No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JACK HOLDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When Congress defined the offenses of mail and wire fraud narrowly to punish only those who devise or intend to devise a scheme to defraud, do courts violate separation of powers and due process by expanding the scope of criminal liability through jury instructions that also allow conviction of one who "participates in" a scheme to defraud?

2. When Congress prescribed the mechanisms available for criminal forfeiture of property, do courts violate separation of powers and due process by authorizing forfeiture by money judgment in a criminal case, when that mechanism exists by statute for some offenses but not for the offense of conviction, and when use of a money judgment serves as an end run around Congress's careful limits on seizure of substitute property?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Jack Holden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 26, 2018, as amended on denial of petition for rehearing on October 30, 2018.

OPINIONS BELOW

The opinion of the Ninth Circuit on the mail and wire fraud jury instructions, as amended on denial of petition for rehearing, appears at 908 F.3d 395 (9th Cir. 2018). Pet. App. A. The opinion on forfeiture is unpublished and appears at 732 Fed. Appx. 619 (9th Cir. 2018). Pet. App. B. The District Court's determinations on forfeiture and jury instructions are unreported. Pet. Apps. E & I.

JURISDICTIONAL STATEMENT

The court of appeals issued its amended opinion on October 30, 2018. Pet. App. A. On December 18, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 28, 2019. *See* 18A631. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1, of the United States Constitution provides in relevant part: "All legislative Powers herein granted shall be vested in a Congress . . . ."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law."

Mail fraud is punished under 18 U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than 20 years, or both.

Wire fraud is punished under 18 U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The statutes pertaining to forfeiture are included in Petitioner's Appendix N.

INTRODUCTION

This petition involves two significant areas of judicial disregard for the plain text of criminal statutes, where lower courts are failing to follow the reasoning of this Court's governing precedent on separation of powers and narrow construction of criminal statutes. *First*, the Ninth Circuit expanded the crimes defined in the plain text of the wire and mail fraud statutes, which punish only those who "devise" any scheme or artifice to defraud, by upholding use of its model jury instructions that also criminalize those who "participated in" a scheme to defraud. Contrary to this Court's guidance on construing fraud statutes, the Ninth Circuit justified its expansion of the statute to encompass individuals who "participated in" a scheme by stating, "we do not usurp the role of Congress simply by

construing a criminal statute broadly." The broad reading of the federal fraud statute has resulted in disarray among the circuits, with seven adding a form of "participated in" to model jury instructions on wire and mail fraud, and two following the statutory text. This Court should address this frequently recurring area of federal criminal law by resolving the conflicting approaches among the circuits and vindicating the Court's precedent that bars judicial creation of criminal liability beyond the text of the fraud statute.

Second, the Ninth Circuit disregarded the plain text of the applicable forfeiture statutes by ordering forfeiture of a "money judgment," when no such forfeiture is authorized in the text of the statutes. This disregard for the congressional limits to criminal forfeiture is repeated in all twelve federal circuits and allows prosecutors to make an end run around Congress' restriction on forfeiture of substitute assets. Just like the joint-and-several liability order invalidated in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), the money judgment order undermines Congress's "carefully constructed statutory scheme" because a money judgment can be enforced against untainted funds and future earnings, regardless of whether the statutory criteria for seizing substitute assets are met. The Court should resolve this important and recurring issue because the circuits' precedent permitting extra-statutory punishment has been accreting prior to and after the reasoning provided in *Lagos v. United States*, 138 S. Ct. 1684 (2018), *Dean v. United States*, 137 S. Ct. 1170, 1173 (2017), and *Honeycutt*, 137 S.Ct. at 1624. Under this Court's precedent, the absence of authorization to order a "money judgment" in the forfeiture statutes for mail and wire fraud, and its presence elsewhere in a forfeiture statute not applicable here,

forecloses judicial expansion to allow "money judgment" forfeiture based on conviction for fraud.

The defense preserved constitutional objections to the expansion of the relevant statutes both at trial and on appeal, so this case presents an ideal vehicle for review of these important issues.

STATEMENT OF THE CASE

A. Over Objection, The Government Convicted Mr. Holden Of Wire And Mail Fraud Using Judicially-Expanded Elements.

Mr. Holden and his co-defendant Lloyd Sharp raised money for innovative but unsuccessful biodiesel projects in Ghana and Chile. Pet. App. 6-7. The businesses failed, the investors lost money, and the government charged both men with seventeen counts of mail and wire fraud, conspiracy to commit mail and wire fraud, conspiracy to commit money laundering, and engaging in monetary transactions with criminally derived property. Pet. App. 6. The indictment also contained a forfeiture allegation. Pet. App. 33-34.

Although Mr. Sharp pled guilty, Mr. Holden invoked his right to trial, which took place over thirteen days in September and October 2015. The defense presented witnesses from Ghana and Chile on Mr. Holden's significant business efforts, arguing in closing that Mr. Holden had a good faith belief in his endeavors but was duped by Mr. Sharp, who was a serial con man. Pet. App. 58-64. The government agreed with that description of

Mr. Sharp. Pet. App. 65 ("Lloyd Sharp is absolutely and positively a conman. No doubt about that.").

For jury instructions on the substantive mail and wire fraud counts, the defense objected repeatedly to use of the Ninth Circuit's Model Jury Instruction, which creates liability for one who "participates in" a scheme to defraud. Pet. App. 39-41; 45-50. The defense noted that the phrase "participate in" is not part of the mail or wire fraud statutes as written by Congress, as these impose criminal liability only on those who "devise[]" or intend to devise a fraud scheme. Pet. App. 39-41. The defense submitted a proposed instruction with the term deleted. *Id.* Counsel further argued that the instruction would dilute the required *mens rea* in violation of the Fifth and Sixth Amendments. Pet. App. 40. The court rejected the defense arguments. Pet. App. 49-50. The court's final instructions on the elements of wire fraud included liability for one who participates in the scheme within the first element:

> First, the Defendant knowingly devised, *participated in*, or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent statements, representations, promises, or omissions of material fact, or the Defendant knowingly aided and abetted Lloyd Sharp in doing so[.]

Pet. App. 53 (emphasis added). The instructions for mail fraud were essentially identical. Pet. App. 57. The jury convicted Mr. Holden on all counts submitted, including eight counts of mail and wire fraud. Pet. App. 6.

B. The Defense Objected To The Forfeiture Order.

At sentencing on May 5, 2016, the government sought a preliminary and final order of forfeiture in the form of a money judgment against Mr. Holden. Pet. App. 70. The defense objected. Pet. App. 70. The government relied on 18 U.S.C. § 981(a)(1)(C), the civil forfeiture statute made applicable to criminal cases by operation of 28 U.S.C. § 2461(c), and 21 U.S.C. § 853. Neither statute, however, authorizes the entry of a money judgment. Rather, § 981 states that forfeitable property includes: "[a]ny property, real or personal" that constitutes or is derived from proceeds of the relevant criminal offense. 18 U.S.C. § 981(a)(1)(C). Section 853(p) permits forfeiture of "substitute property" if the government makes certain factual showings. By their plain text, only forfeiture of "property" is authorized under § 981(a)(1) and § 853(p), not the entry of money judgments.

In later pleadings, the defense elaborated on its objection to the money judgment. Pet. App. 74. Noting that a separate forfeiture statute expressly authorizes the imposition of money judgments for a different offense, the defense urged the trial court not to read this mechanism into the forfeiture statutes that applied to Mr. Holden's offenses. Pet. App. 81-82. That other statute, which applies only to the crime of bulk cash smuggling, provides in part:

> (4) Personal money judgment.—
> If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to section 413(p) of the Controlled Substances Act, the court shall

> enter a personal *money judgment* against the defendant for the amount that would be subject to forfeiture.

31 U.S.C. § 5332(b)(4) (emphasis added). In contrast to this specific statutory authorization of a money judgment to enforce forfeiture for the crime of cash smuggling, the general civil and criminal forfeiture statutes that applied to Mr. Holden's wire and mail fraud counts include no such authorization. The defense noted that § 981 authorizes a sentencing court to order a defendant to forfeit specific property that has a sufficient statutory nexus to the offense of conviction or, if that property is proven unavailable for one of the statutory reasons, substitute property under 21 U.S.C. § 853(p).[1]

After the trial court issued an opinion denying defense arguments on forfeiture (Pet. App. 84), the parties entered a joint stipulation on the forfeiture amount, with the specific agreement that the defendant was "not waiving any argument he has made regarding forfeiture." Pet. App. 94-95. The trial court, having already determined that Mr. Holden had no apparent assets (Pet. App. 71), ordered a $1,410,760.00 money judgment forfeiture against Mr. Holden, along with restitution to investor victims in the identical amount, for a total financial obligation of $2,821,520.00. Pet. App. 97, 107.

C. The Ninth Circuit Denied Relief On The Merits.

Among other issues, Mr. Holden appealed his conviction and the forfeiture order, renewing his constitutional and statutory claims. He maintained that the judicial expansion

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[1] Under 28 U.S.C. § 2461(c), the procedures in § 413 of the Controlled Substances Act (21 U.S.C. § 853) apply to criminal forfeiture proceedings, with limited exceptions not relevant here.

of culpable conduct under the mail and wire fraud statutes violated his rights under the Due Process Clause, and that the judicial creation of a crime violated the separation of powers doctrine. Pet. App. 6. Noting the clear intervening direction from this Court in *Honeycutt* on the textual limits of the same forfeiture statute at issue in his case, Mr. Holden argued that the money judgment forfeiture was not authorized by law and that the judicially-created collection mechanism infringed on separation of powers. Pet. App. 13.

The Ninth Circuit rejected these arguments. On the issue of forfeiture, the appellate court issued an unpublished memorandum decision, stating that it was bound by prior Ninth Circuit case law: "We are not persuaded that our decision in *Newman* is 'clearly irreconcilable' with any recent Supreme Court decisions, [] so we are bound by its conclusion that, 'at least where the proceeds of the criminal activity are money, the government may seek a money judgment as a form of criminal forfeiture' under 18 U.S.C. § 981." Pet. App. 13 (quoting *United States v. Newman*, 659 F.3d 1235, 1242 (9th Cir. 2011)).

On the challenge to the mail and wire fraud instructions, the Ninth Circuit, in a published opinion, acknowledged but rejected the defense argument that expansion of liability to include participators "amount[ed] to judicially created crimes in violation of separation-of-powers principles." Pet. App. 6. Citing, among other sources, a case in which the Second Circuit opined on who "should be held liable" under the mail fraud statute, the Ninth Circuit characterized judicial invention of participation liability as statutory "interpretation" rather than judicial lawmaking. Pet. App. 7 (citing *Schwartzberg v. United*

States, 241 F. 348, 352 (2d Cir. 1917)). The Ninth Circuit offered that "the line separating statutory interpretation and judicial lawmaking is not always clear and sharp" in explaining its decision. Pet. App. 7. The Ninth Circuit also asserted that "we do not usurp the role of Congress simply by construing a criminal statute broadly." Pet. App. 7. The appellate court affirmed conviction based on jury instructions that added criminal liability for one who "participated in" the scheme to defraud. Pet. App. 10.

The Ninth Circuit reversed the trial court's rulings on unrelated sentencing and restitution issues (Pet. App. 10), and the government moved for rehearing on the restitution question. Pet. App. 5. The Ninth Circuit issued an amended opinion on October 30, 2018, and denied rehearing. Pet. App. 2. The mandate issued on November 7, 2018.

REASONS FOR GRANTING THE WRIT

Both questions in this case meet this Court's criteria for granting certiorari as issues of exceptional national importance that divide the circuits or that manifest a disregard of this Court's holdings.

First, by adding liability for one who "participated in" a scheme to defraud, the courts below expanded the scope of criminal conduct under the mail and wire fraud statutes beyond the plain text enacted by Congress. The issue raised is of national importance, both because mail and wire fraud offenses are widely prosecuted, and because seven circuits have adopted model jury instructions adding "participate in" liability to the elements of mail and wire fraud, while two circuits limit jury instructions to the statutory text. Judicial

enlargement of criminal statutes threatens the separation of powers and due process and violates clear guidance from this Court on construing criminal statutes narrowly.

Second, the Ninth Circuit approved a money judgment forfeiture in conflict with the plain text of the applicable forfeiture statutes. Following this Court's decision in *Honeycutt*, which directs that forfeiture statutes be narrowly construed and prohibits an Executive Branch "end run" around forfeiture procedures, this decision is fundamentally wrong. Moreover, this error, repeated in all twelve federal circuits, is especially pressing today as criminal forfeitures increase and provide a source of revenue for federal agencies. Given the entrenched precedent within the circuits, only this Court can vindicate the constitutional principles at stake in these two important and recurring issues.

A. The Jury Instruction Issue

1. The Courts of Appeal Are Divided Over The Proper Jury Instruction For Mail And Wire Fraud.

In the decision below, the Ninth Circuit acknowledged that the text of the mail and wire statutes identify for prosecution only those who "'devise[] or intend[] to devise any scheme or artifice to defraud'; the word 'participate' does not appear in the statutes." Pet. App. 6-7. The court nevertheless upheld the conviction in this case on jury instructions that allowed conviction of one who "participated in" a scheme to defraud. Model jury instructions in the First, Third, Sixth, Seventh, Eighth, and Eleventh Circuits similarly expand the elements of mail and wire fraud to impose criminal liability not just on those

who devise a scheme, but also on those who participate in it. Pet. App. 110-216. For example, the Third Circuit instructs for mail fraud:

> In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:
>
> > First: That (name) knowingly devised a scheme to defraud or to obtain money or property (or the intangible right of honest services) by materially false or fraudulent pretenses, representations or promises (or willfully participated in such scheme with knowledge of its fraudulent nature);

Model Instruction 6.18.1341 of the Third Circuit; Pet. App. 123.

Case law in the circuits upholds this judicial addition of criminal liability for those who participate in the fraud. *See, e.g.*, *United States v. Faulkenberry*, 614 F.3d 573, 581 (6th Cir. 2010) (holding that "willful participation" in a scheme devised by another is sufficient evidence to convict a defendant of wire fraud); *United States v. Yefsky*, 994 F.2d 885, 891-92 (1st Cir. 1993) ("The defendant need not instigate the scheme so long as he willfully participates in it, with the knowledge of its fraudulent nature and with the intent to achieve its illicit objectives."); *United States v. Earles*, 955 F.2d 1175, 1177 (8th Cir. 1992) ("One who knowingly participates in an ongoing mail fraud devised by another is guilty of mail fraud.").

In conflict with these circuits are the Fifth, Tenth, and D.C. Circuit. The Fifth Circuit's Model Jury Instructions accurately reflect the mail and wire fraud statutes and do not add liability for one who "participates in" a scheme to defraud. Pet. App. 136 ("First: That the defendant knowingly devised or intended to devise a scheme to defraud."). The

Tenth Circuit similarly tracks the statutory language in its instructions, (Pet. App. 191), although its courts have concluded that a defendant may be convicted for "join[ing] a scheme devised by someone else." *United States v. Prows*, 118 F.3d 686, 692 (10th Cir. 1997). The D.C. Circuit does not have a model jury instruction for mail or wire fraud, but has held that the first element of mail and wire fraud is the "formation of a scheme to defraud," implying in dicta that mere participation is not sufficient. *See United States v. Lemire*, 720 F.2d 1327, 1340 (1983) (approving a jury instruction that provided that "the government must prove that one or more of the defendants devised or intended to devise a scheme or artifice to defraud").

In another sign of the disarray existing in the circuits concerning the elements of mail and wire fraud, the First and Third Circuit instructions require a willful mental state for persons who participate in a scheme to defraud (Pet. App. 111, 123), whereas the Sixth, Seventh, Eighth, Ninth and Eleventh Circuit instructions require only "knowing" participation. Pet. App. 123, 147, 162, 165, 196, 208.

2. The Ninth Circuit's Decision Upholding Conviction On Judicially-Expanded Elements Of Mail And Wire Fraud Violates Separation Of Powers And Due Process And Fails To Conform To This Court's Directives On Construction Of Criminal Laws.

Congress, not the Judiciary, defines the contours of a crime. *Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature[.]"). Courts have no authority to expand the forms of culpable conduct beyond those enumerated by Congress. *See Nichols v. United States*, 136 S. Ct.

1113, 1118 (2016) ("[W]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court . . . . To supply omissions transcends the judicial function.") (citation omitted); *Yates v. United States*, 135 S. Ct. 1074, 1088–89 (2015) (leaving to Congress the decision whether to expand the covered criminal conduct under a statute). A court that creates a crime not codified by Congress usurps legislative authority and violates the separation of powers. *See Mistretta v. United States*, 488 U.S. 361, 385 (1989) (the separation of powers prevents "the Judiciary from encroaching into areas reserved for the other Branches"); *INS v. Chadha*, 462 U.S. 919, 951 (1983) (each branch should "confine itself to its assigned responsibility").

Furthermore, the Due Process Clause is violated when a person is punished for an act that a criminal statute does not prohibit. *Fiore v. White*, 531 U.S. 225, 228 (2001); *see also McNally v. United States*, 483 U.S. 350, 360 (1987) ("There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." (citation omitted)). A conviction cannot rest on an equivocal direction to the jury on a basic issue. *Zant v. Stephens*, 462 U.S. 862, 881 (1983). This principle sharply applies when the additional language is not only as nebulous as "participates in," but also includes aiding and abetting liability for the participator. *See Skilling v. United States*, 561 U.S. 358, 403-06 (2010) (construing criminal statute narrowly to avoid unconstitutional vagueness and to reach only culpable conduct).

The Ninth Circuit's reasoning upholding expanded liability under the jury instructions is unpersuasive. First, the Ninth Circuit asserted that the addition of liability

for participators was an act of statutory interpretation, not "judicial lawmaking." Pet. App. 7. Reviewing the history of this addition, the court noted that a century ago, the Second Circuit understood the "substance" of the wire fraud offense was "the prosecution of a fraudulent purpose," so that all who join in or participate "should be held liable." Pet. App. 7 (quoting *Schwartzberg*, 241 F. at 352). Similarly, in a case of equal vintage, the Eighth Circuit understood that a scheme to defraud has the "features of a conspiracy," rendering all who join liable. *Blanton v. United States*, 213 F. 320, 325 (8th Cir. 1914). The Ninth Circuit's later cases simply adopted this interpretation, the *Holden* court explained: "We have often noted the similarities between conspiracies and joint schemes to defraud." Pet. App. 7 n.6 (citing *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992)).

Whatever the merits of this view on the connection between conspiracies and schemes to defraud, "'[t]he short answer is that Congress did not write the statute that way.'" *Corley v. United States*, 556 U.S. 303, 315 (2009) (citation omitted). And this Court has long cautioned that, especially in the realm of criminal statutes, judges should take care not to expand liability without congressional authorization. *United States v. Bass*, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity[.]"); *United States v. Wiltberger,* 18 U.S. 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

In addition, what the Ninth Circuit's review of history fails to note is that, in 2002, Congress passed a statute specifically criminalizing conspiracy to commit mail and wire

fraud, 18 U.S.C. § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense . . . ."). Pub.L. 107-204, Title IX, § 902(a), July 30, 2002, 116 Stat. 805. Congress spoke clearly and defined a new crime, relying on well-established conspiracy principles, that covered those who join in a scheme to defraud. *See Skilling*, 561 U.S. at 402 (urging Congress to "speak more clearly" concerning desired reach of criminal laws). Thus, even if it were permissible to construe the substantive mail and wire fraud statutes to include participators *before* Congress enacted this statute, the justification fails to pass scrutiny after enactment of a separate statute to punish conspirators. If the government seeks to convict for conspiracy to commit wire fraud, it must do so under a conspiracy count, not by adding the participation portion of the elements of conspiracy to the substantive counts.[2]

Second, the Ninth Circuit justified the additional language as merely a broad construction of the statute. Pet. App. 7 ("[C]riminal laws are for courts . . . to construe, . . . and we do not usurp the role of Congress simply by construing a criminal statute broadly."). This reasoning ignores well-established direction from this Court that criminal statutes, unlike civil, must be construed narrowly to effectuate their purpose. *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018) (recognizing judiciary's customary exercise of

[2] In this case, the government chose both options: It charged and convicted Mr. Holden of a single count of conspiracy under 18 U.S.C. § 1349 *and* it argued for and obtained the model jury instruction for the eight substantive wire and mail fraud counts that added liability for one who "participated in" the scheme of another. In essence, the instruction converted all the counts to conspiracy counts, without requiring conspiracy's mental state of willfulness.

restraint and deference to Congress on reach of a criminal statute); *McDonnell v. United States*, 136 S. Ct. 2355, 2367-68 (2016) (requiring a narrow reading of the fraud statute based on principles including the need to avoid significant constitutional issues); *United States v. Stevens*, 559 U.S. 460, 462 (2010) (noting that to read the statute as the government desires "requires rewriting, not just reinterpretation"); *United States v. Lanier*, 520 U.S. 259, 266 (1997) (noting the "canon of strict construction of criminal statutes"); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring) (under separation of powers principles, the Constitution "does not license judges to craft new laws"). The Ninth Circuit's assertion of authority to construe criminal statutes "broadly" has no support in this Court's jurisprudence.

Third, the Ninth Circuit's interest in giving effect "to the will of the legislature" by punishing participators in a scheme is misplaced. Pet. App. 7. Congress knows how to penalize those who participate in an offense when it chooses to. *See, e.g.*, 18 U.S.C. § 1962(c) (making it unlawful "to conduct or *participate*, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.") (emphasis added). It is Congress's inclusion of participation liability in one criminal statute and exclusion in another that should be given effect. *See Lagos*, 138 S. Ct. at 1690 (noting limited interpretation of restitution statute is supported by comparison with other statute containing the very language government sought to read into statutory silence); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

For decades, most circuits have added the "participate in" language to mail and wire fraud jury instructions, an addition that expands the scope of parties subject to conviction. But decades of error do not make the practice correct. *See, e.g., Honeycutt*, 137 S. Ct. at 1631 n.1 (vacating decades of case law in most circuits allowing judicially-created remedy of joint and several liability, because forfeiture statute does not by its terms authorize such remedy). The age and prevalence of an error provide no grounds for its continuation. *See Rapanos v. United States*, 547 U.S. 715, 752 (2006) (rejecting idea that 30 years of disregard for statutory text shielded flawed interpretation from judicial review).

By granting certiorari, this Court can review the widespread practice of supplementing the plain text of the mail and wire fraud statutes, a practice that creates federal criminal liability for one who merely participates in a mail or wire fraud.

3. The Breadth Of Criminal Liability Under The Federal Mail And Wire Fraud Statutes Presents A Question of National Importance That Is Fully Preserved In This Case And Ripe For Review.

This issue merits the Court's review. The mail and wire fraud statutes provide widely used and potent tools for prosecutors. Recent statistics indicate that 10% of all federal prosecutions involve economic crimes, and more than half of those are prosecuted under generic fraud statutes, such as the mail and wire fraud statutes. UNITED STATES SENTENCING COMM'N, WHAT DOES FEDERAL ECONOMIC CRIME REALLY LOOK LIKE 5-6

(2019). This means that thousands of defendants each year must weigh the risk of trial based on jury instructions that vary among the circuits and, in most circuits, expand liability beyond the text enacted by Congress. Moreover, the important constitutional principles raised here apply broadly across criminal cases. This Court's guidance would provide needed direction to the lower courts on the importance of separation of powers, due process, and narrow construction of criminal statutes. Because these issues were clearly raised and preserved below, this case presents a perfect vehicle for this Court's review.

B. The Money Judgment Forfeiture Issue.

1. The Error Of Allowing Forfeiture By Means Of A Money Judgment Under 18 U.S.C. § 981 And 21 U.S.C. § 853 Is Entrenched In Every Circuit And Warrants This Court's Review.

The Ninth Circuit relied on its longstanding precedent in *Newman* to uphold money judgment by forfeiture despite the lack of textual support in the statutes. Pet. App. 13 (citing *Newman*, 659 F.3d at 1242). Similarly, every Court of Appeals has precedent approving the use of money judgments for forfeiture under the general forfeiture statutes. *United States v. Misla-Aldarondo*, 478 F.3d 52, 72–75 (1st Cir. 2007) ("[A] court may properly issue a money judgment as part of a forfeiture order, whether or not the defendant still retains the actual property involved in the offense, or any property at all."); *United States v. Awad*, 598 F.3d 76 (2d Cir. 2010) (holding that criminal forfeiture statutes permit imposition of a money judgment on a defendant who possesses no assets at time of sentencing); *United States v. Vampire Nation*, 451 F.3d 189, 201-02 (3d Cir. 2006) (joining other circuits in finding money judgments permissible under § 853); *United States v.*

Blackman, 746 F.3d 137, 145 (4th Cir. 2014) (holding that "nothing in the applicable forfeiture statutes 'suggests that money judgments are forbidden'"); *United States v. Olguin*, 643 F.3d 384, 397 (5th Cir. 2011) (holding that money judgment forfeiture is appropriate in the criminal forfeiture context); *United States v. Logan*, 542 Fed. Appx. 484, 498 (6th Cir. 2013) (holding that a criminal forfeiture action can take the form of a money judgment); *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000) (allowing forfeiture in the form of an *in personam* judgment); *United States v. Smith*, 656 F.3d 821, 827 (8th Cir. 2011) (holding that "§ 853 permits imposition of a money judgment on a defendant who has no assets at the time of sentencing"); *United States v. McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) (concluding that "money judgments are appropriate under criminal forfeiture"); *United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008) ("[T]he federal rules explicitly contemplate the entry of money judgments in criminal forfeiture cases."); *United States v. Day*, 524 F.3d 1361, 1377 (D.C. Cir. 2008) ("Nothing in the relevant statutes suggests that money judgments are *forbidden*.").

The longstanding and entrenched practice of ordering money judgments for forfeiture in criminal cases merits this Court's review to bring a widespread practice into statutory and constitutional compliance.

2. *Imposition Of A Money Judgment Under The Applicable Forfeiture Statutes Contravenes The Plain Language And Purpose Of The Statutes And Ignores This Court's Direction On Narrow Construction Of Forfeiture Statutes.*

Criminal forfeiture is criminal punishment. *Libretti v. United States*, 516 U.S. 29, 39-41 (1995). "Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939) (citation omitted). In this case, there is no dispute that the primary forfeiture statute, 18 U.S.C. § 981(a)(1)(C), does not provide for use of money judgments as a collection tool for forfeiture. Nor does the related statute, 21 U.S.C. § 853, which can be (and was) invoked by the government for forfeiture procedures applicable to mail and wire fraud convictions. Pet. App. 33-34. The Ninth Circuit's reasoning and reliance on its precedent in *Newman* to uphold use of money judgment forfeitures—when that device is only authorized by Congress for convictions under the bulk cash smuggling statute—cannot withstand scrutiny under this Court's precedent.

First, the purpose of criminal forfeiture is to "separate[e] a criminal from his ill-gotten gains." *Honeycutt*, 137 S. Ct. at 1631; *see also Luis v. United States*, 136 S. Ct. 1083, 1094 (2016) (at common law, "'only' those 'goods and chattels' that 'a man has at the time of conviction shall be forfeited.'" (quoting 4 W. Blackstone, Commentaries on the Laws of England 388 (1765)). Contrary to this purpose, the entry of a money judgment does not require disgorgement of ill-gotten gains, in the past tense, since enforcement of such a judgment can occur against future income and assets. *See, e.g.*, 31 U.S.C. § 3720D

(authorizing garnishment of wages for any "delinquent nontax debt owed to the United States by an individual"); 31 U.S.C. § 3711(g)(9) (noting administrative remedies such as tax offsets available to collect delinquent debt owed to United States). As in this case, where the trial court found that Mr. Holden had no apparent current assets, the money judgment will be collected against future earnings and assets. Mr. Holden owes that debt in addition to his restitution obligations.

Second, use of money judgments violates the plain text and structure of the forfeiture statutes. Because a personal money judgment is enforceable against a defendant's untainted assets, regardless of whether the government makes the showing required by 21 U.S.C. § 853(p) for seizing substitute property, the result is the same "end run" around the statute decried by this Court in *Honeycutt*. 137 S. Ct. at 1635; *see*, *e.g.*, *United States v. Lo*, 839 F.3d 777, 792 (9th Cir. 2016) (affirming that government is "not required to follow the procedures applicable to its seeking of substitute property" when it obtains a money judgment). Just as this Court in *Honeycutt* found no basis to expand the statute to circumvent Congress's "carefully constructed statutory scheme," so should this Court decline to read into the statute the same circumvention of plain statutory language. 137 S. Ct. at 1635.

Third, the Ninth Circuit erred in ignoring the textual silence on the availability of money judgments for forfeiture under 18 U.S.C. § 981(a)(1)(C) and 21 U.S.C. § 853, compared to the explicit grant of authority to use money judgments in a different statute. In the last two Terms, this Court repeatedly held that statutory silence cannot be filled by

judicial creations when Congress has spoken clearly in a separate statute. *Lagos,* 138 S. Ct. at 1689-90; *Dean*, 137 S. Ct. at 1173 ("[D]rawing meaning from silence is particularly inappropriate' where . . . 'Congress has shown that it knows how to direct sentencing practices in express terms.'" (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)). In *Lagos,* this Court favored a "more limited interpretation" of the type of restitution due under the Mandatory Victims Restitution Act, in part because "in at least one other statute Congress has expressly provided for restitution" of that same type. *Lagos*, 138 S. Ct. at 1689-90. The same limited interpretation of the forfeiture statute should apply here.

The forfeiture statute on bulk cash smuggling demonstrates that, when Congress intended for a forfeiture statute to authorize a money judgment, Congress uses the words "money judgment" to communicate its intent. 31 U.S.C. § 5332. In contrast, the relevant statutes here contain no such provision. Their relative silence prohibits a judicial interpretation otherwise.

Indeed, the bulk cash smuggling statute, 31 U.S.C. § 5332, refers directly to the substitute assets provision of 21 U.S.C. § 853(p), providing that, if the procedures in § 853(p) prove inadequate to collect substitute assets for the lost bulk cash, *then* a money judgment is authorized. 31 U.S.C. § 5332(b)(4) (if "the defendant has insufficient substitute property that may be forfeited pursuant to section 413(p) of the Controlled Substances Act, the court shall enter a personal money judgment against the defendant for the amount that

would be subject to forfeiture").[3] If the government can simply bypass § 853(p) by obtaining a money judgment, as the Ninth Circuit holds, then the language of 31 U.S.C. § 5332(b)(4) authorizing such money judgments in the case of cash smuggling would be rendered superfluous, in violation of norms of statutory construction. *McDonnell,* 136 S. Ct. at 2369 (noting presumption "that statutory language is not superfluous"); *Hohn v. United States*, 524 U.S. 236, 249 (1998) (disfavoring statutory constructions that render other provisions superfluous).

Fourth, this Court plainly rejected judicial expansion of criminal forfeiture mechanisms in *Honeycutt*, holding:

> [T]he Court cannot construe a statute in a way that negates its plain text, and here, Congress expressly limited forfeiture to tainted property that the defendant obtained. As explained above, that limitation is incompatible with joint and several liability.

137 S. Ct. at 1635 n.2. For the same reason, this Court should not allow lower courts to continue to construe 18 U.S.C. § 981 and 21 U.S.C. § 853 to allow for the imposition of a personal money judgment. This construction of the statutes would allow money judgments that reach well beyond tainted property and well beyond the letter and spirit of the forfeiture law.

Fifth, the Ninth Circuit erred in relying on its precedents that cite the reference to money judgments in Rule 32.2 of the Federal Rules of Criminal Procedure as support for expansive construction of the forfeiture statutes. Pet. App. 13 (citing *Newman,* 659 F.3d at

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[3] Section 413(p) of the Controlled Substances Act is codified at 21 U.S.C. § 853(p).

1242-43). Rule 32.2 establishes general procedures for forfeitures, under any criminal statutes, and notes exceptions when money judgments are involved. *E.g.*, Fed. R. Crim. P. 32.2(a) ("The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks."). The inclusion of rules addressing use of money judgments does not, however, authorize use of money judgments for every offense. Indeed, the Rules Committee expressly reserved decision on whether money judgments were authorized by forfeiture statutes. Fed. R. Crim. P. 32.2, Advisory Committee's Note (2000 Adoption) (noting that "[a] number of cases have approved use of money judgment forfeitures," but the "Committee takes no position on the correctness of those rulings"). Because the Rules Enabling Act provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), it is clear that Rule 32.2 cannot authorize a forfeiture that Congress did not.

Finally, this Court in *Honeycutt* explained that, in adopting asset forfeiture statutes, Congress did not intend to significantly expand the scope of asset forfeiture beyond tainted property, a limitation deeply entrenched in the history of forfeiture in the United States:

> Traditionally, forfeiture was an action against the tainted property itself and thus proceeded *in rem*; that is, proceedings in which "[t]he thing [was] primarily considered as the offender, or rather the offence [was] attached primarily to the thing." *The Palmyra*, 12 Wheat. 1, 14, 6 L.Ed. 531 (1827). The forfeiture "proceeding in rem st[ood] independent of, and wholly unaffected by any criminal proceeding in personam" against the defendant. *Id.*, at 15. But as is clear from its text and structure, § 853 maintains traditional in rem forfeiture's focus on tainted property unless one of the preconditions of § 853(p) exists. . . . Congress did not, however, enact any "significant expansion of the scope of property subject to forfeiture."

137 S. Ct. at 1635. A money judgment reaches beyond tainted or substitute property and reaches a defendant's future income—far beyond the scope of the traditional in rem forfeiture Congress intended to preserve.

Construing the forfeiture statute to exclude money judgments would avoid serious constitutional problems. *See Luis*, 136 S. Ct. at 1094-96 (narrowly construing forfeiture provisions related to "untainted" assets to protect the pretrial right to counsel); *Clark v. Martinez*, 543 U.S. 371, 380-82 (2005) (describing the principle of constitutional avoidance). Courts are "prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Judicial expansion of the criminal penalty of forfeiture violates the separation of powers. *See Dimaya*, 138 S. Ct. at 1223 (2018) (Gorsuch, J., concurring) (discussing the problematic nature of the "transfer [of] legislative power to police and prosecutors, leaving to them the job of shaping a vague statue's contours through their enforcement decisions").

Moreover, applying non-statutory money judgment forfeiture abuses the Eighth Amendment's fundamental prohibition on excessive fines. This Court has traced the "venerable lineage" of the Excessive Fines Clause back to the Magna Carta, which required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)). By authorizing garnishment of future wages, money judgment forfeitures work precisely the deprivation of livelihood that Anglo-American common law has for centuries

shielded against. And like the excessive fines this Court addressed in *Timbs*, money judgment forfeitures undermine other constitutional liberties—they can be used "to retaliate against or chill the speech of political enemies" and employed "'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money.'" *Timbs*, 139 S. Ct. at 689; *see Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989) (describing Department of Justice Assets Forfeiture Fund, which raises funds for law-enforcement activities). Under the doctrine of constitutional avoidance, the forfeiture statutes should be construed narrowly.

3. The Use Of Money Judgments To Evade Federal Forfeiture Procedural Requirements Presents A Question of National Importance That Is Fully Preserved In This Case And Ripe For Review.

This case merits the Court's review because the use of money judgments to evade forfeiture procedures poses an issue of national importance that is especially pressing today. As the large number of cases on this issue attests, forfeiture issues arise frequently. That is not surprising, given that forfeiture of ill-gotten property is mandatory under 21 U.S.C. § 853(a)(1). *See United States v. Monsanto*, 491 U.S. 600, 607 (1989). Like civil forfeiture, which is "widespread and highly profitable," causing "egregious and well-chronicled abuses," *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari), criminal forfeiture is extensively relied upon by the government and equally susceptible to abuse. *See* Steven L. Kessler, *Applying the Brakes*

on A Runaway Train: Forfeiture and Recent Supreme Court Developments, The Champion, at 38, 40 (January/February 2018). In 2017, courts ordered payments of $847,231,073 in criminal forfeiture proceedings. OFFICES OF THE UNITED STATES ATTORNEYS, ANNUAL STATISTICAL REPORT (2017).

In cases like this one, where the criminal defendant is indigent and destitute at the time of sentencing, a money judgment due in full against him will have significant collateral consequences when he is released from prison. *See* Beth A. Colgan, "Fines, Fees, and Forfeitures" in *Reforming Criminal Justice—Volume 4: Punishment, Incarceration, and Release* 212 (Erik Luna ed. 2017) ("Fines, fees, and forfeitures can have devastating consequences on those who are financially vulnerable, particularly in low-income communities and communities of color that are most likely to be heavily policed."). When undertaking forfeiture, the government should be required to adhere closely to the procedural protections and limitations established by Congress. The end run around the substitute property provisions through use of money judgments should be stopped. The defense objected to the use of a money judgment in the district court and on appeal. The issue is ripe for this Court's review.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari.

DATED this 28th day of March, 2019.

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