No. 19-1222

In the Supreme Court of the United States

NATHAN DUCKWORTH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported the district court's finding, by a preponderance of the evidence after a bench trial, that $144,780 in vacuum-sealed bags in petitioner's car was subject to civil forfeiture under 21 U.S.C. 881(a)(6) because petitioner intended to exchange it for unlawful drugs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rule:

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-16a) is not published in the Federal Reporter but is reprinted at 792 Fed. Appx. 573. The order of the district court (Pet. App. 17a-30a) is not published in the Federal Supplement but is available at 2018 WL 4063497.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2019. A petition for rehearing was denied on November 13, 2019 (Pet. App. 31a). On January 27, 2020, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including April 13, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2015, the government filed an *in rem* action in the United States District Court for the District of Kansas seeking civil forfeiture, under 21 U.S.C. 881(a)(6), of currency discovered during a roadside search of a car. The government alleged that the currency was intended to be used in, or represented the proceeds of, an illegal drug transaction. Following a bench trial, the district court ordered the forfeiture of the funds. Pet. App. 17a-30a. The court of appeals affirmed. *Id.* at 1a-16a.

1. In May 2015, a trooper from the Kansas Highway Patrol stopped petitioner for speeding on Interstate 70. Pet. App. 2a. During the stop, the trooper detected the odor of burnt marijuana. *Ibid.* Petitioner told the trooper that he was traveling to Denver for a weeklong vacation—an answer that the trooper found suspicious because the vehicle contained no luggage and because the vehicle was a rental car that was due back to the rental company that same day. *Ibid.*

The trooper searched the car and found $144,780 in United States currency—stored in two vacuum-sealed plastic bags that were in turn placed in a backpack between the driver and passenger seats. Pet. App. 2a. The trooper also found small particles of marijuana in the car. *Id.* at 2a-3a. Later, a drug-detection dog detected a narcotic odor on the currency, and a background check revealed that petitioner had two previous arrests for drug trafficking. *Id.* at 3a.

2. The government brought this civil action seeking forfeiture of the currency that had been discovered and seized during the stop. Pet. App. 17a-18a. The government relied on 21 U.S.C. 881(a)(6), which provides that "[a]ll moneys, negotiable instruments, securities, or

other things of value furnished or intended to be furnished by any person in exchange for a controlled substance" and "all proceeds traceable to such an exchange" are "subject to forfeiture." Petitioner filed a claim to the currency. Pet. App. 18a.

Following a bench trial, the district court determined that the currency was subject to forfeiture. Pet. App. 17a-30a. The court found that the government had shown by a preponderance of the evidence that petitioner had intended to exchange the currency "for a large quantity of marijuana or other controlled substances, which he then planned to distribute." *Id.* at 28a. In making that finding, the court observed that petitioner had lied to the trooper about the reason for his trip, that the amount of currency found in the car was unusually large, that petitioner had placed the currency in vacuum-sealed bags, that petitioner had obtained $40,000 of the currency through an "extraordinary" loan that he had promised to repay "with 50% interest in two months," and that petitioner had a previous federal conviction for drug trafficking. *Ibid.*

The district court rejected petitioner's alternative explanation for the trip—that he was an event promoter who was carrying the money to invest with someone he had never met in person for purposes of a musical tour—as "implausib[le]." Pet. App. 28a. The court found that there was "no evidence" of such a tour—"no artists, venues, dates, locations * * * or other details"—and that it was in any event "doubtful" that "a large sum of cash like this would be used to fund a legitimate musical tour." *Id.* at 25a-26a. The court also emphasized petitioner's "lack of credibility generally," noting that he had lied to the trooper about the purpose of his trip and

that "[h]is answers to numerous questions at trial were evasive or non-responsive." *Id.* at 26a-27a.

3. The court of appeals affirmed in an unpublished, nonprecedential opinion. Pet. App. 1a-16a.

As relevant here, the court of appeals rejected petitioner's contention that insufficient evidence supported the forfeiture order. Pet. App. 10a-16a. Petitioner argued that a separate statutory provision, 18 U.S.C. 983(c)(3), required the government to prove a "substantial connection between the property and the offense" before it could obtain the forfeiture. Pet. App. 10a. The court was "not convinced" that that provision applied in this case. *Ibid.* But the court "decline[d] to address whether such a showing is required here," because "the parties did not fully brief the issue" and because "the evidence in this case [was] sufficient" to demonstrate "a substantial connection * * * between the $144,780 and illegal drug trafficking." *Id.* at 11a. The court found that the "totality" of the facts—the discovery of "large quantities of cash" in "vacuum-sealed plastic bags," "the odor of marijuana coming from [the] vehicle," "the presence of drugs in [the] vehicle," petitioner's "l[ies] to a law enforcement officer," petitioner's "criminal history involving drugs," and petitioner's "implausible" explanation for transporting the currency—provided "sufficient evidence" that petitioner "intended to exchange the $144,780 for a controlled substance" and that "the $144,780 is substantially connected to illegal drug trafficking." *Id.* at 11a-16a.

ARGUMENT

Petitioner contends (Pet. 9-24) that the court of appeals erred in affirming the forfeiture of the currency seized during his traffic stop. The court of appeals' unpublished decision was correct and does not conflict

with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, authorizes forfeiture of, among other things, (1) "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of [the Controlled Substances Act]," (2) "all proceeds traceable to such an exchange," and (3) "all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation." 21 U.S.C. 881(a)(6). The Civil Asset Forfeiture Reform Act of 2000 (Reform Act), Pub. L. No. 106-185, 114 Stat. 202, further provides that, "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." 18 U.S.C. 983(c)(3).

The court of appeals determined that the government satisfied both the standard set forth in the Controlled Substances Act and the standard set forth in the Reform Act. See Pet. App. 16a. The court found that "the Government presented sufficient evidence showing [that petitioner] intended to exchange the $144,780 for a controlled substance" (satisfying the Controlled Substances Act) and that it "presented sufficient evidence showing * * * [that] the $144,780 is substantially connected to illegal drug trafficking" (satisfying the Reform Act). *Ibid.* Those fact-specific findings were correct and do not warrant this Court's review.

2. Petitioner errs in arguing (Pet. 3) that the court of appeals improperly "eschew[ed] the substantial connection test" set out in the Reform Act. The court of appeals stated that it was "not convinced" that the Reform Act's substantial-connection test was applicable to this case, because "[t]he plain text of the statute indicates [that it] only applies when the Government is basing forfeiture on a facilitation theory," as opposed to, "as here," a "proceeds or intended-for-exchange theory." Pet. App. 10a-11a. The court, however, "decline[d] to address whether such a showing is required" because the issue had not been fully briefed and because it found, in any event, "the evidence in this case sufficient to conclude a substantial connection exists between the $144,780 and illegal drug trafficking." *Id.* at 11a; see *id.* at 16a ("[T]he government plainly carried its burden in this case to prove the $144,780 is subject to forfeiture under [the Reform Act]."); *id.* at 16a. ("[T]he Government presented sufficient evidence * * * [that] the $144,780 is substantially connected to illegal drug trafficking."). Petitioner himself acknowledges that "[t]he Tenth Circuit ultimately 'declined to address'" whether the substantial-connection test governed this case. Pet. 16 (brackets and citation omitted).

Contrary to petitioner's contention (Pet. 16-18), the circuits are not in conflict about the applicability of the Reform Act's substantial-connection test to forfeitures under Section 881(a)(6). Every court of appeals to address the question, including the court below, has applied the test to non-proceeds forfeitures under that statute. See *United States* v. *Assorted Jewelry Approximately Valued of $44,328.00*, 833 F.3d 13, 15 (1st Cir. 2016); *United States* v. *Sum of $185,336.07 U.S. Currency Seized*, 731 F.3d 189, 195-196 (2d Cir. 2013);

United States v. *Real Property 10338 Marcy Road Northwest*, 938 F.3d 802, 810 (6th Cir. 2019); *United States* v. *Funds in the Amount of One Hundred Thousand One Hundred & Twenty Dollars*, 730 F.3d 711, 716 (7th Cir. 2013); *United States* v. *$48,100.00 in U.S. Currency*, 756 F.3d 650, 653 (8th Cir. 2014); *United States* v. *$252,300.00 in U.S. Currency*, 484 F.3d 1271, 1273 (10th Cir. 2007); *United States* v. *$291,828.00 in U.S. Currency*, 536 F.3d 1234, 1237 (11th Cir. 2008) (per curiam), cert. denied, 556 U.S. 1238 (2009); see also *United States* v. *Wilson*, 458 Fed. Appx. 637, 638 (9th Cir. 2011). Petitioner claims (Pet. 12) that the First and Third Circuits have "eschew[ed] the substantial connection test," but the decisions on which he relies involve forfeitures that predate the Reform Act. See *United States* v. *Ten Thousand Seven Hundred Dollars & No Cents 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); see also *United States* v. *López-Burgos*, 435 F.3d 1, 2 (1st Cir. 2006) (stating that *One Lot of U.S. Currency* has been "statutorily superseded" and is "therefore legally irrelevant").

At any rate, this case would be a poor vehicle for resolving the alleged circuit conflict about whether the substantial-connection test applies to non-proceeds forfeitures under Section 881(a)(6). The court of appeals explicitly declined to decide that issue. See Pet. App. 11a. No sound basis exists for this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to address that issue in the first instance. In addition, the court of appeals found that the evidence here was sufficient to satisfy the

substantial-connection test—which means that its judgment would remain the same regardless of how this Court resolves any dispute about the applicability of that test. See Pet. App. 16a. "[I]f the same judgment would be rendered by the [court of appeals] after [this Court] corrected [a statement in its opinion], [this Court's] review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

3. Petitioner likewise errs in arguing (Pet. 12-15) that the court of appeals applied the wrong legal standard in evaluating the forfeiture order. Petitioner suggests that the court of appeals should have required the government to show a link between the seized currency and a specific drug transaction, rather than a link between the currency and "'illegal drug activity' or 'drug trafficking' writ large." Pet. 14 (quoting Pet. App. 16a). In his brief in the court of appeals, however, petitioner himself framed the government's burden in the latter terms, arguing that the government was required to show a link to "drug activity" or "drug trafficking." See Pet. C.A. Br. 21 ("'substantial connection' * * * between the money and drug trafficking"); *id.* at 37 ("'substantial connection' between the currency and drug activity") (emphasis omitted); *ibid.* ("substantial connection between the currency and drug trafficking"). Petitioner has thus waived, or at a minimum forfeited, any contention that the court of appeals should have applied a different legal standard in assessing the forfeiture.

In any event, the standard the court of appeals applied was correct. Nothing in the text of either the Controlled Substances Act or the Reform Act suggests, as petitioner appears to argue, that the government was

required to show a link between the currency and a specific, identified drug transaction. "It is enough that the government showed a connection to *some* transaction—the details are not necessary." *United States* v. *Funds in the Amount of One Hundred Thousand & One Hundred Twenty Dollars*, 901 F.3d 758, 768 (7th Cir. 2018); see *Assorted Jewelry*, 833 F.3d at 15 (1st Cir.) (same); *United States* v. *$242,484.00*, 389 F.3d 1149, 1160 (11th Cir. 2004) (same); *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) (same).

Contrary to petitioner's contention (Pet. 12-15), the circuits are not in conflict on that issue. Petitioner claims that the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits read either the Controlled Substances Act or the Reform Act to require the government to show a link to a specific transaction, but in fact, the Fifth, Sixth, Eighth, and Ninth Circuits have explicitly *rejected* such a requirement. See *United States* v. *One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990) ("It is not necessary that the government trace the property to a particular drug transaction."); *United States* v. *1978 Cessna Turbo 210*, 182 F.3d 919, 1999 WL 407469, at *6 n.7 (6th Cir. 1999) (Tbl.) ("[T]he government need not show a relationship between the property and a particular drug transaction.") (citation omitted); *$48,100.00 in U.S. Currency*, 756 F.3d at 655 (8th Cir.) ("The government need not prove the seized currency is linked to any particular drug transaction."); *United States* v. *1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1435 n.4 (9th Cir. 1985) ("There is no need to tie the houseboats to proceeds of a *particular identifiable* illicit drug transaction.").

The decisions cited by petitioner (Pet. 14) do not impose the particularity requirement that petitioner posits. In *United States* v. *$95,945.18, U.S. Currency*, 913 F.2d 1106 (1990), the Fourth Circuit stated that the government must show "that a substantial connection exists between the property forfeited and the criminal activity defined by the statute." *Id.* at 1110. In *United States* v. *$64,000.00 in U.S. Currency*, 722 F.2d 239 (1984), the Fifth Circuit required a link "between the property to be forfeited and a crime." *Id.* at 244. In *United States* v. *$5000 in U.S. Currency*, 40 F.3d 846 (1994), the Sixth Circuit concluded that, although the evidence introduced by the government raised "some suspicion" of a connection to drug trafficking, the government had failed to introduce sufficient evidence to support forfeiture. *Id.* at 850. In *$48,100.00 in U.S. Currency*, the Eighth Circuit explicitly stated that "[t]he government need *not* prove the seized currency is linked to any particular drug transaction." 756 F.3d at 655 (emphasis added). Finally, in *United States* v. *$11,500 in U.S. Currency*, 869 F.3d 1062 (2017), the Ninth Circuit "h[eld] only that § 881(a)(6) does not authorize forfeiture based on mere intent to facilitate drug transactions without proof of some act to effectuate that intent." *Id.* at 1075. None of those decisions holds that the government is required to link the currency to a particular drug transaction.

4. Petitioner's remaining arguments likewise lack merit and do not warrant further review.

Petitioner argues (Pet. 18-19, 22-23) that, because the government proceeded under the theory that petitioner intended to exchange the currency for drugs, the government was required to prove that he engaged in some act to effectuate that intention, and that imposing

forfeiture in the absence of such a showing might violate the Eighth Amendment's Excessive Fines Clause. In this case, however, the courts below found that the government *had* shown that petitioner engaged in acts to effectuate the intent to exchange the currency for drugs. The district court found that petitioner embarked on his road trip for the specific purpose of exchanging his currency for drugs. See Pet. App. 28a-29a. And the court of appeals found that the record "support[ed] th[at] reasonable inference." *Id.* at 14a. Petitioner thus errs in arguing that the government obtained the forfeiture in this case "on the basis of 'mere intent.'" Pet. 23 (citation omitted).

Finally, petitioner argues (Pet. 19-21) that the evidence in this case was insufficient to support the forfeiture. The court of appeals, however, explained that a combination of facts—such as petitioner's transportation of a large quantity of currency, his placement of that currency in vacuum-sealed bags, the odor of marijuana from the vehicle, the particles of marijuana found in the vehicle, and the implausibility of petitioner's explanation for his trip—justified the forfeiture. See Pet. App. 11a-16a. Contrary to petitioner's contention (Pet. 19), consideration of the implausibility of petitioner's explanation does not improperly shift the burden of proof from the government. Petitioner had no obligation to present evidence in this proceeding, but, once he chose to do so, the district court was "entitled to consider all of the evidence, * * * and not simply * * * the evidence in the government's case-in-chief." *United States* v. *Dingle*, 114 F.3d 307, 310 (D.C. Cir.), cert. denied, 522 U.S. 925 (1997); see *United States* v. *Adkinson*, 158 F.3d 1147, 1152 n.12 (11th Cir. 1998) ("Although this evidence comes from the defendant's own mouth, it

may be considered against him."). And "[p]roof that [a party's] explanation is unworthy of credence is simply one form of circumstantial evidence"; "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [party] is dissembling to cover up [unlawful activity]." *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

Petitioner challenges (Pet. 20-21) the probative value of the other evidence on which the court of appeals relied. This Court, however, ordinarily does not review such factbound contentions. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Adherence to that ordinary practice is especially warranted here because both the court of appeals and the district court concurred that the government had introduced sufficient evidence to support the forfeiture. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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