No. 23-160

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In *Honeycutt v. United States*, 581 U.S. 443 (2017), this Court expressed great alarm at the notion that an intermediary could be required in a criminal prosecution to forfeit the value of contraband he transported but in which he had "no ownership interest." *Id.* at 448-50, 454. The Court therefore unanimously rejected the Government's argument that 21 U.S.C. § 853(a) allows that result. *Id.* at 454. The following year, however, the Ninth Circuit construed 28 U.S.C. § 2461 to allow just what *Honeycutt* prohibits: criminal forfeiture based on property the defendant never owned. *See United States v. Valdez*, 911 F.3d 960, 967 (9th Cir. 2018). And that practice has now taken full flower in that jurisdiction, where nearly 20 percent of federal criminal cases are prosecuted.[1] *See* Pet. 23-24; NACDL Br. 14-16.

The Government does not dispute that the validity of the Ninth Circuit's rule presents an issue of great importance (just as the question presented in *Honeycutt* did). Nor does the Government deny that the Ninth Circuit's rule allows it to obtain forfeitures that *Honeycutt* forbids under precisely the same circumstances—by the simple expedient of citing Section 2461 instead of Section 853(a). *See* Pet. 15-16. There can be no doubt, in other words, that the forfeiture theory here circumvents Congress's

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[1] U.S. District Courts, Criminal Cases Filed, *Terminated, and Pending (Including Transfers)—During the 12-Month Periods Ending March 31, 2022 and 2023*, https://www.uscourts.gov/statistics/table/d-cases/federal-judicial-caseload-statistics/2023/03/31.

"carefully constructed statutory scheme." *Honeycutt*, 581 U.S. at 452.

The Government nevertheless opposes certiorari on various grounds. None has merit. The Ninth Circuit's interpretation of Section 2461 is deeply mistaken; it conflicts with decisions from the Third and Fourth Circuits; and this case is an excellent vehicle to rein in the Government's renewed attempt to seek forfeitures at odds with traditional restrictions on that power, as well as with the text and purpose of the governing statutes.

1. *The Merits.* The Government opens its defense of the Ninth Circuit's decision by stating that "[p]etitioner does not appear to dispute that the firearms and ammunition he smuggled across the border were subject to forfeiture under 18 U.S.C. 924(d)." BIO 6. This petition, however, does not concern any order to forfeit those firearms or ammunition; petitioner never owned those items and did not even possess them when his prosecution took place. Instead, petitioner challenges the district court's order requiring him to forfeit $32,663.48 of his own money as a substitute for the weapons. Pet. App. 2a. Furthermore, Section 924(d)—a statute allowing only *civil* forfeiture—is not the statute upon which the forfeiture order here ultimately rests. Rather, the district court invoked 28 U.S.C. § 2461 to order petitioner, as part of his *criminal* sentence, to pay the Government tens of thousands of dollars. Following its previous decision in *Valdez*, the Ninth Circuit affirmed that order. Pet. App. 3a.

The question presented here, therefore, is whether the Ninth Circuit's expansive interpretation of Section 2461 is correct. It is not.

a. The Government agrees that Section 2461 empowers the Government to invoke the "procedures," but not any substantive provisions, of Section 853. BIO 10. And the Government does not deny that remedial provisions of federal law are substantive. *See id.* 9-11. The Government nevertheless contends that substitute forfeiture under Section 853(p) is a mere "procedure" because it "does not change the amount of the forfeiture." *Id.* 8. This case shows why that reasoning is fallacious: The district court used the substitute-forfeiture provision here to change the amount of the forfeiture from *nothing* to $32,663.48. That is, criminal-forfeiture laws gave the district court no power to order petitioner to forfeit firearms and ammunition he never owned and did not even possess at the time of the prosecution. Only by purporting to rely on Section 853(p) could the district court require petitioner to forfeit tens of thousands of dollars. That makes substitute forfeiture under Section 853(p) a substantive power.[2]

[2] Moreover, it was not enough for the district court simply to invoke Section 853(p). The district court also had to make various findings required by Section 853(p), including that petitioner "transferred" the firearms and ammunition to "a third party." 21 U.S.C. § 853(p)(1)(B). These findings underscore the substantive nature of the statute. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (statute is substantive when it regulates a "range of conduct").

Nor does the Government make any headway by asserting that the "purpose" of substitute forfeiture is to prevent a defendant from thwarting "the impact of [an otherwise allowable] criminal forfeiture." BIO 7 (quotation marks and citation omitted). Again, a court cannot order a criminal defendant to forfeit property he never owned. Even if a court could do so, the "purpose" the Government ascribes to substitute forfeiture would be immaterial to whether it is procedural. Various remedies have purposes along the lines of ensuring that a defendant cannot evade a full accounting for his actions: Disgorgement, for instance, ensures that a defendant does not benefit from a breach of contract, *see, e.g. Snepp v. United States*, 444 U.S. 507, 515-16 (1980) (per curiam); and punitive damages sometimes ensure that defendants account for harm not quantified in compensatory judgments, *see, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 n.11 (2001). Yet no serious argument exists that these remedies constitute mere procedures, as opposed to substantive law. So too here.

Finally, the Government quotes a passage in *Honeycutt* referencing the "*procedures* outlined in § 853(p)." BIO 7 (quoting 581 U.S. at 453) (emphasis added). But petitioner has already explained that this passage did not remotely address whether substitute forfeiture is a "procedure" under Section 2461. *See* Pet. 11 n.2. The Government offers no response.

b. Even if substitute forfeiture under Section 853(p) were somehow a mere "procedure" under Section 2461 and therefore available here, the Ninth Circuit's decision would still be incorrect because

Section 853(p) expressly incorporates the limitations in Section 853(a). Pet. 13-16.

The Government contends that Section 853(a) does not apply under Section 2461 because Section 853(a) is "substantive." BIO 10. Petitioner has already explained why that theory is wrong: If Section 853(p) is somehow procedural under Section 2461, then Section 853(a) must be too. Pet. 12 & n.3. The Government's only response is that Section 853(a) operates independently of Section 853(p), allowing it to be classified differently. BIO 10. But that ignores the plain text of Section 853(p), which expressly links the two. That is, Section 853(p) applies only in relation to "property described in subsection (a)." 21 U.S.C. § 853(p)(1). Accordingly, if Section 853(p) applies here, so do the limitations regarding what type of property Section 853(a) covers—including its limitation to property the defendant actually owned. The Government does not get to pick and choose.

c. The Government acknowledges that the criminal-forfeiture statutes at issue not only in *Honeycutt* but also in *United States v. Bajakajian*, 524 U.S. 321 (1998), forbid forfeiture of property the defendant never owned. BIO 11-12. The Government nonetheless maintains that substitute forfeiture under the circumstances here accords with traditional forfeiture principles because those cases construed statutes not directly applicable here and because Section 924(d), which the Government invoked in this case, "allows for forfeiture of property that the defendant did not personally own or obtain." BIO 11. As noted above, however, the Government ignores that Section 924(d) is a *civil*-forfeiture statute—not a

criminal one. And civil forfeiture proceeds directly against tainted property and is governed by entirely different rules and justifications. *See* NACDL Br. 5-6. General principles of *criminal* forfeiture have never allowed the Government to procure property the defendant never owned. *Id.*; Pet. 16.

To be sure, the "bridging statute," Section 2461, allows the Government to seek criminal forfeiture of property that would be subject to forfeiture in a civil proceeding. But when the Government invokes the bridging statute, the legal limitations on criminal forfeiture kick in. Most notably, criminal forfeitures under Section 2461 must comply with "the Federal Rules of Criminal Procedure." 28 U.S.C. § 2461(c). And those rules—consistent with "important background principles" of criminal forfeiture, *Honeycutt*, 581 U.S. at 453—provide that the Government may not obtain forfeiture of property unless "the defendant . . . had an interest in the property that is forfeitable under the applicable statute." Fed. R. Crim. P. 32.2(c)(2).

No other conclusion would make sense. As just noted, the original federal statutes that allow forfeiture in drug and organized-crime prosecutions do not reach property the defendant never owned. Pet. 3-5; BIO 10-11. The bridging statute, Section 2461, was enacted years later and was intended to do nothing more than facilitate forfeiture as part of other sorts of (often less serious) prosecutions. Yet according to the Government, Section 2461 allows forfeiture under vastly broader circumstances than the statutes governing the most serious drug and racketeering offenses. For example, this Court has

explained that Section 853(a) would not allow the Government to seek a $3 million forfeiture judgment from a college student who received $3,600 to deliver marijuana for a "mastermind" farmer. *Honeycutt*, 581 U.S. at 448, 450. Yet the Government would allow the same result as long as the forfeiture was ordered via the bridging statute. *See* Pet. 15-17. That cannot be right.

d. The Government's policy arguments fare no better. It first argues that there is no need to worry that the forfeiture practice at issue here sometimes leads to grossly disproportionate forfeitures because a defendant "may challenge his specific order as unconstitutionally excessive." BIO 12. This argument is upside down. That the Ninth Circuit's construction of Section 2461 sometimes leads to unconstitutional orders is reason to doubt that Congress intended the statute to apply in that manner—and thus is reason to reject the Government's position. It is not reason to permit prosecutors in the Ninth Circuit to keep conducting business as usual.

The Government also posits that disallowing substitute forfeiture in the circumstances here would "essentially grant a benefit" to defendants who successfully transfer contraband they do not own to third parties. BIO 13. Not so. The very fact that defendants do not own the firearms and ammunition under the circumstances here means it does not matter to them whether the Government confiscates such items. By contrast, a substitute-forfeiture order requiring defendants to pay their own money to the Government is extremely punitive. Precluding such orders would simply leave these defendants in the

same position, forfeiture-wise, as those apprehended sooner. And if defendants who transfer contraband to third parties deserve to be punished more severely in other ways, the district court can do so under ordinary sentencing law.

2. *Split.* Citing a handful of cases, the Government first notes that courts have "unanimously concluded that Section 2461(c) incorporates Section 853(p)'s substitute-property provisions." BIO 14; *see also id.* 9. For the reasons stated *supra* at 3-4, those holdings are wrong. If anything, therefore, the existence of those decisions amplifies the need for this Court's review.

At the same time, these other decisions go only so far. With one exception, none of them also holds—as the Ninth Circuit has held here—that Section 2461(c)'s incorporation of Section 853(p) excludes the ownership requirement in Section 853(a). On that ground, the Ninth Circuit stands alone.

The exception is the Second Circuit's unpublished decision in *United States v. Seabrook*, 661 F. App'x 84 (2d Cir. 2016), cited at BIO 9. There, the Second Circuit not only ruled that Section 2461 allows substitute-forfeiture orders but also upheld such an order based on property the defendant never obtained. *See Seabrook*, 661 F. App'x at 85-85. But in a similar case after *Honeycutt*, the Government itself seemingly turned its back on *Seabrook*, and the Second Circuit accepted the Government's concession that *Honeycutt*'s ownership requirement "applie[d] with equal force" to a forfeiture under Section 2461.

United States v. McIntosh, 2023 WL 382945, at *2 (2d Cir. Jan. 25, 2023).[3]

What's more, the only two courts of appeals to consider in published decisions whether Section 2461(c) incorporates the ownership requirement in Section 853(a) have concluded—in direct contrast to the Ninth Circuit—that it does. Pet. 22-23.

The Government, in fact, admits that the Third Circuit has declared that substitute forfeiture under Section 2461 "is limited by the provisions of 21 U.S.C. § 853(a)." *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (discussed at BIO 15); *accord United States v. Gjeli*, 867 F.3d 418, 427 n.16 (3d Cir. 2017). Yet the Government says the Third Circuit's case law does not "suggest[] that Section 853(a)'s limitations would apply *in a case involving a forfeiture under Section 924(d).*" BIO 15 (emphasis added). That is simply incorrect. In *Vampire Nation*, "the Government relied upon 28 U.S.C. § 2461(c) as grounds for obtaining [the] criminal forfeiture" at issue. 451 F.3d at 198. The Third Circuit's holding that the forfeiture there was "limited by the provisions of 21 U.S.C. § 853(a)" thus dictates that *any* criminal forfeiture under a statute that allows "civil forfeiture for th[e] charged crime"—including under Section 924(d)—is limited by Section 853(a)'s

[3] The civil-forfeiture statute that enabled bridging under Section 2461 in *Seabrook* and *McIntosh* was 18 U.S.C. § 981(a)(1)(C), while the civil-forfeiture statute the Government invoked here is 18 U.S.C. § 924(d). But if Section 2461 allows substitute forfeiture, that statute must apply the same in both instances; either it incorporates the ownership requirement in Section 853(a) or it does not. *See* Pet. 23.

ownership requirement. *Id.* at 199, 202; *see also* Pet. 23. And in *Gjeli*, the Third Circuit reaffirmed that holding, explaining that substitute forfeiture under Section 853(p) triggers the limitations in Section 853(a), as explicated in *Honeycutt*. 867 F.3d at 427 & n.16.

The Government likewise fails to distinguish *United States v. Alamoudi*, 452 F.3d 310 (4th Cir. 2006). The Government asserts that "the Fourth Circuit did not suggest—much less hold—that a district court" under the circumstances here "may require the forfeiture or substitute property only in the place of property identified in Section 853(a)." BIO 15. But that is exactly what the Fourth Circuit held. The Fourth Circuit concluded that where substitute forfeiture is sought under Section 2461, 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." 452 F.3d at 315. As explained above and in the Petition, that holding depends on the premise that Section 853(a)'s ownership requirement applies under the circumstances here. *Supra* at 3; Pet. 16-17; *see also Alamoudi*, 452 F.3d at 314 (confirming that Section 853(a) dictated extent of permissible forfeiture). That is the very proposition the Ninth Circuit rejects.

3. *Vehicle*. The Government's final protestation against review is that the record supposedly does not support "[t]he factual premise on which petitioner's arguments rest—*i.e.*, that petitioner did not own the property" that forms the basis for his substitute-forfeiture order. BIO 16. This vehicle argument is vacuous on multiple levels.

To begin, this entire case has been litigated on the premise that petitioner did not own the firearms and ammunition at issue. Petitioner objected to the forfeiture on that ground in the district court. CA9 ER 72; *see also* Dft. CA9 Br. 8-9. And the Government never questioned that reality. CA9 ER 34, 87. Instead, the Government has argued that "the resolution of this case is controlled by *Valdez*." Gvt. CA9 Br. 20; *see also* CA9 ER 84, 87. The Ninth Circuit agreed, declaring itself "bound" to reject petitioner's claim under *Valdez*'s holding that Section 2461 "allows forfeiture of substitute assets even where a defendant purchased munitions at the direction of a third party and with that party's funds." Pet. App. 3a. This Court can—and should—reverse that holding and remand.

At any rate, it is the Government's burden to "establish[] the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(1)(A); *see also id.* 32.2(e)(2). So if the record were silent regarding ownership of the property at issue, then the forfeiture order could not be sustained. It would not be up to petitioner to disprove any ownership interest.

Besides, the record is not silent. A governmental agent testified at petitioner's detention hearing that it did not appear petitioner had enough of his own money to purchase the weapons he transported. Tr. 10 (Nov. 21, 2019). The prosecution thus argued that the drug-trafficking organization provided him money for their purchase. CA9 ER 58; Tr. 52 (Nov. 21, 2019). And the district court ordered petitioner detained partly because his contacts in Mexico supported his actions financially. CA9 ER 62. Furthermore, petitioner pleaded guilty to representing that he was

the actual buyer of the weapons when he was not. Pet. 7; BIO 4. Petitioner admitted that he was paid by someone else to purchase and transfer the firearms. CA9 ER 105. The Government has never renounced that conviction; nor could it argue here that petitioner owned the weapons without doing so.

All told, this is an ideal vehicle for considering the Ninth Circuit's vast expansion of criminal forfeiture.[4] This Court should grant certiorari and reverse.

CONCLUSION

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

[4] The Government notes that the Ninth Circuit's opinion here is an "unpublished, nonprecedential decision." BIO 6. But the Government does not actually make any vehicle argument on that basis. For good reason. The Ninth Circuit's holding here is based entirely on that court's prior decision in *Valdez*, which is both published and precedential. And the Court regularly grants review of unpublished decisions based on binding precedent. *See, e.g.*, *Diaz v. United States*, No. 23-14 (cert. granted Nov. 15, 2023); *Lora v. United States*, 599 U.S. 453, 456 (2023) (No. 22-49); *Thompson v. Clark*, 596 U.S. 36, 41 (2022) (No. 20-659).

Respectfully submitted,

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