No. 19-

IN THE

Supreme Court of the United States

NATHAN DUCKWORTH AND $144,780.00 IN UNITED STATES CURRENCY, MORE OR LESS,
Petitioners,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government is required to show a substantial connection between money it has seized and an intended violation of the Controlled Substances Act, to obtain civil asset forfeiture under 21 U.S.C. § 881(a)(6)?

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the District of Kansas, and the United States Court of Appeals for the Tenth Circuit:

United States v. *$144,780.00 in U.S. Currency, more or less,* No. 15-1230-JWB (D. Kan. Aug. 27, 2018)

United States v. *$144,780.00 in U.S. Currency, more or less*, No. 18-3201 (10th Cir. Oct. 17, 2019)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Claimant-Petitioner is Nathan Duckworth ("Petitioner") and $144,780.00 in U.S. Currency, more or less. Respondent is the United States of America. No party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nathan Duckworth respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit is available at 2019 WL 5294952 and is reproduced in the appendix to this petition at Pet. App. 1a–16a. The order of the Kansas district court is available at 2018 WL 2063066 and is reproduced at Pet. App. 17a–30a.

JURISDICTION

The Tenth Circuit entered judgment on October 17, 2019, Pet. App. 1a, and denied Mr. Duckworth's petition for rehearing and rehearing en banc on November 13, 2019, Pet. App. 31a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

21 U.S.C. 881(a)(6) subjects the following property to forfeiture:

> All moneys, . . . furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys . . . used or intended to be used to facilitate any violation of this subchapter.

18 U.S.C. § 983(c) states, in relevant part:

> In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property—(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture; . . . (3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

STATEMENT OF THE CASE

The circuits are fractured as to the proper standard for civil asset forfeiture under the Controlled Substances Act ("CSA"). In cases involving forfeiture of money, the majority of circuits require the government to show, by a preponderance of the evidence, a "substantial connection" between the money and a past or intended violation of the CSA. 18 U.S.C. § 983(c)(1); 21 U.S.C. § 881(a)(6). Only the First, Third, and Tenth Circuits have chosen not to accept this standard.

The circuits are further divided over the scope of this standard—that is, whether the government must connect the claimant's money to a past or intended violation of the CSA, as the plain language of the statute requires, or whether any suspicion of drug-related activity suffices to permit taking a citizen's property. See *United States* v. *$11,500.00 in U.S. Currency*, 869 F.3d 1062, 1071 (9th Cir. 2017) ("Does § 881(a)(6) reach either back in time to unrealized intentions or forward in time to speculative, inchoate plans? We think not."). Here, for example, the gov-

ernment obtained forfeiture of all of Mr. Duckworth's money on the grounds that his explanation for possessing the money was "implausible," despite no evidence that a specific CSA violation was afoot. Pet. App. 12a. The Tenth Circuit affirmed on largely the same grounds, eschewing the substantial connection test. *Id.* at 10a–16a. This case is an optimal vehicle to address a question that continues to raise discord among the circuits: whether forfeiture demands what the CSA requires—a substantial connection between a claimant's money and a past or intended violation of the drug laws.

A. Factual Background

Petitioner, Nathan Duckworth, was driving from Kansas to Colorado to invest in a 12-city music tour when he was pulled over for speeding. The officer who made the stop searched Mr. Duckworth and the car, citing an alleged odor of marijuana. The officers ultimately found nothing illegal—no marijuana, contraband, or other paraphernalia. The only thing that officers found was a substantial amount of currency in two vacuum-sealed bags, which were in Mr. Duckworth's backpack, along with some clothes. The officer did not arrest Mr. Duckworth, nor was he charged with any crime. Yet the officers seized all of Mr. Duckworth's funds ($144,780), and the government initiated forfeiture proceedings, alleging that the funds were either the proceeds of a previous drug transaction, or that Mr. Duckworth may have intended to use the funds in an unspecified, future drug transaction.

B. District Court Proceedings

Mr. Duckworth challenged the forfeiture and the case proceeded to a bench trial. There he provided significant evidence regarding the origins of the funds

and his intentions with respect to them. Specifically, evidence showed that in 2012 Mr. Duckworth—recovering from a recent bankruptcy—sought ways to get back on his feet. Duckworth C.A. Br. at 6. He chose the entertainment business and, after a couple of years, began to promote events for Encore, a night club in Kansas City, Missouri. *Id.* In December 2014 Mr. Duckworth formally organized his business in Missouri as Building Bridges LLC. *Id.* at 7. Around the same time, he began to perform clerical work at a branch for Avis, a rental car company. *Id.* at 6–7.

Mr. Duckworth's events were a near-immediate success, and he earned as much as $19,000 in cash from entry fees for each one. *Id.* at 7. By May 2015, he earned more than $165,000 by promoting Encore events. *Id.*

As his trial testimony revealed, during this time, Mr. Duckworth became acquainted through social media with Rubin Romero, an event promoter in Denver, Colorado. *Id.* at 8. They discussed local music venues and shows, and later decided to organize and launch a 12-city music tour. *Id.* Under this plan, Mr. Romero would book the artists. Mr. Duckworth would book the venues, and he would also invest roughly $150,000 into the total expected cost of $600,000. *Id.*; see also Pet. App. 21a. Both men were relatively inexperienced in arranging multi-city tours, but as their discussions continued, Mr. Duckworth was able to secure a $40,000 loan from Mustafa Ali, his boss at the Avis branch.[1]

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[1] The terms required Mr. Duckworth to repay the loan within two months, at 50% interest. Duckworth C.A. Br. at 9. Mr. Ali, whose deposition testimony was introduced at trial, confirmed that he loaned the money to Mr. Duckworth for the music tour. *Id.* at 9, 19. Mr. Duckworth further provided his tax return, which reflected significant income from his event-promotion

Mr. Duckworth wanted to close the deal with Mr. Romero in person, so he arranged to drive—with a friend—an Avis rental car to Colorado. With him, he brought his investment funds ($144,780, which included the $40,000 loan). Before reaching Colorado, however, Kansas Highway Patrol Trooper James McCord pulled Mr. Duckworth over for speeding. Duckworth C.A. Br. at 9–10. Mr. Duckworth told Trooper McCord that he was headed to Colorado for a family vacation. This was untrue, but Mr. Duckworth was nervous that his seed money would be confiscated if he told Trooper McCord about it. Mr. Duckworth did not attempt to conceal the money, however. In fact, the backpack remained in Trooper McCord's sight during the entire encounter. *Id.* at 10–11.

Trooper McCord ran Mr. Duckworth's license. After learning that Mr. Duckworth had a prior arrest for a drug offense, Trooper McCord returned to the vehicle, announced that he detected an odor of marijuana, and proceeded to search the vehicle for drugs or drug paraphernalia. He found none. *Id.* Instead, Trooper McCord found in Mr. Duckworth's backpack the money he was bringing to his meeting with Mr. Romero. Trooper McCord later testified that he also found tobacco and marijuana "gleanings" in the carpet by the back seat, but those "gleanings" were never collected or tested. *Id.* at 10. Nor could Trooper McCord accurately identify the gleanings, when looking at a photograph of the carpet during trial. *Id.* at 14. Still, Trooper McCord seized the car and Mr.

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business, as well as testimony from his accountant and the manager of the Encore nightclub. *Id.* at 17–19. Both witnesses provided important corroboration of Mr. Duckworth's recitation of events. *Id.*

Duckworth's money, and took them back to the station. *Id*. at 11.

Once there, a dog alerted to the presence of narcotics on the money, *id*, though he did not alert to the presence of drugs in the car or on Mr. Duckworth. The district court (and Tenth Circuit) attached "no real significance" to the dog alert, because Mr. Duckworth had shown that he had earned the money from a night club (Encore), and that most cash, especially from night clubs, contains traces of narcotics. Pet. App. 11a n.2, 27a, 29a. After a thorough search of the car, officers were unable to find any drugs or other contraband. Mr. Duckworth was released without charge—but the police held onto his money.

The government tried the case on two theories: (1) the money constituted "proceeds" of a drug crime; and (2) Mr. Duckworth intended to use the money to purchase drugs. However, the government adduced no evidence of either a previous or intended drug transaction linked to Mr. Duckworth's funds. Nor did the government present any evidence of drugs or contraband—the supposed "gleanings" were never tested, Duckworth C.A. Br. at 26–36, and the district court disregarded the canine alert. Pet. App. 29a. The government was permitted to introduce, over objection, evidence of prior arrests, notwithstanding the limitations on prior crimes evidence in Federal Rule of Evidence 404(b). Duckworth C.A. Br. at 16, 42. Nearly twenty years earlier, Mr. Duckworth had been arrested for drug offenses in Mississippi and in 2014 he was a passenger during a traffic stop where drugs were discovered. The government also presented evidence that Mr. Romero too had been convicted of an unrelated drug offense in Colorado, also nearly twenty years earlier. *Id.* at 20.

In its ruling, the district court rejected the government's "proceeds" theory, finding that Mr. Duckworth had presented a plausible explanation for the provenance of the investment funds. Pet. App. 29a. But it accepted the government's "intended-for-exchange" theory. *Id.* Although the district court disregarded the evidence of the 2014 traffic stop, *id.* at 20a–21a, 20a n.1, as well as the canine alert, *id.* at 29a, it nonetheless found that the government had otherwise presented sufficient evidence. Primarily, the court relied on the "implausibility" of Mr. Duckworth's 12-city music tour and loan from Mr. Ali. *Id.* at 28a. It also relied on "inference[s]" drawn from four other factors: Mr. Duckworth's lie to Trooper McCord, the large amount of wrapped cash, the "gleanings," and the 20-year-old convictions. *Id.*

C. Tenth Circuit Proceedings

On appeal, Mr. Duckworth challenged, among other things, the sufficiency of the evidence and the improper admission of the prior-crimes evidence (the 2014 traffic stop). He further argued that the "substantial connection" test applied to the government's sole surviving theory: that Mr. Duckworth intended to exchange the money for drugs. Duckworth C.A. Br. at 26–36.

The Tenth Circuit declined to decide whether the government needed to prove a "substantial connection" between the money and an intended violation of the CSA, although in analyzing the statute, the panel stated that "[t]he plain text of the statute indicates the substantial connection requirement only applies when the Government is basing forfeiture on a facilitation theory." Pet. App. 11a. Regardless, the panel concluded that if the test had been applied, there was sufficient evidence that a substantial connection existed between the funds and "illegal drug trafficking"

or "drug activity." *Id.* at 11a, 14a, 16a. As with the district court, the Tenth Circuit relied primarily on the "implausib[ility]" of Mr. Duckworth's planned music tour, and "inference[s]" of criminality (including from the "gleanings" and Mr. Duckworth's prior convictions). *Id.* at 14a, 16a.

The Tenth Circuit subsequently denied Mr. Duckworth's petition for rehearing and rehearing en banc. In his petition, Mr. Duckworth had highlighted a recent Eight Circuit decision that reached an opposite result. See *United States* v. *$48,100.00 in U.S. Currency*, 756 F.3d 650 (8th Cir. 2013).

D. Civil Asset Forfeiture and the Substantial Connection Test

In an effort to curb the proliferating drug trade, Congress passed the Controlled Substances Act which, in relevant part, subjected drugs, vehicles, and other paraphernalia to forfeiture. See Pub. L. No. 91-513, § 511(a)(1)–(5), 84 Stat. 1236, 1276 (1970) (codified at 21 U.S.C. § 881(a)(1)–(5)). In 1978, Congress amended the statute to include money and other valuable items as subject to forfeiture as well. See Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a)(1), 92 Stat. 3768, 3777 (codified as amended at 21 U.S.C. § 881(a)(6)). Congress, however, had provided that money would be subject to forfeiture only if it was: (1) "furnished or intended to be furnished . . . in exchange for a controlled substance . . . in violation of [the CSA]"; (2) "proceeds traceable to such an exchange"; or (3) "used or intended to be used to facilitate any violation [of the CSA]." *Id.*

Years later, and in response to the government's widespread abuses of civil asset forfeiture, Congress passed the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), which raised the burden of proof from

"probable cause" to "preponderance of the evidence," and placed that burden squarely "on the Government." 18 U.S.C. § 983(c)(1). Prior to CAFRA, defendants were subject to a burden-shifting framework. See *United States* v. *$149,442.43 in U.S. Currency*, 965 F.2d 868, 876 (10th Cir. 1992). CAFRA also codified the requirement that the government must show a "substantial connection between the property and the offense." 18 U.S.C. § 983(c)(3). In cases involving the forfeiture of money, this requires the government to show a substantial connection between the money and a violation (or intended violation) of the CSA. See 21 U.S.C. § 881(a)(6); *infra* § II.A.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED AND CONFUSED AS TO THE APPLICABILITY AND SCOPE OF THE SUBSTANTIAL CONNECTION TEST UNDER 21 U.S.C. § 881(a)(6)

A. Application of the Substantial Connection Test to Forfeitures of Money Under § 881(a)(6).

The Tenth Circuit's decision in this case conflicts with decisions in all circuits except for the First and Third. The First and Third Circuits, like the Tenth, have equivocated over whether the substantial connection test applies to forfeiture claims under § 881(a)(6).

1. Nine circuits, and even a prior Tenth Circuit panel, agree that money is only subject to forfeiture if the government shows a substantial connection between the money and an illegal drug transaction. In the prior Tenth Circuit case—*United States* v. *$252,300.00 in U.S. Currency*, 484 F.3d 1271, 1273

(10th Cir. 2007)—the government stressed that it was not required to satisfy the substantial connection test. Rather, the government claimed that it was "required to show only a nexus between the property and the offense, not a 'substantial connection.'" Brief of Appellee at 7 n.1, *United States* v. *$252,300.00 in U.S. Currency*, 484 F.3d 1271 (No. 06-3164), 2006 WL 3293813. The Tenth Circuit rejected this argument and applied the substantial connection test to both of the government's theories, finding that the claimant's money was "substantially connected to illegal drug trafficking." See *$252,300.00 in U.S. Currency*, 484 F.3d at 1273 (quoting 18 U.S.C. § 983(c)(3)).[2]

Courts in nine other circuits agree that the "substantial connection" test under § 881(a)(6) is not limited to the "facilitation" theory. See *United States* v. *Sum of $185,336.07 U.S. Currency Seized*, 731 F.3d 189, 196 (2d Cir. 2013); *United States* v. *Borromeo*, 995 F.2d 23, 26 (4th Cir. 1993) (applying test pre-CAFRA); *United States* v. *$64,000.00 in U.S. Currency*, 722 F.2d 239, 244 (5th Cir. 1984) (same); *United States* v. *Real Prop. 10338 Marcy Rd. Nw*, 938 F.3d 802, 814 (6th Cir. 2019) (it is the "Government's burden to show that a substantial connection between the property and the underlying criminal activity was more likely than not"); *United States* v. *Funds in the*

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[2] *See also United States* v. *$252,300 in U.S. Currency*, No. 04-1296-KMH, 2006 WL 8440853, at *2 (D. Kan. Mar. 31, 2006) (Where "the government contends that the defendant currency is subject to forfeiture because the currency was furnished or intended to be furnished in exchange for a controlled substance, or constitutes proceeds traceable to such an exchange," the government "must 'establish that there was a substantial connection between the property' and the asserted offense.") (quoting 18 U.S.C. § 983(c)(3)), *aff'd*, 484 F.3d 1271 (10th Cir. 2007); *United States* v. *$31,323.00 in U.S. Currency*, No. 06-1356-DWB, 2008 WL 2282646, at *4 (D. Kan. May 30, 2008) (same).

Amount of $271,080, 816 F.3d 903, 908 (7th Cir. 2016) (government required to prove "by a preponderance of the evidence that this money is substantially connected to drug trafficking"); *$48,100.00 in U.S. Currency*, 756 F.3d at 653 (reviewing "whether [the] facts establish a substantial connection between seized currency and a narcotics transaction"); *$11,500.00 in U.S. Currency*, 869 F.3d at 1075 (requiring "substantial step" in furtherance of crime)[3]; *United States* v. *Approximately 50 Acres of Real Prop.*, 920 F.2d 900, 902 n.2 (11th Cir. 1991) (requiring substantial connection); *United States* v. *Funds From Prudential Sec.*, 362 F. Supp. 2d 75, 80 (D.D.C. 2005) (same).

2. The decision below conflicts with all of these cases. As in *$252,300.00* (the prior Tenth Circuit opinion), the government argued that it was not required to satisfy the "substantial connection" test because it "put on no evidence concerning facilitation." U.S. C.A. Br. at 13. In support of that position, the government ignored the above-cited clear weight of authority, and relied almost exclusively on unpublished opinions and district court cases. *Id.* at 13–14. The panel below ultimately equivocated on whether the substantial connection test actually applied, but it indicated—based on an incorrect interpretation of *$252,300.00*—that the government's statutory construction argument was persuasive. Pet. App. 10a–11a (suggesting, inaccurately, that the prior decision proceeded under a "forfeiture" theory).

Notwithstanding the clear applicability of the substantial connection test to forfeiture cases under

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[3] *But see United States* v. *$5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986) (rejecting "substantial connection" test in pre-CAFRA case).

§ 881(a)(6), see *infra* § II.A, the Tenth Circuit has joined the First and Third Circuits in eschewing the substantial connection test. In the Third Circuit's view, the difference between "connection" and "substantial connection" is merely "semantical," and that court declined to address whether the substantial connection test imposed a "substantively different" burden on government. See *United States* v. *$10,700.00 in U.S. Currency*, 258 F.3d 215, 222 n.4 (3d Cir. 2001). The First Circuit has taken a similarly guarded approach. *United States* v. *One Lot of U.S. Currency ($36,634)*, 103 F.3d 1048, 1053 n.6 (1st Cir. 1997) ("This circuit has most recently described the government's burden as being one of showing a 'nexus.' Earlier cases used the term 'substantial connection.' . . . We need not resolve" the issue) (internal citations omitted).

B. Circuits are Split Over Whether the Government Must Show a Substantial Connection to a Violation of the CSA.

The circuits are also split on whether the government must show a substantial connection between the claimant's money and a violation of the CSA, or whether the government need only supply inferences of drug-related behavior more generally. Although circuits are not uniform in their articulation of the test, at least five circuits have applied a more exacting (and correct) standard, requiring the government to show a substantial connection between the claimant's money and a realized or "intended . . . exchange for a controlled substance or listed chemical *in violation of this subchapter*." 21 U.S.C. § 881(a)(6) (emphasis added); see *infra* § II.B. Six circuits, including the Tenth Circuit, hold the government to the more lenient standard.

1. At least five circuits, including the Fourth, Fifth, Sixth, Eighth and Ninth Circuits, require the government to show a substantial connection between the disputed currency and a past or intended violation of the CSA. The Eighth Circuit, for example, requires the government "to prove it more likely than not that [the claimant] intended to use the seized currency in a *planned drug transaction*." *$48,100.00 in U.S. Currency*, 756 F.3d at 655 (emphasis added). The Eighth Circuit has declared that the government must link the currency to a "drug trafficking crime" and cannot merely argue that claimant intended to "purchase narcotics in an unspecified transaction which for some unknown reason had not occurred." *Id.* at 653. Its views directly contravene the Tenth Circuit here.

Likewise, the Ninth Circuit reversed a jury verdict under § 881(a)(6) because the jury instructions had permitted a finding of forfeiture based solely on the existence of an "inten[t] . . . to facilitate illegal *drug activity*" without any "limiting principle." *$11,500.00 in U.S. Currency*, 869 F.3d at 1075 (emphasis added). There, forfeiture under § 881(a)(6) is only permissible if an actor takes "substantial, concrete steps in an attempt to use the subject property in a drug deal, thus making the property temporally proximate to a planned drug offense." *Id.* at 1070; see also *United States* v. *$30,354.00 in U.S. Currency*, 863 F. Supp. 442, 446 (W.D. Ky. 1994) ("The intent contemplated by the statute refers to intent coupled with action . . . .").

Like the Ninth Circuit, the Fifth Circuit has focused on the statutory language, requiring the government to show that a "substantial connection exists between the property to be forfeited and a crime under Title 21 of the United States Code." *$64,000.00*

in U.S. Currency, 722 F.2d at 244 (articulating the test under the pre-CAFRA probable-cause standard). More specifically, the court inquired into whether the claimant had taken "acts in furtherance of his goal of possessing the cocaine with intent to distribute." *Id.* at 245.

The Fourth and Sixth Circuits apparently agree, requiring the government to connect the claimant's money to a past or intended drug transaction. See *United States* v. *$95,945.18, U.S. Currency*, 913 F.2d 1106, 1110 (4th Cir. 1990) ("[T]he government must show . . . that a substantial connection exists between the property forfeited and the criminal activity defined by the statute."); *United States* v. *$5000.00 in U.S. Currency*, 40 F.3d 846, 850 (6th Cir. 1994) (rejecting mere "inchoate and unparticularized suspicion.").

Even the Third Circuit, which has joined the Tenth in avoiding the "substantial connection" test, nonetheless holds that in showing a nexus the government may not rely solely upon behaviors that evidence "unspecified furtive activity." Instead, the government must show "that claimants had engaged, or were about to engage, in a drug sale with th[e] currency." *$10,700.00 in U.S. Currency*, 258 F.3d at 226–27. Stated otherwise, the government must show "that there had been, or was about to be, a violation of the drug laws involving th[e] currency." *Id.* at 225.

2. By contrast, at least five circuits (including the First, Second, Seventh, Tenth, and Eleventh), require that the government show a mere connection to drug "activity" or "trafficking" behaviors generally. In the decision below, for example, the Tenth Circuit only required the government to show that the money was connected to "illegal drug activity" or "drug trafficking" writ large. Pet. App. 16a; see also *United States*

v. *$114,110.00 in U.S. Currency, more or less*, No. 17-1257-JWB, 2019 WL 6218167, at *2 (D. Kan. Nov. 21, 2019) (recognizing Tenth Circuit's split with Ninth Circuit's decision in *$11,500.00*).

The Seventh and Eleventh Circuits similarly hold that the government is "not required to prove the existence of a specific drug transaction." *United States* v. *Funds in the Amount of $100,120.00*, 901 F.3d 758, 768 (7th Cir. 2018). "It is enough that the government showed a connection to *some* transaction—the details are not necessary." *Id.*; see also *United States* v. *Funds in the Amount of $30,670.00*, 403 F.3d 448, 467 (7th Cir. 2005) (finding the government's burden was met where it showed a substantial connection to illegal drug trafficking generally); *United States* v. *$242,484.00*, 389 F.3d 1149, 1160 (11th Cir. 2004) (en banc) (same); but see *id.* at 1178 (Barkett, J., dissenting) ("the evidence *may* support probable cause that the money was connected to *some* sort of suspicious activity, [but] it fails to establish that it was specifically connected to illegal *drug* activity as *required*" under the forfeiture statute).

Courts in the First and Second Circuits tend toward this view as well, holding that the government "need not prove that there is a substantial connection between the property and any specific drug transaction" but rather "prove more generally, based on a totality of the circumstances, that the property is substantially connected to narcotics trafficking." *United States* v. *$22,173.00 in U.S. Currency*, 716 F. Supp. 2d 245, 250 (S.D.N.Y. 2010) (quoting *United States* v. *$185,000*, 455 F. Supp. 2d 145, 149 (E.D.N.Y. 2006)); *accord United States* v. *Assorted Jewelry Approximately Valued of $44,328.00*, 833 F.3d 13, 15 (1st Cir. 2016) (the government need not "link[] the property to a particular transaction").

II. THE DECISION BELOW IS INCORRECT

A. The Substantial Connection Test Applies to All Forfeiture Theories Under § 881(a)(6).

The government acknowledged that it would have been required to satisfy the "substantial connection" test, if it had "put on . . . evidence concerning facilitation" under § 881(a)(6). See U.S. C.A. Br. at 13. But it claimed the test did not apply because it pursued different theories—that the currency was either the "proceeds of" a past drug transaction, or was "intended for a future illegal exchange." *Id.* The Tenth Circuit ultimately "decline[d] to address whether such a showing [was]" required, but nodded to the Government's reading, seemingly because under the statute "the substantial connection requirement only applies when the Government is basing forfeiture on a facilitation theory." Pet. App. 11a; compare 21 U.S.C. § 881(a)(6), with 18 U.S.C. § 983(c)(3).

The Tenth Circuit is incorrect, both as a matter of statutory interpretation, and because (as recognized by most other circuits), Congress unequivocally intended for the substantial connection test to apply to all forfeiture theories under § 881(a)(6).

1. The language in CAFRA is broad enough to encompass all forfeiture theories under § 881(a)(6)—not just "facilitation." Specifically, the statute provides:

> [I]f the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

18 U.S.C. § 983(c)(3). Both government theories in this case—"proceeds" and "intended-for-exchange"—are encompassed by the clause. *Id.* Under the "proceeds" theory, the government must trace the currency to a prior drug exchange: the currency was thus involved in the prior exchange. See 21 U.S.C. § 881(a)(6) ("all proceeds traceable to such an exchange"). The same is true under the "intended-for-exchange" theory, because *attempted* drug transactions are equally prohibited. See 21 U.S.C. § 846 ("Any person who attempts . . . to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt.").

2. The Tenth Circuit's interpretation also ignores the legislative history, which exhorts application of the substantial connection test under *all* theories under § 881(a)(6). Specifically, in adding currency to the list of forfeitable property under § 881, Congress made clear that, due to the "penal nature" of this provision, the Government would be required—under any of these theories—to show a "substantial connection between the property and the underlying criminal activity." S. Rep. No. 95-959 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9518, 9522, 1978 WL 8484 (hereinafter "Joint Explanatory Statement").

When Congress codified the "substantial connection" test in CAFRA, it did so partially in response to an existing circuit split on whether the test applied to forfeiture cases arising under 21 U.S.C. § 881(a)(4) and (7). Those two provisions subject vehicles and real property to forfeiture only if they "facilitate" a drug transaction. The majority of courts had interpreted these provisions as requiring the same "substantial connection" test mandated under

§ 881(a)(6).[4] A minority of courts, however, had permitted forfeiture under attenuated circumstances, relying on those provisions' slightly broader language.[5] Congress short-circuited the split by clarifying that, under *any* of these forfeiture theories, the Government was required to show "a substantial connection between the property and the offense."[6]

B. The Tenth Circuit Failed to Require Proof of an Intended CSA Violation.

Where, as here, the government chooses to proceed under an "intended-for-exchange" theory, the CSA demands proof that the claimant "intended to . . . furnish[]" the money "in exchange for a controlled substance or listed chemical in violation of this subchapter." 21 U.S.C. § 881(a)(6). This requires proof of more than mere "intent." As is the case with other inchoate offenses, the CSA requires that "some act [be] performed in an attempt to effectuate the actor's

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[4] *See Civil Asset Forfeiture Reform Act: Hearing before the Committee on the Judiciary, House of Representatives, on H.R. 1835*, 105th Cong. 70 (1997) (statement of Stefan D. Cassella, Dep't of Justice Assistant Chief of Asset Forfeiture & Money Laundering) ("Section-by-Section Analysis of H.R. 1745: Forfeiture Act of 1997") (hereinafter "H.R. 1745 Analysis").

[5] *See id*; 21 U.S.C. § 881(a)(4), (7) (permitting forfeiture if property is used "in any manner" to facilitate an illegal drug transaction). *See also United States* v. *One Parcel Prop. Located at 427 & 429 Hall St.,* 842 F. Supp. 1421, 1426 n.10 (M.D. Ala. 1994), *aff'd*, 74 F.3d 1165 (11th Cir. 1996) (discussing the circuit split).

[6] *See* H.R. 1745 Analysis at 70. Moreover, in adding § 881(a)(7), Congress specifically referenced § 881(a)(6). *See United States* v. *Parcel of Real Prop. Known as 6109 Grubb Rd.*, 886 F.2d 618, 625 (3d Cir. 1989) ("Because reference is made to 21 U.S.C.A. § 881(a)(6), we must also look to the legislative history of that section," which requires a substantial connection).

intent." See *$11,500.00 in U.S. Currency*, 869 F.3d at 1075. This may include proof that the claimant made arrangements for the drug exchange. See *$64,000.00 in U.S. Currency*, 722 F.2d at 245; see also *United States* v. *$50,000 U.S. Currency*, 757 F.2d 103, 107 (6th Cir. 1985) (Merritt, J., dissenting) ("[T]he threshold triggering mechanism for forfeiture under § 881(a)(6) is a statutory violation."). Were the CSA to require anything less, it would penalize "mere intent" and dramatically lessen the government's burden of proof. *$11,500.00 in U.S. Currency*, 869 F.3d at 1074.

Thus, to obtain forfeiture under an "intended-for-exchange" theory, the government must show, by a preponderance of the evidence, a substantial connection between the claimant's money and an intended exchange for drugs, and this requires proof of at least one act in furtherance of the drug exchange. See 18 U.S.C. § 983(c)(1); 21 U.S.C. § 881(a)(6). The Tenth Circuit failed to apply this standard. In fact, the Tenth Circuit didn't apply anything resembling this standard, and instead permitted the government to proceed on a preponderance-based test, requiring only a substantial connection between Mr. Duckworth's money and inferences suggestive of "illegal drug trafficking" or "drug activity." Pet. App. 13a–14a, 16a.

C. The Government's Evidence Was Insufficient to Sustain an Order of Forfeiture, Under Either Standard.

Under either standard, and using a "common-sense approach" that "look[s] to the totality of the circumstances," the evidence here should have never sustained an order of forfeiture. *Id.* at 10a.

The Tenth Circuit's decision rested primarily on the "implausibility" of Mr. Duckworth's explanation for the trip (the 12-city music tour). *Id.* at 16a; see also

id. at 28a (this was "primary factor" supporting district court's order). This evidence should not have factored into the calculus, however, because requiring a claimant to legitimize the intended use of the money wrongfully shifts the burden of proof away from the government, in violation of CAFRA. See 18 U.S.C. § 983(c)(1). Further, "[f]inding his proffered reason for travel not credible means any other reason is possible"—it does *not* mean "the drug trafficking explanation more likely than any other." See *$48,100.00 in U.S. Currency*, 756 F.3d at 655. Stated otherwise, disbelief in Mr. Duckworth's explanation for the trip does not show that he planned to use the money in an "intended . . . exchange for a controlled substance," 21 U.S.C. § 881(a)(6).

The remainder of the government's proffered evidence fares no better. This includes: (1) Mr. Duckworth's false statement to Trooper McCord; (2) the amount of cash involved; (3) the method in which it was bundled; (4) the untested "gleanings" from the carpet in the back seat; (5) Mr. Duckworth's criminal history; (6) the 50% interest rate imposed by Mr. Duckworth's boss on the $40,000 loan; and (7) inconsistencies between Mr. Duckworth's income and tax returns. Pet. App. 16a. Exactly *none* of this evidence collectively reflects a "substantial" connection to an intended drug transaction, much less that Mr. Duckworth had taken steps in furtherance of a drug transaction. See *$48,100.00 in U.S. Currency*, 756 F.3d at 655 (citing "no texts or voice mail recordings referring to a plan to engage in trafficking" as probative).

The evidence taken on its own fares much worse. Because the government failed to present any "affirmative evidence of the alleged planned transaction," see *id.*, Mr. Duckworth's false statement proves nothing more than the fear that many feel during a

police stop. Also, the details of the $40,000 loan and Mr. Duckworth's tax returns do not support the government's "intended-for-exchange" theory. The government used those details in an attempt to support its "proceeds" theory, but that theory proved unsuccessful at trial. See Pet. App. 29a.

As for the supposed "gleanings," they were never tested for the presence of drugs, and Trooper McCord could not even accurately identify them in a photograph at trial. See *Id*. at 3a, 16a; Duckworth C.A. Br. at 13–14. The court nevertheless based its decision on the "presence of drugs in his vehicle." Pet. App. 14a. And Mr. Duckworth's prior criminal history was both inadmissible, see Fed. R. Evid. 609(b) (barring evidence of convictions after 10 years), and irrelevant, see *$5000.00 in U.S. Currency*, 40 F.3d at 850 ("a man's debt to society cannot be of infinite duration").

What remains is the cash itself, which readily falls away because as even the Tenth Circuit recognized, "[t]he discovery of large quantities of cash alone . . . is not sufficient to establish Claimant intended to furnish the $144,780 in exchange for a controlled substance." Pet App. 13a; see also *United States* v. *$191,910.00 in U.S. Currency*, 16 F.3d 1051, 1072 (9th Cir. 1994) ("*any* amount of money, standing alone" will not satisfy government's burden of proof) (emphasis added). Moreover, the district court found that Mr. Duckworth presented a plausible reason for possessing a large quantity of cash (his events promotion business). See Pet. App. 28a–29a.[7]

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[7] The bundling alone does not change the result. Mr. Duckworth testified that he did so to keep the money all in one place, Duckworth C.A. Br. at 17, and other courts have recognized that "common sense would support having a method of keeping it

III. PERMITTING FORFEITURE ON THE BASIS OF MERE INTENT RAISES SERIOUS CONSITUTIONAL CONCERNS

The Tenth Circuit's determination that forfeiture may stand in the absence of proof that a claimant took a step in furtherance of a violation of the CSA raises Eighth Amendment concerns. See *$11,500.00 in U.S. Currency*, 869 F.3d at 1074 (reversing jury's forfeiture verdict that was likely based on "mere intent").

The Eighth Amendment's excessive-fine and cruel-and-unusual punishment clauses are implicated by the kind of government overreach present in Mr. Duckworth's case. U.S. Const. amend. VIII; see also *United States* v. *Bajakajian*, 524 U.S. 321, 337 (1998) (prohibiting forfeitures that are "grossly disproportional to the gravity of a defendant's offense"); see *Timbs* v. *Indiana*, 139 S. Ct. 682, 690 (2019) (warning against even "partially punitive" forfeitures); *$11,500.00 in U.S. Currency*, 869 F.3d at 1073 (quoting *Robinson* v. *California*, 370 U.S. 660, 662 (1962)) (stating that the Cruel and Unusual Clause prohibits "status" offenses).

The Tenth Circuit's approach raises the specter of these Eighth Amendment violations. First, § 881(a)(6) is, by Congress's own admission, "penal [in] nature," Joint Explanatory Statement at 9522, a fact this Court has previously recognized with respect to companion provisions under § 881. See *Austin* v. *United States*, 509 U.S. 602, 620 (1993) ("[t]he legislative history of § 881 confirms the punitive nature" of § 881(a)(4) and (a)(7)). Accordingly, money forfeitures are subject to the Excessive Fines Clause. Because

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organized while carrying and concealing it from would-be thieves." *$48,100.00 in U.S. Currency*, 756 F.3d at 654.

the Tenth Circuit's interpretation of § 881(a)(6) does not require the government to show a substantial connection to any *violation* of the CSA, "it would be surely excessive to confiscate that cash." *$11,500.00 in U.S. Currency*, 869 F.3d at 1074 n.8.

Second, by permitting forfeiture on the basis of "mere intent," the Tenth Circuit has effectively subjected Mr. Duckworth to a status crime, in violation of the Cruel and Unusual Punishments Clause. *Id.* at 1074 n.7. The government's forfeiture is particularly offensive here, because the district court acknowledged that Mr. Duckworth had a plausible reason for possessing such a large sum of money. Pet. App. 28a–29a.

IV. THIS CASE IS AN IDEAL VEHICLE

Mr. Duckworth preserved these questions throughout his case, so they are cleanly presented. Further, this question requires no further percolation. Twelve circuit courts of appeals have considered the question, and yet petitioners in two of those circuits face different treatment simply by virtue of geography. Deeper divisions lie just underneath: Five circuits require a connection to an intended violation of the law, whereas six circuits agree that the government need only prove a general connection to drug activity. There is no need to wait; doing so will simply foment inconsistency across the country. *See supra* § I.

What is more, the facts of Mr. Duckworth's case are particularly egregious. He suffered forfeiture of almost $150,000 even though the government presented no evidence of drugs or drug paraphernalia. In short, the government lacked any evidence of a CSA violation; it chose instead to kitchen-sink its allegations, sweeping from past ("proceeds") to future ('intended"), neatly covering all bases. At trial, Mr.

Duckworth was left to prove the negative. Had Mr. Duckworth been pulled over by an officer on I-70 near his home in Missouri (that is, in the Eighth Circuit), he would have kept his money. See *$48,100.00 in U.S. Currency*, 756 F.3d at 655.

CONCLUSION

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

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