No. 17-1203

In the Supreme Court of the United States

MELISA SINGH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an individual who fails to establish a cognizable third-party interest in property that is subject to a preliminary order of criminal forfeiture under 21 U.S.C. 853 and Federal Rule of Criminal Procedure 32.2(b)(2) may nevertheless challenge in an ancillary proceeding under 21 U.S.C. 853(n) the district court's determination that the property in question has a sufficient nexus to criminal conduct to be forfeitable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 711 Fed. Appx. 108. The relevant opinions and orders of the district court (Pet. App. 24-38, 19-23, 12-18, 7-11) are not published in the Federal Supplement but are available at 2015 WL 13628130, 2015 WL 4251088, 2015 WL 4251134, and 2017 WL 4769032.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2017. A petition for rehearing was denied on November 28, 2017 (Pet. App. 39-40). The petition for a writ of certiorari was filed on February 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea by defendant David Nicoll in the United States District Court for the District of New Jersey, the United States obtained a determination that a Manhattan condominium had been purchased with approximately $700,000 of proceeds from an unlawful bribery and kickback scheme conducted by defendant Nicoll, and was therefore forfeitable under 21 U.S.C. 853. In an ancillary third-party proceeding commenced by petitioner under 21 U.S.C. 853(n), the district court determined that petitioner lacked a cognizable third-party interest in that property. Pet. App. 24-38; see *id.* at 12-18 (denying reconsideration). The court accordingly dismissed petitioner's third-party petition, *id.* at 37, and subsequently entered a final order of forfeiture of the property, D. Ct. Doc. 135 (Jan. 26, 2016); Pet. App. 7-11 (denying reconsideration). The court of appeals affirmed. Pet. App. 1-6.

1. In August 2005, defendant Nicoll purchased Biodiagnostic Laboratory Services (BLS), a New Jersey blood laboratory. C.A. Supp. App. SA46-SA47. BLS became the center of a scheme through which defendant Nicoll and his co-conspirators paid bribes, kickbacks, and other remuneration to physicians in order to induce those physicians to refer their patients' blood specimens to the laboratory. Pet. App. 2. At the time that defendant Nicoll purchased BLS in 2005, the company was not profitable. *Id.* at 21. "[B]etween 2006 and 2012," however, "BLS generated over $100 million in profits through referrals from doctors whom BLS bribed." *Ibid.*; see C.A. Supp. App. SA53. BLS would not have generated such high revenues but for defendant Nicoll's bribery and kickback scheme. See C.A. Supp. App. SA53.

Defendant Nicoll used the proceeds of the bribery and kickback scheme to fund a lavish lifestyle, including bestowing gifts on petitioner, with whom he had a romantic relationship. C.A. App. A119-A123; Gov't C.A. Br. 2. In January 2008, during the course of their relationship, defendant Nicoll gave petitioner as a gift the funds to purchase a Manhattan condominium. C.A. Supp. App. SA59-SA60; Gov't C.A. Br. 2. In correspondence before the purchase of the condominium was completed, petitioner stated that she was "receiving the condo as a gift" and her "friend David is paying for it in full." C.A. Supp. App. SA174.

The condominium was paid for using funds from a bank account directly traceable to the BLS operating account into which proceeds of the kickback scheme had been deposited. See Gov't C.A. Br. 2. The condominium was purchased using four cashier's checks totaling $687,860.70 that were acquired with funds from an account at Valley National Bank held in the name of defendant Nicoll. See C.A. Supp. App. SA57, SA59-SA60. During the relevant period, virtually all of the funds in that account at Valley National Bank were derived from an account at PNC Bank also held in defendant Nicoll's name. See *id.* at SA57-SA58. And, in turn, virtually all of the funds in the PNC Bank account were derived from a BLS operating account in which proceeds of the kickback scheme were deposited. See *id.* at SA54-SA56.

2. a. On June 10, 2013, the United States filed an information charging defendant Nicoll with (1) conspiracy in violation of 18 U.S.C. 371 to bribe and pay kickbacks to physicians in violation of 42 U.S.C. 1320a-7b(b)(2)(A) (2012) and to travel and to use the mails in interstate commerce to facilitate an unlawful activity, namely, bribery in

violation of 18 U.S.C. 1952(a)(3) and N.J. Stat. Ann. § 2C:21-10 (West 2015); and (2) with money laundering in violation of 18 U.S.C. 1956(a)(1)(B)(i), 2. Information 1-12. The government additionally sought the criminal forfeiture of property that was or had been derived from proceeds of the conspiracy under 18 U.S.C. 981(a)(1)(C) (2012), 18 U.S.C. 982(a)(1) and 982(a)(7), and 28 U.S.C. 2461. Information 13-15.

Pursuant to a plea agreement, and represented by counsel, defendant Nicoll pleaded guilty to both counts charged in the information. Pet. App. 2; see Plea Agreement 1-8. He additionally admitted that various specific property—including (*inter alia*) the condominium—"ha[d] the requisite nexus to the conspiracy * * * and therefore [wa]s forfeitable to the United States of America as property constituting or derived from proceeds traceable to the conspiracy." Plea Agreement 4; see *id.* at 4-5, 12. Defendant Nicoll also agreed to a money judgment of $50 million. *Id.* at 4.

On October 23, 2013, in light of defendant Nicoll's admissions that the property (including the condominium) constituted or were derived from proceeds of the conspiracy, the district court entered a preliminary order of forfeiture under Federal Rule of Criminal Procedure 32.2(b). D. Ct. Doc. 41; Pet. App. 2, 26. That rule requires that, "[a]s soon as practicable after * * * a plea of guilty," a court must "determine what property is subject to forfeiture," considering "evidence already in the record, including any written plea agreement," and additional evidence, and if any property is subject to forfeiture, the court must "promptly enter a preliminary order of forfeiture." Fed. R. Crim. P. 32.2(b)(1) and (2)(A). Pursuant to 21 U.S.C. 853(n)(1) and Rule 32.2(b)(6), the court directed the government to publish notice of the

forfeiture and to send notice of it "to any person who reasonably appears to be a potential claimant." D. Ct. Doc. 41, at 5.

b. After the government provided the required notice, petitioner filed a petition in the district court asserting an interest in the condominium and commencing an ancillary proceeding under 21 U.S.C. 853(n) and Federal Rule of Criminal Procedure 32.2(c). Pet. App. 26. The court granted the government's motion to dismiss petitioner's petition. *Id.* at 24-38.

The district court explained that, under 21 U.S.C. 853(k) and (n), a third party claiming an interest in property may challenge the preliminary order of forfeiture only to the extent that she alleges either (A) that she had a "legal right, title, or interest in the property" that had vested before or was superior to that of the defendant "at the time of the commission of the acts which gave rise to the forfeiture," or (B) that she was a "bona fide purchaser for value" of the property "and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." Pet. App. 28 (quoting 21 U.S.C. 853(n)(6)); see *id.* at 27-29. "[A]ssum[ing] the facts set forth in the petition to be true" for purposes of ruling on the government's motion to dismiss, the court determined that petitioner's allegations failed to state an entitlement to the condominium on either basis. *Id.* at 29 (citing Fed. R. Crim. P. 32.2(c)(1)(A)); see *id.* at 35-36.

The district court concluded that petitioner could not show that her interest in the condominium was superior to defendant Nicoll's at the time he committed the acts giving rise to the forfeiture. Pet. App. 35-36. The court explained that, under Section 853, the government's interest "'relates back' to the time when [defendant

Nicoll's] unlawful acts began" in 2006, before petitioner (according to her allegations) received the funds to purchase the condominium in January 2008. *Id.* at 35; see 21 U.S.C. 853(c) and (n)(6)(A). The court also determined that petitioner could not show that she was a bona fide purchaser of the condominium because petitioner admitted that defendant Nicoll had given her the money to purchase it as "a gift." Pet. App. 36 (citation and emphasis omitted). "Applying the plain language of the statute," the court concluded, "one who has received a gift of money cannot be a 'purchaser' of it." *Ibid.*

Petitioner additionally argued that the government had not adduced sufficient evidence "to establish a nexus between the Condominium Unit and [defendant Nicoll's] criminal acts." Pet. App. 29. The district court concluded that petitioner was not entitled to raise that argument, because 21 U.S.C. 853(n)(6) authorized relief only if she could establish that the condominium properly belonged to her (rather than defendant Nicoll) by virtue of a superior interest in it at the time of the unlawful acts or status as a bona fide purchaser. Pet. App. 29-32. The court observed that "a clear majority of federal authority precludes a third-party challenge to" the forfeitability of the property. *Id.* at 32. The court accordingly determined that it was required to dismiss petitioner's third-party petition. *Id.* at 32, 37.

However, in order to "cautiously ensure that the statutory requirements underpinning forfeiture [were] satisfied" before entering a final order of forfeiture, the district court sua sponte elected to "revisit" its earlier determination that a sufficient nexus existed between defendant Nicoll's conspiracy and the condominium. Pet. App. 32. The court explained that the government's prior submission consisted of defendant Nicoll's

admissions in connection with his plea agreement and that the court was "not required to find that a nexus exists on the basis of [that] admission." *Id.* at 33 (citing *Libretti* v. *United States*, 516 U.S. 29, 43 (1995)). The court nonetheless "direct[ed] the Government to submit additional factual stipulations, affidavits, and/or other documentary evidence of its choosing, which will make the necessary nexus showing." *Id.* at 35.

c. Petitioner filed a motion for reconsideration of the district court's decision dismissing her third-party petition. Pet. App. 12. Meanwhile, the government submitted ex parte a brief and supporting declaration setting forth the factual basis for the forfeiture of the condominium and provided a redacted copy to petitioner. See C.A. Supp. App. SA27-SA179; Gov't C.A. Br. 4.

On July 9, 2015, the district court issued an order determining that the government "ha[d] demonstrated the requisite nexus between Defendant Nicoll's criminal acts and the Condominium." Pet. App. 19; see *id.* at 19-23. The court found that BLS was "tainted by a widespread bribery scheme"; that prior to that scheme, BLS was not profitable; and that during the scheme, BLS generated more than $100 million in profits from bribed doctors. *Id.* at 21. The court additionally found that, although BLS also generated funds through legitimate means, the government had established that "'the very nucleus of [the BLS] business model [was] rotten and malignant' and that its 'entire operation was permeated with fraud.'" *Id.* at 22 (quoting *United States* v. *Warshak*, 631 F.3d 266, 332 (6th Cir. 2010)) (brackets in original). The court concluded that, "[b]ecause BLS depended on massive fraud," the entire proceeds of BLS were "tainted by criminality." *Ibid.* The court further determined that the funds used to purchase the

condominium were directly traceable to criminal proceeds. *Id.* at 22-23.

In a separate order issued the same day, the district court denied petitioner's motion for reconsideration. Pet. App. 12-19. Petitioner filed a notice of appeal from all three of the court's orders.

d. The district court subsequently entered a final order of forfeiture of the condominium. C.A. App. A22-A27; see Gov't C.A. Br. 5. Petitioner filed a motion in the district court for reconsideration of that final order of forfeiture, which the court denied. Pet. App. 7-11. Petitioner filed an amended notice of appeal to encompass that ruling. C.A. App. A32.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-6. On appeal, petitioner contended that the district court had erred in permitting the government to submit supplemental documentation to demonstrate the requisite nexus between defendant Nicoll's criminal acts and the forfeited condominium. *Id.* at 3-4. The court of appeals explained that it "need not address whether the District Court committed procedural error * * * because, even if it did, that error is irrelevant to [petitioner's] claimed third-party interest" in the condominium. *Id.* at 4.

The court of appeals explained that Federal Rule of Criminal Procedure 32.2 "creates a bifurcated forfeiture procedure for all interested parties." Pet. App. 4. At the first stage, the sentencing court makes a preliminary determination of whether the property is forfeitable "without regard to any third party's interest." *Ibid.* (quoting Fed. R. Crim. P. 32.2(b)(2)(A)). The court of appeals reasoned that "[t]hird parties are immaterial to the requisite nexus analysis" underlying such a determination, because the determination "affects only

the rights of the defendant." *Ibid.* The court explained that the first step "is a procedural safeguard to protect the defendant"; "the Rule's purpose is to require that the Government demonstrate why forfeiture of the defendant's property is appropriate to ensure that it does not wrongly seize property unrelated to a defendant's criminal activity." *Ibid.* The court observed that, under 21 U.S.C. 853(k), third parties "are expressly barred from intervening in" this first stage. Pet. App. 4; see 21 U.S.C. 853(k) ("Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under [Section 853] may" either "intervene in a trial or appeal of a criminal case involving the forfeiture of such property" or "commence an action at law or equity against the United States" to challenge the forfeiture.).

The court of appeals explained that 21 U.S.C. 853 and Rule 32.2 instead channel claims by third parties asserting an interest in property subject to forfeiture to the second stage of the forfeiture proceedings. Pet. App. 3-4. In that second stage, the court observed, a third party "may file an ancillary proceeding" in which she seeks to establish an entitlement to the property under one of the two grounds set forth in 21 U.S.C. 853(n)(6): either "a vested right in the property superior to that of the defendant," or status as "a *bona fide* purchaser of the property." Pet. App. 3. The court thus found that "[t]he only relevant question" with respect to the third party in that ancillary proceeding is "whether she ha[s] a third-party interest in the property for the purpose of forfeiture," *i.e.*, whether the third party has "establishe[d] [her] superseding or *bona fide*-purchaser interest[] in the forfeited property." *Id.* at 4-5. The court explained that the ancillary proceeding "does not

provide the opportunity to re-litigate matters pertinent to the prior stage of the proceedings from which that third party was statutorily excluded." *Ibid.*

The court of appeals accordingly determined that petitioner's assertion of procedural error was irrelevant to the substance of any claim she could raise. Pet. App. 5. "Per the Rule and the forfeiture statute," the court explained, "any error would implicate [defendant] Nicoll's property rights, not [petitioner's]." *Ibid.* "Whether the District Court followed the exact steps outlined in Rule 32.2(b)" in determining that the property had the requisite nexus to defendant Nicoll's conspiracy, the court concluded, "is of no import to [petitioner]." *Ibid.* The court of appeals also noted that, in any event, the district court had ultimately determined that the government had "met its burden in demonstrating the requisite nexus between the condominium and proceeds from [defendant] Nicoll's criminal activity before entering the final forfeiture order." *Id.* at 5 n.1.

The court of appeals observed that petitioner did not contest on appeal the district court's findings that she lacked either type of interest that 21 U.S.C. 853(n)(6) permits a third party to assert in ancillary proceedings. Pet. App. 5-6. The court of appeals found it was "undisputed that [petitioner] purchased the condominium during the commission of [defendant] Nicoll's criminal scheme"—not before it had begun—and therefore she lacked a superior property right in the condominium "at the time of the commission of the acts which gave rise to the forfeiture" under 21 U.S.C. 853(n)(6)(A). Pet. App. 5. Nor did petitioner contest the district court's finding that, because she admitted that she received the money to purchase the condominium as gift from defendant

Nicoll, she was not a bona fide purchaser of the condominium under 21 U.S.C. 853(n)(6)(B). Pet. App. 5. The court of appeals thus determined that, "[u]nder the forfeiture statute," petitioner "ha[d] no third-party interest in the property that warrants its excision from the stipulated list of property in the forfeiture order." *Id.* at 6.

ARGUMENT

Petitioner contends (Pet. 17-31) that the district court erred by prohibiting her from challenging in a third-party ancillary proceeding the court's earlier determination in its preliminary order of forfeiture that a sufficient nexus existed between property and the defendant's criminal scheme to render it forfeitable. The court of appeals correctly determined that, because petitioner undisputedly failed to establish a cognizable interest in the property recognized by 21 U.S.C. 853(n)(6), she could not challenge the forfeiture of the property on the theory that the district court committed procedural error in finding that the property was sufficiently linked to criminal activity. Its unpublished decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Criminal forfeiture proceedings are governed, in relevant part, by 21 U.S.C. 853 and Federal Rule of Criminal Procedure 32.2. Rule 32.2 requires that, "[a]s soon as practical after * * * a plea of guilty * * * , on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute." Fed. R. Crim. P. 32.2(b)(1)(A). If the government seeks forfeiture of specific property, the district court must determine whether the government "has established the requisite nexus between the property and the offense." *Ibid.* That determination

may be made "based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B).

If the district court finds that property is subject to forfeiture, it must enter a preliminary order of forfeiture "without regard to any third party's interest in the property." Fed. R. Crim. P. 32.2(b)(2)(A). Instead, "[d]etermining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c)." *Ibid.* Section 853(k) specifies that a third party cannot intervene in a criminal case involving the forfeiture of property and may assert an interest in the property only as provided in Section 853(n). 21 U.S.C. 853(k); see *Libretti* v. *United States*, 516 U.S. 29, 44 (1995) ("Once the Government has secured a stipulation as to forfeitability, third-party claimants can establish their entitlement to return of the assets only by means of the hearing afforded under 21 U. S. C. § 853(n).").[1]

Section 853(n) and Rule 32.2(c) establish a procedure through which a third party claiming a cognizable interest in property subject to a preliminary forfeiture order can seek to demonstrate that she is the "'rightful owner[]' of forfeited assets." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 629 (1989); see

[1] Section 853(i) also provides that the Attorney General may "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims * * * , or take any other action to protect the rights of innocent persons which is in the interest of justice." 21 U.S.C. 853(i)(1); see 28 C.F.R. Pt. 9 (regulations governing petitions for mitigation or remission of forfeiture). Petitioner has not sought such relief.

21 U.S.C. 853(n); Fed. R. Crim. P. 32.2(c). A third party claiming such an interest may file a petition with the district court requesting that the court conduct "a hearing to adjudicate the validity of [the third party's] interest in the property," and must set forth in the petition the "facts supporting the [third-party] petitioner's claim." 21 U.S.C. 853(n)(2) and (3). After conducting the hearing, the court "shall amend the order of forfeiture" if it finds that the third party "has established by a preponderance of the evidence" either of two things: (A) that the third party had a vested right in the property superior to that of the defendant "at the time of the commission of the acts which gave rise to the forfeiture of the property under this section," such that the "order of forfeiture" is "invalid in whole or in part"; or (B) that the third party was "a bona fide purchaser for value" of the property "and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. 853(n)(6); see Fed. R. Crim. P. 32.2(c)(2) (requiring court to "enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights" upon third party's establishment of valid ownership interest).

2. The court of appeals correctly applied those provisions here in determining that petitioner failed to establish a cognizable property interest under 21 U.S.C. 853(n)(6) and that the district court therefore properly dismissed her third-party petition. Pet. App. 3-6. As the court of appeals explained, the district court found that petitioner neither had a property right superior to defendant Nicoll's at the time the government's interest vested nor was a bona fide purchaser for value. *Id.* at 5-6. On appeal, petitioner "d[id] not contest th[ose]

findings," *id.* at 6, and in any event those findings were correct.

The district court correctly determined that petitioner could not establish a vested right in the condominium that was "superior" to that of defendant Nicoll "at the time of the commission of the acts which gave rise to the forfeiture of the property." Pet. App. 5 (quoting 21 U.S.C. 853(n)(6)(A)). As the court explained, defendant Nicoll's bribery scheme commenced in 2006. *Id.* at 35-36; see Information 8; C.A. Supp. App. SA50-SA53. According to petitioner's allegations—which the court "assume[d] * * * to be true" for purposes of ruling on the government's motion to dismiss petitioner's third-party petition—she received from defendant Nicoll the funds to purchase the condominium nearly two years later, in January 2008. Pet. App. 29; see *id.* at 35-36. Petitioner thus did not have a superseding interest in the condominium at the time of defendant Nicoll's "acts which gave rise to the forfeiture." 21 U.S.C. 853(n)(6)(A).

Petitioner suggests (Pet. 4) in this Court that the condominium belongs to her because she "took sole title to and possession of the property" years before the forfeiture proceeding commenced. That is incorrect. Under 21 U.S.C. 853(c), "[a]ll right, title, and interest in property" that is subject to forfeiture under Section 853(a) "vests in the United States upon the commission of the act giving rise to forfeiture under this section," not when the district court issues a forfeiture order. *Ibid.*; see *Luis* v. *United States*, 136 S. Ct. 1083, 1090 (2016). If a defendant transfers property that is subject to forfeiture to a third party after title has vested in the United States, that property "shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona

fide purchaser for value" and "at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. 853(c); see *Caplin & Drysdale*, 491 U.S. at 622-623 (explaining that Section 853(c) provides for "recapture of forfeitable assets transferred to third parties").

As the district court recognized, the government's interest in the condominium here thus "relates back" to the date of defendant Nicoll's acts giving rise to the forfeiture. Pet. App. 35. The government's interest in the proceeds of defendant Nicoll's scheme vested when those proceeds were generated from his unlawful acts, see 21 U.S.C. 853(c), and the government's vested interest carried over to the condominium when it was acquired because it was "derived from" those proceeds, 21 U.S.C. 853(a)(1). Neither the offense proceeds used to purchase the condominium nor the condominium itself, therefore, were defendant Nicoll's to give. See, *e.g.*, *United States* v. *Martinez*, 228 F.3d 587, 590 (5th Cir. 2000) (under "relation back doctrine," spouse of defendant could not acquire interest in property purchased with proceeds of illegal activity). Defendant Nicoll's subsequent transfer of part of the proceeds of his criminal scheme to petitioner was accordingly irrelevant unless petitioner demonstrated that she was a bona fide purchaser.[2]

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[2] Petitioner asserts that the district court erred by entering a final order of forfeiture without determining that defendant Nicoll himself "had any interest in the property." Pet. 9 (citing Fed. R. Crim. P. 32.2(c)(2)). The portion of Rule 32.2 petitioner cites, however, applies only "[i]f no third party files a timely petition." Fed. R. Crim. P. 32.2(c)(2); see Fed. R. Crim. P. 32.2 advisory committee's note (2000). That provision is inapplicable here because petitioner filed a third-party petition.

On that issue, the district court correctly determined that petitioner was not a bona fide purchaser of the condominium for value under Section 853(n)(6)(B) because she received the funds to acquire it as a gift. Pet. App. 36-37. Before the condominium's purchase, petitioner informed the title company handling the sale that "I am receiving the condo as a gift. My friend David is paying for it in full." C.A. Supp. App. SA174 (citation omitted). As the court explained, under "the plain language" of 21 U.S.C. 853(n)(6)(B), petitioner thus could not be a bona fide purchaser because "one who has received a gift of money cannot be a 'purchaser' of it." Pet. App. 36. The bona-fide-purchaser exception protects only those who unwittingly purchase forfeitable property in an arm's length transaction—not those, like petitioner, who received forfeitable property for free. See *United States* v. *Kennedy*, 201 F.3d 1324, 1335 (11th Cir. 2000) ("The criminal forfeiture provisions provide only two ways for third parties to establish their interest in forfeited property; and one of them is emphatically *not* that the criminal defendant gave the third party a gift.").

In any event, the district court's fact-dependent determination that petitioner failed to establish a cognizable interest in the condominium under Section 853(n)(6) does not warrant this Court's review. Such review would be particularly unwarranted in light of petitioner's failure to contest those issues on appeal.

3. In the district court, petitioner sought to challenge the court's forfeiture determination on the theory that the government had not established a nexus between the condominium and defendant Nicoll's criminal acts. Pet. App. 29. In this Court, petitioner contends (Pet. 17-31) that the district court erred by declining to entertain that challenge. That is incorrect.

a. As the court of appeals correctly observed, at the first stage of forfeiture proceedings, "only the [g]overnment and the defendant are involved." Pet. App. 4. Criminal forfeiture is an in personam proceeding against a defendant, see *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1635 (2017), in which only the government and the defendant may participate, see 21 U.S.C. 853(k). Section 853(k) expressly provides that a third party claiming an interest in property may not intervene in the criminal proceeding to dispute the forfeiture and must assert any legal claim to forfeited property through the procedure prescribed in Section 853(n). *Ibid.* Rule 32.2 accordingly makes clear that a court must enter a preliminary order of forfeiture "without regard to any third party's interest." Fed. R. Crim. P. 32.2(b)(2)(A); Fed. R. Crim. P. 32.2 advisory committee's note (2000) (explaining that an ancillary proceeding "does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the forfeited property"). The district court here thus appropriately declined to permit petitioner to challenge its nexus finding during the subsequent ancillary proceeding petitioner commenced.

Petitioner contends (Pet. 21-22) that the court of appeals' application of Section 853(k) here "contravenes" this Court's decision in *Libretti*, *supra*. To the contrary, *Libretti* supports the court of appeals' conclusion and undermines petitioner's contrary position. In *Libretti*, a criminal defendant argued that Federal Rule of Criminal Procedure 11(f), which requires that a district court ascertain the factual basis for a guilty plea before entering judgment, also required the court to ascertain the factual basis for a stipulated forfeiture of

assets. 516 U.S. at 37-38. The defendant contended "that a Rule 11(f) factual basis inquiry is essential to preserving third-party claimants' rights," because "[a] defendant who has no interest in particular assets * * * will have little if any incentive to resist forfeiture of those assets, even if there is no statutory basis for their forfeiture," and a hearing under Section 853(n) "is inadequate to safeguard third-party rights." *Id.* at 44. This Court rejected that contention. *Ibid.* "Whatever the merits of this argument as a matter of policy," the Court concluded, "Congress has determined that § 853(n) * * * provides the means by which third-party rights must be vindicated." *Ibid.* Thus, "[o]nce the Government has secured a stipulation as to forfeitability," as in this case, "third-party claimants can establish their entitlement to return of the assets only by means of the hearing afforded under 21 U.S.C. § 853(n)." *Ibid.* And Section 853(n) does not allow for a third party to relitigate the existence of a nexus between the defendant's criminal acts and the property that gives rise to the government's interest in the property. See Fed. R. Crim. P. 32.2 advisory committee's note (2000). Instead, Section 853(n)(6) permits a third party only to establish in the ancillary proceeding that she has a superseding cognizable interest in the property of the type recognized by Section 853(n)(6).

Petitioner nevertheless contends (Pet. 21) that the decision below is inconsistent with *Libretti* because the Court there "affirmed the critical importance of ensuring that *all* criminal forfeitures are supported by facts connecting the property to the criminal activity." Petitioner's contention is mistaken. As petitioner notes (Pet. 20), the Court in *Libretti* stated that a district court does not have to accept a defendant's agreement

to forfeit property, "particularly when that agreement is not accompanied by a stipulation of facts supporting forfeiture, or when the trial judge for other reasons finds the agreement problematic." 516 U.S. at 43. But the Court did not hold that, when a defendant stipulates to forfeiture of assets in a plea agreement and expressly admits that those assets have the "requisite nexus" to the crime charged, a district court must also make additional factual findings of forfeitability. See *id.* at 38-39. Indeed, petitioner cites no decision in which a court of appeals has reversed an order of forfeiture that rested on a defendant's express stipulation that the asset in question had the requisite nexus to the crime charged.[3]

Petitioner also asserts (Pet. 22-24) that precluding third parties in ancillary proceedings from challenging the district court's finding of a nexus between forfeited property and the defendant's criminal scheme violates due process. That contention was neither properly "pressed nor passed upon" below and is accordingly not appropriate for review in this Court. *Clark* v. *Arizona*, 548 U.S. 735, 765 (2006); see, *e.g.*, *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 237 (1990). In the court of appeals, petitioner made only a glancing, conclusory allusion to her "due process rights," Pet. C.A. Br. 28;

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[3] Petitioner cites (Pet. 23-24) a pre-*Libretti* Eleventh Circuit decision affirming an award of attorney's fees to a successful third-party petitioner, in which the court of appeals noted that the district court's acceptance of a guilty plea does not necessarily mean that the court "found a 'factual basis' for the criminal forfeitures recited in the plea agreement." *United States* v. *Douglas*, 55 F.3d 584, 588 (1995). It does not follow, however, that a defendant's express stipulation to a nexus between his crimes and property is insufficient to support forfeiture of that property.

see generally Pet. C.A. Reply Br. 1-30, and the court of appeals did not address any due-process contention.

In any event, petitioner's due-process argument lacks merit. To have a property interest protected by the Due Process Clause, petitioner must show "a legitimate claim of entitlement" to property that "stem[s] from an independent source such as state law." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756 (2005) (citations omitted). Pursuant to Section 853(n), the district court afforded petitioner ample opportunity to establish a cognizable, legal right to the condominium in the ancillary proceeding, but she failed to do so. See pp. 5-6, *supra*. In addition, individuals may file petitions for remission or mitigation of forfeiture by the Attorney General under 21 U.S.C. 853(i), seeking the return of property or proceeds of a forfeiture, pursuant to procedures set forth in 28 C.F.R. Pt. 9. Petitioner has not pursued any such petition. Petitioner has not demonstrated that those procedures were inadequate to protect any legitimate property right she had. See *DSI Assocs. LLC* v. *United States*, 496 F.3d 175, 186-187 (2d Cir. 2007) (rejecting due-process challenge to Section 853(n) procedure).

b. Petitioner contends (Pet. 12-17) that the decision below implicates a lower-court conflict concerning whether a third party may challenge the nexus between the forfeited property and the offense. That is incorrect.

Every court of appeals to address the issue, including the court below, has stated that an ancillary proceeding under Section 853(n) is the only avenue by which a third party may challenge forfeiture of property under the criminal forfeiture statute. See *United States* v. *Watts*, 786 F.3d 152, 175 (2d Cir. 2015); *United States* v. *Reckmeyer*, 836 F.2d 200, 203 (4th Cir. 1987); *United*

States v. *Holy Land Found. for Relief & Dev.*, 722 F.3d 677, 689-690 (5th Cir. 2013); *United States* v. *Fabian*, 764 F.3d 636, 638 (6th Cir. 2014); *United States* v. *Messino*, 122 F.3d 427, 428 (7th Cir. 1997); *United States* v. *Porchay*, 533 F.3d 704, 707, 710 (8th Cir. 2008); *United States* v. *Andrews*, 530 F.3d 1232, 1236-1237 (10th Cir. 2008); *United States* v. *Davenport*, 668 F.3d 1316, 1321 (11th Cir.), cert. denied, 566 U.S. 1035 (2012); *United States* v. *Emor*, 785 F.3d 671, 675 (D.C. Cir. 2015); see also *United States* v. *Lazarenko*, 476 F.3d 642, 648, 650-651 (9th Cir. 2007) (dismissing third parties' appeal of district court's preliminary order of forfeiture and order denying third parties an immediate hearing, explaining that third parties must raise challenges in ancillary proceedings); *United States* v. *Real Prop. in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995) (stating that, although third parties may participate in hearing regarding a pre-forfeiture restraining order, "[t]o challenge the forfeitability of [property, petitioners] must await the entry of an order of forfeiture and petition for a hearing under § 853(n)(2)"); *United States* v. *Lavin*, 942 F.2d 177, 185 (3d Cir. 1991) (stating that Section 853(n)(6) "afford[s] two narrow categories of third parties standing to petition the courts to determine the validity of their claims to forfeited assets," and "[f]or the majority of third parties * * * who assert an equitable, rather than legal, entitlement to relief, petitioning the Attorney General for remission and mitigation remains the exclusive remedy" (footnote omitted)); Pet. App. 3-4.

Petitioner identifies no decision of any court of appeals holding that Section 853 permits a third party to prevent the entry of a forfeiture order on the ground that the property is unconnected to the defendant's crime.

She asserts that the Fourth, Ninth, and D.C. Circuits have held that a third-party petitioner may challenge the underlying forfeitability of contested property. Pet. 14-15 (citing *Reckmeyer*, *supra*, *Lazarenko*, *supra*, and *Emor*, *supra*). But none of the cited decisions supports petitioner's position.

In *Reckmeyer*, the Fourth Circuit considered the scope of the term "bona fide purchaser for value" in 21 U.S.C. 853(n)(6)(B). 836 F.2d at 206-210. The court stated that "[s]erious due process questions would be raised * * * if third parties asserting an interest in forfeited assets were barred from challenging the validity of the forfeiture" and determined to "resolve all ambiguities in the text of the statute in a manner that will avoid this possible constitutional infirmity." *Id.* at 206. The court of appeals accordingly interpreted the term "bona fide purchaser for value" "liberally" to "include all persons who give value to the defendant in an arms'-length transaction with the expectation that they would receive equivalent value in return," even if that transaction was not completed prior to entry of the order of forfeiture. *Id.* at 208. The Fourth Circuit did not conclude that bona fide purchasers may challenge the preliminary order of forfeiture independently of asserting their own interests as bona fide purchasers.

The Fourth Circuit's statement in *Reckmeyer* that the third parties' claim "attack[ed] the validity of the forfeiture order itself," 836 F.2d at 206, simply described the legal consequence that would follow if the third parties prevailed on their claim that they had an interest akin to that of a bona fide purchaser in property they had transferred to the defendant that was "included within the forfeiture order," *ibid.* If the third parties prevailed, then the property would not constitute "profits or proceeds

of the criminal enterprise and therefore" would not be "forfeitable in the first instance." *Ibid.* The court's description of the legal implication of a ruling that the third parties were entitled to the property as undermining the "validity" of the forfeiture order is unremarkable. Section 853(n)(6)(A), which addresses the other basis on which a third party may claim property in an ancillary proceeding, expressly contemplates that a third party's showing that he had a "legal right, title, or interest in the property" superior to the defendant's at the time of the commission of the acts giving rise to the forfeiture will "render[] the order of forfeiture invalid in whole or in part." 21 U.S.C. 853(n)(6)(A). Section 853(k) and (n)(6) permit a third party to assert claims to property that, if successful, will have the effect of rendering the preliminary forfeiture order invalid. But those provisions allow a third party to raise only certain types of claims and foreclose any challenge to a forfeiture order independent of the third party's claim of a valid interest in the property.

In *Lazarenko*, the Ninth Circuit dismissed a third party's appeal of a district court's preliminary order of forfeiture, which the third party had filed before the commencement of Section 853(n) ancillary proceedings. 476 F.3d at 645-653. The Ninth Circuit stated that the third party had no "standing to invoke the jurisdiction of this Court before the district court concludes ancillary proceedings." *Id.* at 645. The Ninth Circuit observed that the law is "settled that an ancillary proceeding constitutes the only avenue for a third party claiming an interest in seized property." *Id.* at 648 (citing *Libretti*, 516 U.S. at 44). That decision is fully consistent with the court of appeals' decision in this case.

Petitioner's reliance on the Ninth Circuit's decision in a subsequent appeal in the same underlying case, Pet. 14 (citing *United States* v. *Liquidators of European Fed. Credit Bank*, 630 F.3d 1139 (9th Cir. 2011)), is misplaced. The Ninth Circuit in the subsequent appeal did not conclude that third parties in ancillary proceedings ordinarily may challenge the basis of a preliminary order of forfeiture apart from asserting their own valid interest in the property. The court determined only that the government was judicially estopped in that case from arguing that the third party claiming an interest in forfeitable property could not challenge the forfeiture. See 630 F.3d at 1146-1149. According to the Ninth Circuit, the government had argued in the first appeal (which the court of appeals had dismissed) that permitting the third party to appeal the preliminary order of forfeiture was unnecessary because the third party would be able to "present all arguments and defenses to defeat the government's forfeiture" in the Section 853(n) ancillary proceedings. *Id.* at 1148 (citation omitted). The Ninth Circuit reasoned that for purposes of that case the government was bound by that representation. The court expressly declined to address "whether, and to what extent, third parties may challenge forfeitability in an ancillary proceeding where judicial estoppel plays no role." *Id.* at 1147 n.4.

Finally, in *Emor*, *supra*, the D.C. Circuit held (as relevant) only that the district court there had violated Rule 32.2 by failing to assume, in ruling on a motion to dismiss a third-party petition under Section 853(n), that "the facts set forth in the petition are * * * true." 785 F.3d at 677. After the district court had issued a preliminary order of forfeiture, a third party had filed a petition asserting a claim to certain forfeited property.

Id. at 674-676. The district court had dismissed that petition, concluding that the third party lacked standing to assert a third-party claim in light of the court's finding at the first phase of the forfeiture proceeding that the third party was an alter ego of the defendant. *Ibid.* The court of appeals determined that the district court had erred "to the extent the district court relied on an alter ego finding drawn from outside the petition and made during a proceeding in which [the third party] could not represent its own interests." *Id.* at 677. The court of appeals stated that "requiring courts to stick to the pleadings when determining whether a petitioner has failed to state a valid claim for relief * * * fortifies the due process concerns associated with stripping third parties of property rights based on proceedings in which they had no prior opportunity to participate." *Ibid.* The court of appeals' discussion of the proper treatment of the allegations in the third-party petition, in circumstances where the third party's own status had been at issue in an earlier stage of the case, has no bearing on the ability of a third party like petitioner to challenge the underlying determination of forfeitability.

c. Even if the question petitioner presents regarding the ability of third parties in ancillary proceedings to challenge the nexus between forfeited property and a defendant's criminal acts otherwise warranted review, this case would be an unsuitable vehicle to resolve it. Despite the district court's conclusion that petitioner lacked standing to challenge the court's previous finding of such a nexus, the court nevertheless chose to revisit its finding sua sponte and directed the government to submit additional evidence. Pet. App. 32-35. The government did so, and a redacted version of its submission was provided to petitioner. See p. 7, *supra*.

As the court of appeals observed, after receiving the additional evidence, the district court "determined that the Government met its burden in demonstrating the requisite nexus between the condominium and proceeds from [defendant] Nicoll's criminal activity before entering the final forfeiture order." Pet. App. 5 n.1; see *id.* at 19-23. In particular, the district court found that the government proved by a preponderance of the evidence that "the [c]ondominium would have not been acquired 'but-for' [defendant] Nicoll's crimes." *Id.* at 21 (quoting *United States* v. *Ofchinick*, 883 F.2d 1172, 1183 (3d Cir. 1989), cert. denied, 493 U.S. 1034 (1990)). Before defendant Nicoll's bribery scheme, BLS was not profitable; during the course of the scheme, the company generated more than $100 million in profits through referrals from doctors whom BLS bribed. *Id.* at 20. Although "[n]ot every dollar from BLS came from the criminal scheme," the government established that "'the very nucleus of the BLS business model was rotten and malignant' and that its 'entire operation was permeated with fraud.'" *Id.* at 21-22 (quoting *United States* v. *Warshak*, 631 F.3d 266, 332 (6th Cir. 2010)) (brackets omitted). Moreover, "[b]ecause BLS depended on massive fraud, BLS's proceeds are tainted by criminality." *Id.* at 22. In addition, the district court found that BLS deposited all profits from its unlawful scheme into a BLS operating account, which wholly funded the defendant Nicoll's PNC account, which in turn wholly funded his Valley National Bank account, which in turn was used to purchase the condominium. *Id.* at 22-23.

Petitioner did not challenge those factual findings in the district court or in the court of appeals. See, *e.g.*, Pet. C.A. Reply Br. 12 n.2. And even if petitioner had

preserved such a challenge, the district court's highly factbound determination that a sufficient nexus existed would not warrant this Court's review. In light of the district court's sua sponte reconsideration of the nexus issue and its conclusion that the required nexus existed, petitioner is highly unlikely to prevail in this case even if the district court erred in its view that petitioner herself was not entitled to reopen that issue.

Petitioner did argue in the court of appeals, and briefly argues in this Court (Pet. 29-31), that the district court committed procedural error by revisiting its previous finding of the required nexus after having entered the preliminary order of forfeiture. See Pet. C.A. Reply Br. 14-22. The court of appeals, however, expressly declined to decide the merits of that assertion of procedural error because it determined that petitioner lacked any cognizable interest in the question of whether such procedural error occurred. Pet. App. 4-6. The absence of any ruling below on this issue strongly counsels against this Court's review. See *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (explaining that, as "'a court of review, not of first view,'" the Court ordinarily "decline[s] to consider * * * in the first instance" issues not adjudicated by the court below" (citation omitted)). Petitioner also does not identify any court of appeals that has held such a procedure to be improper.

In any event, petitioner's claim of procedural error lacks merit. Petitioner cites no statute or precedent establishing that a district court may not amend a preliminary order of forfeiture prior to entry of a final order of forfeiture. A preliminary order of forfeiture does not become final as to a defendant until either the defendant is sentenced or he consents to its finality as

to him, whichever is earlier, and it does not become final as to any third party until the conclusion of ancillary proceedings. Fed. R. Crim. P. 32.2(b)(4)(A).[4] Here, the district court did not enter a final order of forfeiture as to the condominium until January 2016, Pet. App. 7—more than six months after the court determined that the government had demonstrated the requisite nexus between the condominium and the defendant's crimes, *id.* at 19-23, and that petitioner could not challenge the forfeiture under Section 853(n), *id.* at 24-38. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Defendant Nicoll agreed that the forfeiture could become final as to his interest prior to sentencing, pursuant to Federal Rule of Criminal Procedure 32.2(b)(4)(A). See D. Ct. Doc. 41, at 2. He has not yet been sentenced.