Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HENRY LO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNTIED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal forfeiture laws allow the government to forfeit a convicted criminal defendant's property *only if* the government proves that identified property constitutes or is derived from proceeds traceable to the offense, or, if the government proves that specific property is unavailable due to the defendant's actions, the government may forfeit substitute assets of the defendant. These forfeiture laws do not allow the government to obtain an *in personam* money judgment against an impecunious criminal defendant, as the government conceded below. Nevertheless, the Ninth Circuit here and other lower federal courts have allowed *in personam* money judgments as a form of punishment despite the lack of statutory authorization based on the courts' own policy rationalizations. Such judicially-created punishment contravenes the principle of separation of powers and is not supported by the plain words of the statutes or the rules of statutory interpretation. Only this Court can correct the error.

The question presented is:

Whether a district court may order an *in personam* forfeiture money judgment against an impecunious criminal defendant in the absence of a statute expressly authorizing such a form of punishment.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were petitioner Henry Lo and respondent United States of America.

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PETITION FOR WRIT OF CERTIORARI

Henry Lo petitions for a writ of certiorari to review the judgment of the Ninth Circuit. This case presents an important question of law regarding the power of the courts to create and impose punishments that have not been prescribed by Congress. The United States Court of Appeals for the Ninth Circuit affirmed the district court's imposition of an *in personam* forfeiture money judgment against the defendant Henry Lo despite the absence of statutory authorization for such a form of punishment and despite the government's failure to prove the statutory requisites for forfeiture.

Criminal punishments may be imposed by courts only if those punishments are prescribed by Congress. The Ninth Circuit decision in this case followed earlier decisions of the Ninth Circuit and a number of other circuits creating forfeiture money judgments as a form of punishment because those courts believed that the money judgments would "advance the purposes of the forfeiture statute." Such judicial legislating violates the principle of separation of powers and has no support in the text of the statutes or any rule of statutory construction.

The government's recent expansive use of forfeiture as a punishment in criminal cases has given rise to a number of significant issues that have reached this Court. In those decisions, the Court has emphasized the distinction between tainted and untainted assets when determining the lawfulness of forfeiture orders.

Most recently, this Court granted certiorari to resolve the question whether the principle of joint-and-several liability applies to forfeiture judgments, effectively allowing the government to forfeit a defendant's future untainted assets. *Honeycutt v. United States*, No. 16-142 (on writ of certiorari to the Sixth Circuit Court of Appeals). The bedrock question here is whether a court can impose an *in personam* forfeiture money judgment against an impecunious defendant's future untainted assets instead of following the procedures of the forfeiture statutes to forfeit specific tainted property. It is a significant question that only this Court can resolve.

This case is the perfect vehicle to resolve the question. The issue was directly raised in the district court and in the Ninth Circuit. The government conceded below that the pertinent statutes do not authorize *in personam* money judgments as a form of forfeiture, and instead argued simply that such a punishment was "appropriate." As a result, the government made no effort to comply with the procedural or evidentiary requirements of the forfeiture statutes and the Ninth Circuit held that those procedures do not apply to forfeiture money judgments. The decision below was thus premised solely on the Ninth Circuit's legal conclusion that a forfeiture money judgment was a punishment within the power of the district court to impose. That decision is wrong.

OPINIONS BELOW

The court of appeals' opinion (Pet.App.1-40) is reported at 839 F.3d 777. The district court's judgment imposing forfeiture (Pet.App.41-46) and its oral ruling on forfeiture (Pet.App.185-213) are unpublished.

JURISDICTION

The court of appeals entered judgment on October 5, 2016. The court denied a timely petition for rehearing on December 12, 2016. (Pet.App.47). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be . . . deprived of . . . property, without due process of law . . . ." U.S. Const. amend. V.

28 U.S.C. § 2461(c) provides:

> If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a

criminal forfeiture proceeding [with an exception not relevant here].

18 U.S.C. § 981(a)(1)(C) provides:

> The following property is subject to forfeiture to the United States:
>
> . . . .
>
> Any property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title) . . . .

21 U.S.C. § 853 provides:

> (a) Property subject to criminal forfeiture
>
> Any person convicted of a violation . . . shall forfeit to the United States . . .
>
> (1) any property constituting or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation . . . .
>
> . . . .
>
> (p) Forfeiture of substitute property
>
> (1) In general
>
> Paragraph (2) of this subsection shall apply, if any property described in subsection (a) of this section, as a result of any act or omission of the defendant—
>
> (A) cannot be located upon the exercise of due diligence;
> (B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;
(D) has been substantially diminished in value; or
(E) Has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph 1, as applicable.

Federal Rule of Criminal Procedure 32.2 provides:

(a) NOTICE TO THE DEFENDANT. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) ENTERING A PRELIMINARY ORDER OF FORFEITURE.

(1) *Forfeiture Phase of the Trial.*

(A) *Forfeiture Determinations.* As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the

> government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.
>
> (B) *Evidence and Hearing.* The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

STATEMENT OF THE CASE

I. Course of Proceedings in the District Court and Relevant Facts

Henry Lo was indicted on August 19, 2014, and charged with a number of wire, mail, and access device fraud counts arising from his embezzlement of funds from a former employer and former girlfriend. (Pet.App.48-59). The indictment included a forfeiture allegation under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) and identified specific property that the government sought to forfeit in the event of conviction, including the defendant's family residence and six identified bank accounts. (Pet.App.56-57). The indictment stated that if any of the identified property could not be located because of actions of the defendant to defeat forfeiture, the government would seek to forfeit substitute assets pursuant to 21 U.S.C. § 853(p). (*Id.*) The indictment did not give notice that the government

intended to seek a forfeiture money judgment against Mr. Lo in the event of conviction.

In November 2014, Mr. Lo executed a written plea agreement in which he pleaded guilty to two wire fraud counts and one mail fraud count in furtherance of a scheme to defraud. (Pet.App.60-69). Mr. Lo admitted to certain facts relating to the scheme to defraud, including the transfer of at least $1,700,000 to himself. (Pet.App.62-65). In the plea agreement—drafted by the government—Mr. Lo did *not* agree to forfeit any specific property, he did not agree to pay any amount of money as a forfeiture, and he did not stipulate to any facts that could form the basis for either a direct forfeiture of property or proceeds under 18 U.S.C. § 981(a)(1)(C), or the forfeiture of substitute assets under 21 U.S.C. § 853(p). When Mr. Lo entered his guilty plea on November 20, 2014, the district court listed the maximum penalties but made no reference to any forfeiture, much less a personal money judgment, as a potential punishment, nor did the court make any findings to support any forfeiture, and the omission was not corrected by the government. (Pet.App.76-77).

Nevertheless, when the United States Probation Office submitted its final Presentence Report ("PSR"), two weeks before the scheduled sentencing, the Probation Officer recommended, for the first time and on the last line of the PSR, that the court order a forfeiture money judgment of $2,244,384.39, in addition to

ordering restitution of the same amount. (Pet.App.353). The recommendation itself contained no citation to any specific statutory authority, no factual findings that would justify the forfeiture, and no provision of any agreement by Mr. Lo that would support the recommended forfeiture. In fact, forfeiture was not even mentioned on the first page of the Sentencing Recommendation as a part of the recommended sentence. (Pet.App.349).

Mr. Lo objected to the last-minute forfeiture recommendation on the grounds that the government had not proved that any specific property was the proceeds of the offenses or that the government was entitled to substitute assets under the applicable forfeiture statutes. Mr. Lo also objected that the government had failed to comply with the notice provisions and procedural requirements of Federal Rule of Criminal Procedure 32.2. (Pet.App.106-107). Relying solely on *United States v. Newman,* 659 F.3d 1235, 1242-43 (9th Cir. 2011), the government claimed that a forfeiture money judgment of over $2 million was "warranted" and "appropriate" because it had alleged that the fraud scheme generated that amount. (Pet.App.126; Pet.App.144). The government made no effort to trace the alleged fraud proceeds or demonstrate that any specific property was the proceeds of the fraud.

The government conceded at a scheduled sentencing hearing that "Mr. Lo did not agree that he would forfeit any property, and he did not agree to a forfeiture

money judgment." (Pet.App.159). The government also conceded that until just days before sentencing it "wasn't sure that we would be seeking forfeiture in this case" and that the purpose of seeking a forfeiture money judgment was simply one of convenience and expediency for the government, because "if there's a money judgment ordered pursuant to Rule 32.2, that can be used by the government to seize property almost immediately." (Pet.App.164).

After the parties' sentencing memoranda had been filed, and three days before a scheduled sentencing, the government filed, for the first time, an application for a preliminary order of forfeiture in a belated effort to comply with Rule 32.2(b)(2). (Pet.App.131-135). The application sought a forfeiture money judgment in the amount of $2,323,971.39. (Pet.App.134). The government did not seek forfeiture of the specific property identified in the indictment nor did it present any facts or legal authority supporting the forfeiture of those properties or any substitute assets. Relying on *Newman,* the government claimed it could forfeit a sum of money without complying with the tracing or other provisions of the forfeiture statutes or Rule 32.2, asserting that "forfeiture is not limited to specific assets directly traceable to the offense: it can also take the form of an *in personam* forfeiture money judgment against the defendant, even where the defendant has spent or otherwise dissipated the funds and/or is insolvent." (Pet.App.132-133).

Sentencing was continued. A preliminary order of forfeiture was never entered by the court prior to judgment.

On April 9, 2015, Mr. Lo was sentenced to a term of 70 months' imprisonment, a three-year term of supervised release, restitution in the amount of $2,232,894.39, and a special assessment. Despite the Probation Office's finding that Mr. Lo had no ability to pay a fine (Pet.App.349 and Pet.App.352), the district court imposed a fine of $10,000. Finally, the district court ordered that a forfeiture money judgment be entered in the amount of $2,232,894.39. (Pet.App.41-46). In pronouncing sentence the district court made no factual findings that would support a forfeiture of substitute or any other assets under 18 U.S.C. § 981(a)(1)(C) or 21 U.S.C. § 853(p). (Pet.App.209-210).

II. The Ninth Circuit Opinion

Mr. Lo timely appealed the district court's forfeiture order, arguing that the government had failed to comply with the forfeiture statutes and the forfeiture money judgment was therefore unlawful. (Pet.App.214-251 and Pet.App.306-324). The government conceded that the forfeiture statutes "do not expressly authorize personal money judgments as a form of forfeiture." (Pet.App.287). The government argued, however, that a personal money judgment may nevertheless be imposed as a punishment because "nothing suggests that money judgments are forbidden." (*Id*.).

The Ninth Circuit affirmed the forfeiture order, holding that the government could seek the imposition of "a money judgment as a form of criminal forfeiture under Rule 32.2(b)." (Pet.App.27). The Court of Appeals, relying on *Newman*, 659 F.3d at 1242, concluded that the government was entitled to a forfeiture money judgment without complying with the provisions of Sections 981(a)(1)(C) or 853(p). Because the Court concluded that the forfeiture money judgment was lawful, it held that the appellate waiver in Mr. Lo's plea agreement precluded him from appealing the forfeiture order. (Pet.App.34-35)

REASONS FOR ISSUING THE WRIT

The Ninth Circuit's decision in this case—and the decisions of several other circuits—approves a forfeiture money judgment without any statutory basis. That judicial expansion of the forfeiture statutes enacted by Congress sets a dangerous precedent of judicial legislating and is contrary to the principle of separation of powers that underlies our democracy. It is also unsupported by any plausible reading of the pertinent statutes and runs counter to recent forfeiture decisions of this Court. The Court should grant the writ to cabin the executive's power to forfeit a person's property within the limits Congress has set.

I. Forfeiture Money Judgments Are Not Authorized by Statute

Congress has not authorized the imposition of a forfeiture money judgment as form of punishment for the mail and wire fraud offenses that Mr. Lo committed.

Rather, the federal forfeiture statutes the government relied on in this case allow the government to forfeit specific property of a convicted defendant *if* it proves the property constitutes, or is derived from, proceeds traceable to the offense of conviction. *See* 18 U.S.C. § 981(a)(1)(C) (property is subject to forfeiture if it "constitutes or is derived from proceeds traceable to . . . [certain] offense[s]"); 21 U.S.C. § 853(a) (property subject to criminal forfeiture is "any property constituting or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation"). If those tainted assets are unavailable because of the actions of the defendant, the government may, upon conviction, seek forfeiture of substitute, or untainted, assets from the defendant. 21 U.S.C. § 853(p). *See, e.g.*, *United States v. Ripinsky*, 20 F.3d 359, 361-62 (9th Cir. 1994) (explaining the statutory scheme and concluding that the government may not restrain substitute assets before trial because the statute only allows pretrial restraint of tainted assets). But no provision of these statutes allows the government to obtain an *in personam* forfeiture money judgment against an impecunious defendant as a form of punishment.

The forfeiture money judgment has instead emerged in the Ninth Circuit and several other circuits as a purely judicial creation. This judicially-created punishment has no analogue in federal criminal sentencing. Every other element of a federal criminal sentence—term of imprisonment, restitution, fine, special

assessment, other forms of criminal forfeiture, and the terms and conditions of supervised release—has been created by Congress and explicitly provided for by federal statute. The forfeiture money judgment stands alone as a punishment devised by the courts. As such, it has no lawful basis.

II. Imposition of a Forfeiture Money Judgment in The Absence of Statutory Authorization Violates The Principle of Separation of Powers

One of the fundamental principles of our democracy is that "within our constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides *wholly* with the Congress." *Whalen v. United States,* 445 U.S. 684, 689 (1980) (citing *United States v. Wiltberger,* 18 U.S. 76, 95 (1820); *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) (emphasis added)). When a federal court imposes a punishment that Congress has not authorized, "it violates . . . the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Id.*

This principle of separation of powers does not allow the judicial branch to create punishments that are not specifically provided for by Congress, no matter how wise the punishment may be as a matter of policy. Rather, the judicial branch's discretion when imposing punishment for an offense is cabined by "the range provided by statute." *Apprendi v. New Jersey,* 530 U.S. 466, 481 (2000)

("judges in this country have long exercised discretion . . . in imposing sentence *within statutory limits* in the individual case" (emphasis in original)); *Welch v. United States*, ___ U.S. ___, 136 S.Ct. 1257, 1268 (2016) (courts are "prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law" and "lack[] the power to exact a penalty that has not been authorized by any valid criminal statute").

The government here conceded that the forfeiture statutes do *not* authorize personal money judgments as a form of forfeiture. (Pet.App.287). The Ninth Circuit nevertheless approved the imposition of a forfeiture money judgment. Such judicial legislating cannot be squared with the separation of powers principles that define the role of the judiciary in criminal cases. *See Bigelow v. Forrest*, 76 U.S. 339, 351 (1870) (holding that a district court "had no power to order" a forfeiture beyond what was authorized by Congress and would have "transcended its jurisdiction" with such an order); *see also Ex Parte Lange*, 85 U.S. 163, 176–77 (1874) (holding that a judgment imposing punishment in excess of statutory authorization is inherently void); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."). When, as here, there is no statutory text explicitly providing for forfeiture money judgments, the court's analyses should have ended. If the text itself does not supply the form of punishment, there is nothing for courts to do

except invite Congress to amend the statute. *See United States v. Monsanto*, 491 U.S. 600, 614 (1989).

III. The Ninth Circuit's Decision Approving The Forfeiture Money Judgment Rests on a Flawed Statutory Analysis

The Ninth Circuit, undeterred by the lack of any statutory basis for a forfeiture money judgment, relied upon its previous decisions in *United States v. Newman*, 659 F.3d 1235 (9th Cir. 2011) and *United States v. Casey*, 444 F.3d 1071 (9th Cir. 2006). *Newman* itself relied on *Casey*, as the government concedes. (Pet.App.287). But those decisions rest on a flawed statutory analysis.

The *Casey* court focused on a rule of statutory construction codified in 21 U.S.C. § 853(o): "It is significant that '[t]he provisions of [§ 853] shall be liberally construed to effectuate its remedial purposes.'" *Casey*, 444 F.3d at 1073. From this premise, the *Casey* court concluded that Congress conceived of forfeiture as a form of criminal punishment, and that "[r]equiring imposition of a money judgment on a defendant who currently possesses no assets furthers the remedial purposes of the forfeiture statute by ensuring that all eligible criminal defendants receive the mandatory forfeiture sanction Congress intended and disgorge their ill-gotten gains, even those already spent." *Id*.; *see also Newman*, 659 F.3d at 1242–43 (same); *United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012) (same). Leaving no doubt that the *Casey* court viewed Section 853(o) as a legislative grant to courts to add this new form of punishment based on the courts' evaluation of

whether a money judgment advanced the statute's purposes, the *Casey* court again cited Section 853(o) and concluded: "We are satisfied that money judgments will advance the purposes of the forfeiture statute in combating the illegal drug trade and punishing those involved in it." *Casey*, 444 F.3d at 1076. But this Court has made clear that "interpretive canon[s are] not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)); *see also Ripinsky*, 20 F.3d at 363 (Section 853(o) "does not 'authorize us to amend [the statute] by interpretation.'" (quoting *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993)).

The Ninth Circuit in the opinion below also relied on Federal Rule of Criminal Procedure 32.2(b), which creates procedures governing forfeiture generally, including money judgments. However, in creating those procedures the Advisory Committee noted that "[a] number of cases have approved use of money judgment forfeitures" and expressly noted that "[t]he Committee takes no position on the correctness of these rulings." *See* Fed. R. Crim. P. 32.2 Committee Notes on Rules (2000). Accordingly, Rule 32.2 cannot be read as legislative authority to support forfeiture money judgments as a valid form of punishment, particularly in the absence of any statutory language authorizing that form of forfeiture.

The lack of explicit statutory authority to impose a forfeiture money

judgment explains another fundamental error in the Ninth Circuit's reasoning. The Court of Appeals held that "where 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 21 U.S.C. § 853(p)] are inapplicable." (Pet.App.27). This reasoning is deeply flawed. The reason the statutory requirements for substituting property for forfeiture do not clearly apply is because the forfeiture money judgment is an extra-statutory form of punishment.

IV. Decisions of Other Courts of Appeals Are Similarly Without Legal Foundation

Other Courts of Appeals have also held that the government may obtain a personal forfeiture money judgment against a convicted defendant as a punishment despite the lack of statutory authorization. But those decisions simply "assume the propriety of personal money judgments in forfeiture proceedings, [and then] are subsequently read as establishing the propriety of such judgments." *United States v. Surgent,* 2009 WL 2525137 at *13-14 (E.D.N.Y. 2009). As then-United States District Judge Gleeson held in a thoughtful opinion, neither the statutes nor Rule 32.2 authorize an *in personam* forfeiture money judgment under circumstances such as those here. *Surgent,* 2009 WL 2525137 at *6-7. For instance, *United States v. Hall,* 434 F.3d 42, 59 (1st Cir. 2006), which the government relied upon here:

> exemplifies the shortcomings exhibited, to varying degrees, by all of the cases cited by the government. First, it does not even attempt to explain how a statute can authorize personal money judgments when it does not, by its terms, authorize such judgments. Second, rather than explaining how the language of the statute it purports to interpret sustains its interpretation, *Hall* relies on cases that either interpret statutes containing meaningfully different language [e.g., RICO], assume the meaning of the statute without examining its terms . . . , or do not even purport to address the propriety of personal money judgments in forfeiture proceedings . . . . Third, *Hall* relies on the *in personam* nature of [criminal] forfeiture proceedings, a fact that is logically insufficient to establish the availability of personal money judgments. Fourth, it relies on a desire to achieve the purpose of the statute without discussing whether and how the remedies and procedures explicitly described by the statute fail to effectuate that purpose. Fifth, it fails to account for the fact that Congress has explicitly authorized 'personal money judgments' in other statutes but did not do so in § 982 or § 853.

Surgent, 2009 WL 2525137 at *14.

Judge Gleeson's reflections on *Hall* apply equally to the decisions of other circuits on this issue. The Second Circuit, for instance, simply announced that "[w]e join our sister courts of appeals in holding that §853 permits imposition of a money judgment on a defendant who possesses no assets at the time of sentencing." *United States v. Awad*, 598 F.3d 76, 78 (2d Cir. 2010). The Second Circuit then followed *Awad* without analysis in *United States v. Kalish*, 626 F.3d 165, 168-69 (2d Cir. 2010). In *United States v. Vampire Nation*, 451 F.3d 189, 201-02 (3d Cir. 2006), the Third Circuit engaged in the flawed reasoning that

because "§853 does not contain any language *limiting* the amount of money available in a forfeiture order to the value of assets a defendant possesses at the time the order is issued, we think it clear that an *in personam* forfeiture judgment may be entered for the full amount of the criminal proceeds." In *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000), the Seventh Circuit simply assumed the lawfulness of a forfeiture money judgment, while noting that the defendant had not actually challenged the lawfulness of the *in personam* money judgment. In *United States v. Smith,* 656 F.3d 821, 828 (8th Cir. 2011), the Eighth Circuit followed "five other circuits" to hold that a forfeiture money judgment is permissible because the "broad text" of the statute together with the directive in Section 853(o) that it be "liberally construed to effectuate its remedial purpose" allowed courts to impose forfeiture money judgments without any proof of nexus to the underlying offenses. Finally, the District of Columbia in *United States v. Day*, 524 F.3d 1361, 1377 (D.C. Cir. 2008), reversed a district court decision that forfeiture judgments are not authorized by statute on the grounds that "[n]othing in the relevant statutes suggests that money judgment are *forbidden."* The Court further held that criminal forfeiture "is concerned not with how much an individual has but with how much he received in connection with the commission of the crime."

The decisions of these courts of appeals are not only without statutory basis, they are also contrary to, and reflect a misunderstanding of, the fundamental nature

of forfeiture. With few exceptions, criminal asset forfeiture in the United States has always been *in personam* but limited to specific property that bears the requisite statutory nexus to the offense conduct or that substitutes for that direct nexus property, and such a nexus is required by the forfeiture statutes at issue here. *See, e.g.*, 18 U.S.C. § 981(a)(1)(C) and 982(a); 18 U.S.C. § 1963(a); 21 U.S.C. §§ 853(a) and 853(p); *see also United States v. Saccocia*, 58 F.3d 754, 783–84 (1st Cir. 1995) (in the United States, criminal *in personam* forfeitures require a nexus between the property to be forfeited and the offense). In concluding that the government may seek "a money judgment instead of the forfeiture of specific property," *ab initio*, the line of cases culminating in the Ninth Circuit decision here allows the government to forfeit property that has *no nexus* to the crime that allegedly made the property forfeitable, or, in other words, untainted property. That result is contrary not only to the express language of the statutes, but to the forfeiture decisions of this Court.

V. The Ninth Circuit Opinion Ignores The Distinction Between Tainted and Untainted Assets That Underlie This Court's Forfeiture Decisions

In every forfeiture decision decided by this Court, the Court has emphasized – and its rationale has turned on – the principle that the government may only forfeit *tainted* property, that is, property that is derived from, involved in, or the proceeds of the crime. *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989)

(Sixth Amendment does not prohibit government from seizing tainted assets—*i.e.*, specific property that was the proceeds of drug offense—that a defendant wishes to use to pay attorney's fees); *United States v. Monsanto,* 491 U.S. 600 (1989) (government can restrain pretrial tainted assets that a defendant would like to use to pay counsel); *Kaley v. United States,* 134 S.Ct. 1090 (2014) (in case "where the assets' connection to the allegedly illegal conduct is not in dispute," defendants were not entitled to pre-trial probable cause hearing to challenge grand jury finding); *Luis v. United States*, 136 S.Ct. 1083 (2016) (pretrial restraint of defendant's untainted assets needed to retain counsel violated Sixth Amendment).

The forfeiture money judgment allowed by the Ninth Circuit and other courts of appeals obliterates this fundamental distinction by permitting the government to seize future untainted assets of the defendant that have no nexus with the offense itself. That required nexus between the property and the offense of conviction is the essence of forfeiture as a form of punishment. Every forfeiture statute at issue here provides that the only property subject to forfeiture is property derived from, involved in, or the proceeds of the charged offense. The only exception recognized by Congress is the substitute asset provision of Section 853(p), and that section prohibits the forfeiture of substitute assets unless the government first shows that the forfeitable assets – those with a nexus to the crime – are unavailable due to some action by the defendant. The clear import of these

provisions is that courts are prohibited from forfeiting property that has no nexus to the offense. By creating the forfeiture money judgment as a punishment without any proof of a nexus to the crime, the Ninth Circuit and the other courts of appeals have ignored congressional focus on tainted assets. Without a clear distinction between tainted and untainted assets, the rationale of this Court's forfeiture decisions becomes meaningless.

VI. The Writ Should be Granted or a Decision Held Until This Court Decides *Honeycutt v. United States*

This Court recently granted a writ of certiorari to the Sixth Circuit Court of Appeals in *Honeycutt v. United States,* No. 16-142. The question presented there is whether §853 mandates joint-and-several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy. As the petitioner in *Honeycutt* explained in his briefing, imposition of such liability allows the government to forfeit the current or future untainted assets of the defendant. *Honeycutt v. United States,* No. 16-142, Brief of Petitioner at 13, 23-29. In other words, a forfeiture order based on joint-and-several liability results in the imposition of a forfeiture money judgment.

The issue presented in this case is thus the more foundational question whether Congress has authorized *in personam* forfeiture money judgment as a punishment in any case. If this Court decides in favor of the petitioner in *Honeycutt,* it will necessarily resolve some of the questions raised in this case—

primarily, whether §853 allows the forfeiture of untainted assets. *See Honeycutt*, Brief of Petitioner, at 13-29 ("From start to finish, §853 makes clear that what is subject to forfeiture is *tainted* assets—the actual property constituting, or derived from, the proceeds of drug crimes"). If §853 only permits the forfeiture of *tainted* assets, then necessarily the forfeiture money judgment here cannot stand, as such a judgment allows the government to take the future untainted assets from the defendant.

The Ninth Circuit decision here also raises concerns similar to those raised by the petitioner in *Honeycutt.* For instance, the decision here conflates the distinct concepts of fines and forfeitures and effectively allows the court to impose, and the government to collect, fines that exceed the statutory maximum and in disregard of whether the defendant has the ability to pay. *See Honeycutt*, Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, at 7-11. In this case the district court imposed a fine of $10,000 (despite the defendant's inability to pay), and yet it imposed a personal money judgment in excess of $2 million. And because a forfeiture money judgment allows the government to seize untainted assets, the decision below raises the same serious constitutional questions presented by the decision in *Honeycutt*, namely, whether a forfeiture money judgment constitutes an excessive fine under the Eighth Amendment. Finally, the decision below also raises the question whether, by

allowing the seizure of untainted assets, it potentially violates a defendant's Sixth Amendment right to counsel. *Id.* at 11-13.

CONCLUSION

The petition for a writ of certiorari should be granted.

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