No. 16-142

IN THE
Supreme Court of the United States

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TERRY M. HONEYCUTT,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

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

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# REPLY BRIEF OF PETITIONER

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## INTRODUCTION

Section 853(a)(1) limits forfeiture to property derived from "proceeds the person obtained." 21 U.S.C. §853(a)(1). This text rejects joint-and-several liability. Petitioner did not "obtain" $269,751.98; his brother did.

In response, the government barely argues that §853's text enacts joint-and-several liability. Instead, the government stakes its case on "longstanding background principles" that purportedly ordain joint-and-several liability—in particular, the conspiracy-law rule that each co-conspirator "'becomes responsible for the acts of his co-conspirators.'" Gov't Br. 12, 14-15 (quoting *Smith v. United States*, 133 S. Ct. 714, 719 (2013)). The government asks this Court to read these background principles into §853 because they at least are "consistent with [its] text and structure." Gov't Br. 13.

Thus, under the government's framing of the case, the government must show two things. First, its alleged "background principles" must apply here, such that—absent anything textual to the contrary—they would dictate joint-and-several liability for forfeitures. Second, these principles must in fact be "consistent with Section 853's text and structure."

On both counts, the government fails. This brief addresses these issues in reverse order—first showing that §853's text and structure are inconsistent with the "background principles" the government claims exist, then demonstrating that these background principles are inapplicable.

## ARGUMENT

### I. SECTION 853'S TEXT AND STRUCTURE REJECT JOINT-AND-SEVERAL LIABILITY.

#### A. The Government's Textual Argument Fails.

Section 853(a)(1) limits forfeiture to property derived from proceeds "the person obtained." Yet the government cannot claim Petitioner actually "obtained" $269,751.98 from the Brainerd Army Store. Below, the government admitted Petitioner "did not have a controlling interest in the store" and did not "benefit personally from the illegal sales." Pet. App. 60a.

The government offers only one half-hearted textual argument for why §853(a)(1)'s text enacts joint-and-several forfeitures. It claims Petitioner "obtained … indirectly" the entire $269,751.98, analogizing to property going to "a lawful partnership." Gov't Br. 24-25.

The difference, however, is *actual* ownership. Partners own partnership shares, and thereby indirectly obtain property the partnership receives: They are entitled to a "share of the partnership distributions" from that property, and when the partnership dissolves, they are entitled to the proceeds "in proportion to their respective … share[s]." Uniform Partnership Act §§203, 401(a), 806(b) (1997). Hence, lawful partners have what Petitioner lacks: They "benefit personally," if indirectly, from property the partnership receives. Pet. App. 60a.

### B. Section 853's Structure Is Inconsistent With The Government's Supposed "Background Principles."

The government's position thus boils down to the proposition that even though Petitioner did not actually obtain any proceeds, he should be *deemed* to have obtained them. The government relies on the supposed conspiracy-law rule that each co-conspirator "'becomes responsible for the acts of his co-conspirators,'" like "member[s] of a lawful partnership." Gov't Br. 14-15 (quoting *Smith*, 133 S. Ct. at 719). This Court, the government says, should "presume[]" that "Congress … incorporate[d]" those background principles into §853 "absent some indication to the contrary." Gov't Br. 42.

But there is an "indication to the contrary." The government's "background principles" yield absurd results under the remainder of §853. That shows Congress did not intend to incorporate them into §853.

***Sections 853(a)(2) and (a)(3).*** As Petitioner's brief showed, joint-and-several liability makes no sense under §853(a)(2), which requires forfeiture of instrumentalities of crime, or §853(a)(3), which requires forfeiture of the defendant's interest in a criminal enterprise. That means joint-and-several liability cannot apply to §853(a)(1), either. Pet. Br. 13-15.

The government agrees that joint-and-several liability does not work under §853(a)(2) and (a)(3). It thus resorts to a *deus ex machina*: joint-and-several liability applies only to §853(a)(1), but not §853(a)(2) or (a)(3). Its explanation: "Unlike Section 853(a)(1), those provisions are tied to *ownership* of specified property or

interests—not to the *act* of obtaining proceeds." Gov't Br. 37.

This distinction has no basis, either in §853(a)'s text or the government's background principles. Section 853(a) lists three types of "property" subject to forfeiture. If §853(a)(2) and (a)(3) can be characterized as tied to "ownership" of the "property" defined in those subsections—thus foreclosing joint-and-several liability—then §853(a)(1) is equally tied to "ownership" of the property defined in that subsection, foreclosing joint-and-several liability for the identical reason.

Conversely, if §853 indeed carried forward a rule that each conspirator "becomes responsible for the acts of his co-conspirators," Gov't Br. 14-15 (quotation marks omitted), that rule would apply to all of §853(a)'s subsections. Under the government's "background principles," if *any* co-conspirator has "used, or intended to be used" a car to commit a crime, each conspirator is responsible for having done so and accrues forfeiture liability. 21 U.S.C. §853(a)(2). And as with "member[s] of a lawful partnership," that liability would be enforceable against any co-conspirator—as an "'obligation of the partnership'" for which all "'are liable jointly and severally.'" Gov't Br. 14-15, 20-21 (quoting Uniform Partnership Act §306(a)).

The Court need not take Petitioner's word for it. While the government asserts that courts "have not extended [joint-and-several] liability to Sections 853(a)(2) and (3)," *id.* at 37, that is untrue. Just last year, the Third Circuit "impos[ed] joint and several liability" under §853(a)(2). *United States v. Miller*, 645 F. App'x 211, 226 (3d Cir.), *cert. denied*, 137 S. Ct. 323 (2016).

Circuit precedent, the court explained, established joint-and-several liability under §853(a)(1), and the "language in §853(a)(2)" is "identical." *Id.* at 227. Indeed, the government urged the Third Circuit to reach this result because it was impossible to "meaningfully distinguish" the two. Br. for United States at 111, *United States v. Miller*, *supra*, 2015 WL 1778521.

Juxtaposed with §853(a)(3), the government's position is especially nonsensical. That subsection, as applied to members of drug conspiracies, serves a similar purpose as §853(a)(1). It requires forfeiture of the defendant's "interest in" the criminal enterprise. 21 U.S.C. §853(a)(3). Yet rather than requiring forfeiture of the entire enterprise, or its value—what joint-and-several liability would dictate—Congress made each conspirator liable only for "his interest." *Id.* The government's position requires believing that, after Congress expressly rejected joint-and-several liability in this conspiracy-specific clause, it silently enacted such liability in §853(a)(1)'s general provision.

There is no principled basis for distinguishing §853(a)(1) from §853(a)(2) and (3). And now that the government concedes that joint-and-several liability is incompatible with these provisions, it cannot be true that "background principles" dictate joint-and-several liability *only* as to §853(a)(1).

***Sections 853(c), (e), and (p).*** Petitioner's opening brief explained that §853 makes sense only if the property that was "obtained" under §853(a)(1) is *tainted* property. Yet the property in the hands of co-conspirators is *untainted* property. If a co-conspirator's untainted property was forfeitable property under

§853(a)(1), it would also be subject to asset freezes and §853's other remedial provisions, yielding a cascade of absurdities. Pet. Br. 16-23.

The government's response is a surprise: It agrees that §853(a)(1) is limited to "traceable proceeds," and that if such "tainted property is available, the government must forfeit that property" and cannot use joint-and-several liability. Gov't Br. 32, 36. To save its desired outcome, the government announces a new position: If tainted assets are *unavailable*, the government can "obtain the forfeiture of substitute property" under §853(p) or a "forfeiture money judgment." Gov't Br. 33. And this, the government says, opens the door for it to obtain "substitute" forfeitures from any co-conspirator. Gov't Br. 33-34.

This theory is wrong, as explained below, but what's striking is its novelty. No court has ever adopted this theory, and as far as Petitioner can tell, the government has never argued it. Rather, the "courts that have applied joint-and-several liability for decades," Gov't Br. 35, have done so because they concluded—at the government's urging—that "*§853(a)(1)* imposes joint and several liability." *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) (emphasis added); *see* Pet. App. 26a (citing cases). The same goes for the government's Brief in Opposition, which argued that "*Section 853(a)(1)'s* forfeiture obligation … 'includes all property'" obtained by "'those who acted in concert with'" the defendant. BIO 11 (emphasis added).

This is not just a new *justification*. It is new *rule*. The government now claims that, as a prerequisite for joint-and-several liability, it must prove that the tainted

property is unavailable under §853(p)'s criteria. No court, including the Sixth Circuit below, has ever adopted this rule. Indeed, if the Sixth Circuit had applied this rule, the government would have lost this case. The government did not attempt to prove the "tainted property" Petitioner's brother received was unavailable under §853(p)'s criteria; the record merely showed that the government negotiated a plea agreement in which Petitioner's brother would pay only $200,000 of the $269,751.98 owed. Pet. App. 39a; *see* Final Order of Forfeiture at 2, *United States v. Tony Honeycutt*, No. 12-CR-144 (E.D. Tenn. Dec. 3, 2013), Dkt. 81.[1]

There is another discrepancy between the government's new theory and its lower-court positions. The new theory depends on the claim that, if property is forfeitable only under §853(p) and not §853(a), the government cannot attach it before trial. Gov't Br. 36. That is how the government tries to avoid absurdities under §853's asset freeze provision. *Id.* But the government's position in lower courts is that forfeitable property under §853(p) *is* subject to pretrial restraint. Several courts have rejected this argument, but the Fourth Circuit has accepted it. *See In re Billman*, 915

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[1] The government cites several cases in which courts imposing joint-and-several liability on co-conspirators have required forfeiture of untainted assets. U.S. Br. 33-34. This is obvious. If the co-conspirators had the tainted assets themselves, joint-and-several liability would be irrelevant. But those courts have not endorsed the government's new view that unavailability of the tainted assets is a *prerequisite* for co-conspirators' forfeiture liability.

F.2d 916, 921 (4th Cir. 1990). And in a recent Fourth Circuit brief, the government urged the court to adhere to *Billman*'s holding that "a defendant's untainted or substitute property may be restrained pretrial." Br. for the United States, *United States v. Chamberlain* at 10, No. 16-4313, 2016 WL 4698154 (4th Cir. Sept. 6, 2016). The government has not indicated any change of position in that pending appeal.

The government's position is not just new, but also wrong. It contradicts the statutory text, the statutory purpose, and the very background principles on which the government relies.

First, the government is wrong on the text. Its key claim is that Petitioner must forfeit "substitute property" even though he never obtained forfeitable property under §853(a). Gov't Br. 33, 36. But as Petitioner has explained, §853(p) authorizes forfeiture of substitute property when the defendant *once had* property forfeitable under §853(a). Pet. Br. 21-22. The government ignores this argument altogether. To recap: §853(p) applies only if the government shows that, "as a result of an[] act or omission *of the defendant*," one of five enumerated misfortunes has befallen "property described in subsection (a)"—*i.e.*, property the defendant "obtained." Each of these enumerated misfortunes presupposes that the defendant dissipated property that he obtained. None of §853(p)'s criteria applies where the defendant never received tainted property, but merely foresaw a co-conspirator would do so. Remarkably, the government does not even try to

show that any of those criteria is satisfied here.[2] And to the extent the government's theory is that it can obtain forfeiture of untainted money *without* satisfying §853(p)'s requirements, based on some "unavailability" criterion identified nowhere in §853, this simply illustrates how far the government wanders from the statutory text.

Second, the government's position contradicts the purpose of §853(p), which is to ensure that a defendant cannot benefit by dissipating forfeitable assets. Under the government's rule, if a kingpin obtains proceeds, only he can be liable for forfeiture. But if he hides those proceeds, the result is joint-and-several liability for co-conspirators—which will allow him to keep every dollar that is forfeited from someone else, resulting in the very

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[2] Perhaps the government's unstated theory is that *Pinkerton* principles apply to §853(p)—so that while the statute says the property must be unavailable due to "an[] act or omission of the defendant," *Pinkerton* extends the section to reach acts or omissions by co-conspirators. But for two reasons, that theory fails. First, if *Pinkerton* principles apply to §853(p), they *also* apply to §853(a)(1)—reintroducing all the absurdities the government strains to avoid. Second, *Pinkerton* principles attribute only co-conspirators' acts committed "in furtherance of the conspiracy." *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). One conspirator's dissipation of assets is chargeable to others only if it furthers the conspiracy. This adds *another* new element to the government's theory, which the government did not attempt to prove here and is absent from the cases on the government's side of the split. Indeed, dissipation of assets often will not further the conspiracy—as, for example, if one conspirator goes to Las Vegas and gambles away the proceeds.

benefit from dissipation that §853(p) was designed to prevent.

Third, the government's position contradicts the government's arguments for creating joint-and-several liability in the first place. Ordinary *Pinkerton* principles treat all co-conspirators the same. Every co-conspirator is just as guilty of narcotics trafficking as the person who sold the drugs. Gov't Br. 15-16, 20-21. Faithfully applied, those principles would dictate treating all co-conspirators the same—when one co-conspirator "obtained" something, all co-conspirators would be deemed to have obtained it, and face the same forfeiture consequences.

The government's new rule, however, does *not* treat co-conspirators the same. Rather, per the government, §853 creates two grades of forfeiture defendants. First, there are regular forfeiture defendants who actually received tainted assets. If a conspirator obtains tainted assets, for example, he (and only he) can be liable under §853(a)(1) and compelled to forfeit the assets. Critically, his act of obtaining the assets does not trigger *any* forfeiture consequences for his co-conspirators. Further, his assets (and his alone) are subject to pretrial attachment. 21 U.S.C. §853(e). And the payments he makes to lawyers (no one else's) may be undone. 21 U.S.C. §853(c); *see United States v. Monsanto*, 491 U.S. 600, 614, 616 (1989). Only if the conspirator takes the additional step of thwarting this regular forfeiture may the government may seek a second, lower-grade type of forfeiture. In these forfeitures, the government can pursue co-conspirators, but only for substitute property under §853(p), and it cannot obtain pre-trial restraints or

void subsequent transfers to third parties. Gov't Br. 35-36. This two-tiered system contradicts *Pinkerton*'s premise that every co-conspirator steps into each other's shoes.

### C. Neither Rule 32.2 Nor Lower-Court Case Law Warrants Ruling in the Government's Favor.

Recognizing the weakness of its statutory argument, the government suggests that Rule 32.2 might independently authorize a "forfeiture money judgment" that imposes joint-and-several liability. Gov't Br. 32 & n.10. Not so. Rule 32.2 provides procedures for forfeitures *already* authorized by statute. The rule itself says so: In the "Forfeiture Phase," the court "determine[s] what property is subject to forfeiture *under the applicable statute*." *Id.* R. 32.2(b)(1) (emphasis added); *see also id.* R. 32.2(a). The Rules Enabling Act says so too: It provides that the rules, including the Federal Rules of Criminal Procedure, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Instead, "forfeiture money judgments" under Rule 32.2 play a more prosaic role: For example, if a defendant is liable to forfeit substitute property under §853(p), but "has no assets at the time of sentencing," a money judgment reaches "property acquired by the defendant after." *United States v. Smith*, 656 F.3d 821, 827 (8th Cir. 2011).

Equally unavailing is the government's claim that the "overwhelming majority of the courts of appeals" have endorsed joint-and-several liability. Gov't Br. 10. The split favors the government, but many of those decisions are barely reasoned. The two decisions

containing the most detailed reasoning—*Cano-Flores* and *Solomon*—favor Petitioner. Pet. Br. 11-12, 14. Moreover, the government is not even defending the rule adopted in the decisions it invokes. It now says that, before imposing joint-and-several liability, it must show that "specific tainted assets are no longer available," Gov't Br. 33—a new element in a 30-year-old statute. This case now reaches the Court on a blank slate.

## II. BACKGROUND PRINCIPLES DO NOT SUPPORT JOINT-AND-SEVERAL LIABILITY FOR FORFEITURES IN CRIMINAL SENTENCES.

Joint-and-several liability fits §853 so badly because it is *not* a "background principle[] against which Congress legislate[s]," Gov't Br. 20 (quotation marks omitted), in this realm. Instead, §853 sits at the intersection of two domains—forfeiture, and sentencing—where background principles *reject* joint-and-several liability. The government's supposed background principles are a barely concealed attempt to create common-law criminal liability, which this Court has rejected for 200 years—by first importing, then rewriting, inapplicable rules from such far-flung areas as *Pinkerton*, venue law, and evidence.

### A. The Applicable Background Principles Reject Joint-And-Several Liability.

The government exhausts its pen recapitulating "background principles of conspiracy." Gov't Br. 20; *see id.* at 13-30, 41-42. But it largely ignores the background principles of *forfeiture*—the doctrine §853 actually invokes—including how they apply to co-conspirators.

It is no mystery why. As the government concedes, "joint-and-several liability … is inconsistent with the tradition of … forfeiture[]." Gov't Br. 34. Correct: As Petitioner explained, §853 descends from *in rem* forfeitures, which touched only the person who actually *possessed* property, not any co-conspirators. Pet. Br. 27-28. The government makes much of the fact that §853 enacted an "*in personam* criminal forfeiture," which it describes as a "departure from that tradition." Gov't Br. 34. It is true that §853 incorporates elements of traditional "in personam forfeiture," under which a felon forfeited his property to the Crown. Pet. Br. 27 n.6. But this does not help the government, because under such criminal forfeitures, only the *defendant*'s property escheated to the Crown; there is no record of any co-conspirator ever being held jointly liable. *Id.*

The legislative history confirms that *forfeiture*'s "background principles" apply. Modern statutes "focus[ed] on improving the procedures applicable in forfeiture cases," and did not intend any "significant expansion of the scope of property subject to forfeiture." S. Rep. No. 98-225, at 192 (1983). To the contrary, Congress intended §853 to reach "[t]he same type of property … now subject to civil forfeiture." *Id.* at 211. These affirmations contradict the government's claim that Congress, *sub silentio*, upended traditional forfeiture by creating joint-and-several liability for the first time.

No apologies are needed for this legislative history. The Court has cautioned against "allowing ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). But

here, the government does not rely on "clear statutory language." Its position proceeds from atextual assumptions about Congress' supposed intent to incorporate "background principles." If, as the government maintains, atextual assumptions about congressional intent are relevant to the interpretation of §853, then the first place to look should be legislative history. Yet the legislative history makes clear that Congress was incorporating different background principles that favor Petitioner. Tellingly, the government ignores this legislative history altogether.

Section 853(a)(1) differs from *in rem* forfeiture in another way: It is part of a criminal sentence. But in this respect, too, background principles favor Petitioner. Sentences are individual, not joint-and-several. Each defendant serves his own sentence and pays his own fine. Pet. Br. 51. That is why Walter and Daniel Pinkerton were liable for each other's substantive crimes, but received and discharged individual prison terms and fines. *Pinkerton v. United States*, 328 U.S. 640, 641 (1946). Joint-and-several forfeiture liability contradicts these background principles by requiring Petitioner to discharge part of the legal obligation his brother incurred. Pet. Br. 51-53.

The government insists that *Pinkerton* principles "also appl[y] at sentencing," Gov't Br. 18, but it glosses over *how*. All the government's examples are not materially different from *Pinkerton* itself: Courts attribute "act[s]" of one co-conspirator to others to determine, say, "the quantity of drugs that establishes" the sentencing range. Gov't Br. 18. But the government ignores what happens next: Co-conspirators receive

individual sentences and discharge them individually. That is inconsistent with the government's rule, which treats co-conspirators as interchangeable and imposes joint-and-several liability.

### B. The Government is Seeking Common-Law Criminal Liability.

The government's position has a deeper problem. It claims to be following caselaw permitting the application of "background principles" in criminal cases. It is not. Instead, the government asks this Court to ratify the common-law-style expansion of criminal liability—repurposing doctrines from other areas of the law, based on nothing in §853's text. Centuries of this Court's law rejects that maneuver.

The government's citations betray that what it seeks is unprecedented. To support the claim that it may invoke "background principles" to create joint-and-several liability, the government cites cases interpreting criminal statutes based on "'well-established principles' of conspiracy liability." Gov't Br. 41 (quoting *Salinas v. United States*, 522 U.S. 52, 63-66 (1997), and citing *United States v. Shabani*, 513 U.S. 10, 15-17 (1994)). But in those cases, the modern statutes *ratified* pre-existing principles: *Salinas* and *Shabani* interpreted the word "conspire," and the Court held that "conspire" should mean what it has always meant. *Pinkerton* was similar—the Court ratified a pre-existing common-law principle of conspiracy liability. Pet. Br. 49.

The government asks for something different here. Section 853(a) refers to "forfeiture" as part of a "sentence." Yet unlike in *Salinas* and *Shabani*, the

government does not look to the background principles those words bring with them: It *rejects* traditional forfeiture principles and traditional sentencing principles. Nor can the government claim that §853 simply ratified a joint-and-several forfeiture regime that existed before its enactment. Instead, the government's position is that Congress silently created a *new* forfeiture regime, based on strained analogy to the "principle that … conspirators are responsible for each other's acts" that applies to the "hearsay rule," the "forfeiture-by-wrongdoing doctrine," "venue provisions," and so on. Gov't Br. 17-18.

What gives away that the government is not just implementing "background principles," Gov't Br. 20, is that it must first *rewrite* its background principles in order to jerry-rig them onto forfeiture. Two examples are given above. First, the government must apply its principles selectively—only to §853(a)(1), and not §853(a)(2) and (a)(3). *Supra* at 3-5. Second, the government treats conspirators who actually "obtained" proceeds differently from co-conspirators, when its background principles would treat all co-conspirators the same. *Supra* at 10-11. Indeed, the government's entire *enterprise*—to impose joint-and-several liability, with all the anomalies that follow, Pet. Br. 29-36—seeks to create something that has never existed. The government insists that joint-and-several liability is necessary to avoid excess government recoveries. Gov't Br. 27. But this problem, which has never arisen in the centuries-long history of either conspiracy law or forfeiture law, exists only because the liability the government seeks to impose is *new*. Rather than

rewriting §853(a)(1) to enact such liability, then taking out the blue pencil again to fix the resulting problems, the Court should follow the statute as written. *Cf. Kloeckner v. Solis*, 133 S. Ct. 596, 607 (2012) ("If we reject the Government's odd view … no absurdity arises in the first place ….").

The government is not doing statutory interpretation. Nor is it genuinely applying pre-existing background principles. Rather, the government is applying concepts from other contexts—in modified form—to forfeiture. That is classic common-law reasoning. *See Funk v. United States*, 290 U.S. 371, 384 (1933). In the criminal realm, however, "federal courts lack[] the power to supplement … statutory crimes through the use of the common law." *Lewis v. United States*, 523 U.S. 155, 160 (1998). Rather, only Congress can "make an act a crime [and] affix a punishment to it." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Congress has never enacted joint-and-several forfeiture liability. That should end the matter.

## III. JOINT-AND-SEVERAL LIABILITY CONTRADICTS FORFEITURE'S PURPOSES.

There is a reason conspiracy's "background principles" have never been applied to forfeiture. They do not work. If the government is going to extend conspiracy's "background principles" to a new domain, it should at least explain why that extension makes sense. Yet, the government barely responds to Petitioner's arguments that joint-and-several liability contradicts forfeiture's purposes.

As Petitioner has shown, forfeiture serves the remedial purposes of preventing criminals from "profit[ing] from their illegal acts." *United States v. Ursery*, 518 U.S. 267, 290-91 (1996). Joint-and-several liability undermines this purpose by allowing bosses who received tainted property (like Petitioner's brother) to keep it while directing liability to underlings (like Petitioner) who did not. Pet. Br. 29-31.

The government complains that Petitioner "identifies no case where such a result has occurred," and suggests that it is implausible. Gov't Br. 40. But this result occurs in virtually *every* case, including here. Petitioner's brother reaped $269,751.98, but forfeited only $200,000, and apparently kept the rest. Petitioner must forfeit that amount instead, and his brother "profit[s] from [his] illegal acts." *Ursery*, 518 U.S. at 290-91.

The government also warns that, without joint-and-several liability, the question whether "a particular co-conspirator 'physically handled the money'" will receive "'conclusive weight.'" Gov't Br. 40 (citation omitted). This argument depends on the premise that if a co-conspirator so much as touches money—for example, the henchman who moves bags of money from safehouse to car—he "obtains" that money and is forever liable to forfeit that amount, even from untainted substitute assets. This premise is doubtful, and the government cites no case so holding.[3] And if the government's

[3] The government's cited case, *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995), does not so hold. Rather, it includes a dictum

premise were true, that result would merely flow from Congress's choice to tie forfeiture to property. Similar oddities were well known in forfeiture's history—for example, that a ship's owner might have to forfeit the vessel simply because its captain chose, unknown to the owner, to carry contraband. *See Austin v. United States*, 509 U.S. 602, 617 (1993). By contrast, the government's position creates anomalies unknown to forfeiture's long history. At minimum, the government's supposed anomaly is no justification for the result it urges, which requires a low-level conspirator who "physically handled" proceeds to forfeit *not only* those proceeds, but *additional* proceeds that he never touched, but merely accrued foreseeably to someone else.

The government fares even worse on forfeiture's punitive purposes. Petitioner's opening brief showed that joint-and-several forfeiture liability accords with no rational theory of punishment. Unlike traditional forfeiture, punishment is not pegged to receipt of property. Instead, joint-and-several forfeitures are indistinguishable from fines. Yet while *actual* fines are discretionary and subject to carefully reticulated procedures that calibrate crime and punishment, joint-and-several forfeitures are mandatory and based solely on the amount someone else receives. Pet. Br. 32-33. The government's position makes particular nonsense of the Alternative Minimum Fines Act, which provides discretionary authority to impose fines based on "any person['s] … pecuniary gain." 18 U.S.C. §3571(d). That

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"imagining" a scenario in which the defendant "had been caught with the [property] just before delivering it." *Id.* at 21.

discretionary authority is a farce if §853 compels mandatory forfeiture of other people's gains. Pet. Br. 33-34.

The government's response? Silence. It says *nothing* about forfeiture's punitive purposes in its brief. The Court should decline the government's invitation to import "background principles" into this new context when it cannot explain why that result coheres with *either* of forfeiture's purposes.

Joint-and-several liability so badly fits forfeiture because—as Petitioner's opening brief showed—it derives from doctrines, like tort law, that focus on a different purpose: compensating victims. By contrast, forfeiture's purpose is not to compensate victims, but to strip criminals of the proceeds of crime. Pet. Br. 36-40.

Feebly, the government insists that joint-and-several liability "is not limited to … tort" but "also applies to "debts of a partnership" or liability for breach of fiduciary duty. Gov't Br. 29. But these examples prove Petitioner's point. In both, the payments are compensation for harm—to the partnership's creditors, or the victims of the fiduciary's breach.[4]

Likewise, the government has no adequate answer to *Paroline v. United States*, 134 S. Ct. 1710 (2014), which held that the absence of a "right to contribution" for restitution—likewise absent here—pointed away from

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[4] The government insists that it sometimes uses forfeitures to compensate victims. But compensation is entirely "in [the] discretion" of the Attorney General, *United States v. Bailey*, 630 F. App'x 902, 903 (11th Cir. 2015), and in many drug cases, like this one, there are no ascertainable victims to compensate.

joint-and-several liability. *Id.* at 1725. The government asserts that the "traditional rule" was that "intentional wrongdoers held jointly and severally liable … *did not* enjoy a right of contribution." Gov't Br. 29. But to begin, the modern rule is the opposite: "[C]ontribution is not precluded … by the fact that [the party] is liable for an intentional tort." *Restatement (Third) of Torts: Apportionment of Liability* § 23, cmt. l (2000). Perhaps that is why the same argument in *Paroline* did not move the Court—or indeed, the government, whose brief rejected the argument the government now makes.[5]

More important, the government misstates the traditional rule, which denied contribution to a "tortfeasor who has intentionally *caused the harm*." *Restatement (Second) of Torts* § 886A(3) (1979) (emphasis added). Intentionally joining a conspiracy differs from intentionally causing particular harm. Indeed, courts applying the government's "traditional rule," Gov't Br. 29, have held that when someone is merely "vicariously liable … for … intentional misconduct" by another—what the government seeks to inflict via *Pinkerton*—the bar on contribution "does not operate." *Paloian v. Ridgestone Bank (In re Canopy Fin., Inc.)*, No. 09-44943, 2014 WL 3725724, at *2 (N.D. Ill. July 28, 2014) (quotation marks omitted) (citing cases from Florida, Michigan, and Minnesota and noting "the

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[5] *See* Reply Br. for United States at 17, *Paroline*, 2013 WL 6699432 (noting Amy's argument that joint-and-several liability "would nonetheless be appropriate" despite absence of contribution "because the common law did not allow intentional tortfeasors to pursue contribution," but rejecting it because the results would be "not … proportionate").

court cannot find any decision that disagrees"); *see also Restatement (Second) of Torts* §886A, cmt. a.

Federal restitution statutes further refute the government's position. As Petitioner explained, 18 U.S.C. §3664(h) authorizes a form of joint-and-several liability where that doctrine's justifications apply—the compensatory remedy of restitution. It states that the Court "may make" each defendant liable for the full loss, or "may proportion liability" among defendants. 18 U.S.C. §3664(h). It would be strange indeed to inflict a harsher form of joint-and-several liability, without statutory authorization, when the doctrine's justifications are absent. Pet. Br. 39-40.

In response, the government observes that before this statute's 1996 enactment, courts had "impose[d] joint and several … liability on multiple defendants." Gov't Br. 27 (quoting *United States v. Hunter*, 52 F.3d 489, 494 (3d Cir. 1995)). This, the government suggests, supports imposing nonstatutory joint-and-several forfeiture liability here. *See id.* The pre-1996 statutes, however, *invited* joint-and-several liability: They pegged restitution liability to "damages or loss caused *by the offense*"—which, naturally read, encompasses harm caused by other defendants liable for the offense. 18 U.S.C. §3651 (1982); *see* 18 U.S.C. §§3663, 3664 (1994) (similar). Then, these statutes instructed courts to consider "the amount of the loss sustained by [the] victim" and the defendant's "financial resources" and "needs," 18 U.S.C. §3664(e)—not how much harm was caused by one defendant, rather than another. These decisions provide no support for joint-and-several forfeiture liability, where §853(a)(1) bases the forfeiture

on the amount "the person [convicted] obtained," and where joint-and-several liability's justifications are absent.

## IV. THE CANONS SUPPORT PETITIONER.

The government also has no answer to the canons of construction.

***Lenity***. The government insists that "background legal principles" provide the requisite clarity to overcome the rule of lenity. Gov't Br. 41. That may have been true in the government's cited cases, *Salinas* and *Shabani*—which used background conspiracy principles to flesh out the word "conspire." *Salinas*, 522 U.S. at 66; *Shabani*, 513 U.S. at 17. But there are no such on-point background principles here: §853 concerns "forfeiture" and "sentences," which have no tradition of joint-and-several liability. If lenity has any force, it precludes expanding criminal liability via attenuated analogy to different principles applicable to venue law, the Confrontation Clause, and the like. At a minimum, if §853 is ambiguous as to *which* background principles apply, lenity requires applying the background principles which reject joint-and-several liability.

***Constitutional avoidance***. Petitioner also showed that the government's position is structured to yield violations of the Excessive Fines Clause. In every drug ring or criminal enterprise, that position compels every low-level courier to "forfeit" the organization's entire gross take, provided the amount was foreseeable—yielding results like *Cano-Flores*'s $15 billion judgment. *United States v. Cano-Flores*, 796 F.3d 83, 94 (D.C. Cir. 2015); *see* Pet. Br. 43-45.

In response, the government brushes off *Cano-Flores* as an "outlier." But although *Cano-Flores* appears to be the high-water mark, the government frequently seeks forfeitures via joint-and-several liability vastly exceeding the amount the defendant actually obtained. *See, e.g.*, *United States v. Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999) (noting affirmance of forfeiture order requiring "minor participants" in a conspiracy "to forfeit … up to approximately $140 million"); *United States v. Van Brocklin*, 115 F.3d 587, 602 (8th Cir. 1997) (finding "$1.3 million forfeiture order" "grossly disproportionate" for "secondary figure" who received "no direct share of the proceeds").

Moreover, the government "misconceives … the role played by … avoidance in statutory interpretation." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). The government is careful not to dispute that, on its view, §853 compels a *Cano-Flores*-type forfeiture in every large-scale conspiracy. The government simply observes that in other large drug conspiracy cases, it apparently has refrained from taking its interpretation to the logical conclusion. But constitutional avoidance is a tool for identifying Congress's intent, *id.*, and its operation does not depend on the government's subsequent enforcement strategies.

***Sixth Amendment.*** Petitioner also showed that the government's position inevitably yields Sixth Amendment violations: If co-conspirators are jointly and severally liable under §853(a)(1), their untainted assets are subject to pretrial attachment under §853(e), even when needed to pay an attorney. Pet. Br. 45-47. This Court has held that result violates the Sixth

Amendment. *Luis v. United States*, 136 S. Ct. 1083, 1091 (2016) (plurality opinion).

The government apparently agrees that result is untenable, and to avoid it, constructs the theory discussed above: that §853(a)(1) does *not* enact joint-and-several liability, and only §853(p)'s substitute property provision reaches co-conspirators' untainted property. But as already shown, that theory contradicts §853's text and structure, every lower court decision on the issue, the government's longheld litigating positions, and the government theories elsewhere in its merits brief. *Supra* at 5-11.

## V. THE GOVERNMENT'S ALLEGED PRACTICAL PROBLEMS DO NOT JUSTIFY REWRITING §853.

The government warns that, unless the Court appends joint-and-several liability to §853, enforcing forfeitures will be too hard. Per the government, Petitioner's position would require it to "'prove exactly which defendant received how much,'" and thus defendants could avoid forfeiture by "mask[ing] the allocation of the proceeds." Gov't Br. 38.

But the government buries in a footnote its acknowledgement of the provision that addresses this problem: §853(d), which creates a "rebuttable presumption" that property is forfeitable if it was acquired during "the period of the violation" or "a reasonable time after," and "there was no likely source" besides the crime. 21 U.S.C. §853(d). The government says §853(d) is insufficient because the defendants may have "entirely dissipated or concealed the proceeds," or

there may be "a lack of accurate records." Gov't Br. 38-39 n.11. But if the proceeds are "entirely" hidden and there are no accurate records, the government could not obtain forfeiture with or without joint-or-several liability. In any event, any difficulty in proving that a defendant "obtained" funds in a particular case does not justify a judicial repeal of the "obtained" element.

If a "lack of accurate records" is thwarting forfeitures, the government can seek amendment from Congress. The answer is not to rewrite §853 as prophylaxis, and impose joint-and-several liability on Petitioner where there *are* accurate records that definitively show Petitioner never received a cent of the proceeds the government seeks to forfeit.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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