No. 16-1206

In the Supreme Court of the United States

FINN BATATO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the case-or-controversy requirement of Article III of the United States Constitution prohibits a district court from exercising jurisdiction in a civil-forfeiture proceeding concerning assets in other countries, where those countries' governments have cooperated with U.S. authorities to restrain the assets at issue.

2. Whether the requirement of the fugitive-disentitlement statute, 28 U.S.C. 2466(a)(1)(B), that a claimant must have "decline[d] to enter or reenter" the United States "in order to avoid a criminal prosecution," is satisfied by a finding that the claimant remains outside the United States with the specific intent to avoid prosecution.

3. Whether a district court must treat a motion to strike a fugitive's claim to assets as a motion for summary judgment, with an attendant right to discovery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 833 F.3d 413. The opinion of the district court (Pet. App. 107a-151a) is reported at 89 F. Supp. 3d 813.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2016. A petition for rehearing was denied on November 9, 2016 (Pet. App. 152a-153a). On January 26, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 7, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In July 2014, the United States filed an *in rem* action in the United States District Court for the Eastern District of Virginia, seeking civil forfeiture pursuant to 18 U.S.C. 981(a)(1)(A) and (C), 985, and 2323(a)(1) of certain assets in foreign countries. The complaint alleged that the assets were the proceeds of an extensive international copyright-infringement and money-laundering conspiracy and that the acts and omissions giving rise to the forfeiture took place in the Eastern District of Virginia. C.A. App. 18-19. After the individual and corporate claimants—petitioners here, who currently are all overseas—filed claims to the assets, the government moved to strike their claims pursuant to 28 U.S.C. 2466, the federal fugitive-disentitlement statute. The district court granted the motion to strike, granted the government's motion for a default judgment, and issued forfeiture orders for assets located in New Zealand and Hong Kong. Pet. App. 5a-6a. The court of appeals affirmed. *Id.* at 1a-45a.

1. "Fugitive disentitlement began as a judicial doctrine allowing appellate courts to dismiss appeals from criminal fugitives who failed to surrender to authorities, holding that such failure 'disentitles the defendant to call upon the resources of the Court for determination of his claims.'" Pet. App. 23a (quoting *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam)). Before 1996, lower courts were divided on whether that principle applied to claims in civil-forfeiture proceedings by fugitives evading prosecution. *Ibid.* In *Degen* v. *United States*, 517 U.S. 820 (1996), this Court held that the common-law fugitive-disentitlement doctrine did not authorize striking a civil-forfeiture claimant's claim on

the ground that he was evading related criminal charges. *Id.* at 828.

Congress responded by enacting 28 U.S.C. 2466, which expressly grants federal courts discretion to "disentitle[]" a civil-forfeiture claimant who is a fugitive from justice from using the U.S. courts to pursue his claims. Section 2466(a) provides:

> (a) A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action * * * upon a finding that such person—
>
> (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution—
>
> (A) purposely leaves the jurisdiction of the United States;
>
> (B) declines to enter or reenter the United States to submit to its jurisdiction; or
>
> (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and
>
> (2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.

Ibid.

2. In February 2012, a grand jury in the United States District Court for the Eastern District of Virginia returned a superseding indictment charging petitioners with criminal copyright infringement, in violation of 17 U.S.C. 506 and 18 U.S.C. 2 and 2319; conspiracy to commit copyright infringement, in violation of 18 U.S.C. 371; conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(d); conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and

wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 111a; see C.A. Supp. App. 165-254. The indictment alleged that petitioners' international copyright-infringement and money-laundering scheme—known as the "Mega Conspiracy"—used public websites to illegally reproduce and distribute many millions of copyrighted movies, computer software, television programs, video games, electronic books, and musical recordings. C.A. Supp. App. 166. The grand jury found that the estimated harm to copyright holders was "well in excess" of $500 million and that the conspiracy generated at least $175 million in illegal proceeds. *Ibid.* The grand jury also found probable cause that $175 million and 133 specific assets were subject to forfeiture. *Id.* at 247-253.

The government determined that most of the remaining proceeds of the scheme were located in New Zealand and Hong Kong, and the district court issued restraining orders for those assets. Gov't C.A. Br. 5. In response, the High Court in Hong Kong promptly issued a restraining order against approximately $60 million held in 13 bank accounts. *Ibid.* In April 2012, the New Zealand High Court registered restraining orders on $15 million in assets, including $8 million in New Zealand government bonds; two houses worth approximately $3 million; and luxury cars, bank accounts, and other items worth about $4 million. *Id.* at 6.[1]

3. New Zealand's restraining orders, by law, could remain registered only for two years, with a possible one-year extension. Pet. App. 5a. Recognizing that the

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[1] Despite the restraining orders, the Hong Kong and New Zealand courts have released funds to certain petitioners for living and legal expenses. Some have been substantial—including millions of dollars in legal fees and $170,000 in monthly living expenses for just one petitioner. Pet. App. 5a.

extended restraints would expire in April 2015, the United States filed a complaint in district court in July 2014 against 48 assets, located in New Zealand and Hong Kong, restrained pursuant to the criminal indictment. *Ibid.* Most of the individual and corporate petitioner-claimants filed claims to those assets. *Id.* at 5a-6a.

In November 2014, the government moved to strike petitioners' claims to the assets pursuant to 28 U.S.C. 2466. Pet. App. 6a. It argued that the claimants were avoiding prosecution in connection with the pending criminal charges in the Eastern District of Virginia and should not be allowed to use a federal court to defend against the forfeiture action while at the same time avoiding the court's criminal jurisdiction. *Ibid.*

4. The district court granted the motion to strike. Pet. App. 107a-151a. At the threshold, the court rejected petitioners' contentions that the government failed to charge a violation of federal copyright law, including (*inter alia*) petitioners' contention that the government alleged only "secondary," as opposed to direct, copyright infringement. *Id.* at 117a; see *id.* at 117a-120a. The court found that by designing, and profiting from, a system that facilitated wide-scale copyright infringement, petitioners conspired to violate United States copyright law and that the government had identified assets traceable to the conspiracy. *Id.* at 118a-120a.

The district court also determined that it had *in rem* jurisdiction over the assets at issue, located in New Zealand and Hong Kong, under 28 U.S.C. 1355. Pet. App. 120a-123a. Section 1355 provides, *inter alia*, that "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process

or competent authority of a foreign government, an action or proceeding for forfeiture may be brought" in the district where "any of the acts or omissions giving rise to the forfeiture occurred." 28 U.S.C. 1355(b)(1)(A) and (2). The court found that all of the statute's jurisdictional requirements were satisfied: the assets were located in Hong Kong and New Zealand; the assets had been restrained pursuant to the legal processes of those countries, at the request of the United States; and the forfeiture complaint and superseding indictment alleged that many of the Mega Conspiracy's "acts or omissions" occurred in the Eastern District of Virginia: more than 525 of the computer servers utilized by the conspiracy, for example, were located in the district, and the conspirators received payments from within the district and elsewhere to a PayPal account. Pet. App. 122a-123a.

On the merits of the fugitive-disentitlement issue, after a hearing, C.A. App. 1820-1910, and upon consideration of extensive evidence—including declarations by petitioners themselves, see *id.* at 145-509, 556-936, 994-1435, 1470-1645, 1667-1953—the district court exercised its discretion to find that petitioners' claims to the assets were barred by 28 U.S.C. 2466. Pet. App. 124a-151a. Following the procedure employed by "[n]umerous courts," see *id.* at 127a n.12 (collecting cases), the court rejected petitioners' claim that the fugitive-disentitlement doctrine's application could not be adjudicated in a motion to strike. *Ibid.* The court also found that it could adequately decide the question of petitioners' intent on the record before it. *Id.* at 128a n.13.

The district court found that "each claimant has deliberately declined to enter the United States in order

to avoid criminal prosecution in this country" and therefore is subject to Section 2466. Pet. App. 131a; see *id.* at 130a-142a. Although acknowledging that some petitioners may have had other, additional reasons not to come to the United States—*e.g.*, to live and work in other countries—the court stated that the "existence of other motivations does not preclude a finding that [a claimant] also has a specific intent to avoid criminal prosecution." *Id.* at 134a. The court thereafter granted the government's motion for default judgment, *id.* at 68a-88a, and also issued orders of forfeiture for assets in New Zealand and Hong Kong. *Id.* at 57a-67a.

5. The court of appeals affirmed. Pet. App. 1a-56a.

a. The court of appeals held that the district court correctly interpreted 28 U.S.C. 1355(b)(2) to authorize *in rem* jurisdiction over the overseas assets. Pet. App. 7a-11a. The court noted that, under the "traditional paradigm" of *in rem* jurisdiction, a court "must have actual or constructive control over the res when an *in rem* forfeiture suit is initiated." *Id.* at 8a (quoting *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 58 (1993)). The court held, however, that Section 1355(b)(2) "effectively dispense[d] with this traditional requirement." Pet. App. 8a-9a. As it explained, the "plain meaning of the statutory text" and its legislative history compelled this interpretation. *Id.* at 11a; see *id.* at 9a-11a.

The court of appeals also rejected petitioners' claim that, without control of the res, the district court could issue only an "advisory opinion" to the courts of New Zealand and Hong Kong, in violation of Article III of the Constitution. Pet. App. 11a; see *id.* at 11a-16a. The court observed that, for a court to hear a case, "it must be 'likely,' as opposed to merely 'speculative,' that the

injury will be redressed by a favorable decision." *Id.* at 15a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The court held that the *Lujan* test was satisfied: "the foreign sovereigns have cooperatively detained the res by issuing orders restraining the defendant property pursuant to this litigation," and "[b]y showing that the res was placed in custody in New Zealand and Hong Kong based on the district court's order[,] * * * the government has demonstrated that it is likely, rather than speculative, that these courts will honor a forfeiture order from the United States." *Ibid.* That the foreign courts have released certain restrained funds, the court found, "simply do[es] not prove that an order of forfeiture is unlikely to be honored." *Ibid.*

b. On the merits, the court of appeals rejected petitioners' argument that application of Section 2466 to them violates due process. Pet. App. 22a-30a. Although the Constitution requires an "opportunity to be heard," the court explained, Section 2466 does not eliminate that opportunity: petitioners "could have secured a hearing on [their] forfeiture claim any time . . . simply by entering the United States." *Id.* at 25a-26a (citations omitted; brackets in original). Petitioners, however, had waived that right by "fail[ing] to take advantage of that opportunity." *Id.* at 26a. "[T]here can be no doubt," the court explained, that petitioners' waiver of their right to be heard was knowing: "[g]iven their lengthy, and apparently expensive, intransigence with regard to the underlying controversy, it cannot be argued that they were unaware of the statute's consequences and therefore unable to waive." *Id.* at 28a.

The court of appeals rejected petitioners' argument that, to show that petitioners "decline[d] to enter or reenter the United States" "in order to avoid criminal

prosecution" under Section 2466(a)(1)(B), the government was required to demonstrate that evading prosecution was their "sole or primary reason" for being absent. Pet. App. 31a; see *id.* at 30a-35a. As the court explained, had Congress meant for Section 2466 to apply only where avoiding prosecution was the "sole" or "principal" reason for a person's absence, "adding those modifiers to the statute would accomplish the goal easily." *Id.* at 32a. The court further observed that, because the statute explicitly "applies to both those refusing to 'enter' and those refusing to 're-enter,'" it covers "foreign nationals with no ties to the United States other than their alleged criminal conduct and the indictment describing it." *Id.* at 33a. Because the statute thus applies to people "with no reason to come to the United States other than to defend against criminal charges, * * * a 'sole' or 'principal' purpose test cannot stand." *Id.* at 32a-33a. "The principal reason such a person remains outside the United States will typically be that they live elsewhere. A criminal indictment gives such a person a reason to make the journey, and the statute is aimed at those who resist nevertheless." *Id.* at 33a. The court noted its agreement with the Second and Ninth Circuits, which have specifically embraced the same understanding, and concluded that its interpretation was consistent with decisions of the D.C. and Sixth Circuits. See *id.* at 33a-35a.

The court of appeals found no clear error in the district court's findings as to petitioners' intent. Pet. App. 35a-39a. The district court, it noted, conducted a "holistic analysis" to determine whether petitioners declined to enter the United States to avoid prosecution, and found that petitioners' persistent opposition to extradition,

though not the sole basis of its findings, was a "clearly" relevant consideration. *Id.* at 36a.

c. Judge Floyd dissented. Pet. App. 46a-56a. While agreeing with the majority that Section 1355(b)(2) provides district courts with jurisdiction over property located abroad, *id.* at 46a-47a, he believed that the grant of that jurisdiction ran afoul of Article III's "justiciability concerns." *Id.* at 47a. In his view, because the property at issue was subject to the control of the New Zealand and Hong Kong courts—and beyond the control of the district court—a forfeiture order "merely advises the courts of a foreign sovereign that (in the district court's view under the laws of the United States) the United States should have title to the *res*." *Id.* at 50a.

ARGUMENT

Petitioners seek review of whether Article III forbids federal courts from asserting *in rem* jurisdiction in a civil-forfeiture proceeding under 28 U.S.C. 1355 over property located in a foreign country. The court of appeals correctly held that the district court properly exercised jurisdiction in the particular circumstances of this case, in which the foreign countries' governments are cooperating with U.S. authorities and have restrained the assets at issue. That narrow conclusion does not implicate any lower-court conflict.

Petitioners also seek review of the court of appeals' holding that they qualify as "fugitives" under the federal fugitive-disentitlement statute, 28 U.S.C. 2466(a)(1)(B), because they declined to enter the United States with the specific intent to avoid prosecution. That contention does not warrant review. The court of appeals correctly construed Section 2466 in light of its text and purpose. Its holding applying the statute to the facts here does not conflict with any decision of another circuit.

Petitioners finally contend that the district court erred in deciding the application of Section 2466(a)(1)(B) to this case at the pleading stage, rather than on summary judgment after additional discovery. That issue was not presented or passed upon in the court of appeals. In any event, the district court did not commit reversible error, and its approach is not inconsistent with other courts of appeals' decisions.

1. Petitioners argue (Pet. 13-19) that the court of appeals erred and deepened a lower-court conflict by holding that Article III permits a federal court to assert *in rem* jurisdiction in a civil-forfeiture proceeding over assets located in a foreign country under a foreign government's control. The court of appeals' narrow holding that the district court properly exercised jurisdiction in the circumstances of this case is correct and does not conflict with any other court of appeals' decision.

a. Although petitioners argued in the court of appeals that the district court lacked subject-matter jurisdiction under 28 U.S.C. 1355(b) over assets located in foreign countries, see Pet. App. 6a, the court of appeals rejected that contention, and petitioners do not renew it in this Court. As the decision below explained, the "traditional paradigm" for *in rem* proceedings required that a court have "actual or constructive control" over property before asserting jurisdiction in a forfeiture suit, but Congress "dispense[d] with this traditional requirement" in Section 1355(b)(2). *Id.* at 8a (citation and internal quotation marks omitted); see *id.* at 8a-11a.

Section 1355(b)(2) provides that, "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or compe-

tent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1)"—which permits a "forfeiture action or proceeding [to] be brought" in either the "district in which any of the acts or omissions giving rise to the forfeiture occurred" or in "any other district where venue" is authorized by statute—"or in the United States District [C]ourt for the District of Columbia." 28 U.S.C. 1355(b)(1) and (2) (footnote omitted). By its terms, the court of appeals held, the statute authorizes *in rem* jurisdiction over property located in a foreign country "if any of the acts resulting in the forfeiture action occurred within its jurisdiction." Pet. App. 11a. The court rejected petitioners' argument that Section 1355(b)(2) addresses only venue, not jurisdiction. *Id.* at 8a-11a; see Pet. C.A. Br. 23-24. Petitioners do not seek review of that statutory holding in this Court.

b. Instead, petitioners assert that Article III prohibited the district court from exercising *in rem* jurisdiction over assets "located abroad and under the control of foreign courts." Pet. 13. A forfeiture decree, they contend, would not bind foreign courts and so would amount to an impermissible "advisory opinion." Pet. 13-14 (citation omitted); see Pet. 17-19. The court of appeals correctly rejected that argument. Pet. App. 11a-16a.

The prohibition on advisory opinions stems from Article III's "case or controversy" requirement, which confines federal courts to "resolv[ing] * * * real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (citation and internal quotation marks omitted); accord *Aetna Life Ins. Co.* v. *Haworth*,

300 U.S. 227, 241 (1937). It must be "'likely,' as opposed to merely 'speculative,' that the injury" of the party invoking federal jurisdiction "will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)); see *United States* v. *Hays*, 515 U.S. 737, 743 (1995).

Applying that principle, the court of appeals correctly held that, on the facts presented here, the district court's exercise of jurisdiction comports with Article III. Pet. App. 14a-16a. The court of appeals expressly reserved judgment on broader questions of the precise scope of constitutional limits on *in rem* jurisdiction over property abroad: "We need not wade into the potentially thorny issues raised by [petitioners]," the court explained, "because this case meets the test articulated in *Lujan*." *Id.* at 15a. Here, "the foreign sovereigns have cooperatively detained the res by issuing orders restraining the defendant property pursuant to this litigation." *Ibid.* "By showing that the res was placed in custody in New Zealand and Hong Kong based on the district court's order," the court held, "the government has demonstrated that it is likely, rather than speculative, that these courts will honor a forfeiture order from the United States." *Ibid.* The fact that the foreign courts had permitted "releases" of portions of the restrained funds for petitioners' "living and legal expenses," the court concluded, "simply do[es] not prove that an order of forfeiture is unlikely to be honored." *Id.* at 5a, 15a. That narrow, factbound conclusion does not conflict with any decision of this Court.

Petitioners assert (Pet. 18) that the district court's ruling is advisory because the Hong Kong and New Zealand courts "remain free to * * * refuse recognition to

the judgment of the district court." But, as this Court has explained, "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1025 (2013).

> For example, courts issue default judgments against defendants who failed to appear or participate in the proceedings and therefore seem less likely to comply. Similarly, the fact that a defendant is insolvent does not moot a claim for damages. Courts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed. And [this Court has] heard the Government's appeal from the reversal of a conviction, even though the defendants had been deported, reducing the practical impact of any decision; [the Court] concluded that the case was not moot because the defendants might "re-enter this country on their own" and encounter the consequences of [the Court's] ruling.

Ibid. (internal citations omitted). In short, the possibility that judgments may not be honored—whether because of the actions of a party refusing to obey it or a foreign tribunal refusing to enforce it—does not deprive federal courts of authority to render them. See *United States* v. *All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 Banco Espanol de Credito, Spain*, 295 F.3d 23, 27 (D.C. Cir. 2002) (*Banco Espanol*). Indeed, a live controversy unquestionably exists between the parties who are before the federal court—and who are bound by its judgment—regardless of possible uncertainty about whether third parties and foreign tribunals might be bound by or honor the judgment.

Petitioners also misread this Court's decision in *Republic National Bank of Miami* v. *United States*, 506 U.S. 80 (1992), as establishing that "Article III

requires that a 'court must have actual or constructive control of the *res* when an *in rem* forfeiture suit is initiated.'" Pet. 17 (quoting 506 U.S. at 87). That statement and the surrounding discussion concerned only principles of admiralty law—which Congress abrogated in the civil-forfeiture context in 28 U.S.C. 1355(b)(2), see pp. 11-12, *supra*—not the constitutional case-or-controversy requirement. See 506 U.S. at 84-89. Indeed, the Court did not mention Article III.

Even as a matter of admiralty law, *Republic National Bank of Miami* rejected a proposed rule "that jurisdiction over an *in rem* forfeiture proceeding depends upon continued control of the res." 506 U.S. at 84. Although admiralty law generally requires "that the court must have actual or constructive control of the res when an *in rem* forfeiture suit is initiated," the Court explained, a court is not "divested of jurisdiction by the prevailing party's transfer of the res from the district," at least unless relief thereby becomes impossible. *Id.* at 87, 89; see *id.* at 85. Here, as the court of appeals explained, it is not merely possible that foreign courts will respect the district court's judgment, but "likely," in light of their "cooperat[ion]" to date in promptly "detain[ing]" the assets at issue. Pet. App. 15a; see *id.* at 5a. If the foreign courts had no intention of enforcing the forfeiture orders once this appeal is concluded, presumably they would have released the assets long ago. The continued restraint of the assets strongly suggests that the foreign courts intend to enforce the orders. Petitioners have not shown that the district court's exercise of jurisdiction was improper.

c. Petitioners contend (Pet. 17) that the court of appeals' holding implicates a "longstanding circuit split" on this question. See Pet. 14-17. That is incorrect. The

disagreement petitioners allege among the courts of appeals concerns not Article III, but rather the antecedent statutory question whether 28 U.S.C. 1355(b)(2) displaces the traditional rule requiring actual or constructive control over the res as a prerequisite to *in rem* jurisdiction—an issue that petitioners do not press in this Court. See pp. 11-12, *supra*.

As petitioners note, the D.C., Third, and Ninth Circuits have interpreted Section 1355(b)(2)—as the Fourth Circuit did here—to abrogate the traditional rule and to confer subject-matter jurisdiction when the statute's requirements are met regardless of whether the court has actual or constructive control over the property. See *United States* v. *Approximately $1.67 Million (US) in Cash, Stock, and other Valuable Assets Held by or at: 1) Total Aviation Ltd.*, 513 F.3d 991, 997-998 (9th Cir. 2008) (*Hartog*); *Contents of Account No. 03001288* v. *United States*, 344 F.3d 399, 402-405 (3d Cir. 2003) (*Jalal*); *Banco Espanol*, 295 F.3d at 26-27. Those holdings concerned the statute, not Article III. Although *Hartog*, *Jalal*, and *Banco Espanol* held, like the court of appeals here, that Congress displaced the common-law rule, none of them addressed constitutional limits of *in rem* jurisdiction over property in foreign countries.

Petitioners assert that those decisions conflict with the Second Circuit's decision in *United States* v. *All Funds on Deposit in Any Accounts Maintained in the Names of Meza or De Castro*, 63 F.3d 148 (1995) (*Meza*), cert. denied, 517 U.S. 1155 (1996). But *Meza* similarly addressed only the interpretation of Section 1355(b), not constitutional boundaries of federal jurisdiction. *Meza* concluded that Section 1355(b) did not displace the traditional actual-or-constructive-control requirement. 63 F.3d

at 152. The Second Circuit "[d]id not believe that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdiction," and that actual or constructive control "is required in addition to the requirements of subject matter jurisdiction and venue." *Ibid.* Although *Meza* observed that, "[a]bsent any degree of control over property located in a foreign country * * * a district court's forfeiture order directed against such property would be wholly unenforceable," the court did not ground that holding in (or mention) Article III. *Ibid.* Instead, that holding concerns what "Congress intended" based on the court's analysis of the statute, background principles, and "legislative history." *Ibid.* (internal quotation marks omitted). Petitioners' assertion of a lower-court conflict concerning the requirements of Article III is unfounded.[2]

In any event, petitioners' contention that the decision below conflicts with *Meza* reads that decision's control-of-the-res holding too broadly. Although the Sec-

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[2] As the court of appeals noted, moreover, the status of that statutory holding in the Second Circuit is uncertain at best. Pet. App. 8a n.2. *Meza* described Section 1355(b) as "address[ing] venue in forfeiture actions," 63 F.3d at 151, but the following year, the Second Circuit characterized Section 1355(b) as jurisdictional, and held that it could be applied to civil forfeitures already pending when the statute was enacted on that basis, see *United States* v. *Certain Funds Contained in Account Nos. 600-306211-006, 600-306211-011 & 600-306211-014 Located at Hong Kong & Shanghai Banking Corp.*, 96 F.3d 20, 25 (1996), cert. denied, 519 U.S. 1113 (1997). Contrary to petitioners' suggestion (Pet. 16), *United States* v. *Federative Republic of Brazil*, 748 F.3d 86 (2d Cir. 2014), did not resurrect *Meza*'s reasoning. That case involved neither Section 1355 nor assets held overseas; the question was whether, in a motion for summary judgment, assets located in the United States could be transferred to Brazil in accordance with a Brazilian criminal judgment. See *id.* at 88.

ond Circuit construed Section 1355(b) to leave undisturbed the traditional requirement that a court have actual or constructive control over assets in a forfeiture proceeding, it held that requirement was satisfied in circumstances strikingly similar to those here. See *Meza*, 63 F.3d at 153-154. The assets at issue were located in the United Kingdom, but the British courts entered orders restraining the assets "based solely on a request by the United States." *Id.* at 153; see *id.* at 150. "[T]he United Kingdom," the court noted, was "not bound to remit to the United States any funds seized" and undisputedly "ha[d] the power to retain" them. *Id.* at 153. "Notwithstanding the absence of a binding obligation on the part of the United Kingdom," however, the Second Circuit "conclude[d] that the district court correctly determined that it had constructive control of the funds by virtue of the demonstrated cooperation of the British government." *Ibid.* After reciting the assistance the British government had provided, the court "declined to adopt [the] claimant's unduly narrow interpretation of constructive control, under which this history of demonstrated cooperation would be irrelevant, absent a binding obligation on the part of the United Kingdom to return the funds." *Id.* at 154.

The court of appeals here upheld the exercise of *in rem* jurisdiction on a very similar basis. Pet. App. 15a. Even if *Meza*'s holding had rested on constitutional rather than statutory principles, it does not conflict with the decision below.

2. Petitioners also contend (Pet. 28-33) that the court of appeals erred in concluding that they are "fugitives" under 28 U.S.C. 2466(a)(1)(B) and that the decision below implicates a circuit conflict on the meaning of that provision. That contention does not warrant review.

The court correctly construed the statute to require only a determination that a claimant acted with specific intent to avoid prosecution, and its holding does not conflict with the decisions of any other circuit.

a. The court of appeals' interpretation of 28 U.S.C. 2466 is correct. Section 2466(a)(1) authorizes a court to "disallow a person from using the resources of" federal courts "in furtherance of a claim in any related civil forfeiture action * * * upon a finding that such person," "after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution," either "purposely leaves the jurisdiction of the United States," "declines to enter or reenter the United States to submit to its jurisdiction," or "otherwise evades the jurisdiction of the court" where "a criminal case is pending against" him. 28 U.S.C. 2466(a)(1).[3] The court of appeals correctly held that "in order to avoid criminal prosecution" means that the claimant specifically intended to avoid prosecution, not that avoiding prosecution was the claimant's "sole" or "principal" reason. Pet. App. 30a; see *id.* at 30a-35a.

That interpretation faithfully implements the statutory text. The ordinary meaning of "in order to" in Section 2466(a)(1) is that the claimant acted "for the purpose of" avoiding or "as a means to" avoid prosecution. *Webster's Third New International Dictionary* 1588 (1993); accord *Webster's New International Dictionary* 1716 (2d ed. 1949). The court of appeals' reading of that phrase as requiring "specific intent" accurately reflects that meaning. See *Black's Law Dictionary* 931 (10th ed.

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[3] The statute does not apply if the person is confined or in custody in another jurisdiction for criminal proceedings based on crimes occurring there. 28 U.S.C. 2466(a)(2).

2014) ("The intent to accomplish the precise criminal act that one is later charged with.").

The court of appeals also correctly read "in order to" in Section 2466(a)(1) not to require that avoiding prosecution be the only or the principal purpose for the claimant's absence from the United States. Pet. App. 32a-33a. As the Second Circuit has observed, "[i]t is commonplace that the law recognizes that there may be multiple motives for human behavior," and "a specific intent need not be the actor's sole, or even primary purpose." *United States* v. *Technodyne LLC*, 753 F.3d 368, 385 (2014). Accordingly, "[i]t is well established that a defendant accused of" various "specific-intent crimes" —"such as bribery, tax evasion, and conspiracy"—"may properly be convicted if his intent to commit the crime was any of his objectives." *Ibid.* (collecting cases); see, *e.g.*, *Anderson* v. *United States*, 417 U.S. 211, 226 (1974) (holding that conspiracy, a specific-intent crime, "may have several purposes, but if one of them—whether primary or secondary—be a violation of a federal law, the conspiracy is unlawful under federal law"). In contrast, "when Congress has meant to impose a sole-intent limitation, it has done so expressly." *Technodyne*, 753 F.3d at 385 (citing 10 U.S.C. 2805(a)(2), 18 U.S.C. 227(a), 1512(e)). Section 2466(a)(1), by contrast, "does not contain a sole-intent limitation," and courts should not "engraft one." *Ibid.*; see *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687 (1962) (courts are "not at liberty * * * to add to or alter the words employed to effect a purpose which does not appear on the face of the statute").

As the court of appeals recognized, the language of Section 2466(a)(1)(B) reinforces that conclusion. Pet. App. 32a-33a. It encompasses not only persons who

decline to "reenter" the United States, but also those who decline to "enter," which in juxtaposition to "reenter" naturally refers to "those who have never before entered the United States." *Id.* at 33a (citations and quotation marks omitted). "Such individuals will often be foreign nationals with no ties to the United States other than their alleged criminal conduct." *Ibid.* "The principal reason such a person remains outside the United States will typically be that they live elsewhere." *Ibid.* Indeed, such persons may have "no reason to come to the United States other than to defend against criminal charges." *Id.* at 32a.

Petitioners' contrary reading also is incompatible with the statutory purpose. In enacting Section 2466, "Congress sought to bar the 'unseemly spectacle' of allowing an accused to absent himself deliberately in order to avoid prosecution in the United States while using United States courts to retrieve the proceeds of his crime." *Technodyne*, 753 F.3d at 385-386 (quoting *Collazos* v. *United States*, 368 F.3d 190, 200 (2d Cir. 2004)). It would therefore "defy logic to infer that Congress *sub silentio* intended to allow the fugitive to" do so "by the simple expedient of claiming some additional reason for not returning" to the United States. *Id.* at 386. As the court of appeals recognized, "almost any claimant could defeat disentitlement by merely asserting a self-serving reason to remain outside the United States," which would render the statute a "nullity." Pet. App. 38a.

b. Petitioners argue (Pet. 28-33) that review is warranted to resolve a disagreement among the courts of appeals about the interpretation of "in order to avoid criminal prosecution." That is incorrect. The courts of

appeals broadly agree on the appropriate standard governing application of Section 2466. To the extent any tension can be found in the language of the courts of appeals' opinions, it is not implicated here.

Like the Fourth Circuit here, other courts of appeals have recognized that "in order to avoid criminal prosecution" requires that a claimant has "deliberately" remained outside the United States for that purpose, or has made a "conscious choice" to do so. *United States* v. *$671,160 in U.S. Currency*, 730 F.3d 1051, 1056 & n.2 (9th Cir. 2013) (*Ionita*); see *United States* v. *2005 Pilatus Aircraft, Bearing Tail No. N679PE*, 838 F.3d 662, 664 (5th Cir. 2016), cert. denied, __ U.S. __, 2017 WL 2039192 (May 15, 2017); *Technodyne*, 753 F.3d at 378-379, 383-385; *United States* v. *$6,976,934.65 Plus Interest Deposited into Royal Bank of Scotland Int'l, Account No. 2029-56141070, Held in Name of Soulbury Ltd.*, 554 F.3d 123, 128 (D.C. Cir. 2009) (*Soulbury*); *United States* v. *Salti*, 579 F.3d 656, 665-666 (6th Cir. 2009). Two of these circuits have expressly held, like the decision below, that evading prosecution need not be the claimant's sole or primary purpose in declining to enter or reenter the United States. See *Technodyne,* 753 F.3d at 383 (declining to equate the "specific intent to avoid criminal prosecution," with "sole, principal, or dominant intent"); *Ionita,* 730 F.3d at 1056 n.2 ("[The claimant's] desire to evade criminal prosecution need not be the sole motivating factor causing him to remain abroad, to the exclusion of all others").

Petitioners assert that the D.C. and Sixth Circuits, despite adopting the same "deliberate[]," "conscious choice" standard, require that avoiding prosecution be "*the* reason a defendant does not enter the United States." Pet. 29 (capitalization altered); see Pet. 29-30

(citing *Soulbury*, 554 F.3d at 131-132; *Salti*, 579 F.3d at 664-666). Petitioners read these decisions (Pet. 30) to establish a rule that, if a claimant also has "reasons other than avoiding prosecution to remain in [his] foreign home countr[y]," he has not absented himself from the United States in order to avoid prosecution under Section 2466. Neither case stands for that illogical proposition or conflicts with the decision below.

The D.C. Circuit in *Soulbury* did not hold that Section 2466(a)(1) requires that avoiding prosecution be the sole or primary reason for a claimant's absence from the United States. The district court in *Soulbury* did reject a rule requiring that "avoiding prosecution is *the* reason [the claimant] has failed to enter the United States," *United States* v. *$6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30, 41 (D.D.C. 2007), and the D.C. Circuit held that this was error, *Soulbury*, 554 F.3d at 132. But in doing so, the D.C. Circuit did not conclude that avoiding prosecution must be the exclusive reason why a claimant remains abroad.

Rather, as relevant here, the D.C. Circuit held only that "mere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy" Section 2466(a)(1)(B). *Soulbury*, 554 F.3d at 132. As the court of appeals here explained, the problem in *Soulbury* was that insufficient proof existed "that avoiding prosecution was even *a* reason that the claimant remained outside the United States." Pet. App. 34a (emphasis added). Indeed, the government had not shown that the claimant even had notice of one set of charges filed in 2005—13 years after he had left the United States—and "[w]ithout notice of * * * the attendant criminal proceedings, it is difficult to say that [the claimant's] purpose for remaining outside the country

was to avoid criminal prosecution." *Soulbury*, 554 F.3d at 133; see *id.* at 132-133. Although the claimant apparently had notice of earlier charges filed in 1998, it was "not clear" that the claimant could still be prosecuted based on those charges. *Id.* at 132. The D.C. Circuit had no occasion to address whether avoiding prosecution must be the claimant's exclusive purpose. Rather, the "most that can be taken from" *Soulbury* is that "the intent standard in [Section] 2466 is more than knowledge." Pet. App. 34a-35a; see also *Technodyne*, 753 F.3d at 384.

Similarly, the Sixth Circuit in *Salti* did not adopt a broad rule that avoiding prosecution must be the sole or principal reason for a claimant's absence. It held instead that the district court erred in refusing even to consider evidence that the claimant had not come to the United States because of his poor health, not because he sought to avoid prosecution. *Salti*, 579 F.3d at 665. Such evidence would be "clearly relevant to whether [the claimant] is deliberately avoiding prosecution." *Ibid.* (brackets, citation, and internal quotation marks omitted). As the Sixth Circuit explained, "[i]f [the claimant] is indeed too sick to travel, such that his illness is what prevents him from returning to the United States," he did not decline to enter the United States "in order to avoid criminal prosecution." *Id.* at 665-666 (citation and internal quotation marks omitted). Nowhere did the court indicate that avoiding prosecution must be the sole reason for his absence from the United States. As the court of appeals here noted, *Salti* "left open the possibility * * * that while poor health might be *a* reason for [the claimant's] absence, the government might still prove that avoiding prosecution motivated his absence,

making him a fugitive subject to disentitlement." Pet. App. 35a (emphasis added).

The decision below does not conflict with *Soulbury* or *Salti*. The court of appeals did not hold, like the district court in *Soulbury*, that Section 2466(a)(1) applied merely because petitioners had knowledge of the criminal charges, but rather because they had specific intent to avoid prosecution. Pet. App. 35a-39a. All but two petitioners have actively opposed extradition. *Id.* at 36a-38a. As to the two other petitioners (Sven Echternach and Julius Bencko)—who do not face extradition in their home countries—the court of appeals held that the district court did not abuse its discretion in finding that the evidence showed that each one acted with intent to avoid prosecution. *Id.* at 38a-39a.[4]

Nor did the court of appeals, like the district court in *Salti*, refuse to consider petitioners' proffered evidence that they had "additional reasons" for declining to enter the United States. Pet. App. 38a. It held instead that petitioners' evidence was "utterly unpersuasive" because it "d[id] not contradict the evidence relied upon by the district court" showing that they intended to avoid prosecution. *Ibid.* Petitioners have failed to demonstrate any conflict that warrants further review.

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[4] Petitioners' assertion (Pet. 33-35) that application of Section 2466 to them violates due process and conflicts with *United States* v. *$40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994)—decided before Section 2466's enactment—rests on the erroneous premise that the court of appeals "treat[ed] knowledge of the indictment combined with [a] decision to remain abroad as adequate warrant for fugitive disentitlement." Pet. 33. As explained in the text, the decision below did not determine petitioners to be fugitives on that basis, but rather based its decision on the district court's detailed findings of petitioners' intent.

3. Petitioners further contend that the court of appeals erred by adjudicating the issue of Section 2466's application "at the pleading stage—rather than at summary judgment or after an evidentiary hearing," and that its ruling implicates a circuit conflict. Pet. 19-20; see Pet. 19-28. That contention does not merit review.[5]

a. At the threshold, the procedural question petitioners raise does not warrant review because it was "not raised or resolved in the" the court of appeals. *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted). Petitioners contended in the district court that the government's motion to strike should be converted into a request for summary judgment. See C.A. App. 535; Pet. App. 128a n.13. Following numerous other cases, the district court held that it could resolve the issue of Section 2466's application on a motion to strike, in which the court may consider material outside the pleadings. Pet. App. 127a-128a. Petitioners also sought further discovery on the question of their intent

[5] Petitioners assert in passing (Pet. 20) that the district court violated due process by depriving them of property without an opportunity to be heard. The court of appeals correctly rejected that contention. Pet. App. 25a-30a. Section 2466 did not eliminate petitioners' opportunity to be heard on the merits of their forfeiture claim. They "could have secured a hearing on their forfeiture claim at any time" by "entering the United States." *Id.* at 26a (brackets and citation omitted). Petitioners, however, waived that opportunity by "fail[ing] to take advantage of" it, electing to remain outside the country. *Ibid.*; see *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971) ("Due Process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance."). Moreover, petitioners did receive a hearing and submitted evidence concerning the application of Section 2466 to bar their forfeiture claims. See C.A. App. 1820-1910.

to avoid prosecution. The court denied that request, concluding that the extensive record before it was sufficient to make the determination required by 28 U.S.C. 2466(a), and also questioning "how discovery could help the claimants present evidence of their own intent." Pet. App. 128a n.13.

Petitioners did not challenge these rulings in the court of appeals. They did not argue in their briefing before the Fourth Circuit that the district court erred in deciding the application of Section 2466 on the government's motion to strike or seek review of the discovery rulings. Instead, petitioners asserted that a motion to strike is "akin to a motion to dismiss the claim or for summary judgment" and that "essentially every court to have considered a disentitlement case * * * has treated the motion as something like a motion to dismiss, has looked to matters outside the pleadings, and has, where appropriate, allowed for the possibility of conversion to summary judgment." Pet. C.A. Reply Br. 3 (citations, brackets, and internal quotation marks omitted). The court of appeals accordingly did not address the question whether the district court should have treated the motion to strike as one for summary judgment or granted broader discovery.

This Court ordinarily does not address issues not pressed or passed upon below absent "unusual circumstances." *Taylor*, 503 U.S. at 646 (citation omitted); see, *e.g.*, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 397-398 (2015). Petitioners identify no unusual circumstances here that justify disregarding their forfeiture. At a minimum, that forfeiture and the absence of a lower-court ruling makes this case an unsuitable vehicle for resolving the issues petitioners raise.

b. Even if it were properly preserved, petitioners' challenge to the procedure the district court employed would not merit review. Petitioners' characterization (Pet. 19-20) that the court resolved the application of Section 2466 at the pleading stage does not accurately reflect the proceedings below. The court did not hold that petitioners are fugitives under the statute based on allegations on the face of the pleadings. Rather, as Section 2466 directs, it made a factual "finding," 28 U.S.C. 2466(a)—after a hearing, C.A. App. 1820-1910, and after considering extensive evidence presented, including petitioners' own declarations and multiple submissions, see *id.* at 145-509, 556-936, 994-1435, 1470-1645, 1667-1953—that each petitioner deliberately declined to enter the United States in order to avoid prosecution. Pet. App. 135a-142a.

Petitioners raise factbound issues (Pet. 24-28) over specific evidence the district court considered, inferences it drew, and the extent of discovery it allowed. But those determinations, the district court's conclusion that the record here was adequate to resolve the Section 2466 issue, and its factual findings concerning petitioners' intent do not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

c. Contrary to petitioners' contention (Pet. 20-24), the procedure the district court applied does not implicate any square circuit conflict. The Second and Ninth Circuits each have declined to require district courts to convert motions to strike into motions for summary judgment: A court "is explicitly required to make findings of fact" under Section 2466, and therefore "determinations as to disentitlement are not to be made under the

standards governing summary judgment." *Technodyne*, 753 F.3d at 381-382; see *Ionita*, 730 F.3d at 1059 (affirming district court's decision declining to convert motion to strike into one for summary judgment).

Neither *Soulbury* nor *Salti* conflicts with the decision below. In *Soulbury*, the government moved for summary judgment, and the D.C. Circuit simply addressed the case in that posture, concluding that the district court could not resolve factual disputes at that stage. See 554 F.3d at 124. It did not hold that courts must apply the summary-judgment framework, but simply "dealt with the matter as it stood: an appeal from summary judgment." *Technodyne*, 753 F.3d at 381.

Salti similarly does not conflict with the decision below. The government moved to dismiss the claimant's claim, and the Sixth Circuit rejected the claimant's argument that discovery and a hearing were required before the district court could rule on that motion. See 579 F.3d at 660, 663-664. The Sixth Circuit reversed because the district court granted the motion to dismiss by deciding "as a matter of law" that the claimant was a fugitive, without considering evidence he had submitted concerning his medical history that might support a contention that he remained outside the United States due to poor health, not a desire to evade prosecution. See *id.* at 664-665. As discussed above, see p. 25, *supra*, the court here did not decline to consider evidence petitioners submitted about additional reasons they do not wish to enter the United States, but found the evidence unpersuasive because it did not undermine the court's finding that petitioners deliberately declined to enter the United States in order to avoid prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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