No. 16-142

IN THE
Supreme Court of the United States

TERRY M. HONEYCUTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Under 21 U.S.C. §853(a)(1), a person convicted of violating a federal drug law must forfeit to the government "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation."

The question presented is:

Does 21 U.S.C. §853(a)(1) mandate joint-and-several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy?

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BRIEF OF PETITIONER

Petitioner Terry M. Honeycutt respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (Pet. App. 1a-34a) is reported at 816 F.3d 362 (6th Cir. 2016). The District Court's oral determination on forfeiture (Pet. App. 35a-46a) is unreported. The Sixth Circuit's order denying the petition for rehearing en banc (Pet. App. 47a-48a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit was entered on March 4, 2016. A timely petition for rehearing en banc was denied on May 31, 2016. A timely petition for certiorari was filed on July 29, 2016, which this Court granted on December 9, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, ch. III, §303, 98 Stat. 2040, 2044, are codified at 21 U.S.C. §853. 21 U.S.C. §853(a)(1) provides:

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

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

21 U.S.C. §853 is reproduced in its entirety in an Appendix to this brief.

STATEMENT OF THE CASE

A. Petitioner's Drug Convictions

Petitioner Terry Honeycutt worked as the salaried employee in charge of sales and inventory at a hardware store in Tennessee called the Brainerd Army Store. Pet. App. 2a. Petitioner's brother, Tony Honeycutt, co-owned the store. Pet. App. 2a.[1] The Brainerd Army Store stocked an iodine-based water purification product known as Polar Pure. Pet. App. 2a. In 2008, Petitioner noticed an increased number of "edgy looking folks" purchasing Polar Pure. Pet. App. 2a. He contacted the Chattanooga Police Department to ask whether Polar Pure could be used to manufacture methamphetamine. *Id.* The Chattanooga Police Department advised Petitioner that it could, and urged him not to sell Polar Pure if he felt "uncomfortable." *Id.* The Brainerd Army Store continued to sell Polar Pure, however, and sold it to undercover officers. Pet. App. 2a-3a.

Petitioner and his brother were indicted for federal drug crimes related to the sale of Polar Pure. Petitioner's brother pleaded guilty, but Petitioner went to trial. Pet. App. 3a-4a. A jury convicted Petitioner of

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[1] Petitioner's father, Bill Honeycutt, was the other co-owner.

two counts of conspiracy to distribute iodine, while knowing or having reasonable cause to believe that it would be used to make methamphetamine, in violation of 21 U.S.C. §§841(c), 843(a)(6), and 846. Pet. App. 4a, 5a; *see also* Pet. App. 63a-68a (second superseding indictment). The jury also convicted Petitioner of nine other counts related to the possession and distribution of iodine, while acquitting him of three counts. Pet. App. 4a.

B. Forfeiture Proceedings in District Court

The government sought forfeiture in the amount of $269,751.98. The government contended that this figure corresponded to the Brainerd Army Store's "total profit from iodine sales." Pet. App. 52a. Because Petitioner's brother had already forfeited $200,000 pursuant to his plea agreement, the government argued that Petitioner should have to forfeit the remaining $69,751.98. Pet. App. 39a, 62a.

Petitioner argued, however, that he should not have to forfeit the Brainerd Army Store's profits from the sale of Polar Pure, because he never received any of those profits—they flowed solely to his brother, the owner of the Brainerd Army Store. Petitioner pointed out that he did not have any ownership interest in the Brainerd Army Store, proving the point with documentary evidence. Dkt. 107, Ex. A (Brainerd Army Store's annual corporate reports).[2] He also testified at

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[2] All citations to "Dkt." are to the District Court docket at *United States v. Honeycutt*, No. 1:12-cv-00144-HSM-WBC (E.D. Tenn.).

trial that he held no ownership interest in the store. Pet. App. 72a-73a. Petitioner also testified that he had no authority to withdraw money from the Brainerd Army Store's bank account, again proving the point with documentary evidence confirmed by his trial testimony. Dkt. 107, Ex. B (bank records); Pet. App. 74a.

The District Court then solicited additional briefing on whether Petitioner should be liable for forfeiture. The government acknowledged that Petitioner "did not have a controlling interest in the store selling the listed chemical and did not stand to benefit personally from the illegal sales." Pet. App. 60a. It argued, however, that because "defendant's coconspirator did have an ownership role and did stand to benefit personally from the $269,751.98 in profit from the sales of the listed chemical … the Court should hold the defendant jointly liable for the profit from the illegal sales." Pet. App. 60a-61a.

The District Court declined to require forfeiture. The court acknowledged that Petitioner "was involved in a criminal conspiracy," but concluded that "it's difficult for me to say that [Petitioner] personally … profited from that illegal conspiracy." Pet. App. 40a. The court relied on Petitioner's "lack of an ownership interest in the Brainerd Army Store," noting that Petitioner was "a salaried employee." Pet. App. 40a. The Court also explained that "the government has conceded" that "what Mr. Honeycutt's financial motivations may have been, are just not clear in this case." Pet. App. 40a. The Court therefore "decline[d] to order forfeiture against [Petitioner] in this case." Pet. App. 41a.

C. Sixth Circuit's Decision

The Sixth Circuit reversed. It concluded that Petitioner was jointly and severally liable for all of the conspiracy's profits, regardless of whether he ever received those profits. Pet. App. 24a-28a.

The court noted that there was a conflict of authority on whether §853(a)(1) countenances joint-and-several liability for co-conspirators. The court acknowledged that the D.C. Circuit "has held that §853 does not countenance joint and several liability." Pet. App. 26a (citing *United States v. Cano-Flores*, 796 F.3d 83, 90-95 (D.C. Cir. 2015)). The court, however, found it "unnecessary to probe the reasoning of *Cano-Flores*": In the court's view, it was bound by a prior Sixth Circuit decision that imposed joint-and-several liability under RICO's forfeiture provision, which the court regarded as indistinguishable. Pet. App. 26a-27a (citing *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000)).

Judge Moore concurred in the judgment. She agreed that *Corrado* bound the panel, but wrote "to emphasize why that prior panel was likely incorrect." Pet. App. 29a. She observed that the D.C. Circuit's analysis in *Cano-Flores* was "more thorough than any conducted by the many circuits that hold that joint-and-several liability is available, and it persuades me that we should reconsider *Corrado*." Pet. App. 32a.

SUMMARY OF ARGUMENT

Petitioner's brother obtained $269,751.98 from the drug crime in this case. Petitioner obtained nothing. Yet the judgment below orders Petitioner to "forfeit" this money he never received under the rubric of "joint-

and-several liability." And because Petitioner's brother struck a plea deal, Petitioner must actually *pay* the $69,751.98 that the government excused his brother from forfeiting. That is $69,751.98 of drug proceeds Petitioner's brother keeps. The question here is whether 21 U.S.C. §853(a)(1) provides for the joint-and-several conspiracy liability that yields this result. The Court should answer that question in the negative.

1. Section 853(a)(1)'s text rejects joint-and-several liability. It limits forfeiture to property derived from "proceeds *the person obtained*" from certain drug crimes. 21 U.S.C. §853(a)(1) (emphasis added). Here, Petitioner did not "obtain" $269,751.98; his brother did. Petitioner's conspiracy conviction does not change that simple fact. With the text so clear, the Court need go no further.

2. Structure tells the same story, as joint-and-several liability makes nonsense of nearly every provision of §853. From start to finish, that section makes clear that what is subject to forfeiture is *tainted* property—the actual property constituting, or derived from, the proceeds of drug crimes. For example, §853(c) provides that all "right, title, and interest" in forfeitable property "vests in the United States upon the commission of" drug crimes. Title can only vest in *actual* property obtained from crime. Petitioner received no such property. Yet joint-and-several liability required Petitioner to "forfeit" property anyway. Equally striking is §853(p)'s "substitute property" provision, which allows the government to obtain money from a defendant's general assets if tainted property "cannot be located," or has been "transferred" or "commingled." 21

U.S.C. §853(p)(1). Only if a defendant *once had* tainted property can it be lost, transferred, or commingled. Petitioner never had such property. Indeed, as applied to co-conspirators who never received tainted property, the whole notion of "substitute property" becomes bizarre. Substitute for what?

3. Section 853 builds on a centuries-long tradition of *in rem* forfeiture statutes. *In rem* forfeitures by definition target specific, tainted property. And under such statutes, joint-and-several liability was unknown, and indeed, would have been incoherent. When Congress enacted modern criminal forfeiture statutes in the 1970s and 1980s, it streamlined procedures in order to ease enforcement—for example, permitting *in personam* forfeitures as part of criminal sentences, rather than requiring separate civil actions. But Congress did not alter the fundamental principle that forfeiture targets specific, tainted property. The legislative history is express that Congress did not intend any "significant expansion of the scope of property subject to forfeiture" and instead sought to reach "[t]he same type of property … now subject to civil forfeiture." S. Rep. No. 98-225, at 192, 211 (1983).

4.A. Joint-and-several liability undermines forfeiture's remedial purposes—to ensure crime-tainted property will not again "be used for illegal purposes," and to prevent criminals from "profit[ing] from their illegal acts." *United States v. Ursery*, 518 U.S. 267, 290-91 (1996). Forfeiture serves these purposes by seizing the tools the drug kingpin used to build his empire, and the profits he received. But under joint-and-several liability, every dollar forfeited from an underling is a

dollar that the kingpin, who *actually* received the money, gets to keep and use to offend again.

B. Criminal forfeitures are also intended to punish. But joint-and-several liability follows no rational theory of punishment. Such forfeitures function like criminal fines—orders to pay money from the defendant's untainted assets. For *actual* fines, Congress crafted a detailed scheme to set proportionate punishment, which considers both the defendant's culpability and the fine's burden. But §853's forfeitures-cum-fines are mandatory, pegged solely to the amount foreseeably received by *someone else*. Such judgments violate the core tenet that criminal punishment is individualized. Joint-and-several liability treats every co-conspirator as interchangeable, and the amount any co-conspirator must pay depends not on individual culpability, but on how much the government has extracted from others and in what order it brings prosecutions.

C. Joint-and-several liability ill fits criminal punishment because it is not a criminal-law concept. It derives from tort. Tort law compensates innocent victims, and in this context, joint-and-several liability embodies the judgment that the victim can recover his full losses from any culpable defendant—to guard against the risk that some defendants will be unreachable or insolvent. But this principle does not square with criminal forfeitures, which fill government coffers and do not compensate victims. Such forfeitures also lack the safeguard that makes joint-and-several tort liability workable and fair: a right to contribution, so that less culpable defendants can pass along liability to those more responsible. This Court recently found in *Paroline*

v. United States, 134 S. Ct. 1710 (2014), that the absence of contribution indicated that Congress did not intend joint-and-several liability for restitution. *Id.* at 1725. The same is true here.

5. The canons of construction point the same way. The government asks the Court to impose joint-and-several liability as an atextual expansion of the *Pinkerton* doctrine. But the rule of lenity requires giving *defendants* the benefit of every doubt, not rewriting criminal statutes to favor the government. Constitutional avoidance also compels rejecting joint-and-several liability. Joint-and-several liability yields excessive fines in violation of the Eighth Amendment. Under §853, forfeitures are mandatory wherever authorized—which inevitably leads to results like a $15 billion judgment holding an underling responsible for an entire Mexican drug cartel. Sixth Amendment violations, too, predictably result: This Court has squarely held that defendants have no right to use *tainted* assets to pay their attorneys, but that the Sixth Amendment *does* entitle them to use *untainted* assets. Yet the government's position subjects to seizure all of a defendant's untainted assets.

6. Contra the government, *Pinkerton* does not support joint-and-several liability. Section 853's text and structure are crystal clear, and in any event, *Pinkerton* is inapplicable. *Pinkerton* holds that one conspirator can be convicted of another's *substantive offenses*. At issue here, however, is not substantive liability, but forfeiture imposed as part of a defendant's *sentence*. And under *Pinkerton*, defendants receive individual sentences that they must discharge

individually. Petitioner and his brother, for example, did not receive a five-year prison sentence that could be discharged by incarcerating one or the other. Monetary liability is no different. Indeed, it is hard to understand how the government thinks *Pinkerton* could support joint-and-several liability. When this Court decided *Pinkerton*, forfeitures of tainted assets were *in rem*.

The Court should reject the government's attempt to rewrite §853 to create joint-and-several liability.

ARGUMENT

I. SECTION 853(A) LIMITS FORFEITURE TO PROCEEDS THE DEFENDANT "OBTAINED," AND THEREFORE DOES NOT APPLY TO PROCEEDS THE DEFENDANT DID NOT OBTAIN.

The text of §853(a)(1) resolves this case in Petitioner's favor. Forfeiture under §853(a)(1) is mandatory, applying without exception to "[a]ny person convicted" of certain drug crimes. 21 U.S.C. §853(a). It is also broad, reaching "any property constituting, or derived from, any proceeds" of the crime. *Id.* §853(a)(1). In just one respect, however, it is limited: The property must derive from "proceeds *the person obtained*, directly or indirectly, as the result of" the crime. *Id.* (emphasis added). The question here is whether that limit can be squared with the joint-and-several liability the government imposed on Petitioner, holding him responsible for proceeds that went entirely to Petitioner's co-conspirator.

The answer is no. Forfeiture under §853(a)(1) is limited to proceeds the person "obtained." The verb "to

obtain" means "[t]o bring into *one's own* possession ... esp[ecially] through effort." *Black's Law Dictionary* 1247 (10th ed. 2014) (emphasis added). As the D.C. Circuit observed, in "ordinary English a person cannot be said to have 'obtained' an item of property merely because someone else (even someone else in cahoots with the defendant) foreseeably obtained it." *United States v. Cano-Flores*, 796 F.3d 83, 91 (D.C. Cir. 2015); *see also Sekhar v. United States*, 133 S. Ct. 2720, 2725 (2013) ("Obtaining property requires not only the deprivation but also the *acquisition of property*" (emphasis added; quotation marks omitted)).

Section 853(a)(1)'s plain text thus decides the question presented. Petitioner did not "obtain" $269,751.98; his brother did. Pet. App. 60a-61a. Likewise, in a $1 million drug conspiracy with 100 underlings and one kingpin, each courier does not "obtain" $1 million (though the kingpin may). That means §853(a)(1) did not authorize the forfeiture judgment against Petitioner.

The government's only textual counterargument is that §853(a)(1) reaches property the defendant "obtained, directly *or indirectly*." 21 U.S.C. §853(a)(1) (emphasis added). Per the government, the word "indirectly" yields joint-and-several liability, because when one member of a conspiracy obtains property, "all of the co-conspirators 'indirectly' obtain" it. BIO 14-15.

The government confuses the distinction between obtaining something *indirectly* and *not* obtaining it. When his brother received $269,751.98 in proceeds, Petitioner did not obtain those funds "indirectly"; he did not obtain them at all. Likewise with the kingpin and his

couriers: A courier that only ever carried $10,000 did not obtain $1 million—even indirectly. The same is true outside the criminal realm. An accountant and his client may agree they will collaborate in filing the client's tax return, just as co-conspirators agree to further the conspiracy. But when the client gets his refund, the accountant does not, via the collaboration, "indirectly obtain" the refund. Similarly, a person who advises a car purchaser does not "indirectly obtain" the car, even though he foresees that the purchaser will.

The adverb "indirectly" serves a different purpose, ensuring that *however* a defendant obtains proceeds, they are forfeitable (so long as the defendant actually obtains them). For example, when proceeds go first from a victim to an intermediary, and only then reach the defendant, the word "indirectly" ensures they remain forfeitable. *Cano-Flores*, 796 F.3d at 91-92. Likewise, "indirectly" reaches proceeds received by entities or people under the defendant's control, such as closely held corporations. *See United States v. Parenteau*, 647 F. App'x 593, 597 (6th Cir. 2016); *United States v. Peters*, 732 F.3d 93, 102–04 (2d Cir. 2013). Thus, Petitioner's co-conspirator, unlike Petitioner, "indirectly obtained" $269,751.98—he indirectly obtained it through his interest in the Brainerd Army Store, a corporation he owned. Pet. App. 2a.

In these situations, the defendants obtained proceeds, albeit indirectly. Petitioner, however, never did: The government conceded, and the district court found as fact, that Petitioner "did not … benefit personally from the illegal sales." Pet. App. 60a; *see* Pet.

App. 40a. That means §853(a)(1) does not authorize the forfeiture judgment against Petitioner.

II. THE STRUCTURE OF §853 IS IRRECONCILABLE WITH JOINT-AND-SEVERAL LIABILITY FOR CO-CONSPIRATORS.

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. And defendants are incapable of forfeiting tainted assets unless they actually received those assets. Section 853 carves out one exception to that principle: under §853(p), the government may require defendants who lose, transfer, or commingle tainted assets to forfeit untainted "substitute property." Again, however, §853(p) requires the defendant to have, at some point, received the tainted assets.

Joint-and-several liability for co-conspirators, however, holds defendants like Petitioner liable for forfeiture when they never received tainted assets and all of their property was obtained through legitimate means. That not only yields nonsensical results under virtually every subsection of §853, but is irreconcilable with cases from this Court explicitly holding that §853 concerns forfeiture of tainted assets.

Section 853(a)(2)—forfeiture of the instrumentalities of crime. Section 853(a)(2) renders forfeitable "the person's property used … to commit" a drug crime. This provision again requires that the property be "the person's" (meaning, the defendant's), not someone else's. Joint-and-several liability requires

the reverse, demanding one defendant forfeit his own property because someone else used different property to commit a drug crime.

Absurd results follow. Here is an example from Judge Thapar, who was bound to follow the Sixth Circuit's holding in Petitioner's case yet declared that joint-and-several liability was "not the rule [he] would pick" if "[w]riting on a blank slate." *United States v. Solomon*, No. 13-40-ART-(5), (7), (8), 2016 WL 6435138, at *5 (E.D. Ky. Oct. 31, 2016).

> If a person … used a gun while participating in the conspiracy, then he would have to forfeit the gun. But Congress did not write that he must forfeit "any of any other person's property." Thus, if every other conspirator also used a gun, the defendant would still only have to forfeit his. He would not have to run around collecting his co-conspirators' guns for the government—which, as a forfeiture system, would make little sense.

Id. at *6. Indeed, it is even worse. Imagine a defendant uses a 2010 Chevrolet to carry drugs. Congress' obvious intent under §853(a)(2) was to subject *that* 2010 Chevrolet to forfeiture. "Such is his punishment for donating it to the conspiracy." *Id.* at *9. Under the government's interpretation, however, the government could forfeit any randomly-selected 2010 Chevrolet from any co-conspirator—or even "the doors from one conspirator, the tires from another, and the steering wheel from a third." *Id.* And because liability is joint-and-several, that forfeiture would discharge all other co-conspirators' obligations—which means that the

defendant who actually used his car as part of the conspiracy *can keep the car*. That result is not just bizarre, but frustrates forfeiture's core purpose of preventing the instrumentalities of crime from being reused. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("Forfeiture … prevent[s] further illicit use" of property) (quotation marks omitted)).

Section 853(a)(3)—forfeiture of defendant's interest in criminal enterprise. The next subsection, §853(a)(3), specifically refutes the government's claim that Congress intended joint-and-several liability for co-conspirators. That subsection compels anyone convicted of "continuing criminal enterprise" to forfeit "any of his interest in," or control over, the enterprise. Continuing criminal enterprise is a form of conspiracy, to which *Pinkerton* principles—on which the government heavily relies here, *see infra* Section VI.A—apply. *See* 21 U.S.C. §848(c);[3] *United States v. Aguilar*, 843 F.2d 735, 737 (3d Cir. 1988); *United States v. Graewe*, 774 F.2d 106, 108 (6th Cir. 1985); *United States v. Michel*, 588 F.2d 986, 999 (5th Cir. 1979). So, if Congress intended joint-and-several conspiracy liability, it should apply here, and each participant should be liable to forfeit the *entire* enterprise's value. But Congress did something different. It required the defendant to forfeit only "his interest" in the continuing criminal enterprise. 21

[3] Section 848 requires, *inter alia*, a drug crime undertaken "in concert with five or more persons." 21 U.S.C. §848(c)(2)(A).

U.S.C. §853(a)(3). That is the opposite of joint-and-several liability among enterprise participants.[4]

Section 853(c)—title transfer. Under §853(c), "[a]ll right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of" a drug crime. Section 853(c) then authorizes a "special verdict of forfeiture" against "such property that is subsequently transferred" to another, unless the person is a "bona fide purchaser for value" without cause "to believe that the property was subject to forfeiture." *Id.* Thus, when money is exchanged for drugs, or when a car is used to transport drugs, the government's title immediately vests in the money or the car.

Section 853(c) makes sense only if the "property described in subsection (a)"—that is, the property that is subject to forfeiture—is specific tainted property. Only in a specific item of property—such as the actual money exchanged for drugs, or the actual car used to transport drugs—can "title … vest[] in the United States upon the commission of" a drug crime. Only a

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[4] This provision's history reinforces that Congress declined to enact joint-and-several liability not just for the enterprise *itself*, but for proceeds it generated. Its 1970 precursor contained an analogue to the one that yielded Petitioner's forfeiture, which required anyone convicted of continuing criminal enterprise to forfeit "the profits obtained by him in such enterprise." Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. II, §408(a)(2), 84 Stat. 1236, 1265-66. The phrase "by him" is express in not imposing joint-and-several liability for profits received by others, and underscores that Congress rejected the liability the government inflicted here.

specific item of property may be "subsequently transferred" to a third party. *Id.* And only for a specific item of property does it make sense to ask whether the third party knew "the property" was tainted and so subject to forfeiture. *Id.* This means that the "property described in subsection (a)" is specific tainted property.

So here, the government's title vested in every dollar of the $269,751.98 paid for Polar Pure. But not one such dollar reached Petitioner, and so government title never vested in any of Petitioner's assets, all of which were legitimate. *Supra* at 3-4. That means they were not subject to forfeiture.

If joint-and-several liability exists here, §853(c) becomes nonsensical. Consider again the hypothetical $1 million drug ring. On the government's view, all 100 couriers are subject to a $1 million forfeiture under §853(a). But under §853(c), title to property forfeitable under §853(a) vests, if at all, "upon the commission of" the drug crime. So under the government's theory, title immediately "vests in the United States" not only in the $1 million of proceeds, but in the same amount in the bank account of every co-conspirator—up to $101 million ($1 million for each courier, plus the kingpin). And because liability is joint and several, the moment one co-conspirator forfeits a dollar, the government's title must somehow *un*vest as to a dollar in each co-conspirator's bank account.

That is not all. If there is no requirement that the courier have actually received any tainted property (much less $1 million), then government title cannot attach to specific property the courier possesses; rather, it must attach to all of each courier's property equally.

That means whenever any of the 100 couriers spends a cent, government title follows, subjecting money that courier spends anywhere—the grocery store, the landlord, the barber shop—to a "special verdict of forfeiture" as a "subsequent[] transfer[]" unless the recipient can prove it was unaware of the drug crime. 21 U.S.C. §853(c).

Indeed, three decisions of this Court hold that §853(c) covers—only covers—tainted property in the defendant's possession. *See United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *Luis v. United States*, 136 S. Ct. 1083 (2016). In *Monsanto* and *Caplin*, the Court held that §853 authorizes pre- and post-trial forfeiture orders for tainted assets even when they are earmarked for the defendant's attorney, and that the Sixth Amendment permits this result. *Monsanto*, 491 U.S. at 614, 616; *Caplin*, 491 U.S. at 625-26. The reason was that these were "taint[ed]" assets, and so under §853(c), the defendant "did not hold good title." *Caplin*, 491 U.S. at 627; *see id.* at 626 ("The money, though in his possession, is not rightfully his…."); *Monsanto*, 491 U.S. at 613. By contrast, in *Luis*, this Court held that pretrial restraint of *untainted* assets violates the Sixth Amendment. 136 S. Ct. at 1091 (plurality opinion) (citation omitted). The plurality distinguished *Monsanto* and *Caplin* by emphasizing that those cases had held, as a matter of statutory interpretation, that §853(c) reaches only *tainted* assets. *Id.* (distinguishing *Monsanto* and *Caplin* because those cases concerned "assets that were traceable to the crime" and "thus, the statute passed title … at the time the crime was

committed …, see §853(c)"); *id.* ("The Court in those cases referenced §853(c) more than a dozen times. And it acknowledged that whether property is 'forfeitable' or subject to pretrial restraint under Congress' scheme is a nuanced inquiry that very much depends on who has the superior interest in the property at issue.").[5]

Those holdings on §853(c) answer the question presented here. Subsections 853(a) and 853(c) are joined at the hip: All property "described in"—and so forfeitable under—"subsection (a)" is, *by definition*, property in which government title vests under §853(c). So when this Court held that §853(c) applies only to tainted assets "traceable to the crime," *Luis*, 136 S. Ct. at 1091, it also decided that §853(a)(1) does not enact forfeiture of untainted assets unconnected to crime, thus foreclosing the government's argument here.

Section 853(d)—presumption. The government's theory also makes nonsense of §853(d). Section 853(d) establishes a "rebuttable presumption" that property is forfeitable if (1) "such property was acquired" by the defendant during his crime or soon after, and (2) "there was no likely source for such property" besides the crime. 21 U.S.C. §853(d). This provision helps the government prove that particular property derives from

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[5] The *Luis* Court divided on the Sixth Amendment question, but no Justice disputed that §853(c) reaches only tainted assets. *Cf. Luis*, 136 S. Ct. at 1098-1102 (Thomas, J., concurring in the judgment); *id.* at 1107-08 (Kennedy, J., dissenting); *id.* at 1112-13 (Kagan, J., dissenting).

criminal proceeds when "direct evidence" is lacking. *See* S. Rep. No. 98-225, at 212.

This *presupposes* that the government must prove that the defendant received specific tainted property. The questions that §853(d) asks—the time when "such property was acquired" by the defendant, and the existence of a non-criminal "likely source for such property" make sense *only* for specific tainted property, not untainted assets reached via joint-and-several liability. On the government's theory, however, it need not show that a defendant received tainted assets. That leaves §853(d)'s presumption without work to do.

Section 853(e)—pretrial restraints. Section 853(e) authorizes pre-trial asset freezes to "preserve the availability of [forfeitable] property," subject to a hearing. *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014) (quoting *Caplin*, 491 U.S. at 631). As *Kaley* explains, that hearing asks whether there is probable cause "(1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime." *Id.* at 1095 (citing 21 U.S.C. §853(a)); *see* 21 U.S.C. §853(e)(1).

The government's theory banishes that second question from the statute. It is meaningless to ask whether property sought via joint-and-several liability has "the requisite connection to the crime." *Kaley*, 134 S. Ct. at 1095. No such connection is needed. None exists. Under joint-and-several liability, only the *defendant* need have a connection to the crime. The government's view thus takes a two-part test and cuts it to one—whether the defendant "has committed a[] [conspiracy] offense." *Id. Accord Luis*, 136 S. Ct. at 1091

(plurality opinion) (explaining that §853(e)(1) *presupposes* that §853(a) only reaches tainted assets: "§853(e)(1) … explicitly authorizes restraining orders or injunctions against 'property described in subsection (a) of this section' (*i.e.*, *tainted* assets)" (emphasis in original)).

Section 853(p)—substitute property. The mess joint-and-several liability makes of the statute is most evident in §853(p), the single subsection that allows forfeiture to reach untainted assets. This provision applies if, because of some "act or omission" by the defendant, "any property described in subsection (a)" is unavailable for one of five enumerated reasons: It (A) "cannot be located"; (B) "has been transferred or sold"; (C) is "beyond the jurisdiction of the court;" (D) has "substantially diminished" value; or (E) "has been commingled." 21 U.S.C. §853(p)(1). When those conditions are met, the court "shall order the forfeiture of any other property of the defendant, up to the value of the [unavailable] property." *Id.* §853(p)(2).

In every way, §853(p) contemplates that the defendant *once had* specific tainted property, which Petitioner did not. Substitute property may only be forfeited if the "property described in subsection (a)" is lost, "transferred," put "beyond the jurisdiction of the court," or "commingled." 21 U.S.C. §853(p)(1). These things can only befall specific tainted property, which means that the "property described in subsection (a)" must be specific tainted property. Indeed, the entire concept of "substitute property" becomes incoherent applied to co-conspirators who never received tainted property. Substitute for what? Their bank accounts are

just an undifferentiated mass of untainted assets, with nothing to substitute for.

Telling, too, is that §853(p) is the only instance where §853 directs forfeiture of "the value of" property, rather than the property itself. 21 U.S.C. §853(p)(2). Yet on the government's reading, §853(a)(1) *also* authorizes such a forfeiture in any conspiracy—any co-conspirator who does not receive the tainted property must forfeit "the value" thereof. This violates basic principles of statutory interpretation: When "Congress includes particular language in one section of a statute but omits it in another," the presumption is "that Congress acts intentionally and purposely in the disparate" treatment. *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted).

The government's position fares just as badly in practice as on the text. For the drug kingpin who actually obtained $1 million, forfeiture is limited to his tainted assets, unless the government can satisfy §853(p)'s substitute property requirements. But for the 100 couriers, the government could, based on joint-and-several liability, *directly* obtain a $1 million money judgment under §853(a)(1). The result is strange indeed. Suppose the government struggles to satisfy the substitute property requirements—for example, the tainted money cannot be located, and the government cannot show its absence was due to the defendant's "act or omission" (or cannot show "due diligence" in trying to find the money). 21 U.S.C. §853(p)(1). The government could not then obtain anything from the kingpin. But on the government's theory here, it could extract $1 million

from every other co-conspirator *except the person who actually got the money*.

The government's position thus makes nonsense not just out of §853(a)(1), but of virtually every provision in that section.

III. FORFEITURE'S CENTURIES-LONG HISTORY CANNOT BE RECONCILED WITH JOINT-AND-SEVERAL LIABILITY.

Section 853 so relentlessly targets specific tainted property because it built on a 200-plus year tradition of forfeiture law doing precisely that. Section 853 altered traditional forfeiture in certain respects to streamline enforcement, but it preserved this essential feature—which cannot be squared with joint-and-several liability.

A. Section 853's Historical Antecedents Targeted Specific Assets and Left No Room for Joint-And-Several Liability.

Section 853 requires forfeiture of tainted property associated with crime. Similar forfeiture statutes have existed in the United States for hundreds of years, and they have never imposed joint-and-several liability.

In the early Republic, "forfeiture" was an umbrella term which referred to virtually any conveyance of money or property resulting from an unlawful act. "Forfeitures" ranged from purely punitive fines, *see, e.g.*, *Austin v. United States*, 509 U.S. 602, 614 n.7 (1993), to purely remedial money judgments designed to "reimburs[e] the Government for the losses accruing from the evasion of customs duties." *United States v. Bajakajian*, 524 U.S. 321, 342 (1998).

Section 853, however, descends from a particular type of forfeiture that is deeply entrenched in our national tradition—forfeiture of specific property that becomes tainted because of its link to crime. "Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of English and local forfeiture statutes, which provided for the forfeiture of commodities and vessels used in violations of customs and revenue laws." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (alterations and quotation marks omitted). And after, Congress immediately enacted its own such laws—first, "ships and cargoes involved in customs offenses," then "vessels used to deliver slaves to foreign countries," and later, "those used to deliver slaves to this country." *Id.*; *see also United States v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave.*, 507 U.S. 111, 119-20 (1993) (plurality opinion). Eventually, these forfeitures expanded beyond ships and their cargos. For instance, early statutes required forfeiture of real property used to manufacture alcohol, and automobiles used to transport it, when the alcohol was sold in violation of the tax laws. *Dobbins' Distillery v. United States*, 96 U.S. 395, 400 (1877); *J.W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 508 (1921). By the time of §853(a)'s enactment in 1984, forfeiture statutes had proliferated to "reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo*, 416 U.S. at 683.

These forfeitures were *in rem*. As Justice Story explained, the "thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." *The Palmyra*, 25 U.S. 1, 14 (1827); *see United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner"); *see also Dobbins' Distillery*, 96 U.S. at 400 (similar); *J.W. Goldsmith*, 254 U.S. at 512. That remained true even if the same conduct triggered criminal liability: "Many cases exist, where there is both a forfeiture in rem and a personal penalty," but the *in rem* forfeiture of the thing "stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *The Palmyra*, 25 U.S. at 14-15.

Joint-and-several liability was unknown under such statutes, and would have been nonsensical: In these actions, jurisdiction was "dependent upon seizure of a physical object." *United States v. Ursery*, 518 U.S. 267, 289 (1996) (quotation marks omitted). With the proceeding "targeting the property itself," there was no room for *in personam* joint-and-several liability. *Id.*

B. Section 853 Carries Forward the Traditional Understanding That Forfeiture Targets Specific Tainted Property.

By enacting criminal "forfeiture" in §853, Congress thus "transplanted from another legal source," *Sekhar*, 133 S. Ct. at 2724, this country's centuries-long heritage of civil forfeiture laws. When Congress does that, it "brings the old soil with it." *Id.* (quotation marks

omitted). And in this old soil, joint-and-several liability does not grow. Nothing in §853 changed that fact. *See id.* (When "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken," except to the extent the statute expressly rejects those settled rules (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

To be sure, §853 did not just codify existing forfeiture doctrine. Where traditional American forfeiture was civil and *in rem*, §853 and similar statutes are criminal and *in personam*. *Compare Dobbins' Distillery*, 96 U.S. at 400-02; *J.W. Goldsmith*, 254 U.S. at 508, *with Luis*, 136 S. Ct. at 1099 (Thomas, J., concurring in the judgment); *see also* S. Rep. No. 98-225, at 82, 193. Likewise, by extending forfeiture to cover "property constituting, or derived from, … proceeds" of crime, these statutes "marked an important expansion of governmental power." *Parcel of Land*, 507 U.S. at 121-22 & n.16 (plurality op.).

Equally clear, however, is that §853 did not alter the core principle that forfeiture targets specific crime-tainted property. The statute itself says so: It extends forfeiture to proceeds, but—again—limits forfeiture to "property … derived from … proceeds the person obtained" as a result of crime. 21 U.S.C. §853(a)(1). This is only one of §853's myriad limitations to specific property. *Supra* Section II.

Legislative history confirms what the text makes clear. Modern criminal forfeiture statutes date to the

enactment of the Racketeer Influenced and Corrupt Organizations ("RICO") statute, in which Congress "call[ed] on our common law heritage to meet an essentially modern problem," seeking to combat "the forces of organized crime" in "racketeering and drug trafficking." S. Rep. No. 91-617, at 79 (1969); *see* S. Rep. No. 98-225, at 191. When it enacted §853(a)(1), Congress did *not* intend any "significant expansion of the scope of property subject to forfeiture," aside from the just-mentioned forfeiture of "proceeds," S. Rep. No. 98-225, at 192; *see id.* at 194-95; rather, Congress "focus[ed] on improving the procedures applicable in forfeiture cases." *Id.* at 192.[6]

First, traditional forfeiture required "a separate civil action … in each district in which … property is located." *Id.* at 210. That "waste[d] valuable judicial and

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[6] RICO's legislative history explains that, by enacting *in personam* forfeiture based on a conviction, Congress melded the *in rem* forfeiture tradition with a separate type of forfeiture liability. *See* S. Rep. No. 91-617, at 79-80. In England, the "convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo*, 416 U.S. at 682. This provided precedent for "the concept of forfeiture as a criminal penalty" operating *in personam*. *See* S. Rep. No. 91-617, at 80. But criminal forfeiture statutes retained the *in rem* tradition of requiring a connection between the crime and the property. *See id.* (forfeiture limited to property "which is the subject of the specific offense involved…., and not … any other property of the convicted offender"). Moreover, English felony forfeitures provide no support for *joint-and-several* forfeiture liability. These forfeitures likewise operated only against particular tainted property—the specific property tainted by the convicted felon's ownership. *Calero-Toledo*, 416 U.S. at 682.

prosecutive resources" when the evidence "in the criminal case will be largely dispositive." *Id.*; *cf. The Palmyra*, 25 U.S. at 15 (traditional forfeiture "stands independent of … any criminal proceeding"). So, Congress provided a "more efficient mechanism" that "consolidate[d] the forfeiture action with the criminal prosecution." S. Rep. No. 98-225, at 210; *see id.* at 196-97. Second, Congress believed defendants were too often "defeating forfeiture by removing, transferring, or concealing" assets. *Id.* at 195. So Congress enacted the "substitute asset" provision and improved procedures for pre-trial asset freezes. *Id.* at 192, 195-96.

But these procedural fixes did not upend bedrock forfeiture principles to enact joint-and-several liability against defendants who never received tainted assets at all, as the legislative history repeatedly confirms. First, even as Congress expanded forfeiture to "proceeds," it stressed that "proceeds … will be forfeitable only to the extent that they are derived from" crime. *Id.* at 199. That rejects the government's view that it may obtain money *not* derived from crime (leaving aside §853(p)'s substitute-property provision).

Second, Congress explained that §853(a)(1) reaches "[t]he same type of property … now subject to civil forfeiture." *Id.* at 211. This statement again refutes the government's claim that §853(a)(1) expanded forfeiture to never-before-seen terrain—untainted property with no connection to crime, reached only via joint-and-several liability.

Third, Congress affirmed that the law "is a codification of the 'taint'" theory. *Id.* at 200, 211-12. That further forecloses the government's view that it may

obtain forfeiture when the defendant never received tainted property.

In short, neither the history of American forfeiture generally, nor that of §853 specifically, supports the government's position that Congress in §853 enacted a never-before-seen variety of joint-and-several liability.

IV. JOINT-AND-SEVERAL FORFEITURE LIABILITY SERVES NO RATIONAL REMEDIAL OR PUNITIVE PURPOSE.

Section 853(a)(1) is both remedy and punishment. By requiring forfeiture of specific crime-tainted property, §853(a)(1) furthers the historical remedial purposes of civil asset forfeiture—ensuring the property will not again be used for crime, and depriving criminals of profits from their crimes. By imposing forfeiture as part of a criminal sentence, §853(a)(1) punishes the defendant for his crimes. Joint-and-several liability serves neither goal. Indeed, it ensures that the worst drug offenders can *keep* the proceeds of their crimes, thus undermining forfeiture's remedial goal, and imposes arbitrary and irrational penalties on defendants like Petitioner, thus undermining forfeiture's punitive goal.

A. Joint-and-Several Liability Undermines Forfeiture's Remedial Purposes.

Forfeiture ensures crime-tainted property will not again "be used for illegal purposes." *Ursery*, 518 U.S. at 290. It also prevents criminals from "profit[ing] from their illegal acts." *Id.* at 291. And it "lessen[s] the economic power of criminal enterprises." *Kaley*, 134 S. Ct. at 1094 (quotation marks omitted). Forfeiture does all this by targeting the specific property actually used

in, or derived from, crime. So, for example, forfeiture seizes the tools the drug kingpin used to build his empire, and the profits he received—thus vindicating society's laws and protecting it from the further harm this property might cause.

Joint-and-several liability, however, treats every dollar possessed by any member of a conspiracy the same. The $1,000 that a courier derived from his minimum-wage day job at McDonalds goes just as far in satisfying co-conspirators' joint-and-several forfeiture obligation as $1,000 that the kingpin received from the drug conspiracy. And every dollar the government collects from the courier is a dollar it *cannot* collect from the kingpin.[7] Hence, under joint-and-several liability, forfeiture depends not on whether property is linked to crime, but on whom the government happens to prosecute first.

This undermines all of forfeiture's remedial purposes. The kingpin who receives money or property from drug crimes can keep it, to again "be used for illegal purposes"—so long as his underlings are prosecuted first. *Ursery*, 518 U.S. at 290. When these underlings are jointly and severally liable for the kingpin's proceeds, every untainted dollar they forfeit is a dollar that the kingpin gets to keep as "profit from … illegal

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[7] Lower courts have repeatedly recognized that joint-and-several liability yields this effect. *See, e.g.*, *Solomon*, 2016 WL 6435138, at *13 ("[J]oint-and-several liability will create accidental martyrs: By serving his punishment, one defendant serves—or at least reduces—the punishment of the rest."); *United States v. Black*, 526 F. Supp. 2d 870, 890 (N.D. Ill. 2007); *see also Restatement (Third) of Torts: Apportionment Liab.* §25(b) (2000).

acts." *Id.* at 291. To that extent, joint-and-several liability ensures that "crime does … pay." *Kaley*, 134 S. Ct. at 1094. And the kingpin then can reuse the illicit property or reinvest the proceeds into his empire, by hiring more couriers, digging more tunnels, and so on—all because joint-and-several liability frustrated forfeiture's goal to "lessen[] the economic power of criminal enterprises." *Id.* (quotation marks omitted). These counterproductive consequences, moreover, are no mere hypothetical but rather reflect how conspiracy prosecutions actually work: Prosecutors typically start at the bottom and work their way up. *See, e.g.*, David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 Fed. Sent. Rep. 168, 169 (2001) ("As anyone familiar with federal narcotics prosecutions knows, the theory for taking down a trafficking ring is to flip lower-level participants against their higher-up co-conspirators"); Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415, 1432 (2010) (noting prosecutors' strategy of "encourag[ing] low-level members of organized crime organizations to 'flip,' testifying against their old bosses").

B. Joint-and-Several Liability Undermines Forfeiture's Punitive Purposes.

Forfeiture has always been "understood, at least in part, as imposing punishment." *Austin*, 509 U.S. at 611. Joint-and-several liability, however, is inconsistent with settled punishment principles. It violates forfeiture's historical approach to punishment; yields disproportionate penalties that contravene any theory of

just punishment; and disregards the bedrock principle that criminal punishment is *individual*, not collective.

1. Historical forfeiture was punitive, *see id.*, but always followed a specific theory and measure. Forfeiture punished wrongdoing by "confiscat[ing] property used in violation of the law" and "requir[ing] disgorgement of the fruits of illegal conduct." *Ursery*, 518 U.S. at 284. Joint-and-several liability plainly does not accord with this theory of punishment, as it seizes property never used in violation of the law and targets defendants who never received the "fruits of illegal conduct." *Id.* Instead, such forfeitures function like criminal fines—as orders to pay money from the defendant's untainted assets.

2. As to *actual* criminal fines, Congress crafted a detailed scheme to set proportionate punishment. The criminal fine statute, 18 U.S.C. §3572, requires the court, before imposing a fine, to consider all the general factors that apply to any sentence—that is, the nature of the offense and defendant, and the need for the sentence to reflect "the seriousness of the offense," "afford adequate deterrence," and "protect the public," among others. 18 U.S.C. §3553(a); *see id.* §3572(a). The statute also mandates consideration of a host of fine-specific factors, including the defendant's "income … and financial resources," the "burden that the fine will impose upon the defendant" and any person "financially dependent" on him, and the fine's effects on the defendant's ability to pay restitution. *Id.* §3572(a)(1)-(2), (b). The fine thus fits the crime.

On the government's theory, however, the forfeiture statute imposes an order to pay money from untainted

assets, yet *prohibits* consideration of the factors Congress deemed necessary for courts to weigh when imposing fines. Defendants like Petitioner thus must pay one amount from their general assets under §3572's reticulated scheme—then another, also from general assets, pegged solely to how much money someone else received as a result of the conspiracy.

This is an irrational scheme, yielding irrational results. In *Cano-Flores*, the district court declined to impose any fine under §3572, yet the government's joint-and-several theory bound it to impose a $15 billion forfeiture reflecting the "gross take" of an entire Mexican drug cartel. *Cano-Flores*, 796 F.3d at 94; *see* Judgment at 5, *United States v. Cano-Flores*, No. 1:08-cr-00057 (D.D.C. May 14, 2013), ECF No. 172. The same thing happened here, where Petitioner was liable for $269,751.98, even though the district court found a fine was inappropriate.

Under Petitioner's view, by contrast, the statutory scheme works. The forfeiture judgment—pegged to the amount the defendant illicitly received—punishes by forcing the defendant to disgorge tainted assets in which the government's title already vested, and which were not legitimately the defendant's in the first place. *See* 21 U.S.C. §853(c). Additional fines, levied against untainted assets, remain on the table, but only if justified given the defendant's culpability and the other statutory factors. 18 U.S.C. §3572; *see id.* §3553(a).

The government's forfeitures-cum-fines also make a mockery of the Alternative Minimum Fines Act. Under that provision, if "any person derives pecuniary gain from the offense, or if the offense results in pecuniary

loss to a person other than the defendant," then "the defendant may be fined not more than the greater of twice the gross gain or … loss." 18 U.S.C. §3571(d); *cf.* 21 U.S.C. §853(a). Courts decline to impose such gain-based fines when defendants would be unable to pay, or when they would interfere with the ability to make restitution. *See, e.g.*, *United States v. Li*, No. 15 CR. 870-1 (RWS), 2016 WL 1241527, at *5 (S.D.N.Y. Mar. 24, 2016); *United States v. Nelson*, No. 07 CR. 326-01 (RWS), 2008 WL 4962988, at *5 (S.D.N.Y. Nov. 13, 2008). But the government's view of "forfeiture" makes a functionally identical gain-based judgment *mandatory* in any conspiracy case, without consideration of the facts in §3553(a) or §3572.

This provision shows something else, too: When Congress wished to peg monetary judgments to the gains of all participants in a crime, it knew how. Section 3571(d) does so expressly, basing "the defendant['s]" fine exposure on "the gross gain" to "any person." 18 U.S.C. §3571(d); *see United States v. Hui Hsiung*, 778 F.3d 738, 761-62 (9th Cir. 2014) (holding §3571(d) is based on gains to the whole conspiracy but rejecting joint-and several-liability). This tellingly contrasts with §853(a)(1), which ties forfeiture for each defendant to property "the person obtained." 21 U.S.C. §853(a)(1). Settled principles of statutory construction require following, rather than disregarding, this careful distinction. *Russello*, 464 U.S. at 23.[8]

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[8] Indeed, Congress expressly recognized that §3571(d)'s distinctive phrasing was *necessary* to authorize a fine based on gains to other people. That section replaced an earlier provision that, similar to

3. The government's theory also violates another core tenet of criminal punishment: Punishment is individual and individualized. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 50 (2007) (sentencing courts "make an individualized assessment based on the facts presented"); *see also Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). Joint-and-several liability does the opposite, treating every conspirator as interchangeable. Co-conspirators may vary considerably in their individual level of culpability, yet the government's position would impose an identical, mandatory forfeiture punishment on all of them.

Worse yet, the amount each defendant will actually have to pay to satisfy the forfeiture judgment depends on the amount that his co-conspirators pay—a result antithetical to the purposes of punishment. If the district court had sentenced Petitioner and his brother to a joint-and-several *prison sentence* of 60 months—allowing either to serve the time, so long as one did—no one could defend it as just punishment. Joint-and-several criminal fines are no better: If a defendant deserves to receive a fine, then the law vindicates this

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§853, tied the authorized fine to gains "the defendant derives." Criminal Fine Enforcement Act of 1984, §6, Pub. L. 98-596, 98 Stat. 3134, 3137. When Congress enacted §3571(d), it explained that the new "any person" language was required to authorize a fine "if a person other than the defendant derives pecuniary gain from the offense." H.R. Rep. No. 100-390, at 6 (1987). Congress thus understood that provisions phrased like §853 did not authorize monetary judgments based on receipts by "a person other than the defendant."

defendant's "personal culpability," *Tison*, 481 U.S. at 149, only if *he* pays it—not if someone else remits the same amount to the U.S. Treasury.

Yet the government defends precisely this indefensible result. The drug kingpin's forfeiture penalty depends on whether his couriers happen to have money to satisfy the joint-and-several judgment, and whether he happens to be prosecuted first or last. And here, Petitioner's liability is based on the amount his brother agreed to pay in his plea deal with the government. *Supra* at 3. Setting criminal punishments that way is indefensible, and only frustrates the punitive goals forfeiture seeks to advance.

C. As Applied to Forfeiture, Joint-and-Several Forfeiture Liability Makes No Sense Based On the Tort Principles From Which Such Liability Derives.

Joint-and-several liability works such great mischief on criminal punishment because it is not a criminal-law concept. It derives from tort. *See Prosser and Keeton on the Law of Torts* §52, at 351 (5th ed., W. Page Keeton et al. eds. 1984). And tort's purposes differ fundamentally from both the remedial and the punitive purposes of criminal forfeiture.

Tort aims "to give compensation, indemnity or restitution for harms." *Restatement (Second) of Torts* §901 (1979). One barrier to such relief is that some defendants may be insolvent or unreachable. Joint-and-several liability reflects the judgment that this risk "should fall on a partially guilty defendant than on a completely innocent victim." *Cano-Flores*, 796 F.3d at

95; *see Restatement (Third) of Torts: Apportionment Liab.* §10, cmt. a (2000) ("as between innocent plaintiffs and culpable defendants the latter should bear th[e] risk" "of insolvency"); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220–21 (1994) (similar). Criminal forfeitures, however, go to the government, like criminal fines. *See* 21 U.S.C. §853(a). They need not compensate injured victims. *see* 21 U.S.C. §853(a), (i); 28 U.S.C. §524(c)(1); *United States v. Bailey*, 630 F. App'x 902, 903 (11th Cir. 2015) ("Once funds have been ordered forfeited, the Attorney General is authorized, in her discretion, to retain the forfeited property ...."). So rules derived from tort law's compensatory purposes have no place. *See Solomon*, 2016 WL 6435138, at *10.

Put differently, joint-and-several liability is sensible only where the law is indifferent to the source of the payment because one dollar is as good as another. That is true in tort, where the victim's goal is to achieve full compensation, and the law prioritizes compensating victims even at the cost of some unfairness to tortfeasors. But forfeiture law is *not* indifferent to the source of payment, for the reasons already explained: Its remedial goals require forfeiting the tainted property *itself*—because only that can assure that the property does not again become a tool of crime, and that the person who received it does not "profit from … illegal acts." *Ursery*, 518 U.S. at 290-91; *see supra* at 29-31. And forfeiture's punitive goals require punishing the person who actually received tainted property, rather than a different person who did not. *Supra* at 31-36. Joint-and-several liability does not fit.

Criminal forfeiture also lacks the critical safeguard that enables joint-and-several liability in tort: contribution. Where the law has guarded against the risk of insolvency by allowing the injured plaintiff to recover fully from one defendant, fairness dictates allowing that defendant to obtain contribution from others in proportion to their fault—so that liability ultimately rests where it should fall. *See Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 88 (1981) ("[W]hen two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability."); *see Restatement (Third) of Torts: Apportionment Liab.* §23 (2000).

Criminal forfeiture includes no right of contribution. *Cf. Paroline v. United States*, 134 S. Ct. 1710, 1725 (2014) ("There is no general federal right to contribution."). So here, Petitioner had to forfeit $69,751.98 simply because his brother—who obtained all the proceeds—struck a plea deal to forfeit only $200,000. He has no avenue to seek contribution on the ground that his fair share was less. Likewise, if the couriers in the hypothetical drug ring discussed above collectively have the money to satisfy a $1 million forfeiture judgment, they could bear the full liability, unable to pass it on to the kingpin who profited. Indeed, in *Paroline*, this Court recently held that the absence of a right of contribution was evidence that Congress did not intend to impose joint-and-several liability in the context of restitution for victims of child pornography crimes. 134 S. Ct. at 1725. That reasoning applies with full force here.

Federal restitution statutes confirm that Congress knows how to draft compensation-focused sentencing provisions with joint-and-several liability—and provide some of the strongest evidence against the government's position here. Under the general restitution statute, "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. §3664(h). Congress incorporated this provision in §853, providing that defendants convicted of methamphetamine crimes would be subject to "restitution as provided in section[] … 3664"—*i.e.*, to joint-and-several liability. 21 U.S.C. §853(q)(1). Then, in the next subsection, Congress enacted a different form of such liability, mandating that defendants "reimburse [the government] for the costs … for the cleanup" of the meth labs. *Id.* §853(q)(2).

In at least three ways, these provisions underscore that the government's position is wrong. First, they confirm that "when Congress wished to provide" joint-and-several liability, "it knew how to do so and did so expressly." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) (quotation marks omitted). It did not expect courts to manufacture such liability via strained analogies to tort. The obvious inference from Congress's explicit enactment of joint-and-several liability in §3664 and §853(q) is that when Congress omitted similar language

from §853(a)(1), it meant this distinction to make a difference. *Russello*, 464 U.S. at 23.

Second, §3664 shows that when Congress enacts joint-and-several liability, Congress addresses the unfairness it can yield: It made such liability permissive only (not mandatory). 18 U.S.C. §3664(h). And it authorized courts to account for "the level of contribution … of each defendant" (to avoid sticking one defendant with burdens others should fairly bear). *Id.* In §853(a)(1), Congress did not address those problems because it did not intend joint-and-several liability in the first place.

Third, these provisions reinforce that Congress enacts joint-and-several liability only where doing so *makes sense*. The goal of restitution is to compensate victims; the goal of §853(q) is to clean up methamphetamine labs. In achieving these goals, a dollar from one defendant is as good as a dollar from any other. Joint-and-several liability is exactly what one would expect, *supra* at 37, and the text of these provisions expressly provides it. Here, by contrast, the government would inflict *nonstatutory* joint-and-several liability that is far *harsher* than what Congress expressly enacted for restitution—where the justifications for such liability are absent. *Id.* The government's view yields these bizarre results because it so badly contradicts the statute.[9]

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[9] At the certiorari stage, the government's response was that §3664(h) *restricts* a power to impose joint-and-several liability that the government would otherwise enjoy. *See* BIO 15 n.6 (§3664(h)

V. THE CANONS OF CONSTRUCTION REJECT JOINT-AND-SEVERAL LIABILITY.

A. The Rule of Lenity Forecloses Joint-and-Several Liability.

Given how decisively text, structure, history, and purpose refute the government's position, the rule of lenity has no work to do. But it reinforces why the government's arguments fail.

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); *see United States v. Bass*, 404 U.S. 336, 347-49 (1971). Here, the government has no serious textual argument for why §853(a)(1) commands, or even permits, its reading. Instead, the government claims that the Court should adopt joint-and-several liability based on vague "principle[s] of federal conspiracy law"

"shows that Congress can depart from the background rule of co-conspirator liability when it wishes to do so"). That is obviously wrong. Section 3664(h) expressly *confers* new power, stating that district courts "may make each defendant" jointly and severally liable for restitution. 18 U.S.C. §3664(h). Indeed, the law is clear that a "federal court has no inherent authority to order restitution in a criminal case; it may do so only as expressly provided by statute." *United States v. Wells*, 177 F.3d 603, 608 (7th Cir. 1999) (quotation marks omitted); *accord Paroline*, 134 S. Ct. at 1725; *Hughey v. United States*, 495 U.S. 411, 413 (1990). The government thus is incorrect that §3664(h) merely limits some inherent, unwritten power to impose a particularly *extreme* form of restitution via joint-and-several liability.

supposedly "carried forward from the common law" (which the government, incorrectly, locates in *Pinkerton*), plus a policy argument that forfeiture will be unworkable absent joint-and-several liability (also wrong). BIO 10, 13. These arguments fail on their own terms. *Infra* at 47-55. But regardless, they do not provide what the rule of lenity demands: A federal statute unambiguously enacting joint-and-several forfeiture liability. "In our system, … defining crimes and fixing penalties are legislative, not judicial, functions." *United States v. Evans*, 333 U.S. 483, 486 (1948). The government flouts these principles with its call to enact joint-and-several liability via common law-esque, policy-driven judicial lawmaking.

The government fails again with its attempt to avoid lenity by invoking §853(o), which specifies that the "provisions of this section shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. §853(o); *see* BIO 9, 17. Even indulging the government's questionable assumption that the rule of lenity may be nullified by statute, *cf. United States v. Lanier*, 520 U.S. 259, 266 (1997) (rule of lenity "ensures fair warning" and avoids potential due process violations), the government's position here does not advance any of §853's "remedial purposes." The legislative history *sets forth* Section 853's "remedial purposes." *Supra* Section III.B. And they were not to work any "significant expansion of the scope of property subject to forfeiture," but to "improv[e] the procedures applicable" by fixing certain discrete procedural flaws. S. Rep. No. 98-225, at 192; *supra* at 25-29. Those purposes have nothing to do with joint-and-several liability. As this Court said of

RICO's similar liberal-construction provision, §853(o) "is not an invitation to apply [the statute] to new purposes that Congress never intended," and it comes into play only "as an aid for resolving an ambiguity" but cannot "be used to beget one." *Reves v. Ernst & Young*, 507 U.S. 170, 183–84 (1993) (quotation marks omitted). Section 853(o) thus has no role to play here. Indeed, as explained, the government's position would *frustrate* forfeiture's traditional remedial purposes, by ensuring that criminal defendants who actually receive assets from crime can keep them. *Supra* at 29-31.

B. Constitutional Avoidance Requires Rejecting Joint-and-Several Liability Given the Grave Questions It Raises Under the Excessive Fines Clause.

When one alternative interpretation would raise "serious constitutional doubts," the canon of constitutional avoidance tells courts to reject it in favor of another that will not, based on the "reasonable presumption that Congress did not intend the alternative which raises [such] doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

Here, the government imputes to Congress the opposite intent. The Eighth Amendment's Excessive Fines Clause prohibits forfeitures when their amount is "grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. And under that clause, joint-and-several liability by its nature will raise case after doubtful case. It makes every underling liable for the conspiracy's entire gross take and all of its assets, provided only that they were foreseeable. The forfeiture judgment thus reflects the size and revenues of the

conspiracy as a whole, no matter that the defendant was the most marginal of two-bit players. So, for example, a courier in the drug ring hypothesized above receives a $1 million forfeiture judgment because the ring also included 99 other couriers—not based on the amount he actually received, or his culpability. Likewise in *Cano-Flores*, a "mid-level manager" received a $15 billion forfeiture judgment reflecting the "gross take" of an entire Mexican drug cartel over a decade. 796 F.3d at 94. At minimum, a monetary penalty amounting to Senegal's annual GDP raises "serious constitutional doubts." *Clark*, 543 U.S. at 381; *see* Int'l Monetary Fund, World Economic Outlook Database (Oct. 2016).

Given these obvious constitutional problems, it matters not whether Petitioner's forfeiture of $69,751.98 (or $269,751.98) would violate the Excessive Fines Clause. As *Clark* explained, the avoidance canon is a tool for ascertaining what a statute means, which does not vary from one case to another. 543 U.S. at 381-82. Hence, if one interpretation raises "constitutional problems, the other should prevail—whether or not th[ey] pertain to the particular litigant before the Court." *Id.* at 380-81.

That rule applies here because the government's reading makes joint-and-several liability mandatory in any conspiracy. No statutory mechanism allows picking and choosing between applications that would potentially violate the Excessive Fines Clause and those that would not. That means the "lowest common denominator, as it were, must govern." *Id.* at 380. Indeed, *Clark*'s rule is especially appropriate here. Via §853, Congress used forfeiture to target "organized

crime and illegal drug[]" rings that had grown into "criminal organizations or enterprises." S. Rep. No. 98-225, at 191. Yet it is precisely there that the government's reading raises constitutional concerns—because, as in *Cano-Flores*, it attributes an organization's entire proceeds to every underling. On the government's view, the statute's potentially unconstitutional applications thus arise not in unanticipated cases, but the statute's heartland. The avoidance canon, therefore, teaches that the government's reading must be rejected.

C. Joint-and-Several Liability Also Raises Grave Sixth Amendment Concerns.

The government's theory is incompatible with the constitutional avoidance canon for a second reason: it forces §853 to inflict Sixth Amendment violations. As explained above, *Caplin* and *Monsanto* held that the Sixth Amendment permitted pre-trial freezes and post-trial forfeitures of money the defendants would use to pay their attorneys, but only because the assets were tainted. *See Caplin*, 491 U.S. at 626 ("A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his …."); *see also Monsanto*, 491 U.S. at 609-10. In *Luis*, this Court turned that point into a square holding, concluding that "pretrial restraint of … *untainted* assets needed to retain counsel of choice violates the Sixth Amendment" and distinguishing *Caplin* and *Monsanto* as having "relied critically upon the fact that the property at issue was 'tainted.'" 136 S. Ct. at 1088, 1090 (plurality opinion) (emphasis added).

Under *Caplin* and *Luis*, the government's position inevitably yields Sixth Amendment violations. If §853(a)(1) imposes joint-and-several liability, pre-trial freezes and post-trial forfeitures of untainted assets are mandatory on the government's application, even if the assets are needed to pay an attorney. *See supra* at 16-19; *Monsanto*, 491 U.S. at 612-13 (Section 853(e)(1)(A) "cannot sensibly be construed to give district court discretion to permit the dissipation of [any] property that §853(a) requires be forfeited upon conviction"). In the $1 million drug ring hypothesized above, for example, the government could freeze *all* the assets of *all* 100 couriers, provided only that their net worth is less than $1 million—preventing *any* one of them from hiring their counsel of choice with untainted assets. That squarely violates *Luis*. 136 S. Ct. at 1088 (plurality op.); *id.* at 1096 (Thomas, J., concurring in the judgment). And if the couriers avoid a pre-trial freeze, then after trial the government could seek forfeiture of up to $1 million they had paid their attorneys with untainted assets. Facing that prospect, no one could ever hire a lawyer, even if every dollar in their bank account was earned legitimately. That would raise grave Sixth Amendment concerns given this Court's careful limitation of *Caplin*'s holding to tainted assets. *Caplin*, 491 U.S. at 626; *Luis*, 136 S. Ct. at 1090 (plurality opinion).

Notably, although *Luis* was a fractured decision, the government's position raises grave questions under the views of every member of this Court. Justice Thomas concurred in the judgment because the "common-law forfeiture tradition … draws a clear line between tainted

and untainted assets," and based on that tradition, he concluded that "the Sixth Amendment prevents the Government from freezing untainted assets." *Luis*, 136 S. Ct. at 1097, 1099. That distinction is precisely why the government's interpretation raises constitutional problems here. Justice Kennedy and Justice Kagan found no Sixth Amendment violation, but only because tainted assets and untainted assets are fungible in the hands of *the same person*. *See id.* at 1109 (Kennedy, J., dissenting) ("Money … is fungible" because "[t]here is no difference between a defendant who has preserved his or her own assets by spending stolen money and a defendant who has spent his or her own assets and preserved stolen cash instead"); *id.* at 1113 (Kagan, J., dissenting) ("The thief who immediately dissipates his ill-gotten gains and thereby preserves his other assets is no more deserving of chosen counsel than the one who spends those two pots of money in reverse order."). But tainted assets held by one defendant are not fungible with untainted assets of *someone else*. Yet the government here would mandate that a defendant's assets be frozen even if he never received tainted assets. Neither Justice Kennedy nor Justice Kagan endorsed that position.

VI. THE GOVERNMENT'S REMAINING ARGUMENTS FAIL.

A. *Pinkerton* Does Not Support Joint-and-Several Liability for Conspiracy Forfeitures.

Lacking any genuine argument based on §853's text, structure, history, or purpose, the government relies primarily on atextual background principles. Per the government, Congress "legislate[d] against the

backdrop of" a "fundamental principle of federal conspiracy law, carried forward from the common law" and manifested in "the *Pinkerton* rule." BIO 10-11. Under this rule, "a defendant who joins a conspiracy may be convicted of the 'substantive offense[s]' committed by his co-conspirators so long as those substantive offenses were reasonably foreseeable to the defendant and were committed 'in furtherance of the conspiracy.'" *Id.* (quoting *Pinkerton v. United States*, 328 U.S. 640, 644 (1946)). So, the government says, Congress should "be assumed to have" incorporated the *Pinkerton* rule into §853 in a manner that yields joint-and-several liability. BIO 11.

This argument fails at the outset because *Pinkerton* is an interpretation of substantive criminal law, not an inexorable constitutional command. Here, the text, structure, and history of §853—none of which were at issue in *Pinkerton*—so plainly point away from joint-and-several liability for co-conspirators that they overcome any unwritten "assum[ption]" regarding Congress' intent. *Id.*

More fundamentally, this argument fails because the government's background principles are inapplicable. Under the common-law principle embodied in *Pinkerton*, a co-conspirator's conduct can be the basis for a conviction on a "substantive offense." *Pinkerton*, 328 U.S. at 647. But *Pinkerton* does not allow what the government seeks: treating defendants interchangeably as to liability for part of their *sentence*, as joint-and-several liability does. Bonnie can be convicted of Clyde's crimes, but Clyde's 30-year sentence is his alone; it cannot be discharged by, say, Clyde serving 20 years and

Bonnie 10. What the government requests here is a never-before-seen expansion of *Pinkerton*—and one that is inconsistent with all the background principles the government invokes, including *Pinkerton* itself.

The government first relies on "the common law." BIO 10. The government is right that *Pinkerton*'s rule has "roots in the common law," reflecting the rule that "'[s]econdary parties … are also guilty of unintended crimes committed by the primary party if those crimes are a natural and probable consequence of the intended offense.'" Matthew A. Pauley, *The* Pinkerton *Doctrine and Murder*, 4 Pierce L. Rev. 1, 31 (2005) (quoting Joshua Dressler, *Reassessing the Theoretical Underpinnings*, 37 Hastings L.J. 91, 97 (1992)); *see United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987).

The government's problem is that common-law practice *as to forfeiture* points the opposite way. As explained above, common-law forfeiture always targeted specific property, and never encompassed joint-and-several liability. *Supra* Section III.A. Hence, Congress in §853 could not have intended to "carr[y] forward," BIO 10, a common-law tradition of joint-and-several forfeiture liability. There was none.

Next, the government points to *Pinkerton* itself. *Id.* But nothing in *Pinkerton* supports joint-and-several liability for sentencing consequences like criminal forfeiture. Quite the opposite. *Pinkerton* was laser focused on substantive liability—*i.e.*, the conviction itself—and all its reasoning targeted the building blocks of substantive liability: It held that both "[m]otive or intent" and "overt act[s]" of one co-conspirator were

"attributable to the others for the purpose of holding them responsible for *the substantive offense*." *Pinkerton*, 328 U.S. at 647 (emphasis added). And with both *mens rea* and *actus reus* requirements met, each co-conspirator could be convicted of crimes committed by others "in furtherance of the conspiracy." *Id.*

Pinkerton itself makes clear, however, that its rule did not extend to sentencing consequences of convictions. Walter and Daniel Pinkerton received separate, individual sentences for their substantive convictions: Walter a $500 fine and thirty months, and Daniel $1,000 and thirty months. *Id.* at 641. As with Bonnie and Clyde, they were not jointly-and-severally liable for these sentences, so that if Walter did not pay his fine (or serve his jail sentence), Daniel would do so (or vice-versa). Nor did *Pinkerton* alter the then-existing rules for forfeiture of tainted assets: At the time, the only forfeitures were *in rem*, and so could never touch a co-conspirator who never received tainted assets. *See Alexander v. United States*, 509 U.S. 544, 563 (1993) ("[U]ntil the enactment of RICO in 1970," only in rem forfeitures were "[]known in the federal system…."); S. Rep. No. 91-617, at 79 (As of 1970, the "existing forfeiture provisions under Federal statutes" provided for "proceeding … in rem against the property").

That history forecloses the government's effort to impose joint-and-several liability here. Lacking any support in the statutory text, the government is left to argue that §853(a) ratified a pre-existing principle that co-conspirators were jointly and severally liable for forfeiture. But given that *Pinkerton* itself did not

impose joint-and-several forfeiture liability, the government cannot conjure from it an unwritten rule of joint-and-several liability that §853 could have silently ratified. *See Solomon*, 2016 WL 6435138, at *10 ("*Pinkerton* is about the crime, not the punishment. The forfeiture statute, meanwhile, is about the punishment, not the crime.").

Finally, the government relies on "fundamental principle[s] of federal … law." BIO 10. But as to sentencing consequences like forfeiture, the bedrock principle is the opposite of the rule the government advocates. Sentences are individual and individualized, not interchangeable across defendants. *See, e.g.*, *Pepper v. United States*, 562 U.S. 476, 487 (2011) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." (quotation marks omitted)). Even when two defendants' convictions are identical, their sentences are individual, reflecting "the principle that 'the punishment should fit the offender and not merely the crime.'" *Id.* at 487-88 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)); *see also Woodson v. North Carolina*, 428 U.S. 280, 296 (1976); S. Rep. No. 98-225, at 51-52. Each defendant serves his own sentence, pays his own fine, and suffers any other adverse consequences of the judgment himself. Joint-and-several liability is nowhere to be found, unless a statute, like the restitution statute, expressly imposes it. *Supra* at 39-40.

Federal criminal law thus divides into two domains: Substantive offenses (in which *Pinkerton* liability may apply), and sentencing consequences (where liability is individual). That second domain is where criminal forfeitures reside. Not only are such forfeitures expressly part of the "sentence," 21 U.S.C. §853(a); *see* 18 U.S.C. §3554, but this Court has already decided as much. In *Libretti v. United States*, 516 U.S. 29 (1995), this Court held that that "Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws, not as a separate substantive offense." *Id.* at 39. Indeed, *Libretti* rejected the argument that at least *aspects* of forfeiture were substantive, such that forfeiture should be treated as substantive. *Id.* at 40 (rejecting petitioner's argument that forfeiture is "a hybrid that shares elements of both a substantive charge and a punishment imposed for criminal activity"). "[T]he simple fact," *Libretti* explained, is "that forfeiture is … punishment" and lives "in the realm of sentencing." *Id.* at 41. And in that realm, individual sentences—not joint-and-several liability—are the rule.

To be sure, sentencing rules sometimes *take account* of co-conspirators' conduct, as under the Sentencing Guidelines. U.S.S.G. §1B1.3. But they do so only as one element of a calculus that is individual and individualized, with the recommended sentences increasing or decreasing to reflect all relevant considerations about the defendant and the crime. *See, e.g.*, *Gall*, 552 U.S. at 50. And the relationship between the co-conspirator's conduct and punishment often is not linear. That is true, for example, under §2D1.1, which

provides that a defendant who possessed (with intent to distribute) 100 grams of cocaine, and to whom 1900 additional grams are attributed under *Pinkerton* (a 20–fold increase), would be subject to only a three-fold increase in minimum imprisonment (63 months compared to 21 months). *See* Drug Quantity Table, U.S.S.G. §2D1.1; *Cano-Flores*, 796 F.3d at 95. The government's rule here, by contrast, increases punishment directly with every dollar a co-conspirator receives.

* * *

At bottom, joint-and-several forfeiture liability is a Frankenstein doctrine held together only by the government's desire to broaden the reach of a liability-expanding rule while throwing aside the limits the law has imposed. The government wants the *Pinkerton* attribution rule of substantive criminal law, but without the individual sentences that have always existed. The government wants the joint-and-several liability of tort, but without the need to either compensate victims or provide a right to contribution. And the government invokes forfeiture's historic power to confiscate the instrumentalities and proceeds of crime—while jettisoning forfeiture's limit to property actually *tainted* by criminality (or substitute assets for property wrongfully dissipated). The Court should reject this unprincipled mashup.

B. The Government's Claim That, Without Joint-and-Several Liability, Forfeiture Will Be Too Hard Is Incorrect and Irrelevant.

Last, the government claims that absent joint-and-several liability, proving forfeiture cases will be too hard. Says the government, it may not be able to "prove exactly which defendant received how much of the pot," and it darkly warns that requiring such proof would "defeat[] the purpose" of forfeiture. BIO 13 (quotation marks omitted).

This argument fails because §853 solves the problem the government complains about. As explained, §853(d) enacts a powerful presumption: If the government shows, by just "a preponderance," that the defendant acquired property "during the period of" his crime and there was no other "likely source," then the property is presumptively tainted. 21 U.S.C. §853(d). If further assistance is needed, the government can seek an order to depose "any witness" to "facilitate the identification and location of property." *Id.* §853(m). And once the government makes the modest showing that §853(d) requires, no heroic steps are needed to trace property; instead, it can proceed via the "substitute property" provision. 21 U.S.C. §853(p).

The government apparently thinks §853's careful scheme is not enough. BIO 13. The government therefore advocates a heretofore unknown forfeiture regime, in which defendants who never received a penny in tainted assets are liable for forfeiture as a kind of prophylaxis against the risk that the government might encounter problems of proof. Only such a system, the government insists, would advance forfeiture's

"purpose." *Id.* But even leaving aside the lack of evidence to support that claim, the government's concerns over any inefficiencies in the current forfeiture regime are properly directed to Congress. The government cannot procure a judicial revision via a joint-and-several liability rule that contradicts §853's plain text and renders much of the system it creates superfluous, incoherent, or both.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

21 U.S.C. §853

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

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

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine

otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is

sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, *however*, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has

not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit

(A) In general

Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or

the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply

Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter

such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d)

of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the

testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the

nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title,

or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), 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 any of 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.

(3) **Return of property to jurisdiction**

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.