No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NIDAL AHMED WAKED HATUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a concealment money laundering case (18 U.S.C. § 1956(h)) based on a series of "mirror-image" banking transactions in which the "same funds" (*i.e.*, the tainted property) borrowed on a line of credit were "almost simultaneously" returned to the victim bank, with interest, thus causing no loss to the bank (a gain, actually), App. 41, the district court imposed zero forfeiture, finding that "[t]here [were] no laundered funds that were retained by the Defendant or any other co-conspirator to be forfeited." App. 38. In a published opinion, the Court of Appeals reversed and remanded for imposition of an order of forfeiture, approving imposition of a "forfeiture money judgment" against petitioner's *untainted* property even though none of the applicable forfeiture statutes authorizes a money judgment. App. 2, 13. The question presented is:

> Whether a criminal defendant's legitimate, untainted property is subject to an extra-statutory forfeiture money judgment or substitute property forfeiture (under 21 U.S.C. § 853(p)), particularly when the defendant himself never "actually acquired" the tainted property (*i.e.*, the laundered funds "involved in such offense," 18 U.S.C. § 982(a)(1)), *see Honeycutt v. United States,* 137 S. Ct. 1626, 1635 (2017), and all of the tainted property was returned to its rightful owner (the victim of the offense) before sentencing.

The question presented can be subdivided into three stand-alone questions, any one of which, if answered in favor of petitioner, requires that the question presented be answered in the negative and the judgment of the Court of Appeals reversed:

(1) Whether a district court can impose a forfeiture money judgment against a criminal defendant in the absence of any statutory authority;[1]

(2) Whether the Court's holding in *Honeycutt v. United States*—that criminal forfeiture under 21 U.S.C. § 853(a) of drug "proceeds the person obtained" is "limited to [tainted] property the defendant himself actually acquired as the result of the crime" (*i.e.*, no joint and several liability), 137 S. Ct. 1626, 1635 (2017)—likewise limits criminal forfeiture under 18 U.S.C. § 982(a)(1) to the tainted property "involved in" the money laundering offense that "the defendant himself actually acquired as the result of the crime"; and

(3) Whether returning tainted property (*i.e.*, the laundered funds "involved in such offense," 18 U.S.C. § 982(a)(1)) to the rightful owner of the property (*i.e.*, the victim of the offense) before sentencing is a "transfer[] … to … a *third party*," 21 U.S.C. § 853(p)(1)(B) (emphasis added), that triggers forfeiture of a defendant's untainted, substitute property in an equivalent amount.

[1] Pending before the Court is a certiorari petition likewise seeking review of the legality of forfeiture money judgments. *See Bradley v. United States*, No. 20-7198 (Court-ordered response due May 10, 2021).

PARTIES TO THE PROCEEDINGS

Petitioner Nidal Ahmed Waked Hatum was the defendant in the District Court and the appellee in the Eleventh Circuit. He is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The respondent is the United States.

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Petitioner Nidal Waked petitions this Court pursuant to Sup. Ct. Rule 10 for issuance of a writ of certiorari to review the decision of the Eleventh Circuit that: (1) upheld the imposition of a "forfeiture money judgment" not authorized by statute; (2) held that criminal forfeitures are not limited to tainted property, notwithstanding this Court's opinion in *Honeycutt v. United States,* 137 S. Ct. 1626 (2017); and (3) held that the Government can forfeit a defendant's legitimate, untainted assets even after—indeed, *because*—the tainted funds were returned to the alleged crime victim.

ORDERS AND OPINIONS OF THE COURTS BELOW

The published opinion of the Eleventh Circuit reversing the district court is reported as *United States v. Waked Hatum*, 969 F.3d 1156 (11th Cir. 2020), and reproduced in the Appendix at App. 1-34.

The Eleventh Circuit's order denying rehearing and rehearing *en banc* is reproduced in the Appendix at App. 35-36.

The District Court's order imposing zero forfeiture is reproduced in the Appendix at App. 37-38.

The Factual Proffer supporting the guilty plea is reproduced in the Appendix at App. 39-41.

JURISDICTION

The Eleventh Circuit issued its decision on August 11, 2020 and denied a petition for rehearing and/or *en banc* review on October 29, 2020.

The deadline for filing a petition for a writ of certiorari in this case is March 29, 2021, the Court having ordered that in light of the pandemic, "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." *Order Regarding Filing Deadlines*, 589 U.S. (Mar. 19, 2020). This petition, therefore, is timely.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of law are reproduced in the Appendix as follows: 18 U.S.C. § 981, at App. 42-53; 18 U.S.C. § 982, at App. 54-57; 21 U.S.C. § 853, at App. 58-66; and Rule 32.2, Federal Rules of Criminal Procedure, at App. 67-86.

STATEMENT OF THE CASE

Petitioner pled guilty to one count of conspiracy to engage in concealment money laundering (18 U.S.C. § 1956(h)) based on a series of "mirror-image" banking transactions that caused zero loss to the bank. The "same funds" that were borrowed on a line of credit were timely returned to the bank, with interest. App. 41. The district court imposed zero forfeiture, finding that "[t]here are no laundered funds that were retained by the Defendant or any other co-conspirator to be forfeited." App. 38. The government appealed. Petitioner framed the issue as:

> Whether the district court correctly imposed a forfeiture amount of zero, where the same funds (the corpus) "involved in" the money laundering offense were returned to, and thus recovered by, the victim before sentencing (indeed, years before the defendant was indicted).

The Court of Appeals reframed the issue as follows:

> If a defendant is convicted of a money laundering scheme that caused no financial harm to an innocently involved bank, is an order of forfeiture still mandatory? We conclude that it is and reverse the District Court's denial of the government's forfeiture motion in this case.

App. 1-2.

The facts were not in dispute: As the general manager of Panamanian electronics wholesaler Vida Panama, petitioner arranged to draw down on the corporate credit facility that Vida Panama had at the International Commercial Bank of China ("ICBC" or the "Bank"). App. 2. To justify drawing that corporate line of credit, petitioner used phony invoices from other corporations he managed that misrepresented to the Bank that Vida Panama was purchasing electronics from those other corporations. *Id.* "In truth, Vida Panama was not buying merchandise" from the other corporations. App. 3. "After the transfer from Vida Panama cleared, [the manager of the other corporations] would send a check in the same amount from one of those corporations back to Vida Panama. Ultimately, [petitioner] would deposit that check in Vida Panama's bank account." *Id.* "Because of the mirror-image nature of the scheme, the Bank incurred no financial loss from these transactions and all draws were repaid with interest." App. 3.

Petitioner, Vida Panama and the manager of the other corporations were charged in a three-count indictment. The government alleged that petitioner used the phony invoices "to launder money among his corporations … knowingly misrepresenting to the Bank how the drawn money would be used." App. 3. Before trial, the counts against the manager were dismissed on speedy trial grounds. App. 4. Petitioner "pled guilty to conspiracy to commit money laundering in violation of 18

U.S.C. § 1956(h), based on misrepresentations to [the Bank] in violation of 18 U.S.C. § 1957." App. 4. In return for petitioner's guilty plea to that one count, the remaining counts against petitioner were dismissed, as were all charges against Vida Panama. Binding precedent in the Eleventh Circuit mandated the entry of a forfeiture money judgment. *E.g.*, *United States v. Padron*, 527 F.3d 1156, 1161–62 (11th Cir. 2008). But petitioner's plea agreement expressly quantified the money judgment as "the value of the property involved in the offense which is *not otherwise recovered*…." App. 4 (emphasis added). And the "Factual Proffer" supporting the plea stipulated that the "scheme resulted in the *same funds* being moved from Panama to Miami and almost simultaneously from Miami back to Panama." App. 41 (emphasis added).

"The District Court sentenced petitioner to 27 months imprisonment," App. 5, and found that petitioner was "not able to pay a fine." ECF#358 (Sentencing Transcript), at 31. "The government requested forfeiture of $20,852,000. This was the total amount of money [petitioner] illegally transferred from Vida Panama to [the other corporations], plus the amount Vida Panama received back in mirror-image repayments." *Id*. "The government conceded there were no proceeds of [petitioner]'s money laundering offense, but argued that, under the broad 'involved in' language of 18 U.S.C. § 982(a)(1), forfeiture of all the money [petitioner] laundered was proper." App. 6. Petitioner argued that because the Bank had already recovered the "same funds" involved in the scheme (*i.e.*, "the laundered money had already been returned to the Bank"), there was no tainted property for petitioner to forfeit. App. 6. Petitioner "also argued that forfeiture money judgments are not authorized by statute." App. 6.

The District Court "denied forfeiture based on 'the unique circumstances of this case, where Mr. Waked returned all of the money plus interest.'" App. 6. The District Court explained that it was "declining to impose [forfeiture] because the statute's purposes—'to ensure that criminals do not retain money for themselves and to punish defendants by transferring ill-gotten gains to the United States'—would not be served here." App. 6 (quoting App. 37). In response to petitioner's Eighth Amendment challenge, the District Court found that "the government's requested sum of $20,852,000 would be unconstitutionally excessive." App. 6. The District Court held that "if it were required to impose a forfeiture money judgment," the District Court "would order $520,000 ($10,000 for each of the 52 transactions)." App. 6.

On the government's motion to correct the sentence, the District Court "said it was still having 'a hard time getting [its] head wrapped around the idea that if the money goes back to the original victim before there's any prosecution, how is there any money to recover?'" App. 7. Citing to language in the plea agreement that quantified the money judgment as "equal to the value of the property involved in the offense which is not otherwise recovered," App. 4, the District Court reiterated its ruling "that, since [petitioner] returned all the laundered money to the Bank, there was no money to 'recover.'" App. 7.

The Eleventh Circuit reversed, holding that:

> (1) "[u]nless and until Congress, the Supreme Court, or this Court sitting *en banc* changes the law of forfeiture, we will follow this Court's precedent permitting forfeiture money judgments." App. 13;

(2) "[e]ven if … laundered funds voluntarily returned to the victim are not always subject to forfeiture, *see United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998), that is not what happened in [petitioner]'s case. [Petitioner] does not argue that he 'returned' the fraudulently obtained funds to the Bank out of the goodness of his heart. His laundering scheme depended on the Bank being repaid in full at the conclusion of each mirror-image transaction." App. 14-15;[2]

(3) "[a]llowing [petitioner] to escape forfeiture on the ground that the interest in the laundered funds was actually Vida Panama's, not his own, would relieve him of culpability for the offense to which he already pled guilty." App. 16;

(4) this Court's holding in *Honeycutt* "was based on the language of § 853(a), which limits forfeiture to 'proceeds the person *obtained* directly or indirectly' as the result of the crime. By contrast, the government is seeking forfeiture against [petitioner] under 18 U.S.C. § 982(a)(1) [("The court … shall order that the person forfeit to the United States any property, real or personal, *involved in* such offense, or any property traceable to such property.") (emphasis added)]. And because § 982(a)(1) contains neither a 'proceeds' nor an 'obtained' limitation,

[2] Construing the plea agreement, the Court of Appeals concluded that "[t]he plea agreement's use of the word 'recovered' in the forfeiture context clearly refers to property not already recovered for forfeiture *by the United States*, rather than *the Bank*." App. 17 n.4 (emphasis added).

Honeycutt's 'tainted property' requirement does not apply to this case." App. 17 (emphasis added); and

(5) returning the tainted property to the victim bank—"the original and still-current owner of the laundered money"—before sentencing constituted a "third party" transfer within the meaning of 21 U.S.C. § 853(p)(1)(B), thus triggering forfeiture of petitioner's untainted, substitute property in an equivalent amount. App. 18-19.

Summing up its opinion, the Court of Appeals wrote:

> The definition of property in 18 U.S.C. § 982(a)(1) is distinct from that in the other subsections of § 982(a), as well as 21 U.S.C. § 853(a). Our ruling allows forfeiture in the amount of property that Mr. Waked transferred as a part of his laundering scheme. We understand this outcome to be what Congress intended when it used the broad term "any property, real or personal, involved in such offense" and instituted a scheme of substitute forfeiture. We therefore conclude that the District Court was under an obligation to order forfeiture against Mr. Waked and we reverse its order to the contrary.

App. 19-20. The Court of Appeals also concluded that the District Court erred in holding that "any forfeiture order above $520,000 would be unconstitutionally excessive." App. 21.

In her opinion concurring in part and dissenting in part, Judge Lagoa observed that "three separate forms of forfeiture relief are reflected in the Rules of Criminal Procedure." App. 28. She did not identify any statutory source for forfeiture money judgments (there is none). Moreover, she distinguished "substitute asset forfeiture and forfeiture money judgments [as] separate forfeiture remedies. The latter is not dependent on the existence of forfeitable substitute property or the government's

entitlement under § 853(p).” App. 29 (citing *United States v. Lo*, 839 F.3d 777, 792 (9th Cir. 2016) (“[W]here the government does not seek substitute property under Rule 32.2(e), but seeks only ‘a money judgment as a form of criminal forfeiture under Rule 32.2(b),’ those requirements [of § 853(p)] are inapplicable.”)). Observing that in the district court “the government moved for only a money judgment,” App. 31, and “did not request relief under § 853(p)—the substitute asset forfeiture provision,” App. 29, Judge Lagoa thought the court should “defer discussion on substitute asset forfeiture and the Eighth Amendment until those issues properly reach” the Court of Appeals. App. 34. Still, Judge Lagoa agreed with the majority that the District Court was obliged to enter a forfeiture money judgment reflecting “the total money laundered through [petitioner]’s conspiracy ... *even if he paid those funds back to the bank*.” App. 27 (emphasis added).

Petitioner timely sought rehearing and *en banc* review, which the Court of Appeals denied.

REASONS FOR GRANTING THE WRIT

This petition challenges the judicial use of “extra-statutory” common law money judgments to compel mandatory criminal forfeiture of *untainted* property, *i.e.*, property lacking any nexus to crime. As this Court confirmed in *Honeycutt*, over the last two centuries, Congress intentionally limited first civil, and then criminal, forfeitures to property tainted by crime; forfeiture did not reach *untainted* property unless expressly authorized by statute, for example, so-called “substitute property” forfeiture under 21 U.S.C. § 853(p). By rejecting “joint and several liability” in a drug

case, the Court in *Honeycutt* narrowed the application of the criminal forfeiture laws, 21 U.S.C. § 853(a), to comply with original Congressional intent. Despite this, many courts, including the Eleventh Circuit here, have since relied upon *Honeycutt*'s limiting language to expand—rather than constrain—forfeitures, under the theory that any type of forfeiture *Honeycutt* failed to expressly prohibit (*i.e.*, money judgments, joint and several liability for non-drug offenses, forfeiture statutes using different language) remains fair game for the imposition of mandatory forfeitures. In this case, the Court of Appeals mandated that the District Court saddle an indigent defendant with a money judgment—presumably to be collected against untainted property that the indigent defendant may acquire in the future—even though petitioner's scheme, by design, had already ("almost simultaneously," App. 41) returned the tainted property back to its rightful owner (the victim bank).

Having preserved all challenges to this extra-statutory forfeiture, petitioner asks this Court to grant review and direct the lower courts to adhere to the congressionally-mandated procedures for imposing criminal forfeitures. At a minimum, the Court should correct the decision of the Eleventh Circuit insofar as it has interpreted the forfeiture statute to authorize forfeiture of a defendant's untainted, substitute property when the tainted property was previously returned, in full, to its rightful owner.

I. The Court should decide whether a district court can impose a forfeiture money judgment against a criminal defendant in the absence of any statutory authority.

None of the statutes at issue authorize the imposition of a forfeiture money judgment. Yet every court of appeals has approved their imposition, just as all, but one, had approved joint and several forfeiture liability until this Court's decision in *Honeycutt*.

Extra-statutory forfeiture money judgments emerged in the mid-1980s, and particularly in drug prosecutions, when some circuits deduced that because criminal forfeitures are *in personam* judgments, federal prosecutors need not trace a criminal offense to specific items of property to justify a forfeiture but rather can simply have the court impose a "money judgment" against all of the defendant's property. The Eleventh Circuit coined the concept in *United States v. Conner,* 752 F.2d 566, 577 (11th Cir. 1985) ("This is a money judgment and the creditor need not trace the proceeds to identifiable assets.").

This judicial creation pre-dated the decision of Congress to enact substitute property forfeiture in 1986, *see* 21 U.S.C. § 853(p), which, for the first time, allowed the government to forfeit a defendant's untainted property, but only after satisfying the statutory preconditions of § 853(p)(1-5), *i.e.*, dissipation by the defendant of the tainted property. Despite this legislative development, the misguided judicial assumption about Congressional abandonment of taint limitations for criminal

forfeitures proceeded largely unchecked.[3] Money judgments quickly ripened into general judicial acceptance of common law (non-statutory) criminal forfeiture liability, whereby courts imposed forfeitures upon a defendant's *untainted* property under attribution theories such as joint and several liability, *United States v. Caporale*, 806 F.2d 1487, 1508 (11th Cir. 1986) (citing *Conner*), and co-conspirator liability. *United States v. Browne*, 505 F.3d 1229, 1280 (11th Cir. 2007) (citing *Caporale*).

In full bloom, courts deploy forfeiture money judgments to displace entirely the substitute assets provisions of § 853(p), making the government's compliance with its statutory preconditions wholly unnecessary to forfeit a defendant's legitimate property. *See, e.g., United States v. Newman*, 659 F.3d 1235, 1243 (9th Cir. 2011) ("Because the government sought a money judgment in the first instance, there was no need to seek *substitute* property.") (emphasis in the original) (quoted and followed in *United States v. Channon*, 973 F.3d 1105, 1116 (10th Cir. 2020)).

These forfeiture money judgments, therefore, are judge-made devices born from the unfounded judicial assumption that the scope of criminal, *in personam*, forfeitures is materially different from the civil, *in rem*, forfeitures from which they originated. Forfeiture money judgments assume that criminal forfeitures are not

[3] The logical impact of the 1986 adoption of substitute asset forfeiture was not initially lost on some lower courts. *See, e.g., United States v. Ripinsky*, 20 F.3d 359, 365 n.8 (9th Cir. 1994) (distinguishing rulings of "courts of appeals prior to 1986," including *Conner*, as being "written prior to the enactment of § 982, which defines forfeitable assets to be only those associated with the underlying offense or traceable to the offense and distinguishes between 'forfeitable" and 'substitute' assets.").

confined by civil forfeiture's historical limitation to specific "tainted" property. Under this erroneous premise, courts hold that the *in personam* nature of criminal forfeitures frees the prosecution from identifying, tracing, or securing specific tainted property to obtain a forfeiture judgment (all of which is required in civil forfeitures). The judicial device of forfeiture money judgments reduces the government's burden to estimating the potential monetary value of potentially forfeitable property wherever historically located, by whomever obtained or currently held, to impose an equivalent financial forfeiture liability upon all current and future property of all co-defendants and co-conspirators. By abandoning any tracing requirement for specific property, money judgments essentially eliminate both of the property nexus requirements for forfeitures: (i) the nexus between the tainted property and the offense; and (ii) the nexus between the tainted property and the defendant.

The essential premise of this precedent—that tracing a defendant's criminal conduct to specific property is unnecessary to impose a criminal forfeiture judgment—would later be rejected by this Court in a series of cases leading up to this Court's unanimous opinion[4] in *Honeycutt*, which reaffirmed that: "'[F]orfeiture applies only to specific assets.'" 137 S. Ct. at 1633 (quoting *Kaley v. United States*, 571 U.S. 320, 335 n.11 (2014) (criminal forfeiture under 18 U.S.C. § 982(a)(1)). *See also Luis v. United States*, 136 S. Ct. 1083, 1090 (2016) (relation back doctrine, § 853(c), and pretrial restraints, § 853(e), limited to tainted property).

[4] Justice Gorsuch took no part in the case.

Honeycutt involved a challenge to "joint and several liability for forfeiture judgments." 137 S. Ct. at 1631. The Sixth Circuit held (along with all but one circuit) that joint and several forfeiture liability applied to conspirators, making the defendant liable in criminal forfeiture for the value of drug proceeds acquired by his co-defendant (co-conspirator) brother. In rejecting common law attribution theories for criminal forfeiture liability, *Honeycutt* reaffirmed the government's burden to trace the proscribed criminal conduct directly to specific, tainted property acquired by the individual defendant. Congress authorized the punishment of criminal forfeiture "only from the defendant who initially acquired the [tainted] property and who bears responsibility for its dissipation." 137 S. Ct. at 1634. This Court concluded that "§ 853 maintains traditional *in rem* forfeiture's focus on tainted property unless one of the preconditions [for forfeiting substituted property] exists." *Id.* at 1635.

Honeycutt rejected the application of common-law principles to the criminal forfeiture of a defendant's untainted property as an impermissible "end run" around the exclusive language of 21 U.S.C. § 853(p), which permits the forfeiture of a defendant's untainted assets. *Id.* at 1634. *Honeycutt* observed that all three subsections of § 853(a) reflect Congressional intent to limit forfeitures to property "acquired" by the defendant. 137 S. Ct. at 1632-33 ("obtain" under § 853(a); "personal property" under § 853(a)(2); defendant's "interest" under § 853(a)(3)). "[T]he Court cannot construe a statute in a way that negates its plain text, and here, Congress expressly limited forfeiture to tainted property that the defendant obtained." *Id.* at 1635 n.2.

Describing the advent of criminal forfeiture as "effectively merging the *in rem* forfeiture proceeding with the *in personam* criminal proceeding," *Honeycutt* found it "clear from its text and structure, [that] § 853 maintains traditional *in rem* forfeiture's focus on tainted property unless one of the preconditions of § 853(p) exists." 137 S. Ct. at 1635.[5] The statutory preconditions of § 853(p) require a government showing that, by act or omission, a defendant dissipated tainted property to make it unavailable for forfeiture at sentencing.

During oral argument in *Honeycutt*, the government told the Court that it need not address the propriety of money judgments because Honeycutt had failed to raise such a challenge. Responding to questions from the Court about when untainted, "substitute property" is subject to forfeiture, government counsel emphasized that Honeycutt conceded in the courts below that:

> the government can seek a money judgment for an amount equal to the value of the property that constitutes the proceeds of the drug violation. … Petitioner could have argued that the prerequisites for seeking a money judgment weren't satisfied, *either because we can't get money judgments* and have to go through (p), or if we do have to go through (p), that we hadn't satisfied those prerequisites … *but Petitioner didn't make those arguments*…. The question, *as this case has been litigated and as it comes to the Court*, there's no question that the government can get a money judgment.

Honeycutt, 2017 WL 1165184 (U.S.), 38-39, 48 (U.S. Oral. Arg., 2017) (emphasis added). So, the Court did not address, in the first instance, the predicate for joint and several liability, to wit, the entry of an "extra[-]statutory money judgment[]." *Id.* at

[5] In 2000, Congress merged criminal and civil forfeitures with passage of the Civil Asset Reform Act, 28 U.S.C. § 2671, which broadly renders property that is subject to civil forfeiture also subject to criminal forfeiture.

46:13 (Justice Kagan: "And let's put aside the extra[-]statutory money judgments, since I don't understand really how that works, so let's just focus on (p). All right?"). The lower courts have construed *Honeycutt*'s silence on the propriety of money judgments as an endorsement of their use in criminal cases. *E.g.*, *United States v. Bradley*, 969 F.3d 585, 588 (6th Cir. 2020) ("*Honeycutt* itself addressed the permissible scope of a *money judgment* under § 853. It's hard to maintain that the Court always prohibited what it refined, absentmindedly cutting off the branch it sat on.") (citing *United States v. Elbeblawy*, 899 F.3d 925, 941 (11th Cir. 2018)), *petition for certiorari filed,* S. Ct. No. 20-7198 (February 22, 2021).

This Court's review is therefore justified to clarify that this Court did not approve money judgments by failing expressly to reject them in *Honeycutt*. Further, review is justified to clarify that *Honeycutt*'s attention to the legislative intent reflected in § 853(a) does not bar application of this Court's reasoning to other criminal forfeiture statutes, especially those statutes that contain the same features that *Honeycutt* held were "incompatible" with attributed forfeiture liability. 137 S. Ct. at 1635 n.2. *See post* Section II. Quite the contrary, *Honeycutt* construed the Congressional intent expressed in the criminal forfeiture statutes by considering: (a) the statutory text; (b) the statutory structure; and (c) the historical traditions of forfeiture. 137 S. Ct. at 1634-35. Each of these considerations also render the judicially-created forfeiture sanction of money judgments incompatible with the manifest intent of Congress. Only this Court can prevent the further fragmentation of mandatory criminal forfeiture jurisprudence in the wake of *Honeycutt*.

a. The plain text of the forfeiture statute does not authorize money judgments.

Money judgments cannot be found in any of the statutory provisions applicable to this case. More broadly, each of the three subsections of § 853(a), as originally enacted in 1970 to describe property nexus requirements for criminal forfeiture—such as property "obtained" ((a)(1)), a defendant "person's property" ((a)(2)), and defendant's "interest in" an enterprise ((a)(3))—demonstrate legislative intent to forfeit only specific, tainted property directly connected to crime. *Honeycutt*, 137 S. Ct. at 1633. Money judgments are also not a textually enumerated condition for the forfeiture of a defendant's untainted property under § 853(p)(1)(A)-(E), the incorporated counterpart to "subsection (a)."

Nor did Congress depart from traditional taint doctrine when it later simultaneously enacted the three forfeiture provisions at issue here: the money laundering offense (18 U.S.C. § 1956), the sanction of criminal forfeiture for its violation (18 U.S.C § 982(a)(1)), and substitute-property forfeiture (21 U.S.C. § 853(p)). Each were component parts of the same legislation—the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1351 ("Money Laundering Control Act of 1986"), § 1366 ("Forfeiture"), § 1153(b) ("Substitute Assets"). The applicable "involved in" language of § 982(a)(1) would be enacted with the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VI, § 6463(c), 102 Stat. 4374, 4375 (1988).

Honeycutt construed the nexus criminal forfeiture language of the 1970 drug forfeiture statute (§ 853(a)) to codify the traditional taint forfeiture limitations applicable to civil forfeitures. 137 S. Ct. at 1634. This was then reinforced by the

introduction in 1986 of the limited statutory pathway to forfeit untainted substitute assets under § 853(p). The legislative express incorporation of § 853(p) for criminal forfeitures under the statute invoked here, § 982, must signify the same legislative intent—*i.e.*, that § 982 criminal forfeitures are similarly limited to tainted property, subject only to the preconditions for substitute-property forfeiture listed in § 853(p).

Although § 982 has been amended eighteen times since 1986, Congress has never amended it to authorize money judgments. This Court's holding in *Honeycutt* that Congress intended that § 853(p) implement the pre-existing taint limitation on forfeitures is reinforced by each such amendment to § 982, and indeed in multiple other consistent legislative extensions of § 413 of the Comprehensive Drug Abuse and Prevention Act of 1970 (*i.e.*, § 853) to additional criminal offenses.[6] That Congress repeatedly adopted these provisions without even a mention of forfeiture money judgments reinforces this Court's futility doctrine reasoning in *Honeycutt*. *Honeycutt* deployed the futility principle to reject the notion that the nexus language of § 853(a) could somehow be construed to authorize the forfeiture of untainted property, thereby superseding and rendering futile § 853(p)'s specific provisions governing untainted property. *Honeycutt*, 137 S. Ct. at 1633 ("It would also render futile one other provision of the statute. Section 853(p)—the sole provision of § 853 that permits the Government to confiscate property untainted by the crime . . . .").

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[6] In 1986, for 18 U.S.C. §§ 982(b)(1), 1029(c)(2), 1834, 1963(m); in 1996, for 18 U.S.C. § 1834; in 2001, for 28 U.S.C. §§ 2461(c) & 2553(b), 31 U.S.C.§§ 5317(c) & 5332(b)(3); and in 2006, for 18 U.S.C. § 1467(b).

"Congress provided just one way for the government to recoup substitute property when the tainted property itself is unavailable—the procedures outlined in § 853(p)." *Honeycutt*, 137 S. Ct. at 1634. The circumscribed substitute-property forfeiture authority would be completely unnecessary if, as the Eleventh Circuit held here, the same result could be obtained with a money judgment, without a government showing that the defendant acquired anything at all, and without any act of dissipation by the defendant to render property unavailable for forfeiture at sentencing. Indeed, the textual language of § 853(p) informs the construction of its express textual counterpart—"any property described in subsection (a)." § 853(p)(1). The language of § 853(p) "begins from the premise that the defendant once possessed tainted property as 'described in subsection (a),' and provides a means for the Government to recoup the value of the property if it has been dissipated or otherwise disposed of by 'any act or omission of the defendant.' § 853(p)(1)." *Honeycutt*, 137 S. Ct. at 1634.

Some courts have found a textual grant of Congressional authority to impose forfeiture money judgments implicit in the liberal construction clause of 21 U.S.C. § 853(o). *See, e.g.*, *United States v. Casey*, 444 F.3d 1071, 1073 (9th Cir. 2006). But this Court, in *Honeycutt*, rejected this very argument when offered to justify the imposition of joint and several liability not authorized by the plain text used by Congress. *Honeycutt*, 137 S. Ct. at 1635 n.2 ("But the Court cannot construe a statute in a way that negates its plain text, and here, Congress expressly limited forfeiture to tainted property that the defendant obtained.").

b. The statutory structure conflicts with money judgments.

As *Honeycutt* held, Congress created interlocking statutory structures to extend taint doctrine from civil forfeiture proceedings (which begin with the seizure of tainted property) to the different processes of criminal forfeitures: beginning with the relation back doctrine's historical timing of the vesting of government title rights to specific tainted property (§ 853(c)), to affording pretrial judicial authority to restrain such tainted property (§ 853(e)), to the post-trial system for recouping the value of missing tainted, forfeited, property if dissipated by the defendant prior to sentencing. § 853(p).[7]

These statutory structures collectively "*expressly incorporate the § 853(a) limitations*," that is, the taint limitations applicable to property nexus language of § 853(a). *Honeycutt*, 137 S. Ct. at 1633 (emphasis added). *Honeycutt* emphasized that substitute-property forfeiture procedures and provisions (§ 853(p)) demonstrated "that Congress contemplated situations where the tainted property itself would fall outside the Government's reach." 137 S. Ct. at 1634. There simply is no statutory structure for money judgments, and they pose an existential threat to the actual statutory structures enacted by Congress to distinguish between tainted and untainted property.

[7] Another consistent statutory structure created by Congress (but unidentified in *Honeycutt*) to implement the taint limitation is the third-party post-forfeiture ancillary procedures enacted in 1984 to permit third parties to exclude their specific property forfeited under § 853(a) from the final forfeiture judgment against the defendant. *See* 21 U.S.C. § 853(n).

c. The traditional history of forfeiture does not support money judgments.

Honeycutt fully accounted for the "background" forfeiture principle that Congress intended to restrict forfeitures to tainted property. 137 S. Ct. at 1635. Congress intended to extend this age-old limitation from civil forfeitures to its newer iteration, criminal forfeitures. *Id*. at 1635 (holding that "§ 853 maintains traditional *in rem* forfeiture's focus on tainted property unless one of the preconditions of § 853(p) exists."). *Honeycutt* interpreted the "background" principles of forfeiture law to leave no room for judge-made theories to expand the scope of criminal forfeiture under common law attribution doctrines such as conspiracy or joint and several liability. Such forfeiture theories are "incompatible" with the language and history of criminal forfeitures. 137 S. Ct. at 1635 n.2.

A forfeiture money judgment is one such common law forfeiture liability doctrine untethered to any statutory language, which conflicts with (and renders futile) the substitute-property forfeiture provisions of § 853(p) and the corresponding taint language of the other forfeiture statutes. For example, neither 18 U.S.C. § 982 nor 21 U.S.C. § 853 mention forfeiture money judgments, although both expressly incorporate the substitute-property language of § 853(p) and its narrow statutory path to the forfeiture of untainted property. *See* 18 U.S.C. § 982(b)(1).

Even after admitting that "the criminal forfeiture statutes at issue here do not use the term 'money judgment,'" the government continues to insist that "they impose a mandatory *in personam* forfeiture obligation." Brief of the United States (opposing certiorari) in *Henry Lo v. United States*, S. Ct. No. 16-8327, at 19. Like the Eleventh

Circuit opinion below, for decades the majority of circuits have accepted the use of forfeiture money judgments—as they previously did the use of conspiracy and joint and several liability principles (now prohibited by *Honeycutt*)—to expand forfeiture liability. The dissenting judicial voices on the judicial device of money judgments were few, and they went largely unheeded. *See, e.g., United States v. Surgent*, 2009 WL 2525137 (E.D.N.Y. 2009) (Gleeson, J.), *abrogated in United States v. Awad*, 598 F.3d 76, 79 n.5 (2d Cir. 2010) ("criminal forfeiture need not be traced to identifiable assets in a defendant's possession").

As in this case, the circuits have found nothing in this Court's *Honeycutt* opinion to justify abandonment of this judicial device authorizing the forfeiture of defendant's untainted assets.[8] The Ninth Circuit has held that money judgments are still permitted, but that they can only be enforced by means of a substitute property proceeding under § 853(p). *United States v. Nejad*, 933 F.3d 1162, 1166 (9th Cir. 2019). But, as this Court held in *Honeycutt*, the plain text for substitute-property forfeiture in § 853(p) is limited to the replacement of identified, traced, specific tainted property previously found to be forfeitable under § 853(a). There is no statutory basis under § 853(p) to substitute a defendant's legitimate assets to satisfy a money judgment not textually found in § 853(a). *Honeycutt* instructs that, where § 853(p) goes, the taint doctrine follows. Fidelity to the expressed intent of Congress

[8] *See, e.g., United States v. Nejad*, 933 F.3d 1162, 1165 (9th Cir. 2019); *United States v. Gorksi*, 880 F.3d 27, 40 (1st Cir. 2018).

counsels reluctance to create a new judicial doctrine to salvage a statutorily unauthorized forfeiture sanction.

That Congress enacted a different statute that expressly authorizes money judgments as a forfeiture punishment for another, unrelated offense confirms that "[t]here is no basis to read such an end run into the statute." *Honeycutt*, 137 S. Ct. at 1634. The Patriot Act of 2001 authorizes forfeiture "money judgments" for bulk cash smuggling at the border, 31 U.S.C. § 5332(b)(4), and also deployed this term in a way that further undermines the legitimacy of its judicially-created cousin.

Initially, the cash smuggling offense uses the same "involved in" property nexus forfeiture language found in the money laundering forfeiture statute in this case, § 982(a)(1). *See* 31 U.S.C. § 5332(b)(2). Unlike the forfeiture statute invoked here, however, the bulk cash smuggling statute expressly provides for a "personal money judgment," but only *after* establishing that the original tainted cash has been rendered unavailable *by the defendant*. 31 U.S.C. § 5332(b)(4). Congress differentiated among: (i) the "involved in" cash actually smuggled; (ii) the forfeiture of substitute property of the defendant under § 853(p);[9] and (iii) when the defendant lacks sufficient substitute property to offset the missing cash, authorizing a "money judgment" to be imposed upon the defendant for any resulting shortfall.[10]

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[9] 31 U.S.C. § 5332(b)(3).

[10] 31 U.S.C. § 5332(b)(4) provides: "Personal money judgment. If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to section [853(p)], the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture."

By approving the imposition of a money judgment (exclusively for the crime of bulk cash smuggling), but only *after* a court exhausts its direct ("involved in") and substitute property forfeiture authority (§ 853(p)), Congress made clear it did not intend for money judgments to supersede the statutory forfeiture mechanisms for tainted and untainted property, or to render them surplusage by permitting money judgments for all offenses. The sequential language in the Patriot Act would have been utter surplusage if Congress had previously authorized forfeiture money judgments to be available *ab initio* for all criminal forfeitures because of their *in personam* nature, and without regard to the statutory requirement of identifying and exhausting tainted and substitute assets.

The presence of the express statutory term "money judgments" for "involved in" forfeitures under 31 U.S.C. § 5332(a)(2), when contrasted with its total absence from § 982(a)(1), must be given effect. *Russello v. United States*, 464 U.S. 16, 23 (1983). *See also Sandoz Inc. v. Amgen, Inc.*, 137 S. Ct. 1664, 1676 (2017) (presence of express federal statutory enforcement remedies is strong evidence that Congress did not intend others; courts should be reluctant to provide other remedies).

Admittedly, forfeiture money judgments are described in Fed. R. Crim. P. 32.2(a) as an alternative to forfeiting "specific property,"[11] and courts have looked to such language as authorizing imposition of money judgments. *Padron*, 527 F.3d at

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[11] Rule 32.2(b)(1)(A) distinguishes between cases in which the government seeks the forfeiture of "specific property" versus those "where the government seeks a personal money judgment."

1162. But the Drafting Committee of this Rule noted that it was not thereby authorizing use of forfeiture money judgments, but instead added this language in recognition that, as of 2000, some lower courts had employed them. 2000 Adv. Cmtee Notes Rule 32.2 (comment on subdivision (b)(1)) ("The Committee takes no position on the correctness of those rulings."). Only Congress can authorize criminal punishments, and "courts aren't free to rewrite clear statutes under the banner of our own policy concerns." *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1815 (2019). Ultimately, of course, the Rules Committee lacks authority to authorize forfeitures not enacted by Congress, 28 U.S.C. § 2072(b), and the Committee disclaimed having done so here.

In the courts below, petitioner explicitly "argued that forfeiture money judgments are not authorized by statute." App. 6. But the three-judge panel of the Court of Appeals felt constrained to mandate imposition of a money judgment "[u]nless and until Congress, the Supreme Court, or this Court sitting *en banc* changes the law of forfeiture." App. 13. This case, in which the parties have stipulated that the tainted property was returned to its rightful owner, and petitioner preserved his challenge to the imposition of an extra-statutory money judgment, is an excellent vehicle for the Court to address this issue.[12]

[12] Given that another certiorari petition similarly seeking review of the legality of forfeiture money judgments is currently pending, *see Bradley v. United States*, No. 20-7198 (Court-ordered response due May 10, 2021), the Court may prefer that the two cases be considered at the same conference and carried together.

II. The Court should decide whether the holding in *Honeycutt v. United States*—that criminal forfeiture under 21 U.S.C. § 853(a) of drug "proceeds the person obtained" is "limited to [tainted] property the defendant himself actually acquired as the result of the crime" (*i.e.*, no joint and several liability), 137 S. Ct. 1626, 1635 (2017)—likewise limits criminal forfeiture under 18 U.S.C. § 982(a)(1) to the tainted property "involved in" the money laundering offense that "the defendant himself actually acquired as the result of the crime."

Regardless of whether the Court addresses—or even if it approves—the imposition of extra-statutory forfeiture money judgments, the Court should grant certiorari to resolve the disagreement among the circuits over whether the taint limitation confirmed in *Honeycutt*—a case specifically addressing forfeiture of drug proceeds under 21 U.S.C. § 853(a)—extends to other criminal and civil forfeiture statutes, like the money laundering forfeiture statute at issue in petitioner's case, 18 U.S.C. § 982(a)(1).

The "Factual Proffer" supporting petitioner's guilty plea stipulated that the money laundering "scheme resulted in the *same funds* being moved from [the Bank in] Panama to Miami and almost simultaneously from Miami back to [the Bank in] Panama." App. 41 (emphasis added). By design, petitioner's "laundering scheme depended on the Bank being repaid in full at the conclusion of each mirror-image transaction." App. 15. Petitioner never personally acquired—much less retained—any of the corporate credit draws; no sooner than the funds hit the Miami corporate account, those same "laundered funds were returned to the Bank with interest." App. 16; accord App. 6, 7, 11, 13, 17 n.4, 24, 29 ("Mr. Waked returned all laundered funds to the bank."). Consistent with the holding in *Honeycutt* that forfeiture is "limited to

[tainted] property *the defendant himself actually acquired as the result of the crime*," 137 S. Ct. at 1635 (emphasis added), the District Court found as a factual matter that "[t]here [were] no laundered funds that were retained by the Defendant or any other co-conspirator to be forfeited." App. 38.

The Eleventh Circuit rejected this acquisition limitation, narrowly focusing on the "obtained" nexus language of § 853(a)(1)—the specific subsection addressed by the Court in *Honeycutt*—and contrasting it with the "involved in" money laundering nexus language of 18 U.S.C. § 982(a)(1), the statute under which petitioner was convicted.[13] Because § 982(a)(1) does not contain the "obtained" nexus language of § 853(a)(1), the Eleventh Circuit held that *Honeycutt* is inapplicable and is not thereby "limited to [tainted] property the defendant himself actually acquired as the result of the crime." *Honeycutt*, 137 S. Ct. at 1635; App. 17 ("because § 982(a)(1) contains neither a 'proceeds' nor an 'obtained' limitation, *Honeycutt*'s 'tainted property' requirement does not apply to this case."); App. 19 ("The definition of property in 18 U.S.C. § 982(a)(1) is distinct from that in the other subsections of § 982(a), as well as 21 U.S.C. § 853(a).").

More recently, the Ninth Circuit held that the "obtained" property nexus language addressed in *Honeycutt* was not the *sine qua non* of *Honeycutt*'s taint limitation. Noting that its "sister circuits are split" on whether the taint limitation

[13] The statutory language of § 982(a)(1) provides that "the person shall forfeit to United States" the "property *involved in* such offense." 18 U.S.C. § 982(a) (emphasis added).

applied to another forfeiture statute, 18 U.S.C. § 981(a)(1)(C),[14] the Ninth Circuit held that:

> *Honeycutt* does apply to 18 U.S.C. § 981(a)(1)(C). The textual differences between it and 21 U.S.C. § 853 appear to us to be immaterial, in light of the reasoning and language in *Honeycutt*. *Honeycutt* treats forfeiture, in accord with its development at common law over many centuries, as applicable only to "tainted" property … Also, the absence of the phrase, "the person obtained" in Section 981 strikes us as immaterial in light of the reasoning in *Honeycutt*, that "the most important background principles underlying § 853" are "those of forfeiture." The same principles animate Section 981. The text of this statute and its roots in common law forfeiture, like the statute in *Honeycutt*, necessitate a connection to tainted property.

United States v. Thompson, ___ F.3d___, 2021 WL 800686, at *8 (9th Cir. Mar. 3, 2021); *accord United States v. Gjeli*, 867 F.3d 418 (3d Cir. 2017) (*Honeycutt* applies to criminal forfeitures under 18 U.S.C. § 981(a)(1)); *contra United States v. Sexton*, 894 F.3d 787, 799 (6th Cir. 2018) ("Unlike § 853(a)(1), 18 U.S.C. § 981(a)(1)(C) does not contain the phrase 'the person obtained' which was the linchpin of the Supreme Court's decision in *Honeycutt*. … While property must be connected, or 'traceable,' to the crime, it does not need to be property that the particular defendant received. As long as the property is connected to the crime, a defendant can be liable for property that his codefendant acquired. Consequently, we hold that the reasoning of *Honeycutt* is not applicable to § 981(a)(1)(C)."); *United States v. Peithman*, 917 F.3d 635, 652

[14] 18 U.S.C. § 981(a)(1)(C) provides that "[t]he 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 [certain sections] 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."

(8th Cir. 2019) ("The plain language under § 981 is broader than § 853 and less focused on personal possession. … The statute does not contain any language that requires possession of the property by the defendant, either explicitly or implicitly. We think these differences are significant. We join the Sixth Circuit and conclude that the reasoning of *Honeycutt* is not applicable to forfeitures under 18 U.S.C. § 981(a)(1)(C) and hold the district court did not err when imposing joint and several liability as to this portion of the money judgment."), *cert. denied*, 140 S. Ct. 340 (2019).

In dissenting from the denial of certiorari in *Peithman*, Justice Sotomayor observed:

> The Government now concedes error. According to the Government, there is no "distinguishing 18 U.S.C. 981 from 21 U.S.C. 853 for purposes of joint and several liability." Brief in Opposition 6. … [T]he Government now concedes that the rationale of *Honeycutt* applies equally to § 981(a)(1)(C) as it does to § 853(a)(1)….

Peithman v. United States, 140 S. Ct. 340, 340 (2019) (Sotomayor, J., dissenting from the denial of certiorari). The government has made no such concession on the related question presented in this case: whether "*Honeycutt* applies equally to" criminal forfeitures sought under § 982(a)(1), which authorizes forfeiture "under the broad[er] 'involved in' language of 18 U.S.C. § 982(a)(1)." App. 6.

The textual distinction does not justify abandoning *Honeycutt*'s guidance on Congressional intent and the criminal forfeiture structures Congress enacted, especially "the most important background principles underlying § 853: those of *forfeiture*." 137 S. Ct. at 1634 (emphasis added) (citing *The Palmyra*, 12 Wheat 1,

14-15 (1827)). These same forfeiture background principles have been extended by Congress from civil forfeitures to criminal forfeitures:

> By adopting an *in personam* aspect to criminal forfeiture, and providing for substitute-asset forfeiture, Congress made it easier for the Government to hold the defendant *who acquired the tainted property* responsible. Congress did not, however, enact any "significant expansion of the scope of property subject to forfeiture."

Honeycutt, 137 S. Ct. at 1635 (emphasis added) (quoting S. Rep. No. 98–225, p. 192 (1983)).

There is no statutory evidence that Congress abandoned centuries of forfeiture doctrine by using the term "involved in" in § 982(a)(1) to describe the property nexus required for money laundering forfeitures. To the contrary, § 982(b)(1)'s express adoption for money laundering forfeitures of the same statutory structures used for drug forfeitures under § 853 (including substitute-asset procedures) demonstrates that Congress intended that "the rationale of *Honeycutt* applies equally to § 981(a)(1)(C) [*and § 982(a)(2)*] as it does to § 853(a)(1)…." *Peithman,* 140 S. Ct. at 340 (Sotomayor, J., dissenting) (interlineation and emphasis added).

Indeed, *Honeycutt* quoted, and relied upon, this Court's earlier opinion in *Kaley v. United States*, 571 U.S. 320 (2014), which recognized and extended this same taint limitation to the "involved in" forfeiture nexus language of § 982(a)(1). *Honeycutt*, 137 S. Ct. at 1633 (quoting *Kaley*, 571 U.S. at 335 n.11). And this Court separately re-affirmed the taint limitation on criminal forfeitures by holding that the Fifth and Sixth Amendments preclude pretrial restraints on a defendant's use of his untainted

assets to pay for criminal defense counsel of choice. *Luis*, 136 S. Ct. at 1095 ("[courts] have experience separating tainted from untainted assets").

The Eleventh Circuit's opinion is not only in derogation of this Court's *Kaley, Luis,* and *Honeycutt* opinions, it also dramatically expands criminal forfeiture by abandoning taint doctrine underlying centuries of forfeiture statutes, a result which should not be lightly inferred from the mere use of the nexus phrase "involved in" in § 982(a)(1). Such a result is precluded by the statutory textual principle that Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001) (Scalia, J.).

The upshot of the Eleventh Circuit's opinion—that Congress intended to favor drug defendants, but not other defendants, by limiting their forfeiture exposure to their tainted property under § 853(a)(1))[15]—cannot be divined solely from the use of the term "involved in" in § 982(a)(1). It is doubtful that such a Congressional intent to favor drug defendants over money launderers (and most other offenders) would be contained in the Anti-Drug Abuse Acts of 1986 or 1988, and it is not. To the contrary, the consistent practice of Congress has been to extend the drug forfeiture provisions to non-drug offenses by reference to and incorporation of "§ 413 of the Controlled Substances Act" (*i.e.*, § 853). *See, e.g.*, 18 U.S.C. § 1029(c)(2) (credit card offenses). Congress did not intend by using the term "involved in" to authorize such an "end run" around the careful substantive and procedural language of § 853(p). The

[15] *United States v. Stein*, 964 F.3d 1313, 1325 (11th Cir. 2020) (distinguishing *Honeycutt* as addressing drug crimes).

"involved in" language of § 982(a)(1) is illustrative of, rather than a repeal of, the historical taint limitation on forfeitures. *See Thompson,* 2021 WL 800686, at *6 (forfeiture's "common law origin and development explains why forfeiture is closely tied to the property *involved in* the criminal conduct, as opposed to a criminal fine or restitution, which depends on guilt but not on any taint on the criminal's property.") (emphasis added).

In stating that the defendant "shall forfeit" the property involved in the offense, § 982(a)(1), Congress carried forward the traditional limitation of criminal forfeitures that a defendant can be ordered to forfeit only that property which he acquired in violation of the law, subject to his acts or omissions of later dissipation under § 853(p), for which he can be held responsible by forfeiting his "other property." 21 U.S.C. § 853(p)(2). As *Honeycutt* explains, Congress structurally layered the three nexus subsections of § 853(a) to capture the pre-existing limitation of forfeiture to property with a specific nexus to criminality—tainted property. Substitute property forfeiture under subsection (p) applies exclusively to *tainted* property, *i.e.*, "property described in subsection (a)." § 853(p)(1).

The Eleventh Circuit made no attempt to reconcile the language of § 853(p), its incorporation into § 982(a) by § 982(b)(1), the statutory structures erected by Congress, or the background forfeiture principles restricting forfeitures to tainted property. Instead, the panel opinion concluded that merely by using the term "involved in" in subsection 982(a)(1), Congress *sub silentio* rendered inapplicable the

statutory language and structures and background forfeiture principles that this Court honored in *Honeycutt*.

If the Court agrees that the acquisition limitation confirmed in *Honeycutt* applies equally to "involved in" property, then the government would not be entitled to any forfeiture. As the Ninth Circuit explained when it rejected the government's effort to pin forfeiture liability on a defendant under § 981(a)(1)(C) based solely on the defendant's "physical control" of the tainted funds:

> *Honeycutt* does not allow for an interpretation that any conspirator who at some point had physical control is subject to forfeiture of all the proceeds. … [H]ere, the trust accounts and escrows were stops on the way to splitting up the money, not jointly controlled deposits where the money came to rest after the swindlers split it up. … The forfeiture judgments must be separate, for the approximate separate amounts that came to rest with each of them after the loot was divided among the swindlers.

Thompson, 2021 WL 800686, at *9. *Honeycutt's* acquisition limitation on forfeiture is not satisfied where the tainted property "came to rest" with its rightful owner. *See id*. Petitioner's role as manager of a corporate account into which the tainted corporate funds were initially deposited, only to be returned "almost simultaneously" under a corporate credit facility to the (victim) Bank in Panama (plus interest), App. 41, would not suffice to authorize an *in personam* forfeiture against petitioner. Accordingly, this case presents an ideal vehicle to address the issue.

III. The Court should grant certiorari to confirm that returning tainted property to the rightful owner of the property before sentencing is not a "transfer[] … to … a *third party*," 21 U.S.C. § 853(p)(1)(B) (emphasis added), that triggers forfeiture of a defendant's untainted, substitute property in an equivalent amount.

The District Court imposed no substantive forfeiture, and therefore had no reason, or legal basis, to consider whether a substitute-asset forfeiture should be imposed under § 853(p). Nonetheless, the Eleventh Circuit held that § 853(p) applies equally to authorize imposition of substitute-asset forfeiture even when the laundered funds have been returned to their rightful owner. The Eleventh Circuit approved substitute property forfeiture under the theory that returning the "same funds" (credit draws), App. 41, to "the original and still-current owner of the laundered [tainted] money" (the Bank), App. 18, was a "transfer[] … to … a third party," thus triggering the forfeiture of petitioner's untainted, substitute property under § 853(p)(1)(B).

The Eleventh Circuit's construction of "third party" under § 853(p)(1)(B) to include the victim/rightful owner of the misappropriated funds cannot withstand scrutiny. This specific statutory substitute forfeiture precondition is intended to prevent a defendant from defeating *in personam* forfeiture by transferring tainted property to others, *i.e.*, a "third party." Return of tainted property to the victim is a recognized goal of forfeiture, not a method to frustrate it. Indeed, the statutory scheme provides that the government's interest in imposing forfeiture as punishment must yield to a victim's "right, title, or interest in the [tainted] property." *See* § 853(n);

see also 21 U.S.C. § 853(h) ("[T]he Attorney General shall direct the disposition of the property … making due provision for the rights of any innocent persons").

To be sure, § 853(n) is titled: "Third Party Interests." It protects the property rights of third parties who have a "superior" interest in the tainted property, § 853(n)(6)(A), or are *bona fide* purchaser[s] for value … without cause to believe that the property was subject to forfeiture," § 853(n)(6)(B). After the government secures a forfeiture of the tainted property, *those* third parties—the rightful owners of the forfeited property—can petition the court to "amend the order of forfeiture" to restore/recover their property rights. § 853(n)(6). Thus, a "third party" transfer (dissipation) of tainted property under § 853(p)(1)(B)—one of five preconditions to imposition of substitute property forfeiture—cannot logically include a transfer to the rightful owner, who would be entitled, under the same statutory scheme, to recover that property. Returning *to* the alleged victim of a fraud offense the "same funds" obtained *from* the victim is not a transfer to a "*third* party."

After all, had petitioner retained possession of the funds "involved in the offense" (rather than returned them to the Bank), those "same [tainted] funds"—seized by the government upon petitioner's arrest—would have been forfeited under § 853(a), precluding forfeiture under § 853(p) of petitioner's untainted, substitute property. And once forfeited, the court, if not the government, would have been obliged under § 853(n)(6) to return those "same funds" to their rightful owner (the Bank) following the ancillary procedures provided by Congress to insure this result. The government could not (lawfully) have kept the Bank's funds—*i.e.*, the property

involved in the offense. *See Luis*, 136 S. Ct. at 1091 ("And we see this in § 853(n)(6)(A), which exempts certain property from forfeiture when a *third party* can show a vested interest in the property that is 'superior' to that of the Government.") (emphasis added). Under 21 U.S.C. § 853(n), the victim Bank would have then recovered those "same funds" *after* sentencing, in the ancillary proceedings. Returning the "same funds" to the Bank before sentencing—even if not "out of the goodness of [petitioner's] heart," App. 14-15—accomplished (more expediently) the statutory objective of "'returning property, in full, to those wrongfully deprived or defrauded of it.'" *Honeycutt*, 137 S. Ct. at 1631 (quoting *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 629 (1989)).

Not surprisingly, the Eleventh Circuit's counterintuitive interpretation "find[s] no support in the statute" and conflicts with a decision of the Eighth Circuit. *See Hawkey*, 148 F.3d at 928 ("We find no support in the statute … for the proposition that a defendant should not be credited with returning misappropriated funds…. We conclude that while Hawkey must forfeit the entire corpus of his ill-gotten gains, the total funds subject to forfeiture *must reflect any funds returned prior to the forfeiture order*….") (emphasis added). *See also United States v. Kalish*, 626 F.3d 165, 169-70 (2d Cir. 2010) ("We recognize, however, that once some *payment* has been made by way of restitution, a defendant would be in a position to argue that such a payment should be a credit against any then remaining forfeiture amount. The forfeiture amount represents 'ill-gotten' gains, and *it is at least arguable that any money returned to a victim has reduced the amount of 'ill-gotten' gains remaining in the*

defendant's possession. In the absence of any claim that Kalish has made any restitution payment, however, we need not decide whether such an argument would prevail.") (citations omitted) (emphasis added).

The Eleventh Circuit's decision mandates a higher forfeiture penalty upon a defendant for returning laundered funds to their rightful owner even *before* arrest than could be imposed if the government had seized those funds from a defendant *upon* or *after* arrest. Perhaps more puzzling, a defendant who "had physical control of all the money," none of which "came to rest with him" after "the loot was divided among conspirators," faces no forfeiture liability in the Ninth Circuit, *see Thompson*, 2021 WL 800686, at *9; yet, under the Eleventh Circuit's holding, where the loot comes to rest with its rightful owner (rather than with conspirators), the defendant faces forfeiture of his untainted property in an equivalent amount. In the Eleventh Circuit, therefore, a defendant faces a higher and more severe forfeiture punishment for transferring the tainted property to its rightful owner (thus making the victim whole) than he faces in other circuits where the tainted property comes to rest with a co-conspirator. *See id*. The Court should not let stand a circuit decision that produces such "patently absurd consequences," that "Congress could not *possibly* have intended." *Pub. Citizen v. U.S. Dep't of Just.,* 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (citations and quotations omitted) (emphasis in original).[16]

[16] *See also United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain

Conclusion

The petition should be granted.

Respectfully submitted,

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meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.") (footnotes omitted).