots of United States currency seized in searches of the bingo hall and assorted safe deposit boxes. The United States alleged that the property had been used in an illegal gambling business or involved in financial transactions in criminally derived property. The United States sought forfeiture of the property under 18 U.S.C. 1955(d) and 18 U.S.C. 981(a)(1)(A). Pet. App. 4a-5a.

In August 1993, a federal grand jury indicted petitioner on various counts of illegal gambling, money laundering, and engaging in monetary transactions in criminally-derived property. In November 1996, petitioner was convicted on those counts. Following petitioner's convictions, the government moved for summary judgment in the forfeiture action. Pet. App. 5a..

The district court granted the government's motion in substantial part. Pet. App. 20-31. The court noted that, under the forfeiture statutes, once the government establishes probable cause to institute the forfeiture action, the burden shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture. *Id.* at 21a-22a. Relying on Sixth Circuit precedent, the court rejected petitioner's argument that the government must establish that property is subject to forfeiture by clear and convincing evidence. *Id.* at 22a.

Applying the settled statutory framework, the district court first held that petitioner could raise no factual issue to oppose forfeiture of the three parcels of property devoted to the bingo hall because "illegal gambling actually occurred there." Pet. App. 23a. The court next found that "the evidence clearly and convincingly proves that the [RVA hall] was used as and in connection with an illegal gambling operation." *Ibid.* In that regard, the court noted that petitioner completely controlled the RVA; that the RVA sponsored most of the illegal gambling events at the nearby bingo hall; and that "the RVA and the RVA Hall had no existence apart from" the "central" role they played in petitioner's illegal gambling operation. *Ibid.* Finally, the court concluded that the cash seized at the bingo hall and from petitioner's safe deposit box was derived

from petitioner's gambling operation. *Id.* at 24a-25a. The court rejected petitioner's argument that the funds cannot be traced to his gambling operation because they were derived from the concession stand operations. "Without the illegal gambling operation," the court reasoned, "the concession stand would not have existed. The concession stand was an important and expected part of the entire bingo scene." *Id.* at 24a.

3. In an unpublished per curiam opinion, the court of appeals affirmed. Pet. App. 1a-19a. The court rejected petitioner's contention that the burden of proof set forth in 19 U.S.C. 1615, and incorporated by reference in 18 U.S.C. 981(d) and 18 U.S.C. 1955(d), violates due process. The court noted that under the terms of Section 1615, once the government establishes probable cause for the institution of the suit, the burden of proof is on the claimant. Pet. App. 7a. The court further noted that the Sixth Circuit's standard practice has been to "place on claimants the evidentiary burden to show by a preponderance of the evidence that forfeiture is not warranted." *Ibid.*

The court of appeals rejected petitioner's contention that this Court's decisions in *Austin* v. *United States*, 509 U.S. 602 (1993), and *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), required a contrary conclusion. The court reasoned that *James Daniel Good Real Property* held only that, absent exigent circumstances, the Due Process Clause requires notice and an opportunity to be heard before the government seizes real property under the forfeiture statutes. The court also noted that, in holding that forfeitures are subject to the limitations of the Eighth Amendment's Excessive Fines Clause, this Court in *Austin* did not rest its analysis on characterizing forfeiture as criminal or quasi-criminal. Pet. App. 8a. The

court of appeals emphasized, moreover, that in *United States* v. *Ursery*, 518 U.S. 267 (1996), this Court refused to extend *Austin*'s punishment rationale to the Double Jeopardy Clause. To the contrary, the court noted, this Court held that "[t]here is little doubt that Congress intended [forfeitures under 18 U.S.C. 981] to be civil proceedings," and that there is "little evidence" to suggest that such proceedings "are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." Pet. App. 8a (quoting *Ursery*, 518 U.S. at 288, 290).

Judge Clay dissented. Pet. App. 14a-19a. In his view, the burden of proof allocation set forth in 19 U.S.C. 1615 "violates the Fifth Amendment's protection against loss of property without due process of law." Pet. App. 15a. He concluded that the government should be required to "establish at minimum that forfeiture is supported by a preponderance of the evidence–a typical burden in civil proceedings–before the burden of proof may shift to the claimant to demonstrate that he is entitled to keep his property." *Ibid.*

ARGUMENT

Petitioner contends that the burden of proof for civil forfeitures established in 19 U.S.C. 1615 violates the Due Process Clause of the Fifth Amendment. That contention is without merit and does not warrant review.

Section 1615 provides as follows:

> In all suits or actions * * * brought for * * * forfeiture * * * where the property is claimed by any person, the burden of proof shall lie upon such claimant; * * * *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court * * *.

19 U.S.C. 1615. That method for allocating the burden of proof also governs forfeiture actions instituted under the provisions at issue here. See 18 U.S.C. 981(d), 1955(d). Every court of appeals that has considered the question has upheld that burden of proof allocation against due process challenge. See *United States* v. *$129,727 U.S. Currency*, 129 F.3d 486, 491-494 (9th Cir. 1997), cert. denied, 523 U.S. 1065 (1998); *United States* v. *One Beechcraft King Air 300 Aircraft*, 107 F.3d 829, 829-830 (11th Cir. 1997) (per curiam); *United States* v. *$94,000 in U.S. Currency*, 2 F.3d 778, 782-784 (7th Cir. 1993); *United States* v. *228 Acres of Land*, 916 F.2d 808, 814 (2d Cir. 1990); *United States* v. *Santoro*, 866 F.2d 1538, 1543-1544 (4th Cir. 1989); *United States* v. *$250,000 in U.S. Currency*, 808 F.2d 895, 900 (1st Cir. 1987); *Bramble* v. *Richardson*, 498 F.2d 968, 970-973 (10th Cir. 1974). This Court has repeatedly denied petitions for a writ of certiorari that have challenged that allocation of the burden of proof on due process grounds. See *Trujillo* v. *United States*, 523 U.S. 1065 (1998); *Scianna* v. *United States*, 519 U.S. 932 (1996); *Moreno* v. *United States Drug Enforcement Admin.*, 498 U.S. 1091 (1991); *Aponte* v. *United States*, 466 U.S. 994 (1984). For several reasons, review is unwarranted in this case as well.

First, after the instant petition was filed, Congress enacted legislation altering the burden of proof in civil forfeiture actions. The Civil Asset Forfeiture Reform Act of 2000 contains the following provision:

> (c) BURDEN OF PROOF.—In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property —
>
> (1) the burden of proof is on the Government to establish, by a preponderance of the

> evidence, that the property is subject to forfeiture;
>
> (2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and
>
> (3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

Pub. L. No. 106-185, § 2(a), 114 Stat. 205-206. Those provisions apply to civil forfeiture actions brought under 18 U.S.C. 981 and 1955, the statutes at issue here. See § 2(b), 114 Stat. 210.

As the text of the new statute makes clear, in future actions to forfeit property under Sections 981 and 1955, the burden is no longer on the claimant to avoid forfeiture once the government establishes probable cause to initiate a forfeiture action. Under the new statute, the government must establish "by a preponderance of the evidence" that the property is subject to forfeiture. The question raised by petitioner—whether the Due Process Clause permits the government to forfeit property upon a showing of probable cause, unless the defendant shows by the preponderance of the evidence that the property is not forfeitable—is therefore of no continuing importance.

Second, even if the question presented were of prospective importance, this case would present a poor

vehicle for resolving it. The evidence submitted by the government in support of forfeiture in this case readily satisfies both the preponderance of the evidence standard suggested by the dissent and the clear and convincing standard espoused by petitioner. As petitioner's criminal convictions demonstrate, the government proved beyond a reasonable doubt that illegal gambling actually occurred at the bingo hall. See Pet. App. 23a. The district court also found that "the evidence clearly and convincingly proves" that the RVA hall was "used as and in connection with an illegal gambling operation." *Ibid.* And there was "overwhelming evidence in the record" to establish that the two lots of seized currency were proceeds from petitioner's gambling operation. *Id.* at 3a-4a, 24a-25a. Thus, the three parcels of land devoted to the gambling hall, the RVA hall, and the two lots of seized currency are all subject to forfeiture, regardless of the applicable burden of proof.

Finally, petitioner's constitutional challenge lacks merit. Since the earliest days of our nation, forfeiture statutes have placed the burden of proof on the claimant to avoid forfeiture once the government established probable cause to initiate a forfeiture proceeding. For example, a revenue collection Act of 1799 provided:

> [I]n actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case, the *onus probandi* shall lie upon such claimant; * * * but the *onus probandi* shall lie on the claimant, only where probable cause is shown for the prosecution, to be judged of by the court before whom the prosecution is had.

Act of Mar. 2, 1799, ch. 22, § 71, 1 Stat. 678. As this Court recently reaffirmed, "[e]vidence of a longstanding legislative practice 'goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice.'" *United States* v. *Ursery*, 518 U.S. 267, 276 (1996) (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-328 (1936)).

Moreover, in several cases, this Court has applied the forfeiture laws' probable cause standard without ever suggesting that such a standard might be constitutionally infirm. In *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 348 (1813), for example, the Court concluded that the evidence offered by the government furnished "just cause to suspect" that certain goods were subject to forfeiture. The Court rejected the claimant's contentions that "this [wa]s not enough to justify the Court in requiring exculpatory evidence" from him and that guilt "must be proved, before the presumption of innocence can be removed." *Ibid.* Applying the plain terms of the 1799 statute, the Court concluded that

> the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion.

Ibid. See also, *e.g.*, *The John Griffin*, 82 U.S. (15 Wall.) 29, 33 (1872) (finding that government established clear prima facie case for forfeiture, which "both by the statutes and the ordinary rules of evidence required of the claimant such testimony as should satisfactorily

rebut the presumption of guilt which it raised"); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 366 (1842) (finding government's proof established probable cause and affirming jury instructions placing onus probandi on the claimant).

Petitioner's reliance (Pet. 11-12) on *Santosky* v. *Kramer*, 455 U.S. 745 (1982), and *Addington* v. *Texas*, 441 U.S. 418 (1979), as support for a clear and convincing evidence standard is misplaced. Those cases hold that due process requires the government to adduce clear and convincing evidence in order to obtain a judgment terminating parental rights or a judgment of involuntary civil commitment. The crucial factor in those cases was that they implicated "fundamental liberty interest[s]" (*Santosky*, 455 U.S. at 753) of great "weight and gravity" (*Addington*, 441 U.S. at 427). This case does not implicate such a fundamental liberty interest. Instead, it involves the loss of property and money. That distinction is significant. As explained in *Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 424), "[t]his Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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