No. 25-1238

IN THE

Supreme Court of the United States

MARTIN MIZRAHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION, DUE PROCESS INSTITUTE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has participated as an *amicus curiae* before this Court in many cases involving the Fifth, Sixth, and Eighth Amendments, including those addressing sentencing enhancements after *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *See, e.g.*, *Gall* v. *United States*, 552 U.S. 38 (2007); *United States* v. *Rita*, 551 U.S. 338 (2007); *United States* v. *Booker*, 543 U.S. 220 (2005).

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the U.S. criminal legal system. Founded in 2018, it is guided by a bipartisan Board of Directors and supported by bipartisan staff. Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for the accused. NACDL was founded in 1958 and has thousands of direct members nationwide. NACDL's members include private criminal defense

[1] No counsel for a party authored the brief in whole or in part, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2, *amici* notified all counsel of their intention to file this brief more than 10 days before the date of filing.

lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. It files many *amicus* briefs each year in this Court and in other federal and State courts around the country, providing *amicus* assistance in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

The National Association for Public Defense (NAPD) comprises more than 25,000 professionals who deliver legal services across the United States. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel in a wide range of criminal matters. NAPD members are not only advocates in courtrooms and jails, but also deeply involved in the day-to-day realities of law practice and community engagement.

Amici believe that criminal forfeiture, which has expanded dramatically to account for billions of dollars each year, represents a potent tool of state power that can deprive individuals and businesses of property without the full procedural safeguards envisioned by the Framers. Allowing judges to determine forfeitability by a mere preponderance of the evidence, as permitted under *Libretti* v. *United States*, 516 U.S. 29 (1995), undermines the jury's historic role as a bulwark against arbitrary government action. It also conflicts with this Court's *Apprendi* jurisprudence, which requires that "any fact" that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" must be resolved beyond a reasonable doubt by a

unanimous jury. 530 U.S. at 490 (quotation marks and citation omitted).

SUMMARY OF ARGUMENT

Petitioner asks this Court to resolve an important and recurring question of criminal law: whether the Sixth Amendment forbids courts from imposing forfeiture based on their own factual findings.

Under our Constitution, and within the Anglo-American legal tradition generally, the right to a trial by a jury is the cornerstone of criminal adjudication. As long as there has been criminal justice in America, the independence of citizen jurors has been understood to be an indispensable structural check on executive, legislative, and judicial power. Recognizing that rich and important history, this Court held more than a quarter-century ago that the Sixth Amendment requires juries—not judges—to find all facts necessary to impose punishment. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). The Court has since applied *Apprendi* to all manner of criminal penalties requiring factual determinations, from fines and probation revocations to mandatory minimums and death sentences.

Criminal forfeiture, too, is a punishment that can be imposed only upon a specific factual finding—that the property in question was tainted by the offense. Consistent with *Apprendi* and our broader legal tradition, only a jury can decide whether forfeiture is warranted. That was the rule at common law: juries were regularly tasked with determining whether a criminal defendant possessed property subject to forfeiture. And juries, as the "bulwark between the State and the accused," *S. Union Co.* v. *United States*, 567 U.S. 343, 350 (2012), regularly found that a

defendant possessed no forfeitable property when the penalty was unwarranted. The same practice followed in the early American colonies until the First Congress effectively abolished criminal forfeiture in 1790. And when Congress reintroduced criminal forfeiture in 1970 to combat organized crime, Congress acknowledged its common law origins and limitations, mandating that juries enter a special verdict when resolving forfeiture allegations.

Yet five years before *Apprendi*, this Court held that the Sixth Amendment does not apply to criminal forfeiture. *Libretti* v. *United States*, 516 U.S. 29, 49 (1995). That precedent has left the circuits in a jam. While *Libretti*'s reasoning is incompatible with the Court's precedent and the jury's historical role, this Court alone enjoys the prerogative of overruling its own decisions. This case presents an ideal vehicle to do so and ensure that criminal defendants today enjoy the same Sixth Amendment protections that existed at the Founding.

ARGUMENT

I. THE RIGHT TO JURY TRIAL IS THE BACKBONE OF OUR CRIMINAL SYSTEM, AND IT EXTENDS TO SENTENCING DETERMINATIONS.

The right to jury fact-finding developed as a "check or control" on the government—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan* v. *Louisiana*, 391 U.S. 145, 151, 156 (1968) (citation omitted). It guarantees citizens' "control in the judiciary," *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004), and safeguards a person accused of a crime "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," *Duncan*, 391

U.S. at 156. Indeed, common law juries at times acted as the conscience of the community through "flat-out acquittals," even where culpability was obvious. *Jones* v. *United States*, 526 U.S. 227, 245 (1999).

Great Britain's refusal to extend "the benefits of Trial by Jury" to the colonies was one of the main reasons "cited in the Declaration of Independence" for the break with the Crown. *Erlinger* v. *United States*, 602 U.S. 821, 829 (2024) (quotation marks and citation omitted). "After securing their independence, the founding generation sought to ensure what happened before would not happen again." *Id.*; *see* 1 Annals of Cong. 784 (Joseph Gales ed., 1789) (Madison describing the jury-trial right as among "the most valuable" on "the whole list" of amendments he drafted). Thus, in "the early Republic, if an indictment or 'accusation lacked any particular fact which the laws made essential to the punishment,' it was treated as 'no accusation' at all." *United States* v. *Haymond*, 588 U.S. 634, 642 (2019) (plurality op.) (brackets and ellipsis omitted) (quoting 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* 55 (2d ed. 1872) ("Bishop")).

Juries historically determined not only guilt but also the defendant's sentence. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 70-71 (2003). The common law system "left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the 'judge was meant simply to impose [the prescribed] sentence.'" *Alleyne* v. *United States*, 570 U.S. 99, 108 (2013) (plurality op.) (citation omitted) (discussing 3 William Blackstone, *Commentaries* 396). A judge could not "swell the

penalty above what the law * * * provided for the acts" found by a jury of the defendant's peers. *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring) (citing Bishop, *supra*, at 55). Juries thus "indirectly checked" the "severity of sentences" by issuing "what today we would call verdicts of guilty to lesser included offenses." *Jones*, 526 U.S. at 245. For example, juries would "often * * * bring in larc[e]ny to be under the value of twelvepence" to avoid a mandatory death sentence. 4 Blackstone, *Commentaries* 238-239.

Juries were thus able—and expected—to tailor their verdicts to prevent excessive punishment. By providing an "opportunity for ordinary citizens to participate in the administration of justice," the Sixth Amendment preserved "the democratic element of the law," *Powers* v. *Ohio*, 499 U.S. 400, 406-407 (1991), and "place[d] the real direction of society in the hands of the governed," Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 88 (1998) (quoting 1 Alexis De Tocqueville, *Democracy in America* 293-294 (Phillips Bradley ed. 1945)).

II. *LIBRETTI* IS IRRECONCILABLE WITH THIS COURT'S FOCUS ON HISTORY TO DETERMINE THE SCOPE OF THE JURY-TRIAL RIGHT.

This Court looks to history to determine the contours of the jury-trial right. As the Court has explained, in enacting the Sixth Amendment, "the framers desired to preserve the jury safeguard as it was known to them at common law," *Johnson* v. *Louisiana*, 406 U.S. 366, 370-371 (1972) (Powell, J., concurring in the judgment), and the Constitution's guarantees "cannot mean less today than they did the day they were adopted," *Haymond*, 588 U.S. at 642 (plurality op.). Thus, in a long line of cases beginning with *Apprendi*, this Court has scrutinized historical

practices, treatises, and opinions to determine what protections are due criminal defendants today.

Libretti is a stark outlier. Despite acknowledging that "forfeiture" "is * * * punishment"—meaning that it traditionally fell within the jury's bailiwick—*Libretti* concluded "that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. at 41, 49. It did so without a shred of historical evidence, sharply breaking from the Court's usual analysis. That alone warrants reconsideration, but *Libretti* is also wrong on the merits. Reams of historical data establish that common law juries were indeed tasked with resolving all factual questions necessary to impose forfeiture. The Court should grant the Petition to preserve the original scope of the Sixth Amendment.

A. This Court has confirmed—again and again—that the scope of the jury-trial right must be informed by the jury's historical role at common law. Consider *Apprendi* itself. The question there was whether the Sixth Amendment requires the jury to make a factual determination authorizing an increase in the maximum prison sentence. 530 U.S. at 469. To answer that question, the Court turned to historical studies, which established that "[t]he substantive criminal law" in eighteenth-century England "tended to be sanction-specific; it prescribed a particular sentence for each offense." *Id.* at 479 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution, in* The Trial Jury in England, France, Germany 1700-1900, 13, 36-37 (Antonio Padoa Schioppa ed. 1987)). The judge "was meant simply to impose that sentence," not to

"determin[e]" it. *Id.* at 479-480 (quoting Langbein, *supra*, at 36-37; 3 Blackstone, *Commentaries* 396).

The Court also looked to contemporary treatises, which maintained that when a statute "annexe[d] a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision." *Id.* at 480 (quoting *Archbold's Pleading and Evidence in Criminal Cases* 51 (15th ed. 1862)). Based on that historical evidence, the Court held that "any fact that increases the penalty for a crime beyond prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

The Court conducted a similarly exhaustive analysis in *Southern Union*, where it assessed whether the jury must find facts necessary to impose a criminal fine. The Court began by surveying "authority suggesting that English juries were required to find facts that determined the authorized pecuniary punishment." 567 U.S. at 354 (citing 1 Thomas Starkie, *A Treatise on Criminal Pleading* 187-188 (1814); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 234-235 (3d ed. 1739)). The Court also looked to early American decisions like *Commonwealth* v. *Smith*, 1 Mass. 245 (1804), and *Clark* v. *People*, 2 Ill. 117 (1833), which confirmed that "the predominant practice" in America "was for such facts to be alleged in the indictment and proved to the jury." *See* 567 U.S. at 354-355. The Court finally cited an influential nineteenth century treatise, which reported that "the indictment must, in order to inform

the court what punishment to inflict, contain an averment of every particular thing which enters into the punishment." *Id.* at 356 (quoting Bishop, *supra*, at 330). The Court concluded that "*Apprendi* applies to the imposition of criminal fines." *Id.* at 360.

The Court followed that same historical thread from *Blakely* to *Booker* to *Cunningham* to *Alleyne* and, most recently, to *Erlinger*. *See Blakely*, 542 U.S. at 308 (whether a defendant's sentence may be increased based on a judicial determination that he acted with deliberate cruelty depends on how "the Framers would have" answered that question); *United States* v. *Booker*, 543 U.S. 220, 238 (2005) (assessing Sentencing Guidelines alongside "the ideals our constitutional tradition assimilated from the common law"); *Cunningham* v. *California*, 549 U.S. 270, 281 (2007) (inquiring into the relevant "longstanding common-law practice"); *Alleyne*, 570 U.S. at 108-109 (plurality op.) (examining "the relationship between crime and punishment" at "common law"); *Erlinger*, 602 U.S. at 843 (relying on "the original meaning of the Fifth and Sixth Amendments"); *see also id.* at 862-867 (Kavanaugh, J., joined by Alito and Jackson, JJ., dissenting) (explaining that, "to define the jury right," the Court "has looked to the common law, state practices in the founding era, opinions and treatises written soon afterward, and this Nation's historical tradition").

Even the Court's decision in *Oregon* v. *Ice*, 555 U.S. 160 (2009)—which *permitted* judges to unilaterally decide whether to impose sentences consecutively or concurrently—was grounded in a detailed "historical record." *Id.* at 168-169. The Court reviewed another of Bishop's treatises, which reported that it was common for "the judgment," rather than the jury

verdict, to "direct, that each succeeding period of imprisonment shall commence on the termination of the period next preceding." *Id.* (quoting 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* 649-650 (2d ed. 1858)). And it surveyed numerous English and American decisions dating to 1770, which similarly held that judicial imposition of consecutive sentences was "the common practice" in those years. *Id.* at 168-169 & nn.8-9 (citation omitted). "In light of this history," the Court concluded, "legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*" because there "is no encroachment here by the judge upon facts historically found by the jury." *Id.* at 169.

In each case, the Court looked to Founding-era practice to determine "[w]ho—judge or jury—found the facts" at issue. *S. Union*, 567 U.S. at 367 (Breyer, joined by Kennedy and Alito, JJ., dissenting). Not so in *Libretti*. The Court there said nothing about common law traditions, cited no treatises, invoked no English or Early American case law. The sum total of *Libretti*'s reasoning was that three cases from the 1980s—all of which have now been overruled—held "that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed." 516 U.S. at 49 (citing *McMillan* v. *Pennsylvania,* 477 U.S. 79 (1986); *Cabana* v. *Bullock,* 474 U.S. 376 (1986); *Spaziano* v. *Florida,* 468 U.S. 447 (1984)); *see also* Pet. 19-20. That reasoning is incompatible with the careful historical analysis the Court has conducted in every other case following *Apprendi*. And these "subsequent legal developments" make *Libretti* particularly weak precedent. *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446,

458 (2015); *id.* at 458 & n.4 (noting that a "legal last-man-standing" provides a reason to "depart from *stare decisis*").

B. Had *Libretti* consulted historical sources, it would have easily concluded that the Sixth Amendment demands jury fact-finding in forfeiture proceedings.

At common law, forfeiture was part of the penalty for felonies and treason. 4 Blackstone, *Commentaries* 376-377. Having "broken his part of the original contract between king and people," the convict lost the rights of community membership, including the right to have and transmit property. *Id.* at 375. Because forfeiture was absolute—convicted persons forfeited *all* of their property, depriving entire families of their livelihoods—juries were directed to make specific factual findings about the defendant's property. A typical charge in the seventeenth and eighteenth century thus instructed the jury to:

> Look upon the prisoner; you that are sworn, what say you, is he guilty of the felony whereof he stands indicted, or not guilty? If * * * Guilty, * * * What lands or tenements, goods or chattels, he (the prisoner) had at the time of the felony committed, or any time since?

W. Stubbs and G. Talmash, *The Crown Circuit Companion* 8 (Thomas Dogherty ed., 6th ed. 1791) (emphasis omitted); *see also, e.g.*, *The Office of the Clerk of the Peace*, *in* The Office of the Clerk of Assize 83, 158 (2d ed. 1694) (recording the same charge); *Hale* v. *Petit* (1562) 75 Eng. Rep. 387, 391-392; 1 Plowden 253, 256-257 (empaneling the jury to find whether a felon possessed livestock subject to forfeiture).

The jury's role in forfeiture proceedings was no mere formality but a fundamental guardrail against prosecutorial overreach: "it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or sei[z]e any man's possessions upon bare surmises without the intervention of a jury." 3 Blackstone, *Commentaries* 259; *see also* 2 William Hawkins, *A Treatise on the Pleas of the Crown* 639 (Thomas Leach ed., 6th ed. 1788) (explaining that the question of whether property is forfeitable "is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the Court where it is not expressly found"). And—just like with any other type of punishment—juries consistently exercised their authority to mitigate the severity of the forfeiture penalty when they deemed the punishment to be too burdensome. Blackstone, for example, observed that juries would "seldom find" that convicted persons tried to flee—a charge that demanded forfeiture—because they viewed forfeiture as "too large a penalty for [the] offen[s]e." 4 Blackstone, *Commentaries* 380. And other common law juries "almost invariably reported no forfeitable lands, tenements or chattels upon conviction," even when the defendants plainly had property. Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York* 715 (Patterson Smith ed. 1970).

All that carried over to the American colonies. Early American juries were similarly charged with finding whether the accused had any "goods or chattels * * * at the time of the crime," and were required to make those findings explicit in their verdicts. Goebel & Raymond, *supra*, at 674 (citation omitted); *see also* George C. Thomas III, *Colonial Criminal Law and*

Procedure: The Royal Colony of New Jersey 1749-57, 1 N.Y.U. J. L. & Liberty 671, 701 (2005) (reporting similar charges in eight cases); *Rimlawi* v. *United States*, 145 S. Ct. 518, 518 (2025) (Gorsuch, J., dissenting from denial of certiorari) ("more than a little evidence suggests that, at the time of the founding, juries found the facts needed to justify criminal restitution awards").

And, just like their English counterparts, early American juries consistently found that "the defendant 'hath no goods or chattels, at the time of the felony or ever afterwards.'" Herbert William Keith Fitzroy, *The Punishment of Crime in Provincial Pennsylvania*, 60 Pa. Mag. of Hist. & Biography 242, 258 (1936) (quoting a Pennsylvania jury's verdict from April 1728); *see also* Raphael Semmes, *Crime and Punishment in Early Maryland* 21-29 (1938) (recounting a famous 1666 trial of Pope Alvey, where the jury found Alvey guilty of felony theft but repeatedly refused to find that Alvey had any lands, goods, or chattels that could be forfeited). In fact, historians have been able to identify only *three* instances in which a jury identified forfeitable property in colonial New York and "*no* cases" at all "in which the jury made that finding" in colonial New Jersey. Goebel & Naughton, *supra*, at 715; Thomas III, *supra*, at 702 (emphasis added). Early American juries therefore understood it to be their prerogative and their duty to mitigate availability and amount of forfeiture through specific factual findings.

The penalty of forfeiture largely disappeared in the colonies by the middle of the eighteenth century. Thomas III, *supra*, at 702. Most defendants were "so meanly circumstanced that there was nothing to forfeit." *Id.* (quoting Goebel & Naughton, *supra*, at

716). The colonies were also chronically underpopulated, and crown officers had no incentive to deprive defendants' heirs of a freehold estate, for doing so would encourage them to leave the colony. *Id.*

But most importantly, the penalty was simply viewed as too harsh. Again, forfeiture at common law was absolute: upon conviction for a felony or treason, the offender's entire estate, real and personal, was forfeited to the Crown or the feudal lord. 4 Blackstone, *Commentaries* 374-381. Forfeiture also could involve "corruption of blood," meaning that the offender could not inherit from his ancestors or transmit his own property to his heirs. *Id*. at 377-378. That was a devastating punishment that condemned a defendant's entire family to destitution. And it was not unheard of for men to choose to be "pressed to death" to avoid a jury's finding of forfeiture that would leave their children "penniless." *See* Frederic W. Maitland & Francis C. Montague, *A Sketch of English Legal History* 60-61 (James F. Colby ed., 1915). Thus, when America gained its independence, the Framers prohibited corruption of blood as punishment for treason, U.S. Const. art. III, § 3, cl. 2, and the First Congress banned forfeiture altogether as punishment for federal crimes, *see* Act of Apr. 30, 1790, § 24, 1 Stat. 112, 117 ("no conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or any forfeiture of estate").

Not until 1970 did Congress resurrect criminal forfeiture to combat organized crime and major drug trafficking. *See United States* v. *Bajakajian*, 524 U.S. 321, 332 & n.7 (1998). Critically, however, Congress recognized the strict safeguards that common law placed on the penalty. The Advisory Committee,

tasked with amending the Federal Rules of Criminal Procedure to implement the forfeiture provisions, explained that defendants under common law were "entitled to notice, trial, and a *special jury finding* on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction." Fed. R. Crim. P. 7 advisory committee's note (1972) (emphasis added). The Committee therefore added Rule 31(e) to ensure that forfeiture allegations are spelled out in "the indictment or the information" and that "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture." Fed. R. Crim. P. 31(e) (1972). A subsequent Senate Report similarly acknowledged forfeiture's "origins in ancient English common law" and endorsed the new Rule 31(e)'s requirement that "a special verdict must be returned with respect to the forfeiture allegations." S. Rep. No. 98-225, at 193-194 & n.566 (1983).

The history of forfeiture is thus exceedingly clear: juries have always had a right to determine the predicate facts necessary to impose forfeiture and to mitigate that punishment as part of the jury's historic role as a "circuit breaker in the State's machinery of justice." *Blakely*, 542 U.S. at 306. And when history "suppl[ies] a clear answer, we can conclude that a rule is part of the jury right enshrined in the Sixth Amendment." *Erlinger*, 602 U.S. at 862 (Kavanaugh, J., joined by Alito and Jackson, JJ., dissenting). *Libretti* was wrong to conclude that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. at 49.

III. *LIBRETTI* IS IRRECONCILABLE WITH THIS COURT'S PRECEDENT.

As Petitioner explains, *Libretti* is also inconsistent with the *Apprendi* cases, particularly the Court's decisions in *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Southern Union*. In *Ring*, the Court expressly rejected the argument that the jury's role traditionally was limited to finding guilt or innocence. Rather, consistent with the history discussed above, the Court held that common law juries were charged with determining all facts necessary for the imposition of a particular "punishment." *Id.* at 599, 604. Otherwise, as the Court explained, the Sixth Amendment would turn into a semantics exercise, allowing Congress to jettison jury fact-finding simply by characterizing "a fact or circumstance" as a "sentencing factor" rather than an "element of the offense." *Id.* at 605 (quotation marks and citations omitted); *see also Apprendi*, 530 U.S. at 502-518, 521 (Thomas, J., joined by Scalia, J., concurring) (concluding, after a thorough historical overview, that the jury must find all facts that form "the basis for imposing or increasing punishment").

The Court put an even finer point on that concern in *Southern Union*, where it was asked to decide whether the Sixth Amendment applies differently to criminal fines than other types of criminal penalties like imprisonment or a death sentence. The Court answered no, because "the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts." 567 U.S. at 349. Criminal fines therefore implicate "*Apprendi*'s animating principle"—"the preservation of the jury's historic role as a bulwark between the State and the accused"—as

much as any other type of punishment, and the Court saw "no principled basis" to distinguish between them. *Id.* at 349-350 (quotation marks and citation omitted).

Ring and *Southern Union* apply fully to criminal forfeiture. It is a "simple fact" that criminal forfeiture is "punishment"—even *Libretti* recognized as much. 516 U.S. at 41; *accord Bajakajian*, 524 U.S. at 328. And there is no principled basis to treat criminal forfeiture differently from criminal fines (or any other type of criminal penalty). *Alexander* v. *United States*, 509 U.S. 544, 558 (1993). Modern criminal forfeiture statutes demand factual findings. For example, the money laundering statute here requires that the property be "involved in [the] offense" or "traceable to such property." 18 U.S.C. § 982(a)(1). Other federal criminal forfeiture statutes demand similar links between the property and the offense. Criminal forfeiture, then, implicates exactly the same *Apprendi* concerns the Court highlighted in *Southern Union*. *See also Hester* v. *United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (reasoning that, without fact-finding, the statutory maximum "is usually *zero*, because a court can't award *any* [money] without finding additional facts").

Criminal forfeiture, moreover, remains a severe penalty that can often plunge a defendant's entire family into devastating poverty. While criminal defendants are no longer subject to death sentences to avoid forfeiture, a large financial penalty obviously "engender[s] a significant infringement of personal freedom." *S. Union*, 567 U.S. at 351 (quotation marks and citation omitted). Indeed, this Court has already held in the Eighth Amendment context that criminal

forfeiture is "clearly a form of monetary punishment no different * * * from a traditional 'fine.'" *Alexander*, 509 U.S. at 558. *Libretti*'s reasoning is no longer valid.

The Court has previously corrected just such anomalies. In *Alleyne*, for example, the Court held that the jury must determine all facts necessary to increase the mandatory minimum sentence, overruling *Harris* v. *United States*, 536 U.S. 545 (2002). The Court explained that *Harris* cannot be squared with *Apprendi* because *Harris*'s distinction "between facts that increase the statutory maximum and facts that increase only the mandatory minimum" ignores the "historic role of the jury" and "the original meaning of the Sixth Amendment." *Alleyne*, 570 U.S. at 103, 114. And *Ring* required the jury to find the presence of aggravating circumstances warranting the death penalty, overruling *Walton* v. *Arizona,* 497 U.S. 639 (1990). The Court emphasized "the English jury's role in determining critical facts in homicide cases" and concluded that *Walton* fails *Apprendi*'s historical inquiry. *Ring*, 536 U.S. at 599, 609 (citation omitted). Just so here. The Court should grant the Petition to resolve the forfeiture anomaly, too.

IV. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

The question presented is undeniably important. After eschewing criminal forfeiture for 180 years, Congress reintroduced the practice to the American legal system in 1970. *Bajakajian*, 524 U.S. at 332 & n.7. Today, criminal forfeiture is "a routine part of criminal law enforcement in federal cases." Stefan D. Cassella, *Criminal Forfeiture Procedure*, 32 Am. J. Crim. L. 55, 56 (2004). The U.S. Code is replete with criminal forfeiture provisions for crimes from food-stamp fraud, 42 U.S.C. § 1786(p), to copyright

infringement, 17 U.S.C. § 506(b). And while those statutes generally demand tainted "property," the circuits uniformly permit judges to award forfeiture money judgments instead. *See United States* v. *Olguin*, 643 F.3d 384, 397 (5th Cir. 2011) (collecting cases). Such judgments do not seek "property" tainted by the offense, 18 U.S.C. § 982(a)(1); instead, they put defendants on the hook for often massive sums of money even where—as here—the defendant did not ultimately retain the proceeds of the crime. *See* Pet. 14 (the district court ordered Mr. Mizrahi to forfeit $4.5 million even though that money ultimately went to Mr. Mizrahi's co-conspirators); *see also United States* v. *Peters*, 732 F.3d 93, 95 (2d Cir. 2013) (compelling defendant to pay a $23,154,259 money judgment); *United States* v. *Haberman*, 338 F. App'x 442, 443 (5th Cir. 2009) (per curiam) ($20,000,000). These orders magnify the potential for abuse and make the jury safeguard that much more important.

As Petitioner explains (at 3), in 2024 alone, U.S. Attorneys' Offices obtained more than $2.5 billion in criminal forfeiture orders across thousands of cases—five times the federal government's take from civil forfeiture. *United States Attorneys' Annual Statistical Report: Fiscal Year 2024* at 64 tbl. 16, U.S. Dep't of J. (2025) ("USDOJ"), https://perma.cc/WGZ4-PGES. Absent this Court's intervention, the government can seek forfeiture and money judgments without jury fact-finding in every one of those cases.

As this Court has noted, "broad forfeiture provisions carry the potential for Government abuse." *Libretti*, 516 U.S. at 43. Federal criminal forfeiture goes straight to the Department of Justice, not only in the form of cash but also assets like "fast cars, boats and planes." David J. Fried, *Rationalizing Criminal*

Forfeiture, 79 J. Crim. L. & Criminology 328, 362 (1988). In 2024, only *one fifth* of the assets derived from federal criminal forfeiture was used for victim compensation; the rest remained with the Department. USDOJ, *supra*, at 64 tbl. 16. That self-interest creates an obvious risk that prosecutors' "charging decisions may be distorted by considerations of the most profitable course." Fried, *supra*, at 365.

Judicial fact-finding under these circumstances does more than merely infringe criminal defendants' jury-trial rights. It also "undermines respect for the law and the jury system." *United States* v. *Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J.). It deprives the sentence of the legitimacy that follows from the verdict of a jury of one's peers and "divest[s] the people at large * * * of their constitutional authority to set the metes and bounds of judicially administered criminal punishments." *Haymond*, 588 U.S. at 646 (plurality op.) (quotation marks and citation omitted). The Court's review is urgently needed to restore the jury's historic role.

CONCLUSION

For these reasons, and the reasons stated in Mr. Mizrahi's Petition, the Court should grant the Petition and reverse.

Respectfully submitted,

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