No. 22-652

IN THE

Supreme Court of the United States

PAVEL IVANOVICH LAZARENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit and the government's blinkered reading of Section 853(p) is inconsistent with the statutory forfeiture scheme. The Ninth Circuit ruled below that any time a defendant makes *any amount* of a forfeited asset unavailable, the government can go after any of the defendant's other possessions. It doesn't matter whether those other possessions are connected to the crime. It doesn't matter if there are other assets available that are actually connected to the crime and already restrained. Instead, the government can take whatever it wants; the only limit is the value of the unavailable asset.

The statutory scheme does not permit this. Congress enacted careful procedural safeguards that the government must comply with before it seizes property. These safeguards depend on the distinction between tainted and untainted assets.

The Ninth Circuit ignored that distinction. In doing so, it split from the majority of circuits to address the issue. The Third, Fifth, and Tenth Circuits all require the government to prove whether assets are tainted or untainted before forfeiting them. Only the First Circuit's precedent is arguably reconcilable with the Ninth's.

The distinctions between tainted and untainted assets matter. They ensure that a defendant forfeits only as much as he should and that the government meets its burden before seizing private property. They protect the rights of third parties and prevent unlawful forfeitures.

The government asks this Court to deny this petition so it can retain the expansive forfeiture power bestowed by the Ninth Circuit. But that decision was not just wrong, it significantly undermined the protections afforded to criminal defendants and eviscerated statutorily assured property rights. This Court should grant review and reverse.

I. The Phrase "Any Other Property" Applies Only to Untainted Assets.

The plain text of 21 U.S.C. 853 restricts the forfeiture of substitute assets to untainted property. In reaching a contrary interpretation, the government disregards the statutory text.

Section 853's substitute asset provision provides that the government can seize "any *other* property of the defendant, up to the value of [the property made unavailable]." 21 U.S.C. 853(p)(2) (emphasis added). Focusing exclusively on the word "any," the government ignores the word "other." This Court's "practice, however, is to 'give effect, if possible, to every clause and word of a statute.'" *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 478 (2017) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). When the word "other" is given effect, it produces a much different meaning than that proffered by the government.

The words "any other property" in paragraph (2) mean that there are two different categories of property: (i) some original property, and (ii) "any other property," which is different than the original property. What is that different, original property? Paragraph (2) directs the reader back to "paragraph (1)," which states:

> Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant [is made unavailable].

21 U.S.C. 853(p)(1). In context, then, "any other property" as used in paragraph (2) means any property other than the "property described in subsection (a)." 21 U.S.C. 853(p).

Subsection (a), in turn, is titled "Property subject to criminal forfeiture" and applies to property "obtained, directly or indirectly" from or "used or intended to be used" in the commission of certain crimes. 21 U.S.C. 853(a); *see also Honeycutt v. United States*, 581 U.S. 443, 454 (2017) ("Forfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime."). Such property is commonly called "tainted property." *See United States v. Erpenbeck*, 682 F.3d 472, 477 (6th Cir. 2012). Thus, putting it all together, the "any other property" mentioned in section 853(p)(2) is any property other than tainted property—that is, untainted property.

United States v. Gonzales does not suggest otherwise. 520 U.S. 1, 5 (1997). True, "any" means "any." But in *Gonzales*, no "language limit[ed] the breadth of th[e] word" any. *Ibid.* Here, in contrast, "any" is limited by the words "other property," meaning untainted assets. So while "any" should be read broadly to include *all* untainted assets, *Gonzales* does not authorize exceeding the textual boundaries to include items other than untainted assets—such as tainted assets.

Applying the plain text, the government cannot forfeit tainted property under subsection (p). Instead, if the government wishes to forfeit tainted property, it must do so under subsection (a), and the value of that tainted property must be applied against a defendant's judgment. That is why the distinction between tainted and untainted property is "an important one, not a technicality." *Luis v. United States*, 578 U.S. 5, 16 (2016). The entire statutory framework proceeds from the premise that tainted property will be forfeited before substitute assets so that a criminal forfeiture judgment will be satisfied with the "property the defendant himself actually acquired as the result of the crime." *Honeycutt*, 581 U.S. at 454; *see also United States v. Voigt*, 89 F.3d 1050, 1084 (3d Cir. 1996).

Yet the Ninth Circuit adopted a contrary interpretation. It held that "'any other property' of the defendant may be substituted, whether it is tainted or not." *United States v. Lazarenko*, No. 21-10225, 2022 WL 4127712, at *1 (9th Cir. Sept. 12, 2022). That holding cannot be reconciled with the statute's plain text.

Nor does subsection (o) authorize this approach. Subsection (o) provides that "[t]he provisions of this section shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. 853(o). But "[t]he fact that a statute has a broad remedial structure does not allow us to interpret its text in a way that conflicts with its plain language." *Michigan Flyer LLC v. Wayne Cnty. Airport Auth.*, 860 F.3d 425, 430 (6th Cir. 2017). Here, the plain text of section 853 provides that "other property" does not include tainted property. The government cannot use subsection (o)'s remedial language to ignore that plain meaning.

Still, the government argues that the Ninth Circuit's interpretation better captures what "mattered to Congress." (Reply at 10). This too is misplaced. "[T]his Court does not allow hidden legislative intentions to 'muddy' . . . plainly expressed statutory directives." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2435 (2019) (Gorsuch J., concurring) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011)). The best evidence of Congress's intent is the language in the statute itself. *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014). That language should be given effect, not a supposed legislative purpose.

Finally, the fact that criminal forfeiture is a "punishment" does not help the government. (*See* Reply at 9-10). Criminal statutes implicate the rule of lenity, under which the "harsher" of two interpretations should be rejected. *United States v. Bass*, 404 U.S. 336, 347 (1971). To the extent this Court finds the rule of lenity applicable, it too undermines the government's expansive interpretation of this criminal statute. *See Bittner v. United States*, 143 S. Ct. 713, 724 (2023) (Gorsuch J., joined by Jackson, J.).

The government was right to invoke the plain text of section 853. But it fails to recognize that the plain text contradicts the Ninth Circuit's interpretation. This Court should grant certiorari to correct that misinterpretation.

II. The Ruling Below Cannot Be Reconciled with This Court's Precedent.

This Court has admonished lower courts to preserve the distinction between tainted and untainted property. The Ninth Circuit completely disregarded that instruction.

Instead, the Ninth Circuit held that "it does not matter whether the Guernsey and Liechtenstein funds are tainted or untainted." *Lazarenko*, 2022 WL 4127712, at *2. The government likewise argues that this Court shouldn't care "whether the substitute property was legitimately or illegitimately obtained." (Resp. at 10). Under their approach, subsection 853(p) permits the government to take any asset it wants; it need not prove whether the asset is tainted or untainted. *See Lazarenko*, 2022 WL 4127712 at *1.

As discussed above, that interpretation violates the plain text of section 853. It also contradicts this Court's precedent.

"The distinction" between tainted and untainted assets is "an important one, not a technicality. It is the difference between what is yours and what is mine." *Luis*, 578 U.S. at 16. Applying this rule, *Luis* explicitly "distinguishe[d] between a criminal defendant's (1) tainted funds and (2) innocent funds" in determining the scope of pre-trial restraint. *Ibid.* at 20.

Likewise, *Honeycutt* held that subsection 853(p) is the proper means for seizing untainted property, and "only" after tainted property is made unavailable. *Honeycutt*, 581 U.S. at 452-53. In reaching that holding, this Court expressed disapproval of the government's attempts to "read . . . an end run into the statute." *Ibid.* at 852.

Yet that is exactly what the Ninth Circuit did. It misinterpreted subsection 853(p) to eliminate the distinction between tainted and untainted property. That decision cannot be reconciled with this Court's precedent.

III. Tainted Assets Should Be Credited Against Their Corresponding Criminal Forfeiture Judgments, Even if Seized Through Civil Forfeiture.

The government wants to hold Lazarenko's tainted assets in reserve for civil forfeiture while first collecting as much of his untainted assets as it can through criminal forfeiture. That is not allowed. The civil forfeiture of assets tainted by the defendant's criminal convictions must be credited against a criminal forfeiture produced by those convictions.

As the government points out (Reply at 11), criminal forfeiture is an *in personam* proceeding, imposed as a punishment for the defendant's underlying offense. *United States v. Bajakajian*, 524 U.S. 321, 332 (1998). The amount of a criminal forfeiture judgment is a specific monetary number that the government proves based on the defendant's underlying offense. *Voigt*, 89 F.3d at 1084. Since it's based on the underlying offense, that amount should be satisfied from the defendant's available tainted property—"property the defendant himself actually acquired as the result of the crime." *Honeycutt*, 581 U.S. at 454; *see also ibid* at 447 ("Criminal forfeiture statutes empower the Government to confiscate property derived from or used to facilitate criminal activity.").

But that's not what the government is trying to do here. The government holds tainted assets related to Lazarenko's convictions in one hand and a criminal forfeiture judgment based on those convictions in the other. Yet instead of handing itself the tainted assets it has already restrained, the government is trying to grab Lazarenko's untainted assets that are unconnected to the

conviction. It then plans to mop up any remaining tainted assets through a civil forfeiture action.

That is not to say that the government cannot choose to pursue tainted assets through civil forfeiture; it can. *United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1152 (9th Cir. 2011). But the value of any such forfeited assets must be credited against the criminal forfeiture judgment. To hold otherwise would permit the government a double recovery. *See United States v. Iacaboni*, 363 F.3d 1, 6 n.8 (1st Cir. 2004) (observing that it would be "concern[ing]" if "the government sought to forfeit the same property twice").

Under the Ninth Circuit's logic, that double recovery is fine. In reality, it warps the structure of criminal and civil forfeiture beyond recognition. This Court should grant certiorari to correct it.

IV. There Is a Circuit Split, and the Government Is on the Wrong Side of It.

The Third, Fifth, and Tenth Circuits have all recognized that an asset cannot be both tainted and untainted. The Ninth and First Circuits have disagreed and held it doesn't matter. Try as it might, the government cannot escape this circuit split. And its preferred side of the split cannot prevail.

To distinguish the Third, Fifth, and Tenth Circuit's decisions, the government focuses on their factual differences from this case. (Resp. at 14-15). And it's true that these cases are not factually identical. But each case involved the interpretation of subsection 853(p). And each court interpreted it the same.

That interpretation is expressed no clearer than in *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998):

> An asset cannot logically be both forfeitable and a substitute asset. To allow such an anomaly would render the substitute assets provision meaningless.

Ibid. at 1138. This was not dicta as the government suggests. (Resp. at 15). Rather, it was one of two reasons *Bornfield* gave for vacating the district court's forfeiture order. *See Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) (observing that if there are two reasons for a holding, neither is dicta). *Bornfield* vacated the district court order not only because (1) there was no "waiver of jury trial on the issue of forfeiture," but "*also*" (2) because "the court could not logically order the forfeiture of § 982(a)(1) forfeitable assets pursuant to § 982(b) and § 853(p), the substitute assets provisions." 145 F.3d at 1138-39 (emphasis added). Since *Bornfield* vacated the district court's order on both grounds, the government cannot simply disregard the second ground as dicta.

The government's attempt to reconcile *Bornfield* with the opinion below likewise fails. The Tenth Circuit held that "[a]n asset cannot logically be both forfeitable and a substitute asset." *Ibid.* at 1138. The Ninth Circuit held "that 'any other property' of the defendant may be substituted whether it is tainted or not." *Lazarenko*, 2022 WL 4127712, at *1. These two statements directly contradict each other.

The government (Resp. at 14-15) also argues that the Third and Fifth Circuits do not contradict the Ninth

Circuit because all they held was that untainted assets are forfeitable under subsection 853(p). *See United States v. Ayika*, 837 F.3d 460, 474-75 (5th Cir. 2016); *Voigt*, 89 F.3d at 1088. But both *Ayika* and *Voigt* went one step further. *Ayika* held that only once the government proved an asset "was not traceable to the charged crime" could the government "proceed under the substitute asset provision of" subsection 853(p). 837 F.3d at 75-76. And *Voigt* recognized that if the government proves an asset is tainted, "then the substitute asset provision should have no applicability whatsoever." 89 F.3d at 1086. That is the opposite of the holding below.

Additionally, these holdings contradict the First Circuit's decision in *United States v. Saccoccia*, 564 F.3d 502, 506 (1st Cir. 2009) (holding that tainted property "may be forfeited in substitution" under subsection 853(p)). The government does not even try to argue otherwise.

Despite its best efforts, the government cannot escape this circuit split. The Third, Fifth, and Tenth Circuit's holding—that tainted assets cannot be forfeited as substitute property—is irreconcilable with the First and Ninth Circuit's holding—that tainted assets can be forfeited as substitute property. Only this Court can resolve that conflict.

V. The Government Ignores the Practical Problems Caused by the Ninth Circuit's Decision.

The government's response focuses on Lazarenko's second question presented: whether tainted assets should be credited against a criminal forfeiture judgment before untainted assets can be seized. The government

ignores the harms identified in Lazarenko's first question presented—whether tainted and untainted assets must remain distinct—calling those concerns "overblown." (Reply at 11). Not so.

Requiring the government to prove whether an asset is tainted or untainted, and then following the appropriate procedure to forfeit it, meaningfully protects property rights. As laid out in Lazarenko's petition, tainted and untainted assets receive different protections in many contexts, including prior to trial, *Luis*, 578 U.S. at 10; in relation to third parties, *Erpenbeck*, 682 F.3d at 478; *United States v. Jarvis*, 499 F.3d 1196, 1203 (10th Cir. 2007); and in certain categories of crimes, 18 U.S.C. 982(b)(2); *see also Bornfield*, 145 F.3d at 1139.

The Ninth Circuit's approach would eliminate the distinction that these protections rest upon. Equating tainted and untainted assets permits, for instance, untainted assets to be improperly forfeited under 18 U.S.C. 982(b)(2) or third parties to be denied due notice before forfeiture. (*See* PWC at 18).

Tellingly, the government's response never addresses these concerns. But they cannot be ignored. This Court should grant certiorari and reverse.

VI. This Case Is an Appropriate Vehicle.

The government argues that this is a poor vehicle to address the circuit split because a reversal will not ultimately affect the outcome. That is wrong on two counts.

First, the government has not shown that the more than $200 million it has restrained is unable to satisfy Lazarenko's criminal forfeiture judgment of, at most, $19 million. *See United States v. Lazarenko*, No. 00-CR-00284, 2021 WL 3471172, at *1 (N.D. Cal. Aug. 6, 2021). The government may claim that it cannot access these assets (Reply at 16-17), but its own behavior indicates otherwise. This case began in 2004. The government would not still be litigating two decades later if it believed that the restrained funds were wholly unavailable. Even if some assets (such as those restrained in Antigua) prove to be unavailable, the government has never shown that the funds in Guernsey, Lithuania, and Switzerland are not.

Second, resolving the circuit split on the forfeiture of tainted assets under subsection 853(p) would directly impact this case. As Lazarenko pointed out below, the government previously argued that the assets at issue are tainted. *See Lazarenko*, 2021 WL 3471172, at *5. Judicial estoppel prevents the government from changing its position to now argue that they are untainted. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The Ninth Circuit was only able to bypass this conundrum because it ignored the distinction between tainted and untainted assets and thus estoppel "d[id] not matter." *Lazarenko*, 2022 WL 4127712, at *2.

But if the plain text of section 853 is applied, then estoppel *will* matter. The government will be unable to forfeit the assets as tainted property under subsection 853(p) and estopped from arguing that the property is untainted. Lazarenko will be in a much better position to recover his property.

The Ninth Circuit's decision squarely presents two meaningful questions for this Court's review. Resolution of those questions will not only resolve a circuit split and reaffirm property protections, it will also affect this case's outcome. Certiorari is warranted.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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