No. 23-160

In the Supreme Court of the United States

FRANCISCO DARIO MORA, PETITIONER,

v.

UNITED STATES, RESPONDENT.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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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.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. Founded in 1958, NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper and efficient administration of justice and files numerous amicus briefs each year, including in this Court, addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

One such issue of paramount importance to criminal defense attorneys around the country is that of forfeiture liability. Forfeiture orders like the one under review here frequently impose judgments out of proportion to an offender's culpability and untethered to any statutory authorization. NACDL submits this brief in support of the petition for certiorari because hearing this case will provide the Court with an opportunity to interpret several forfeiture statutes in

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. Further, no counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *Amicus* and its counsel funded its preparation and submission.

accordance with the scope Congress intended and with background historical principles in mind.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important opportunity to rein in the government's atextual and ahistorical expansion of the forfeiture statutes, with implications for criminal defendants across the country. The Ninth Circuit is an outlier in permitting the government to forfeit as a substitute asset the monetary value of property that the defendant *temporarily possessed* at any point during the commission of dozens of crimes. That is wrong for multiple reasons. The Ninth Circuit's interpretation cannot be reconciled with the text of the relevant forfeiture statutes or with background forfeiture principles. Moreover, the decision below runs directly contrary to this Court's precedent and that of other courts of appeals. This Court should grant the petition.

The defendant here, Francisco Mora, was a straw purchaser who used funds provided by a cartel to secure and transport weapons. Mr. Mora never had a property interest in the smuggled weapons. Yet the government requested and the district court imposed a substitute-asset forfeiture under 21 U.S.C. § 853(p) of $32,663.48—a money judgment for "the total amount of munitions purchases Mora smuggled to Mexico." Pet. App. 2.

That order—forfeiting a monetary substitute for property that Mr. Mora never owned but merely possessed temporarily—was unlawful. In *Honeycutt* v. *United States*, this Court unanimously rejected the

government's attempt to "significant[ly] expand[] the scope of property subject to forfeiture" and impose joint and several liability on certain criminal defendants, a result it found incompatible with "traditional" forfeiture principles. 581 U.S. 443, 453-454 (2017) (internal quotation marks omitted). It should do so again here. Historically, neither civil *nor* criminal forfeiture statutes reached substitute property that a defendant temporarily possessed, the forfeited asset at issue here.

In the modern era, Congress has legislated consistent with that historical backdrop. The text of the pertinent criminal forfeiture statutes limits forfeitable property to property "*obtained*" by the defendant as a result of the offense, or "any of the person's property used" to commit or facilitate the commission of the offense. 21 U.S.C. § 853(a) (emphasis added). As this Court has already found, the word "obtained" in Section 853 refers to property the defendant "acquired," as opposed to property that was ultimately "acquired by someone else." *Honeycutt*, 581 U.S. at 450 (citation omitted). Because the property at issue here was only temporarily possessed by Mr. Mora before being "acquired by someone else," its forfeiture is not permitted by Section 853.

The government circumvented the express limitations of Section 853 by relying on Section 2461(c), which "bridges" various civil statutes with the criminal forfeiture mechanisms of Section 853, thereby permitting criminal forfeiture where a defendant is convicted of offenses for which civil forfeiture of property is authorized. But as explained below, in connecting criminal forfeiture mechanisms with the

civil forfeiture provisions, the bridging statute in no way eliminates the limitations applicable to criminal and civil forfeiture alike.

The question presented is of undeniable significance. The government can obtain criminal forfeiture money judgments against those who violate dozens of federal statutes through the bridging statute at issue in this case. And the government often imposes such forfeiture money judgments, as it did here, for the monetary value of the property at issue in the criminal activity as a substitute for the tainted property, even if the defendant never owned the property but only temporarily possessed it. Thus, indigent defendants are left saddled with debt from which they often cannot hope to emerge, given that they never even owned the property in question. *Amicus* and its members have first-hand experience with this troubling expansion of the criminal forfeiture statutes, and urge this Court to intervene in this case.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS WRONG.

A. Forfeiting Substitute Property from a Defendant Who Never Owned the Tainted Property Is Inconsistent with Traditional Forfeiture Principles

As this Court has instructed, the interpretation of civil and criminal forfeiture statutes should be informed by "traditional[] forfeiture" principles, including the relevant history and context. *Honeycutt*, 581 U.S. at 453. Those principles counsel against forfeiting substitute property from a defendant where the

defendant only temporarily possessed the property in question. This case therefore presents a compelling opportunity to bring "broad modern forfeiture practice" in line with historical practice and congressional intent. *Leonard* v. *Texas*, 137 S. Ct. 847, 850 (2017) (Thomas, J., concurring in the denial of certiorari) (questioning constitutionality of modern civil forfeiture statutes).

Civil and criminal forfeiture statutes serve distinct purposes and therefore differ in their respective reaches. Civil forfeiture proceeds *in rem* against criminally tainted property, meaning the "offending objects" themselves. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) (citing 3 W. Blackstone, Commentaries *261-262)). Its purpose is remedial rather than punitive—to permit confiscation of illegal goods and the tools used to commit crimes. *United States* v. *Ursery*, 518 U.S. 267, 278 (1996). In keeping with that tradition, the civil forfeiture statute at issue in this case, 18 U.S.C. § 924(d), was intended to "[k]eep[] potentially dangerous weapons out of the hands of unlicensed dealers" by "removing from circulation firearms that have been used or intended for use outside regulated channels of commerce." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984).

Because the named defendant in a civil forfeiture proceeding is the tainted property, the government historically did not need to proceed against any particular person and prove his complicity to secure the property itself. *Bennis* v. *Michigan*, 516 U.S. 442, 447 (1996) (rejecting "innocent owner" defense based on history of *in rem* proceedings whether the owner "be

innocent or guilty") (citation omitted). This flexibility and ensuing lack of procedural protections for property owners came at a price: the government could not typically obtain *substitute* property if the tainted property could not be found or was otherwise unavailable—after all, the action was directed at "*guilty property* rather than against the offender himself." *United States* v. *Bajakajian*, 524 U.S. 321, 330 (1998) (emphasis added). That limitation is consistent with civil forfeiture's remedial purpose: the forfeiture of a vehicle or of cash in lieu of missing contraband firearms, for example, would not serve to remove firearms from circulation. *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice In Federal Court*, 13 Nev. L. J. 1, 40 (2012).

Criminal forfeiture, in contrast, proceeds *in personam* against a criminal defendant, and is part of the punishment imposed for committing an offense. *See Bajakajian*, 524 U.S. at 332. Despite a long pedigree in England, early Americans "adopted a hostile attitude toward criminal forfeitures." Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost:* Bennis v. Michigan *and the Forfeiture Tradition*, 61 Mo. L. Rev. 593, 613 (1996). They viewed criminal forfeiture as unnecessarily harsh, *id.* (quoting 2 James Kent, Commentaries on American Law 317 (1st ed. 1826-1830)), and a "Crown revenue-generating device." Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 Duquesne L. Rev. 77, 93 (2001). The First Congress went so far as to enact a ban on *in personam* forfeitures as punishments for federal crimes. *Bajakajian*, 524 U.S. at 332 n.7 (citing Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117).

Congress's forays into criminal forfeiture began in earnest in 1970, as part of its effort to ferret out organized crime. *See* Racketeer Influenced and Corrupt Organizations Act of 1970, Pub. L. 91-452, Title IX, 84 Stat. 941. In subsequent years, Congress has increased the number of criminal offenses permitting forfeiture, but criminal forfeiture's central purpose has remained the same: to "separat[e] a criminal from his ill-gotten gains." *Honeycutt*, 581 U.S. at 447 (citation omitted); *Kaley* v. *United States*, 571 U.S. 320, 327 (2014) (same). Criminal forfeiture provisions "enforce the age-old adage that 'crime does not pay'" and "deprive criminals of both the tools they use to commit crimes and the fruits—the 'proceeds'—of their crime." H.R. Rep. No. 105-358, pt. 1, at 35 (1997).

Unlike civil forfeiture statutes, criminal forfeiture statutes sometimes permit the government to seek substitute property if the defendant *owned* the property involved in the crime but has disposed of it. *See* 21 U.S.C. § 853(p). This alternative remedy furthers the punitive purpose of criminal forfeiture: if a mobster has already sold his contraband, forfeiture of the proceeds of that sale or other similarly valued property will operate to fully disgorge him of the profits of his crime. However, criminal forfeiture still does not reach property the defendant never owned or obtained. *Cf. Calero-Toledo*, 516 U.S. at 682 ("forfeiture of estates as a consequence of federal criminal conviction" has not been permitted in "this country").

Taking these strands together, civil forfeiture provides for the confiscation of tainted property, regardless of who owns it, but not substitute property. And criminal forfeiture provides for the forfeiture of taint-

ed property or its substitute, but only if the tainted property was *owned by the defendant*. Neither type of proceeding traditionally reaches substitutes for tainted property that was never owned by the defendant—the type of forfeiture imposed here.

Congress has legislated in line with these background forfeiture principles. When it has permitted the forfeiture of substitute property by a person who did not actually own the tainted property, it has done so expressly and in narrow circumstances. For example, 18 U.S.C. § 982(b)(2) permits a court to order that a defendant convicted of certain money laundering offenses forfeit tainted property or substitute assets. In the case of a defendant who "acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense," the court may order forfeiture of substitute assets only if that defendant, "in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period." *Id.* Thus, Congress in Section 982(b)(2) expressly provided for substitute property forfeiture for defendants who did not own the tainted property, but also limited that provision to the most culpable defendants.

This Court has recognized the inherent limitations on forfeiture remedies and interprets the forfeiture statutes in light of them. Applying "traditional" forfeiture principles, *Honeycutt* explained that by enacting 21 U.S.C. § 853 (one of the statutes at issue here), Congress "made it easier for the government to hold the defendant who acquired … tainted property re-

sponsible," but "Congress did not, however, enact any 'significant expansion of the *scope* of property subject to forfeiture,'" namely, "tainted property" that had been "*obtained by* the defendant." 581 U.S. at 454 (emphasis added) (quotation marks omitted).

Yet the government in this case significantly "expand[ed] the scope of property subject to forfeiture." *Id.* It combined the substitute-property aspect of *in personam* criminal forfeiture and the without-regard-to-ownership aspect of *in rem* civil forfeiture in a manner that is divorced from the critical limitations embodied in both. The government did so by relying on Section 2461, the so-called "bridging statute," which permits property forfeitable under civil forfeiture provisions to be forfeited as part of certain criminal prosecutions. According to the Ninth Circuit, the bridging statute can serve to incorporate some aspects of Section 853 without incorporating its protections. That understanding of the bridging statute is incorrect.

B. The Criminal Forfeiture Statutes Do Not Authorize the Forfeiture of Property the Defendant Temporarily Possessed

As explained above, Congress must be—and has been—explicit when it wants to override traditional forfeiture principles. But Congress chose not to do so in the case of Mr. Mora's offense of conviction. That is confirmed by this Court's decision in *Honeycutt*, which precludes the government from using criminal forfeiture to seize and forfeit property a defendant only temporarily possessed.

This case concerns three interconnected forfeiture statutes. First, 21 U.S.C. § 853 provides for the criminal forfeiture of property of those convicted of drug crimes. Second, 18 U.S.C. § 924(d)(1) permits civil forfeiture of the particular "firearm or ammunition involved in or used in" committing certain offenses. Finally, 28 U.S.C. § 2461(c) bridges Section 853 and Section 924(d), permitting the government to use the mechanisms set out in Section 853 to seek forfeiture of firearms under Section 924(d) in the course of a criminal proceeding. Section 2461(c) thus broadens the number of *offenses* for which the government can seek forfeiture in a criminal proceeding. But Section 2461(c) expressly incorporates Section 853 and its limitations on the scope of forfeiture proceedings.

Turning to those limitations, Section 853(a) provides for the criminal forfeiture of "proceeds the person [*i.e.*, the defendant] obtained" as a result of committing certain drug crimes or any of "the person's property" used to facilitate such crimes. *Honeycutt*, 581 U.S. at 448, 450 (quoting 21 U.S.C. § 853(a)). The government below relied on Section 853(p), which

permits the government to forfeit substitute property "if any property described in subsection (a)" (that is, property "obtained" by the defendant as a result of the offense or any of "the person's property" used to commit or facilitate the offense) has become unavailable as "a result of an act or omission by the defendant." 21 U.S.C. § 853(p). Interpreting these provisions in *Honeycutt*, this Court held that Section 853 does *not* permit the government to hold a conspirator "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant did not himself acquire" because the word "obtaine[d]" in Section 853(a) does not encompass property that was ultimately "acquired by someone else." *Honeycutt*, 581 U.S. at 445, 450.

In arriving at its decision, this Court relied on the following "instructive" example, which is directly analogous to Mr. Mora's position:

> Suppose a farmer masterminds a scheme to grow, harvest, and distribute marijuana on local college campuses. The mastermind recruits a college student to deliver packages and pays the student $300 each month from the distribution proceeds for his services. In one year, the mastermind earns $3 million. The student, meanwhile, earns $3,600. If joint and several liability applied, the student would face a forfeiture judgment for the entire amount of the conspiracy's proceeds: $3 million. The student would be bound by that judgment even though he never per-

> sonally acquired any proceeds beyond the $3,600.

Honeycutt, 581 U.S. at 448. In other words, the Court found that even where a co-conspirator temporarily possesses contraband—like the student in the Court's hypothetical, or a straw purchaser like Mr. Mora—he has not "obtained" the property, nor can it be said to be his "property" for the purpose of Section 853(a).

There is no dispute that the weapons at issue were not "obtained" by Mr. Mora. Yet in this case, the Ninth Circuit upheld a forfeiture order of the *entire* monetary value of the weapons. That result is irreconcilable with *Honeycutt*, which makes clear that temporary possession of property cannot justify a criminal forfeiture order under Section 853.

While this case also involves the bridging statute and the civil firearms forfeiture provision (Sections 2461(c) and 924(d)), that difference is not meaningful, as other courts of appeals have recognized. The asset forfeiture provisions of Section 853 cannot be construed more expansively when the underlying offense is a firearms offense rather than the narcotics offense at issue in *Honeycutt*. That is because the bridging statute simply serves to incorporate Section 853, which this Court construed *not* to permit the government to secure criminal forfeiture of property temporarily possessed by a defendant. *Honeycutt*, 581 U.S. at 448. The Ninth Circuit has reached a contrary conclusion only by reading the substitute asset provision (Section 853(p)) in isolation. But Section 853(p) limits substitute forfeiture to a replacement for "property de-

scribed in *subsection (a)*." 21 U.S.C. § 853(p)(1) (emphasis added).

At least two courts of appeals have held that Section 853(a)'s substantive limitations still apply when the government is invoking the "procedures" of Section 853(p). As the Third Circuit has explained, the personal property limitations of Section 853(a) become "relevant" whenever, as here, the government seeks "substitute property pursuant to 21 U.S.C. § 853(p)." *United States* v. *Gjeli*, 867 F.3d 418, 427 n.16 (3d Cir. 2017); *United States* v. *Alamoudi*, 452 F.3d 310, 311-14 (4th Cir. 2006) (Section 853(p) does not "increase . . . the dollar amount of the forfeiture"); *see also Peithman* v. *United States*, 140 S. Ct. 340, 340 (2019) (Sotomayor, J., dissenting from denial of certiorari) (noting government's position that "there is no distinguishing 18 U.S.C. § 981 from 21 U.S.C. § 853 for purposes of joint and several liability"). This circuit split provides a strong reason for this Court to intervene.

II. THE NINTH CIRCUIT'S DECISION IS OF CRITICAL IMPORTANCE.

The government consistently seeks forfeiture in connection with federal criminal prosecutions. In fiscal year 2022 alone, DOJ collected more than $1.7 billion from forfeitures and imposed hundreds of millions more in forfeiture money judgments. *See* U.S. Dep't of Justice, *FY2022 Asset Forfeiture Fund Reports to Congress: Total Net Deposits*, https://www.justice.gov/afms/fy2022-asset-forfeiture-fund-reports-congress.

Amicus and its members have direct experience with the government's aggressive use of forfeiture, a practice that raises issues of undeniable national significance. NACDL members routinely defend (often indigent) defendants against forfeiture efforts. *See* NACDL, Forfeiture, https://www.nacdl.org/Landing/Forfeiture. Given the number of forfeiture actions and the variety of forfeiture proceedings, accurate—and uniform—resolution of the scope of the government's forfeiture authority is critically important to the fair administration of criminal justice nationwide.

The forfeiture question presented by the petition in particular warrants this Court's attention. As petitioner explains, in the District of Arizona alone, the government filed 128 weapons-exportation cases and 92 straw-purchase cases from 2018-2022. Pet. 23. But the Ninth Circuit's broad interpretation of the forfeiture statutes in this case has implications far beyond weapons-exportation offenses. That is because the bridging statute provides the forfeiture mechanisms for dozens of federal criminal statutes that do not have their own criminal forfeiture provisions. *See* 18

U.S.C. § 981(a)(C) (listing nearly 50 offenses); *see also* 18 U.S.C. § 1956(c)(7), 18 U.S.C. § 1961(1) (listing additional offenses). It serves, for example, to impose criminal forfeiture penalties as punishment for statutes targeting mail and wire fraud, securities fraud, public corruption, money laundering, and sanctions evasion. The Ninth Circuit's decision also creates unintended discrepancies among the criminal statutes. For example, a defendant convicted of a narcotics offense could *not* be forced to forfeit the value of property he never obtained (because, as this Court held in *Honeycutt*, the forfeiture of narcotics proceeds are limited by Section 853(a)), but a defendant convicted of wire fraud could.

The government's chosen penalty—entry of a money judgment as "substitute property" subject to forfeiture—further heightens the stakes of resolving the question presented by the petition.[2] Criminal defendants are often indigent. In securing a money judgment, the government therefore typically obtains what is in effect a lien on the defendant's future assets instead of following the procedures of the forfeiture statute to forfeit specific tainted property. These effective liens, moreover, never expire: "the government may *at any time* seek the forfeiture of substitute assets." *United States* v. *Fischer*, 394 Fed. App'x 322, 323 (7th Cir. 2010) (emphasis added).

In practice, that means defendants subject to forfeiture often face a crushing debt that can be collected

[2] The entry of a money judgment as substitute property is a judicial creation; there is no statute that authorizes a personal money judgment (except a specific provision regarding bulk cash smuggling), *see* 31 U.S.C. § 5332.

by the government at any time (including during their prison sentences or at any moment until their deaths). Removing the requirement that a defendant must have "obtained" property in order to forfeit it exacerbates the problem because that is an exceedingly difficult debt to repay. Mr. Mora's case provides a good example. He has a negative net worth due to outstanding medical debts and is now required to pay $32,663 to the government for "the total amount of munitions" that he never owned. Pet. App. 2.

Finally, this case presents an excellent opportunity to bring modern forfeiture practice more in line with the historical tradition. "There is reason to believe that forfeiture in the modern day … acts more harshly in fact" than would be consistent with that historical tradition. Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1518 (2019). Many members of this Court have accordingly expressed skepticism regarding the legality of contemporary forfeiture proceedings and a desire to return forfeiture to its historical underpinnings. *See, e.g.*, *Leonard*, 137 S. Ct. at 848 (Thomas, J., concurring in the denial of certiorari) ("I am skeptical that … historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice."); Oral Arg. Tr. at 46, *Timbs* v. *Indiana*, No. 17-1091 (139 S. Ct. 682 (2019)), 2018 WL 6200334 (Sotomayor, J.) ("[I]f we look at these forfeitures that are occurring today … many of them seem grossly disproportionate to the crimes being charged."). Yet the vast majority of criminal forfeiture practices are not reviewed by any court, given that forfeiture is most frequently imposed through plea agreements. This petition, how-

ever, presents an excellent vehicle to reexamine criminal forfeiture practices. The Court should grant it.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted.

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