No. 22-7386

IN THE

Supreme Court of the United States

LOUIS MCINTOSH, AKA LOU D,

Petitioner,

—v.—

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of over 300 lawyers, including many former federal prosecutors and federal public defenders, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the rights of the accused guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of practitioners who regularly defend complex and significant criminal cases in the trial courts in the U.S. Court of Appeals for the Second Circuit, including cases in which the government seeks criminal forfeiture.

The Court has cited NYCDL's *amicus* briefs on a range of topics, including criminal forfeiture. *See Kaley v. United States*, 571 U.S. 320, 340 (2014); *id.* at 353 (Roberts, C.J., dissenting); *see also Luis v. United States*, 578 U.S. 5, 22 (2016); *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring); *United States v. Booker*, 543 U.S. 220, 266 (2005).

NYCDL members regularly represent individuals who, when sentenced, face serious financial penalties in addition to the threat of incarceration. Thus, the Second Circuit's decision allowing the government to seek forfeiture of a defendant's property years after

[1] No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

the defendant's conviction and sentencing implicates NYCDL's core mission to promote the fair administration of criminal justice. NYCDL is also in a unique position to describe the consequences of forfeiture rules for individuals and for principles of fairness and due process.

INTRODUCTION

NYCDL supports Petitioner Louis McIntosh in his argument that Rule 32.2(b) of the Federal Rules of Criminal Procedure (the "Rule") is a mandatory claims-processing rule, requiring that the government file, and the court enter, a preliminary order of forfeiture *before* sentencing, and that such order become final *at* sentencing. This procedure satisfies the Congressional directive that a trial court order forfeiture "*in imposing sentence* on a person convicted" of certain federal offenses. 18 U.S.C. § 982 (emphasis added).

The Second Circuit's holding that Rule 32.2(b) provides merely a "time-related directive" is inconsistent with the text, structure, and purpose of the Rule. It cannot be justified by analogizing forfeiture to restitution, as the Second Circuit did. And it flouts the evenhanded application of the principle of finality in criminal cases, allowing the government to pile on punishment long after the defendant has been sentenced. This Court should reverse the judgment below.

ARGUMENT

I. The Second Circuit's Decision Conflicts with the Criminal Forfeiture Statute and Rule 32.2

A. The Text and Structure of Rule 32.2(b) Effectuate the Criminal Forfeiture Statute and Support Construing Its Time Limits as Mandatory

Passed as part of the Anti-Drug Abuse Act of 1986, 18 U.S.C. § 982, the criminal forfeiture statute is unequivocal about when forfeiture must be ordered. In subsection after subsection, it states, "[t]he court, *in imposing sentence* on a person convicted of an offense . . . shall order that the person forfeit to the United States" all property and proceeds related to the offense. 18 U.S.C. § 982(a)(1)-(3), (a)(5)-(8) (emphasis added). Under the plain text of the statute, forfeiture must be imposed at sentencing. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 583 U.S. 109, 127 (2017) (where statute is "'unambiguous,' 'our inquiry begins with the statutory text, and ends there as well.'") (quoting *BedRoc Ltd. LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality op.)).

This requirement is unsurprising, as criminal forfeiture is "an aspect of punishment imposed [at sentencing] following conviction of a substantive criminal offense." *Libretti v. United States*, 516 U.S. 29, 39 (1995). Indeed, *in personam* criminal "forfeitures have historically been treated as . . . *part of the punishment* imposed for felonies and treason." *United States v. Bajakajian*, 524 U.S. 321, 332 (1998) (emphasis added).

The text and structure of Rule 32.2 effectuate the Congressional directive that forfeiture be imposed at sentencing. Specifically, subsection (b)(4) states: "*At sentencing*—or at any time before sentencing if the defendant consents—the preliminary forfeiture order becomes final as to the defendant." Fed. R. Crim. P. 32.2(b)(4) (emphasis added). To implement the statutory requirement that the order of forfeiture become final "[a]t sentencing," the Rule dictates that "[u]nless doing so is impractical, the court *must* enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4)." Fed. R. Crim. P. 32.2(b)(2)(B) (emphasis added). *See United States v. Ripinsky*, 20 F.3d 359, 363 n.5 (9th Cir. 1994) (stating that because criminal forfeiture statutes are partly punitive, courts should be cautious about construing them liberally).

The advisory committee added subsection (b)(2)(B) in 2009, explaining that many courts had delayed the entry of the preliminary order of forfeiture until after sentencing—a procedure that was "undesirable" because, at that point, "the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment)." Advisory Comm. Notes to 2009 Am. to Rule 32.2. This is so, the committee explained, because "[o]nce the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order." *Id.* Thus, "[t]he amendment *requires* the court to enter the preliminary order in advance of sentencing to

permit time for corrections, unless it is not practical to do so in an individual case." *Id*. (emphasis added); *accord* Charles Alan Wright & Arthur R. Miller, 3 *Fed. Prac. & Proc. Crim.* § 573 (5th ed.) ("[B]ecause the preliminary order becomes final as to the defendant at sentencing, if the parties do not have a chance to review the order in advance of that hearing, they will not have an opportunity to suggest corrections.").

Other 2009 amendments that addressed situations where the specific forfeitable property is not identifiable before sentencing reinforce that the order of forfeiture must be imposed at sentencing, and specify the limited modifications allowed thereafter. The 2009 amendments added a provision that allows courts to enter a "[g]eneral [o]rder" when they "cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment." Fed. R. Crim. P. 32.2(b)(2)(C). This addition "reconcile[d] the requirement that forfeiture be made part of the sentence with the possibility that the government has not completed its investigation by the time defendant is sentenced." Wright & Miller, 3 *Fed. Prac. & Proc. Crim.* § 573.

The amendment required, however, that the order "list[] any identified property"; "describe[] other property in general terms"; and "state[] that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated." Fed. R. Crim. P. 32.2(b)(2)(C). And while Rule 32.2(e)(1) allows the government to move for an order of forfeiture or amendment of an existing order "at any time," the Rule permits the government to include *only* property that "(A) is subject to forfeiture *under*

an existing order of forfeiture . . . ; or (B) is substitute property that qualifies for forfeiture under an applicable statute." Fed. R. Crim. P. 32.2(e)(1) (emphasis added). And even then, the "Committee advises that such [general] orders should be used only in unusual circumstances and not as a matter of course." Wright & Miller, 3 *Fed. Prac. & Proc. Crim.* § 573. The committee did not authorize the district court to order forfeiture whenever the prosecutor gets around to identifying the property and filing the proposed order, no matter how long after sentencing that may be.

Other provisions of Rule 32.2 protect a defendant's right to be advised of the forfeiture by the time of sentencing. For example, under Rule 32.2.(b)(1)(A), "[i]f the government seeks forfeiture of [a] specific property, the court must determine whether the government has established the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(1)(A). Similarly, if "the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." *Id.*

Both of these judicial determinations must occur "[a]s soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted," *i.e.*, before sentencing. *Id.* The Rule even permits either party to request that the jury determine the forfeitability of specific property. *Id.* The defendant may insist that the government submit a special verdict form listing each property subject to forfeiture and asking the jury to find whether the government has established the requisite nexus

between the property and the offense. Fed. R. Crim P. 32.2(b)(5).

Finally, the Rule states that "[t]he court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing." Fed. R. Crim. P. 32.2(b)(4)(B). In sum, "Rule 32.2(b)'s undoubtable purpose is to ensure defendants receive due process paired with finality and efficiency." *United States v. Maddux*, 37 F.4th 1170, 1178 (6th Cir. 2022).

B. The Restitution Statute Is Readily Distinguishable from the Forfeiture Rule

The commands of Rule 32.2 stand in sharp contrast to the text of the Mandatory Victims Restitution Act ("MVRA"), the statute at issue in *Dolan v. United States*, 560 U.S. 605 (2010). The MVRA provides that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664." 18 U.S.C. § 3663A. That provision generally contemplates that restitution *should* be imposed at sentencing, but also provides the following procedures for situations when restitution cannot be ordered at that time:

> If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further

> losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

18 U.S.C. § 3664(d)(5).

Unlike Rule 32.2(b), under the MVRA, the district court need not order restitution at sentencing and then tie any new information about the victim's losses to that original order. Rather, the court can defer the entire restitution decision until ninety days after sentencing.[2] Thus, the MVRA and its corresponding procedural provision specifically contemplate that restitution may be ordered after sentencing and may be adjusted at any time after sentencing. *See United States v. Martin*, 662 F.3d 301, 314 (4th Cir. 2011) (Gregory, J., dissenting in part) (contrasting 18 U.S.C. § 3664(k) with Rule 32.2(b)).

Nor is the MVRA subject to the strict limitations in the Federal Rules of Criminal Procedure on altering a judgment after the oral pronouncement of sentence. *Cf. Eberhart v. United States*, 546 U.S. 12, 13 (2005) (describing deadline for making a motion under Fed. R. Crim. P. 33(a) for a new trial as "rigid"). In contrast

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[2] Section 3664 also provides that, after restitution is ordered, the defendant, the victim, or the Attorney General may advise the court of a material change in the defendant's circumstances, and "[u]pon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require." 18 U.S.C. § 3664(k).

to the flexible "time-related directive" of the MVRA, *Dolan*, 560 U.S. at 608, the Federal Rules' time limits may be extended only "before the originally prescribed or previously extended time expires" or "after the time expires if the party failed to act because of excusable neglect." Fed. R. Crim. P. 45(b)(1).

In this case, there was no finding of excusable neglect, and there would be no basis for such a finding. Rather, the district court expressly directed the government to file an order of forfeiture—already late at that point—a week after sentencing, and the government still failed to do so. *United States v. McIntosh*, 58 F.4th 606, 609 (2d Cir. 2023). The government did not file a proposed order of forfeiture until more than two-and-a-half years later, when the case was on remand from the Court of Appeals. Pet'r's Br. 2.

Finally, contrary to the Second Circuit's holding, the fact that Rule 32.2 "'does not specify a consequence for noncompliance with its timing provisions,'" *McIntosh*, 58 F.4th at 610 (quoting *Dolan*, 560 U.S. at 611), while a relevant factor, is not dispositive. This Court has held that other statutes that contain no provision expressly stating a consequence for non-compliance are nonetheless strict in their time limits.

For example, in *Bowles v. Russell*, 551 U.S. 205 (2007), the Court held the time-limiting provisions permitting extensions of time for filing an appeal contained in 28 U.S.C. § 2107(c) and Rule 4(a)(6) of the Federal Rules of Appellate Procedure were *jurisdictional*, despite the statute and related rule containing no express consequence for non-compliance. *Id.* at 208-09. Similarly, the Court has also held time limits in Rule 33 of the Federal Rules

of Criminal Procedure and Rule 4004 of the Federal Rules of Bankruptcy Procedure to be non-jurisdictional, yet nonetheless *mandatory* claims-processing rules, *i.e.*, subject to waiver by parties but no less rigid in their application. *See Eberhart*, 546 U.S. at 15; *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). The language of Bankruptcy Rule 4004 is far more permissive than Criminal Rule 32.2—providing situations in which a court "may for cause extend the time to object to discharge," Fed. R. Bankr. P. 4004(b)(1), as opposed to directing when the court "*must*" enter a preliminary order of forfeiture, Fed. R. Crim. P. 32.2(b)(2)(B) (emphasis added).

Thus, this Court's precedents dictate what is manifest from the text and structure of the Rule: the consequence of non-compliance is loss of the claim.

C. Strict Deadlines Are Routine in the Forfeiture Context

There is nothing unusual or anomalous about applying strict time limits to the government's ability to seek forfeiture. Such limits have been deemed commonplace and sensible even in the civil forfeiture context, because of the considerable power forfeiture statutes vest in the government and the potential for "egregious and well-chronicled abuses" of the type that have "frequently target[ed] the poor and other groups least able to defend their interests." *Leonard v. Texas*, 580 U.S. 1178 (2017) (Thomas, J., statement respecting denial of cert.).

The statute governing federal civil asset forfeiture proceedings, the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") imposes a strict ninety-day limit on filing a civil forfeiture action after an individual has

made a claim on seized property. *See* 18 U.S.C. § 983(a)(3). This provision has been interpreted so rigidly by courts that commentators have called it "the 'death penalty' for civil forfeiture." 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, 145 (2001). Indeed, the specific problem Congress set out to ameliorate in enacting CAFRA was the "inequity in imposing strict deadlines and sanctions on property owners contesting civil forfeiture actions, while not imposing similar deadlines and sanctions on the government." *Id.* at 134; *see also* 146 Cong. Rec. S1753-02, S1759, 2000 WL 309749 (Mar. 27, 2000) (Statement of Sen. Hatch) (CAFRA was intended to "place reasonable time limits on the government in civil forfeiture actions").

Thus, there is nothing unusual or contrary to settled expectations about holding the government to the deadlines imposed by the relevant statute or rule when the government seeks to forfeit a citizen's property.

II. The Second Circuit's Decision Wrongly Analogized Forfeiture to Restitution Based on an Incorrect and Unsupported Belief That Forfeiture Ordinarily Benefits Crime Victims

Besides the critical textual differences that distinguish Rule 32.2(b) and the MVRA discussed *supra* at 7-10, the Second Circuit erred in assuming that the logic of *Dolan* applies in the forfeiture context "because forfeited funds frequently go to the victims of the crime" and are therefore akin to restitution. *McIntosh*, 58 F.4th at 610.

The Circuit cited no evidence for that claim, and while it acknowledged that forfeiture and restitution serve distinct purposes, the panel nonetheless warned—again without any evidence—that "preventing forfeiture due to the missed deadline would tend to harm innocent people who are not responsible for the oversight." *Id.* Consequently, the panel stated, "we see no reason why, for purposes of timing, restitution and forfeiture should be treated differently." *Id.* at 611.

That is wrong. The Second Circuit's reasoning is premised on assumptions that lack a factual basis.

A. Forfeiture and Restitution Serve Distinct Goals

"The primary goal of restitution is remedial or compensatory." *Paroline v. United States*, 572 U.S. 434, 456 (2014). Forfeiture, on the other hand, "is punitive," and has "historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law." *Bajakajian*, 524 U.S. at 332-33; *accord Kaley*, 571 U.S. at 323 ("Forfeitures help to ensure that crime does not pay: They at once punish wrongdoing, deter future illegality, and 'lessen the economic power' of criminal enterprises." (quoting *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 630 (1989))). Thus, "[w]hile the focus of restitution is on the victim, forfeiture focuses on the defendant." *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007) (rejecting as "specious" defendant's argument that money she paid to victims should reduce her forfeiture amount, since

"restitution pursuant to the [MVRA] and forfeiture . . . each serve[] a different goal.").[3]

Courts frequently rely on the distinct purposes of forfeiture and restitution to order both, rejecting defendants' objections that they face an unfair "double recovery." *See, e.g.*, *United States v. Torres*, 703 F.3d 194, 202-04 (2d Cir. 2012) (affirming imposition of forfeiture and restitution in identical amounts and counting "[e]ight other Circuits [that] have considered orders of forfeiture and restitution in the face of 'double recovery,' due process-type challenges [and] affirmed their concurrent imposition"); *United States v. Newman*, 659 F.3d 1235, 1241 (9th Cir. 2011), *abrogated on other grounds by Honeycutt v. United States,* 581 U.S. 433 (2017) (that defendants "must pay both restitution and criminal forfeiture . . . is not an impermissible 'double recovery'").[4]

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[3] To be sure, "[t]he Government *also* uses forfeited property to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training," *Kaley*, 571 U.S. at 323 (emphasis added), but as will be discussed *infra*, the prevalence of the first of these uses is overstated in the Second Circuit's decision.

[4] *Accord United States v. Sanjar*, 876 F.3d 725, 751 (5th Cir. 2017); *United States v. Blackman*, 746 F.3d 137, 142-45 (4th Cir. 2014); *United States v. Joseph*, 743 F.3d 1350, 1354 (11th Cir. 2014); *United States v. Schwartz*, 503 F. App'x 443, 448-49 (6th Cir. 2012); *United States v. McGinty*, 610 F.3d 1242, 1247 (10th Cir. 2010); *United States v. Leahy*, 464 F. 3d 773, 793 n.8 (7th Cir. 2007); *United States v. Leon-Delfis*, 203 F.3d 103, 115 (1st Cir. 2000); *United States v. Various Computers and Computer Equip.*, 82 F.3d 582, 588 (3d Cir. 1996).

In *Dolan*, this Court noted that the restitution "statute seeks speed primarily to help the victims of crime and only secondarily to help the defendant." *Dolan*, 560 U.S. at 613. Further, it reasoned that reading that statute strictly would harm "the victims of crime—who likely bear no responsibility for the deadline's being missed." *Id.* at 613-14.

But the "same concern for victims does not explicitly appear in the criminal forfeiture statutes." *Martin*, 662 F.3d at 313-14 (Gregory, J., dissenting in part). To the contrary, Rule 32.2(b) expressly "arms defendants with procedures to correct preliminary forfeiture orders before sentencing," and "aims to culminate forfeiture at sentencing" so that "defendants can be sure no more forfeiture awaits them[.]" *Maddux*, F.4th at 1178. While the Rule also provides procedures for third-party claimants to challenge forfeiture by the government, these claims are considered in an ancillary proceeding *after* the order is made final *as to the defendant*. *See* Fed. R. Crim. P. 32.2(c). Those ancillary proceedings decide only whether it is the government or third-party claimants who should retain the defendant's property. Thus, the time limits in Rule 32.2(b) protect the defendant from the piling-on of punishment, while preserving the ability of innocent third-party claimants to pursue their rights in a separate proceeding.

B. The Premise That Forfeited Funds Frequently Go to Victims Lacks a Factual Basis

Moreover, the Second Circuit's premise that forfeited funds frequently go to victims of crime lacks factual support. A review of the procedural pathways

by which forfeited funds might make their way to victims, the data the government itself maintains, and the experience of NYCDL members indicate that, at a minimum, the Circuit's premise is oversimplified and speculative.

First, routing forfeited property to victims is not mandatory but instead a matter wholly within the Attorney General's discretion. There are two procedural pathways. "Remission is a process whereby, in a civil or criminal forfeiture proceeding, the Department solicits, considers, and rules on petitions for payment." U.S. Dep't of Just., *Asset Forfeiture Pol'y Manual* (2023) § 14-1. Restoration, in turn, aims to simplify and accelerate the return of forfeited property to victims, by allowing prosecutors from individual U.S. Attorney's Offices to request that the Attorney General apply forfeiture funds toward the defendant's restitution obligations in cases where both have been ordered. *Id.* §§ 14-6 – 14-7.

In either case, the decision-making authority is vested solely in the Attorney General, and the Attorney General's decision cannot be reviewed by courts. *Id.* § 14-2 ("[J]udicial review of a denial of remission is not available."); *see Willis Mgmt. (Vermont), Ltd. v. United States*, 652 F.3d 236, 243 (2d Cir. 2011) (restoration under 21 U.S.C § 853(i) is "a 'non-judicial remedy' that is left entirely to the Attorney General's discretion") (quoting *DSI Assocs. LLC v. United States*, 496 F.3d 175, 186 (2d Cir. 2007)); *United States v. Bailey*, 926 F. Supp. 2d 739, 773 (W.D.N.C. 2013) ("any remission procedure is a discretionary matter within the purview of the Attorney General, the Court does not have jurisdiction to order the Attorney General to make any such

distribution"); *see also United States v. Pescatore,* 637 F.3d 128, 137 (2d Cir. 2011).

Moreover, the rules that govern remission and restoration impose burdens on victim-applicants and administrators that further impede the prospect of directing forfeited funds to victims. *See* U.S. Dep't of Just.*, Asset Forfeiture Pol'y Manual* §§ 14-1, 14-6–14-7. Remission requires the filing of a petition by the victim, with documentary evidence establishing "the petitioner's interest in the property[,]" and provides no entitlement to a hearing on that claim. 28 C.F.R. §§ 9.2, 9.4(c)(1)(v).[5] Restoration requires a request by the U.S. Attorney's Office which will only be granted if, *inter alia*, other property is not available to satisfy the restitution order. U.S. Dep't of Just.*, Asset Forfeiture Pol'y Manual* §§ 14-1, 14-6–14-7; *see Pescatore*, 637 F. 3d at 138.

It is uncertain—to say the least—that these processes in fact result in victims obtaining a significant percentage of forfeited assets. As an initial matter, in 2017, the Department of Justice reported that it did "not use aggregate data to evaluate fully and oversee their seizure operations," making it nearly impossible to determine whether forfeiture is primarily used to compensate victims. U.S. Dep't of Justice Office of the Inspector General, *Review of the*

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[5] In addition, notice of the "seizure and intent to forfeit the property" are sent only to "persons who may have a *present ownership interest* in the property[.]" 28 C.F.R. § 9.4(a) (emphasis added). Because the seizing agency does not necessarily know of all such persons, victims may never learn of the seizure, let alone before "the forfeited property is placed in official use, sold, or otherwise disposed of according to law," at which time petitions for remission are no longer considered. *Id.*

Department's Oversight of Cash Seizure and Forfeiture Activities, (Mar. 2017) ("OIG Report") at Exec. Summary, p. ii. Accordingly, no publicly available data supports the Second Circuit's conclusion that forfeiture ultimately benefits victims.

If anything, the reported data indicates that a substantial percentage of forfeited funds do *not* make their way to victims. "The lion's share of confiscated cash or the proceeds from the sale of confiscated property . . . is now deposited in either the Department of Justice Asset Forfeiture Fund, or the Department of the Treasury Forfeiture Fund. The Treasury and Justice Department Funds together receive over $1.5 billion *per year*." Charles Doyle, *Crime and Forfeiture: In Short*, Cong. Rsch. Serv. (Updated Jan. 10, 2023) at 5 (emphasis added). Yet, in the 2017 OIG Report, the Justice Department reported distributing only $4 billion *total* to victims from the Asset Forfeiture Fund since fiscal year 2000. *See* OIG Report at 1.[6] According to these statistics, then, between fiscal year 2000 to 2016, when approximately $25.5 billion was forfeited by the government, barely 15% of these funds were provided to victims, with the government retaining the balance or distributing it to state and local law enforcement agencies.

Indeed, the $4 billion provided to victims between 2000 and 2016 was *less* than the $6 billion of forfeited funds which had been transferred to state and local

[6] At the time of the OIG Report, the Department anticipated making additional payments of approximately $4 billion to victims over time to compensate victims of Bernard Madoff's fraud. *See id.* at 1 n.6.

law enforcement through "equitable sharing during the same period." *Id.* This "equitable sharing" refers to funds provided by federal authorities not to victims, but to state and local law enforcement agencies to use for "rewards to informants in illicit drug cases," "to equip cars, boats and planes for law enforcement purposes," "overtime, travel, training and the like for assisting state and local law enforcement" and "for joint state, local and federal cooperative law enforcement operations." Doyle, *Crime and Forfeiture: In Short*, at 5-6 (listing the above among other uses of equitable sharing).

The OIG Report focused particularly on cash seized by the Drug Enforcement Administration ("DEA"), and those figures too belie the notion that forfeited "frequently" go to victims. *McIntosh*, 58 F.4th at 610. Forfeiture is routinely ordered in narcotics cases, *see* 21 U.S.C. § 853(a) (making property proceeds of drug crimes forfeitable, as well as any real or personal property used to commit, or to facilitate the commission of, the offense), but such crimes have no identifiable victims. *See* U.S.S.G. § 3D1.2, comment (n.2) (explaining that in drug or immigration offenses, "society at large is the victim" and there are "no identifiable victims").[7] The OIG Report found that in 2016, seventy-nine percent of cash seized by the DEA was deposited in the Asset Forfeiture Fund, but only four percent was fully returned to the owner, lienholder, or victim. *Id.* at 14.[8] These figures are

[7] These two categories of crimes—drug and immigration crimes, which have no identifiable victim—comprise fifty-nine percent of all federal offenses nationwide. *See* U.S. Sentencing Comm'n, Statistical Information Packet (Fiscal Year 2022), Fig. A.

[8] Another four percent was partially returned. *Id.*

significant in assessing the uses to which forfeited funds *in toto* are put, because the same OIG Report noted that in the ten fiscal years prior to its publication, the DEA was "responsible for 80 percent of the [Justice] Department's cash seizures." OIG Report at Exec. Summary, p. ii.

The reported data is consistent with the experience of the over 300 defense lawyers who comprise the NYCDL membership. Even in some of the most serious and complex financial cases in the country, it is not common for the government to remit criminal forfeiture proceeds to victims. And even when the assigned Assistant U.S. Attorneys have *requested* that the Attorney General apply forfeited funds to restitution, such requests have been denied and defendants are left effectively paying twice because their payment of forfeiture is not applied to their restitution obligation. *See Pescatore*, 637 F.3d at 137. NYCDL members have also requested restoration *on behalf of victims*, with the support of the U.S. Attorney's Office, only to have the Attorney General deny the request without explanation and the district court conclude it had no power to review the denial. *United States v. Afriyie*, No. 16-CR-377 (PAE), 2017 WL 6375781 at *4 (S.D.N.Y. Dec. 11, 2017) (holding that "judicial review" of Attorney General's "choice between 'restoration and retention'" of forfeited funds "would not be appropriate" (quoting *Pescatore*, 637 F.3d at 137)).

The net result is consistent with the Sixth Circuit's observation that, "[f]orfeited property . . . ordinarily ends up in the hands of the government, not victims." *Maddux*, 37 F.4th at 1179.

Indeed, contrary to the Second Circuit's supposition, treating Rule 32.2 as a flexible time-related directive may ultimately *disserve* victims who would otherwise be able to claim entitlement to property subject to forfeiture. One of the problems that Rule 32.2(b) addressed was that "third parties who might have an interest in the forfeited property are not parties to the criminal case, [yet] [a]t the same time, a defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations." *Martin*, 662 F.3d at 314 (Gregory, J., dissenting in part) (citing Fed. R. Crim. P. 32.2, 2000 Advisory Comm. Notes). Rule 32.2(b) provides that the preliminary order of forfeiture (which "must" be entered "without regard to any third party's interest in the property," Fed. R. Crim. P. 32.2(b)(2)(A)), "becomes final *as to the defendant*" at sentencing. *Id.* at 32.2(b)(4)(A) (emphasis added). Only then may third parties initiate "an ancillary proceeding" to assert their right to the property. *Id.*

Other claimants, including victims, thus have an interest in any objections to the forfeiture by the defendant being resolved at the time of sentencing. The Rule "aligns the incentives of the parties, provided that the preliminary order of forfeiture becomes final as to the defendant at a specific time—at sentencing." *Martin*, 662 F.3d at 314 (Gregory, J., dissenting in part).

Consider what occurred below. More than three years after Petitioner was sentenced, and more than six years after his property was seized, the district court finally entered a preliminary order of forfeiture that it attached to an amended judgment. *McIntosh*, 58 F.4th at 608-09. Pursuant to the Rule, interested

third parties, including victims, would have been notified and permitted to initiate ancillary proceedings to assert their property interest only at that point.[9] No doubt, as time passes, "evidence and witnesses disappear, memories fade[] and events lose their perspective," *Smith v. Hooey*, 393 U.S. 374, 380 (1969), making it more difficult for third parties to establish ownership at an ancillary proceeding pursuant to Rule 32.2(c).

The Second Circuit's decision thus offers dubious benefits to victims of crime and lacks the policy justification this Court emphasized in *Dolan* for treating the ninety-day period under the MVRA as a "time-related directive." 560 U.S. at 613-14.

III. The Second Circuit's Decision Flouts the Principle of Finality in Sentencing and Gives Asymmetric Leeway to Prosecutors

As this Court has oft stated, the "principle of finality . . . is essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Although typically deployed in favor of the government, this principle is in fact essential to the interests of *both* the government and criminal defendants. *See Johnson v. United States*, 544 U.S. 295, 309 (2005) (the "United States has an interest in the finality of sentences imposed by its own courts"), *cited with approval in Jones v. Hendrix*, 599 U.S. 465, 491 (2023); *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality op.) (Double Jeopardy "represents a

[9] Even worse, in this case, the district court did not publish a notice of forfeiture, as required by Rule 32.2(b)(6), until more than twelve years after the property was seized. JA 184-86.

constitutional policy of finality for the defendant's benefit in federal criminal proceedings").

The Federal Rules embody this principle, providing that "[o]nce a federal sentence becomes final, a court may alter that sentence 'only in very limited circumstances.'" *Concepcion v. United States*, 597 U.S. 481, 504 (2022) (Kavanaugh, J., dissenting) (quoting *Pepper v. United States*, 562 U.S. 467, 501-02 n.14 (2011)); *see Dolan*, 560 U.S. at 622 (Roberts, C.J., dissenting) (that a sentence "is final" and a "trial judge's authority to modify it is narrowly circumscribed" is a "bedrock" rule to which 18 U.S.C. § 3664(d)(5), allowing the delay of a restitution order for ninety days, is a "limited exception").

By treating Rule 32.2(b) as a time-related directive, however, the Second Circuit allows courts to impose orders of forfeiture, "an aspect of punishment," *Libretti*, 516 U.S. at 39, long after a sentence has been imposed. In this case, the government failed to file a preliminary order of forfeiture and then failed once again to file such an order even after the district court directed it to do so. Such failure would almost certainly be deemed a waiver if committed by the defendant, and this Court's jurisprudence does not establish one kind of claims-processing rule for defendants and another for the government. *See Eberhart*, 546 U.S. at 19 ("[C]laim-processing rules . . . assure relief *to a party* properly raising them, but do not compel the same result if the party forfeits them. Here, where the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense." (emphasis added)).

Providing asymmetric leeway to the government in this context is particularly troubling because "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939); *accord United States v. $38,000.00 in U.S. Currency*, 816 F.2d 1538, 1547 (8th Cir. 1987) (because forfeiture is not favored, "[i]f anything, the burden on the government to adhere to the procedural rules should be heavier than on claimants.").

While responsible prosecutors will undoubtedly continue to file timely preliminary orders of forfeiture before sentencing no matter the rule this Court adopts, it is notable that since *Dolan*, prosecutors have repeatedly capitalized on *its* holding that disregarding the ninety-day deadline in the MVRA has "no consequence whatever," with the result that orders of restitution are long delayed. 560 U.S. at 621 (Roberts, C.J., dissenting). *See*, *e.g.*, *United States v. Avenatti*, 81 F.4th 171, 204-07 (2d Cir. 2023) (affirming order imposed 221 days after sentencing); *United States v. Dalicandro*, 711 F. App'x 38, 39-42 (2d Cir. 2017) (summary order) (five years after sentencing); *United States v. Rodriguez,* 751 F.3d 1244, 1260-62 (11th Cir. 2015) (over two years after sentencing); *United States v. Gushlak*, 728 F.3d 184, 191-93 (2d Cir. 2013) (a year and a half after sentencing); *United States v. Schwamborn*, 467 F. App'x 35, 36-38 (2d Cir. 2012) (summary order) (nine months after sentencing); *United States v. Harder*, 552 F. Supp. 3d 1144, 1149-51 (D. Or. 2021) (five years after sentencing); *United States v. Lewis*, 6:14-cr-000199-GFVT-HAI, 6:14-cr-00024-GFVT, 2020 WL 5412965, at *3-*5 (E.D. Ky. Sept. 9, 2020) (five years

after sentencing); *United States v. Wilson*, No. 6:14-cr-00028-GFVT, 2020 WL 5412976, at *3 (E.D. Ky. Sept. 9, 2020) (five years after sentencing); *United States v. Chipps*, No. CR 11-50067-RAL, 2013 WL 4852254, at *1-*4 (D.S.D. Sept. 6, 2013) (year and a half after sentencing).

Allowing the government and courts to treat Rule 32.2(b) as a mere time-related directive (that for all intents and purposes may be ignored) similarly risks that orders of forfeiture will frequently be entered even years after sentencing. Such delays might be tolerable in the context of restitution, where "the purpose behind the statutory ninety-day limit . . . is not to protect defendants from drawn-out sentencing proceedings or to establish finality; rather, it is to protect crime victims from the willful dissipation of defendants' assets." *United States v. Zakhary*, 357 F.3d 186, 191 (2d Cir. 2004). But that is not true of forfeiture. To extend that rationale to a prototypical part of the punishment would enshrine a double standard—finality for me but not for thee—and flout the defendant-protective structure of Rule 32.2. *See Maddux*, 37 F.4th at 1178.

The Second Circuit posited that treating the time limit in Rule 32.2(b) "rigidly here would disproportionately benefit defendants." *McIntosh*, 58 F.4th at 611. Quite the contrary: doing so would affirm that the principle of finality applies equally to the government and defendants.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's brief, the Court should reverse the judgment below.

Dated: December 4, 2023

Respectfully submitted,

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