No. 12-1046

IN THE

Supreme Court of the United States

RYAN J. CRAIG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

TINA SCHNEIDER
44 Exchange Street
Suite 201
Portland, ME 04101
(207) 871-7930

DAVID T. GOLDBERG*
Donahue & Goldberg LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813
david@donahuegoldberg.com

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW, Suite 411
Washington, DC 20006
(202) 775-4500

**Counsel of Record*

Additional Counsel Listed on Inside Cover

JOHN P. ELWOOD
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW,
Suite 500 West
Washington, DC 20037
(202) 639-6518

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

REPLY BRIEF FOR PETITIONER 1

I. The Important Split Warrants Review.....2

II. The Issue Is Squarely Implicated.....4

III. The Majority Rule Is Wrong 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

14 Penn Plaza LLC v. *Pyett*,
556 U.S. 247 (2009).....5

Bennis v. *Michigan*,
516 U.S. 442 (1996).....11

Bowen v. *Massachusetts*,
487 U.S. 879 (1988).....1, 9, 11

Campbell v. *United States*,
365 U.S. 85 (1961).....7

Carvajal v. *United States*,
521 F.3d 1242 (9th Cir. 2008).....3, 4, 8

Harber Corp. v. *United States*,
131 S. Ct. 104 (2010).....9

Honda v. *Clark*,
386 U.S. 484 (1967).....11, 12

Koontz v. *St. Johns River Water Mgmt. Dist.*,
133 S. Ct. 2586 (2013).....4, 11

Library of Congress v. *Shaw*,
478 U.S. 310 (1986).....1

Phillips v. *Washington Legal Found.*,
524 U.S. 156 (1998).....1, 10

Soldal v. *Cook County,*
506 U.S. 56 (1992).....11

United States v. *$8,850 in U.S. Currency*,
461 U.S. 555 (1983).....11

TABLE OF AUTHORITIES—Cont'd

Page(s)

United States v. *$30,006.25 in U.S. Currency*,
236 F.3d 610 (10th Cir. 2000).....8

United States v. *$277,000 U.S. Currency*,
69 F.3d 1491 (9th Cir. 1995) 7, 10

United States v. *$515,060.42 in U.S. Currency,*
152 F.3d 491 (6th Cir. 1998) 7, 8

United States v. *92 Buena Vista Ave.*,
507 U.S. 111 (1993).....6, 11

United States v. *1461 W. 42nd St.*,
251 F.3d 1329 (11th Cir. 2001).....2

United States v. *1980 Lear Jet*,
38 F.3d 398 (9th Cir. 1994) 12

United States v. *Bajakajian*,
524 U.S. 321 (1998).....11

United States v. *Ford*,
64 F. App'x 976 (6th Cir. 2003) .....*passim*

United States v. *Nordic Vill. Inc.*,
503 U.S. 30 (1992).....1

United States v. *Rand Motors*,
305 F.3d 770 (7th Cir. 2002) 3

Webb's Fabulous Pharmacies, Inc. v. *Beckwith*,
449 U.S. 155 (1980).....11

Statutes, Rules, and Regulations

28 U.S.C. § 2465(b)(1)(A) 4

Fed. R. Crim. P. 41(g).....1, 7, 8

28 C.F.R. § 9.2(v) 10

TABLE OF AUTHORITIES—Cont'd

Page(s)

Other Authorities

U.S. Dep't of Justice, Asset Forfeiture Policy Manual (2012) 6

REPLY BRIEF FOR PETITIONER

What the government calls "some disagreement," Br. in Opp. ("BIO") 7, is in fact an acknowledged, entrenched, and consequential circuit split rooted in divergent understandings of this Court's precedent. The Third Circuit below and others have given controlling effect to broad "no interest" language in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). Other circuits have instead heeded this Court's cases recognizing fundamental differences between "[a] suit for payment of funds from the Treasury [and one] * * * for the return of tangible property in which the debtor retained ownership," *United States* v. *Nordic Vill. Inc.*, 503 U.S. 30, 39 (1992), and the general rule that ownership of interest "follows the principal," *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 166 (1998). See also *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'").

Unable to deny the division of authority (or to successfully denigrate its extent and importance), the government claims that the conflict is not "implicated" here. False. The government's seizure of funds was no more "wrongful" in the Sixth and Ninth Circuit cases that returned interest than it was here; and those decisions foreclose the suggestion that a different rule governs actions under Rule 41(g). The most energetically pressed "vehicle" claim – that the government *could have* prevailed under the minority rule – does not withstand scrutiny. To be clear, the government has never argued – ***and does not represent here*** – that

petitioner's funds did not accrue actual or constructive interest. Why not? Because it is the government's stated policy to deposit such money in the Seized Deposit Asset Fund, subject only to "rare exceptions." Nor did the government ever argue below that the "absence" of evidence as to what it did with petitioner's funds was an alternative ground for refusing to return interest. And though petitioner's *pro se* pleading did not formally seek "discovery" on the subject, it implored the government to "disclose[]" where it held his money.

I. The Important Split Warrants Review

The government does not deny that the courts of appeals "disagree" on the question presented. It claims only that the Eleventh Circuit's treatment was "dicta." BIO 12-13. But the decision below "recognize[d] that [its] approach differs from that articulated by the Sixth, Ninth, and *Eleventh* Circuits." Pet. App. 10a (emphasis added). And there is nothing "incorrect," BIO 12, about that description. In *United States* v. *1461 W. 42nd St.*, 251 F.3d 1329 (11th Cir. 2001), the court affirmed that, where "the government * * * has earned interest on the seized *res*, * * * [it] must disgorge its earnings along with the property," but then held that because the government had needed the income for expenses, "[t]here [were] no earnings to disgorge." *Id.* at 1338. *Even by the government's count*, the split pits five circuits (covering 22 States) against two other circuits (covering 14 States). That is more than enough to warrant review.

The government's suggestions that CAFRA's enactment obviates the need for review fare no better. Both the Sixth and Ninth Circuits have

reaffirmed their position post-CAFRA. See, *e.g.*, *Carvajal* v. *United States*, 521 F.3d 1242, 1248-1249 (9th Cir. 2008); *United States* v. *Ford*, 64 F. App'x 976, 980-981 (6th Cir. 2003); see also *United States* v. *Rand Motors*, 305 F.3d 770, 775 (7th Cir. 2002) (post-CAFRA decision, noting "circuit split * * * on this point"). Indeed, those courts have done so in the face of the government's curious argument – abandoned here – that that legislation, whereby Congress *rejected* as "manifestly unfair" the government's retention of interest in unsuccessful civil forfeiture cases, had somehow displaced case law establishing that interest is part of the res that must be returned (and that sovereign immunity is not implicated). See *Carvajal*, 521 F.3d at1249.

Nor is the government's assurance that it will (pursuant to statutory command) return interest earned on seized property in "ordinary civil asset-forfeiture cases," which it asserts (without support) are "most cases in which money has been unjustifiably seized," BIO 16, reason for refusing review. The government expressly concedes that the "sovereign immunity" rule embraced below allows the government to keep interest earned on funds seized in (a) criminal or administrative (rather than civil) forfeiture cases; (b) cases where no forfeiture proceeding was initiated; and (c) cases where (as here) the government *initiated* a civil forfeiture proceeding, but returned funds in advance of a court's adverse ruling.

Rather than deny that "[under its] rationale, the United States could avoid the disgorgement of interest * * * by voluntarily returning seized money at the very last minute before such an order is

entered," *Carvajal*, 521 F.3d at 1246, the government asks the Court not to worry about such "sidestepping." BIO 17 n.4 (quoting Pet. 22). The primary "reason" for concern is that such behavior, which enables the government to avoid paying defendants' costs and attorney's fees, as well as returning their interest, 28 U.S.C. § 2465(b)(1)(A), is economically rational. Cf. *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2589, 2595 (2013) (rejecting as "especially untenable" rule that would "enable the government to evade [unwanted] limitations"). Moreover, that course is, in the government's view, entirely lawful. (Indeed, it says it would be "highly *in*equitable" to *return* interest in these circumstances. But see *infra*).

The government's conduct in this case hardly inspires confidence that self-restraint will suffice. The opinion the government references (BIO 5) recounts that *after* the Third Circuit decision holding unlawful the transfer of petitioner's funds, the government moved in the District of Rhode Island to levy on those assets; and that court learned of the Third Circuit decision only from petitioner's *pro se* objection. See Dkt. No. 230 Ex. A at 8 n.7 ("This Court finds it a bit puzzling, if not troubling, that the Government made no mention whatsoever of the Third Circuit's ruling in either its initial or subsequent application for its writ of execution, even though that ruling concerned the very funds for which that execution was sought.").

II. The Issue Is Squarely Implicated

The government's main "vehicle" claim is that the "the record here does not establish" which account petitioner's funds were held in, BIO 7-8; see also *id.*

at 14 (faulting petitioner for "[h]aving failed to seek any discovery"). This is misdirection.

1. For starters, the government does not represent that it *did not* hold petitioner's funds in accounts where they accrued actual or constructive interest. The government contends only that exceptions to the Justice Department's general policies governing seized funds do exist (and, the government claims, petitioner has "not shown," BIO 14, his case was not one of those). But that argument was never presented below. The government argued exclusively – and both courts agreed – that actual or constructive accrual of interest on these funds was irrelevant, in the face of an impregnable "sovereign immunity" bar. See BIO 8 n.1 (maintaining that government should prevail "even if the record did demonstrate that such interest had been earned"). This is not an "exceptional case[]," where the Court should "resurrect * * * on respondents' behalf," an argument never raised below. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009).

In any event, while petitioner's *pro se* pleading did not formally seek "discovery," it explicitly stated that "the United States has never disclosed if any interest was actually paid to them, by having the Defendant's money in an interest-bearing account or instrument." Dkt. No. 236 ¶5; see *id.* ¶6 (asserting entitlement to interest, "[a]ssuming that the government's position is that no interest was actually paid"). And the government's response did not indicate its "position" on this factual question; it cannot now turn its own reticence into a "vehicle" problem.

2. In fact, ample "reason exists to believe" (BIO 14) that interest did accrue. It is official DOJ policy that cash and negotiable instruments seized in criminal proceedings should be placed in the Seized Asset Deposit Fund "within 60 days of seizure or 10 days of indictment." U.S. Dep't of Justice, Asset Forfeiture Policy Manual, at 26 (2012) ("Manual"). And, consistent with this Court's precedent, "the Government does not have title" to such funds. *Id.* at 89; see *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 129 (1993).

The government denies none of this. It notes only that its policy does not apply invariably. Cf. Manual at 36 (noting that "[l]imited exceptions to this directive are very rare"). But it is irrelevant that the amount ultimately *returned* to petitioner was beneath the $5,000 threshold, see BIO 14 (citing Manual at 26); the sums *seized from him* – $9,000 and $6,690, were subject to the rule. And the fact that funds were initially "secured as evidence" makes no difference: The Manual provides that "[r]etention of currency will be permitted [only] when it serves a significant independent, tangible, evidentiary purpose due to, for example, the presence of fingerprints." *Id.* at 26. No cash was introduced as evidence at petitioner's trial – *which, in any event, accounted for just four days of the five years the government held his money*.

3. Contrary to the government's assertion, the Sixth or Ninth Circuit *would not* treat a defendant's "failure" to establish that the government had followed its deposit policy as grounds for refusing relief. *Ford* highlighted the absence of such evidence and instructed the district court on remand to "make

specific findings as to whether the assets in question were held by the government in interest-bearing accounts." 64 F. App'x at 985; accord *United States* v. *$277,000 U.S. Currency*, 69 F.3d 1491, 1494-1496 (9th Cir. 1995).

Indeed, these courts – consistently with the law's historic reluctance to "place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary," *Campbell* v. *United States*, 365 U.S. 85, 96 (1961) – have treated the government's caginess as cause for disapprobation, not for ruling *against* the property owner. See *$277,000*, 69 F.3d at 1496 (labeling "little short of scandalous" government's claims of "ignoran[ce] of the actual status of [defendant's seized] money"). And both courts have held that the government's failure to deposit funds into interest-bearing accounts is not a basis for avoiding its obligation. See *ibid.*; *United States* v. *$515,060.42 in U.S. Currency,* 152 F.3d 491, 505 (6th Cir. 1998).

4. The government's remaining "vehicle" arguments are equally specious.

a. The government says that "[n]ot one of the [conflicting] cases involve[d Rule] 41(g)," a mechanism, it suggests, some courts have "frowned on * * * in circumstances similar to those presented here." BIO 14-15. But the issue is whether sovereign immunity is implicated when a defendant seeks return of interest his property generated while in government custody. In no circuit does the answer depend on the particular power the government invoked when seizing it or the mechanism by which the defendant seeks its return.

Moreover the Sixth Circuit's "conflicting decision" in *Ford* may well have "involve[d] Rule 41(g)." There, the *government* argued that the defendant "was required to file a motion pursuant to Federal Rule of Criminal Procedure 41 seeking return of the interest." 64 F. App'x at 982. The Sixth Circuit rejected that argument, reasoning that the equitable action Ford pleaded and the Rule 41(g) procedure the government (then) insisted was proper were, in substance, indistinguishable. See *id.* at 983. (What is more, the decision the government cites as "frown[ing] on" resort to Rule 41(g), *United States* v. *$30,006.25 in U.S. Currency*, 236 F.3d 610 (10th Cir. 2000), held that the defendant should file a motion under CAFRA – the very remedy the government has consistently argued is *not* available here.)

b. The government claims that "all of the cases [returning interest] are premised on situations in which the money at issue was 'wrongfully' held, rather than rightfully taken to be used as evidence in a criminal proceeding." BIO 14 (citing *Carvajal*, 521 F.3d at 1244). But in *none* of the conflicting decisions did a "court * * * conclude[] the government *seized* the funds wrongfully." BIO 15 (emphasis added). (Indeed, *Carvajal* appears to be the only cited decision in which the defendant even challenged the legality of the seizure).

More important, none of the conflicting decisions depend on a finding of "wrongful" government conduct. Rather, the Sixth and Ninth Circuits hold that interest should be returned whenever the government (lawfully) seizes money, but "is later found, for whatever reason, to have no proper claim to [it]," *$515,060.42*, 152 F.3d at 504; see *Ford*, 64 F. App'x

at 983 (interest should be returned in case where it was "clear that both" the "seizure and retention of the assets were permissible"). Indeed, *Ford* expressly rejected the government's argument that in ordering the return of interest, "the district court improperly viewed the government as a wrongdoer." *Id.* at 982. (Under the Third Circuit rule *the government* endorses, the wrongfulness *vel non* of the seizure or retention is irrelevant).[1]

c. Still further amiss is the government's assertion that it "would be highly inequitable for petitioner to obtain an award of interest on [his] funds," because he would have had to surrender the principal on account of the "unsatisfied [restitution] obligation" arising from his earlier, unrelated conviction. BIO 15. But "equitable" in this context refers to the character of the judicial powers enlisted, not some abstract determination of a party's worthiness. See *Bowen*, 487 U.S. at 893-894; Br. for U.S., *Republic National Bank* v. *United States*, No. 91-767 at 32 n.14 (explaining that funds "in the Seized Asset Deposit Fund [are] not public money

---

[1] The denial of certiorari in *Harber Corp.* v. *United States*, 131 S. Ct. 104 (2010), BIO at 8, avails the government nothing. The government there argued that cases "requiring a return of interest together with the *res* with which it has merged," were irrelevant, because the petitioners in *Harber Corp.* had not "recovered the *res*." BIO, No. 09-1389 at 10.

The government also notes that petitioner's original filing relied "exclusively on CAFRA." BIO 5-6. Consistently with the obligation to construe pro se complaints generously, however, the district court addressed non-CAFRA arguments, as did the government, and so did both sides' appellate briefs and the Third Circuit's opinion.

* * * [and are therefore] subject to the control of the courts"). Thus, the successful parties in Sixth and Ninth Circuit decisions included individuals convicted of crimes. Cf. *Ford*, 64 F. App'x at 983 (rejecting argument that defendant's "unclean hands" precluded recovery). In any event, as between the owner of funds and the government, *the person whose money it is has the stronger claim to the interest*. As Judge Boggs observed in *$277,000*, if a district court, instead of authorizing retention in a case like this, "releas[ed] money on bond" but required deposit in an escrow account, and the defendant were "ultimately determined to be entitled to the funds," it would be inconceivable to order him "to disgorge to the government the interest earned on the amount while it was held in escrow." 69 F.3d at 1496.

The government's effort to bring up (again) petitioner's Rhode Island obligations is mere distraction. The government does not claim that its retention of interest on petitioner's funds will – or even could, see 28 C.F.R. § 9.2(v) – benefit those whom he owes on account of the Rhode Island judgment. And as for "realization," the Sixth Circuit has rejected almost exactly this argument. See *Ford*, 64 F. App'x at 983 (explaining that "even [were it] true," that defendant would not have invested funds, that would not support allowing the government "a windfall on property that it held without proprietary interest"); cf. *Phillips*, 524 U.S. at 171 (rejecting arguments that interest was not fund-owners' private property but rather "government-created value").

III. The Majority Rule Is Wrong

The government's defense of the majority rule does little more than parrot the "no interest" language in *Shaw* and pronounce "beside the point" lines of this Court's precedent supporting the minority rule. BIO 10. But it is hardly self-evident why *Shaw* – a case involving pre-judgment interest on attorney's fees in an employment discrimination suit – is more factually on point than *Phillips* or *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), which involved the ownership of interest earned on private money lawfully held by the government. (Indeed, these latter cases rest on a *constitutional* rule – that interest follows principal – with roots no less ancient than the rule in *Shaw*.) See also *Koontz*, 133 S. Ct. at 2600 (explaining that government appropriation of a "specific, identifiable" fund is a quintessential taking).[2]

There is no shortage of precedent rejecting sovereign immunity in similar settings. See *Bowen*, 487 U.S. at 893-894. Indeed, in *Honda* v. *Clark*, 386 U.S. 484 (1967), the Court rejected the government's invocation of sovereign immunity-based rules, because that case, like this one, arose from proceedings

---

[2] The government's suggestion (BIO 10-11 n.3) that the Constitution's protections for property cease in the criminal justice context is wrong. See, *e.g.*, *Soldal* v. *Cook County,* 506 U.S. 56, 70 (1992); *United States* v. *Bajakajian*, 524 U.S. 321, 333 (1998); *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555, 563 (1983). *Bennis* v. *Michigan*, 516 U.S. 442 (1996), held that government acquisition through *lawful forfeiture* precluded a takings claim (at least where the lower court had applied equitable principles, see *id.* at 457 (Ginsburg, J., concurring)). But this case concerns ownership of property that was *never forfeited.* See *92 Buena Vista Ave.*, 507 U.S. at 129.

established for "returning seized * * * assets * * * that were never contemplated as finding their way permanently into the public fisc." *Id.* at 501; accord *United States* v. *1980 Lear Jet*, 38 F.3d 398, 402 (9th Cir. 1994) ("there is no issue of sovereign immunity here, because the government is not being required to pay interest out of the United States Treasury").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

TINA SCHNEIDER
44 Exchange Street
Suite 201
Portland, ME 04101
(207) 871-7930

JOHN P. ELWOOD
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW,
Suite 500 West
Washington, DC 20037
(202) 639-6518

DAVID T. GOLDBERG*
Donahue & Goldberg LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813
david@donahuegoldberg.com

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW, Suite 411
Washington, DC 20006
(202) 775-4500

**Counsel of Record*

JULY 2013