No. 22-652

In the Supreme Court of the United States

PAVEL IVANOVICH LAZARENKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court may order the forfeiture of substitute assets under 21 U.S.C. 853(p)—which permits forfeiture of "any other property of the defendant" if the defendant has made "any" directly forfeitable property unavailable—without finding that the defendant made all directly forfeitable property unavailable.

2. Whether "any other property" that may serve as a substitute asset under 21 U.S.C. 853(p)(2) includes property that is not subject to a final criminal forfeiture order but could possibly have been included in such an order.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

United States v. *Lazarenko*, No. 00-cr-284 (Apr. 24, 2006)

United States v. *Lazarenko*, No. 00-cr-284 (Sept. 29, 2006)

United States v. *Lazarenko*, No. 00-cr-284 (Dec. 14, 2006)

United States v. *Lazarenko*, No. 00-cr-284 (Jan. 17, 2007)

United States v. *Lazarenko*, No. 00-cr-284 (Nov. 23, 2009)

United States v. *Lazarenko*, No. 00-cr-284 (Feb. 4, 2010)

United States v. *Lazarenko*, No. 00-cr-284 (Apr. 4, 2011)

United States v. *Lazarenko*, No. 00-cr-284 (Aug. 6, 2021)

United States v. *Lazarenko*, No. 00-cr-284 (Aug. 20, 2021)

United States v. *Lazarenko*, No. 00-cr-284 (June 3, 2022)

United States Court of Appeals (9th Cir.):

United States v. *Lazarenko*, No. 06-10273 (Nov. 21, 2006)

United States v. *Lazarenko*, Nos. 06-10273, 06-10614 (Feb. 7, 2007)

United States v. *Lazarenko*, No. 06-10592 (Sept. 26, 2008)

United States v. *Lazarenko*, No. 08-10388 (Jan. 23, 2009)

United States v. *Lazarenko*, No. 06-10592 (Apr. 10, 2009)

United States v. *Universal Trading & Inv. Co.*, No. 09-10255 (Dec. 15, 2009)

United States v. *Lazarenko*, No. 08-10185 (Nov. 3, 2010)

United States v. *Lazarenko*, No. 08-10185 (Dec. 2, 2010)

United States v. *Liquidators of European Fed. Credit Bank*, Nos. 09-10116, 09-10161, 09-10183 (Jan. 4, 2011)

United States v. *Lazarenko*, Nos. 21-10225, 21-10250 (Sept. 12, 2022)

United States v. *Lazarenko*, No. 22-16163 (Dec. 7, 2022)

Supreme Court of the United States:

Lazarenko v. *United States*, No. 09-49 (Nov. 2, 2009)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2022 WL 4127712. The orders of the district court (Pet. App. 7a-11a, 12a-31a) are not published in the Federal Supplement but are available at 2021 WL 3935278 and 2021 WL 3471172.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2022. On December 8, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including January 10, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, in 2006 petitioner was convicted on one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); seven counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (1994) and 18 U.S.C. 1956(a)(2); five counts of wire fraud, in violation of 18 U.S.C. 1343 (1994) and 18 U.S.C. 1346; and one count of transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 (1994). D. Ct. Doc. 1113, at 1 (Dec. 14, 2006). The court of appeals affirmed petitioner's conspiracy and money-laundering convictions, reversed his wire-fraud and transporting-stolen-property convictions, and remanded. 564 F.3d 1026. This Court denied petitioner's petition for a writ of certiorari. 558 U.S. 1007. On remand, the district court sentenced petitioner to 97 months of imprisonment, to be followed by two years of supervised release. D. Ct. Doc. 1574, at 3-4 (Feb. 4, 2010).

In 2006, the district court entered a preliminary order of forfeiture, D. Ct. Doc. 947 (Apr. 24, 2006), which it amended shortly thereafter to include a forfeiture money judgment for $22.851 million, D. Ct. Doc. 1080, at 1 (Sept. 29, 2006). In 2021, the court entered an order for substitute-assets forfeiture to help satisfy the outstanding forfeiture money judgment, Pet. App. 12a-31a, and corrected that order, *id.* at 7a-11a. The court of appeals affirmed. *Id.* at 1a-6a.

1. In the 1990s, petitioner held several high-level government roles in Ukraine, eventually becoming Prime Minister. 564 F.3d at 1030. During that time, he engaged in money laundering and extortion, and he "defrauded" the people of Ukraine "by obtaining interests

in companies, allocating privileges to cronies, and then failing to disclose his assets and wealth." *Ibid.* Petitioner "kept his money in foreign bank accounts, transferring funds from one account to another across the globe in an effort * * * to disguise and conceal the sources and ownership." *Id.* at 1029.

2. a. A federal grand jury in the Northern District of California charged petitioner in a second superseding indictment with one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); seven counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (1994) and 18 U.S.C. 1956(a)(2); 22 counts of wire fraud, in violation of 18 U.S.C. 1343 (1994) and 1346; and 23 counts of transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 (1994). D. Ct. Doc. 143, at 3-24 (July 19, 2001). The indictment also contained forfeiture allegations under 18 U.S.C. 982 (1994). D. Ct. Doc. 143, at 25-26.

Following the government's case-in-chief, the district court dismissed 11 of the transporting-stolen-property counts and 12 of the wire-fraud counts. 564 F.3d at 1032. The jury found petitioner guilty of the remaining counts. *Id.* at 1033. The court dismissed additional counts so that petitioner was convicted of one count of conspiring to commit money laundering, seven counts of money laundering, five counts of wire fraud, and one count of transporting stolen property in interstate commerce. *Ibid.*; D. Ct. Doc. 1113, at 1.

The district court also entered a preliminary order of forfeiture, which it later amended. See D. Ct. Docs. 947, 1080. Federal law provides for the criminal forfeiture of "any property, real or personal, involved in" a money-laundering offense, including a violation of 18 U.S.C. 1956, and "any property traceable to such prop-

erty," 18 U.S.C. 982(a)(1). In lieu of forfeiting particular property, the government may obtain a forfeiture money judgment reflecting the amount of a defendant's forfeiture liability. See Fed. R. Crim. P. 32.2(b)(1)(A) and (2)(A); see also 28 U.S.C. 2461(c). After a court enters a forfeiture money judgment, if the government newly identifies assets involved in or traceable to assets involved in the underlying offense, it may forfeit those assets in satisfaction of the money judgment. Alternatively, if the government can show that directly forfeitable property is unavailable, it may seek substitute-assets forfeiture to satisfy the money judgment, because forfeitures under Section 982 are subject to the procedures in 21 U.S.C. 853. 18 U.S.C. 982(b)(1). Section 853(p) provides for substitute-assets forfeiture—that is, the forfeiture of "any other property of the defendant"—if the directly forfeitable property has become unavailable, according to any of five criteria, "as a result of any act or omission of the defendant." 21 U.S.C. 853(p)(1) and (2); see *Honeycutt* v. *United States*, 581 U.S. 443, 452 (2017) (explaining that "[t]his provision begins from the premise that the defendant once possessed tainted property * * * and provides a means for the Government to recoup the value of the property if it has been dissipated or otherwise disposed of") (citation omitted). A court may amend a previously entered forfeiture order "to include property that * * * is substitute property that qualifies for forfeiture." Fed. R. Crim. P. 32.2(e)(1)(B).

The district court here ordered petitioner to forfeit certain assets under Section 982(a)(1), and, in lieu of forfeiting additional assets involved in his counts of conviction, ordered petitioner to pay a forfeiture money judgment of $22.851 million. D. Ct. Docs. 947, 1080.

The preliminary order of forfeiture became final when petitioner's initial sentencing concluded in 2006, and petitioner did not appeal the court's forfeiture findings. See Fed. R. Crim. P. 32.2(b)(4); see also D. Ct. Doc. 1591, at 1-3 (Apr. 4, 2011).*

b. The court of appeals affirmed petitioner's conspiracy and money-laundering convictions, reversed his wire-fraud and transporting-stolen-property convictions, and remanded. 564 F.3d at 1047. This Court denied petitioner's petition for a writ of certiorari. 558 U.S. 1007. On remand, the district court sentenced petitioner to 97 months of imprisonment, to be followed by two years of supervised release. D. Ct. Doc. 1574, at 3-4. The court also ordered petitioner to pay a $600 special assessment and a $9 million criminal fine. *Id.* at 6. The court did not amend the forfeiture money judgment. See Pet. App. 13a; D. Ct. Doc. 1591.

3. The government sought and obtained the forfeiture of some directly forfeitable property and some substitute assets to satisfy part of petitioner's forfeiture money judgment. See, *e.g.*, D. Ct. Doc. 1626, at 2-3 (Oct. 8, 2013) (ordering forfeiture of a mansion bought with laundered funds); D. Ct. Doc. 1639, at 2 (Apr. 14, 2014) (ordering forfeiture of a Picasso lithograph and a decorative urn as substitute assets). But as of 2021 petitioner still owed more than $19 million of his forfeiture money judgment. See Pet. App. 13a.

In 2021, the government moved again to forfeit substitute assets under Section 853(p) to satisfy peti-

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* Since petitioner's conviction, multiple third parties have filed petitions in ancillary proceedings asserting alleged interests in directly forfeitable assets. Those petitions have resulted in limited amendments to the forfeiture order that have not affected the forfeiture money judgment. See D. Ct. Doc. 1591, at 2-3.

tioner's outstanding forfeiture money judgment. Specifically, the government sought to forfeit more than $2 million in bank accounts located in Guernsey and Liechtenstein; petitioner is the account holder of the Guernsey account and a signatory to the Liechtenstein account. Gov't C.A. Br. 3-4, 16.

The district court granted the government's motion for forfeiture of the substitute assets. Pet. App. 12a-31a. The court first determined that "because of [petitioner's] conduct * * * tainted property matching or exceeding" the amount in the Guernsey and Liechtenstein bank accounts "ha[d] fallen beyond the government's reach" and had therefore been rendered unavailable under multiple criteria specified in Section 853(p)(1). *Id.* at 15a-16a; see *id.* at 16a-21a. The court then rejected petitioner's contention that the government could not forfeit the funds in those accounts because directly forfeitable funds were supposedly available in other accounts held by petitioner. *Id.* at 21a. The court explained that it need not determine whether the alternative funds identified by petitioner were available because "if the government identifies tainted property that has fallen beyond its reach for one of" the reasons listed in Section 853(p)(1), "the government can obtain '*any* other property' belonging to the defendant." *Id.* at 22a (quoting 21 U.S.C. 853(p)(2)).

The district court also rejected petitioner's assertion that the government's position in a separate and ongoing civil forfeiture proceeding under 18 U.S.C. 981(a) in the United States District Court for the District of Columbia was "inconsistent with the position that the government has taken here." Pet. App. 25a. As part of that civil forfeiture proceeding, the government asserted that the funds in the Guernsey and Liechtenstein ac-

counts were traceable to petitioner's unlawful activities for purposes of Section 981(a), and the district court in that case placed a restraint on those accounts. *Id.* at 22a-23a. In rejecting petitioner's argument, the district court here pointed to the text of Section 853(p), explaining that "[t]he phrase 'any other property' is most naturally read to mean any property of the defendant that has not been placed beyond the government's reach for one of the reasons enumerated in" Section 853(p)(1). *Id.* at 24a. The court thus concluded that "the statute does not preclude courts from ordering the forfeiture of other tainted property as substitute property" and "the government's position in the [civil forfeiture] litigation is not inconsistent with the position that the government has taken here." *Id.* at 24a-25a. In reaching that conclusion, the court noted that "[p]roperty cannot be simultaneously tainted" by a count of conviction "and untainted," but the court emphasized that Section 853(p) "permits both tainted and untainted property to be forfeited as substituted property." *Id.* at 24a n.8.

The district court subsequently corrected its order granting the government's forfeiture motion, adjusting the precise amount that the government could forfeit from the Guernsey and Liechtenstein accounts. Pet. App. 7a-11a.

4. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1a-6a. The court agreed that petitioner had rendered some directly forfeitable property—valued at a total of $2,794,502.80—unavailable under Section 853(p)(1). *Id.* at 3a. And the court found that funds (of that same total value) in the Guernsey and Liechtenstein bank accounts could be forfeited as substitute property because petitioner's counter-argument was "foreclosed by the text of" Sec-

tion 853(p)(2). *Ibid.* The court explained that once a defendant has made any directly forfeitable property unavailable, then "'any other property' of the defendant may be substituted, whether it is tainted or not." *Id.* at 4a (citation omitted). The court further found that "[n]othing in the text" of Section 853(p) "suggests" that the funds in the Guernsey and Liechtenstein accounts could not "be used as substitute property because other assets more directly traceable to [petitioner's] crimes are still available." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 2, 9, 14-15) that the court of appeals erred in permitting the forfeiture of substitute assets under 21 U.S.C. 853(p) without finding that all directly forfeitable property was unavailable. He also contends (Pet. 2) that the court erred in finding that property that may have been directly forfeitable can be forfeited as a substitute asset. Those contentions lack merit. The court adhered to the plain text and context of Section 853(p), and its unpublished memorandum decision does not conflict with any decision of this Court or implicate a division of authority among the courts of appeals. No further review is warranted.

1. a. The text and context of Section 853(p) dispose of petitioner's argument (Pet. 14-15) that a court cannot order substitute-assets forfeiture without first finding that *all* directly forfeitable property is unavailable. Section 853(p)(2) requires a court to "order the forfeiture of any other property of the defendant" if the defendant has rendered *any* directly forfeitable property unavailable. 21 U.S.C. 853(p)(2). That provision applies when "any property described in subsection (a)" (*i.e.*, any directly forfeitable property) has been rendered unavailable. 21 U.S.C. 853(p)(1).

As this Court has explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted); see *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020) ("We have repeatedly explained that the word 'any' has an expansive meaning.") (citation and some internal quotation marks omitted). The government thus is permitted to seek substitute-assets forfeiture of "whatever kind," *Gonzales*, 520 U.S. at 5 (citation omitted), from among the defendant's "other property," 21 U.S.C. 853(p)(2)—regardless of whether that property was directly forfeitable. Petitioner has identified "no basis in the text for limiting" the term "any," *Gonzales*, 520 U.S. at 5, in Section 853(p)(2) to other property that is not directly forfeitable (*i.e.*, what petitioner calls (Pet. 8) "untainted" property).

Similarly, petitioner identifies no basis for reading the reference in Section 853(p)(1) as if it depends on the unavailability of all directly forfeitable property, when it refers to "any property described in subsection (a)." 21 U.S.C. 853(p)(1). That requires the government to show only that the defendant made "one" portion or "some" part of the directly forfeitable property unavailable—not all of it. *Gonzales*, 520 U.S. at 5 (citation omitted). Petitioner's reading of Section 853(p)(1) would depart from the statutory text by replacing the word "any" with the word "all."

And, if there were any doubt whether Section 853(p)(1) and (2) should be given their plain meaning, it would be resolved by Congress's express instruction that "[t]he provisions of [Section 853] shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. 853(*o*). Criminal forfeiture, as authorized in statutes like 18 U.S.C. 982 and 21 U.S.C. 853, is part of

a defendant's "punishment," *United States* v. *Bajakajian*, 524 U.S. 321, 328 (1998), and serves the important interests of "'separating a criminal from his ill-gotten gains, returning property, in full, to those wrongfully deprived or defrauded of it,' and 'lessening the economic power' of criminal enterprises," *Honeycutt* v. *United States*, 581 U.S. 443, 447 (2017) (brackets and citation omitted). By authorizing substitute-assets forfeiture—whether the substitute property was legitimately or illegitimately obtained—Section 853(p) enables the government's efforts to disrupt criminal enterprises and helps to ensure that defendants do not benefit from their ill-gotten gains. Cf. *United States* v. *Saccoccia*, 564 F.3d 502, 506 (1st Cir.) (noting that "[w]hether the now available property is tainted or innocent could hardly have mattered to Congress, which wanted the deficiency paid" under a similarly worded substitute-assets provision in 18 U.S.C. 1963(m)), cert. denied, 558 U.S. 891 (2009).

b. Section 853(p)'s text and context likewise dispose of petitioner's contention that, if a particular asset could have been ordered directly forfeited at an earlier point in a criminal proceeding, it cannot be used as a substitute asset to satisfy a forfeiture money judgment entered as part of that criminal proceeding. Property that perhaps could have been (but was not) ordered directly forfeited in a criminal proceeding can still be "any other property of the defendant." 21 U.S.C. 853(p)(2). When it is, such property may be used as a substitute asset to the extent that the defendant has rendered unavailable any property that was actually forfeited. See 21 U.S.C. 853(p).

For those reasons, the courts below correctly determined that because petitioner made some directly for-

feitable property unavailable under Section 853(p)(1), petitioner could be ordered to forfeit funds of equal value in the Guernsey and Liechtenstein accounts—regardless of whether other directly forfeitable property remained available or whether the funds in those accounts could hypothetically have been found directly forfeitable.

c. Petitioner's remaining arguments lack merit. Petitioner does not ground his interpretation of Section 853(p) in its text or context. He instead asserts (Pet. 14-18) that the court of appeals' decision would erase the distinction between property involved in or traceable to a defendant's criminal conviction and property that is not. That concern cannot overcome the plain meaning of Section 853(p), and, in any event, the problems petitioner alleges are overblown.

Petitioner primarily contends (Pet. 15-17) that the court of appeals' decision will permit the government to collect more than it is due through overlapping criminal and civil forfeiture proceedings. But "[s]ince the earliest years of this Nation, Congress has authorized the Government to seek parallel * * * civil forfeiture actions and criminal prosecutions based upon the same underlying events." *United States* v. *Ursery*, 518 U.S. 267, 274 (1996). And the two types of forfeitures serve different purposes. Criminal forfeiture is part of a defendant's "punishment" for his underlying offense, *Bajakajian*, 524 U.S. at 328, and involves an "*in personam* aspect," *Honeycutt*, 581 U.S. at 454; see *Bajakajian*, 524 U.S. at 332 ("Section 982(a)(1) * * * descends not from historic *in rem* forfeitures of guilty property, but from a different historical tradition: that of *in personam*, criminal forfeitures."). In contrast, civil forfeiture proceedings under 18 U.S.C. 981(a) are "*in rem*"—that

is, they "target[] the property itself," not the criminal defendant; "serve important nonpunitive goals"; and "are neither 'punishment' nor criminal." *Ursery*, 518 U.S. at 289-292.

In any event, petitioner errs in raising (Pet. 10, 15, 17) the specter of a "double" recovery. Such a double recovery through civil forfeiture proceedings under Section 981(a) and criminal forfeiture proceedings would not be possible. Because civil forfeiture proceedings under Section 981(a) are *in rem* and that provision does not permit substitute-assets forfeiture, once specific property is forfeited in criminal proceedings or made unavailable, neither that property nor its equivalent value can be forfeited in a civil forfeiture proceeding. In other words, when the funds in the Guernsey and Liechtenstein accounts are applied toward petitioner's forfeiture money judgment in his criminal case, they will be dismissed from the separate civil forfeiture proceeding, see Pet. App. 26a—and the government will not be able to obtain substitute-assets forfeiture for the amount in those accounts in the civil proceeding.

Petitioner also notes (Pet. 9, 17-18) that directly forfeitable property and a defendant's other property may be treated differently in various situations. But that does not undermine the plain text of Section 853(p): Once a court has found property directly forfeitable and has also found that the defendant made some of that property unavailable, the court may order any other property of the defendant (in that amount) forfeited as a substitute asset. There is no requirement that the substitute asset have (or lack) a relationship to the defendant's crime, as long as the substitute asset has not already been forfeited. It is true that for various reasons a court may need to determine whether certain

property is tainted in certain situations. But it was not necessary to do so here. And that fact in no way suggests that the Court should read either of petitioner's proposed limitations into Section 853(p).

2. Petitioner asserts (Pet. 11-14) that the decision below conflicts with this Court's decisions in *Honeycutt* v. *United States*, *supra*, and *Luis* v. *United States*, 578 U.S. 5 (2016), and with decisions of other courts of appeals. That assertion is mistaken.

a. None of this Court's cases supports petitioner's reading of Section 853(p). In *Honeycutt*, this Court held that 21 U.S.C. 853(a), which governs forfeitures arising out of violations of the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, and includes language materially different from that in Section 982(a), does not permit the imposition of joint and several liability on a member of a conspiracy for proceeds of the conspiracy that the member himself did not acquire. 581 U.S. at 445. The Court did not address (1) whether a court may order substitute-assets forfeiture without finding that the defendant made all directly forfeitable property unavailable or (2) whether property that a court could perhaps have found directly forfeitable can be used as a substitute asset. And to the extent the Court in *Honeycutt* discussed Section 853(p), it merely suggested that it should be read according to its plain terms. See, *e.g.*, *id.* at 453 ("But as is clear from its text and structure, [Section] 853 maintains traditional *in rem* forfeiture's focus on tainted property *unless* one of the preconditions of" unavailability in Section "853(p) exists.") (second emphasis added).

Luis involved a Sixth Amendment challenge to a statutory provision that permits a court to freeze an indicted defendant's assets. 578 U.S. at 8-9 (plurality opin-

ion). The plurality opinion and Justice Thomas's concurrence therefore noted distinctions between tainted and untainted assets when analyzing the constitutional question—and did not broadly suggest that such distinctions are relevant for all purposes, let alone for the purpose of post-conviction substitute-assets forfeiture under Section 853(p). See *id.* at 17-22 (plurality opinion); *id.* at 25, 28-33 (Thomas, J., concurring in the judgment). *Honeycutt* and *Luis* thus are not in conflict—or even in tension—with the court of appeals' decision in this case.

b. The court of appeals' decision likewise does not conflict with decisions from the Third, Fifth, and Tenth Circuits. The decisions in *United States* v. *Ayika*, 837 F.3d 460 (5th Cir. 2016), and *United States* v. *Voigt*, 89 F.3d 1050 (3d Cir.), cert. denied, 519 U.S. 1047 (1996), did not address the questions presented here. Both cases involved defendants who commingled directly forfeitable and untainted funds in bank accounts and, through subsequent deposits and withdrawals, made it impossible to determine whether the funds or the items purchased with them were involved in or traceable to the defendants' money-laundering offenses. *Ayika*, 837 F.3d at 471-474; *Voigt*, 89 F.3d at 1084-1088. The courts found that, as a result of that commingling, the funds in the relevant accounts were "not traceable to the crime of conviction" and therefore were not directly forfeitable. *Ayika*, 837 F.3d at 474 (citation omitted); see *Voigt*, 89 F.3d at 1088. But both courts indicated that those same funds could still be forfeited under 21 U.S.C. 853(p)(1)(E), which permits substitute-assets forfeiture when property traceable to a conviction "has been commingled with other property which cannot be divided without difficulty." *Ayika*, 837 F.3d at 476; see *Voigt*,

89 F.3d at 1088 ("[O]nce a defendant has commingled laundered funds with untainted funds * * * such that they 'cannot be divided without difficulty,' the government must satisfy its forfeiture judgment through the substitute asset provision.") (citation and footnote omitted). *Ayika* and *Voigt* thus stand for the simple proposition that funds that are not directly forfeitable can be forfeited only if the government proceeds under Section 853(p). Those decisions do not conflict with the court of appeals' decision in this case.

And the Tenth Circuit's decision in *United States* v. *Bornfield*, 145 F.3d 1123 (1998), cert. denied, 528 U.S. 1139 (2000), does not conflict with the court of appeals' decision in this case. In *Bornfield*, the jury found in a special verdict that funds held in a bank account were "involved in" the defendant's money-laundering offense and thus directly forfeitable under Section 982(a)(1). *Id.* at 1133-1135. The district court then ordered those same funds forfeited as substitute assets under Section U.S.C. 853(p). *Id.* at 1135, 1138-1139. The court of appeals in *Bornfield* held that the jury erred in finding that the funds in the bank account were directly forfeitable and vacated the special verdict and the substitute-assets forfeiture order on that basis. *Id.* at 1138-1139 (finding that "[a]bsent the jury's valid initial award of forfeiture, the district court could not grant forfeiture pursuant to the substitute assets provision"); see *United States* v. *Smith*, 770 F.3d 628, 642 n.39 (7th Cir. 2014) (emphasizing that the decision in *Bornfield* was based on the Tenth Circuit's vacatur of the jury's special verdict). That determination does not conflict with the court of appeals' decision in this case because there is no dispute that the forfeiture money judgment against petitioner is valid.

It is true that the Tenth Circuit in *Bornfield* expressed concern that the district court "ordered [criminal] forfeiture based on" Section 853(p) "of the *same asset* alleged to be forfeitable" under 18 U.S.C. 982(a) and stated that "[i]f an asset is forfeitable pursuant to 18 U.S.C. § 982(a), * * * then it cannot be a substitute asset." 145 F.3d at 1133 n.6, 1139 (emphasis added). But those statements are dicta; they were unnecessary to the court of appeals' determination that the jury erred in finding that the funds in the bank account were directly forfeitable.

And, in any event, the Tenth Circuit solely considered whether a specific asset that has already been ordered directly forfeited could also be found forfeitable as a substitute asset. The court did not suggest that a court must find that a defendant has made all directly forfeitable assets unavailable before ordering substitute-assets forfeiture. Nor did it discuss whether assets that might be tainted—but have not been ordered directly forfeited—can serve as substitute assets. *Bornfield*'s "broad language" thus "came in a unique context," and there is no conflict that would merit this Court's review. Pet. App. 25a n.8; see *Saccoccia*, 564 F.3d at 506-507 (noting that *Bornfield* involved "a different context than the one" in *Saccoccia*, which was whether "property that the government could earlier (but did not) have forfeited and seized as tainted can instead be reached later as substitute assets" under Section 1963(m)).

3. In any event, this case would be a poor vehicle to address the questions presented. If petitioner is correct that Section 853(p) requires a defendant to make all directly forfeitable assets unavailable before the government can seek substitute-assets forfeiture, the government could likely meet that burden here. As the

court of appeals noted, "the record casts doubt on [petitioner's] representation that the assets he would prefer the government to seize are in fact available." Pet. App. 4a n.2 (citing *United States* v. *All Assets Held at Bank Julius Baer & Co.*, 244 F. Supp. 3d 188, 194 (D.D.C. 2017), and *United States* v. *All Assets Held at Bank Julius*, 959 F. Supp. 2d 81, 114 (D.D.C. 2013)). Meanwhile, even if Section 853(p) bars substitute-assets forfeiture of property that could be directly forfeited, petitioner could avoid substitute-assets forfeiture only by proving that the funds in the Guernsey and Liechtenstein accounts are directly forfeitable. But that would permit the government to forfeit those accounts in the ongoing civil forfeiture proceeding. See 18 U.S.C. 981(a)(1)(A) (permitting the civil forfeiture of "[a]ny property, real or personal, involved in" a money-laundering offense, including a violation of 18 U.S.C. 1956, "or any property traceable to such property").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2023

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* The Solicitor General is recused in this case.