No. 19-16

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The government's brief confirms certiorari is warranted. It concedes that the courts of appeals are squarely divided on the question presented: whether the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), forecloses joint and several forfeiture among co-conspirators under 18 U.S.C. § 981(a)(1)(C). It also concedes that the Eighth Circuit joined the wrong side of the circuit conflict in its decision below deeming *Honeycutt* inapplicable to § 981(a)(1)(C).

The government contends the latter concession means this Court need not resolve the circuit conflict. It omits that it continues to rely in the lower courts on the very precedent it disavows, insisting that precedent remains binding because this Court has not yet overruled it—all while urging this Court *not* to weigh in. The time has come to foreclose such gamesmanship and restore nationwide uniformity on a critical criminal justice issue. Given the tens of thousands of criminal convictions impacted each year, "[t]he importance of this Court's guidance in this arena is hard to overstate." Cato Br. 4.

Straining to avoid certiorari, the government posits as an alternate argument that joint and several liability is permissible under § 981(a)(1)(C) as long as co-conspirators are "equally culpable." The government's "equal culpability" theory is neither a vehicle obstacle nor correct. Contrary to the government's account of the decision below, the Eighth Circuit *rejected* the government's proposed "equal culpability" exception to *Honeycutt*'s prohibition of joint and sev-

eral forfeiture, and rightly so: It is atextual and contradicts *Honeycutt*'s essential teaching that forfeiture cannot extend to untainted assets.

The government briefly suggests 31 U.S.C. § 5317(c) as another alternate rationale for imposing joint and several forfeiture, but the government waived the argument by failing to raise it below. It is meritless in any event, as § 5317(c) also permits forfeiture of only tainted property.

The petition for certiorari should be granted.

ARGUMENT

I. The Government Concedes That The Circuits Are Divided On The Question Presented, And That The Eighth Circuit's Decision Below Is Wrong.

As the petition explains, the courts of appeals are starkly divided over whether this Court's reasoning in *Honeycutt* forecloses joint and several liability under § 981(a)(1)(C). In its decision below, the Eighth Circuit joined the Sixth Circuit in holding that *Honeycutt* has no application to § 981(a)(1)(C), based on minor textual differences between that provision and the provision addressed in *Honeycutt*, 21 U.S.C. § 853. Pet. 17-19. In direct conflict, the Third Circuit holds that *Honeycutt* forecloses joint and several forfeiture liability under § 981(a)(1)(C) and § 853 alike, because the provisions' text and structure are materially identical. Pet. 16-17.

The government concedes this split is real. BIO 9-10 ("the courts of appeals have reached conflicting decisions" over whether *Honeycutt*'s reasoning applies to § 981(a)(1)(C)). It also concedes that the Eighth and Sixth Circuit decisions are wrong, and that the Third Circuit is correct, because there is no "distinguishing 18 U.S.C. 981 from 21 U.S.C. 853 for purposes of joint and several liability." BIO 6.

The Eighth Circuit's erroneous holding—that *Honeycutt* has no application to § 981(a)(1)(C)—is the only rationale it provided for sustaining joint and several liability in this case. As elaborated below, the government misleadingly suggests the Eighth Circuit endorsed its alternate equal culpability theory for affirmance. In fact, the court rejected it. *Infra* § II. Nor does the judgment rest on § 5317(c); the Eighth Circuit never cited that statute as a basis for the joint and several forfeiture order, which is unsurprising since the government failed to raise it. *Infra* § III.

This case thus squarely presents the question dividing the courts of appeals, and that question is dispositive of joint and several liability here. *Honeycutt* wasted no time in resolving a similar conflict related to § 853(a), a statute that governs only "certain drug offenses." BIO 4. Certiorari is even more vital with respect to § 981(a)(1)(C), which "covers a wide range of offenses," BIO 4, and so affects a vast number of prosecutions across the country. Pet. 27-28; Cato Br. 4.

The government asserts that its concession before this Court that the Eighth Circuit erred renders the question presented "of diminishing importance." BIO

10. In fact, the government's blithe approach to forfeiture in § 981(a)(1)(C) cases makes certiorari all the more urgent. In both the Sixth and Eighth Circuits, the government has won published decisions affirming joint and several forfeiture orders under § 981(a)(1)(C), reasoning that *Honeycutt* imposes *no* limitation on the government because it concerns only § 853(a). *See* Pet. App. 33a-35a; *United States v. Sexton*, 894 F.3d 787, 799 (6th Cir. 2018). Only when the defendants sought certiorari did the government confess error for the first time—and solely for the purpose of persuading this Court not to intervene. BIO 6, 9-10; Br. in Opp. to Cert. at 11, 13, *Sexton v. United States,* 139 S. Ct. 415 (2018) (No. 18-5391).

Indeed, at the government's urging, the Sixth Circuit recently affirmed yet another joint and several forfeiture award under § 981(a)(1)(C)—this time for a staggering $19 million. *United States v. Bates*, No. 17-6263, 2019 WL 3451052, at *19-20 (6th Cir. July 31, 2019). The government acknowledged its prior concession "in the Supreme Court that the reasoning of *Honeycutt* applies to Section 981(a)(1)(C)," but nonetheless insisted that because *Sexton* has not been disturbed by this Court, the defendants' "arguments that the district court's forfeiture order is inconsistent with *Honeycutt* remain foreclosed." Br. of the United States, *Bates*, 2018 WL 6721535, at *86 (6th Cir. Dec. 17, 2018) (citation omitted); *see also id.* at *83 ("The district court did not err in holding [defendants] jointly and severally responsible for forfeiture in this

case, and their argument to the contrary is foreclosed by [Sixth Circuit] precedent." (citation omitted)).[1]

The government has engaged in similar maneuvering in the Second Circuit. Post-*Honeycutt*, it continues to obtain joint and several liability judgments under § 981(a)(1)(C) in the district courts based on pre-*Honeycutt* circuit precedent allowing such judgments. *E.g.*, *United States v. McIntosh*, No. 11-CR-500 (SHS), 2017 WL 3396429, at *3-6 (S.D.N.Y. Aug. 8, 2017). If pressed on appeal, however, the government concedes the issue, thereby avoiding the Second Circuit abrogating that precedent based on *Honeycutt*. *See* Pet. 21-22 (citing cases). As a result, district courts continue upholding legally erroneous joint and several forfeiture judgments across the Second Circuit—with devastating consequences for each defendant. *See id*.

[1] The government does not mention *Bates*, but notes (BIO 9) that it has occasionally acknowledged its concession before other courts of appeals. Its isolated citations are hardly confidence-inspiring examples of fair play. In one, the government conceded that *Honeycutt* applied to § 981(a)(1)(C), yet argued that the issue had been waived by the defendant's plea bargain even though *Honeycutt* issued after the plea bargain and was not addressed during sentencing. *See* Br. of United States, *United States v. Villegas*, 747 F. App'x 600 (9th Cir. 2019) (No. 17-10300), 2018 WL 2234308, at *12-13 (May 14, 2008). In the other, the government merely noted in passing that *Honeycutt* applies to § 981(a)(1)(C) while pressing an argument that *Honeycutt* has no application to the forfeiture statute actually at issue in the case, 18 U.S.C. § 982(a)(1). Br. of United States, *United States v. Haro*, 753 F. App'x 250 (5th Cir. 2018) (No. 17-40539), 2018 WL 1064494, at *43-44 (Feb. 23, 2018).

Against this backdrop of escalating injustice, the government's suggestion that its concession renders this Court's intervention unnecessary, BIO 10, rings hollow. The government's strategy of selective concessions has not only failed to mitigate the circuit conflict, but has encouraged the erroneous reading of § 981(a)(1)(C) at issue here to flourish. It has spread from district courts within the Second Circuit, to the Sixth Circuit, and now to the Eighth Circuit—not to mention an untold number of plea bargains. *See* Cato Br. 8. As long as those precedents remain on the books, the government's conduct makes clear that it will continue to deploy this "atom bomb of tort remedies." *Id.* at 4. This Court should put a stop to the overreach once and for all.

II. The Government's Proposed "Equal Culpability" Exception To *Honeycutt* Is Meritless.

Instead of defending the Eighth Circuit's interpretation of § 981(a)(1)(C), the government devotes most of its brief to a different theory. It argues that joint and several forfeiture is consistent with *Honeycutt*'s reasoning where defendants are "equally culpable" in a conspiracy. BIO 5-8. That argument was rejected by the Eighth Circuit and rightly so, as it fundamentally misunderstands *Honeycutt*.[2]

[2] Notably, the government does not limit its misreading of *Honeycutt* to § 981(a)(1)(C). The government's asserted "equal culpability" exception would apply alike to § 853, and possibly many other forfeiture statutes. *See, e.g.*, Cato Br. 9.

1. As an initial matter, the government errs in suggesting that the Eighth Circuit endorsed its spurious reading of *Honeycutt*. *See* BIO I, 6, 9. Quite the opposite. In reversing the portion of the forfeiture order entered under § 853, the Eighth Circuit held that Petitioners' purported equal culpability could *not* justify joint and several liability under *Honeycutt*'s reasoning: "While we find no clear error in the court's determination that Peithman and Elder were equally culpable, *Honeycutt* precludes the district court from imposing joint and several liability for co-conspirators under § 853." Pet. App. 33a. The Eighth Circuit upheld the remainder of the forfeiture order only because it concluded that *Honeycutt*'s reasoning did not apply *at all* to § 981(a)(1)(C). Pet. App. 35a.

The government's suggestion that certiorari is inappropriate without a separate circuit conflict over its equal culpability theory is frivolous. BIO 9. The question presented—whether *Honeycutt*'s reasoning extends to § 981(a)(1)(C)—was the sole basis for the Eighth Circuit's holding imposing joint and several liability on Petitioners and is, by the government's own account, the subject of circuit conflict. If a respondent could render such a question unworthy of review simply by positing an alternative theory for affirmance, this Court would have no docket.

In any event, all of the cases in the acknowledged circuit conflict confronted similar facts. *United States v. Gjeli*, 867 F.3d 418, 420-21, 428 (3d Cir. 2017) (no joint and several liability, although defendants were both "leader[s]" of gambling operation); *Sexton*, 894 F.3d at 799-800 (defendant jointly and severally re-

sponsible for amount he and business partner defrauded from banks); *Bates*, 2019 WL 3451052, at *19 (brothers jointly and severally liable for proceeds of fraudulent family business). The government identifies no reason to wait for more courts to weigh in.

2. The government's equal culpability theory is also wrong. *Honeycutt*'s core holding is that Congress authorized forfeiture of only *tainted* property, consistent with the bedrock principle that criminal forfeiture is limited to the fruits of a defendant's crime. *See* Pet. 1, 5-6; 137 S. Ct. at 1635. Nothing in § 981(a)(1)(C)'s text or structure (or that of § 853(a), which the government agrees is materially identical) permits holding one defendant liable for the value of tainted property obtained by a different defendant, "equally culpable" or not.

To be sure, as an illustration of how drastically joint and several forfeiture can exceed the statute's limitation to tainted property, *Honeycutt* describes a drug kingpin who obtains $3 million and a college student who earns $3,600 delivering the drugs—but would, under a joint and several forfeiture order, be obligated to give up nearly $3 million of his own untainted assets. 137 S. Ct. at 1631-32. *Honeycutt*'s holding, however, was in no way limited to such an extreme example. *See id.* at 1635. Indeed, the point of our 50-50 culpability example, Pet. 31, is that joint and several forfeiture impermissibly reaches tainted assets in that circumstance, too. *Contra* BIO 8. After all, if a "joint[] mastermind," *id.*, in the aforementioned drug operation were made jointly and severally liable for the full $3 million in proceeds, but actually acquired only half that sum, he would need to forfeit

$1.5 million in *untainted* assets to satisfy the judgment.

Honeycutt emphasized that there is only one way that forfeiture may extend to such untainted property: the substitute property procedures of § 853(p), which the government does not dispute are incorporated wholesale into § 981(a)(1)(C). *See* Pet. 17, 25. Those procedures permit the government to recover a defendant's untainted assets in place of tainted property—but only if the government proves the defendant obtained and then dissipated the tainted property at issue. *Honeycutt*, 137 S. Ct. at 1633-34. *Honeycutt* rejected joint and several forfeiture in part because it would enable the government to improperly "circumvent" § 853(p)'s requirements by seizing a defendant's untainted assets merely because his "*co-conspirators*" obtained tainted property of equal value. *Id.* (emphasis added); *see* Pet. 6, 24-25. Such an "end run" is foreclosed by the "text and structure" of the statutes. 137 S. Ct. at 1634.

The government never disputes that its equal culpability theory of forfeiture would allow it to reach untainted assets without satisfying § 853(p)'s requirements. Instead, it argues that as long as co-conspirators have roughly the same level of involvement in the conspiracy—say, because they each had "ownership interests" in various aspects of the operation, BIO 7—they should be on the hook not only for their own tainted property, but also the tainted assets obtained by others. That is exactly what *Honeycutt* forecloses. 137 S. Ct. at 1634.

In a bid to reconcile its theory with the statutory text, the government suggests that equally culpable co-conspirators each "obtain" the full proceeds of the crime, and only "later" make a "decision to split up those proceeds among themselves." BIO 6. But that is not how *Honeycutt* construed "obtain." 137 S. Ct. at 1632 ("Neither the dictionary definition nor the common usage of the word 'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else."). Co-conspirators with comparable levels of involvement could "obtain" vastly different sums (say, $1 and $2,999,999). Or, as the petition notes, they could "obtain" similar amounts (say, $1.5 million and $1.5 million). Pet. 31. But the government never explains how they could *both* "obtain" *the same* funds (the whole $3 million and the whole $3 million).[3]

The whole point of *Honeycutt*'s holding is that co-conspirators *do not* each obtain the full proceeds of their shared enterprise merely because they act "in concert," BIO I, 5-6, to generate those proceeds. The college student in *Honeycutt*'s example obtained only his salary, even though he conducted drug sales that generated millions of dollars. 137 S. Ct. at 1631-32.

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[3] Perhaps the government is imagining something like a jointly held bank account, but that circumstance plainly is absent here and is not the same as "equal culpability." It is undisputed that Petitioners kept separate bank accounts; that only Sharon Elder owned the businesses during the relevant time period; and that Allen Peithman and AEP earned only rent money, not revenue from the businesses Sharon owned. *See* Pet. 7-8, 10; BIO 3. Moreover, the district court stated that in ordering joint and several liability, it was "n[o]t talking about property actually acquired." Doc. 463 at 9-10.

And the actual defendant in *Honeycutt* obtained *nothing*, even though he "managed sales and inventory" for a store that grossed hundreds of thousands of dollars in illicit revenue. *Id.* at 1630, 1635. The question is what property each co-conspirator "actually acquired as the result of the crime," *id.* at 1635—in the government's words (BIO 6), how the illicit profits are "split."

Ultimately, the government simply seeks under the banner of "equal culpability" what *Honeycutt* already foreclosed. The government's expressed concern about ostensible "gamesmanship" by defendants, BIO 8, makes that clear. It warns that "if participants in a conspiracy consolidate their ill-gotten gains in the hands of one particular criminal, leaving the other criminals judgment-proof, the government could obtain only partial recovery from the one participant who holds all the tainted assets, and nothing from all the rest." *Id.* But that would not be a partial recovery—it would be a *full* recovery of all tainted assets. However much the government might wish to punish the other co-conspirators for their crimes, forfeiture would not be the proper vehicle. As for the government's concern that the enriched co-conspirator might use "accounting practices" to dissipate the tainted property, Congress has already provided an answer: the substitute property procedures of § 853(p). This Court should not countenance the government's attempt to again "end run" that "carefully constructed" regime. *Honeycutt*, 137 S. Ct. at 1634.

III. This Case Presents An Ideal Vehicle To Resolve The Question Presented.

As the petition explains, this case presents an ideal vehicle for resolving whether *Honeycutt*'s prohibition of joint and several forfeiture applies to § 981(a)(1)(C). Pet. 30-31. The government does not dispute that the question presented was properly preserved and is squarely posed.

In addition to its misguided equal culpability claim, the government argues that this Court should deny review because even if Petitioners are correct that joint and several forfeiture is unavailable under § 981(a)(1)(c), such an order could nevertheless be upheld under 31 U.S.C. § 5317(c). BIO 10. The government, however, declined to raise § 5317(c) as a ground for joint and several forfeiture in the Eighth Circuit, *see* Gov. CA8 Br. 72-75, and the court accordingly did not address it. *See In re MidAmerican Energy Co.*, 286 F.3d 483, 487 (8th Cir. 2002) (holding appellee waived "alternate allegations" by failing to raise them "in an initial appeal brief" (citation omitted)); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) (Court will not address "alternative ground" for affirmance not advanced below).

Such an argument would have been meritless in any event. As the government recognizes, § 5317(c) authorizes forfeiture of only those assets "involved in" the offense of conviction. BIO 10. That language—just like the text of § 981(a)(1)(C)—restricts forfeiture to tainted assets, and so forecloses joint and several liability among co-conspirators.

CONCLUSION

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

Respectfully submitted,

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