No. 16-1206

IN THE

Supreme Court of the United States

FINN BATATO; BRAM VAN DER KOLK; JULIUS BENCKO; MATHIAS ORTMANN; SVEN ECHTERNACH; KIM DOTCOM; MONA DOTCOM; MEGAUPLOAD LIMITED; MEGAPAY LIMITED; VESTOR LIMITED; MEGAMEDIA LIMITED; MEGASTUFF LIMITED, (CLAIMANTS)

Petitioners,

AND

ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO (*IN REM* DEFENDANTS),

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

Pursuant to Supreme Court Rule 15.8, Petitioners respectfully file this Supplemental Brief in support of their Petition for a Writ of Certiorari.

Last week, the Sixth Circuit issued two opinions that compound the circuit splits Petitioners have identified surrounding fugitive disentitlement: *United States v. $525,695.24, Seized from JPMorgan Chase Bank Inv. Account #xxxxxxxx* ("*Sbeih*"), --- F.3d ----, No. 16-3209, 2017 WL 3612006, at *8 (6th Cir. Aug. 23, 2017); *United States v. $525,695.24, Seized From JPMorgan Chase Bank Inv. Account #xxxxxxxx* ("*Salouha*"), --- F.3d ----, No. 16-3542, 2017 WL 3613299, at *7 (6th Cir. Aug. 23, 2017). The two opinions address claims by persons residing in Israel and Gaza to property in the United States. The property at issue is allegedly forfeit because it connects to illegal prescription drug sales and money laundering. *Sbeih*, 2017 WL 3612006, at *1–*2.

In *Sbeih* (the lead opinion), the Sixth Circuit has vacated and remanded the Northern District of Ohio's ruling that Sbeih is a fugitive who has requisite intent to avoid prosecution. *Sbeih*, 2017 WL 3612006, at *1. While purporting to align itself with the Fourth, Second and Ninth Circuits (*contra* the D.C. Circuit) on the substantive standard governing fugitive disentitlement (the Third Question Presented), the Sixth Circuit actually adopted a position peculiar to it—vacating application of fugitive disentitlement on facts indistinguishable from those the courts below found sufficient to disentitle these Petitioners and espousing a higher burden the Government should face. As to the procedural standard (the Second Question Presented), the Sixth Circuit took

pains to instruct the district court that it must develop a fulsome evidentiary record well beyond that adduced in Petitioners' case, which was decided based on papers alone.[1] As elaborated below, the Sixth Circuit has thus illustrated the need for this Court to bring clarity and uniformity to the procedural and substantive standards governing fugitive disentitlement.

ARGUMENT

I. THE SIXTH CIRCUIT RECENTLY ADDED TO THE CIRCUIT SPLIT ON THE SECOND QUESTION PRESENTED

Petitioners' Second Question Presented asks whether courts may resolve fugitive disentitlement by making findings of fact and credibility determinations at the pleading stage. In deciding the parallel

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[1] At the same time, the Sixth Circuit affirmed application of fugitive disentitlement in a parallel case involving Sbeih's co-defendant, Osama Salouha. Unlike Sbeih, Salouha could not "credibly argue" there was a relevant factual dispute "[g]iven [his] unique circumstances": Salouha did not deny that the U.S. State Department had procured a travel visa permitting him and his family to travel, that his wife had then returned to the United States with his five children, and that Salouha himself fled to an undisclosed location. *Salouha*, 2017 WL 3613299, at *7. The Sixth Circuit "h[e]ld that the district court did not commit clear error in crediting the uncontested statements of the government, as well as relying on the knowledge of Mrs. Salouha's return, to conclude that Salouha was deliberately staying outside the jurisdiction of the United States in order to avoid prosecution." Citing the Second Circuit's decision in *United States v. Technodyne LLC*, 753 F.3d 368, 381–82 (2d Cir. 2014), the Sixth Circuit noted the question whether summary judgment should govern but declined "to delve" into that aspect of the Sixth Circuit's own decision in *Salti* "given the unusual circumstances of [Salouha's] case." *Id.* at *7 n.3.

case of *Salouha*, the Sixth Circuit specifically acknowledged the potential split between its decision in *United States v. Salti*, 579 F.3d 656 (6th Cir. 2009) and the Second Circuit's *Technodyne* decision as to whether "summary judgment standards" should govern, yet declined to "delve into" that question "given the unusual circumstances" present there. *Salouha*, 2017 WL 3613299 at *7 n.3.

In *Sbeih*, however, the Sixth Circuit stressed the need for the district court to develop a robust factual record before resolving factual disputes over fugitive disentitlement. After seeking civil forfeiture of various bank accounts allegedly connected to drug trafficking and money laundering and encountering a competing claim by Sbeih Sbeih (a U.S. citizen residing in Israel), the United States had moved to dismiss Sbeih's claims under the fugitive-disentitlement statute. In vacating and remanding the district court's ensuing dismissal, the Sixth Circuit lamented the "sparsity of the district court's record." *Sbeih*, 2017 WL 3612006 at *8. According to the Sixth Circuit's pointed instruction, the district court on remand must permit both the government and Sbeih to "present evidence regarding Sbeih's intent in refusing to return to the United States," *Sbeih*, 2017 WL 3612006 at *8, and the evidence must then "be presented in such a way that it is available for future appellate review." *Id.* Finally, the district court must "make detailed factual findings regarding the strength of the evidence, the credibility of those providing the evidence, and the basis for determining whether Sbeih should be prevented from defending against civil forfeiture." *Id.*

The Sixth Circuit went further in admonishing the district court not to make credibility determinations from declarations, so long as they are plausible. As held by the Sixth Circuit, the district court could not reject Sbieh's alternative explanations for remaining outside the United States, as set forth in his declaration, because "the record does not contain numerous inconsistent statements that would indicate that Sbeih was being misleading, thus entitling the district court to discount his statements." *Id*. at *8.[2] In contrast, the Fourth Circuit in this case has categorically endorsed discounting claimants' declarations for fear that "any claimant could defeat disentitlement by merely asserting a self-serving reason to remain outside the United States." 38a. In this respect, too, the Sixth Circuit has deepened the divide between the circuits as to whether, and under what circumstances, a district court may make credibility determinations based on the papers alone. *See* Petition for a Writ of Certiorari ("Pet.") 26–27; Pet. Reply at 8–9.

Therefore, without revisiting its *Salti* decision, 579 F.3d 656, 666 (6th Cir. 2009) (reversing and remanding due to a district court's failure to properly hear and resolve a factual dispute on fugitive intent), the Sixth Circuit substantively adhered to it. To the extent that the Sixth Circuit avoided total clarity on this procedural point in its *Salouha* decision—instead bracketing the applicability of the "summary

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[2] Requiring a district court to find multiple, inconsistent statements by a claimant before discrediting his declaration is consistent with the "sham affidavit rule" that attends summary judgment. *See generally*, *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (reviewing sham-affidavit doctrine).

judgment standard," 2017 WL 3613299 at *7 n.3—it has only deepened the confusion and divergence among the circuits. There is no doubt now that the Sixth Circuit, in the face of a genuine factual dispute, calls for evidentiary proceedings and development of a factual record far beyond anything traditionally associated with judgment on the pleadings. It follows that the Sixth Circuit is either aligned with the D.C. Circuit (by following summary judgment standards and foreclosing resolution of genuine issues of material fact surrounding fugitive disentitlement),[3] or else adopting a position all its own (by disavowing summary judgment standards while calling for *sui generis* development of a factual record to inform merits resolution at the pleading stage).

In no event does the Sixth Circuit's latest position square with that of the Fourth Circuit. Unlike the Sixth Circuit, the court below held that district courts may necessarily resolve factual disputes and make credibility determinations surrounding fugitive disentitlement on motions to strike at the pleading stage without affording any evidentiary hearing. By the Fourth Circuit's account, a civil claimant's "refusal to face criminal charges . . . supports a presumption that the property was indeed [illegally] obtained" and claimants cannot "secure[] a hearing on their forfeiture claim [without] entering the United States." 26a; *see also* 26a–30a; 131a–142a. The fracture on this point remains sharp and shows no prospect of healing.

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[3] *See* Pet. 20–22; Pet. Reply 8.

II. THE SIXTH CIRCUIT ALSO ADDED TO THE CIRCUIT SPLIT ON THE THIRD QUESTION PRESENTED

Petitioners' Third Question Presented asks what substantive showing must be made to establish requisite intent "to avoid criminal prosecution" under 28 U.S.C. § 2466(a)(1)(B). When it previously addressed this issue in *Salti*, the Sixth Circuit sided with the D.C. Circuit (in conflict with the Second and Fourth Circuits, in one camp, and the Fifth and Ninth Circuits, in another) by holding that "avoiding prosecution" must be "*the* reason"—not simply *a* reason—why an individual fails to enter the United States. 579 F.3d at 664 (quoting *United States v. $6,976,934.65, Plus Interest Deposited into Royal Bank of Scot. Int'l, Account No. XXXX-XXXXXXXX, Held in Name of Soulbury Ltd.* ("*Soulbury*"), 554 F.3d 123, 132 (D.C. Cir. 2009)); *see* Pet. 29–31.

In *Sbeih*, however, the Sixth Circuit has now staked out a new position that potentially departs from *Salti* (and thus from the D.C. Circuit in *Soulbury*) while also splitting in substance from *other* circuits. As of *Sbeih*, the Sixth Circuit does "not read *Salti* as requiring the government to prove that Sbeih had only one motive—avoiding prosecution—for staying in Israel," 2017 WL 3612006, at *4, or as "consider[ing] whether any legitimate reason for staying outside the United States would defeat" the statutory intent requirement. *Id.* The Sixth Circuit thereby purports to join the "Second, Fourth and Ninth Circuits" insomuch as "§ 2466 requires the government to prove that the claimants had a specific intent of avoiding criminal prosecution in deciding to remain outside the United States, [but] the statute

does not require that that intent be the sole or principal intent." *Id.* at *6.[4]

Notwithstanding the Sixth Circuit's claim that it has adopted the "specific intent" standard of the Second and Fourth Circuits, its actual holding brings a critical twist and appears to adopt an intermediate position akin to, yet distinct from, that of the Fifth and Ninth Circuits.[5] The Fourth Circuit, like the Second Circuit, holds that § 2466 reaches claimants if "any of their motivations for declining to reenter the United States was avoidance of criminal prosecution" and that the statute designedly "appl[ies] to people with no reason to come to the United States other than to face charges." 33a. But *Sbeih* explicitly parts ways on that bottom line: According to the Sixth Circuit, "[t]he government cannot satisfy its burden [to prove intent] by relying solely on the fact that Sbeih had notice of the warrant but failed to return to the United States. Such a low burden reads out the specific intent requirement, incorporated in both the statute and the five-factor test, that the claimant '*deliberately* avoided

[4] Notably, the Sixth Circuit did not deny that the D.C. Circuit has split over the intent standard, as reflected in *Soulbury*. Although the Sixth Circuit characterized *Soulbury* as "not address[ing] whether a claimant can have multiple motives in remaining outside the United States," *Sbeih*, 2017 WL 3612006 at *5, it relied upon a supposed factual distinction that rings hollow. *See* Pet. Reply at 10–11. At the same time, the Sixth Circuit rightly took care to omit the D.C. Circuit from the list of sister circuits it purports to be joining. *Id.* at *6.

[5] Although the Sixth Circuit has claimed that the Ninth Circuit applies the same "specific intent" standard, the Ninth Circuit in fact applies a distinct totality-of-the-circumstances test. *See* Pet. 31–32.

prosecution.'" *Sbeih*. 2017 WL 3612006 at *7 (emphasis in original) (citing *Soulbury*, 554 F.3d at 132, for the proposition that "mere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy" Section 2466(a)(1)(B)). Nor could the Government meet its substantial "burden" by further noting that Sbeih was actively engaging in "plea negotiations" over the criminal charges. *Sbeih*, 2017 WL 3612006 at *7–*8.

The Sixth Circuit seems to have charted a unique course by instructing the district court on remand to analyze the "totality of the circumstances" and, in doing so, to take stock of such things as Sbeih's prior travel history, his prior statements, and other evidence bearing on "whether Sbeih has a *justifiable reason* for not returning to the United States." *Id.* at *8 (emphasis added). This approach to a "totality-of-the-circumstances" assessment may evoke that of the Fifth and Ninth Circuits, *see* Pet. at 31–32, but it seemingly stands distinct in putting the Government to greater burdens while breaking especially sharply from the Fourth Circuit, *see* 36a–39a. For the Fourth Circuit, requisite intent follows from the mere fact that these Petitioners knew of criminal indictments yet invoked extradition rights in their home countries rather than dropping everything to travel to the United States. *See* 38a; *accord* Brief for the United States in Opposition to Certiorari at 25. The Sixth Circuit parts ways, however, by expressly holding that mere "notice and a failure to return cannot carry the entirety of the government's burden," *Sbeih*, 2017 WL 3612006, at *7, and by rejecting the notion that engaging in "plea negotiations" (analogous to extradition proceedings) while abroad

makes someone a fugitive. *Sbeih*, 2017 WL 3612006, at *7.

In sum, by adjusting its formulation of the operative standard, the Sixth Circuit may have tweaked its precise alignment among the circuits (whether by adopting a new position that demands more from the Government than the Fifth and Ninth Circuits would, or else by joining the Fifth and Ninth Circuits), but it has not mitigated the severity or multiplicity of the overall split on the Third Question Presented.

CONCLUSION

The circuits are continuing to disagree and diverge over the Second and Third Questions Presented. The petition should be granted.

Respectfully submitted,

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