

No. _____

In The
Supreme Court of the United States

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101 HOUSECO, LLC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—

PETITION FOR A WRIT OF CERTIORARI

—◆—

JOHN D. CLINE
LAW OFFICE OF JOHN D. CLINE
600 Stewart Street, Suite 400
Seattle, WA 98101
(360) 320-6435
cline@johndclinelaw.com
Counsel for Petitioner
101 Houseco, LLC

QUESTION PRESENTED

This Court has declared that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). The Second Circuit applied *Parklane Hosiery* to hold that a third-party claimant to property that has been forfeited from a criminal defendant must be permitted to challenge the underlying forfeiture order. The Fourth Circuit similarly recognized serious due process questions if a third-party claimant were barred from challenging the underlying forfeiture order. By contrast, the Fifth Circuit and the Ninth Circuit (in this case) hold that third-party claimants have no due process right to challenge the underlying criminal forfeiture order.

The question presented is:

Whether a third-party claimant holding title to property that has been ordered forfeited as part of a criminal defendant's punishment must be permitted, as a matter of due process, to challenge the underlying forfeiture order.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner 101 Houseco, LLC, and Respondent United States of America.

CORPORATE DISCLOSURE STATEMENT

Petitioner 101 Houseco, LLC, has no parent corporation, and no publicly held company owns 10% or more of its membership interests (the equivalent of stock for a California limited liability company).

RELATED PROCEEDINGS

This petition arises from the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. 101 Houseco, LLC*, No. 18-10305, filed January 10, 2022. The decision of the Ninth Circuit is reported at 22 F.4th 843.

This petition is related to the following Ninth Circuit proceeding: *United States v. David John Lonich, Brian Scott Melland, and Sean Clark Cutting*, No. 18-10298, filed January 10, 2022. The decision of the Ninth Circuit is reported at 23 F.4th 881.

This petition is additionally related to the following proceedings in the United States District Court for the Northern District of California:

1. *United States v. Bijan Madjlessi*, No. 3:14-cr-139(1). No judgment entered; case terminated by defendant's death.
2. *United States v. David John Lonich*, No. 3:14-cr-139(2). Judgment entered August 8, 2018.
3. *United States v. Sean Clark Cutting*, No. 3:14-cr-139(3). Judgment entered August 8, 2018.
4. *United States v. Brian Scott Melland*, No. 3:14-cr-139(4). Judgment entered August 8, 2018.
5. *United States v. Sean Clark Cutting*, No. 3:17-cr-139(1). Judgment entered August 8, 2018.
6. *United States v. Brian Scott Melland*, No. 3:17-cr-139(2). Judgment entered August 8, 2018.

7. *United States v. David John Lonich*, No. 3:17-cr-139(3). Judgment entered August 8, 2018.

8. *United States v. James House*, No. 3:14-cr-329. Amended judgment entered July 23, 2019.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT.....	iii
RELATED PROCEEDINGS	iv
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTES AND CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT.....	4
STATEMENT OF THE CASE	8
I. STATEMENT OF FACTS.....	8
II. PROCEEDINGS BELOW	10
A. <i>United States v. House</i>	10
B. <i>United States v. Lonich</i>	11
REASONS FOR GRANTING THE WRIT	13
I. THERE IS A CLEAR SPLIT IN THE CIRCUITS ON THE DUE PROCESS ISSUE	13
II. THE COURT OF APPEALS' DECISION PERMITS THE CONFISCATION OF PROPERTY WITHOUT DUE PROCESS	15

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT SPLIT OVER A THIRD-PARTY CLAIMANT'S DUE PROCESS RIGHTS	20
CONCLUSION.....	22
APPENDIX	
Court of Appeals Decision (Jan. 10, 2022).....	App. 1
District Court Order dismissing 101 Houseco, LLC's third-party petition in <i>United States</i> <i>v. Lonich</i> (Sept. 28, 2018).....	App. 20
District Court Order dismissing 101 Houseco, LLC's third-party petition in <i>United States</i> <i>v. House</i> (Aug. 1, 2018).....	App. 21
District Court Order denying motion for preliminary order of forfeiture in <i>United</i> <i>States v. Lonich</i> (June 5, 2018).....	App. 47
Court of Appeals Order denying petition for rehearing en banc (Apr. 21, 2022)	App. 51

TABLE OF AUTHORITIES

	Page
CASES	
<i>DSI Associates LLC v. United States</i> , 496 F.3d 175 (2d Cir. 2007).....	19, 20
<i>Honeycutt v. United States</i> , 137 S. Ct. 1626 (2017)	4, 5, 13, 21
<i>Libretti v. United States</i> , 516 U.S. 29 (1995)	6, 17, 18, 19
<i>Parklane Hosiery Co. v. Shore</i> , 439 U.S. 322 (1979)	i, 5, 6, 7, 8, 15, 17
<i>United States v. Daugerdas</i> , 892 F.3d 545 (2d Cir. 2018)...	7, 14, 15, 16, 17, 19
<i>United States v. Hunyh</i> , 595 Fed. Appx. 336 (5th Cir. 2014).....	7, 13
<i>United States v. Lonich</i> , 23 F.4th 881 (9th Cir. 2022)	12
<i>United States v. Reckmeyer</i> , 836 F.2d 200 (4th Cir. 1987)	7, 14, 17
<i>United States v. Sigillito</i> , 938 F. Supp. 2d 877 (E.D. Mo. 2013).....	6
CONSTITUTION, STATUTES, AND RULES	
U.S. Const. Amend. V	i, 1, 5, 7, 13, 14, 19, 20
21 U.S.C. § 853(i)	19, 20
21 U.S.C. § 853(k)	2, 4, 15
21 U.S.C. § 853(n)(2).....	2
21 U.S.C. § 853(n)(6).....	3, 5, 6, 14, 15, 17, 20

28 U.S.C. § 1254(1)	1
Fed. R. Crim. P. 11	6, 17, 18

PETITION FOR A WRIT OF CERTIORARI

101 Houseco, LLC, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1-19) is reported at 22 F.4th 843. The district court's forfeiture orders (App. 20-46) are unpublished.

JURISDICTION

The decision of the court of appeals was issued on January 10, 2022. App. 1.¹ That court denied a timely petition for rehearing en banc on April 21, 2022. App. 51. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides:

"[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law"

¹ The appendix to this petition is cited as "App." The excerpts of record and further excerpts of record in the court of appeals are cited as "ER" and "FER."

Section 853(k) of Title 21 provides:

Bar on intervention. Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

Section 853(n)(2) of Title 21 provides:

Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

Section 853(n)(6) of Title 21 provides:

If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

STATEMENT

Petitioner 101 Houseco, LLC held title to a development in Santa Rosa, California called Park Lane Villas East ("PLV East"), worth more than \$20 million. The Ninth Circuit's decision permitted the government to confiscate PLV East from petitioner, based on criminal forfeiture orders against two individual defendants that, the court of appeals held, petitioner had no right to challenge. Petitioner seeks review of the court of appeals' judgment, which squarely conflicts with decisions from the Second and Fourth Circuits.

Criminal forfeiture of specific property proceeds in two stages. In the first stage, the district court determines whether the property should be forfeited from the convicted criminal defendant. Following this Court's landmark decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), that determination often turns on whether the criminal defendant "actually acquired" the property through his criminal conduct. *Id.* at 1635. Third parties with an interest in the property are barred by statute from participating in this stage of the proceeding. 21 U.S.C. § 853(k).

In the second (or "ancillary") stage, third parties with an interest in property forfeited from the criminal defendant may petition the district court to assert their claims. The governing statute authorizes two types of claims: where the third party had a superior interest in the property "at the time of the commission of the acts which gave rise to the forfeiture of the property," and where the third party

is a "bona fide purchaser for value" without reason to believe that the property was subject to forfeiture. 21 U.S.C. § 853(n)(6)(A), (B). The statute does not expressly authorize the third party to challenge the underlying forfeiture order--to argue, in other words, that the criminal defendant never "actually acquired" the property, as *Honeycutt* requires.

This statutory lacuna raises a grave due process problem. This Court has declared that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). But that is exactly what the statutory scheme purports to permit. The district court's underlying forfeiture judgment--that the criminal defendant "actually acquired" the property--is "binding on a litigant"--the third-party claimant--who "was not a party or a privy" to the first stage of the forfeiture proceeding "and therefore has never had an opportunity to be heard."

Consider a simple example. A man donates a van to his local church to transport senior citizens to worship services. The donor's business associate is later convicted of conspiracy to commit wire fraud, and the government moves to forfeit the van as part of the associate's punishment. It contends the donor was the associate's unindicted co-conspirator and acquired the van with proceeds of the conspiracy. The district court orders the van forfeited from the donor's associate, and the church files a third-party petition. The church has no claim under § 853(n)(6)(A), because it received the van after the associate committed the

fraudulent acts. The church has no claim under § 853(n)(6)(B), because it did not purchase the van for value. *See, e.g., United States v. Sigillito*, 938 F. Supp. 2d 877, 886-87 (E.D. Mo. 2013). The district court's forfeiture order is plainly wrong under *Honeycutt*, because the associate never "actually acquired" the van, but (according to the Fifth and Ninth Circuits) the church is barred from challenging that order. And so, contrary to *Parklane Hosiery*, the church loses the van based on a judgment as to which it "has never had an opportunity to be heard." 439 U.S. at 327 n.7

The failure of due process is particularly acute when the criminal defendant pleads guilty and consents to the forfeiture as part of his plea. A criminal defendant who pleads guilty has an enormous incentive to consent to forfeiture of property he does not own. The forfeiture costs him nothing, and he may benefit from helping the government obtain the property. Here, for example, James House, the defendant in one of the underlying cases, pleaded guilty, consented to forfeiture of PLV East--which by his own admission he had never owned--and in exchange received credit for a \$12 million money judgment. According to the court of appeals, however, petitioner had no right to challenge what was, in effect, a collusive judgment. The due process concern is heightened because this Court has held that a district court accepting a guilty plea has no obligation under Fed. R. Crim. P. 11 to ensure that an agreed forfeiture has a factual basis. *See Libretti v. United States*, 516 U.S. 29, 51 (1995).

Applying *Parklane Hosiery*, the Second Circuit has held that, even when a third party cannot assert either of the claims § 853(n)(6) expressly allows, due process requires an opportunity to challenge the underlying forfeiture order. As the court of appeals put it, "The Due Process Clause does not permit us to hold that a third party is precluded from asserting, in her own right, her entitlement to property she claims is hers, on the ground that she is bound by a determination that the property belonged to someone else, when that determination was made in a separate proceeding in which she was not permitted to participate." *United States v. Daugerdas*, 892 F.3d 545, 557 (2d Cir. 2018). The Fourth Circuit similarly recognized "[s]erious due process questions" if a third-party claimant were barred from challenging the underlying forfeiture order. *United States v. Reckmeyer*, 836 F.2d 200, 206 (4th Cir. 1987). The court added, "The determination made at the defendant's criminal trial that the property was subject to forfeiture cannot be considered binding on persons who were not only not parties to the criminal action but were specifically barred from intervening." *Id.*

Here, in direct conflict with the Second and Fourth Circuits, and without even citing *Parklane Hosiery*, the Ninth Circuit concluded that "[a]s a third party in a criminal forfeiture proceeding, 101 Houseco could not relitigate whether the defendants had a forfeitable interest in [PLV East]." App. 7. The Fifth Circuit has reached a similar conclusion. *See United States v. Huynh*, 595 Fed. Appx. 336, 340-41 (5th Cir. 2014) (rejecting third-party claimants' argument that "§ 853 violates the Fifth Amendment Due Process

Clause insofar as it forecloses them from challenging the propriety of the initial forfeiture").

The Court should grant the writ to resolve this clear split in the circuits. On review, it should hold, under *Parklane Hosiery*, that a third-party claimant must be permitted to challenge the district court's underlying criminal forfeiture order before the claimant's property can be forfeited.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

Petitioner 101 Houseco is a California limited liability company. ER24-27. Until the forfeiture in this case, it held title to PLV East. Neither the company nor its current members and investors (who put millions of dollars into PLV East) have been charged with any crime.

In the mid-2000s, a developer named Bijan Madjlessi began construction of PLV East. In 2008, he defaulted on a construction loan, which he had personally guaranteed. The FDIC auctioned the loan. Madjlessi was prohibited by law from bidding at the auction. To circumvent the prohibition, Madjlessi recruited James House (a contractor) to serve as straw purchaser. Madjlessi promised House that if he participated in the scheme, Madjlessi would pay him \$200,000 that he owed House for work on PLV East.

David Lonich (Madjlessi's attorney) formed 101 Houseco to serve as the vehicle by which the purchase would be made. ER24. Using a loan from Sonoma

Valley Bank, 101 Houseco purchased the rights to the loan on which Madjlessi had defaulted. ER768-71. To hide Madjlessi's involvement, Lonich and House claimed falsely to Sonoma Valley Bank and the FDIC that House, not Madjlessi, controlled 101 Houseco. Having purchased the defaulted construction loan, 101 Houseco then acquired PLV East. The loan from Sonoma Valley Bank was repaid in full; no victim suffered any loss from the 101 Houseco transactions. FER4.

A grand jury indicted Madjlessi, Lonich, and two employees of Sonoma Valley Bank. House, who was charged by information, pled guilty and cooperated with the government. Madjlessi died before trial.

House testified as a prosecution witness. He denied that he ever owned either 101 Houseco or PLV East. ER271-72, 284, 293, 299. The government embraced House's testimony, arguing that he was a mere straw owner. ER305, 308, 314, 317.

As with House, ample evidence showed that Lonich never owned PLV East. Lonich himself declared: "At no time was I a member of any entity that owned all or any portion of the real property referred to as Park Lane Villas East. At no time have I ever held an ownership interest in 101 Houseco, LLC, or any of its members, or Park Lane Villas East." ER382, ¶21.

II. PROCEEDINGS BELOW.

The forfeiture of PLV East arises from the criminal cases against House and Lonich.

A. *United States v. House.*

House was charged with conspiracy to commit bank fraud and other offenses. ER784-87. The information alleged that House "assisted in obtaining a loan for [101 Houseco] falsely claiming that company was controlled by [House], but knowing that [House] was a straw and that 101 Houseco was actually controlled by Bijan Madjlessi and David Lonich." ER785.

House pled guilty. In his plea agreement, House acknowledged that he "knowingly signed documents I knew were false indicating I was the true owner of 101 Houseco." He promised not to oppose any forfeiture request the government made.

The government moved for a preliminary order of forfeiture against House. The motion sought a money judgment of \$12,270,000 and forfeiture of PLV East. It provided that the money judgment would be "credited with the net proceeds from the successful forfeiture and sale of the Park Lane Villas East in this case or the companion criminal case [*Lonich*]." House did not oppose the forfeiture. ER339.

The district court granted the preliminary order of forfeiture. ER330. 101 Houseco filed a third-party petition. The company maintained that it held

title to PLV East and that House had never owned or otherwise actually acquired the property.

The district court dismissed 101 Houseco's petition. App. 21. The court concluded that 101 Houseco's ownership was not "distinguishable from Lonich, House, and Madjlessi" and thus that Lonich and House owned PLV East. App. 32. By reaching the merits, the court implicitly rejected the government's argument--adopted by the court of appeals as its sole basis for affirmance, App. 7--that 101 Houseco had no right to challenge the forfeiture judgment against House. 101 Houseco appealed.

B. *United States v. Lonich.*

Lonich was indicted with Madjlessi and two former Sonoma Valley Bank employees. Madjlessi died, and the case continued with Lonich and the other defendants. Neither 101 Houseco nor any of its current members or investors was charged.

The indictment charged the defendants with defrauding Sonoma Valley Bank and others in the transaction involving 101 Houseco and PLV East. The indictment sought forfeiture of PLV East. ER779-80, ¶¶43(b), 45(c).

The jury found the defendants guilty on most counts. The government moved for a preliminary order of forfeiture against Lonich, seeking both PLV East and a \$20,800,000 money judgment. As with House, the government asserted that the money judgment against Lonich would be "credited with the

net proceeds from the successful forfeiture and sale of the Park Lane Villas East."

The district court denied the government's motion. App. 47. The court reasoned that, although Madjlessi and Lonich had controlled 101 Houseco, "the government did not show that Lonich *owned* 101 Houseco, LLC, or that Lonich *obtained* the loan proceeds made to 101 Houseco, LLC." App. 49 (emphasis in original). It declared that "[u]nder these circumstances, the Court cannot find that Lonich 'obtained directly or indirectly' property subject to forfeiture." App. 49 (quoting forfeiture statute).

The government sought reconsideration, based on its discovery that 101 Houseco had indemnified Lonich for a portion of his legal fees in the criminal case. The district court granted the government's motion, concluding that Lonich had "obtained" PLV East, even though he never held title. App. 21. Contrary to its initial order, in which the court refused to equate control with ownership, it declared that "[w]hile Lonich insists that he never 'obtained' 101 Houseco or Park Lane Villas East, his ownership of Park Lane Villas East is reflected by his control over the property." App. 35. The court declined to impose a money judgment.²

101 Houseco filed a third-party petition asserting ownership of PLV East and arguing under *Honeycutt* that Lonich never "actually acquired" the

² In Lonich's appeal from his conviction and sentence, he did not challenge the forfeiture of PLV East, and the court of appeals did not address the merits of that forfeiture. *United States v. Lonich*, 23 F.4th 881 (9th Cir. 2022).

property. The district court dismissed the petition, App. 20, and 101 Houseco appealed. The Ninth Circuit consolidated 101 Houseco's appeals in *House* and *Lonich* for briefing and argument.

The court of appeals affirmed. App. 1. It did not decide whether House and Lonich "actually acquired" PLV East, as *Honeycutt* requires. Instead, it held that 101 Houseco had no right to challenge the district court's determination of that issue, either by statute or as a matter of due process. App. 7.

The district court had stayed the government's sale of PLV East pending the court of appeals' decision. Following the Ninth Circuit's ruling, the district court lifted the stay. We understand that the government, through the United States Marshals Service, is in the process of selling the property.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve the clear conflict in the circuits over the right of a third-party claimant to challenge the underlying criminal forfeiture order through which the government seeks to confiscate the claimant's property. This case presents an ideal vehicle for deciding the due process question. That issue was fully briefed, argued, and considered below; its outcome will likely determine whether petitioner and its innocent investors keep or lose millions of dollars; and the split in the circuits is deep and entrenched.

I. THERE IS A CLEAR SPLIT IN THE CIRCUITS ON THE DUE PROCESS ISSUE.

The court of appeals' decision solidifies a clear split in the circuits. The Ninth Circuit (in this case) and the Fifth Circuit (in *Huynh*) hold that a third-party claimant has no due process right to challenge the underlying criminal forfeiture order. The Second Circuit (in *Daugerdas*) and the Fourth Circuit (in *Reckmeyer*) have reached the opposite conclusion.

The court below attempted to distinguish *Daugerdas* and *Reckmeyer*. App. 18-19. It noted that *Reckmeyer* interpreted 21 U.S.C. § 853(n)(6)(B), a provision on which petitioner does not rely. But that misses the larger point of the decision. The Fourth Circuit interpreted the statute broadly because otherwise the third-party claimant would have no means "to attack the validity of the forfeiture order by proving that a particular asset was not forfeitable under the terms of the statute," and that would create "[s]erious due process questions." 836 F.2d at 206. To underscore the point, the court added: "The determination made at the defendant's criminal trial that the property was subject to forfeiture cannot be considered binding on persons who were not only not parties to the criminal action but were specifically barred from intervening." *Id.*

Reckmeyer addresses the precise circumstance here: 101 Houseco, a third party, seeks to "attack the validity of the forfeiture order[s] by proving that [PLV East] was not forfeitable under the terms of the statute," because House and Lonich never "actually

acquired" it. And the district court's forfeiture orders against House and Lonich "cannot be considered binding" on 101 Houseco, because the company was "not only not [a] part[y] to the criminal action[s] but [was] specifically barred from intervening." *Id.*

Turning to *Daugerdas*, the court of appeals cited the portion of the Second Circuit's decision noting that § 853(n)(6) provides the exclusive statutory grounds on which a third-party claimant can prevail. App. 18-19. *Daugerdas* did recognize, as the court noted, that § 853(n)(6) does not authorize a challenge to the underlying forfeiture order, *see* 892 F.3d at 554--but it then found that such a challenge must be permitted as a matter of due process, *see id.* at 557-58, as petitioner seeks to do here.

The court of appeals also asserted that *Daugerdas* turned on the fact that the property at issue constituted substitute assets. But that was not the basis for the Second Circuit's due process analysis. Rather, the court found that due process would be violated if the claimant were deprived of property based on a forfeiture order that she had no opportunity to challenge--just as petitioner contends here. *Daugerdas* is on all fours with this case.

II. THE COURT OF APPEALS' DECISION PERMITS THE CONFISCATION OF PROPERTY WITHOUT DUE PROCESS.

This Court declared in *Parklane Hosiery* that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be

heard." 439 U.S. at 327 n.7. As the court below acknowledged, petitioner was barred by 21 U.S.C. § 853(k) from intervening to contest the underlying forfeiture orders in *House* and *Lonich*. App. 8. Due process thus required that it have an opportunity, through its third-party petitions, to address the merits of those orders, which constitute the predicate on which the forfeiture of PLV East rests. As the Second Circuit held, relying on *Parklane Hosiery*, "The Due Process Clause does not permit us to hold that a third party is precluded from asserting, in her own right, her entitlement to property she claims is hers, on the ground that she is bound by a determination that the property belonged to someone else, when that determination was made in a separate proceeding in which she was not permitted to participate." *Daugerdas*, 892 F.3d at 557.

A third party's ability to challenge the underlying forfeiture order is essential for the protection of its property rights, because "[a] criminal defendant generally will not have the same incentive as a third-party claimant to argue that property subject to forfeiture is not his. The defendant will not end up with the property either way, and he might actually get a windfall if the money he owes is paid off with someone else's property." *Id.* This problem is particularly acute when the criminal defendant pleads guilty and consents to the forfeiture as part of his plea agreement, as the *House* forfeiture demonstrates. Although House disavowed ownership of PLV East at the *Lonich* trial, he did not oppose the government's motion to forfeit the property from him. House had a powerful motive to support the forfeiture of PLV East, regardless of the merits. He did not own

the property, so he lost nothing from its forfeiture, and the government agreed to credit the proceeds from the sale of PLV East toward his \$12 million money judgment. ER330-31. Due process does not allow the government to take property worth millions of dollars through an uncontested judgment without giving the property owner an opportunity to challenge that judgment.

The court of appeals' reasoning permitting such confiscation is deeply flawed. First, the court's analysis of the due process issue conflicts squarely with *Parklane Hosiery*, which it made no effort to distinguish and did not even cite.

Second, the court of appeals asserted incorrectly that its ruling "agree[s] with every circuit to have considered the question." App. 3. As discussed above, however, the court's decision conflicts squarely with *Daugerdas* and *Reckmeyer*.

Most of the cases the court cited in support of its decision (App. 12-14) merely hold that the statute governing third-party claims--21 U.S.C. § 853(n)(6)--does not expressly authorize a third party to challenge the underlying forfeiture determination. Those cases do not address whether, under *Parklane Hosiery*, third parties must be permitted to raise such a challenge as a matter of due process. That is the issue *Daugerdas* and *Reckmeyer* addressed, and they reached the opposite conclusion from the court of appeals below. Only the Fifth Circuit's decision in *Huynh* squarely supports the Ninth Circuit's ruling on the due process issue.

Third, the court of appeals cited this Court's *Libretti* decision, which, it asserted, "rejected a similar argument." App. 15. The court misread *Libretti*. A criminal defendant argued there that Fed. R. Crim. P. 11 required that before accepting a guilty plea with a stipulated forfeiture, the district court had to find a factual basis for the forfeiture. The defendant contended that this interpretation of Rule 11 was necessary to protect third-party interests. *Libretti*, 516 U.S. at 44. This Court rejected the argument, holding that "Congress has determined that § 853(n), rather than Rule 11(f), provides the means by which third-party rights must be vindicated. Third-party claimants are not party to Rule 11(f) proceedings, and *Libretti*'s assertion that their interests are best protected therein fits poorly within our adversary system of justice." *Id.*

Libretti thus turned on an interpretation of Rule 11. The case says nothing about whether a third party that has filed a petition under § 853(n), as 101 Houseco did, has a due process right to challenge the underlying forfeiture order. That is undoubtedly why the government did not cite *Libretti* in opposition to 101 Houseco's due process argument in this case³ and why *Daugerdas* does not mention *Libretti*.⁴

³ The government cited *Libretti* in the court of appeals as "see also" support for a proposition unrelated to 101 Houseco's due process argument. Brief for the United States at 10. It made no mention of *Libretti* in its due process discussion. *Id.* at 25-33.

⁴ In *Daugerdas*, unlike this case, the government cited *Libretti* in opposing the claimant's due process argument. *United States v. Daugerdas*, No. 17-898, Brief for the United States at 24. The Second Circuit rejected the government's position without even citing *Libretti*.

Far from supporting the court of appeals' decision, *Libretti* underscores the importance of permitting a third-party claimant to challenge the underlying forfeiture order when the criminal defendant has consented to the forfeiture as part of a guilty plea, as House did here. *Libretti* holds that Rule 11 does not require the district court to ensure there is a factual basis for a forfeiture to which the defendant stipulates in a plea agreement. *Libretti*, 516 U.S. at 51. When the order of forfeiture against the criminal defendant receives no meaningful judicial review through a factual basis inquiry, the right of the third party to challenge that order in an ancillary petition is especially vital in safeguarding the third party's property rights.

Fourth, citing *DSI Associates LLC v. United States*, 496 F.3d 175 (2d Cir. 2007), the court of appeals suggested that the opportunity to seek remission of forfeited property from the Attorney General under 21 U.S.C. § 853(i) satisfies due process. App. 17-18. In *DSI*, however, the court deferred consideration of a due process claim pending a request for remission; it did not find that the opportunity for remission satisfied due process. 496 F.3d at 186-87. In *Daugerdas* the Second Circuit distinguished its prior decision in *DSI* on this basis and rejected the government's contention that a property owner's ability to seek remission satisfies due process:

An opportunity to ask the Attorney General, acting in her sole discretion, to return to you property that you contend was yours, and should never have been

taken from you in the first place, is not an adequate substitute for an opportunity to prevent the taking by presenting your claim of ownership in court before it occurs.

892 F.3d at 558.

The experience of 101 Houseco's investors illustrates the inadequacy of remission. Those investors petitioned for remission under § 853(i). In response, the Attorney General decided to return their principal, *minus all past returns*, leaving them far worse off than they were before the forfeiture occurred. ER72-82. If 101 Houseco were to seek remission, it could expect nothing better than the inadequate remedy the Attorney General has granted the investors. That is no substitute for the ability to challenge the entire forfeiture and to do so before the property is confiscated, awarded to the government, and sold by the government to someone else.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT SPLIT OVER A THIRD-PARTY CLAIMANT'S DUE PROCESS RIGHTS.

For several reasons, this case provides an ideal vehicle for resolving the circuit split.

First, the due process issue was fully briefed and argued in the district court and on appeal. There is no concern about preservation.

Second, resolution of the due process question is outcome-determinative. The court of appeals affirmed the district court's orders dismissing 101 Houseco's third-party petitions solely on the ground that a third-party claimant cannot challenge the underlying criminal forfeiture order. If this Court concludes, as petitioner urges, that a third party must be permitted to bring such a challenge as a matter of due process, the appropriate disposition is to vacate the court of appeals' judgment and remand for a ruling on the merits of petitioner's *Honeycutt* argument. On remand, petitioner has a substantial likelihood of prevailing on its contention that neither House nor Lonich "actually acquired" PLV East.

Third, the circuit split is fully formed and deeply entrenched. Further consideration by the courts of appeals will only deepen the split. There is no reason to wait to resolve it.

Finally, the issue is an important and recurring one. The Department of Justice routinely seeks to forfeit money and property in criminal cases. *Honeycutt* curtailed the government's ability to forfeit property the defendant never actually acquired, but the lower courts are still absorbing the message of that case. Third-party petitions under § 853(n) are common, and they have acquired new urgency in the wake of *Honeycutt*. Particularly when the criminal defendant pleads guilty and consents to forfeiture, the third-party claimant's ability to challenge the underlying forfeiture order is essential to the protection of the claimant's property rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Law Office of
John D. Cline
600 Stewart Street
Suite 400
Seattle, WA 98101
(360) 320-6435
Counsel for Petitioner

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