No. 22-7386

IN THE

Supreme Court of the United States

LOUIS MCINTOSH,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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

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December 4, 2023

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL has a nationwide membership, with many thousands of direct members and up to 40,000 members with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution.

NACDL has a fundamental interest in the equitable administration of the criminal justice system through clear laws that are properly applied in accordance with the Constitution, the will of Congress, and the decisions of this Court.

NACDL has a particular interest in this case because some Circuit Court decisions, including the decision of the Second Circuit in this case, have failed to apply the procedural requirements of protections for criminal forfeiture as strictly to the government as they do upon criminal defendants and innocent third-party claimants to criminally forfeited property. This creates an unacceptable double standard. There is ample evidence that a guiding principle in federal forfeiture is to ensure that the government is held to the same strict standards as property owners and that the parties suffer the same consequences for noncompliance. Further, decisions like *McIntosh* leave enforcement of the plain requirements for criminal forfeiture to a case-by-case determination by the district courts. This leads not only to the uneven application of the rules, but it also creates the potential for dangerous precedents, especially when applied to innocent third parties, who already must wait months, if not years, before receiving their due process in court. Rule 32.2 of the Federal Rules of Criminal Procedure clearly imposes a unified procedure for all criminal forfeiture cases. Application of those procedures must be equal and consistent in

order to promote fairness, efficiency and finality in criminal forfeitures.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 32.2 of the Federal Rules of Criminal Procedure sets forth carefully calibrated procedures to ensure the parties to criminal forfeiture proceedings – the government, the defendant and third parties with interests in the forfeited property – have a full and fair opportunity to make their case. Equally important, Rule 32.2 ensures efficiency and finality in the forfeiture phase of criminal proceedings by imposing numerous requirements on each of the parties. Many of the Rule's requirements, couched in mandatory language, are strictly applied. For example, defendants have a limited opportunity to contest forfeiture. Third parties must wait until the conclusion of the criminal proceedings to file their ancillary petitions within a brief 30-day period. These requirements and others are triggered by the actions of the government – a party with a direct pecuniary interest in the outcome of the forfeiture proceedings. But to lawfully forfeit the property, the government must comply with the mandatory procedures set forth in Rule 32.2.

Here, the government failed to comply with what is arguably the most critical requirement in the

entire criminal forfeiture process. It failed to timely secure a preliminary order of forfeiture for the property it sought to forfeit. The district court nevertheless held the government was entitled to forfeit the defendant's property despite this failure. The Second Circuit affirmed. This Court granted Petitioner's petition for certiorari.

In his main Brief, Petitioner persuasively demonstrates that the language of Rule 32.2 and well-reasoned decisions applying the rule make clear that the government's failure to timely seek entry of a preliminary order of forfeiture is fatal to its criminal forfeiture claims.

As *amicus,* NACDL focuses on the double standard inherent in the test used by the Second Circuit, strictly enforcing deadlines against defendants and third-party property owners imposed by Rule 32.2 while overlooking critical procedural failures by the government, by employing a test that purports to assess the government's degree of compliance on a case-by-case basis. This approach is as unlawful as it is unworkable. It expressly contradicts the plain language of the Rule while creating uncertainty and imbalance in the application and enforcement of the Rule. It also contravenes the requirements of due process, efficiency and finality embodied by Rule 32.2. Further, the circuit court's method misapplies this Court's decision in *Dolan v.*

United States, 560 U.S. 605 (2010) and contravenes the principles of equal enforcement of forfeiture deadlines embodied by Congress in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION FAILS TO APPLY THE REQUIREMENTS OF RULE 32.2 FOR A VALID CRIMINAL FORFEITURE

There are only four requirements for the government to follow to impose a valid criminal forfeiture:

1) Include a general forfeiture allegation in the indictment that need not specify the property sought to be forfeited (Rule 32.2(a));

2) Issue a preliminary order of forfeiture that specifies the forfeited property or money sufficiently in advance of sentencing to allow the parties to resolve any issues relating to it (Rule 32.2(b)(2));

3) State the specific forfeiture imposed when orally announcing the sentence, unless there is a record showing that the defendant was already

advised of the forfeiture specifics (Rule 32.2(b)(4)(B)), and

4) Include the forfeiture in the criminal judgment (*id.*).

There are two lines of cases on the consequences for the government's failure to comply with one or more of these requirements. One, exemplified by decisions such as *United States v. Maddux*, 37 F.4th 1170 (6th Cir. 2022), and *United States v. Shakur*, 691 F.3d 979 (8th Cir. 2012), holds the government must comply with all of these requirements or there can be no forfeiture. The other, exemplified by *United States v. Martin*, 662 F.3d 301 (4th Cir. 2011), and the Second Circuit's decision below in *McIntosh*, employs a vague smell test, assessing the overall level of error and determining whether it exceeds some undefined critical mass of errors or satisfies an equally undefined level of tolerance. Under that test, only violations of the Rule that, in the view of the district court, qualify as the most egregious will have consequences for the government. Decisions like *McIntosh* fail to apply the requirements of Rule 32.2 for a valid criminal forfeiture. The judicial discretion embedded in these decisions unacceptably permits wide and uneven application, risking violation of the principles of due process, equal application of the law, and consistency and finality in sentencing. The Seventh Circuit recently described this approach as follows:

> A key inquiry when evaluating a Rule 32.2 violation is whether the proceedings were marred by minor hiccups or a wholesale disregard of the Rule. For example, in *McIntosh*, . . . the district court's failure to enter a preliminary order was only a small deviation because the court otherwise 'gave the defendant an opportunity to contest forfeiture, and it included the order of forfeiture in its judgment.'

United States v. Skaggs, 78 F.4th 990, 994 (7th Cir. 2023) (citing *McIntosh*, 58 F.4th at 606).

This is an unworkable standard. The majority of cases will likely fall into the vast chasm between a few "minor hiccups" and "a wholesale disregard of the Rule." And while the *McIntosh* standard appears to relegate that entire grey area to the district court, the prime mover in criminal forfeiture is in fact the government, which must, *inter alia*, request forfeiture in the indictment, establish a nexus between the property and the crime and submit a proposed preliminary order of forfeiture to the district court. *See*, *e.g.*, Rule 32.2(a)-(b). There is no place for unpredictability and variation in this enforcement. Nor does the Rule provide for any. The requirements of Rule 32.2 are plain and unambiguous. The

requirements must therefore be applied strictly and equally to all parties in the proceedings.

II. THE SECOND CIRCUIT'S TEST FOR COMPLIANCE WITH THE PRELIMINARY ORDER OF FORFEITURE REQUIREMENT CREATES A DOUBLE STANDARD

The Second Circuit's test for determining whether there should be any consequences to the government for its failure to comply with the preliminary order of forfeiture requirement allows great leeway for violations the court deems to be something less than a "wholesale disregard" of Rule 32.2. In sharp contrast, however, no such variance is permitted to the actual owners of the property, who may include innocent third parties seeking to protect their interests in property subject to criminal forfeiture. In fact, Rule 32.2 imposes strict requirements on *all* parties to preserve their rights to seek or oppose criminal forfeiture. Those requirements must be applied equally to ensure just and fair administration of criminal forfeiture laws and procedures.

Defendants who timely fail to oppose forfeiture or seek a jury determination of forfeiture have routinely been found to have waived those rights or were limited to 'plain error' review on appeal. *E.g.*, *Mills v. United States*, 777 F. App'x 763, 763 (5th Cir. 2019) (defendant "did not challenge the preliminary

forfeiture order [which] therefore divested him of any interest in the forfeited property"); *United States v. Mandell*, 752 F.3d 544, 553-54 (2d Cir. 2014) ("Mandell argues that the district court erred by not providing a preliminary forfeiture order . . .. Under plain error review, we reject this argument"); *United States v. Giles*, 518 F. App'x 181, 188 (4th Cir. 2013) ("Corsi was on notice of all property subject to forfeiture as set forth in the indictment, and did not object at any point nor request a hearing. Accordingly, we find no basis to vacate the district court's forfeiture order"); *United States v. Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012) (affirming forfeiture where, although "a conspirator is liable only for the conspiracy's illegal proceeds that were reasonably foreseeable to him," the defendant "did not raise this issue in the district court or on appeal"); *United States v. Hively*, 437 F.3d 752, 763 (8th Cir. 2006) ("a party is entitled to a jury determination under Rule 32.2(b) if one is requested. Hively made no such request. Moreover, Hively did not object to the forfeiture order at the time it was issued by the district court and never sought a ruling on his eventual motion to vacate it").

Further, third party property owners who fail to file ancillary petitions within 30 days of issuance of a preliminary order of forfeiture are deemed to have waived their property rights, regardless of the circumstances or the extent or validity of their interest in the property. *See*, *e.g.*, *United States v. Crew*, 704

F. App'x 30, 32 (2d Cir. 2017) ("[Petitioner] failed to file a petition asserting a legal interest in the property within 30 days . . and he was therefore barred from intervening to challenge the forfeiture or order of sale"); *United States v. Chavous*, 654 F. App'x 998, 1000 (11th Cir. 2016) ("If a third party fails to file a petition before the deadline, she forfeits her interest in the property") (citation omitted); *United States v. Sharma*, 509 F. App'x 381, 382 (5th Cir. 2013) (same) (citations omitted); *United States v. Grossman*, 501 F.3d 846, 848-49 (7th Cir. 2007) (same).

Just this year, the Second Circuit strictly applied the Rule 32.2 deadline to a third-party petitioner even though there was no prejudice to the government and no delay to the court proceedings. In *United States v. Swartz Family Trust*, 67 F.4th 505 (2d Cir. 2023), the court concluded, "once a preliminary order of forfeiture is entered, whether before or after the time criminal judgment is entered, the government is authorized to commence proceedings governing third-party rights." *Id.* at 515 (quoting *United States v. Marion*, 562 F.3d 1330, 1339 (11th Cir. 2009)). The government had served notice of the preliminary order on the petitioner months before sentencing was complete. Because of a prolonged stay in the hospital and other issues following his discharge, petitioner missed the required filing deadline.

Therefore, as applied, the standard utilized below creates one set of rules for the government and another for everyone else. Such a test cannot be allowed to stand.

III. THE SECOND CIRCUIT'S RULINGS ON THIRD-PARTY PETITIONS UNDERMINE THE COURT'S RELIANCE ON *DOLAN* TO OVERLOOK NONCOMPLIANCE WITH THE REQUIREMENT FOR TIMELY ISSUANCE OF A PRELIMINARY ORDER OF FORFEITURE

A primary basis for the Second Circuit's decision in *McIntosh* is this Court's decision in *Dolan*, which held that a missed deadline in the Mandatory Victims Restitution Act ("MVRA") had no consequence because it was a mere "time-related directive" rather than a more stringent "claims-processing rule" or an inviolable "jurisdictional deadline." *McIntosh*, 58 F.4th at 609-11 & nn. 8-22 (citing *Dolan*, 560 U.S. at 608, 610-11, 613-16).

The key to the Second Circuit's conclusion that the preliminary order of forfeiture requirement in Rule 32.2 was only a "time-related directive" was that it "does not specify a consequence for noncompliance with its timing provisions . . .." *McIntosh*, 58 F.4th at 610 & n.11 (quoting *Dolan*, 560 U.S. at 611).

The Second Circuit's double standard continues in this application of *Dolan*. Neither 21 U.S.C. § 853(n), which authorizes third party petitions, nor Rule 32.2 specifies a consequence for noncompliance with the requirement that a third-party file a petition requesting an ancillary proceeding within thirty days of service of notice of the preliminary order of forfeiture (or within sixty days of publication). Yet, this did not affect the same court from making the opposite determination in *Swartz* and *Crew*, cited above, that failure to file had the irreversible consequence of barring the third-party claims. Thus, at the very least, the Second Circuit construes the third-party petition deadline as a "claims-processing rule."

Notably, in *Swartz*, the Second Circuit rejected the Petitioner's contention that a petition is a responsive pleading to the preliminary order of forfeiture, holding instead that the petition is in the nature of a complaint. The court therefore concluded that the filing deadline for third party petitions is at least a 'claims processing rule,' if not jurisdictional. *Swartz*, 67 F.4th at 515 (rejecting the argument that service of an amended preliminary order of forfeiture restarted the time to file the third-party petition because it is the "petition, not the court-issued amended preliminary order of forfeiture, that operates as the equivalent of a civil complaint in this case")

(citing *United States v. Daugerdas*, 892 F.3d 545, 552 (2d Cir. 2018)).

Further, the applicability of *Dolan*'s application of the MVRA deadlines to criminal forfeiture is questionable at best. As at least one Circuit has noted, forfeiture laws "have little in common" with the MVRA. *See Langbord v. U.S. Dep't of the Treasury*, 783 F.3d 441, 455 n.19 (3d Cir. 2015), *vacated en banc on rehearing on other grounds* (July 28, 2015), *on reh'g en banc*, 832 F.3d 170 (3d Cir. 2016). Whereas this Court's concern in *Dolan* was on the impact on innocent victims of a court or government oversight, here, the timely issuance of a preliminary order of forfeiture is deemed by Rule 32.2 to *benefit* third parties who seek to vindicate their interests in criminally forfeited property by enabling them to have their claims heard while an appeal is pending. These are the same third parties who had their property seized by the government and have been compelled to wait until the completion of the criminal case to have their day in court. As the Advisory Committee points out, Rule 32.2 ensures that third parties do not "have to await the conclusion of the appellate process even to *begin* to have their claims heard" Fed. R. Crim. P. 32.2(d), 2000 Advisory Committee Notes (emphasis in original).

Indeed, the preliminary order of forfeiture requirement protects third parties by giving them

their first and only opportunity to participate in litigation relating to their potentially superior interest in forfeited property. *See*, *e.g.*, 21 U.S.C. § 853(k)(1) (barring third-party intervention in criminal forfeiture proceedings).

The court below was able to glide past the impact on third parties of its ruling because there were no such claims to any specific property subject to forfeiture in that case. But Rule 32.2 is drafted to apply to the entire multiplicity of circumstances in which criminal forfeiture is sought: (1) whether the government seeks to forfeit specific property or only a money judgment; (2) whether either the defendant or the government seeks a jury determination of the forfeiture of specific property or a ruling by the court, and (3) whether there are potential third-party claims to forfeited property or a claim of the defendant only. Whether the government and the district courts are required to comply with the requirements of Rule 32.2 for criminal forfeiture should not depend on the vagaries of the specific factors at issue in individual cases. Such uncertainty undermines principles of due process, as well as the rights of third parties with an interest in criminally forfeited property. *E.g.*, *Maddux*, 37 F.4th at 1178. The procedures in Rule 32.2 have been carefully calibrated to ensure these principles are upheld regardless of the specifics of the criminal forfeiture case. Such uniformity must apply as well to the consequences of any violation of the Rule.

Dolan also provides a poor fit because in forfeiture, unlike restitution, the government has a "pecuniary interest" in the outcome of the proceedings "that goes beyond merely separating a criminal from his ill-gotten gains." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989). Further, criminal forfeiture is a "creature of statute." *S.E.C. v. Contorinis*, 743 F.3d 296, 307 (2d Cir. 2014). Overlooking government failures to proceed in accordance with the rules applicable to criminal forfeiture effectively permits the government to perform an "end run" around the statutory requirements. *Honeycutt v. United States*, 581 U.S. 443, 452 (2017). Such lax enforcement of forfeiture requirements contravenes this Court's recognition that "it makes sense to scrutinize governmental action *more* closely when the State stands to benefit." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.) (emphasis added) (internal quotations omitted)).

Thus, the Second Circuit was wrong in relying on *Dolan*. The court apparently saw *Dolan* as providing support for the imposition of a double standard that overlooked government violations of Rule 32.2 while strictly enforcing those of the defendant and third parties. In fact, a close reading of *Dolan* supports a strict enforcement of the preliminary

forfeiture order requirements of the Rule against the government.

Notably, even with even-handed enforcement of the deadlines in Rule 32.2, the government *still* maintains a significant advantage over third party property owners and the defendant. As Rule 32.2 provides, the government effectively controls the progress and pace of the forfeiture proceedings. Were this Court to permit the government to disregard the statutory deadlines with no consequence, forfeiture proceedings could reach the stage of a free-for-all, creating an impossible scenario for innocent third parties seeking to protect their interests in the property being sought by the government. As it is, these innocent individuals must wait months, sometimes years, until the end of the criminal proceedings before having their day in court. If the government is not constrained by the deadlines specified in the Rule, and if there are no consequences for the government's failure to comply with those deadlines, the rights of innocent third parties might never be recognized.

Further, even if the government lost its right to seek criminal forfeiture by failing to timely secure a preliminary order of forfeiture – or any other violation of the Rule – the government still has an option to commence a *civil* forfeiture action against the property. *See*, *e.g.*, 18 U.S.C. § 983(a)(3)(C) ("In lieu of,

or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment"); *United States v. Cosme*, 796 F.3d 226, 234 (2d Cir. 2015). While the constitutionality of civil forfeiture may be subject to debate, *see Leonard v. Texas*, 580 U.S. 1178 (2017) (Statement of Thomas, J., respecting the denial of certiorari) ("I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice, . . ."), at present, it remains yet another viable and powerful tool in the government's seemingly unlimited forfeiture arsenal.

Finally, removing the statutory restraints from the government in criminal forfeiture proceeds would expand the government's power and reach, and effectively reverse the trend set by this Court and Congress since the turn of the century, during which time the forfeiture laws have been reformed and the government's 'anything goes' approach has been regulated. *See, e.g.,* CAFRA; *Honeycutt*, *supra*; *Luis v. United States*, 578 U.S. 5 (2016).

IV. CONGRESS INTENDED TO HOLD ALL PARTIES TO THE SAME DEADLINES

The double standard applied by the court below to violations of Rule 32.2 by the government and those by the defendant and third parties further contravenes the principles underlying Congress' overhaul of the

federal forfeiture laws with the enactment of CAFRA. Passed by an overwhelming margin by Congress and signed into law in August 2020, CAFRA was a response to overreaching and forfeiture-related abuses by the government. *See*, *e.g.*, *United States v. One 1990 Beechcraft, 1900 C Twin Engine Turbo-Prop Aircraft, Venezuelan Registration No. YV219T, Serial UC118*, 619 F.3d 1275, 1277 (11th Cir. 2010) (noting that the Judiciary Committee was "gravely concerned about" civil forfeiture abuses involving imposition of "tremendous procedural hurdles" for property owners) (citing, *inter alia*, H.R. Rep. 106-192, at 8); *see generally* Steven L. Kessler, *Civil and Criminal Forfeiture: Federal and State Practice* (Thomson Reuters 2023). CAFRA demonstrates Congress' intent to, at the very least, hold the government to the same level of compliance with deadlines and other rules and standards as the property owners.

As even the former Deputy Chief of the Department of Justice's Asset Forfeiture and Money Laundering Section, Criminal Division, acknowledged,

> The enactment of CAFRA was, in part, a reaction to the perception that there was some inequity in imposing strict deadlines and sanctions on property owners contesting civil forfeiture actions, while not imposing similar deadlines and

> sanctions on the government. The logic was that if property owners were required to file claims within a fixed period of time, and were made to suffer consequences for failing to do so, the government should face deadlines and suffer consequences as well.

Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97, 122-25 (2001).

Equality and consistency in the enforcement of the requirements of Rule 32.2 furthers these important legislative priorities.

CONCLUSION

For all these reasons, this Court should reverse.

Respectfully submitted,

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