

No. 26-91

In the Supreme Court of the United States

RICHARD STUART ROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

**BRIEF OF THE MANHATTAN INSTITUTE AND
KANSAS JUSTICE INSTITUTE AS
AMICI CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether a civil-forfeiture claimant “substantially prevails” under the Civil Asset Forfeiture Reform Act when the Government dismisses the forfeiture action without prejudice and returns the claimed property.

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INTERESTS OF *AMICI CURIAE*¹

The Manhattan Institute (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has sponsored scholarship and filed briefs supporting the security of Americans' property rights and access to judicial process to vindicate those rights.

The Kansas Justice Institute (KJI) is a nonprofit, pro bono, public interest litigation firm committed to upholding constitutional freedoms, protecting individual liberty, and defending against government overreach and abuse. KJI directly litigates, including forfeiture cases, files amicus briefs, and comments on matters of public concern. KJI is a Kansas limited liability company whose sole member is Kansas Policy Institute—a think tank—founded in 1996. In particular, KJI believes the government's ability and propensity to seize and forfeit a person's property without a criminal conviction poses a serious risk to our constitutional rights.

This case interests *amici* because they seek to protect private property from confiscation and other government abuses. If the Second Circuit's decision is allowed to stand, the government could seize private property, force its owner to litigate for its return, and then avoid paying attorney's fees simply by returning the property before a court orders it to do so.

¹ Supreme Court Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel; no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Reacting to the many abuses of the civil asset forfeiture system—innocent citizens losing their property, others losing property far in excess of what their crimes justified—Congress enacted the Civil Asset Forfeiture Reform Act of 2000, commonly known as CAFRA. Pub. L. No. 106-185, 114 Stat. 202. Chief among the injustices that CAFRA aimed to correct was the difficulty of finding legal representation to challenge civil forfeitures, especially in cases where the seized property’s value was less than the expected cost of recovering it. Without counsel, the property’s owners may simply give up, letting the federal government get away with effectively robbing its own citizens.

CAFRA’s corrective is the provision at issue here: the promise of a fee award to any private claimant who “substantially prevails” over the government in a civil forfeiture case. 28 U.S.C. § 2465(b)(1). And the meaning of that two-word phrase is the primary textual question raised by Ross’s petition—specifically, how does the word “substantially” modify the generally well-established meaning of the word “prevails”?

According to the Second Circuit, “substantially prevails” means essentially the same thing as “prevailing party” because “both the phrases . . . require a litigant to ‘prevail’ to some degree.” Pet. App. 29a. But this interpretation misunderstands the use of the word “substantially,” both in common usage and elsewhere in the United States Code.

In common usage, ascertained through dictionaries and a search of the Corpus of Contemporary American English (COCA), “substantially” has two primary uses:

an augmenting use, in which it heightens or strengthens the meaning of the word it modifies, and a diminishing use, in which it implies that the modified word might not quite apply, or might apply only partially. The augmenting use is much more common, appearing with words of indeterminate magnitude like “higher” and “lower” and answering questions like “how much higher (or lower)?” The diminishing use, while rarer, appears predictably with words like “all” or “rewritten,” and it walks back the sense of totality or completion that the words might otherwise convey.

A search of the United States Code reveals the same pattern in acts of Congress. “Substantially burden,” “substantial impact,” and “substantial evidence” are all examples of the augmenting sense of “substantially” (or “substantial”). But the diminishing sense appears clearly in numerous statutes, in phrases like “substantially complete,” “substantial compliance,” and “substantially equivalent.”

“Substantially prevail” is an example of the diminishing sense, not the augmenting sense. This is clearest in the several statutes where Congress has used the phrase “prevail or substantially prevail” or some equivalent, since the only purpose of adding “substantially prevail” to that phrase is to include some parties who do not quite prevail. But even in CAFRA, where “substantially prevails” appears alone, it implies a standard lower than the “prevailing party” standard that the Second Circuit chose to apply.

Under any reasonable reading of “substantially prevails,” the standard is satisfied whenever a party (like Ross) files a claim to recover seized assets and succeeds in recovering the assets. For the sake of property owners who lack Ross’s resources, for whom the

risk of not securing a fee award may prevent them from contesting forfeiture to begin with, the Court should grant certiorari and correct the Second Circuit's error.

ARGUMENT

I. IN ORDINARY LANGUAGE, “SUBSTANTIALLY” IMPLIES “ALMOST, BUT NOT QUITE” WHEN MODIFYING PREDICTABLE TYPES OF WORDS

A. Corpus Linguistics Helps Here

Corpus linguistics is an approach to textualism that seeks to discern ordinary usage from large bodies of organic speech and writing compiled in an electronic database known as a “corpus.” Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. Rev. 1915, 1954–55 (2010). The basic idea behind corpus linguistics is that, to determine what a word means, we should observe how people use it. This idea is “so commonsensical that”—as Justice Scalia once wrote of the canons of construction—“were [it] not couched in Latin,” “you would find it hard to believe anyone could criticize [it].” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 26 (Amy Gutmann ed., 1997).

Corpus linguistics does not replace dictionaries; it picks up where they leave off. Dictionaries can only take a legal reader so far—they can identify the possible meanings of a statutory term, but they often have little to say about which of the possible meanings was

intended in any given statute. To answer that question, a reader must consult examples of how the word is used in other contexts, and corpus linguistics allows readers to find examples from the most relevant contexts as systematically and objectively as possible. *See Mouritsen, supra*, at 1956–58.

Corpus linguistics thus reduces the risk that a court will select an isolated example that happens to support a preferred reading, instead permitting courts to compare numerous examples across a large body of actual usage. That comparison is especially useful for polysemous modifiers such as “substantially,” whose meaning depends heavily on the character of the word it modifies.

B. Corpus Linguistics Shows Two Uses of “Substantially”: An Augmenting Sense and a Diminishing Sense

CAFRA’s word “substantially” can be used in a variety of ways, but we will focus on two: an augmenting or magnitude sense (Substantially₁) and a diminishing or threshold sense (Substantially₂). The augmenting sense of Substantially₁, when modifying a verb, usually conveys the meaning that the actor in question has done more than would be implied by the unmodified verb: a child who has grown substantially is not merely larger but *substantially* larger than she was before. The diminishing sense of Substantially₂, on the other hand, implies that an actor has done something less than implied by the unmodified verb: a child who has substantially cleaned the kitchen probably left some mopping for Mom.

Dictionaries acknowledge both the augmenting sense of Substantially₁ and the diminishing sense of

Substantially₂. The *Oxford Advanced Learner's Dictionary*, for example, gives two definitions that map exactly onto those two senses: Oxford's definition 1 is "very much; a lot," and definition 2 is "mainly; in most details, even if not completely." *Substantially*, Oxford Advanced Learner's Dictionary, <https://tinyurl.com/ytmwbf5p> (last visited Aug. 17, 2026). Merriam-Webster lists "substantially" only as the adverbial form of "substantial," but two of its definitions of "substantial" likewise match Substantially₁ and Substantially₂: Merriam-Webster's definition 3b is "considerable in quantity: significantly great," and its definition 5 is "being largely but not wholly that which is specified," as in "a substantial lie." *Substantial*, Merriam-Webster.com Dictionary, <https://tinyurl.com/3k8cmmjc> (last visited Aug. 17, 2026).

So which sense of "substantially" best fits CAFRA? Answering that question requires examining the word "substantially" not only by itself but in context, in conjunction with "prevailed" and other words like it.

To perform that examination, we searched the Corpus of Contemporary American English, <https://www.english-corpora.org/coca>, for uses of the word "substantially" between 1990 and 2005 (since CAFRA was passed in 2000). The search yielded 4,598 results, of which we chose 100 at random for analysis. We concluded that 80 of the 100 were examples of the augmenting sense (Substantially₁), 15 were examples of the diminishing sense (Substantially₂), and the remaining 5 were ambiguous.

Substantially₁ predominates, but that is not dispositive; nothing requires Congress to use only the single most common meaning of each word. Instead, the corpus sample is helpful in two ways: first, it proves that both senses are actually in common use

and neither is a mere relic or eccentricity preserved by overzealous lexicographers; and, second, it lets us identify usage patterns that can indicate when one sense is intended and when the other. *See* Mouritsen, *supra*, at 1915.

In this case, the usage pattern is straightforward. Substantially₁ is used with words that are indeterminate in scope or degree, and its purpose is to specify the otherwise unstated scope or degree. To repeat the example from above, merely saying a child has grown does not say how much—even a tenth of an inch is “growth.” On the other hand, Substantially₂ is used with words that already imply a certain scope or degree, and its purpose is to diminish the scope or degree implied: saying a child has cleaned a kitchen implies that the kitchen is clean, full stop; the reason to add “substantially” is to acknowledge that the standard usually implied by “clean” might not quite be met.

Further examples from the corpus confirm this distinction. In our sample, Substantially₁ modifies words like the following:

- “Reduce,” “decrease,” “diminish,” “fall,” “lessen,” “lower,” or “cut,” as in “cutting taxes” (18 uses);
- “Increase,” “boost,” “drive up,” “go up,” “grow,” “raise,” or “rise” (14 uses);
- “Benefit,” “contribute,” “enhance,” “enrich,” or “further,” as in “to further a purpose” (6 uses); and
- “Damage,” “deteriorate,” “erode,” “undermine,” or “water down” (5 uses).

These verbs make up more than half the uses of Substantially₁ in the sample. Their common theme is that they indicate the direction of a change—lower or

higher, better or worse—without indicating its magnitude. The same theme appears in some of the sample’s adjectives: “better,” “cheaper,” “closer,” “faster,” “greater,” “higher,” “larger,” “less,” “lower,” “shorter,” and “more” (19 uses total). These all say that something has more of some quality than something else, but none of them says how much more, and Substantially₁ attempts to supply the missing information.

The words we associate with Substantially₂, on the other hand, already imply a magnitude, scope, or degree. Examples follow:

- “Last week, negotiators in the House and Senate agreed on a measure that would **substantially overturn** the 1984 act[.]”
- “The psychological dialectic leads Fukuyama to a reflection on bourgeois culture—**shared substantially** by authors from Tocqueville to Nietzsche, Riesman, and many others.”
- “The employer-required insurance will probably be **substantially rewritten**.”
- “[T]he Telegraph made up ‘**substantially all**’ of Hollinger International’s assets[.]”
- “We have a **substantially non-immune** population and that’s a very risky situation if we face a malicious bioterrorist[.]”

In each of these cases, the word modified by “substantially” already conveys a clear degree or magnitude, as can be seen by removing “substantially” from the sentence. Without “substantially,” a bill that overturns the 1984 act would be expected to repeal it entirely; an idea “shared by authors from Tocqueville

to Nietzsche” would be shared completely; a “non-immune” population would be assumed to have no immunity at all.

And in each case, “substantially” is clearly being used to diminish the degree or magnitude conveyed by the phrase. A bill that “substantially overturn[s]” the 1984 act still leaves part of the act in place, and an insurance policy that is “substantially rewritten” is not rewritten all the way. A newspaper that makes up “substantially all” of a company’s assets isn’t the company’s only asset; there must be some minor property somewhere else on the balance sheet. Thus, these five results are all examples of Substantially₂.

II. FEDERAL STATUTES USE “SUBSTANTIALLY” TO IMPLY “ALMOST, BUT NOT QUITE” WHEN MODIFYING THE SAME TYPES OF WORDS

Our analysis based on the COCA is reinforced by a second corpus: the United States Code. Congress’s use of the words “substantially” and “substantial” reflects the same two recurring functions of “substantially” discussed above: the augmenting sense of Substantially₁ and the diminishing sense of Substantially₂.

Further, the pattern of contexts in which Congress uses each sense matches the pattern observed above in COCA. Examples of the augmenting sense of “substantially” or “substantial” include

- “substantially burden,” 42 U.S.C. § 2000bb-1(a) (Religious Freedom Restoration Act or RFRA);
- “substantial impact,” *e.g.*, 42 U.S.C. § 7191(b) (administrative procedure provisions for the Department of Energy); and

- “substantial evidence,” *e.g.*, 42 U.S.C. § 405(g) (if supported by “substantial evidence,” factual findings by the Social Security Commissioner are “conclusive”).

In each case, the modified word can exist in varying amounts or degrees, and “substantial” is needed to answer the question “how much.” Without “substantially,” RFRA would apply whenever religion is burdened even in the slightest and most insignificant way. Likewise, if “substantial” were removed from 42 U.S.C. § 405(g), then factual findings by the Social Security Commissioner would be conclusive if supported by any evidence at all.

In acts of Congress as in normal usage, Substantially₂ is less common than Substantially₁, but some statutes still employ it to soften the effect of words that would otherwise be too absolute.

The Federal Food, Drug, and Cosmetic Act, for example, identifies a “first applicant” for a new drug based on which parties first file “a substantially complete application.” 21 U.S.C. § 355(j)(5)(B)(iv)(II)(bb). We know Substantially₂ is intended because Congress says so: the statute defines “substantially complete application” to mean “an application under this subsection that on its face is *sufficiently complete to permit a substantive review* and contains all the information required by paragraph (2)(A).” *Ibid.* (emphasis added). In other words, “substantially” was added to indicate that perfect completion is not required.

Similarly, a number of statutes use “substantially” or “substantial” to modify “comply” or “compliance,” indicating that, in a particular context, perfect compliance with the statute is not required. *See, e.g.*,

17 U.S.C. § 512(c)(3)(B); 42 U.S.C. § 609(a)(8)(A)(i)(III). The point of the phrase “substantial compliance” is to acknowledge and excuse “minor violations.” 21 U.S.C. § 333(f)(1)(B)(ii).

“Complete” and “compliant” are like “all,” “non-immune,” “rewritten,” etc.—the words modified by Substantially₂ in our COCA sample. They are all words that, when left unmodified, ordinarily imply something complete or total: ordinarily a party either complies or doesn’t, just as an insurance policy usually either has been rewritten or hasn’t. And they are far from the only examples in the U.S. Code. *See* 21 U.S.C. § 360c(i)(1) (“substantially equivalent”); 11 U.S.C. § 1101(2) (“substantial consummation”); 34 U.S.C. § 20927 (“substantially implement”); 15 U.S.C. § 1692o (“requirements substantially similar”); 16 U.S.C. § 2634 (proceedings and actions that “substantially conform” to federal requirements).

III. IN CAFRA, “SUBSTANTIALLY PREVAILS” IMPLIES “ALMOST PREVAILS, BUT NOT QUITE”

As argued above, both common usage and other statutes give “substantially” its augmenting sense when it modifies a word that is indeterminate in scope or degree, and they give “substantially” its diminishing sense when it modifies a word that ordinarily implies completeness or totality. The only remaining question, then, is which side of the line “substantially prevails” falls on: is “prevail” the sort of word that triggers the augmenting sense of Substantially₁, or does it trigger the diminishing sense of Substantially₂?

Again we will give a common-usage answer and a statutory-usage answer. The American Heritage Dictionary lists four meanings of “prevail”:

1. To be greater in strength or influence; triumph: *The home team prevailed against the visitors.*
2. To be most common or frequent; be predominant: *a region where snow and ice prevail.*
3. To be in force, use, or effect; be current: *an ancient tradition that still prevails.*
4. To use persuasion or inducement successfully. Often used with *on*, *upon*, or *with*.

Prevail, Am. Heritage Dictionary of the English Language, <https://tinyurl.com/mutvcpv3> (last visited Aug. 17, 2026). Other dictionaries' entries are, well, "substantially" similar. See, e.g., *Prevail*, Merriam-Webster.com Dictionary, <https://tinyurl.com/y2swhxr6> (last visited Aug. 17, 2026) ("[T]o gain ascendancy through strength or superiority.").

"Prevails" in CAFRA is obviously an instance of *Prevail*₁, specifically the "triumph" part of the definition. It is also precisely the kind of word that triggers the diminishing sense of *Substantially*₂. Unlike the verbs modified by *Substantially*₁—verbs like "reduce," "increase," "benefit," and so on—the verb "prevail" already implies a degree or magnitude.

Specifically, "prevails" implies completeness: one either prevails or not. When the home team "prevails" against the visitors (as in the dictionary example above), the home team adds exactly one game to its wins column and the visiting team adds exactly one loss. When a chess player writes 0.5–0.5 at the end of

her game score, the word for what she has done is not “prevail” but “draw.”

Examples from politics lead to the same conclusion. A candidate who “prevails” in the election takes office; partially prevailing is not possible. Likewise, a bill’s sponsors “prevail” when the bill passes; if their bill doesn’t pass, they haven’t prevailed. If the sponsors “substantially prevail,” on the other hand, everyone understands that they have not passed the bill they really wanted—they have passed a bill that contains most of what they wanted, or a bill that contains everything they wanted but also some things they wanted to leave out.

As with “substantially,” this common usage of “prevails” is confirmed by statutory usage—specifically, by the word’s use in other statutes allowing fee awards. For example, to be a “prevailing party” and obtain a fee award under 42 U.S.C. § 1988, a party must obtain legally binding “relief on the merits of his claim,” relief that “materially alters the legal relationship between the parties.” *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)). Such relief has either been awarded or not, with no middle option, and Ross lost below because the Second Circuit ruled that it hadn’t been. Pet. App. 32a–38a (“Ross obtained none of the *judicially sanctioned relief* that he sought from the district court.” (emphasis added)).

In some statutes, however, Congress makes fees easier to award by including exactly the same “substantially prevails” language at issue here:

- 29 U.S.C. § 1303(f)(3) authorizes costs to a party who “prevails or substantially prevails.”

- 33 U.S.C. § 1365(d) authorizes fees to “any prevailing or substantially prevailing party.”

And at least four other statutes use similar constructions. 29 U.S.C. § 1370(e)(1) (“prevails or substantially prevails”); 33 U.S.C. § 1369(b)(3) (“prevailing or substantially prevailing party”); *id.* § 2706(g) (same); 42 U.S.C. § 6972(e) (same).

In all of these instances of “substantially prevails,” the augmenting sense of Substantially₁ would make surplusage of the entire phrase—any party that prevailed “very much, a lot”² would already be covered by the words “prevailing party,” so the separate language covering a “substantially prevailing party” would be unnecessary. The only plausible reading of these provisions interprets “substantially” in the diminishing sense of Substantially₂—i.e., “largely but not wholly.”³ The two phrases together must mean something like “any party who prevails, plus any party who doesn’t quite prevail but still achieves something substantial.”

The phrase “substantially prevails” should carry the same meaning in CAFRA, even though the statute says only “substantially prevails” rather than “prevails or substantially prevails.” 28 U.S.C. § 2465(b)(1). In CAFRA as in the other statutes, “prevails” is an all-or-nothing verb like “overturn,” not a verb of indeterminate magnitude like “reduce” or “increase.” Consequently, in CAFRA as in the other statutes, “substantially” must carry its Substantially₂ sense—

² *Substantially*, Oxford Advanced Learner’s Dictionary, <https://tinyurl.com/ytmbwf5p> (last visited Aug. 17, 2026).

³ *Substantial*, Merriam-Webster.com Dictionary, <https://tinyurl.com/43xsd2zp> (last visited Aug. 17, 2026).

the same sense as in “substantially complete” and “substantially comply.”

The Second Circuit got this exactly wrong. It reasoned that because “substantially prevails” includes the word “prevails,” it must therefore “require a litigant to ‘prevail’ to some degree.” Pet. App. 29a. Then the Circuit proceeded to apply—without alteration—the standard definition of “prevail” from the “prevailing party” cases. *See* Pet. App. 28a–38a (discussing, inter alia, “prevailing party” case *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Hum. Res.*, 532 U.S. 598 (2001)).

With that chain of reasoning, the Second Circuit read “substantially” out of the statute. The only plausible reason for Congress to write “substantially prevails” rather than “prevails” is to grant attorney fees to some parties who have not “prevailed” in the strict sense. And the single most obvious scenario in which a party might “substantially prevail” under CAFRA without fully, technically “prevailing” is Ross’s situation exactly: failing to obtain legally binding relief from the court, but nevertheless securing the return of his funds.

* * *

CONCLUSION

Ross filed a claim to get his money back, and he got his money back. That counts as “substantially prevailing” under any reasonable sense of the words.

The Court should grant certiorari and reverse.

Respectfully submitted,

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