NO. 20-7198

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN BRADLEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF

More than 200 federal felonies are punishable by mandatory forfeiture. Richard E. Finneran & Steven K. Luther, *Criminal Forfeiture and the Sixth Amendment: The Role of the Jury at Common Law*, 35 Cardozo L. Rev. 1, 5 (2013). Without meaningful constitutional or procedural safeguards, these penalties have become primary sources of government revenue for funding equipment, training, and "general investigative expenses."[1] Indeed, as of September 30, 2020, the U.S. Marshals Service held over $2.78 billion in seized property.[2] Although many Americans think forfeiture applies only to illegal contraband, the reality is that these seized assets include "real estate, commercial businesses, cash, financial instruments, vehicles, jewelry, art, antiques, [and] collectibles."[3]

This case illustrates the toll inflicted on hundreds of thousands of defendants by an unrestrained forfeiture system. If the district court's forfeiture order stands, Benjamin Bradley will leave prison after 17 years with no money, no home, and $1,000,000 in debt. Such penalties "undermin[e] the criminal justice system's rehabilitation goals … and society's interest in fully reintegrating people after release from prison." Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison - Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 Clearinghouse REV. 187 (2007).

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[1] *See* U.S. Dep't of Justice, Assets Forfeiture Fund (2021), https://www.justice.gov/afp/fund.
[2] U.S. Marshals Service, Asset Forfeiture Program (2020), https://usmarshals.gov/assets/.
[3] *Id.*

The facts triggering Bradley's massive forfeiture penalties were never found by a jury. Instead, the district court made those findings itself after applying a "rebuttable presumption" that any property he acquired after his offense began in 2009 was subject to forfeiture. Pet. App. 53 (quoting 21 U.S.C. § 853(d)). Relying on that presumption, the district court ordered the forfeiture of homes—which Bradley purchased for as little as $900 and then renovated or rented in post-recession Detroit—without requiring the government to present any evidence linking the homes to criminal proceeds. Pet. App. 76–77. And it did so despite undisputed evidence that Bradley's legitimate after-tax income during that period averaged $58,000 per year. *Id.* 75. Further, based on back-of-the-envelope extrapolations, the district court ordered Bradley to pay a $1,000,000 money judgment that grossly exceeds his identifiable assets. *Id.* 61–66.

The decision below raises two important and recurring questions of federal law: (i) whether the Sixth Amendment requires the facts triggering mandatory forfeiture penalties to be found by a jury, and (ii) whether 21 U.S.C. § 853 authorizes the imposition of *in personam* money judgments. Despite overwhelming historical evidence of the existence of a jury right for forfeiture determinations at common law, the Sixth Circuit concluded it was bound by this Court's pre-*Apprendi* decision in *Libretti v. United States*, 516 U.S. 29, 48–49 (1995), to hold that the Sixth Amendment's jury protections do not apply to criminal forfeiture. Pet. App. at 15–16. The Sixth Circuit also relied on circuit

precedent to hold that § 853 somehow authorizes *in personam* money judgments, which operate as mandatory fines, notwithstanding the contrary plain meaning of the statutory text. Pet. App. 12.

Lower courts have had an opportunity to consider these questions in light of the Court's recent decisions in *Southern Union Co. v. United States*, 567 U.S. 343 (2012) and *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), which respectively conflict with the Sixth Amendment and money judgment holdings here. The lower courts' refusal to reevaluate existing precedents in light of those decisions has revealed entrenched conflicts within the law of criminal forfeiture that can only be resolved by this Court.

Bradley's petition presents a unique vehicle for the Court to resolve these issues. After remand from the Sixth Circuit, the district court addressed both the Sixth Amendment and money judgment questions on the merits, held a full evidentiary hearing on forfeiture, and—applying judge-found facts—issued multiple memoranda outlining the reasoning for its judgment. *See* Pet. App. 47, 78. Then, after extensive briefing, the Sixth Circuit addressed both questions in a published opinion. *See* Pet. App. 10. The petition, therefore, squarely presents two important forfeiture issues that were raised, preserved, and thoroughly litigated at every level below. The Court should grant Bradley's petition for review, vacate the judgment below, and remand for further proceedings.

I. This Court's Review of the Sixth Amendment Issue is Necessary Based on the Erroneous Decision Below.

The United States does not dispute that this case presents an "important question of federal law." *See* S. Ct. R. 10(c). As the United States acknowledges, forfeiture is a significant and omnipresent element of criminal sentencing. Opposition at 15–16. Indeed, forfeiture is "a mandatory penalty for most major federal crimes." Finneran & Luther, *supra*, at 23–24. In the last 50 years, criminal forfeiture has gone from a seldom-used reinvention of criminal law to a congressionally mandated penalty in a wide range of sentencing contexts. *See, e.g.*, 18 U.S.C. § 982(a), § 1963(a)(3); 21 U.S.C. § 853(a)(1); *see also* Charles Doyle, *Crime and Forfeiture* at 13–14, Cong. Rsch. Serv. (Jan. 22, 2015), https://crsreports.congress.gov/product/pdf/RL/97-139/13.

Today, defendants like Bradley are regularly ordered to forfeit the homes their families live in without a right to have a jury find the facts triggering that forfeiture. As in *Apprendi* and its progeny, "[a]t stake … are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,'" "the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,'" and "the right to have the jury verdict based on proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476–78 (2000) (citations omitted).

The Sixth Amendment's jury protections are critical in safeguarding the bedrock constitutional principles that forfeiture implicates. The jury right "provides an important check on the government's awesome forfeiture powers." 2 David B. Smith, Prosecution and Defense of Forfeiture Cases ¶ 14.03A. Indeed, the historical role of the jury in making forfeiture decisions is well established through "centuries of common law practice in England and America"—even more clearly than, for instance, criminal fines. *Id.*; *cf. S. Union*, 567 U.S. at 358 (citing the "ample historical evidence showing that juries routinely found facts that set the maximum amounts of fines"). Common law practice "provid[ed] a defendant with 'a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction.'" Smith, *supra* (citing Advisory Committee Note to Fed. R. Crim. P. 7(c)(2) (1972)).

The practical effects of this deviation from historical practice are profound. In the case below, the district court ordered Bradley to forfeit his family's home based on uncorroborated hearsay in a single affidavit presented to the judge (not a jury) by a government agent. Pet. App. 72–74. And it did so based on the preponderance standard and a presumption that the home was subject to forfeiture. Pet. App. 53–54. The Sixth Amendment's jury right demands much more.

The decision below also cannot be reconciled with this Court's post-*Apprendi* precedents. *Apprendi* held that in the sentencing context "[i]t is

unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties for which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490 (citation omitted). In the two decades since that decision, this Court "has not hesitated to strike down [trial practice] innovations that fail to respect the jury's supervisory function." *United States v. Haymond*, 139 S. Ct. 2369, 2377 (2019) (collecting cases). For example, in *Alleyne*, the Court held that mandatory sentencing enhancements triggered by judge-found facts were unconstitutional because "*any* fact that, by law, increases the penalty for a crime … must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013). And in *Southern Union*, the Court made clear that *Apprendi*'s protections apply equally to monetary forms of criminal punishment. *See* 567 U.S. at 350 ("In stating *Apprendi's* rule, we have never distinguished one form of punishment from another.").

Despite those clear commands, lower courts continue to feel bound by a pre-*Apprendi* decision that is flatly inconsistent with the Court's modern Sixth Amendment doctrine. In *Libretti*, the Court's opinion included a cursory statement that criminal forfeiture is an aspect of sentencing such that criminal defendants do not have a constitutional right to a jury verdict on the issue. *Libretti*, 516 U.S. at 49 (1995); *see also* Smith, *supra.* That statement has been recognized as fundamentally inconsistent with the Court's post-*Apprendi* decisions by leading jurists and scholars. *See, e.g.*, *United States v. Bradley*,

969 F.3d 585, 591 (6th Cir. 2020) (Sutton, J.) (noting that "[*Libretti*'s] reasoning did not anticipate *Apprendi*'s"); Wayne R. LaFave et al., Criminal Procedure §26.4(i) (4th ed. 2020) (noting that "*Apprendi's* logic" compelled its application to criminal forfeiture notwithstanding *Libretti*). Yet, as the United States admits, every Court of Appeals to consider this issue has concluded it remains bound by *Libretti*. Opposition at 13–14; *see, e.g.*, *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012); *United States v. Simpson*, 741 F.3d 539, 559–60 (5th Cir. 2014); *United States v. Sigillito*, 759 F.3d 913, 935 (8th Cir. 2014); *United States v. Fruchter*, 411 F.3d 377, 380–82 (2d Cir. 2005); *United States v. Leahy*, 438 F.3d 328, 331–32 (3rd Cir. 2006).

Only this Court's intervention can resolve that conflict. The Courts of Appeals are not free to disregard what they have concluded is an on-point precedent from this Court, even when it creates a logical chasm in the doctrine. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."). And, crucially, many of these courts have followed *Libretti* only after noting its continuing tension with *Apprendi* and *Southern Union*, thereby asking this Court to intervene. *See, e.g.*, *Bradley*, 969 F.3d at 591; *Fruchter*, 411 F.3d at

380; *Phillips*, 704 F.3d at 769; *Sigillito*, 759 F.3d at 935; *Leahy*, 438 F.3d at 332.

The United States argues that this Court's review is not necessary because the Court has denied certiorari on this question before.[4] Opposition at 10. Yet the doctrinal landscape has meaningfully evolved since the Court considered many of those petitions. At the time *Southern Union* was decided, members of this Court and the United States anticipated that the Court's holding regarding criminal fines would lead lower courts to extend *Apprendi*'s reach to the closely analogous context of criminal forfeiture. *See* Transcript of Oral Argument at 36–37, *S. Union Co. v. United States*, 567 U.S. 343 (2012) (No. 11-94). The Courts of Appeals have since made clear, however, that they continue to feel restrained from doing so. The Court should grant review of this petition to ensure *Apprendi*'s Sixth Amendment principles are applied uniformly across all forms of criminal punishment, including forfeiture.

II. This Court's Review of the Money Judgment Issue is Necessary Based on the Erroneous Decision Below

The imposition of money judgments under 21 U.S.C. § 853 conflicts with both the plain meaning of the statute and this Court's precedent. The decision

[4] Alternatively, the United States argues that the imposition of mandatory forfeiture penalties based on judge-found facts is consistent with *Apprendi*, *Alleyne*, and *Southern Union* because forfeiture is a so-called "indeterminate" sentencing scheme. Opposition at 8–9. But forfeiture is no such thing. Like a criminal fine contingent on a finding of the defendant's legal noncompliance, forfeiture is a mandatory criminal penalty triggered by a finding of particular facts related to the defendant's use or purchase of the property. Without those factual findings, the range of forfeiture penalties authorized by the statute is precisely zero. Because those factual findings increase the mandatory minimum penalty imposed on a defendant, forfeiture fits squarely within the protections adopted by this Court's post-*Apprendi* precedents.

below reflects an entrenched misinterpretation among the Courts of Appeals, which have allowed money judgments based not on the statute's text but on their own policy judgments. The United States does not effectively dispute any of this. Instead, the United States relies on purported procedural protections to downplay the inequitable effects of money judgments. This reasoning, however, does nothing to justify imposing a penalty the statute clearly does not authorize.

Although the United States is correct that the Courts of Appeals are aligned on this issue, Opposition at 18–19, their opinions are at odds with this Court's precedent and, in most cases, evince an obvious failure to devote careful consideration to the issue. The cases the United States cites do not provide reasoned support for grafting money judgments into the forfeiture statutes. Indeed, some of those decisions just assume without analysis that money judgments are authorized. *See United States v. Candelaria–Silva*, 166 F.3d 19, 42 (1st Cir. 1999), *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000).

A number of circuits rely on the theory that, while the statute does not authorize money judgments, neither does it explicitly forbid them. *United States v. Day*, 524 F.3d 1361, 1377 (D.C. Cir. 2008) ("Nothing in the relevant statutes suggests that money judgments are forbidden."); *United States v. Blackman*, 746 F.3d 137, 145 (4th Cir. 2014); *United States v. Hampton*, 732 F.3d 687, 691–92 (6th Cir. 2013) (same). But the absence of an express prohibition on a penalty clearly cannot be interpreted as implicit authorization

for that penalty. "[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

The prevailing view among the Courts of Appeals reflects an entrenched policy judgment rather than the statutory text. That is inappropriate. *Burrage v. United States*, 571 U.S. 204, 218 (2014) ("The role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'"). This is particularly troubling when courts create a new criminal penalty. *See Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (courts are "prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law"); *Whalen v. United States*, 445 U.S. 684, 689 (1980); *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.").

The United States claims money judgments are justified because they allow the government to recover where it cannot trace or has difficulty tracing illegally obtained assets or proceeds. But the government's difficulty proving its case does not supersede the plain text of the statute. *See Flores-Figueroa v. United States*, 556 U.S. 646, 656 (2009) (concerns about the difficulty of enforcement do not override the statutory text).

This Court's precedent in *Honeycutt* also precludes interpreting § 853 to authorize money judgments. The United States mischaracterizes *Honeycutt* as merely "refin[ing]" the scope of authorized money judgments. Opposition at 25. But *Honeycutt* was not so limited. It clarified the appropriate general standard under which to interpret forfeiture statutes. "The most important background principles underlying § 853 [are] those of forfeiture." *Honeycutt*, 137 S. Ct. at 1634. Instead of heeding this Court's precedent, the United States "ignores the basic nature of a forfeiture, whether criminal or civil. There simply cannot be a forfeiture without something to forfeit." Smith, *supra*, ¶ 13.02(4)(a).

The United States concedes that historical forfeiture practice did not include money judgments. Opposition at 15. But it maintains that modern practice has formed a division between *in rem* (civil) and *in personam* (criminal) forfeiture. That framing is neat but irrelevant. *Honeycutt* made clear that while Congress added an "in personam aspect" to criminal forfeiture, "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." *Honeycutt*, 137 S. Ct. at 1634–35. Even apart from that, an *in personam* aspect of criminal forfeiture does not authorize courts to legislate new forfeiture penalties or remedies, particularly where Congress has provided one, and only one, substitute asset remedy—§ 853(p). *Id.* at 1634.

The United States downplays the issue of whether the criminal forfeiture statutes authorize money judgments by implying that the procedures already in place sufficiently limit government overreach. Opposition at 21. But those procedures have no bearing on whether the statute authorizes the penalty, which it does not.

And even with the procedures prescribed in § 853 and Federal Rule of Criminal Procedure 32.2, there is little constraining the government from using money judgments to run roughshod over defendants. The goal of the substitute asset provisions is ostensibly to "separat[e] a criminal from his ill-gotten gains." *Id.* at 1631. Money judgments instead give the government a chance to evade having to trace the proceeds to specific items of property or prove its forfeiture case to a jury. *See* Fed. R. Crim. P. 32.2(b)(1)(A) (exempting money judgments from the jury trial right).

The substitute assets provision already relieves the government of the careful efforts required under § 853(a) to limit forfeiture to tainted property from the offense, *United States v. Capoccia*, 503 F.3d 103 (2d Cir. 2007), and, by unmooring the calculation from actually tainted property, money judgments allow prosecutors to greatly exaggerate the total proceeds of the criminal activity. Smith, *supra*, ¶ 13.02(4)(a) (citing examples of exaggerated extrapolations in reported cases).

The government can and does extrapolate from extremely limited evidence and basic arithmetic to reach exorbitant estimates of what the

defendant owes. While district courts occasionally hold the government to a conservative estimate, in the vast majority of cases the district courts accept the government's "back-of-the-envelope" estimates. *See, e.g.*, *United States v. Bradley*, 897 F.3d 779, 783 (6th Cir. 2018); *but see, e.g.*, *United States v. King*, 231 F. Supp. 3d 872, 894, 915–16, 951–95 (W.D. Okla. 2017) (rejecting government's extrapolation findings, which "should be assessed with some semblance of intellectual rigor, lest loose talk, even under oath (of which there has been no shortage in this case), be allowed to render a defendant a pauper for life"). And often those estimates wildly exceed any available evidentiary support. *See, e.g.*, *United States v. Morrison*, 656 F. Supp. 2d 338 (E.D.N.Y. 2009) (rejecting government's proposed $172 million money judgment as based on erroneous extrapolation and issuing a judgment for $6.1 million).

The imposition of poorly supported money judgments far beyond the defendant's ability to pay is all the more troubling given the absence of an escape valve. Criminal forfeiture is a mandatory penalty. *See*, *e.g.*, *United States v. Casey*, 444 F.3d 1071, 1077 (9th Cir. 2006). Apart from the Excessive Fines Clause, district courts cannot provide a meaningful check on the government. Even where district courts are concerned with the fairness of a money judgment, if they find that the government's estimate is supported by a preponderance of the evidence presented, they are not at liberty to use any discretion to limit its amount. *See, e.g.*, D.Ct.Dkt.1123 at 7 ("I am very troubled

by forfeiture in criminal actions … I think saddling defendants who have spent years in jail with large forfeiture judgments is very unfair.")

The supposedly protective procedures the United States cites do nothing to circumscribe that power. The United States acknowledges "that a forfeiture money judgment does not supply independent authority for seizing the defendant's untainted property" and that any judgment must be issued under an applicable forfeiture statute. Opposition at 21. In the United States' telling, under Rule 32.2(e)(1)(B) and § 853(p)(2) a "district court imposing a criminal forfeiture under Section 853 may enter a forfeiture money judgment that establishes the amount of the defendant's forfeiture liability and is enforceable through subsequent forfeitures of specific property." Opposition at 15. That means that a district court's order, which is not limited by the defendant's ability to pay, may be amended in perpetuity to seize any new, untainted assets that the defendant acquires. *See United States v. Duboc*, 694 F.3d 1223, 1227–28 (11th Cir. 2012) (determining there is no time limit for substitute asset recovery under Rule 32.2(e)(1) and § 853).

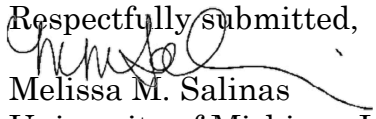
This presents an equity issue. Defendants are not usually able to pay back large money judgments: the judgment will hang over a defendant after he serves his sentence and then for the rest of his life, interfering with his rehabilitation and reentry into society. Thus, money judgments convert people like Bradley, who are repaying their debts to society through lengthy prison terms, into lifelong debtors to the United States.

This Court said in *Honeycutt* that the most important principles underlying § 853 are "those of forfeiture," by which it meant *in rem* forfeiture. 137 S. Ct. at 1634. Money judgments are at odds with the fundamental nature and history of *in rem* forfeiture. At common law, and all the way back to the Magna Carta, *in personam* money judgments were not permitted. "Blackstone wrote that 'only' those 'goods and chattels' that 'a man has *at the time of conviction* shall be forfeited.'" *Luis v. United States*, 136 S. Ct. 1083, 1094 (2016) (emphasis in original) (quoting 4 W. Blackstone, *Commentaries* 380 (1769)). Blackstone explained that the Magna Carta provided that "no man shall have a larger amercement imposed on him than his circumstances or personal estate will bear." 4 Blackstone, *id.*, at 372. It seems that English law, in this regard, was more enlightened and humane in 1215 than in America today. *See also Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (reiterating that the Excessive Fines Clause has its roots in 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'"). Accordingly, money judgments are deeply at odds with both the statutory text and the historical foundations of the American legal system.

CONCLUSION

For the foregoing reasons, Bradley respectfully requests that this Court grant the petition for review, vacate the judgment below, and remand for further proceedings.

Respectfully submitted,



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