No. 19-1222

IN THE

Supreme Court of the United States

NATHAN DUCKWORTH,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The court below blessed an interpretation of the forfeiture statutes that would permit the government to seize a citizen's money—here more than $140,000—based on the flimsiest of proof: a stale prior conviction, a purported "odor" of marijuana, and the reticence of an African American driver to disclose his travel plans to the police. Under this approach, no meaningful connection between the money and any conceivable violation of the Controlled Substances Act ("CSA") need be shown before the money is pronounced "intended-for-exchange" and deposited in the government's coffers. The Tenth Circuit's interpretation is at odds with other circuit courts of appeal, which do require a substantial connection to a drug crime.

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

1. The government is estopped from claiming, as it now does, that "the circuits are not in conflict about the applicability of the Reform Act's substantial-connection test." Br. in Opp. at 6 ("Opp."). See *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."). In its Tenth Circuit brief, the government acknowledged that existing circuit precedent conflicted with case law from four other circuits on this very question. See U.S. C.A. Br. at 13–14 (citing *United States* v. *$118,170.00 in U.S. Currency*, 69 F. App'x 714, 718 n.1 (6th Cir. 2003); *United States* v. *$125,938.62, Proceeds of Certificates of Deposit*, 537

F.3d 1287, 1294 n.2 (11th Cir. 2008); *United States* v. *$225,850.00 in U.S. Currency*, 2007 WL 9718551, at *4 (C.D. Cal. 2007); *United States* v. *$115,471.00 in U.S. Currency*, 2017 WL 2842778, at *4 (M.D.N.C. 2017); *United States* v. *$15,795.00 in U.S. Currency*, 2016 WL 3351015, at *6 & n.10 (M.D.N.C. 2016)). The Tenth Circuit declined to adopt the substantial connection test in whole or in part, see Pet. App. 10a–11a, based on the government's argument below that it did "*not* have the burden of establishing a 'substantial connection' . . . in a proceeds case or in an intended-for-exchange case." See U.S. C.A. Br. at 13.

2. In any event, the government fundamentally misconceives the forfeiture theory at issue. Two types of "non-proceeds forfeitures" exist: "intended for exchange" forfeitures and facilitation forfeitures. The government treats them as one so that it may make the claim that "[e]very court of appeals to address the question, including the court below, has applied the [substantial connection] test to *non-proceeds forfeitures* under that statute." Opp. at 6 (emphasis added). That is a strawman. Facilitation forfeitures are expressly subject to the substantial connection test under the Reform Act. See 18 U.S.C. § 983(c)(3) ("substantial connection" test applies "if the Government's theory of forfeiture is that the property was used to commit or *facilitate* the commission of a criminal offense.") (emphasis added). So of course every court to have mentioned this type of non-proceeds forfeiture has recognized this clear statutory mandate.[1]

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[1] In fact, the government in this case and others has deliberately avoided the "facilitation" theory because it is more difficult to prove. *See* Brief of Appellee at 29 n.19, *United States* v. *$225,850.00 in U.S. Currency*, No. 04-57099 (9th Cir. Sept. 15, 2005) (government admitted to "specifically amend[ing] its complaint such that it did not proceed on a 'facilitation' theory, so

The government never gives separate treatment to the *other* type of non-proceeds forfeiture—the one actually at issue in this case. Doing so would mean grappling with a split of authority that it now chooses to sweep under the "non-proceeds forfeitures" rug. The First and Third Circuits (like the Tenth) declined to interpret § 881(a)(6) to require a "substantial connection" to a drug crime in "intended-for-exchange" cases. See Pet. at 11–12 (citing *United States* v. *$10,700.00 in U.S. Currency*, 258 F.3d 215, 222 n.4 (3d Cir. 2001); *United States* v. *One Lot of U.S. Currency ($36,634)*, 103 F.3d 1048, 1053 n.6 (1st Cir. 1997)).[2] The government faults Mr. Duckworth for relying on these decisions because they "involve forfeitures that predate the Reform Act." Opp. at 7. The substantial connection test, however, originated in 1978 with the CSA—it is *not* an invention of the Reform Act. See Pet. at 17. The government's argument is also internally inconsistent, as the government itself relies on four cases that predate the Reform Act to bolster its claim of circuit uniformity. See *infra* I.3.

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the heightened proof standard [in the Reform Act] did not apply.").

[2] The government suggests that *One Lot of U.S. Currency ($36,634)* has been superseded on the applicability of the substantial connection test. *See* Opp. at 7 (quoting *United States* v. *López-Burgos*, 435 F.3d 1, 2 (1st Cir. 2006)). But *López-Burgos* stands for the unremarkable proposition that the Reform Act changed the burden of proof from "probable cause" to "preponderance of the evidence." *See López-Burgos*, 435 F.3d at 2 ("López Burgos invoked statutorily superseded (and therefore legally irrelevant) authority *requiring the government to plead facts sufficient to establish probable cause*.") (emphasis added). The decision does not discuss the "substantial connection" test whatsoever.

In short, the decision below, together with the First and Third Circuit cases, and *all* of the cases cited by the government in its Tenth Circuit brief, see *supra* I.1, conflict with the cases the government now relies upon. See Opp. at 6–7; see also *United States* v. *Assorted Jewelry Approximately Valued of $44,328.00*, 833 F.3d 13, 15 (1st Cir. 2016) ("proceeds" theory); *United States* v. *Sum of $185,336.07 U.S. Currency Seized*, 731 F.3d 189, 192 (2d Cir. 2013) (proceeds); *United States* v. *Real Prop. 10338 Marcy Rd. Nw.*, 938 F.3d 802, 805 (6th Cir. 2019) (proceeds); *United States* v. *Funds in the Amount of One Hundred Thousand One Hundred & Twenty Dollars*, 730 F.3d 711, 716 (7th Cir. 2013) (proceeds and facilitation); *United States* v. *$48,100.00 in U.S. Currency*, 756 F.3d 650, 653 (8th Cir. 2014) (intended-for-exchange); *United States* v. *Wilson*, 458 F. App'x 637, 638 (9th Cir. 2011) (proceeds); *United States* v. *$252,300.00 in U.S. Currency*, *More or Less*, 484 F.3d 1271, 1273 (10th Cir. 2007) (intended-for-exchange and proceeds); *United States* v. *$291,828.00 in U.S. Currency*, 536 F.3d 1234, 1237 (11th Cir. 2008) (per curiam) (Fourth Amendment case).

3. The government fares no better in rebutting the split around the government's burden of linking currency to a violation of the CSA. Pet. at 12–14 (noting that at least five circuits have "applied a more exacting (and correct) standard," requiring a link to a CSA violation whereas five others permit forfeiture based on nebulous allegations of drug-activity or trafficking "behaviors"). Reframing Mr. Duckworth's argument once more, this time to require a link to a "specific" or "particular" drug transaction,[3] Opp. at 8–10, the

[3] The "specific transaction" language is a relic of the "traceability" requirement in "proceeds" cases. *See* 28 U.S.C. § 881(a)(6) (subjecting to forfeiture "all proceeds *traceable* to" an

government presses its flawed argument that there is no conflict by relying almost entirely on "proceeds" cases. See also *Assorted Jewelry*, 833 F.3d at 15 (proceeds); *United States* v. *One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990) (proceeds); *United States* v. *1978 Cessna Turbo 210*, 182 F.3d 919, 1999 WL 407469, at *6 n.7 (6th Cir. 1999) (Tbl.) (proceeds); *United States* v. *Funds in the Amount of One Hundred Thousand & One Hundred Twenty Dollars*, 901 F.3d 758, 768 (7th Cir. 2018) (all three theories); *United States* v. *1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1435 n.4 (9th Cir. 1985) (proceeds); *United States* v. *One Hundred Forty-Nine Thousand Four Hundred Forty-Two & 43/100 Dollars in U.S. Currency*, 965 F.2d 868, 878 (10th Cir. 1992) (proceeds and facilitation); *United States* v. *$242,484.00*, 389 F.3d 1149, 1160 (11th Cir. 2004) (en banc) (proceeds).

By contrast, the five cases Mr. Duckworth relies upon all reflect an "intended" or "intended-for-exchange" theory. See *United States* v. *$95,945.18, U.S. Currency*, 913 F.2d 1106, 1110 (4th Cir. 1990) (intended-for-exchange); *United States* v. *$64,000.00 in U.S. Currency*, 722 F.2d 239, 244 (5th Cir. 1984) (same); *United States* v. *$5000.00 in U.S. Currency*, 40 F.3d 846, 850 (6th Cir. 1994) (same); *$48,100.00 in U.S. Currency*, 756 F.3d at 655 (same); *United States* v. *$11,500.00 in U.S. Currency*, 869 F.3d 1062, 1075 (9th Cir. 2017) ("intended to facilitate" theory).

4. The government is flat wrong to contend that, even if Mr. Duckworth's articulation of the test is accurate, Mr. Duckworth has "waived, or at a minimum forfeited," application of that test. Opp. at 8. The

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illegal exchange for drugs) (emphasis added); *see also United States* v. *Parcels of Land*, 903 F.2d 36, 38–39 (1st Cir. 1990) (addressing whether "trac[ing]" of "specific drug transactions" is required in context of proceeds case).

government points to Mr. Duckworth's use of the terms "drug trafficking" and "drug activity" on two pages of his Tenth Circuit brief. *Id*. But Mr. Duckworth was merely reciting the Tenth Circuit's own previous articulation of the test. Duckworth C.A. Br. at 24 (citing *$252,300*, 484 F.3d at 1275 (reviewing whether currency was "substantially connected to illegal drug trafficking.")). This cannot reasonably be construed as any endorsement of a more amorphous standard, nor can it be deemed a deliberate choice to forego an interpretation that aligns with the express statutory language. Indeed, in the same brief, Mr. Duckworth advanced the standard that requires proof of some particularized crime: The government must satisfy its burden by establishing a 'substantial connection' between the seized property and the *purported offense*." See *id*. (emphasis added). And the remainder of Mr. Duckworth's brief likewise unequivocally reflects his argument that something more than unparticularized "drug activity" is required under § 881(a)(6). See *id*. at 15, 21, 26 ("The government presented not a shred of evidence that Duckworth had discussed a *drug transaction* with Romero or *anyone*.") (emphasis in original); ("The government presented no communications regarding a planned *drug transaction* . . .") (emphasis added); ("There was no testimony or documentation of a *drug transaction* that occurred.") (emphasis added). No waiver or forfeiture occurred here.

II. THE DECISION BELOW IS INCORRECT

1. The government states with false certainty that there were "particles of marijuana" in Mr. Duckworth's rental car. Opp. at 2, 11. That misstates the record, which is wholly silent as to any proof of the presence of drugs, apart from the uncorroborated testimony of the troopers who conducted the seizure re-

garding an odor of marijuana. The lack of corroborative evidence in this case highlights the egregious nature of the forfeiture, and the importance of the "substantial connection" requirement. Here, the government thoroughly searched Mr. Duckworth's car, and searched his person, but it found no drugs or drug paraphernalia. It also presented no evidence that his business partner Mr. Romero was in possession of drugs, or that Mr. Duckworth had conversed with anyone about drugs.

At trial the government also claimed that a canine smelled drugs on the currency, and that there were "particles" or "gleanings" of marijuana in the carpet in the back seat. However, the district court rejected the supposed canine alert in ruling against the government on its "proceeds" theory, and the government never tested the "particles" for the presence of drugs, nor could the trooper correctly identify the particles when he reviewed a photo at trial.

2. The government contends that the court was fully empowered to consider the "implausibility" of Mr. Duckworth's story. *Id.* at 11–12. Mr. Duckworth agrees. Courts may certainly find a claimant's proffered reason for travel "implausible," but that implausibility simply means "any other reason" for travel is possible. See *$48,100.00 in U.S. Currency*, 756 F.3d at 655. In other words, a claimant's false alibi does not stand as affirmative evidence that a drug transaction was more likely than not. See *id.* ("In the absence of any affirmative evidence suggesting it was for drug trafficking, the court would have to speculate to find the drug trafficking explanation more likely than any other."). But that is precisely how the Tenth Circuit (and district court) interpreted the evidence, logically leaping from the "implausibility of Claimant's explanation" to evidence of "illegal

drug trafficking," even though the government failed to advance any cognizable theory of its own.

III. THIS CASE IS AN IDEAL VEHICLE

This case cleanly presents an important issue of statutory interpretation under § 881(a)(6). See Pet. at 23. The government disagrees, claiming that the Tenth Circuit "explicitly declined to decide" whether the "substantial connection" test applied. Opp. at 7. Yet it acknowledges, two sentences later, that "the court of appeals found that the evidence here was sufficient to satisfy the substantial-connection test." *Id.* at 7–8. Setting aside the fact that the Tenth Circuit applied an *incorrect formulation* of that test, see *supra* I.3, the government cannot have it both ways. Because the "substantial connection" test was applied below, even if haphazardly, review by this Court is proper.

The government also argues that this case is "fact-bound." Opp. at 5, 12. Not so. This case turns on whether, under the government's "intended-for-exchange" theory, the "substantial connection" test applies and how fact-finders should apply it. Whether the evidence was sufficient in this case is simply a merits point. And, in contrast to the result here, other circuits have rejected forfeiture arguments in factually indistinguishable scenarios. See, *e.g.*, *$48,100.00 in U.S. Currency*, 756 F.3d at 652–53 (bundled currency, false story, quantifiable marijuana and paraphernalia insufficient to justify forfeiture); *$5000.00 in U.S. Currency*, 40 F.3d at 850 (bundled currency, false story, canine alert, and stale conviction insufficient to justify forfeiture).

CONCLUSION

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

Respectfully submitted,

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