No. 23-____

In The

Supreme Court of the United States

FRANCISCO DARIO MORA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Government may require criminal defendants under 28 U.S.C. § 2461 to forfeit their own property as a substitute for objects they temporarily possessed during a criminal offense but never owned.

RELATED PROCEEDINGS

United States v. Mora, No. 4:19-cr-03289-SHR-MSA-1 (D. Ariz.)

United States v. Mora, No. 21-10147 (9th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Francisco Mora respectfully requests a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-5a) is unpublished but is reported at 2022 WL 17984468. The district court's order is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 29, 2022. Pet. App. 1. The Court of Appeals denied petitioner's petition for rehearing and rehearing en banc on April 24, 2023. *Id.* 6a. On July 12, 2023, Justice Kagan extended the deadline for filing the petition for a writ of certiorari to August 23, 2023. No. 23A22. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2461 and 21 U.S.C. § 853 are reproduced in full at Pet. App. 21a-34a.

INTRODUCTION

In *Honeycutt v. United States*, 581 U.S. 443 (2017), this Court unanimously held that property is not subject to criminal forfeiture where the defendant had "no ownership interest" in it. *Id.* at 454. Rejecting the Government's expansive reading of the forfeiture power codified at 21 U.S.C. § 853(a), the Court explained that where a defendant had only temporary possession of drugs to make "deliver[ies]" on behalf of

someone else, the Government cannot hold him responsible for the value of the drugs. 581 U.S. at 448, 450.

Undeterred, the Ninth Circuit has allowed the Government to achieve functionally the same result here—only with respect to firearms and ammunition instead of drugs. In requiring a defendant in this context to forfeit the value of the temporarily possessed property, the Ninth Circuit has held that Section 853(a)'s ownership requirement "does not apply" where, as here, the Government seeks the forfeiture of "substitute" property under 28 U.S.C. § 2461(c). *See* Pet. App. 2a; *United States v. Valdez*, 911 F.3d 960, 967 (9th Cir. 2018).

The Ninth Circuit is wrong. For one thing, substitute forfeiture is not even permissible in this situation. Section 2461(c) incorporates the rules in 21 U.S.C. § 853—the statute at issue in *Honeycutt*—insofar as they lay out "procedures" for litigating forfeiture claims. And a provision within Section 853 (subsection (p)) allows substitute forfeiture. But substitute forfeiture is no mere procedure. Rather, it is a substantive power allowing the Government to force a defendant to forfeit additional property the Government would not otherwise be able to obtain.

Even if Section 853(p) applied here, it still would not justify the Ninth Circuit's ruling. That statute expressly limits substitute forfeiture to a replacement for "property described in subsection (a)." 21 U.S.C. § 853(p)(1). And, as explained just above, *Honeycutt* makes clear that subsection (a) does not cover property in which the defendant had "no ownership interest." 581 U.S. at 454.

This Court should grant certiorari and reverse. Not only is the Ninth Circuit's sweeping interpretation of the forfeiture provisions here indefensible, but it also conflicts with decisions from the Third and Fourth Circuits. The issue is also frequently recurring and extremely important.

In fact, this Court seems already to have started to give the issue serious consideration. When the Ninth Circuit established the forfeiture rule at issue here in *Valdez*, the defendant sought certiorari. This Court relisted the case after its first conference. *See Valdez v. United States*, No. 19-6062. On March 30, 2020, as the Covid-19 pandemic took full hold over the country, the Court denied certiorari. This case provides an excellent vehicle for picking up where the Court left off.

STATEMENT OF THE CASE

A. Statutory Background

"[C]riminal forfeitures were well established in England at the time of the founding." *United States v. Bajakajian*, 524 U.S. 321, 332 (1998). But "they were rejected altogether in the laws of this country until very recently." *Id.* "The First Congress explicitly rejected *in personam* forfeitures as punishments for federal crimes, *see* Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ('[N]o conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate'), and Congress reenacted this ban several times over the course of two centuries." *Bajakajian*, 524 U.S. at 332 n.7 (citing additional statutes).

It was not until 1970, and again in 1984, that Congress gave the concept of criminal forfeiture a limited

embrace. Seeking to combat special problems related to "organized crime and major drug trafficking," *Bajakajian*, 524 U.S. at 332 n.7, Congress enacted our country's first criminal-forfeiture statutes. *See* Comprehensive Forfeiture Act of 1984 and the 1984 amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 98-473, Chapter III, §§ 302 & 303, 98 Stat. 1837 (1984); 21 U.S.C. §§ 853(a) & (p); 18 U.S.C. §§ 1963(a) & (m). These statutes are designed to "enforce the age-old adage that 'crime does not pay,'" by "depriv[ing] criminals of both the tools they use to commit crime and the fruits—the 'proceeds'—of their crime." H.R. Rep. NO. 105-358(I), at 35 (1997).

Consistent with this goal, these seminal criminal-forfeiture statutes—21 U.S.C. § 853(a) and 18 U.S.C. § 1963(a)—allow forfeiture of the defendant's property used in or involved in the offense, or proceeds the defendant obtained as a result of the offense. These statutes allow the Government "to confiscate property untainted by the crime" only in "carefully" cabined circumstances—namely, only when necessary to serve as a "substitute" for otherwise forfeitable property that the defendant has rendered unavailable. *Honeycutt v. United States*, 581 U.S. 443, 451-53 (2017); *see also* S. Rep. No. 98-225, at 194 (1983) ("Should a defendant succeed in transferring or concealing his forfeitable assets prior to conviction," substitute forfeiture "allow[s] forfeiture of other assets of the defendant to satisfy the forfeiture judgment"); *id.* at 196 (substitute forfeiture is necessary "both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does

transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture").

Years after the enactment of the drug-trafficking and racketeering criminal-forfeiture statutes, Congress enacted 28 U.S.C. § 2461—sometimes called the "bridging statute." This statute, enacted in 2000 and amended in 2006, allows criminal forfeiture where a defendant is convicted of any offense for which *civil* forfeiture of property is authorized. Section 2461(c) also specifies, with one exception not relevant here, that the "procedures" of 21 U.S.C. § 853 (the original forfeiture regime) apply to forfeiture proceedings instituted under Section 2461.

This case concerns whether or when Section 2461(c)'s cross-reference to Section 853 allows forfeiture of a defendant's untainted property under circumstances not allowed directly under Section 853 itself. In *United States v. Valdez*, 911 F.3d 960 (9th Cir. 2018), the Ninth Circuit held that 21 U.S.C. § 853(p), which allows substitute forfeiture under specified conditions, is a "procedure" under Section 2461(c). 911 F.3d at 965. The Ninth Circuit then stretched Section 853(p) to apply even where the defendant never owned the property serving as the basis for substitute forfeiture. The court of appeals did not dispute that Section 853(a) bans forfeiture of property to substitute for items the defendant temporarily possessed but never owned. But according to the Ninth Circuit, where the Government seeks substitute forfeiture under the bridging statute, the ownership requirement

of Section 853's "carefully constructed" substitute-forfeiture regime, *Honeycutt*, 581 U.S. at 452, drops away. *See Valdez*, 911 F.3d at 967.[1]

The question presented here is whether this interpretation of the bridging statute, Section 2461(c), is correct.

B. Facts and Procedural History

1. Petitioner Francisco Mora, now 31 years old, is a naturalized United States citizen who was born in Mexico, near the Arizona border, and eventually settled in Tucson, Arizona. After high school, petitioner took out $27,000 in loans to obtain an associate degree in diesel and industrial mechanics. He also incurred substantial debt for tools and medical expenses. He worked for several years as a mechanic, but he developed arthritis, which made working with his hands difficult. He had a young daughter to support, and his parents needed financial assistance due to their significant medical issues and limited ability to work.

Faced with these financial responsibilities and burdened by over $40,000 in debt, petitioner became involved in the criminal activity for which he was convicted. Acquaintances in Mexico—who, as it turned out, were affiliated with a drug-trafficking organization (DTO)—asked him to straw-purchase and export firearms and ammunition for them. They provided the money upfront for the purchases. After petitioner acquired each batch of munitions, he delivered them

[1] For the Court's convenience, the *Valdez* decision is reproduced at Pet. App. 8a-20a.

to Mexico, or made the necessary arrangements for delivery.

After some of the exported firearms were recovered in Mexico, the Bureau of Alcohol, Tobacco, and Firearms (ATF) initiated an investigation. ATF determined that, for each purchase, petitioner and his codefendant falsely declared that they were the actual buyers of the munitions, when they were actually being paid to purchase them on behalf of others in Mexico and given money to make those purchases.

2. Petitioner and his codefendant were arrested and indicted for conspiracy to smuggle goods under 18 U.S.C. § 371, smuggling goods from the United States under 18 U.S.C. § 554, and making false statements in the acquisition of firearms under 18 U.S.C. §§ 922(a)(6) and 924(a)(2). Pet. App. 2a. The indictment alleged unindicted coconspirators. It also included a forfeiture allegation requiring petitioner and the codefendant to forfeit the firearms and ammunition involved in the offenses under 28 U.S.C. § 2461(c)—which, as noted above, allows criminal forfeiture where civil forfeiture is permitted, subject to the "procedures" in 18 U.S.C. § 853—and 21 U.S.C. § 924(d), which authorizes civil forfeiture of firearms and ammunition involved in certain offenses, including the charged offenses here.

Petitioner pleaded guilty to his charges without a plea agreement. He admitted that he falsely claimed that he was the actual buyer of firearms when he was really paid to buy them for someone else, and that he had personally ensured that the straw-purchased munitions were delivered to the actual buyers in Mexico.

But petitioner objected to the proposed order of forfeiture of $32,663.48, the value of weapons that crossed the border. He contended that Section 2461 did not allow substitute-asset forfeiture because substitute forfeiture is not a "procedure," and even if it were, it would still not be allowed here because he was never the actual owner of the weapons. Rather, he was merely an intermediary who used money given to him by DTO-affiliated individuals to purchase the weapons on the DTO's behalf. Relying on *Valdez*, the district court rejected these arguments and ordered the forfeiture. It also imposed a 60-month prison term.

3. Petitioner appealed, challenging only the forfeiture order. The Ninth Circuit affirmed in an unpublished disposition, also declaring itself "bound" by *Valdez*. Pet. App. 3a.

4. Petitioner sought en banc review, arguing that *Valdez* contravenes the plain text of the controlling statutes and conflicts with the law in other circuits. The Ninth Circuit denied the petition, with only Judge Wardlaw voting to grant it. Pet. App. 6a-7a.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's rule requiring substitute forfeiture to account for the value of property the defendant never owned is wrong.

A. The Ninth Circuit's rule flouts the plain language of 28 U.S.C. § 2461 and the other provisions it incorporates.

The Ninth Circuit required petitioner to forfeit property as a substitute for property he never owned. The Ninth Circuit held that this substitute forfeiture was permissible by virtue of 28 U.S.C. § 2461(c), which provides that the "procedures" in 21 U.S.C. § 853 apply to forfeitures of property involved in the types of crimes petitioner committed. But substitute forfeiture is not a "procedure." And even if it were, the Ninth Circuit had no warrant to allow substitute forfeiture under Section 853(p) while disregarding that statute's explicit restriction to property involved in the crime *that the defendant actually owned*.

1. The power of a court to order a defendant to forfeit certain property as a substitute for other property used in a crime is a substantive power, not a mere "procedure."

Black's Law Dictionary defines "procedure" as a "judicial rule or manner for carrying on a civil lawsuit or criminal prosecution." *Procedure*, Black's Law Dictionary (11th ed. 2019). Accordingly, as Congress itself has made clear in the Rules Enabling Act, a rule of "procedure" "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). That con-

ception of "procedure" comfortably fits various provisions within 21 U.S.C. § 853. For example, the statute describes how warrants may issue for the seizure of property; how depositions may be taken; how parties may intervene in forfeiture proceedings; and how protective orders may be issued. *Id.* §§ 853(e), (g), (k), and (m).

Substitute forfeiture, by contrast, does not merely set forth a rule for litigating over certain property. It creates an entirely new category of property that may be forfeited, "permit[ting] the Government" under certain circumstances "to confiscate property untainted by the crime." *Honeycutt v. United States*, 581 U.S. 443, 451 (2017). As such, it enlarges the Government's rights and thus is plainly substantive. Lest there be any doubt, when Congress incorporated Section 853(p) into another statute to allow forfeiture of substitute assets, it used the term "provision," not "procedure." *See* 18 U.S.C. § 982(b)(2).

This Court's *Erie* jurisprudence—perhaps the most time-tested means of distinguishing procedural from substantive rules—reinforces that substitute forfeiture under Section 853(p) cannot be characterized as a mere "procedure." Under this jurisprudence, a rule is not procedural if it "significantly affect[s] the result of a litigation." *Hanna v. Plumer*, 380 U.S. 460, 466 (1965) (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)). More particularly, a rule is not procedural if it "intimately affect[s] recovery or nonrecovery" of money or some other remedial award. *Guaranty Trust Co.*, 326 U.S. at 110. Therefore, rules are substantive where they dictate whether certain

equitable remedies are available, *see id.*, as are statutes where they create remedies at law or regulate their amount, *see Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427-31 (1996).

These principles dictate that Section 853(p)'s allowance of substitute forfeiture is manifestly *not* a mere procedural rule. The statute creates a "remedy" that allows the Government to recover certain money or other property that otherwise "would fall outside the Government's reach." *See Honeycutt*, 581 U.S. at 452. That is the very essence of a substantive rule.

2. The Ninth Circuit in *Valdez* failed to consider the plain meaning of the word "procedures" or this Court's jurisprudence differentiating procedural from substantive rules. Rather, the Ninth Circuit simply pronounced that Section 853(p) "describes a *process* for ordering the forfeiture of substitute property" whenever the defendant transferred tainted property to a third party. *United States v. Valdez*, 911 F.3d 960, 965 (9th Cir. 2018) (emphasis added). But this begs the entire question. The very issue here is whether the forfeiture of substitute property is a "procedure" or a substantive action; conclusively labeling substitute forfeiture "a process" does not acknowledge, much less answer, that question.[2]

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[2] This Court in *Honeycutt* similarly referred at one point to "the procedures outlined in § 853(p)." 581 U.S. at 453. But the Court did not consider the question presented here or any other question that required distinguishing substantive from procedural statutory provisions. Much less did the Court characterize the overall availability of substitute forfeiture—as opposed to any particular method of carrying it out—as a "procedure."

The Ninth Circuit took the substance/procedure line more seriously when it turned to Section 853(a). The court of appeals found that provision to be substantive "because it describes the forfeitable property for certain drug crimes." *Id.* at 967. That is exactly right. But if Section 853(a) is substantive because it "describes the forfeitable property," *id.*, then Section 853(p) must be substantive too. It provides that where tainted property used in a crime is no longer available, "the court shall order the forfeiture of any other property of the defendant," up to the value of the property that is no longer available. 21 U.S.C. § 853(p)(2). Section 853(p) thus also creates a distinct category of forfeitable property and is necessarily substantive.

The Ninth Circuit in *Valdez* also observed that Section 2461(c) expressly disclaims incorporating "subsection (d)" of Section 853. 911 F.3d at 964. The court of appeals then remarked that "[h]ad Congress intended to . . . preclude forfeiture of substitute property, it could have excepted § 853(p) in addition to § 853(d)." *Id.* at 966. But again, this reasoning ignores the fact that the concept of substitute forfeiture is substantive, not procedural. And the Ninth Circuit itself has recognized that Section 2461(c) does not incorporate components of Section 853 that are "substantive, not procedural." *Id.* at 967. So Congress had no need to expressly exempt Section 853(p) from Section 2461(c)'s coverage.[3]

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[3] The only other way to read Section 2461(c) is that it uses "procedures" in a nontechnical sense, signaling that the statute incorporates *all* of the provisions of Section 853 except for subsection (d). But if that were the case, then *Valdez* would still be

In short, Section 853(p) does not just set forth an alternative process for forfeiting the same property. It grants the Government the authority to confiscate different property altogether. As such, it is a substantive rule and does not apply where the Government seeks forfeiture under Section 2461(c).

3. Even if the Ninth Circuit were correct that 21 U.S.C. § 853(p) were nothing more than a "procedure" that applies via 28 U.S.C. § 2461(c), the Ninth Circuit's application of Section 853(p) here would still contravene the plain language of the governing statutes. By its terms, Section 853(p) permits the forfeiture of substitute assets only "if any property described in subsection (a)" is unavailable to the government as a result of the defendant's act or omission. 21 U.S.C. § 853(p)(1). Subsection (a), in turn, covers only proceeds the defendant obtained as a result of his crime or any of "th[at] person's property" used to commit or facilitate the violation. *Id.* § 853(a)(1)-(2). The provision does not encompass property merely handled by an intermediary. *See Honeycutt*, 581 U.S. at 450 (temporary possession of property to deliver it is insufficient); *United States v. Moya*, 18 F.4th 480, 482, 485-86 (5th Cir. 2021) (although managerial defendant temporarily possessed drug proceeds, he did not personally obtain proceeds that were delivered to drug "boss" in Mexico and thus was not subject to criminal forfeiture of those proceeds under Section 853(a)). Thus, forfeiture of substitute property under

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wrong, for Section 2461(c) would then incorporate the ownership requirement in subsection (a) directly.

Section 853(p) is available only, as relevant here, if the defendant used his own property in the offense.

The plain language of Section 853(p) reinforces this limitation. It provides that, if the forfeitable property is unavailable as a result of any act or omission of the defendant, "the court shall order the forfeiture of any *other* property *of the defendant*" up to the value of the property that the defendant rendered unavailable. 21 U.S.C. § 853(p)(2) (emphasis added). This language makes clear that substitute-asset forfeiture is authorized only if the defendant causes the unavailability of *his own* property.

Indeed, the very meaning of the term "'[p]roperty . . . signifies, in a strict sense, one's exclusive right of ownership of a thing.' In their strict meanings, therefore, the right of ownership and property are synonymous, each term signifying a bundle or collection of rights." *Property*, Black's Law Dictionary (11th ed. 2019) (citation omitted). And "forfeit" means "to lose or lose the right to, **e**specially by some error, offense, or crime." Merriam-Webster Dictionary (2023); *see also Forfeiture*, Black's Law Dictionary (11th ed. 2019) ("1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."). If something never belonged to the defendant, then it is difficult to fathom how he could "lose" it via forfeiture.

To be sure, Section 853(a) also applies by its terms only to property used "for certain drug crimes." *Valdez*, 911 F.3d at 967. But the Ninth Circuit was wrong that this means that courts may ignore Section 853(a)'s requirement that the defendant have owned

the property that provides the basis for the substitute forfeiture. Either Section 2461 incorporates Section 853(p)—which, in turn, incorporates Section 853(a)—or it does not. If it does, then perhaps the Ninth Circuit is right that "courts must read the references" in Section 853(a) to drug crimes as referring to the other crimes for which Congress has allowed the Government to seek forfeiture. *Id.* But there is no justification for rewriting Sections 853(a) and 853(p) to erase their more general requirement that the defendant have owned the property that is the subject of the substitute-forfeiture order.

Indeed, the Ninth Circuit's interpretation of Section 2461(c) would allow the Government "to circumvent Congress' carefully constructed statutory scheme," *Honeycutt*, 581 U.S. at 452, in drug-trafficking cases in which 21 U.S.C. § 853 is directly applicable. Another section of the same chapter, 21 U.S.C. § 881(a), authorizes civil forfeiture of some of the same things that are subject to criminal forfeiture under Section 853(a), including firearms used in the offense, but without regard to who owns the property. As a civil forfeiture statute, 21 U.S.C. § 881(a) simply ordains that these things are "subject to forfeiture to the United States." It does not authorize seizure of substitute property. But under *Valdez*, anything subject to forfeiture under 21 U.S.C. § 881 is subject to criminal forfeiture via Section 2461(c), enabling the Government to obtain substitute assets from the defendant under 21 U.S.C. § 853(p)—even if the property subject to forfeiture does not meet the requirements of Section 853(a). The Government could therefore force drug-trafficking defendants to criminally

forfeit assets indirectly via 21 U.S.C. § 881 and 28 U.S.C. § 2461 when it is unable to obtain those assets directly under 21 U.S.C. § 853, the criminal-forfeiture statute Congress specifically crafted for drug-trafficking offenses. There is no basis for allowing the bridging statute to upend the criminal-forfeiture scheme of 21 U.S.C. § 853 in this way.

B. The Ninth Circuit's rule also conflicts with this Court's precedent and other principles of statutory interpretation.

1. The forfeiture order in this case—requiring a criminal defendant to forfeit his own money as a substitute for guns and ammunition that never belonged to him—contravenes not just the plain text of the governing statutes but also this Court's precedent.

The Court has explained that criminal-forfeiture provisions operate *in personam* as part of a defendant's punishment for an offense. *United States v. Bajakajian*, 524 U.S. 321, 332 (1998). Criminal forfeiture, therefore, permits the forfeiture only of *the defendant's* interest in property used in the offense. As this Court put it in *Bajakajian*, "criminal *in personam* forfeiture reaches only" items "owned" by the defendant; it cannot reach items possessed by an agent or intermediary on behalf of the "true owner[]." *Id.* at 328 n.3. If criminal forfeiture cannot be imposed on a defendant where the property at issue never belonged to him, then substitute-asset forfeiture should not apply in this circumstance either.

Honeycutt reinforces this limitation. There, this Court held that a person's temporary possession of property does not mean that he owned or "obtained"

the property for purposes of 21 U.S.C. § 853(a). 581 U.S. at 446-47. The Court stressed the consistency of this holding not only with the statutory text but also with "important background principles . . . of forfeiture." *Id.* at 453. One such principle is that the Government should not be allowed to "confiscate property untainted by the crime," save the special situation where "the requirements of §§ 853(p) and (a) are satisfied." *Id.* at 451-52.

The forfeiture of substitute assets under the circumstances here is inconsistent with these restrictions. Substitute-asset forfeiture makes sense when a defendant makes *his own* property unavailable to avoid a forfeiture penalty. But requiring an intermediary like petitioner to forfeit property in lieu of weapons he never actually owned—weapons purchased at a mastermind's behest, with funds supplied by that mastermind—is inconsistent with the principles of *in personam* forfeiture.

2. The Ninth Circuit's interpretation also creates discord with aspects of the statutory scheme designed to ensure that equally culpable defendants receive commensurate punishment. Criminal forfeiture is "punishment for past criminal conduct." *Alexander v. United States*, 509 U.S. 544, 553 (1993). Punishment should "fit the crime." *United States v. Vasquez*, 654 F.3d 880, 886 (9th Cir. 2011); *see also Molina-Martinez v. United States*, 578 U.S. 189, 193 (2016) (discussing the importance of uniformity and proportionality in sentencing). But under the Ninth Circuit's rule, similarly situated defendants can be treated dramatically differently under forfeiture law.

Imagine, for example, that an intermediary uses a DTO-owned vehicle to transport drugs across the border and that investigators arrest the intermediary after he has returned the car to Mexico. A district court would not be authorized under Sections 853(p) and 853(a) to order the intermediary to forfeit substitute assets in lieu of the car, because the car is not the intermediary's property. *See supra* at 16-17. The same result should hold if the Government were to seek forfeiture under 21 U.S.C. § 881—or if the intermediary was transporting a DTO's firearms or ammunition, instead of drugs, across the border.

Furthermore, a defendant has little control over whether he is caught at the border while attempting to export firearms or whether he is apprehended after the exportation has occurred. That mainly depends on factors such as whether a loaded vehicle is selected for a random search, or whether law enforcement receives a tip about a suspicious purchase in enough time to intercept the weapons before they cross the border. A defendant should not receive a harsher sentence based on such happenstance.

Consistent with this principle, petitioner's statute of conviction, 18 U.S.C. § 554 (like many federal criminal statutes), punishes attempted exportation the same as if it were completed. The Federal Sentencing Guidelines likewise typically punish an attempted crime the same as a completed crime if, "but for apprehension or interruption by some similar event beyond the defendant's control," the defendant would have completed the crime. U.S.S.G. § 2X1.1(b)(1); *see also id.* § 2K2.1(b)(6)(A) (applying four-level enhancement if person possessed weapons "while leaving or

attempting to leave the United States"). Yet under the Ninth Circuit's rule, defendants who act as intermediaries and *unsuccessfully* attempt to cross the border with weapons at the behest of criminal masterminds in Mexico do not face the harsh monetary sanction of substitute-asset forfeiture, because the DTO's weapons are seized at the time of arrest. Defendants like petitioner, by contrast, who are apprehended after the weapons are exported, receive the additional punishment exacted by substitute-asset forfeiture.

The Ninth Circuit rejected the argument that its "interpretation [of the statutory scheme] is inequitable." *Valdez*, 911 F.3d at 967. But the court of appeals did not provide a persuasive explanation for doing so. It merely said that it saw "no inequity" in imposing additional punishment on those who cause the additional harm of allowing weapons to leave the jurisdiction. *Id.* Under that interpretation, a district court *cannot* impose a criminal-forfeiture penalty on a high-level cartel operative who is caught at the border attempting to export $1 million worth of semiautomatic weapons, but it *must* impose a forfeiture penalty—if sought by the Government—on a defendant like petitioner, caught after the fact, who delivered $32,000 worth of weapons to DTO operatives. It is unlikely that Congress intended this inequitable result.

3. The Ninth Circuit's substitute-forfeiture rule is also belied by the legislative history of the statutes involved. All agree that the forfeiture provisions in Section 853 allow forfeiture of substitute assets only where the defendant owned the property triggering the forfeiture. According to the Ninth Circuit, however, Congress discarded this critical limitation when

it extended forfeiture law to allow criminal forfeitures not just in drug and organized-crime prosecutions but in many others, including offenses involving firearms and ammunition.

If Congress had intended to change the rules that fundamentally, one would think it would have said something when enacting the bridging statute at issue here. Yet the legislative history of 28 U.S.C. § 2461 contains not a peep in this regard. To the contrary, this history indicates that, in enacting 28 U.S.C. § 2461, Congress merely sought to extend criminal forfeiture to new crimes, in order to streamline forfeiture proceedings and *enhance* due process protections for criminal defendants in those proceedings. *See* H.R. Rep. No. 105-358(I) at 35 (noting that, previously, the Government had to "file a parallel civil forfeiture case" and that criminal forfeiture provides "heightened due process protection"). In discussing proposed amendments to other forfeiture statutes, Congress also noted that criminal forfeiture laws are designed to "deprive" criminals of both the tools used to commit crimes and the proceeds of their crimes. *Id.* If property does not belong to the defendant in the first place, it is impossible to "deprive" him of it.

4. Any lingering doubt regarding the propriety of substitute forfeiture here must be resolved against the Government. "Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939). Indeed, because criminal forfeiture is a form of punishment for a criminal offense, any ambiguity in these statutes must be resolved in defendants' favor under

the rule of lenity. *United States v. Cano-Flores*, 796 F.3d 83, 93-94 (D.C. Cir. 2015) (citing *United States v. Batchelder*, 442 U.S. 114, 121 (1979)); *see also United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (elaborating on rule of lenity).

The rule of lenity is especially important here because the Government has an obvious incentive to overreach regarding its forfeiture power. Specifically, the Government is authorized to use seized assets to finance law-enforcement efforts. *See United States v. Real Prop. Located in El Dorado Cnty.*, 59 F.3d 974, 984 & n.10 (9th Cir. 1995). "To that end, and to that extent, crime *does* pay." *Id.* at 984 (emphasis in original). The judiciary, therefore, must be vigilant to protect against "proscribed injustices imposed on individual wrongdoers." *Id.* at 984-85.

In *Valdez*, however, the Ninth Circuit did not even acknowledge these principles and liberally construed 28 U.S.C. § 2461(c) and 21 U.S.C. § 853 to allow the forfeiture of substitute property via Section 853(p), even though the property subject to criminal forfeiture was never the defendant's property. *Valdez*, 911 F.3d at 962-67. This Court should countermand that oversight.

II. The Ninth Circuit's rule conflicts with decisions from other circuits.

1. The Ninth Circuit's rule that the ownership limitations in 21 U.S.C. §§ 853(a) and 853(p) do not apply to substitute forfeitures under the bridging statute, 28 U.S.C. § 2461(c), conflicts with decisions from the Third and Fourth Circuits.

In *United States v. Gjeli*, 867 F.3d 418 (3d Cir. 2017), the Third Circuit explained that where the Government "seek[s] substitute property pursuant to 21 U.S.C. § 853(p)," the limitations of Section 853(a) "bec[o]me relevant." *Id.* at 427 n.16. This is so, the Third Circuit stressed, even where the Government seeks forfeiture under the bridging statute, as opposed to Section 853(a) itself. In both situations, the governing legal framework is "substantially the same as the one under consideration in *Honeycutt*." *Id.* at 427. As support for these propositions, the Third Circuit cited its previous decision in *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006), in which the court explained that substitute forfeiture under Section 2461 "is limited by the provisions of 21 U.S.C. § 853(a)," *id.* at 202. *Gjeli*, 867 F.3d at 427.

In *United States v. Alamoudi*, 452 F.3d 310, 311-14 (4th Cir. 2006), the Fourth Circuit likewise applied Section 853(a) where substitute-asset forfeiture came into play under Section 853(p) via Section 2461(c). The Fourth Circuit emphasized that substitute-asset forfeiture under Section 853(p) "neither leads to nor allows for an increase in the dollar amount of the forfeiture, and therefore, does not increase the punishment imposed." *Id.* at 315. This, too, is inconsistent with the Ninth Circuit's decision here. If a defendant can be forced under Section 2461 to forfeit substitute assets in lieu of something that never belonged to him in the first place, then Section 853(p)—as incorporated by the bridging statute—allows a greater punishment than would otherwise be permitted. *See supra* at 16-17.

2. In its brief in opposition in *Valdez*, the Government brushed aside this case law from the Third and Fourth Circuits on the ground that these cases involved forfeitures permitted by 18 U.S.C. § 981(a) for offenses involving financial malfeasance, instead of forfeitures permitted by 18 U.S.C. § 924(d) for weapons-related offenses. BIO, 12-14, *Valdez v. United States*, No. 19-6062 (Feb. 14, 2020). But this is a distinction without difference. In both settings, these statutes state merely that forfeiture is allowed for certain crimes, whether they relate to financial improprieties or illegal purchasing or smuggling of weapons. The operative provisions then become the bridging statute, 28 U.S.C. § 2461(c), and the provisions of 21 U.S.C. § 853. And the Third and Fourth Circuit's interpretations of those provisions is irreconcilable with the Ninth Circuit's decisions in *Valdez* and here.

III. The question presented is important.

For two reasons, the question presented warrants this Court's attention.

1. The specific question raised by this case—whether a mere intermediary who transported firearms or ammunition during a covered offense can be made under the bridging statute to forfeit the value of that weaponry—arises with regularity. In the District of Arizona alone, the Government filed 128 weapons-exportation cases and 92 straw-purchase cases from 2018-2022.[4] And federal prosecutors in Arizona

[4] The data used for this analysis was extracted from the U.S. Sentencing Commission's "Individual Offender Datafiles" spanning fiscal years 2018-2022. U.S. Sent'g Comm'n, *Commission*

seek substitute assets from defendants—regardless of their financial circumstances—whenever the weapons involved in such cases are themselves unavailable.[5]

The more general question whether the ownership limitations in Sections 853(a) and 853(p) apply where the Government seeks forfeiture under Section 2461 is all the more consequential. The bridging statute covers not just the weapons-related offenses here, but also many other offenses, including money laundering, mail and wire fraud, making false statements, the theft or robbery of motor vehicles, *see* 18 U.S.C. § 981(a), and even drug-trafficking, *see* 21 U.S.C. § 881.

Consider, therefore, just one example of where the Ninth Circuit's rule leads. A person can be convicted of wire fraud if he uses his bank account to temporarily hold funds that someone else fraudulently procured, before the funds are routed to the person who procured them. That means, under the Ninth Circuit's interpretation of Section 2461(c), that a person who holds $1 million for someone else for a single day—never having any actual ownership over the money—can be required to forfeit $1 million of his own money or property in addition to whatever prison

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Datafiles, https://www.ussc.gov/research/datafiles/commission-datafiles.

[5] Insofar as other U.S. Attorney's Offices do not seek substitute forfeiture under the circumstances here, that only underscores the need for review. A person should not be subject to five-figure (or more) forfeiture orders depending on the district in which he is prosecuted.

sentence and fine a court imposes. That cannot be right.

2. Substitute forfeiture under the circumstances here can be devastating to defendants. Offenders in cases like this are often economically vulnerable. In fact, DTO operatives frequently inveigle unsophisticated, financially strapped border residents with the promise of making some extra money. And the amount of substitute-forfeiture orders often far outstrips the value of any assets that these offenders actually have.

This is a case in point. Petitioner has no property, save a few personal belongings. Indeed, he has a negative net worth of $40,500, largely stemming from educational and medical debt. His existing debt alone will pose an enormous obstacle after his release as he strives to help support his daughter and ailing parents and to become a productive member of society. Piling on an additional $32,663 forfeiture penalty—representing the value of items that never belonged to him in the first place—would only compound these difficulties and inhibit his reintegration into his community.

IV. This case is an ideal vehicle to resolve the question presented.

1. The facts of this case are simple and undisputed. A Mexican DTO supplied the money that petitioner and his codefendant used to straw-purchase guns and ammunition. The organization's operatives also directed petitioner to export those items to Mexico. The Government has never contested that petitioner was a mere intermediary with no ownership interest in

the weapons. In fact, the Government charged and convicted petitioner under 18 U.S.C. § 922(a)(6) of claiming he was the actual buyer of the weaponry at issue when in fact he was not.

2. The question presented is also fully preserved and outcome-determinative. The Government has offered no justification for requiring petitioner to forfeit the $32,663.48 at issue besides the substitute-forfeiture theory the Ninth Circuit endorsed in *Valdez*. Consequently, if this Court holds that substitute forfeiture under the bridging statute requires an ownership interest in the weaponry (or other property) at issue, the forfeiture order here would need to be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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