No. 20-1370

In the Supreme Court of the United States

NIDAL AHMED WAKED HATUM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
SCOTT A.C. MEISLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a district court imposing a criminal forfeiture under the procedures set forth in 21 U.S.C. 853 may enter a forfeiture money judgment establishing the amount of the defendant's forfeiture liability.

2. Whether criminal forfeiture under 18 U.S.C. 982(a)(1), which makes forfeitable "any property * * * involved in" a money-laundering offense, is limited to the property that a defendant personally acquires and retains.

3. Whether the movement of funds back to the same bank from which the funds originated as part of a money-laundering scheme is a transfer to "a third party" for purposes of substitute-assets forfeiture under 21 U.S.C. 853(p)(1)(B).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):
United States v. *Waked Hatum*, No. 15-cr-20189 (Apr. 10, 2018)

United States Court of Appeals (11th Cir.):
United States v. *Waked Hatum*, No. 18-11951 (Aug. 11, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rules:

Statutes and rules—Continued: Page

In the Supreme Court of the United States

No. 20-1370

NIDAL AHMED WAKED HATUM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 969 F.3d 1156. The order of the district court (Pet. App. 37-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2020. A petition for rehearing was denied on October 29, 2020 (Pet. App. 36). By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on March 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Judgment 1. The district court sentenced him to 27 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court also entered a preliminary order of forfeiture, D. Ct. Doc. 354 (Dec. 18, 2017), which the court later vacated, Am. Judgment 1; see Pet. App. 37-38. The court of appeals reversed the denial of a forfeiture money judgment and remanded for further proceedings. Pet. App. 1-34.

1. Petitioner, who is a citizen of Panama and Columbia, was a part owner and general manager of Vida Panama, Z.L., S.A., an electronics wholesaler and exporter based in Colón, Panama. Pet. App. 2. Vida Panama had a line of credit at the International Commercial Bank of China (ICBC) in Panama, and petitioner had signature authority on the account. *Ibid.* Petitioner also owned two corporations based in Miami, Florida. *Ibid.*

From 2000 to 2009, petitioner used his control of the three companies to engage in a cross-border scheme involving mirror-image financial transactions. See Pet. App. 2-3. Petitioner's Florida companies would send Vida Panama invoices for sums of money between $22,000 and $550,000; the invoices appeared to bill for electronics merchandise sold to Vida Panama. *Id.* at 2, 40. Petitioner then used the invoices to satisfy the requirements for drawing on Vida Panama's line of credit at ICBC. See *ibid.* Petitioner paid the funds he obtained from ICBC to the Florida companies. *Id.* at 2-3. Almost immediately after the transfers from Vida Panama to the Florida companies cleared, petitioner would

have his co-conspirators send a check from the Florida companies to Vida Panama in the same amount as the Florida companies had received from Vida Panama, and petitioner would then deposit that check into Vida Panama's bank account at ICBC. *Id.* at 3, 40-41.

But Vida Panama did not actually purchase any goods from the Florida companies. Pet. App. 3. Instead, petitioner used fraudulent invoices to misrepresent the planned use of funds to ICBC, and, once petitioner accessed the funds, he laundered them among his corporations. *Ibid.* Given the nature of the scheme, all loans from ICBC were repaid with interest. *Id.* at 3, 41. But, had ICBC known that the invoices were fraudulent, it would not have approved the draws on Vida Panama's line of credit. *Id.* at 3, 40. And the nine-year scheme placed ICBC at serious risk of financial and reputational harm. See Sent. Tr. 30-31.

2. a. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with two counts of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), and one count of bank fraud, in violation of 18 U.S.C. 1344(2). Indictment 2-6. The indictment also contained forfeiture allegations under 18 U.S.C. 982(a)(1). Indictment 6-7.

Section 982(a)(1) provides for the criminal forfeiture of "any property, real or personal, involved in" a money-laundering offense, including a violation of 18 U.S.C. 1956, and "any property traceable to such property." 18 U.S.C. 982(a)(1). Forfeitures under Section 982(a)(1) are governed by the procedures set forth in 21 U.S.C. 853. See 18 U.S.C. 982(b)(1). Section 853(p) provides for the forfeiture of "any other property of the defendant" if, "as a result of any act or omission of the defendant," the directly forfeitable property "has been

transferred or sold to, or deposited with, a third party," "has been placed beyond the jurisdiction of the court," or meets other statutory criteria of unavailability. 21 U.S.C. 853(p)(1) and (2). In this case, the indictment invoked Section 982(a)(1) and sought forfeiture of "any property, real or personal, involved in" or "traceable to" the property involved in the charged money-laundering conspiracy. Indictment 6.

b. Petitioner pleaded guilty to one of the money-laundering-conspiracy counts. See Pet. App. 4. The plea agreement provided that the government would dismiss the remaining charges against petitioner. Plea Agreement ¶ 2. Petitioner "agree[d] to the entry of a money judgment equal to the value of the property involved in the offense which is not otherwise recovered" and that "the amount of such money judgment may be deferred until a later date pursuant to" Federal Rule of Criminal Procedure 32.2. Plea Agreement ¶ 9. Petitioner "agree[d] to forfeit to the United States all of his right, title, and interest in property that was involved in the commission of the offense, or traceable to such property," and, "[i]f that property is no longer available, * * * to cooperate in the discovery of any substitute assets that he may have and to surrender the same to the United States in lieu of the original property." *Ibid.*

The district court sentenced petitioner to a below-guidelines sentence of 27 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court did not impose a fine or order restitution. Judgment 5; see Sent. Tr. 31. The court also entered a preliminary order of forfeiture, which provided that, pursuant to 18 U.S.C. 982(a)(1), "all property involved in" petitioner's money-laundering-conspiracy offense "or traceable to such property is hereby

forfeited to the United States." D. Ct. Doc. 354, at 2. Pursuant to Federal Rule of Criminal Procedure 32.2(b)(2), the order provided that the government "may move at any time to amend this order when specific forfeitable property is identified or when the Government is prepared to establish the amount of a money judgment by a preponderance of the evidence." D. Ct. Doc. 354, at 2.

c. The government later moved for entry of a forfeiture money judgment in the amount of $20,852,000. Pet. App. 5. That total was calculated based on the amount of money petitioner illegally transferred from Vida Panama to his Florida companies, in addition to the amount that Vida Panama received back in mirror-image repayments under the money-laundering scheme. *Ibid.*

The district court declined to enter a forfeiture money judgment and vacated its preliminary order of forfeiture. Pet. App. 37-38; see Am. Judgment 1. The court "acknowledge[d] that forfeiture is a mandatory part of a defendant's sentence under [Section] 982(a)(1)," Pet. App. 37, because that provision states that a court "*shall* order" the forfeiture of any property "*involved* in" the offense of conviction, *ibid.* (quoting and adding emphases to 18 U.S.C. 982(a)(1)). But the court found that because "all of the funds that were laundered were returned to [ICBC], with interest," there were "no laundered funds that were retained by [petitioner] * * * to be forfeited." *Id.* at 37-38. The court also stated that if it were required to order forfeiture, an amount of $20,852,000 would be excessive under the Eighth Amendment but "a forfeiture money judgment of $520,000 would be appropriate." *Id.* at 38 n.1.

The government moved to correct petitioner's sentence under Federal Rule of Criminal Procedure 35(a),

again requesting that the district court enter a forfeiture money judgment in the amount of $20,852,000 or, in the alternative, $10,426,000, which is the amount that petitioner caused Vida Panama to send in fraudulent transfers. Pet. App. 7; D. Ct. Doc. 379, at 1 (Apr. 18, 2018). The court denied the motion. Pet. App. 7.

3. The court of appeals reversed the denial of the government's forfeiture motion and remanded for further proceedings. Pet. App. 1-34.

a. The court of appeals noted that this Court "has made clear that when Congress provides that a district court 'shall order' forfeiture, it 'could not have chosen stronger words to express its intent that forfeiture be mandatory.'" Pet. App. 9 (quoting *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989)). The court of appeals found that, because Congress included such language in Section 982(a)(1), "forfeiture is mandatory" and can be avoided only "if a requirement for imposition of forfeiture was not satisfied." *Id.* at 10.

The court of appeals found that, for purposes of Section 982(a)(1), the property "involved in" petitioner's offense included the amount of funds that were "actually laundered ('the corpus')." Pet. App. 8 (citations omitted). The court further found that such funds do not cease to be "involved in" the offense if they are returned to the victim as part of the scheme, because "the government's interest in the corpus vests 'the moment' [that] property is laundered." *Id.* at 13-14 (citation omitted).

Relying on circuit precedent, the court of appeals rejected petitioner's contention that forfeiture money judgments are not authorized by statute. Pet. App. 11-13. The court concluded that this Court's decision in *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017),

"does not change this analysis," Pet. App. 12, because, "rather than 'abolishing *in personam* judgments against conspirators, the [*Honeycutt*] Court presumed the continued existence of *in personam* proceedings,'" *id.* at 13 (quoting *United States* v. *Elbeblawy*, 899 F.3d 925, 941 (11th Cir. 2018) (brackets in original), cert. denied, 139 S. Ct. 1322 (2019)).

The court of appeals also rejected petitioner's argument that because only "tainted" or substitute property is subject to forfeiture under *Honeycutt*, no forfeitable property existed in this case once the laundered funds were returned to ICBC. Pet. App. 16-17. The court explained that "this aspect of the *Honeycutt* holding was based on the language of [Section] 853(a), which limits forfeiture" for violations of the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, "to 'proceeds the person obtained directly or indirectly' as a result of the crime." Pet. App. 17 (quoting 21 U.S.C. 853(a)). "And because [Section] 982(a)(1) contains neither a 'proceeds' nor an 'obtained' limitation," the court found that "*Honeycutt*'s 'tainted property' requirement does not apply to this case." *Ibid.*

And the court of appeals rejected petitioner's assertion that substitute-assets forfeiture is unavailable in the circumstances of this case. Pet. App. 17-19. Section 853(p) permits substitute-assets forfeiture when property "has been transferred or sold to, or deposited with, a third party," 21 U.S.C. 853(p)(1)(B); petitioner contended that ICBC was not a third party under that provision, Pet. App. 18. The court disagreed, finding no "support for this idea in the text of the statute." *Id.* at 19. It noted that "Section 853(p)(1)(B) distinguishes between only 'the defendant' and 'a third party' to whom

property was transferred." *Ibid.* The court thus identified "no reason why a victim of money laundering could not also have received a transfer of the property." *Ibid.*

b. The court of appeals vacated the district court's order finding that a forfeiture money judgment in the amount requested by the government would violate the Eighth Amendment. Pet. App. 20-26. The court of appeals concluded that the district court failed to consider all the relevant factors. See *id.* at 20-25. But the court of appeals declined to "set the amount of forfeiture required" and remanded for the district court to engage in "factfinding to that effect" and to "conduct a proper constitutional analysis" "in the first instance." *Id.* at 26.

c. Judge Lagoa concurred in part and dissented in part. Pet. App. 27-34. She agreed "that the district court must enter a forfeiture money judgment against [petitioner]" and "that the amount subject to forfeiture in this case includes the amount laundered by [petitioner], even if he paid those funds back to the bank." *Id.* at 27. Judge Lagoa would not have reached any issues related to the availability of substitute-assets forfeiture because "[t]he government has not yet sought substitute asset forfeiture." *Ibid.*; see *id.* at 28-32. And she would also have deferred discussion of the Eighth Amendment issue until the district court had made the relevant factual findings. *Id.* at 27, 32-34.

ARGUMENT

Petitioner contends (Pet. 8-36) that the applicable statutes do not authorize the entry of a forfeiture money judgment establishing the amount of a defendant's forfeiture liability; that the limits on forfeiture under 21 U.S.C. 853(a)(1) that this Court articulated in *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017), should

extend to forfeiture under 18 U.S.C. 982(a)(1); and that the court of appeals erred in holding that substitute-assets forfeiture may be available on remand because ICBC is a "third party" under 21 U.S.C. 853(p)(1)(B). The court of appeals correctly rejected all three of those contentions, and its resolution of petitioner's claims does not conflict with any decision of this Court or another court of appeals. Moreover, immediate review is unnecessary because this case is in an interlocutory posture. No further review is warranted.

1. As a threshold matter, review is unwarranted at this time because the decision below is interlocutory. See, *e.g.*, *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893); see also Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 4-55 n.72 (11th ed. 2019) (noting that this Court "generally denies" interlocutory petitions in criminal cases). Although the court of appeals reversed the district court's order declining to enter a forfeiture money judgment, the court of appeals did not "set the amount of the forfeiture required." Pet. App. 26. The court of appeals instead remanded for the district court to engage in factfinding and the appropriate legal analysis—and to determine the required amount of the forfeiture money judgment in the first instance, as well as whether that amount complies with the Eighth Amendment under the correct legal framework.

Under this Court's ordinary practice, the interlocutory posture of a case "alone furnishe[s] sufficient ground for * * * denial." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to the district court

"is not yet ripe for review by this Court"). If petitioner ultimately is dissatisfied with the amount of the forfeiture money judgment imposed on remand and if that judgment is upheld in any subsequent appeal, petitioner will be able to raise his current claims, together with any other claims that may arise with respect to the forfeiture judgment, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought after the most recent" judgment). This case presents no occasion for the Court to depart from its usual practice of awaiting final judgment before determining whether to review a challenge to a criminal conviction or sentence.

2. Petitioner contends (Pet. 10-24) that a district court imposing criminal forfeiture under 18 U.S.C. 982(a) and 21 U.S.C. 853 may not enter a forfeiture money judgment that establishes the amount of the defendant's forfeiture liability. For the reasons explained on pages 14 to 26 of the government's brief in opposition to the petition for a writ of certiorari in *Bradley* v. *United States*, No. 20-7198 (June 14, 2021), petitioner's arguments lack merit and do not warrant this Court's review.[1] The court of appeals' resolution of that issue is consistent with this Court's decision in *Honeycutt*. As Judge Sutton observed for the Sixth Circuit, "*Honeycutt* itself addressed the permissible scope of a *money judgment*," and it is "hard to maintain" that the Court was "absentmindedly cutting off the branch it sat on"

---

[1] We have served petitioner with a copy of the government's brief in opposition in *Bradley*. That brief is also available on the Court's electronic docket.

when it "refined" that scope. *United States* v. *Bradley*, 969 F.3d 585, 588 (2020), cert. denied, No. 20-7198 (June 14, 2021); see Pet. App. 13. As petitioner concedes (Pet. 10), every court of appeals with criminal jurisdiction has approved of the legality of forfeiture money judgments.[2] And such judgments have been expressly mentioned in the Federal Rules of Criminal Procedure for more than twenty years. See Pet. 23-24 (discussing Fed. R. Crim. P. 32.2(a)). This Court has repeatedly denied petitions for writs of certiorari presenting similar questions, most recently in *Bradley* v. *United States*, No. 20-7198 (June 14, 2021).[3] It should do so again here.

---

[2] See, *e.g.*, *United States* v. *Candelaria-Silva*, 166 F.3d 19, 42 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000); *United States* v. *Awad*, 598 F.3d 76, 78-79 (2d Cir.), cert. denied, 562 U.S. 950, and 562 U.S. 1054 (2010); *United States* v. *Vampire Nation*, 451 F.3d 189, 202-203 (3d Cir.), cert. denied, 549 U.S. 970 (2006); *United States* v. *Blackman*, 746 F.3d 137, 145 (4th Cir. 2014); *United States* v. *Olguin*, 643 F.3d 384, 397 (5th Cir.), cert. denied, 565 U.S. 956, and 565 U.S. 958 (2011); *United States* v. *Hampton*, 732 F.3d 687, 691-692 (6th Cir. 2013), cert. denied, 571 U.S. 1145 (2014); *United States* v. *Baker*, 227 F.3d 955, 970 (7th Cir. 2000), cert. denied, 531 U.S. 1151 (2001); *United States* v. *Smith*, 656 F.3d 821, 827 (8th Cir. 2011), cert. denied, 565 U.S. 1218 (2012); *United States* v. *Casey*, 444 F.3d 1071, 1073-1077 (9th Cir.), cert. denied, 549 U.S. 1010 (2006); *United States* v. *McGinty*, 610 F.3d 1242, 1246-1247 (10th Cir. 2010); *United States* v. *Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008); *United States* v. *Day*, 524 F.3d 1361, 1377-1378 (D.C. Cir.), cert. denied, 555 U.S. 887 (2008).

[3] See, *e.g.*, *Holden* v. *United States*, 139 S. Ct. 1645 (2019) (No. 18-8672); *Lo* v. *United States*, 138 S. Ct. 354 (2017) (No. 16-8327); *Crews* v. *United States*, 137 S. Ct. 409 (2016) (No. 16-6183); *Hampton* v. *United States*, 571 U.S. 1145 (2014) (No. 13-7406); *Newman* v. *United States*, 566 U.S. 915 (2012) (No. 11-9001); *Smith* v. *United States*, 565 U.S. 1218 (2012) (No. 11-8046); *Olguin* v. *United States*, 565 U.S. 958 (2011) (No. 11-6294).

3. Petitioner next contends (Pet. 25-32) that this Court's decision in *Honeycutt* limits forfeiture liability to property that the defendant himself acquired and retained as a result of a money-laundering crime under 18 U.S.C. 982(a)(1).[4] The court of appeals correctly rejected that contention, which is based on a mistaken conflation of the text of 18 U.S.C. 982(a)(1) with the text of 21 U.S.C. 853(a). And those portions of the decision below do not conflict with any decision of this Court or another court of appeals.

a. Forfeiture liability in money-laundering cases is not limited to property that a defendant personally acquired and retained. Petitioner would derive his proposed limitation from this Court's decision in *Honeycutt*. See Pet. 25-32; see also Pet. App. 16-17. But *Honeycutt* construed a different forfeiture provision with materially different language: 21 U.S.C. 853(a), which governs forfeitures arising out of violations of the Controlled Substances Act and requires the forfeiture of "any *proceeds* the person *obtained*, directly or indirectly, as the result of" such violations. 21 U.S.C. 853(a)(1) (emphases added). In *Honeycutt*, the Court

---

[4] Portions of petitioner's argument can be read as suggesting that he never even acquired the laundered funds. See Pet. 25-26. But, as part of his guilty plea to the money-laundering conspiracy, petitioner admitted to facts establishing that he acquired these funds by initiating transfers of the funds to accounts that he controlled. See Pet. App. 39-41; see also *id.* at 16 ("As part of his plea, [petitioner] acknowledged that he personally applied for the credit draws and redeposited the money in Vida Panama's account with ICBC. * * * He did all this not as a bystander, but as general manager and part owner of Vida Panama with signature authority over its bank accounts."). We thus understand petitioner to be arguing primarily that the Court should read a retention-of-funds requirement into Section 982(a)(1).

held that Section 853(a)(1) does not permit the imposition of joint and several liability on a member of a conspiracy for proceeds of the conspiracy that the member himself did not acquire. 137 S. Ct. at 1630. In reaching that conclusion, the Court relied on the "text and structure" of Section 853(a), *ibid.*, emphasizing that the term "obtained" in Section 853(a)(1) indicates both that forfeiture under that provision is "limit[ed] * * * to tainted property" and that "forfeitable property [is defined] solely in terms of personal possession or use," *id.* at 1632. The Court also relied on language in Section 853(a)(2) and (a)(3) to support its conclusion that only tainted property acquired or used by the defendant may be forfeited under Section 853(a). *Id.* at 1632-1633.

By contrast, Section 982(a)(1) does not limit forfeiture to proceeds of the crime obtained by a defendant. It instead broadly provides that, when a person is convicted of a money-laundering offense, the district 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." 18 U.S.C. 982(a)(1) (emphasis added). Congress's choice of that expansive language was deliberate. The original money-laundering-forfeiture provision enacted in 1986 made forfeitable only "the gross receipts a person obtains" as a result of a money-laundering crime. Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H., § 1366(a), 100 Stat. 3207-39. But just two years later, Congress replaced that formulation with Section 982(a)(1)'s current language, which requires the forfeiture of all property "involved in" the money-laundering offense. Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6463(c), 102 Stat. 4374.

At the same time it adopted Section 982(a)(1)'s current language, Congress adopted Section 982(b)(2), which likewise indicates that Section 982(a)(1) is not limited to funds that a defendant personally retains. Section 982(b)(2) includes a safe harbor for certain low-level money launderers, providing that the substitute-assets provisions of Section 853(p) "shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense" unless the defendant "conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period." 18 U.S.C. 982(b)(2). That limited safe harbor would be superfluous if Section 982(a)(1) did not generally require the forfeiture of funds beyond those that a defendant personally retained. Put another way, Section 982(b)(2) confirms that Congress intended defendants falling outside that narrow category to have broad forfeiture liability under Section 982(a)(1)—regardless of whether they personally retained the laundered funds. See *United States* v. *Bermudez*, 413 F.3d 304, 307 (2d Cir.) (per curiam) ("[Section] 982(b) provides for the forfeiture of substitute assets for certain intermediaries who launder large amounts of property" even though such forfeiture "may be 'extremely punitive and burdensome.'") (quoting *United States* v. *Hendrickson*, 22 F.3d 170, 175 (7th Cir.), cert. denied 513 U.S. 878 (1994)), cert. denied, 546 U.S. 996 (2005). The drafters indicated as much when Congress adopted the current versions of Sections 982(a)(1) and (b)(2). See 134 Cong. Rec. 32,698 (1988) (section-by-section analysis introduced by the Chairman of the Senate Judiciary Committee: "The substitute assets

provisions would, of course, apply to * * * any property [the launderer] may have used to facilitate the offense; and they would apply to the corpus itself with regard to a defendant who initially or ultimately had control of the laundered property and who was not merely an intermediary.").

b. Contrary to petitioner's assertion (Pet. 25-26, 29-30), the court of appeals' holding that forfeiture liability under Section 982(a)(1) extends beyond property that the defendant himself acquired and retained does not conflict with *Honeycutt* or any other decision of this Court. *Honeycutt* was a statutory-interpretation decision that considered the text of a materially different forfeiture provision. See pp. 12-13, *supra*. And while petitioner correctly observes (Pet. 28-29) that *Honeycutt* also relied on "background principles * * * of forfeiture" and stated that "[t]raditionally, forfeiture was an action against the tainted property itself and thus proceeded *in rem*," the Court also recognized that in Section 853(p) "Congress altered the traditional system," "adopt[ed] an *in personam* aspect to criminal forfeiture, and provid[ed] for substitute-asset forfeiture." 137 S. Ct. at 1634-1635. Section 982(a)(1) diverges even further from a traditional *in rem* forfeiture system: in addition to incorporating Section 853(p)'s substitute-assets provisions, Congress provided that all property "involved in" the offense "shall" be forfeited, 18 U.S.C. 982(a)(1)—and thus adopted a broader understanding of tainted property than countenanced in traditional *in rem* proceedings. Indeed, as this Court recognized in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), "Section 982(a)(1) * * * descends not from historic *in rem* forfeitures of guilty property, but from a different historical tradition: that of *in personam*, criminal forfeit-

tures," and forfeitures under that provision "do[] not bear any of the hallmarks of traditional civil *in rem* forfeitures." *Id.* at 331-332.

Nor is the decision below inconsistent with this Court's decisions in *Kaley* v. *United States*, 571 U.S. 320 (2014), and *Luis* v. *United States*, 578 U.S. 5 (2016). *Kaley* and *Luis* considered Fifth and Sixth Amendment challenges to two different statutory provisions that permit courts to freeze an indicted defendant's assets before trial. Neither case interpreted Section 982(a)(1) or otherwise broadly addressed the law governing forfeiture. Those decisions thus do not support—or even speak to—whether a forfeiture order entered under Section 982(a)(1) following a money-laundering conviction must be limited to the funds that the defendant personally acquired and retained.

c. Petitioner also errs in asserting (Pet. 25-28) that the decision below implicates a disagreement among the courts of appeals regarding the application of *Honeycutt* to statutes other than 21 U.S.C. 853. Petitioner correctly observes (Pet. 25-28) that the courts of appeals have issued conflicting decisions on whether *Honeycutt*'s approach to joint and several liability applies to forfeiture under Section 981(a)(1)(C). See Br. in Opp. at 9-11, *Peithman* v. *United States*, 140 S. Ct. 340 (2019) (No. 19-16) (noting the existence of those conflicting decisions, explaining that the government has acknowledged in this Court and various lower courts that *Honeycutt*'s reasoning rejecting joint and several liability also extends to forfeitures under Section 981(a)(1)(C), and emphasizing the diminishing importance of the split given the government's concession).

This case, however, does not implicate that disagreement. Section 981(a)(1)(C) provides for the civil forfeit-

ture of "[a]ny property, real or personal, which *constitutes or is derived from proceeds traceable to* a violation of" certain criminal statutes. 18 U.S.C. 981(a)(1)(C) (emphasis added). Again, that language is materially different from Section 982(a)(1)'s broad "involved in" requirement—and thus the decision below does not implicate the Section 981(a)(1)(C) issue on which the courts of appeals are divided. What is more, the government has not requested the entry of a forfeiture judgment reflecting joint and several liability in this case, see, *e.g.*, D. Ct. Doc. 349 (Dec. 7, 2017); D. Ct. Doc. 367 (Mar. 14, 2018)—further demonstrating that the court of appeals' decision has no bearing on the split in authority that petitioner has identified.

And petitioner points to no court of appeals decision holding that *Honeycutt*'s approach to joint and several liability applies to Section 982(a)(1). Rather, multiple courts have signaled agreement with the court of appeals below. See *United States* v. *Alquza*, 722 Fed. Appx. 348, 349 (4th Cir. 2018) (per curiam) ("*Honeycutt* addressed only forfeiture under [Section 853(a)(1)]—which provides for joint and several liability for coconspirators in certain drug crimes—and not forfeiture of property 'involved in' money laundering under [Section 982(a)(1)]."); *United States* v. *Kenner*, 443 F. Supp. 3d 354, 363 (E.D.N.Y. 2020) ("[E]ven assuming *arguendo* that *Honeycutt* would apply to [Section] 981(a)(1)(C), this Court holds that *Honeycutt* does not preclude joint and several liability under [Section] 982(a)(1) based upon the defendants' conviction for the money-laundering conspiracy."); *United States* v. *Fujinaga*, No. 15-cr-198, 2019 WL 2503939, at *5 n.1 (D. Nev. June 17, 2019), appeal pending, No. 19-10222 (9th Cir. filed June 28, 2019); see also *United States* v. *Bikundi*, 926 F.3d 761, 794

(D.C. Cir. 2019) (per curiam) (noting that Section 982(a)(1) "arguably define[s] forfeitable property more broadly than in *Honeycutt*, so it is unclear whether *Honeycutt*'s logic extends" to forfeitures under that provision, but finding it unnecessary to reach the issue), cert. denied, 141 S. Ct. 150, and 141 S. Ct. 457 (2020).

4. Petitioner further contends (Pet. 33-36) that his movement of laundered funds back to the same bank from which they originated as part of the money-laundering scheme does not qualify as a transfer to "a third party" that made the funds unavailable for purposes of substitute-assets forfeiture under 21 U.S.C. 853(p)(1)(B). The court of appeals correctly rejected that argument, Pet. App. 18-19, and its resolution of the third-party issue does not conflict with any decision of this Court or another court of appeals.

a. Section 853(p) provides for substitute-assets forfeiture if, "as a result of any act or omission of the defendant," the directly forfeitable property meets one of numerous criteria of unavailability. 21 U.S.C. 853(p)(1)-(2). One of the criteria permits substitute-assets forfeiture if the property "has been transferred or sold to, or deposited with, a third party." 21 U.S.C. 853(p)(1)(B).

The court of appeals correctly determined in the context of this case that ICBC, the foreign bank that petitioner used when money laundering, is a "third party" within the plain meaning of that term, even though laundered funds were returned to that bank as part of the scheme. As relevant here, a "[t]hird party" is "[o]ne not a party to * * * an action but who may have rights therein." *Black's Law Dictionary* 1479 (6th ed. 1990). In a criminal case, the "part[ies] to" the action are the government and the defendant. *Ibid.* Any other individual or entity who is "not a party" but "may have rights"

related to the case is a third party, *ibid.*—including any victim, regardless of whether some or all of any property taken from the victim was returned. The text of Section 853(p)(1)(B) suggests that "third party" carries its normal meaning here, because it differentiates only between "the defendant" and "a third party." 21 U.S.C. 853(p)(1)(B). Another provision in Section 853 likewise supports that reading: the subsection entitled "[t]hird party transfers" applies to property that is "transferred to a person other than the defendant," 21 U.S.C. 853(c) (emphasis omitted).

ICBC is thus a third party for purposes of petitioner's criminal prosecution and his criminal-forfeiture obligations. Because petitioner moved the laundered funds back to ICBC, those funds "ha[ve] been transferred * * * or deposited with, a third party," 21 U.S.C. 853(p)(1)(B), which renders those funds unavailable and subject to substitute-assets forfeiture.

b. Petitioner's contrary reading (Pet. 33-36) relies on Section 853(n) and petitioner's understanding of the purpose of criminal forfeiture—neither of which undermines the plain meaning of "third party" in Section 853(p)(1)(B).

Section 853(n)(1) supports, rather than undercuts, the plain-meaning use of "third party" throughout Section 853. Section 853(n) protects "[t]hird party interests," 21 U.S.C. 853(n) (emphasis omitted), in certain situations "[f]ollowing the entry of an order of forfeiture" by permitting "[*a*]*ny person, other than the defendant*, asserting a legal interest in property which has been ordered forfeited to the United States" to "petition the court for a hearing to adjudicate the validity of his alleged interest in the property." 21 U.S.C. 853(n)(1) and (2) (emphasis added); see also 21 U.S.C. 853(n)(4)

(allowing for the consolidation of hearings for any "petition[s] filed by a person other than the defendant under this subsection"). And in *Luis*, a four-member plurality of this Court confirmed that a "third party" under Section 853(n) is simply an interested person or entity other than the defendant or the government. See 578 U.S. at 15-16 (noting that Section 853(n)(6)(A) "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").

To the extent that petitioner suggests (Pet. 33-36) that a forfeiture order reaching his untainted assets does not further the purposes of criminal forfeiture in this case because he ultimately returned the laundered funds to ICBC as part of his criminal scheme, that argument is misplaced. "[E]ven the most formidable argument concerning the statute's purposes" cannot support a contrary reading where, as here, there is "clarity * * * in the statute's text" that forfeiture in circumstances like these is mandatory under Section 982(a)(1), and that substitute-assets forfeiture is authorized under Section 853(p). *Kloeckner* v. *Solis*, 568 U.S. 41, 55 n.4 (2012).

In any event, petitioner misunderstands the policy motivations underlying criminal forfeiture in cases such as this one. Petitioner was convicted not of bank fraud but of money laundering—an offense whose harms fall "upon society in general" rather than a single victim. Pet. App. 24 (citation omitted). Unlike restitution—a sanction whose "primary goal * * * is remedial or compensatory," *Paroline* v. *United States*, 572 U.S. 434, 456 (2014)—*in personam* criminal forfeiture is "punitive," *Bajakajian*, 524 U.S. at 333; see *Libretti* v. *United States*, 516 U.S. 29, 39 (1995) ("Our precedents have

* * * characterized criminal forfeiture as an aspect of punishment imposed following conviction of a substantive criminal offense."). As previously discussed, see pp. 13-15, *supra*, in adopting Section 982, Congress clearly chose to impose that form of punishment even when a defendant did not personally retain the laundered funds—perhaps because money laundering does not necessarily have a traditional "victim" as might exist in other financial crimes, although it still imposes costs on financial institutions and society as a whole. Congress's choice ensures that defendants like petitioner, who engaged in a nine-year money-laundering scheme that implicated financial institutions in two countries and placed ICBC at serious risk of financial and reputational harm, see Sent. Tr. 28-31, do not commit extensive financial crimes yet avoid a monetary sanction.

c. Petitioner asserts (Pet. 35) that the Eighth Circuit's decision in *United States* v. *Hawkey*, 148 F.3d 920 (1998), conflicts with the decision below. In *Hawkey*, the defendant, a county sheriff, was convicted of mail fraud, money laundering, and other offenses for using funds from the sheriff's department's bank accounts for personal expenses. *Id.* at 923. The defendant had also deposited some of his personal funds into the accounts to replace funds that he had withdrawn. *Ibid.* Reversing in part a forfeiture order entered under Section 982(a)(1), the Eighth Circuit concluded that the district court erred in failing to adjust the forfeiture order to reflect the amount of misappropriated funds that the defendant had returned to the accounts "prior to the forfeiture order." *Id.* at 928.

The determination made by the court of appeals below—that substitute-assets forfeiture is available

here because petitioner made the funds unavailable by transferring them to a third party—does not conflict with *Hawkey*. The Eighth Circuit in *Hawkey* did not consider the availability of substitute-assets forfeiture under Section 853(p)(1)(B)—or even mention that provision. There is thus no division of authority on the third-party question that petitioner presents. And, in any event, as the court of appeals explained below, *Hawkey* did not address the scenario here, under which a defendant returned laundered funds not "out of the goodness of his heart," but because the "scheme depended on the [financial institution's] being repaid in full." Pet. App. 14-15. *Hawkey* does not preclude the Eighth Circuit from reaching the same result that the court of appeals reached in this case. There is therefore no conflict warranting this Court's review.[5]

d. Finally, because the government may be able to establish another basis for substitute-assets forfeiture

---

[5] Petitioner also quotes (Pet. 35) language from a Second Circuit decision suggesting that restitution payments to a victim could offset forfeiture liability. See *United States* v. *Kalish*, 626 F.3d 165, 169-170 (2010). *Kalish* did not consider the availability of substitute-assets forfeiture under Section 853(p), nor did the decision below rely on the relationship between forfeiture and restitution. And the Second Circuit has since recognized that those aspects of *Kalish* were "dicta," *United States* v. *Bodouva*, 853 F.3d 76, 79 n.1 (2017) (per curiam), and expressly held that district courts "c[annot] reduce the amount of [a] forfeiture order by the amount of any restitutive payments in the absence of specific statutory authorization to do so," *id.* at 77. Similarly, petitioner's reliance (Pet. 36) on the Ninth Circuit's decision in *United States* v. *Thompson*, 990 F.3d 680 (2021), is misplaced, because *Thompson* interpreted the civil-forfeiture provision in Section 981(a)(1)(C)—which is materially different from Section 982(a)(1)'s criminal-forfeiture provision, see p. 17, *supra*—and did not consider the availability of substitute-assets forfeiture under Section 853(p).

in the district court proceedings on remand, this case would be an unsuitable vehicle for addressing any question involving third-party transfers under Section 853(p)(1)(B). Substitute-assets forfeiture is also available when, due to the defendant's acts or omissions, the directly forfeitable property "has been placed beyond the jurisdiction of the court." 21 U.S.C. 853(p)(1)(C). Because ICBC is located in Panama, petitioner's transfers to that bank may have placed the laundered funds beyond the jurisdiction of the district court. Cf. *United States* v. *Saccoccia*, 564 F.3d 502, 504 (1st Cir.) (indicating, for purposes of forfeiture under 18 U.S.C. 1963(m), which permits substitute-assets forfeiture where the property has been placed beyond the jurisdiction of the court, that funds "wired to persons and banks abroad" were "not reachable by federal courts"), cert. denied, 558 U.S. 891 (2009). Accordingly, Section 853(p)(1)(C) may provide the government with an independent basis for seeking petitioner's substitute assets.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

JULY 2021