No. 18-

IN THE

Supreme Court of the United States

ALLEN PEITHMAN, JR., AEP PROPERTIES, L.L.C., SHARON A. ELDER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Mark E. Rappl
NAYLOR & RAPPL LAW OFFICE P.C., L.L.O.
1111 Lincoln Mall, Ste. 300
Lincoln, NE 68508

Robert B. Creager
ANDERSON, CREAGER & WITTSTRUCK, P.C., L.L.O.
1630 K Street
Lincoln, NE 68508

Kelsi Brown Corkran
Counsel of Record
Thomas M. Bondy
Hannah Garden-Monheit
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400
kcorkran@orrick.com

E. Joshua Rosenkranz
Ned Hirschfeld
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Counsel for Petitioners

QUESTION PRESENTED

Does 18 U.S.C. § 981(a)(1)(C) authorize forfeiture imposed jointly and severally among co-conspirators, as the Sixth and Eighth Circuits have held, or is such joint and several liability foreclosed under the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), as the Third Circuit has held?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

While the government enjoys considerable forfeiture powers, a bedrock limitation on those powers is that criminal forfeiture does not reach assets untainted by criminal activity. A defendant may be compelled to give up the fruits of her offense, ensuring that "crime does not pay." *United States v. Monsanto*, 491 U.S. 600, 614 (1989). But the defendant's other property is traditionally off limits insofar as forfeiture is concerned.

In *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), the Court held that Congress codified this limitation in 21 U.S.C. § 853(a)(1) by restricting forfeiture for specified drug crimes to tainted assets—namely, property that "'the person obtained, directly or indirectly, as the result of' the crime." *Id.* at 1632 (quoting § 853(a)(1)). In particular, the Court explained, this language does not authorize joint and several forfeiture liability among co-conspirators. Such liability would "by its nature" compel a defendant to forfeit not only tainted property that she obtained, but also her "*untainted* property," equal in value to the tainted assets obtained only by her co-conspirators. *Id.* (emphasis added). That would greatly expand the longstanding scope of criminal forfeiture, contrary to congressional intent.

The courts of appeals are starkly divided about *Honeycutt*'s implications for another, more generally applicable forfeiture statute: 18 U.S.C. § 981(a)(1)(C). The language of that statute mirrors § 853(a)(1) by restricting forfeiture to tainted assets—property "obtained directly or indirectly, as the result of" the crime

or "traceable thereto." 18 U.S.C. §§ 981(a)(1)(C), (a)(2)(A). The Third Circuit has thus concluded that *Honeycutt*'s reasoning applies with equal force to § 981(a)(1)(C), foreclosing joint and several forfeiture liability. In direct conflict, the Eighth Circuit's decision below joins the Sixth Circuit in holding that § 981(a)(1)(C) permits joint and several forfeiture. Those courts acknowledge that § 981(a)(1)(C) and § 853(a)(1) are similarly worded, but decline to apply *Honeycutt*'s reasoning to § 981(a)(1)(C) because it does not contain § 853(a)(1)'s precise verbal formulation restricting forfeiture to tainted assets obtained by "the person" subject to liability.

This Court's intervention is necessary to resolve the acknowledged, entrenched circuit conflict over § 981(a)(1)(C)'s scope. The Eighth Circuit's decision below marks a dramatic and inapt expansion of criminal forfeiture, permitting the government to reach property that a defendant owns independently of any criminal activity. That is not the function of forfeiture, and it is not the scheme that Congress enacted. Notwithstanding the absence of the particular phrase "the person," § 981(a)(1)(C), like § 853(a)(1), by its terms restricts forfeiture to tainted property and so forecloses joint and several liability. Even the government has partially conceded as much, although it seeks to carve out exceptions plainly foreclosed by *Honeycutt*'s logic. And the circuit split has continued to deepen despite that concession.

At this point, only this Court can restore uniformity to a widely enforced and deeply consequential federal statute—and foreclose a troubling form of governmental overreach—by holding that § 981(a)(1)(C)

does not permit joint and several forfeiture liability among co-conspirators. The Court should grant certiorari and reverse the decision below.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 917 F.3d 635 (8th Cir. 2019). Pet. App. 9a-44a. The opinion of the district court regarding the money judgment is available at 2017 WL 1682778 and reproduced at Pet. App. 47a-60a. The final judgments of the Eighth Circuit are reproduced at Pet. App. 1a-8a.

JURISDICTION

The Eighth Circuit entered judgments on February 28, 2019. On April 30, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including June 27, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 981(a)(1)(C) provides:

(1) The following property is subject to forfeiture to the United States:

***

> (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670,

> 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

18 U.S.C. § 981(a)(2)(A) provides:

> (2) For purposes of paragraph (1), the term "proceeds" is defined as follows:
>
> > (A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

21 U.S.C. § 853(a)(1) provides:

> (a) Property subject to criminal forfeiture
>
> > Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

Additional statutory provisions involved are reproduced in the Appendices. Pet. App. 61a-72a.

STATEMENT OF THE CASE

Honeycutt *holds that 21 U.S.C. § 853(a)(1) does not permit joint and several forfeiture liability among co-conspirators*

This case arises against the backdrop of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). The Court there unanimously held that a criminal forfeiture statute for drug offenses, 21 U.S.C. § 853(a)(1), does not permit "joint and several liability for co-conspirators." *Id.* at 1633. The Court reasoned that § 853(a)(1)'s plain text—which authorizes forfeiture of "'property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of' the crime"—necessarily restricts forfeiture to "tainted property." *Id.* at 1632. Joint and several forfeiture liability "by its nature" sweeps more broadly. *Id*. It puts a defendant on the hook for the value of assets acquired only by her co-conspirators—an obligation that "would require forfeiture of untainted property" by the defendant. *Id. Honeycutt* thus concluded that joint and several liability is fundamentally at odds with § 853(a)(1)'s focus on tainted assets. *Id.*

Honeycutt found further confirmation in the accompanying procedural provisions of § 853. First, § 853(c) specifies when the government's right to forfeitable property vests. It "applies to tainted property only." *Id.* at 1633. Second, § 853(e)(1) authorizes pretrial freezes on forfeitable property. It applies only if the government proves that the property "has the requisite connection to that crime." *Id.* Third, § 853(p) permits the government to "confiscate property untainted by the crime" as a replacement for tainted assets—but only in certain specified circumstances. *Id.* at 1633-34. All of these provisions reflect the fundamental limitation that § 853(a)(1) restricts forfeiture to tainted assets.

Section 853(p), in particular, "lays to rest any doubt" that joint and several forfeiture liability is impermissible. *Id.* at 1633. That provision authorizes the government to seize "substitute property" from a defendant—that is, untainted assets—only if *that defendant* acquired but later "dissipated or otherwise disposed of" tainted property. *Id.* at 1633-34. "Permitting the Government to force *other co-conspirators* to turn over untainted substitute property would allow the Government to circumvent Congress' carefully constructed statutory scheme," rendering § 853(p)'s requirements "futile." *Id.* (emphasis added).

Finally, *Honeycutt* explained that "traditional[]" forfeiture principles further bolstered this conclusion, because historically forfeiture proceeded *in rem* only against tainted property. There was no indication that Congress sought to expand the scope of property subject to forfeiture in adopting § 853. *Id.* at 1634-35.

The government prosecutes Petitioners as co-conspirators and seeks joint and several forfeiture

This case, like *Honeycutt*, involves a joint and several forfeiture order against co-conspirators. It began in 2013-2014, when law enforcement first investigated sales of synthetic marijuana (known as "potpourri") by two "head shops" in Lincoln, Nebraska—the store "Dirt Cheap," initially owned by Petitioner Allen Peithman, Jr., and the store "Island Smokes," owned by Allen's mother, Petitioner Sharon Elder. Pet. App. 10a-13a.

Petitioners' respective involvement with the stores and with potpourri sales varied significantly over time. When Peithman opened Dirt Cheap in 2008, the store sold potpourri, which Peithman believed "did not contain any banned chemicals [and] did not cause consumers any problems." Pet. App. 13a. But Peithman was incarcerated on charges unrelated to the store from March 2013 to June 2014. *Id.* Elder took over operation of Dirt Cheap in his absence, Pet. App. 13a-14a, and ultimately bought the store from him, Doc. 373 at 162.[1]

During his time away from the store, Peithman decided he "did not want to sell 'potpourri' at Dirt Cheap any longer." Pet. App. 14a. Elder accordingly opened a new store, Island Smokes. Dirt Cheap "ceased selling 'potpourri,'" although it "continued to

[1] "Doc. X" refers to item number X on the district court's docket, *see United States v. Allen E. Peithman, Jr., et al.*, No. 15-cr-03091 (D. Neb.).

sell what law enforcement consider drug paraphernalia," *id.*—namely, pipes, bongs, and rolling papers, Indictment p.31. Island Smokes, however, sold both potpourri and paraphernalia. Pet. App. 14a. According to Elder, "she, not her son, was solely responsible for the sale of 'potpourri' during and after Peithman's incarceration.'" Pet. App. 17a-18a.

When Peithman got out of prison, he "shifted from being a business owner to being a landlord." Pet. App. 22a. He started a property management company, Petitioner AEP Properties, L.L.C. ("AEP"). Doc. 372 at 25. Peithman and AEP owned the buildings containing Dirt Cheap and Island Smokes (along with unrelated rental properties) and collected rent from them. Pet. App. 22a-24a; Doc. 382 at 141, 143; Doc. 383 at 30, 77-83. Meanwhile, Elder owned both businesses—Dirt Cheap and Island Smokes, Doc. 373 at 118-19—and, according to the government, was "the one running the day-to-day business," Doc. 353 at 9. Peithman helped out only "on occasion," *id.* at 6, with tasks like "collecting cash for her[,] … helping her order products[,] [and] closing up the store," *id.* at 8. He also attempted to help confirm that the products Elder was selling were "100 percent federally compliant" and legal. Doc. 356 at 53.

Elder believed "the products she was selling were legal," and she attempted to confirm that by conferring with suppliers, consulting with a lawyer, and reviewing the chemical sheets associated with the products. Pet. App. 17a-18a. Elder also cooperated with law enforcement and followed their advice when she was told particular products could have serious side effects. Pet. App. 18a. It nonetheless turned out

that several (but not all) of the potpourri packets sold at Island Smokes tested positive for illegal drugs. Pet. App. 13a-16a.

The government indicted Petitioners on thirteen counts.[2] The case proceeded to trial, and a jury acquitted Petitioners of most of the charges. The jury found them not guilty of selling, distributing, or possessing controlled substances, i.e., illegal drugs (Counts I-VI); maintaining a business for the purpose of distributing illegal drugs (Count VII); and money laundering (Count XIII). Docs. 435, 437, 440; *see also* Indictment. However, the jury found Elder and Peithman—but not AEP—guilty of conspiracies to sell drug paraphernalia (Count VIII) and misbranded potpourri in violation of the Federal Food, Drug, and Cosmetic Act (Count X), as well as conspiracy to commit mail fraud by receiving potpourri by mail (Count XI). *Id.* The jury also found Elder and Peithman—but not AEP—guilty of investing the profits from paraphernalia and potpourri sales in Dirt Cheap and Island Smokes (Count IX). Finally, the jury convicted all three Petitioners of conspiracy to structure financial transactions to evade reporting requirements (Count XII). *Id.*[3]

---

[2] Some counts applied only to certain Petitioners. A fourteenth count was later vacated. *See* Indictment; Doc. 327 at 1.

[3] The jury also found a fourth defendant—Cornerstone Plaza, Inc., a now-defunct company then owned by Elder—guilty of Counts VIII-XII. Doc. 439; *see* Doc. 480 at 50. Prior to trial, a store employee had also pleaded guilty to distributing a controlled substance. Doc. 314. Neither Cornerstone nor the employee was a party in the Court of Appeals proceeding below.

In addition to hefty terms of incarceration and sizeable criminal fines, the government requested forfeitures under both § 853, which applies to specified drug crimes, and § 981, which applies more generally to a wide range of offenses. Indictment p.29.

***The district court imposes joint and several forfeiture liability under § 981(a)(1)(C), purporting to distinguish* Honeycutt**

The government pursued two forms of forfeiture in two separate stages. It first asked the jury to find that specific property allegedly linked to the offenses of conviction should be forfeited. Indictment p.30-31; Doc. 285. The specific property included potpourri and paraphernalia; the buildings housing the Island Smokes and Dirt Cheap stores, along with other real estate; and several vehicles. *Id.*; *see also* Doc. 356 at 7-9. The government also sought forfeiture of four specified bank accounts: two business accounts controlled by Peithman; Elder's personal checking account; and a business account owned by Elder's company, Cornerstone Plaza, Doc. 285. Of all these items, the jury found only the potpourri, paraphernalia, and Cornerstone bank account (which contained $11,440.89) subject to forfeiture. Docs. 285, 449. The district court entered a preliminary order of forfeiture as to those items, Doc. 296, which subsequently became final at sentencing, Doc. 449.

Separately, the government asked the district court to enter an additional forfeiture money judgment at sentencing. Doc. 323. Not content with the jury's more limited verdict, the government sought a further money judgment of $2,248,728.56—a sum

that included, among other things, the value of much of the property the jury had expressly declined to forfeit.[4] Of the $2,248,728.56, the government claimed that $117,653.57 had been used to "purchase … paraphernalia," while another $1,025,288.75 had been used "to purchase, (wholesale), 'potpourri.'" Doc. 323 at 1-2.

After an evidentiary hearing, the district court preliminarily agreed with the government that Petitioners had used $117,653.57 to buy drug paraphernalia "related to Count VIII" (conspiracy to sell drug paraphernalia), and $1,025,288.75 to buy potpourri "found in Count XI" (mail fraud). Doc. 461 at 45-46; *accord id.* at 18. Adding those numbers together, the court indicated that the government could obtain a forfeiture judgment totaling $1,142,942.32, but that the remainder of the government's requested amount was unwarranted. *Id.*; Pet. App. 50a-52a. Rather than apportion that liability among the defendants, however, the court concluded—without explanation—that "all four defendants" should be "jointly and severally" liable for the entire money judgment. Pet. App. 50a; *accord* Doc. 461 at 18.

As to the specific items of property the jury declined to forfeit, the court ordered the government to "return" them. Pet. App. 56a. But it imposed conditions designed to secure the government's "interest" in using them to collect on the money judgment. Pet.

---

[4] Specifically, the government sought the value of the Dirt Cheap and Island Smokes buildings, Doc. 323 at 2, as well as the value of deposits into the same bank accounts that the jury addressed, *id.* at 3; *see also* Doc. 285 at 4-5; Indictment pp.18-19.

App. 56a-60a; Doc. 461 at 26. For example, the court prohibited Peithman from selling or otherwise disposing of his real estate and authorized the government to file lis pendens. Pet. App. 57a-58a, 60a.

Several months later, the district court conducted Petitioners' formal sentencing hearing. By then, this Court had decided *Honeycutt*. Nonetheless, the district court reaffirmed its preliminary decision that forfeiture should be joint and several. Doc. 463 at 3. Counsel for Peithman and AEP specifically objected, arguing among other things that the court was improperly holding Peithman "responsible for all of that money while he was incarcerated," rather than just the "rent checks" he received as landlord. *Id.* at 4-6. The government had not "demonstrate[d] who should pay for what." *Id.* at 6. Counsel for Elder added likewise that "the record evidence … is insufficient, … for the Court to make a proper allocation contemplated under *Honeycutt*." *Id.* at 7.

The district court nevertheless overruled the parties' objections, purporting to distinguish *Honeycutt* on two grounds. The court first stated that *Honeycutt* does not apply where, as here, a forfeiture judgment uses criminal expenditures rather than "profits" to serve as a proxy for the defendants' illicit gain. *Id.* at 9-10. The court then concluded that *Honeycutt* was inapplicable in any event "because each of the Defendants are equally culpable." *Id.* at 10. The court thus entered a final money judgment in the amount of $1,142,942.32, jointly and severally against Peithman, Elder, AEP, and Cornerstone. Pet. App. 45a-46a.

The money judgment compounded sentences that were already extraordinarily severe. The court sentenced Peithman to 115 months' incarceration, to be served consecutively to a 14-month sentence for violating conditions of supervised release. Pet. App. 11a, 18a. Elder, then 71 years old and in poor health, Doc. 480 at 29, received a 63-month sentence, Pet. App. 18a.[5] Petitioners also received substantial criminal fines, on top of the money judgment: The court fined Peithman and Elder $500,000 each and assessed each $500. Doc. 435 at 6; Doc. 437 at 6. It fined AEP $450,000 and assessed AEP $400, Doc. 440 at 2. Finally, the court also held Elder and Peithman liable for $5,186.56 in restitution. Doc. 435 at 7; Doc. 437 at 7.

The Eighth Circuit holds that § 981(a)(1)(C) authorizes joint and several forfeiture liability, acknowledging the circuit split on this question

Petitioners appealed, among other things, the district court's imposition of joint and several forfeiture liability. The Eighth Circuit recognized that a

---

[5] The district court acknowledged that "acquitted conduct … dr[o]ve[] the Guidelines" calculation. Doc. 399 at 3 (Peithman); Doc. 400 at 3 (Elder); *see also* Doc. 463 at 80-81. During sentencing, the court found that Peithman and Elder's conduct involved controlled substances—a finding that significantly increased the Guidelines range for each defendant. That disregarded the jury's decision to *acquit* Peithman and Elder of distributing or conspiring to distribute a controlled substance. *Id.* Based on discomfort with the role acquitted conduct played in the Guidelines calculations—along with the Guidelines' harsh treatment of synthetic marijuana—the district court varied downward slightly from the Guidelines in imposing the abovementioned sentences. *Id.*

$117,653.57 portion of the money judgment related "to the conviction for conspiracy to distribute drug paraphernalia" and was therefore governed by 21 U.S.C. § 853. Pet. App. 33a. Explaining that "*Honeycutt* precludes the district court from imposing joint and several liability for co-conspirators" under § 853(a)(1) even if "Peithman and Elder were equally culpable," the court reversed and remanded as to that fraction of the money judgment. Pet. App. 33a.

The Eighth Circuit affirmed joint and several liability, however, as to "[t]he bulk of the … money judgment"—the remaining $1,025,288.75. *Id.* That sum, the court explained, "related to the conviction for conspiracy to commit mail fraud." *Id.* Forfeiture is therefore governed by 18 U.S.C. § 981(a)(1)(C), *id.*, which—much like § 853(a)(1)—authorizes forfeiture of property "obtained directly or indirectly, as the result of the commission of the offense," §§ 981(a)(1)(C), (a)(2)(A). The Eighth Circuit "note[d] a circuit split has developed on the question of whether *Honeycutt* applies to criminal forfeitures under § 981(a)(1)(C)." Pet. App. 34a. As the court observed, the Sixth Circuit holds that *Honeycutt*'s reasoning does not apply to forfeiture under § 981(a)(1)(C), while the Third Circuit has concluded that it does. *Id.*[6]

Deepening the split, the Eighth Circuit held that *Honeycutt*'s reasoning is limited to § 853 and does not

[6] The court further noted that the Eleventh Circuit had "observ[ed] [that *Honeycutt*] appeared likely to apply" to § 981(a)(1)(C). Pet. App. 34a. The Eleventh Circuit has since reserved the question. *United States v. Carlyle*, No. 18-11486, 2019 WL 2307959, at *4 & n.3 (11th Cir. May 30, 2019).

foreclose joint and several liability under § 981(a)(1)(C). The court examined the "similarities" and "differences" in the "text and structure" of § 853 and § 981. Pet. App. 34a. On the one hand, the court acknowledged that the definition of forfeitable property under § 981, like § 853, "use[s] the verb 'obtained,' which the Supreme Court placed great emphasis on" in *Honeycutt*. Pet. App. 34a-35a. And § 981(a)(1)(C)'s specific textual "requirement that property be 'traceable' to the commission of the offense … is similar" to the "tainted property" limitation that was central to *Honeycutt*'s holding regarding § 853. Pet. App. 35a. On the other hand, the court found that "a material distinction is the lack of a reference to a 'person' in § 981," which made § 981 "broader than § 853 and less focused on personal possession." *Id.* Relying on that textual difference, the Eighth Circuit "join[ed] the Sixth Circuit and conclude[d] that the reasoning of *Honeycutt* is not applicable to forfeitures under 18 U.S.C. § 981(a)(1)(C)." *Id.* It therefore affirmed the imposition of joint and several forfeiture.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Has Intractably Divided The Courts Of Appeals.

In *Honeycutt*, this Court unanimously held that the language of § 853(a)(1) precludes the imposition of joint and several forfeiture orders. There is an acknowledged 2-1 circuit split over whether *Honeycutt*'s reasoning likewise forecloses joint and several forfeiture orders under § 981(a)(1)(C). The Third Circuit holds that it does, reasoning that § 981(a)(1)(C),

which encompasses property "obtained directly or indirectly, as the result of the commission of the offense," is materially indistinguishable from § 853(a)(1), which covers property that "the person obtained, directly or indirectly, as the result of such violation." § I.A. In direct conflict, the Eighth Circuit in its decision below joins the Sixth Circuit in holding that § 981(a)(1)(C) permits joint and several liability, on the theory that the two provisions though worded very similarly are not worded identically, and § 981(a)(1)(C) is less focused on personal possession of tainted property than § 853(a)(1). § I.B. In an unusual twist, the government has elsewhere conceded that the Third Circuit is correct. Yet this Court's intervention remains urgent and necessary, as the conflict among the circuits has only deepened in the wake of the government's purported change in position. § I.C.

A. The Third Circuit holds that § 981(a)(1)(C) does not authorize joint and several liability.

Contrary to the Eighth Circuit's decision below, the Third Circuit holds that *Honeycutt*'s reasoning compels the conclusion that courts may not impose joint and several forfeiture orders under § 981(a)(1)(C).

In *United States v. Gjeli*, the Third Circuit held that "*Honeycutt* … appl[ies] with equal force" to § 981(a)(1)(C). 867 F.3d 418, 428 (3d Cir. 2017). It reasoned that "the text and structure" of § 981(a)(1)(C) is "substantially the same as [§ 853(a)(1), the statute] under consideration in *Honeycutt*." *Id.* at 427. Therefore, the co-conspirators could not be held jointly and

severally liable for the over $5 million made by their loan sharking and illegal gambling operation, notwithstanding that they were both leaders of the enterprise. *Id.* at 420-21, 428.

Underscoring the relevance of *Honeycutt*, the Third Circuit further noted that § 853 was directly relevant to the government's efforts to obtain forfeiture under § 981(a)(1)(C), because the government "desire[d] to seek substitute property pursuant to § 853(p) for each count for which forfeiture was sought"—including twelve counts subject to forfeiture under § 981(a)(1)(C). *Id.* at 427 n.16. Section 853(p) governs forfeiture of "substitute property" when the defendant's tainted assets have become unavailable. *Supra* 6. And, as *Honeycutt* explained, it delineates the exclusive circumstances in which the government may "confiscate property untainted by the crime" in a way that forecloses joint and several liability. 137 S. Ct. at 1633; *supra* 6. Critically, § 853(p)'s substitute property procedures apply to forfeitures sought under § 981(a)(1)(C) and § 853(a)(1) alike. *See* 28 U.S.C. § 2461(c). That procedural overlap further confirms the "substantial equivalency" of forfeiture under those two statutes. *Gjeli*, 867 F.3d at 427 n.16.

B. The Sixth and Eighth Circuits hold that § 981(a)(1)(C) authorizes joint and several liability.

In sharp contrast to the Third Circuit, the Sixth and Eighth Circuits hold that *Honeycutt*'s reasoning does not foreclose joint and several forfeiture orders under § 981(a)(1)(C), based on purported differences

between the language of § 853(a)(1) and § 981(a)(1)(C).

In *United States v. Sexton*, the Sixth Circuit "h[e]ld that the reasoning of *Honeycutt* is not applicable to § 981(a)(1)(C)," and that accordingly "a defendant can be liable for property that his codefendant acquired." 894 F.3d 787, 799 (6th Cir. 2018). The court reasoned that "[u]nlike § 853(a)(1), 18 U.S.C. § 981(a)(1)(C) does not contain the phrase 'the person obtained,' which was the linchpin … in *Honeycutt*." *Id.* And while § 981(a)(1)(C) explicitly requires forfeited property to be "traceable" to the crime, the court found that this requires only that "the property [be] connected to the crime," and not that it "be property that the particular defendant received." *Id.* The Sixth Circuit expressly acknowledged that the Third Circuit had determined that *Honeycutt*'s reasoning applies to forfeitures under § 981(a)(1)(C), but it concluded that the Third Circuit was "incorrect." *Id.* The Sixth Circuit therefore affirmed an over-$2.5 million money judgment, which reflected the amount that the defendant and his business partner collectively defrauded from banks. *Id.* at 792, 799-800.

In the decision below, the Eighth Circuit explained that "a circuit split has developed on the question of whether *Honeycutt* applies to criminal forfeitures under § 981(a)(1)(C)." Pet. App. 34a (contrasting *Sexton* with *Gjeli*). It then "join[ed] the Sixth Circuit" in holding that § 981(a)(1)(C) permits joint and several forfeiture orders. Pet. App. 35a. Like the Sixth Circuit, the Eighth Circuit emphasized "the lack of a reference to a 'person' in § 981." *Id.* It concluded from that omission that "[t]he plain language

under § 981[(a)(1)(C)] is broader … and less focused on personal possession" than § 853(a)(1), with no requirement of "possession of the property by the defendant, either explicitly or implicitly." *Id.* On that basis, the Eighth Circuit concluded that joint and several forfeiture remains available under § 981(a)(1)(C), notwithstanding that other aspects of "[t]he two statutes … are similar." Pet. App. 34a. It therefore affirmed the $1,025,288.75 money judgment imposed jointly and severally against Peithman, Elder, and AEP. Pet. App. 36a.

C. The conflict has deepened despite the government's concession that the Third Circuit is correct.

In response to a petition for certiorari from the Sixth Circuit's decision in *Sexton*, the government made two concessions: First, it conceded that there is a "conflict" among the circuits "on the applicability of *Honeycutt*'s reasoning to 18 U.S.C. 981(a)(1)(C)." Br. in Opp. to Cert. at 12-13, *Sexton v. United States*, 139 S. Ct. 415 (2018) (No. 18-5391) ("*Sexton* BIO"). It acknowledged that "the Third … Circuit[] ha[s] concluded, contrary to the [Sixth Circuit's] opinion below, that *Honeycutt* does apply to Section 981(a)(1)(C)." *Id.* at 12. Second, the government "agree[d] with petitioner … that *Honeycutt*'s reasoning applies to Section 981(a)(1)(C)." *Id.* at 13. The government explained that although it "did not directly express a position on that specific issue" before the Sixth Circuit in *Sexton*, in other lower courts it had agreed that "*Honeycutt*'s rejection of joint and several liability also applies to forfeiture orders under Section 981(a)(1)(C)." *Id.* at 10-11. The government urged this

Court to deny review because "additional appellate decisions adopting a contrary view are unlikely to arise" in light of the government's position. *Id.* at 9. The Court accordingly denied the petition.

This case proves the government's assertion wrong. Notwithstanding the Solicitor General's claim in *Sexton* to have conceded the issue, the circuit split has become further entrenched: The Eighth Circuit has now explicitly joined the Sixth Circuit in holding that § 981(a)(1)(C) permits joint and several liability. Only this Court can resolve the conflict.

That courts have continued to sustain joint and several liability under § 981(a)(1)(C) is not a one-off glitch—a temporary bump in the road following a change in position by the government. It has been well over a year and a half since the government began inconsistently conceding that *Honeycutt* forecloses joint and several liability under § 981(a)(1)(C). *E.g.*, 28(j) Supp. Authority Letter, *United States v. Carlyle*, No. 15-12977 (11th Cir. Sept. 18, 2017); Br. for the United States at 48-50, *United States v. Fiumano*, No. 16-3250 (2d Cir. Oct. 6, 2017). All of the decisions in the circuit split post-date the concession.

Far from resolving the conflict, the government's supposed concession has served only to exacerbate the confusion in the lower courts. For example, in the Second Circuit, the government has twice "concede[d] that 'the reasoning of *Honeycutt*—insofar as it rejects joint and several liability as a basis for forfeiture—also applies to forfeiture under 18 U.S.C. § 981(a)(1)(C).'" *United States v. Gil-Guerrero*, 759 F. App'x 12, 18 (2d Cir. 2018) (quoting Gov't Suppl. Br.

at 2); *see also United States v. Fiumano*, 721 F. App'x 45, 51 (2d Cir. 2018) (conceding same). In response, the Second Circuit expressly reserved the question. *Gil-Guerrero*, 759 F. App'x at 18 n.8; *Fiumano*, 721 F. App'x at 51 n.3. But in the wake of this reservation, district courts have continued to find that pre-*Honeycutt* Second Circuit precedents authorize joint and several forfeiture orders under § 981(a)(1)(C). *See Lasher v. United States*, No. 12 CR. 868 (NRB), 2018 WL 3979596, at *10 & n.5 (S.D.N.Y. Aug. 20, 2018); *Pierce v. United States*, No. 12-CR-0340 (WHP), 2018 WL 4179055, at *8 & n.8 (S.D.N.Y. Aug. 31, 2018) (Mag.); *see also United States v. McIntosh*, No. 11-CR-500 (SHS), 2017 WL 3396429, at *6 (S.D.N.Y. Aug. 8, 2017). Plainly, the government's indication that the Third Circuit is correct about § 981(a)(1)(C) has not settled the question.

Moreover, the intermittent nature of the government's concession yields deeply unfair results. In *Sexton*, the government waited until the cert. stage to mention its agreement with the Third Circuit, while urging this Court to deny review based in part on that concession. *Sexton* BIO 11, 13. When the Court then denied review, the Sixth Circuit's concededly incorrect opinion authorizing joint and several money judgments under § 981(a)(1)(C) remained good law and Sexton remained liable for the full $2.5 million judgment. Here, the government has again failed to mention in any of the proceedings to date its supposed agreement with the Third Circuit, and the same unfair result as in *Sexton* will likely recur if the Court again denies review. Post-conviction relief cannot remedy the injustice, because "courts have universally rejected the argument that *Honeycutt* can form

the basis to disturb a final forfeiture order on a § 2255 petition." *Lasher*, 2018 WL 3979596, at *9.

Finally, this Court's intervention remains necessary because notwithstanding the supposed concession that *Honeycutt*'s reasoning is applicable to § 981(a)(1)(C), the government continues to advance arguments that fundamentally misunderstand *Honeycutt*. *Honeycutt* held that, *as a matter of law*, § 853(a)(1) does not authorize joint and several liability; it "foreclose[s] joint and several liability for co-conspirators" across the board, regardless of the facts of the particular case. 137 S. Ct. at 1633. Yet in § 981(a)(1)(C) cases, the government claims that there are *factual exceptions* with respect to which joint and several liability can still properly be authorized. Here, for example, it contends that "*Honeycutt* does not bar the imposition of joint and several money judgments where co-conspirators share equally in the proceeds of the illegal activity." Gov. CA8 Br. 74. Similarly, in *Sexton*, it argued that a joint and several forfeiture order was "consistent with the Court's reasoning in *Honeycutt*" "in this particular case" based on the defendant's supposedly higher level of involvement in the underlying business. *Sexton* BIO at 12 (purporting to distinguish *Honeycutt* on the ground that Sexton "is … more akin to Honeycutt's brother"). As further elaborated below (at 31), the government's attempts to carve out factual exceptions to *Honeycutt* are legally mistaken, and this case is an ideal vehicle for decisively rejecting them.

II. The Eighth Circuit's Decision Is Wrong.

Certiorari is also warranted because the Eighth Circuit's decision is incorrect. *Honeycutt* read § 853(a)(1) to foreclose joint and several liability because its text limits forfeiture to the defendant's tainted assets—a limitation further confirmed by § 853's neighboring procedural provisions and also by traditional and longstanding precepts of criminal forfeiture. The nearly identical text of § 981(a)(1)(C) also covers only tainted assets, and § 853's procedural provisions apply to forfeitures under § 981. *Honeycutt*'s rationale thus applies with full force and also forecloses joint and several forfeiture liability under § 981(a)(1)(C).

Honeycutt construed § 853(a)(1) to apply only to tainted assets because the statute limits forfeiture to "property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a)(1). That language describes "property flowing from … the crime itself"—that is, "tainted property." *Honeycutt*, 137 S. Ct. at 1632. Section 853(a)(1) thus excludes "untainted property" that a defendant did not acquire as "the result" of criminal activity. *Id.*

Section 981(a)(1)(C)'s language is in pertinent part virtually identical. As further defined by § 981(a)(2)(A), it limits forfeiture to property "which constitutes or is derived from proceeds" that were "obtained directly or indirectly … as the result of the commission of the offense," or are "traceable thereto." 18 U.S.C. §§ 981(a)(1)(C), (a)(2)(A). Much of that text

matches § 853(a)(1) word for word, including the requirement that forfeited property was "obtained" as "the result" of criminal activity. Section 981(a)(1)(C) then goes even further by specifying that property must be "traceable" to the crime. The exclusion of untainted assets could hardly be clearer.

Honeycutt confirmed that § 853(a)(1) applies only to tainted property by explaining how that restriction shapes several neighboring procedural provisions. Section 853(c), which governs the vesting of forfeitable property, "applies to tainted property only." 137 S. Ct. at 1633. Section § 853(e)(1), in turn, authorizes pretrial freezes on forfeitable property only if the government proves that the property "has the requisite connection to that crime." *Id.* (quoting *Kaley v. United States*, 571 U.S. 320, 324 (2014)). And § 853(p) permits the government to "confiscate property untainted by the crime" as a substitute for tainted assets—but only in certain specified circumstances. *Id.* at 1633-34. As explained above, *supra* 5-6, the Court read these provisions to be incompatible with joint and several liability. *Honeycutt*, 137 S. Ct. at 1633-34. In particular, § 853(p)'s "carefully constructed statutory scheme" for substitution of untainted property "lays to rest any doubt" on that point. *Id.*; *supra* 6.

Again, § 981 works exactly the same way. Regarding the vesting of forfeitable property, § 981(f) simply reproduces § 853(c) virtually verbatim. *Compare* 18 U.S.C. § 981(f) ("All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.") *with* 21

U.S.C. § 853(c) ("All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section."). As for pretrial freezes and substitute property, § 981 incorporates §§ 853(e)(1) and (p) wholesale. *See* 28 U.S.C. § 2461(c) (procedural provisions of § 853 "apply to all stages of a criminal forfeiture proceeding" under § 981); *United States v. Soto*, 915 F.3d 675, 680 (9th Cir. 2019) ("Section 853(p) is a procedural provision, so § 2461(c) makes it applicable [under other forfeiture statutes]."). The procedural provisions for forfeiture under § 853 and § 981 are thus essentially identical. *Honeycutt*'s analysis of those provisions applies equally to forfeiture under § 981(a)(1)(C), further confirming that joint and several liability is unavailable.

Honeycutt concluded by noting that § 853(a)(1)'s focus on tainted assets is consistent with the "background principles" of forfeiture. 137 S. Ct. at 1634. This Court explained that "[t]raditionally, forfeiture was an action against the tainted property itself and thus proceeded *in rem*." *Id.* Consistent with that longstanding practice, "§ 853 maintains traditional *in rem* forfeiture's focus on tainted property unless one of the preconditions of § 853(p) exists." *Id.* at 1635. Section 981 embodies the same background principles. Congress adhered to that understanding in § 853, and there is not the slightest indication that Congress deviated from it in the context of § 981.

In short, § 981 duplicates—largely verbatim—the key textual and structural features of § 853. *Honeycutt*'s reasoning thus applies with full force here. In concluding otherwise, the Eighth Circuit mistakenly

relied on a single textual difference between the two statutes: § 853(a)(1) limits forfeiture to property that "*the person* obtained, directly or indirectly, as the result of" criminal activity, while §§ 981(a)(1)(C), (a)(2)(A) cover property "obtained directly or indirectly, as the result of" criminal activity. Emphasizing "the lack of a reference to a 'person' in § 981," the Eighth Circuit concluded that § 981(a)(1)(c) "does not contain any language that requires possession of the property by the defendant, either explicitly or implicitly." Pet. App. 35a. On that basis, it held that § 981(a)(1)(C) permitted joint and several forfeiture liability. *Id.*

The Eighth Circuit was wrong. Section 981(a)(1)(c) *does* "require[] possession of the [forfeited] property by the defendant." Pet. App. 35a. As explained, the statute covers only tainted assets—property "obtained directly or indirectly … as the result of the commission of the offense," or "traceable thereto." 18 U.S.C. §§ 981(a)(1)(C), (a)(2)(A). But the only tainted assets that a defendant can forfeit are those she has personally obtained. A defendant cannot possibly forfeit tainted assets obtained only by her co-conspirators; at most, the defendant can surrender her own *untainted* assets of equal value. That is precisely why "joint and several liability…, by its nature, would require forfeiture of untainted property." *Honeycutt*, 137 S. Ct. at 1632. Thus, limiting forfeiture to tainted assets—as § 981(a)(1)(C) plainly does—necessarily also limits it to assets that the defendant has personally obtained.

The Third Circuit is therefore correct that "the holding in *Honeycutt* … appl[ies] with equal force" to

§ 981(a)(1)(C). *Gjeli*, 867 F.3d at 427-28. As that court explained, "the text and structure" of § 981(a)(1)(C) are "substantially the same as" the text and structure of § 853. *Gjeli*, 867 F.3d at 427. This Court should grant certiorari to clarify that § 981(a)(1)(C), like § 853(a)(1), does not permit joint and several forfeiture liability.

III. The Question Presented Is Important And Recurring.

This Court's resolution of the question presented is enormously important. Forfeiture is big business for the federal government. In Fiscal Year 2018 alone, the Department of Justice made over $1.3 billion from forfeitures. U.S. Dep't of Justice, *Total Net Deposits to the Fund by State of Deposit*, *FY2018 Asset Forfeiture Fund Reports to Congress*, https://tinyurl.com/y6ca4h7h (Feb. 1, 2019). And the government has broad discretion in how to spend or dispose of those forfeited assets. *See* 28 U.S.C. § 524(c)(1). It thus has every incentive to pursue massive money judgments against criminal defendants. Meanwhile, there are only limited checks. For example, the Rules of Criminal Procedure "provide no right to a jury verdict" "if the government is seeking a money judgment," and a preponderance-of-the-evidence standard applies. Charles Alan Wright, et al., *After Defendant Found Guilty: the Forfeiture Phase*, 3 Fed. Prac. & Proc. Crim. § 573 (4th ed. 2011).

Money judgments have extremely harsh consequences for criminal defendants—particularly where imposed jointly and severally, and therefore with po-

tentially no tangible relationship to the amount a defendant actually received from the crime. For example, the $1,025,288.75 forfeiture judgment at issue here is over twenty-six times Elder's net worth, *see* Presentence Investigation Report ("PSI") ¶ 126, and nearly one-and-a-half times Peithman's net worth, *see* PSI ¶ 129. It was imposed on top of very large criminal fines—$500,000 each for Peithman and Elder, and $450,000 for AEP—as well as additional restitution amounts and assessments. Doc. 435 at 6-7; Doc. 437 at 6-7; Doc. 440 at 2; Doc 463 at 87. As a result, after serving their substantial prison sentences, Peithman and Elder will likely face destitution.

The question presented recurs frequently, because § 981(a)(1)(C) is "[t]he closest Congress has come to enacting one, all-powerful forfeiture statute." Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 17 S. Afr. J. Crim. Just. 347, 350 (2004). Section 981(a)(1)(C) applies much more broadly than the forfeiture provision at issue in *Honeycutt*, which governs only designated drug-related offenses. *See* 21 U.S.C. § 853(a). Section 981(a)(1)(C) applies to "all of the common" federal crimes "like fraud, bribery, embezzlement and theft, and scores of more obscure ones as well." Cassella, *supra*, at 350; *see also* 18 U.S.C. § 1956(c)(7) (listing crimes incorporated by § 981(a)(1)(C)). Given how many crimes implicate the circuit split over the question presented here, inconsistent results will arise again and again until this Court intervenes.

That state of affairs is intolerable. It defies two key goals of sentencing: uniformity and proportionality. *E.g.*, *Rita v. United States*, 551 U.S. 338, 349

(2007). The conflict among the circuits means that the scope of forfeiture orders will vastly differ for similarly situated defendants based solely on the happenstance of where they are prosecuted. And in the Sixth and Eighth Circuits, defendants will face crippling joint and several money judgments that bear no relationship to their individual culpability or how much they may have benefited from their crimes.

There is no reason to await additional percolation. The question presented is a purely legal issue of statutory interpretation, and the arguments on both sides have been fully aired. Only this Court can resolve the conflict, which is now firmly entrenched. As explained *supra* (§ I.C), the government purports to largely agree that the Third Circuit is correct, yet that did not stop the Sixth and Eighth Circuits from reaching the opposite conclusion. And there is no realistic possibility of the Sixth and Eighth Circuits revisiting their unanimous holdings permitting joint and several liability, absent this Court's intervention. Notably, Judge Moore was on the Sixth Circuit panels in both *Honeycutt* and *Sexton*, but urged rehearing en banc only in the former (which was denied)—underscoring the unlikelihood of the Sixth Circuit reconsidering its position on § 981(a)(1)(C). *See United States v. Sexton*, 894 F.3d 787, 801-02 (6th Cir.), *reh'g denied* (July 16, 2018); *United States v. Honeycutt*, 816 F.3d 362, 381-83 (6th Cir.) (Moore, J., concurring in the judgment), *reh'g denied* (May 31, 2016). Nor should the Court await further deepening of the split. This Court routinely grants certiorari to resolve circuit splits with only one court of appeals in disagreement. Indeed,

only one court of appeals had rejected joint and several liability in the split resolved by *Honeycutt*. 137 S. Ct. at 1631 n.1.

IV. This Case Is An Ideal Vehicle For Deciding The Question Presented.

Finally, this case presents an ideal vehicle for resolving whether joint and several forfeiture liability is permissible under § 981(a)(1)(C). The question presented was properly preserved and is squarely posed. Petitioners argued to the district court and the Eighth Circuit that § 981(a)(1)(C) does not permit joint and several forfeiture liability. Both courts expressly rejected their arguments on the merits. *See* Pet. App. 31a-35a; Doc. 463 at 9-10. And that rejection was the sole basis for the Eighth Circuit's decision to uphold Petitioners' joint and several forfeiture liability. *See* Pet. App. 33a-35a. This case thus provides a much cleaner vehicle than the previously denied petition in *Sexton*, where the petitioner had not raised the question presented to the district court (indeed, petitioner there had agreed to the forfeiture as part of a plea agreement). *See Sexton*, 894 F.3d at 798; *United States v. Sexton*, No. 16-cr-40-DCR-EBA, Doc. 154 ¶ 10 (E.D. Ky. 2017).

Moreover, the joint and several money judgment in this case facilitates a particularly extreme form of governmental overreach. When a joint and several forfeiture order applies to a single conspiracy, it permits the government to compel co-conspirators to forfeit more than their share of the tainted assets. That's bad enough. But the money judgment here goes a step further. It applies to *multiple* conspiracies, including

those to sell drug paraphernalia and to commit mail fraud. *Supra* 11. Petitioner AEP was not convicted of those charges. *Supra* 9. Yet under the terms of the money judgment, the government could compel AEP to pay the entire $1,142,942.321. Pet. App. 45a. That would force AEP to forfeit assets in connection with conspiracies for which it was *acquitted*—an even more glaring misuse of the forfeiture power that demands immediate correction.

Finally, this case provides the opportunity for this Court to clarify the meaning of *Honeycutt* by rejecting the theory that "equal culpability" among co-conspirators justifies joint and several forfeiture liability. That theory is plainly wrong; at most, equal culpability might warrant *equally divided* forfeiture liability, not *joint and several* liability. Yet the government has insisted otherwise on appeal. *See* Gov. CA8 Br. 74; *see also* Pet. App. 45a-46a (the district court emphatically endorsing a proposed equal culpability exception to *Honeycutt*). This Court can and should foreclose that misinterpretation by clarifying that joint and several forfeiture is *never* authorized under § 981(a)(1)(C) (or § 853(a)(1))—regardless of co-conspirators' relative culpability. Joint and several forfeiture liability here is simply forbidden as a matter of law.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Mark E. Rappl
NAYLOR & RAPPL LAW OFFICE P.C., L.L.O.
1111 Lincoln Mall
Suite 300
Lincoln, NE 68508

Robert B. Creager
ANDERSON, CREAGER & WITTSTRUCK, P.C., L.L.O.
1630 K Street
Lincoln, NE 68508

Kelsi Brown Corkran
Counsel of Record
Thomas M. Bondy
Hannah Garden-Monheit
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400
kcorkran@orrick.com

E. Joshua Rosenkranz
Ned Hirschfeld
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

June 27, 2019