NO. 23-1164

In the
Supreme Court of the United States

BATTLE BORN INVESTMENTS COMPANY, LLC; FIRST 100 LLC; 1ST ONE HUNDRED HOLDINGS LLC,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government's brief confirms that certiorari is needed in this case to ensure meaningful judicial scrutiny of the forfeiture of a bitcoin wallet that was "the most valuable asset ever seized." C.A. ER-21.

The government has routinely pressed a view of standing that prevents many legitimate claimants from contesting the forfeiture of their property. Lower courts—including then-Judges Sotomayor and Gorsuch—have repeatedly rejected the government's view as "mistaken," "fundamental[ly] flaw[ed]," and "problematic." *See*, *respectively*, *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 76 (2d Cir. 2002) (Sotomayor, J.); *United States v. $148,840.00 in U.S. Currency*, 521 F.3d 1268, 1274 (10th Cir. 2008) (Gorsuch, J., on panel); *United States v. $31,000.00 in U.S. Currency*, 872 F.3d 342, 353–54 (6th Cir. 2017). Yet the government remains unfazed. This Court needs to step in.

There is no dispute the question presented is critically important. After the petition was filed, five Justices signaled the need to end the "myriad abuses of the civil forfeiture system." *Culley v. Marshall*, 601 U.S. 377, 403 (2024) (Sotomayor, Kagan, and Jackson, JJ., dissenting); *accord id.* at 401–03 (Gorsuch and Thomas, JJ., concurring) (similar). This case presents an ideal opportunity to address one particularly problematic practice, and to do so in the context of a record-setting civil forfeiture.

Certiorari is further warranted because the decision below entrenches a 6-3 circuit split on what a claimant asserting an ownership interest must show

to establish standing at summary judgment. The government's response—that all circuits apply the "some-evidence standard," BIO 16—frames the relevant rule at too high a level of abstraction. While all circuits require some evidence of "a facially colorable interest in the res," six circuits require evidence of only the *fact* that the claimant owns the property, whereas three require evidence explaining *how* ownership was acquired. *See* Pet. 17–25. These are two distinct and irreconcilable standards.

The decision below is so indefensible that the government is forced to adopt a novel view that no court has adopted—and that its lone cited authority expressly rejected. "The fundamental flaw in the government's logic," that case explained, is that it overlooks "an important difference, for standing purposes," between possessory and ownership interests. *$148,840.00*, 521 F.3d at 1274. The government nowhere addresses this critical distinction. And it misapplies the summary-judgment standard in discounting Petitioners' substantial evidence of ownership in this case.

Certiorari is urgently needed.

I. Undisputedly, The Question Presented Is Immensely Important.

The government does not dispute the immense importance of the question presented. *See* Pet. 12–17; BIO 10–19 (not disputing importance). Indeed, the need for certiorari is even more apparent after *Culley*.

"[C]ivil forfeiture has become a booming business." *Culley*, 601 U.S. at 395 (Gorsuch, J., concurring). Every year, the government obtains

billions of dollars of property through civil forfeiture proceedings—often without *any* proof it is entitled to keep that property. *See id.* at 395–97; Pet. 12–14. The government does not dispute that, to avoid having to prove its case, it routinely "pushes courts to shut out legitimate claimants for lack of standing." Pet. 14. Nor does it dispute that this practice has persisted despite repeated rebuke by federal courts. Pet. 14–15.

As five Justices recently lamented, this "system preys" on disadvantaged populations. *Culley*, 601 U.S. at 401 (Gorsuch, J., concurring); *see id.* at 406–07 (Sotomayor, J., dissenting) ("marginalized groups" and "low-income communities" bear the brunt of government abuse). Those groups "are more likely to use cash," which is more "susceptible to forfeiture" than other payment forms. *United States v. $17,900.00 in U.S. Currency*, 859 F.3d 1085, 1090 (D.C. Cir. 2017) (quotation marks omitted). Yet the government continues to peddle an "onerous, unfair, and unrealistic" view of standing, *id.* at 1091, that would force such marginalized groups to "provid[e] some explanation of how they came to own" their cash before they can contest whether the government may permanently keep it, BIO 13.

The Court should take action in this case, which involves the then-largest civil forfeiture in history. Indeed, the government continues to use gamesmanship to try to avoid judicial scrutiny. It tells this Court that "[n]o one has suggested that petitioners had to definitively prove their ownership interest at summary judgment." BIO 14 (quotation marks omitted). Yet it told the Ninth Circuit the exact opposite, convincing that court to deny Petitioners

"standing because they did not prove an ownership interest ... by a preponderance of the evidence." C.A. Dkt. No. 29 at 45.

This Court needs to send a message that the federal government should not be in the business of depriving legitimate claimants of the opportunity to dispute the permanent forfeiture of their property. Transparency and adversarial testing—not gamesmanship—should prevail when the government tries to forfeit billions of dollars.

II. The 6-3 Circuit Split On The Question Presented Warrants Review.

Certiorari is further warranted because the circuits are deeply divided on what claimants must show to establish standing at summary judgment based on an ownership interest. Pet. 17–25. The government's response that all circuits apply the "some-evidence standard," BIO 16, ignores that they sharply split 6-3 on what *type* of evidence is needed.

The Fourth and Tenth Circuits epitomize this intractable conflict. The rule in the Fourth Circuit—which the government tellingly fails to mention—is that "a claimant alleging an ownership interest in seized property *must, at a minimum,* present some evidence regarding how the claimant came to possess the property." *United States v. Phillips*, 883 F.3d 399, 405 (4th Cir. 2018) (emphasis added; quotation marks omitted). That rule cannot be reconciled with the Tenth Circuit's opposite rule: In "ownership interest" cases, that "court[ ] *ha[s] not required* the claimant to present the type of explanatory evidence urged by the government." *$148,840.00*, 521 F.3d at 1274–75

(emphasis added). Rather, it has required only "some evidence tending to support the existence of that ownership interest." *Id.* at 1276.

The government concedes that, like the Tenth Circuit, several other circuits require some evidence of only the fact of ownership and "no explanation of ownership." BIO 17; *see*, *e.g.*, *$557,933.89*, 287 F.3d at 73, 79 n.10 (2d Cir.) (upholding standing even though claimant "asserted the Fifth Amendment" to avoid explaining how he acquired ownership); *United States v. $774,830.00 in U.S. Currency*, 2023 WL 1961225, at *3 (6th Cir. Feb. 13, 2023) (where "a claimant asserts an ownership interest, the type of additional explanatory evidence urged by the government here … is not essential" (deriving rule from *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 499 (6th Cir. 1998))); *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013–14 (8th Cir. 2003) (unexplained "title" to property established standing).

But the government misreads these cases "as requiring no explanation of ownership" *only* in the absence of "direct evidence" of ownership. BIO 17. No case says or even suggests that. Rather, as Petitioners explained—and the government fails to address—these circuits "sharply distinguish[ ] between the evidentiary standards for ownership and possession claims." Pet. 18; *see* Pet. 17–21. While these "courts have required the claimant to [prove] the legitimacy of [a] possessory interest," they categorically reject such a requirement where the claimant "assert[s] an ownership interest." *$148,840.00*, 521 F.3d at 1275 (emphasis removed). What matters is the nature of the property interest, not the evidence of that interest.

The government's suggestion that the Seventh and D.C. Circuits would require claimants "to explain their ownership" is mistaken. BIO 18. The Seventh Circuit has endorsed the Tenth Circuit's rule that a claimant need not "'explain his relationship to property that he claims to *own*,'" *United States v. Funds in the Amount of $239,400*, 795 F.3d 639, 642 (7th Cir. 2015) (citation omitted), and has upheld standing even where a claimant refused to explain his ownership interest, *United States v. $304,980.00 in U.S. Currency*, 732 F.3d 812, 818 (7th Cir. 2013). And the D.C. Circuit has explained it would be "unfair" to require claimants to substantiate their "account of ownership" with, *e.g.*, "pro[of] that [the] cash is legitimate." *$17,900.00*, 859 F.3d at 1090–91.

As to the other side of the circuit split, the government has no meaningful response. Its discussion of the facts in *Phillips* ignores the legal rule announced in that case—which the Fourth Circuit took from a possession case. *See* 883 F.3d at 405 (requiring in "ownership" cases "some evidence 'regarding how the claimant came to possess the property'" (quoting *$515,060.42*, 152 F.3d at 498); *$515,060.42*, 152 F.3d at 498 ("The assertion of simple physical possession of property as a basis for standing must be accompanied by factual allegations regarding how the claimant came to possess the property.").

The Third and Fifth Circuits similarly require claimants to "rebut the government's evidence" on the merits to establish standing. *United States v. Contents of Acct. Nos. 3034504504 & 144-07143*, 971 F.2d 974, 986 (3d Cir. 1992); *accord*, *e.g.*, *United States v. One 1998 Mercury Sable Vin: 1MEMF5OU4WA621967*,

122 F. App'x 760, 763–64 (5th Cir. 2004) (per curiam) (claimant must "present sufficient evidence to establish a facially colorable claim that he, not the [criminal] offenses [at issue], was the source of the funds"). In sharp contrast to the above circuits, which require evidence of only the fact of ownership, these courts require claimants to explain their ownership by proving legitimate ownership. The government offers no reason to think these courts would ever apply a different rule.

Finally, the government wrongly contends that the decision below "applied the more-claimant-friendly some-evidence standard" addressed above. BIO 16. Like the Third, Fourth, and Fifth Circuits, the Ninth Circuit applied a *different* standard, requiring Petitioners to explain their ownership interest. Despite Petitioners' undisputed "ownership rights to the bankruptcy estate of Ngan" and evidence of Ngan's prior ownership, the panel faulted Petitioners for "offer[ing] nothing to suggest how Ngan would have come into ownership of the [contested] bitcoin." App.6. The government ignores both the panel's actual reasoning and its tacit acknowledgement that it was imposing a requirement that other circuits do not. *See* App.7 (observing that "no authority in [that] Circuit" foreclosed this requirement).

The decision below thus entrenches a 6-3 circuit split that requires resolution by this Court.

III. The Decision Below Is Wrong.

Given the undisputed importance of the question presented and deep division among the circuits, the government's argument that the Ninth Circuit

"correctly" struck Petitioners' claims is irrelevant to the cert-worthiness of this case. BIO 10. It is also flawed on its own terms.

The government contends that, absent "some direct evidence of ownership"—*e.g.*, possession, control, or a financial stake—the panel was correct to require "some explanation of how [Ngan] came to own" the 1HQ3 wallet. BIO 13. But the lone authority it cites for this novel rule categorically *rejected* such a requirement, reasoning that "[t]he fundamental flaw in the government's logic" is that it overlooks "an important difference, for standing purposes," between possessory and ownership interests. *$148,840.00*, 521 F.3d at 1274 (Gorsuch, J., on panel). Petitioners detailed this critical flaw, Pet. 26–27, yet the government offers no response.

A "distinct evidentiary burden exists in possession cases" because a claimant's explanation of possession is needed to distinguish a lawful possessor or bailee, who would "suffer a constitutional injury in fact" if deprived of that property, from a mere custodian or unknowing transporter, who would not. *See $148,840.00*, 521 F.3d at 1276. No "explanatory evidence" is needed in ownership cases, however, because the mere fact of ownership establishes that the claimant would be injured if deprived of the property. *See id.* at 1275. Importantly, whether ownership is evidenced through possession, control, or otherwise is irrelevant: A colorable ownership interest—however it is evidenced—establishes the claimant's concrete stake in a forfeiture.

Regardless, the government's novel rule has no bearing here because, despite receiving no discovery,

Petitioners *did* provide evidence of Ngan's ownership and control of 1HQ3. Their unrebutted evidence showed that Ngan tried to sell enormous quantities of bitcoin, secured one sale through draft agreements and an escrow account, and specifically indicated the 1HQ3 wallet would fund that sale. Pet. 25 (citing App.39–50; App.57–64; ER-35–72). This conduct would have been pointless had Ngan not controlled the 1HQ3 wallet. In addition, Ngan's associate deleted 54 files from Ngan's devices, App.83–84—a fact the government cannot explain except by reference to "the 54 transfers of bitcoin" that it says eventually ended up in 1HQ3, BIO 11.[1] Taken together, and drawing all inferences in Petitioners' favor, this is "some evidence tending to support the existence of [Ngan's] ownership interest." *$148,840.00*, 521 F.3d at 1276.

The government suggests this evidence "indicates at most that Ngan was behind one of the numerous scams at that time." BIO 11. But that adverse inference is not permissible on summary judgment. In the referenced scams, the buyer paid the scammer *before* receiving a (fake) key to a bitcoin wallet. *See* App.28–32. Ngan, in contrast, was selling actual bitcoin and could not possibly scam any buyer because, under the sale and escrow agreements Ngan drafted, he would receive no payment until *after* the buyer "confirm[ed] ... receipt" of the bitcoin. App.44. Nor was

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[1] It is irrelevant whether bitcoin transactions are ordinarily "saved on the parties' devices." BIO 11 n.2. According to the government, the 54 purported transfers here were not ordinary bitcoin transactions; they stemmed from a "vulnerability in Silk Road's vendor portal" that "tricked Silk Road into sending bitcoin to" other wallets. D. Ct. Dkt. No. 99-2 ¶ 9.

Ngan's ownership "facially implausible." *Contra* BIO 17. It is highly plausible that a man of "substantial personal wealth" who conceals millions of dollars in assets, App.81, would try to sell bitcoin worth only $354,000 when it was allegedly taken from Silk Road, ER-169 ¶ 15.

At bottom, the government presses—and the Ninth Circuit endorsed—a rule effectively requiring Petitioners to "prove legitimate ownership" before they could contest the government's forfeiture theory. Pet. 29. That impermissibly "shift[s] the burden of proof from the government back to the claimant" to prove the "property is not subject to forfeiture," *i.e.*, that it is *not* connected to unlawful activity. *$239,400*, 795 F.3d at 646. It also presumes that courts should not scrutinize the government's forfeiture theory unless a claimant can effectively disprove it. The government thus turns on its head "the general rule" that it "cannot seize a person's property without a *prior* judicial determination that the seizure is justified." *Culley*, 601 U.S. at 398 (Gorsuch, J., concurring) (quotation marks omitted).

The government also overlooks the need for transparency here. Consistent with its pattern in other Silk Road forfeitures, the government has granted Individual X unusual leniency so that he would not contest the 1HQ3 forfeiture. *See* Consent Agreement, *Battle Born Invs. Co. v. DOJ* ("*Battle Born*"), No. 1:24-cv-00067 (D.D.C. June 18, 2024), ECF 15-7 (government apparently never charged Individual X in exchange for his non-opposition); DOJ Br. at 10, *Battle Born* (D.D.C. July 25, 2024), ECF 19 (government acknowledging Individual X

"presently can retain a private life"); Opp. at 3–4, 13–14, *Battle Born* (D.D.C. July 12, 2024), ECF 16 (detailing pattern of lenient treatment). And to make it impossible for Petitioners to establish standing via proof of Ngan's connection to Individual X, the government has refused to disclose Individual X's identity in the related FOIA action (which is currently on summary judgment). The largest forfeiture in history should not be shrouded in such secrecy.

Accordingly, the Court should either grant certiorari or, at minimum, hold the petition pending the related FOIA action, resolution of which could significantly buttress Petitioners' standing to contest the government's forfeiture.

IV. There Are No Vehicle Problems.

The government does not dispute that this case presents a rare opportunity to address its tactics in seeking to avoid judicial scrutiny of its forfeitures, or that there was extensive briefing and analysis on the question presented. *See* Pet. 30–31.

While the government contends Petitioners' "claims ... should be struck" as untimely, BIO 18–19, that is no impediment to this Court's review because the government ignores the applicable standard of review. The decision to excuse a claim's untimeliness is usually reviewed for an "abuse [of] discretion," as the government concedes. C.A. Dkt. No. 29 at 26. But that question faces an even higher standard of review here, as the district court never decided whether any untimeliness should be excused. *See* App.21–22. Because the district court did not purport to decide the issue at all, the government must satisfy the high bar

of proving "as a matter of law that it would have been an abuse of discretion for the trial court to" excuse any untimeliness. *Ashby v. McKenna*, 331 F.3d 1148, 1151 (10th Cir. 2003) (quotation marks omitted).

The government makes no argument it can show an abuse of discretion, much less as a matter of law—and it cannot make either showing. The most salient factors courts consider all clearly weigh in Petitioners' favor: (1) they did not learn of the forfeiture action until after the January 26, 2021 claims-filing deadline, App.77; (2) they acted diligently in "promptly" searching for and "engag[ing] several counsel" to file their claims within weeks, App.77; (3) they expended significant resources "hir[ing] data scientists, forensic experts, private investigators and attorneys" to prepare their claims, App.76; and (4) their claims concerned the "most valuable asset ever seized" through civil forfeiture, ER-21. Just as importantly, (5) the government suffered no prejudice, as it did not move to strike Petitioners' claims until four months later. *See* D. Ct. Dkt. No. 62 (claims filed Mar. 16, 2021); D. Ct. Dkt. No. 90 (government's motion filed July 13, 2021).

Accordingly, this case is an appropriate vehicle for considering the important question presented. This Court should grant certiorari.

CONCLUSION

The Court should grant the petition for writ of certiorari. Alternatively, the petition should be held pending resolution of the related FOIA action.

Respectfully submitted,

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