No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the government lawfully seizes an individual's cash property and is later required by law to return it, may the government refuse to return interest?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Third Circuit (App., *infra*, 3a-11a) is reported at 694 F.3d 509. The district court's decision (App., *infra*, 12a-21a) is available at 2011 WL 839538.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 2012. Petitioner timely moved for rehearing, and that petition was denied on October 11, 2012. App., *infra*, 36a-37a. On December 28, 2012, Justice Alito extended the time for filing a petition for a writ of certiorari to February 25, 2013.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 41(g) of the Federal Rules of Criminal Procedure provides in pertinent part:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

STATEMENT

A. Legal Background

When the government seizes property in connection with a criminal investigation, "such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture." *United States* v. *Chambers*, 192 F.3d 374, 376 (3d Cir. 1999) (citing *United States* v. *Wilson*, 540 F.2d 1100, 1103 (D.C. Cir. 1976)). This case raises the issue of what constitutes the "property" the government is obliged to return to a criminal defendant. Three courts of appeals have held that interest accruing on seized funds is part of the property that must be returned. In the decision below, however, the Third Circuit joined four other courts of appeals in holding that interest earned is not part of the defendant's "property."

Federal Rule of Criminal Procedure 41(g) provides a mechanism by which "[a] person aggrieved by * * * the deprivation of property may move for the property's return." When a Rule 41(g) motion is made after the termination of criminal proceedings, it "is treated as a civil proceeding for equitable relief," *Chambers*, 192 F.3d at 376, in which "the person from whom the property was seized is presumed to have a right to its return, and the government must demonstrate that it has a legitimate reason to retain the property," *id.* at 377. Because "it is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner," *Wilson*, 540 F.2d at 1103, the court has a "duty to return such property." *Ibid.*

B. Proceedings Below

In 2007, petitioner was arrested and charged with various federal offenses arising from the alleged fraudulent sale of items through his grandmother's eBay account. App., *infra*, 13a. During the course of the criminal investigation leading to his arrest, law enforcement personnel seized $16,432 from the petitioner's person and bank account. *Id.* Petitioner was convicted of wire fraud in violation of 18 U.S.C. § 1343 and of one count of failure to appear in violation of 18 U.S.C. § 3146. *Id.* at 4a. The government dismissed all other counts, including a criminal forfeiture allegation. Petitioner was sentenced to 71 months' imprisonment and ordered to pay a special assessment of $300 and $12,411 in restitution. *Id.* at 23a. The Third Circuit affirmed in 2009. See 343 F. App'x. 766 (2009).

In February 2008, the government initiated civil forfeiture proceedings against the seized funds, App., *infra*, 18a, and three months later filed a motion requesting that the funds be used to satisfy the district court's restitution order, *id.* at 6a-7a. After petitioner objected that the funds could not be put to both purposes, the government dismissed the forfeiture proceeding without prejudice. *Id.* at 19a. Petitioner then conceded that $12,711 of the seized funds could be directed toward the restitution order, but requested that the remaining $3,631 be returned to him pursuant to Rule 41(g). *Id.* at 23a. The government opposed that motion, urging the district court instead to transfer the remaining funds to the United States District Court for the District of Rhode Island, where they would be applied toward a restitution obligation in an unrelated case. *Id.* at 24a.

The district court ruled for the government and directed that the remaining $3,631 be deposited with the clerk of court in Rhode Island. App., *infra*, 32a-35a. After acknowledging "that a criminal defendant is presumptively entitled to the return of his property once it is no longer needed as evidence," the district court reasoned that an order of restitution should be considered "a lien in favor of the government," *id.* at 32a, which could be satisfied out of funds owned by a defendant.

The Third Circuit reversed the transfer order. App., *infra* 22a-31a. The Third Circuit rejected the district court's analysis and held that the district court lacked any "statutory authority to order the transfer of seized funds to the Rhode Island Court for the purpose of facilitating the payment of restitution in an unrelated case." *Id.* at 27a. On remand, the district court entered an order requiring the government to return $3,531[1] to petitioner. No. 06-cr-00219, Docket entry No. 232 (M.D. Pa. Filed Aug. 20, 2010).

Petitioner then filed a *pro se* motion requesting that the government return the interest attributable to his money while it was in the government's possession. The district court denied the motion. App., *infra*, 12a-21a. It first held that it lacked the "jurisdiction to award interest on the seized funds pursuant to Rule 41(g)," *id.* at 16a, citing *United States* v. *Bein*, 214 F.3d 408 (3d. Cir. 2000), for the proposition that "Rule 41(g) provides for one specific remedy—'the return of property,'" and explaining

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[1] This amount was $100 less than the amount seized because of a bank fee.

that "when th[e] court ordered the return of the excess seized funds to [petitioner], he achieved his only remedy." *Ibid.*

The district court also held that petitioner was not entitled to the interest under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), because that statute's remedies are available only to claimants who "substantially prevail in a civil forfeiture proceeding," see 28 U.S.C. § 2465(b)(1), App., *infra*, 14a, and that petitioner, who had "agreed to the dismissal of the civil [forfeiture] action *without* prejudice," "did not obtain a judgment on the merits and * * * was not awarded any relief specific to the civil forfeiture action," did not so qualify. *Id.* at 19a (emphasis added).[2]

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[2] CAFRA further provides that, "[u]pon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law . . . such property shall be returned forthwith to the claimant or his agent." 28 U.S.C. § 2465(a)(1). If a defendant "substantially prevails" in that proceeding, the government "shall be liable for,"

> (C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale—
>
> > (i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and
> >
> > (ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence),

C. The Court of Appeals Decision

The Third Circuit affirmed, concluding that principles of sovereign immunity entitled the government to retain, rather than return to petitioner, interest accruing to his seized funds while in government custody. App., *infra*, 8a-11a. The court of appeals held that petitioner's claim was foreclosed by this Court's decision in *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986). *Id.* at 9a. *Shaw* held that sovereign immunity barred an award of pre-judgment interest on an attorney's fees award in a Title VII case against the United States, invoking a general "'no-interest rule,'" 478 U.S. at 314, whereby "the United States is immune from an interest award," in the absence of express authorization for such awards. *Ibid.*

Stating that "Rule 41(g), which provides only for the 'return of property' and makes no explicit mention of interest, does not waive the sovereign's immunity," App., *infra*, 8a, the court described its conclusion as following from the "logic" of an earlier decision, *United States* v. *Bein*, 214 F.3d 408, 415 (3d. Cir. 2000). *Bein* held that "a Federal Rule of Criminal Procedure that does not expressly provide for an award of *monetary damages* does not waive sovereign immunity." 214 F.3d at 413 (emphasis added). The fact that interest can be "characteriz[ed]

> commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

Id. at § 2465(b)(1). CAFRA also grants "reasonable attorney fees and other litigation costs" to substantially prevailing property owners. *Id.* at § 2465(b)(1)(A).

* * * as part of the seized property," the decision below explained, was immaterial because *Shaw* admonished that courts not allow "'the force of the no-interest rule [to] be avoided simply by devising a new name for an old institution.'" App., *infra*, 9a (quoting *Shaw*, 478 U.S. at 321).

The court explicitly acknowledged that its "approach differ[ed] from that articulated by the Sixth, Ninth, and Eleventh Circuits, which permit claims of interest to proceed against the United States." App., *infra*, 10a.[3]

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeals Are Divided As To Whether The Government Must Return Interest As A Component of Seized Property

As the decision below expressly acknowledged (App., *infra*, 10a), the courts of appeals are sharply split on whether interest is part of the property that must be returned to a defendant. While the Sixth, Ninth, and Eleventh Circuits have held interest to be "an aspect of the seized res to which the Government is not entitled," *United States* v. *$515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998), and

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[3] The court of appeals also rejected petitioner's argument that CAFRA required the government to return interest attributable to the detained funds. App., *infra*, 6a-8a. The court explained that petitioner did "not qualify as a 'substantially prevail[ing]' party under CAFRA." *Id.* at 7a. While CAFRA is relevant to the question presented insofar as it casts light on Congress's understanding of the basic rules governing ownership of interest, see *infra* at 20 n.6, petitioner does not seek review of that part of the Third Circuit's decision, and his claim for relief in this Court does *not* arise under CAFRA.

would have ruled for petitioner had his case arisen there, "the First, Second, Eighth, and Tenth Circuits," have, like the Third Circuit below, "reached the opposite conclusion," *Carvajal* v. *United States*, 521 F.3d 1242, 1248-1249 (9th Cir. 2008). See also *United States* v. *$30,006.25 in U.S. Currency*, 236 F.3d 610, 613 (10th Cir. 2000) (noting that courts are "split on whether the government can be ordered to pay interest when it must return seized property to a claimant"); *United States* v. *Rand Motors*, 305 F.3d 770, 775 (7th Cir. 2002) (noting, while declining to reach the issue, that there exists "a circuit split * * * on this point").

A. Three Circuits Have Held That Interest Is A Component Of Seized Property That The Government Must Return

The Sixth, Ninth, and Eleventh Circuits have held that interest is part of the property that must be returned to a defendant. *Carvajal*, 521 F.3d at 1242; *United States* v. *Ford*, 64 F. App'x. 976 (6th Cir. 2003); *$515,060.42 in U.S. Currency*, 152 F.3d at 505; *United States* v. *1461 W. 42nd St.*, 251 F.3d 1329 (11th Cir. 2001); *United States* v. *$277,000 U.S. Currency*, 69 F.3d 1491, 1492 (9th Cir. 1995). "To the extent that the Government has actually or constructively earned interest on seized funds, it must disgorge those earnings along with the property itself when the time arrives for a return of the seized res to the owner." *$515,060.42 in U.S. Currency*, 152 F.3d at 505. "To the extent that * * * the property seized and held by the government * * * is ultimately adjudged not forfeitable, and, therefore, is returnable to its rightful owner, it is appropriate for the government to disgorge interest it

constructively or actually received on the property." *Ford*, 64 F. App'x. at 981.

Relying on common-law property rules—as well as equity and "common sense"—these circuits have concluded that interest accruing to seized funds while in government possession is "part of, and would be substituted for * * * the *res* itself," *$277,000 U.S. Currency*, 69 F.3d at 1496, and "an aspect of the seized *res* to which the Government is not entitled," *$515,060.42 in U.S. Currency*, 152 F.3d at 504; see also *$277,000 U.S. Currency*, 69 F.3d at 1497 (stating that because interest accrued on a defendant's seized property "must be allocated either to the government or [to him] * * * the government will not be allowed to retain the fruits, once the tree has been ordered returned to its owner").[4]

These courts have rejected the assertion that sovereign immunity entitles the government to retain interest attributable to the seized *res*. The rules requiring specific explicit waivers for damages, they have explained, do not apply to "every payment of money by the government relat[ing] to something it has seized." *$277,000 U.S. Currency*, 69 F.3d at 1493. As the Sixth Circuit has highlighted, "where the Government has seized property subject to a mechanic's lien, the innocent lien holder has been

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[4] The Ninth and Sixth Circuits have also concluded that, even if the account into which the seized funds was deposited was not an interest-bearing account, "the act of holding funds in the United States Treasury, even where those funds are held in a non-interest bearing status, financially benefits the federal government," because the financial assets are a means by which the Government "avoids having to borrow equivalent funds." *$515,060.42 in U.S. Currency*, 152 F.3d at 505.

allowed to recover * * * costs normally allowed under state law, including statutory interest," *$515,060.42 in U.S. Currency*, 152 F.3d at 504, and "the government should not be allowed to use the doctrine of sovereign immunity" to avoid returning interest, *United States* v. *1980 Lear Jet, Model 35A, Serial No. 277*, 38 F.3d 398, 401 (9th Cir. 1994).

In such cases, the government is not "'being required to *pay* interest,' only to disgorge some of its share of the proceeds of the seized property." *$277,000 U.S. Currency*, 69 F.3d at 1493 (emphasis added); see also *1461 West 42nd St.*, 251 F.3d at 1338 (concluding that, if the government earns interest on the seized res, it must "disgorge its earnings along with the property at the time when the property is returned"). Thus "no express waiver of sovereign immunity [is] necessary." *Carvajal*, 521 F.3d at 1245.

These courts have reaffirmed those holdings in the face of government arguments that these precedents have been undermined or superseded by CAFRA, which provides for the return of interest (as well as attorney's fee awards) in certain cases where defendants "substantially prevail" in civil forfeitures. In *Carvajal*, the Ninth Circuit held that the new statutory provisions largely adopt the reasoning of its earlier decisions, and that "the payment of interest on wrongfully seized money is not a payment of damages, but instead is the disgorgement of a benefit 'actually and calculably received from an asset that [the government] has been holding improperly.'" 521 F.3d at 1245 (quoting *$277,000 U.S. Currency*, 69 F.3d at 1498). In enacting CAFRA, Congress gave no indication that it intended

to extinguish the property rights of defendants who were entitled under circuit precedent to return of interest, but who (like petitioner here) might not qualify as "substantially prevailing" parties under the statute. *Ibid.*

B. Other Circuits Have Held That The Government May Not Be Required To Return Interest On A Defendant's Seized Property

In the decision below, the Third Circuit joined the First, Second, Eighth, and Tenth Circuits in holding that the government need not return interest on seized property for the period when the property was held. See App., *infra*, 9a.; *Larson* v. *United States*, 274 F.3d 643, 647-648 (1st Cir. 2001); *United States* v. $*30,006.25 in U.S. Currency*, 236 F.3d 610, 614-615 (10th Cir. 2000); *United States* v. $*7,990.00 in U.S. Currency*, 170 F.3d 843, 846 (8th Cir. 1999); *Ikelionwu* v. *United States*, 150 F.3d 233, 239 (2d Cir. 1998).

Courts invoking this "no-interest rule" have characterized the return of interest as "an award of prejudgment interest," $*7,990.00 in U.S. Currency*, 170 F.3d at 846, and therefore barred under *Library of Congress* v. *Shaw*, 478 U.S. 310 (1994). *Shaw* had held interest on an attorney's fees award in a Title VII case was "an element of damages" separate from the costs authorized under the statute, and like other types of damages, barred by sovereign immunity, "[i]n the absence of express congressional consent." 478 U.S. at 314.

These courts have recognized that "the circuits are split on whether the government can be ordered

to pay interest when it must return seized property," $*30,006.25 in U.S. Currency*, 236 F.3d at 613, but have believed themselves "constrained [by *Shaw*] to hold that sovereign immunity prevents recovery of interest," *Larson*, 274 F.3d at 647; see $*30,006.25 in U.S. Currency*, 236 F.3d at 614; $*7,990.00 in U.S. Currency*, 170 F.3d at 844. Their decisions have expressly rejected their sister circuits' "alternative rationale," *Larson*, 274 F.3d at 647, that interest on a defendant's seized property is merely part of the *res* to be returned to him by the government, invoking, as did the decision below, the *Shaw* Court's observation that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." *Ibid.* (quoting *Shaw*, 478 U.S. at 321).

* * *

Three circuits recognize that, because interest is part of the *res* held by the government, it must be returned to the defendant. By contrast, five circuits have held that interest on funds seized from a defendant is a form of "damages" "separate from" the property that the government must return. This Court's review is necessary to resolve this stark, entrenched, and well-recognized conflict.

II. The Majority Rule is Wrong

A. The Interest On Petitioner's Funds Is His Property, Not The Government's

The government, like any custodian, may have lawful *possession* of property it seizes pursuant to a warrant. *Title* of such property, however, is still held by the original owner of the principal. UNITED STATES DEP'T OF JUSTICE, ASSET FORFEITURE POLICY

MANUAL, at 14 (2012) (noting that the government retains valid possession of property only so long as the forfeiture matter is pending). Once a court determines that the government can no longer lawfully hold a citizen's property, the government must return the entire property. Whether the government may retain possession of the interest turns on whether the interest is part of the citizen's property. The answer to that question is clear from a series of this Court's decisions, themselves rooted in longstanding common-law rules: "any interest that does accrue [while in the possession of a custodian] attaches as a property right *incident to the ownership of the underlying principal*." *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 168 (1998) (emphasis added); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155, 162 (1980). See also, *e.g., James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451, 463 (5th Cir. 1971); *Murphy* v. *Travelers Ins. Co.*, 534 F.2d 1155, 1165 (5th Cir. 1976); *In re Brooks & Woodington, Inc.*, 505 F.2d 794, 799 (7th Cir. 1974).[5]

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[5] Given the importance of state law rules in defining "property" subject to constitutional protection, this rule, unsurprisingly, has deep roots in state common law decisions. See, *e.g.*, *Freeman* v. *Young,* 507 So.2d 109, 110 (Ala. Civ. App. 1987) ("The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." (internal quotation marks omitted)); *Pomona City Sch. Dist.* v. *Payne,* 9 Cal.App.2d 510, 512 (Cal. 1935) ("[O]bviously the interest accretions belong to such owner."); *Burnett* v. *Brito,* 478 So.2d 845, 849 (Fla. Dist. Ct. App. 1985) ("[A]ny interest earned on interpleaded and deposited funds follows the principal and shall be allocated to whomever is found entitled to the principal."); *Morton Grove Park Dist.* v. *American Nat. Bank & Trust Co.,* 399 N.E.2d 1295, 1299 (Ill. 1980) ("The earnings on the funds deposited are a mere incident of ownership of the

This Court recognized and applied the "interest follows principal" rule in *Webb's Fabulous Pharmacies*. There, the Court held that interest accruing on cash deposited in an interpleader fund "follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." 449 U.S. 155, 162. The Court analogized cash to coupon bonds, reasoning that if the coupon bonds had been deposited in the registry, the "coupons would follow the principal and could not be claimed by the county." *Id.* at 163, n.6.

This Court has applied that reasoning in recent cases involving the Interest On Lawyer Trust Accounts (IOLTA) program. IOLTA programs were implemented to take advantage of laws allowing monetary deposits to be pooled into a single account. The programs allowed client money, held in trust by

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fund itself."); *B & M Coal Corp.* v. *United Mine Workers,* 501 N.E.2d 401, 405 (Ind. 1986) ("[I]nterest earnings must follow the principal and be distributed to the ultimate owners of the fund."); *Bordy* v. *Smith,* 34 N.W.2d 331, 334 (Neb. 1948) ("Once settled clearly and definitely whose money the principal sum was, the interest necessarily belongs to that person as an increment to the principal fund."); *Bd. of Educ., Woodward Pub. Sch.* v. *Hensley,* 665 P.2d 327, 331 (Okla. Civ. App. 1983) ("The interest earned * * * becomes a part of the principal of the fund which generates it."); *University of S.C.* v. *Elliott,* 149 S.E.2d 433, 434 (S.C. 1966) ("[I]nterest earned * * * is simply an increment of the principal fund, making the interest the property of the party who owned the principal fund."); *Bd. of Cnty. Comm'rs* v. *Laramie Cnty. Sch. Dist. No. One,* 884 P.2d 946, 953 (Wyo. 1994) ("In general, interest is merely an incident of the principal fund, making it the property of the party owning the principal fund."). See also *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 166, n.5 (1998) (collecting additional cases).

attorneys, to be pooled into a larger IOLTA account. Interest earned on these pooled accounts was retained by the States and given to foundations to fund legal representation for low-income litigants.

In *Phillips,* this Court held that interest earned on IOLTA account deposits was the private property of the owners of the principal and (pursuant to the Takings Clause) must be returned along with the principal. 524 U.S. at 171. The Court relied on the "interest follows principal" rule, explaining that "property * * * consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing.'" *Id.* at 170 (citing *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945)). The "possession, control and disposition" of interest generated on income, the Court explained, are "valuable rights that inhere in property." *Ibid.* To illustrate the point, the Court noted that the government "may not seize rents received by the owner of a building." *Ibid.*

Moreover, this Court has rejected the argument that interest may be separated from the property even when it is the result of "government-created value"—*i.e.*, where owners' funds would not have earned interest had they not been pooled and invested by the government. See *Phillips*, 524 U.S. at 171 (citing *Webb*, 449 U.S. at 163). Investment of the principal does not "entitle[] [the government] to assume *ownership* of the interest." *Webb*, 449 U.S. at 162 (emphasis added).

Indeed, the Department of Justice has promulgated a policy that appears to recognize that interest belongs to the owner of the principal. According to the DOJ's Asset Forfeiture Manual,

seized cash is to "be deposited promptly in a Seized Asset Deposit Fund." United States Dep't of Justice, Asset Forfeiture Policy Manual, at 26 (2012). Assets seized from various citizens are pooled into SADF accounts and invested in Government Securities. United States Dep't of Justice, Office of Inspector General Audit Division, Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2001, Audit Rep. No. 02-22 (June 2002), available at http://www.justice.gov/jmd/afp/01programaudit/auditreport72002.htm. Just as in the IOLTA context, the principal deposited in SADF accounts remains the private property of the citizen unless and until the government successfully forfeits the money and thereby obtains title. The manual provides that interest earned on SADF accounts is either "returned to the owner with the underlying principal or become[s] the property of the government upon forfeiture of the principal." *Ibid.*

The IOLTA cases and the DOJ's manual are but recent examples of the well-established rule that "interest follows principal." For more than 120 years, the common law has defined "property" to include potential value that comes to fruition during the property's detention. Take the example considered by the Ninth Circuit in *$277,000 U.S. Currency*: A farmer owns a pregnant cow, which the government lawfully seizes. While in government custody, the cow gives birth. If the court then rules that the government has no lawful basis for retaining the cow, "it could hardly be contended that the government had fulfilled its duty by returning the now-barren cow, but retaining the calf." 69 F.3d at 1496 (citing *Sherwood* v. *Walker,* 66 Mich. 568,

578 (1887)). Although the government may lawfully seize a citizen's property, title to the property and its fruits remains with the citizen unless and until title is transferred to the government following due process.

This principle is easily illustrated in the context of financial instruments. Suppose that the government lawfully seizes a defendant's corporate stock pursuant to a government investigation and that the corporation pays out a dividend on the stock while it is in the government's possession. If the government is later required to return the stock to its owner, would the government be entitled to keep the dividend payments? Surely not. Yet that is precisely the logic of the rule adopted below.

That rule would also give rise to constitutional concerns under the Fifth Amendment Takings Clause. As explained above, this Court's IOLTA cases have reaffirmed that interest earned in an IOLTA account is the private property of the owner of the principal and thus any transfer of that interest to the government would constitute a taking. *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003). The rule should be no different when accounting for seized funds, and a categorical exclusion of "interest" from the definition of "property" would constantly give rise to conflict with the Takings Clause. That is yet another reason to reject the decision below. See, *e.g.*, *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 82 (1982) (declining to construe the Bankruptcy Reform Act of 1978 in a way that would raise sensitive questions of the Takings Clause).

B. Sovereign Immunity Is Not Implicated When Returning Petitioner's Own Property

The Third Circuit's argument was not rooted in longstanding property law or based on precedent regarding the relationship between principal and interest. Instead, the Third Circuit relied on *Shaw*, which involved an award of pre-judgment interest on attorney's fees secondary to a damages award. That context is fundamentally different from whether interest is "an incident of ownership" of property itself.

The Ninth Circuit recognized this distinction, holding that "the payment of interest on wrongfully seized money is not a payment of damages." *Carvajal*, 521 F.3d at 1245. Rather, seeking the return of interest amounts to an action for specific relief in equity—comparable to an action in replevin where interest is part of the property to be returned. See *Wash. Ice Co.* v. *Webster*, 125 U.S. 426, 441 (1888). That does not raise the issue presented in *Shaw* "'because the government is not being required to pay interest'" but only to return "the proceeds of seized property." *$277,000 U.S. Currency*, 69 F.3d at 1493 (citation omitted).

Indeed, *Shaw* itself rests on the Court's understanding of pre-judgment interest as a form of *damages*. For example, *Shaw* noted that "[b]ecause [pre-judgment] interest was generally presumed not to be within the contemplation of the parties, common-law courts in England allowed interest by way of *damages* only when founded upon agreement of the parties." 478 U.S. at 314-315 (emphasis added) (citing *De Havilland* v. *Bowerbank*, 1 Camp.

50, 51, 170 Eng. Rep. 872, 873 (N.P. 1807); *Calton* v. *Bragg*, 15 East. 223, 226-227, 104 Eng. Rep. 828, 830 (K.B. 1812)). Since the Court held that "interest [was] an element of damages separate from damages on the substantive claim," sovereign immunity required a separate waiver. *Id*. at 314.

The common law and the Constitution have long understood interest earned on property in government custody as fundamentally different from an award of pre-judgment interest to a successful litigant. See pp. 12-13, *supra*. Court orders to *return* property seized (often with judicial assistance) from the owner are distinct from *awards* of interest paid from government funds. Thus, this Court rejected the government's argument that an order overturning disallowances of reimbursements was barred by sovereign immunity, explaining that the mere fact that a judgment will require a sovereign "to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988). The law has "long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include * * * 'the recovery of specific property *or monies*.'" *Ibid*. (emphasis in *Bowen*) (quoting *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). A judicial proceeding directing the government to return specific private property over which it had lawful temporary custody but not ownership is a quintessentially "equitable" action to which the historic rules limiting imposition of damage awards have no application.

Similar rules operate in the Eleventh Amendment immunity context. In *School Committee* v. *Dep't of Educ.*, 471 U.S. 359, 370-371 (1985), for example, this Court rejected a claim that an order requiring reimbursement of monies should qualify as "damages" subject to the Eleventh Amendment bar. And this Court has upheld lower courts' authority to order monetary relief, irrespective of any express immunity waiver, when the cost to the sovereign's treasury is a "necessary result of compliance with [the court's judgment]" or the relief has only an "ancillary effect on the [sovereign's] treasury." *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974).

Even where, unlike here, the remedy sought is not necessary to the judgment, sovereign immunity does not serve as a trump card denying relief because "breadth and flexibility are inherent in equitable remedies." *Hutto* v. *Finney*, 437 U.S. 678, 687 n.9 (1978) (citation omitted). Where the government has employed a court's power to help effectuate a seizure and maintain temporary control over the seized property, it is hard to imagine that a court lacks either the authority or the "breadth and flexibility" to oversee and assure the full and proper return of that property.[6]

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[6] In enacting CAFRA, Congress specifically recognized that "the denial of interest to a property owner who prevailed in a forfeiture action [was] 'manifestly unfair.'" *Carvajal*, 521 F.3d at 1248-1249 (quoting H.R. Rep. No. 106-192, at 19 (1999)). In making that finding, Congress's intent was to permit the recovery of interest, as in cases like *$277,000 U.S. Currency*, 69 F.3d 1491, rather than to create an escape hatch where the government can acquire the rights to interest by returning property on the eve of losing a CAFRA proceeding. As explained below, CAFRA does not solve the problem at issue

The decision below and others like it thus rest on a misguided understanding of the "rule" announced in *Shaw*. *Shaw* did not hold out "interest" as a uniquely disfavored form of relief in every context; rather, it held that the historic rule that *damages* are presumptively barred should apply to *awards* of *pre-judgment* interest. *Shaw* did not consider—let alone reject—the long lines of authority establishing that interest on private property belongs to the owner and that sovereign immunity does not limit courts' powers to order specific relief, including the return of property.

III. This Case Presents An Issue Of Substantial Legal and Practical Importance

In fiscal year 2011 alone, there were 966 individual instances where the United States Department of Justice retuned seized cash, monetary instruments, or financial instruments. United States Dep't of Justice, Office of Inspector General Audit Division, Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2012, Audit Rep. No. 13-07, at 45 (Jan. 2013), available at http://www.justice.gov/oig/reports/2013/a1307.pdf. Data for fiscal year 2012 depicts a similar picture, with 886 cases resulting in the return of the once-seized cash or monetary and financial instruments. *Id.* at 44. Based on the raw monetary amounts associated with those returns, it can be estimated

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here, and the decision below offers a roadmap for evading CAFRA's application. But there can be little doubt that CAFRA confirms the longstanding rule that interest follows the principal.

that close to three-quarters of a billion dollars has been returned by the Department of Justice since the year 2000, and the passage of CAFRA. *Id*. at 44-45 ($121 million in FY 2012 and FY 2011 combined).

Although CAFRA has provided a mechanism for the recovery of seized property, prevailing in a civil forfeiture action under CAFRA is but one method in the universe of avenues of recovery. Included among the non-CAFRA routes to recovery are a Rule 41(g) motion, where the government uses a seized item as evidence at trial but neither needs the item for a future proceeding nor pursues a forfeiture action against the item, see *United States* v. *Sims*, 376 F. 3d 705, 708 (7th Cir. 2004), and the government's voluntary return of property.[7] In short, there are many cases in which CAFRA will not apply.

Moreover, the decision below establishes a roadmap for sidestepping CAFRA: Having seized monetary assets, the government may wait to see if a proceeding is brought to recover the assets; if an action with a likelihood of success is brought, the government may simply return the assets before a judgment is entered against the government in a forfeiture proceeding, all while benefiting from being in possession of the assets. That is, because CAFRA is triggered only by a defendant's successful litigation to judgment of a forfeiture proceeding, see *Synagogue* v. *United States*, 482 F.3d 1058, 1064 (9th

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[7] According to the Department of Justice's Asset Forfeiture Policy Manual (2008), Chap. 1 Sec. I.D.1, forfeiture proceedings will not be commenced against amounts seized of less than $5,000, where the person from whom they are seized is not criminally prosecuted, and will never be commenced against any amount under $1,000.

Cir. 2007), it does not address cases where, as here, the government pulls the plug on the forfeiture proceeding. Indeed, CAFRA's limitation means that it is likely to apply only in cases where the government determines that its claim is substantial enough to take to trial. By contrast, where the government's claim to the defendant's property is weak and the government is therefore willing to dismiss the forfeiture proceeding before adjudication, CAFRA will not apply. In the latter circumstance, the defendant's entitlement to the return of his interest ought to be at its zenith, yet the decision below would deny it.

Precisely because of these alternate means of recovery, the Ninth Circuit squarely "reject[ed] the government's contention that CAFRA supplanted all pre-CAFRA forfeiture law." *Carvajal*, 521 F.3d at 1247. Similarly, the Sixth Circuit has indicated that CAFRA failed to displace pre-CAFRA circuit rulings supporting a claimant's right to retain interest on property where the property is recovered through means other than a civil forfeiture action. See *United States* v. *Ford*, 64 F. App'x. 976, 981 n.5 (6th Cir. 2003). In concluding that their rules requiring disgorgement had vitality post-CAFRA, both courts relied on the statute's text, history, and purpose to hold that CAFRA "ratified" their prior rulings. *Ibid.*; see also *Carvajal*, 521 F.3d at 1247-1249.

The impact of denying interest is magnified by the fact that seized assets are often held for substantial periods of time. At the start of fiscal year 2012, the government held over $4 billion in seized assets. Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements

Fiscal Year 2012 at 44. This sizable year-to-year carryover permits the government to reap significant amounts of interest and imposes corresponding harm on the funds' owners. When viewed in the aggregate, the interest windfall kept by the government is dramatic. But even when relatively small amounts are viewed in isolation, this Court has long recognized that the "constitutional protection for the rights of private property cannot be made to depend on the size of the [intrusion]." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (claim for $1 fee in compensation for occupation of property by a one-half inch wide cable wire); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997) (dispute over compensation for fractional interests of land that had not produced at least $100 in income over a five-year period).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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