No. 21-_____

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

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ALLEN FONG,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Sixth Amendment guarantees the right to a jury finding beyond a reasonable doubt any fact necessary to the imposition of a mandatory criminal forfeiture.

2. Whether a district court may impose an *in personam* forfeiture money judgment in the absence of any statutory authority.

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## PARTIES TO THE PROCEEDING

Petitioner Allen Fong was the defendant-appellant below. The respondent is the United States, the plaintiff-appellee below. There are no other parties to the proceeding.

## OPINIONS BELOW

The Ninth Circuit's decision (App. 1a) is unreported but available at 831 F. App'x 284. The Ninth Circuit's order denying Fong's petition for rehearing (App. 4a) is not reported. The district court's forfeiture order (App. 6a) is not reported.

## STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on December 14, 2020. App. 1a. The Ninth Circuit denied Fong's timely petition for rehearing on May 11, 2021. App. 4a.

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.3 this Court's April 15, 2020, and July 19, 2021 orders concerning deadlines during the COVID-19 pandemic because it was filed within 150 days of the Ninth Circuit's order denying rehearing.

## RELEVANT STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The RICO forfeiture statute, 18 U.S.C. § 1963 defines the relevant property subject to criminal forfeiture as follows:

> (a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—
>
> (1) any interest the person has acquired or maintained in violation of section 1962;
>
> (2) any—
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.
>
> The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.
>
> (b) Property subject to criminal forfeiture under this section includes—
>
> (1) real property, including things growing on, affixed to, and found in land; and
>
> (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

## STATEMENT OF THE CASE

Petitioner Allen Fong and nine codefendants were charged with numerous racketeering, money-laundering, and Mann Act offenses, in relation to a prostitution enterprise that operated a series of brothels in the San Francisco Bay Area. Excerpts of Record (ER) 434–540. The indictment contained forfeiture allegations, including an allegation under the Racketeer Influenced and Corrupt Organizations Act's (RICO's) forfeiture provision, 18 U.S.C. § 1963. ER 536–39. Fong pleaded guilty without a plea agreement to all counts, but did not admit any facts concerning the forfeiture allegations or the "proceeds" of the RICO conspiracy. ER 367–415.

The government originally sought an *in personam* forfeiture money judgment of $5,269,698, which it stated was its estimate of the gross revenue of the entire prostitution enterprise. ER 348–57. The government never identified any specific property that it sought to forfeit; instead, it sought a money judgment *ab initio*. *Id.* Fong opposed the forfeiture, arguing, among other things, that he could only be subject to forfeiting those "proceeds" that he personally obtained. ER 293–94. The district court nevertheless imposed a $5,269,698 *in personam* forfeiture money judgment, with Fong jointly and severally liable with his codefendants for the enterprise's entire gross proceeds. ER 287, 288.

Fong appealed, arguing among other things that the district court's forfeiture order must be reversed in light of this Court's intervening opinion in *Honeycutt v. United States*, 137 S. Ct. 1626, 1630 (2017), which prohibited imposition of joint and several liability under the drug forfeiture statute, 21 U.S.C. § 853. *See United*

*States v. Fong*, 9th Cir. Case No. 17-10075, Dkt. 11. The government conceded error, and filed a motion to vacate the district court's forfeiture order in light of *Honeycutt*. *See id.*, Dkt. 15. The Ninth Circuit granted the motion, vacated the original forfeiture order, and remanded for further proceedings in light of *Honeycutt*. *See id.*, Dkt. 19.

On remand, the government again sought an *in personam* forfeiture money judgment, now in the amount of $1,756,566. This was exactly one-third of the prior forfeiture order, which the government reasoned was amount of the enterprise's gross proceeds, after accounting for the two-thirds of the enterprise's gross receipts that the individual prostitutes retained themselves. The government again never identified any specific property it sought to forfeit, and only ever sought a money judgment. The only evidence the government proffered was a five-paragraph declaration from the case agent, stating that "Fong's share" of the revenues was 33% (or sometimes 37.5%), along with two attached Homeland Security Investigations reports to this effect, one from an interview with codefendant Jie Mu,and one from an individual prostitute who had been arrested by immigration authorities. ER 206–22. Fong opposed the government's forfeiture request on numerous grounds, including that *in personam* forfeiture money judgments are not authorized by the operative RICO forfeiture statute, section 1963. ER 167–68.

The district court held a 15-minute hearing on the government's amended forfeiture request, and took no evidence at the hearing. ER 4–16. The district court later issued a two-and-a-half page order granting the government's requested forfeiture money judgment of $1,756,566 in full. App 6a-8a.

On appeal, the Ninth Circuit rejected, among other arguments, Fong's contention that the district court violated the Sixth Amendment by finding facts necessary to triggering the mandatory criminal forfeiture, citing *United States v. Phillips*, 704 F.3d 754, 769–71 (9th Cir. 2012); and his contention that *in personam* forfeiture money judgments were not authorized by the RICO statute, citing *United States v. Nejad*, 933 F.3d 1162, 1165 (9th Cir. 2019). App 3a. Fong timely petitioned for panel and en banc rehearing. The panel denied his request for panel rehearing,[1] and for en banc rehearing. App. 4a–5a.

## REASONS FOR GRANTING THE WRIT

At the Founding, the English practice of forfeiture as a punishment for criminal offenses was deeply disfavored, with the Constitution itself limiting the duration of any forfeiture penalty for treason offenses. *See* U.S. Const. art. 3, § 3, cl. 2. The First Congress then banned forfeiture entirely as a punishment for any crime. Act of Apr. 30, 1790, ch. 9, §24, 1 Stat. 112, 117; *see United States v. Bajakajian*, 524 U.S. 321, 332 & n.7 (1998); 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, 41–42 (2013). For nearly two centuries, forfeiture as a criminal punishment was not a feature of federal law. Only with passage of RICO in 1970 did Congress first enact a criminal forfeiture statute. *See* Pub. L. 91-452, § 901, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968); *see also United*

[1] Judge Fletcher dissented from the denial of panel rehearing, and would have granted panel rehearing and remanded for further consideration in light of another Ninth Circuit opinion, *United States v. Thompson*, 990 F.3d 680 (9th Cir. 2021), which addressed the scope of forfeiture liability after *Honeycutt*.

*States v. L'Hoste*, 609 F.2d 796, 813 n.15 (5th Cir. 1980) ("By enacting [the criminal forfeiture provisions of RICO], Congress revived the concept of forfeiture as a criminal penalty against the individual, since the proceeding is in personam against the defendant and the forfeiture is part of the punishment.").

Since 1970, Congress has radically expanded the scope of criminal forfeiture, which now covers federal drug offenses, *see* 21 U.S.C. § 853, and hundreds of other federal felonies, *see* 18 U.S.C. §§ 981 and 982; *see also* Finneran & Luther, *supra*, at 48 & n.293. Indeed, the Department of Justice now routinely secures forfeiture orders in thousands of criminal cases, large and small, with the U.S. Marshals Service holding over $2.78 billion in forfeited assets. *See* https://www.usmarshals.gov/duties/factsheets/asset_forfeiture.pdf. Such mandatory criminal forfeitures apply even to indigent defendants, hampering their ability to reintegrate into society after release from prison. *See* Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison - Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 Clearinghouse Rev. 187 (2007).

Here, Fong's case implicates two important potential procedural safeguards concerning criminal forfeiture, which are recurring and important issues in federal criminal forfeiture practice: whether the Sixth Amendment guarantees a right to have a jury find those facts necessary to trigger a mandatory criminal forfeiture punishment, and whether the RICO forfeiture statute (and most other federal forfeiture statutes) authorize *in personam* forfeiture money judgments, even in the absence of any express authorization.

## I. The Court should grant certiorari to resolve whether the Sixth Amendment right to a jury trial extends to facts necessary to trigger a mandatory criminal forfeiture punishment.

### A. The circuit courts have concluded they are bound by dictum in *Libretti* that the Sixth Amendment right to a jury trial does not extend to facts necessary for criminal forfeiture.

In *Libretti v. United States*, this Court addressed whether Federal Rule of Criminal Procedure 11 required district courts to determine whether a factual basis existed to support a stipulated criminal forfeiture contained in a plea agreement, and whether the right to a special jury verdict concerning forfeiture contained in the Criminal Rules can only be waived if the district court specifically advises a defendant of the right he was waiving. 516 U.S. 29, 31–32 (1995). The Court concluded that Rule 11 did not require district courts to find any specific factual basis supporting forfeiture, and that no specific advisement was required during the plea colloquy concerning the waiver of the right contained in the Criminal Rules for a jury verdict concerning forfeiture. *Id.* at 51–52.

In its discussion of the adequacy of Libretti's waiver of his right under Rule 31(e) (now Rule 32.2(b)(5)) to a jury determination concerning forfeiture, the Court stated:

> Without disparaging the importance of the right provided by Rule 31(e), our analysis of the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection. Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed.

*Id.* at 49. In support of this proposition, the Court quoted *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986), which stated that "[t]here is no Sixth

Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Libretti*, 546 U.S. at 49.

*Libretti*'s brief discussion of the scope of the Sixth Amendment right to a jury finding facts necessary to trigger a mandatory criminal forfeiture appears to be dictum because the issue at stake in *Libretti* was the adequacy of a waiver under Rule 11 of a "statutory right to a jury determination of forfeitability." *Id.* at 48–49; *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion *necessary to that result* by which we are bound." (emphasis added)). Nevertheless, all the circuits to have addressed the issue have determined that they are bound by *Libretti*'s statement that the Sixth Amendment jury-trial right does not apply to the criminal forfeiture penalty. *See United States v. Bradley*, 969 F.3d 585, 591 (6th Cir. 2020) (collecting cases).

B. *Libretti*'s dictum conflicts with this Court's post-*Apprendi* interpretation of the scope of the Sixth Amendment jury-trial right at sentencing.

Certiorari is warranted here because the *Libretti*'s dictum from 1995 conflicts with the intervening two decades of this Court's post-*Apprendi* Sixth Amendment jurisprudence. *See* S. Ct. R. 10(c). First, and most obviously, *Libretti* relied on this Court's 1986 *McMillan* case for the broad proposition that there is no Sixth Amendment right whatsoever to any jury fact-finding concerning sentencing. *See Libretti*, 546 U.S. at 49 ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact") (quoting *McMillan*, 477 U.S. at 93)). This statement of law is flatly inconsistent with *Apprendi*, which held

that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (plurality opinion) (noting that *McMillan* has been expressly overruled and is inconsistent with the *Apprendi* rule).

In the years following, this Court extended *Apprendi* to mandatory sentencing guidelines systems, in which judges, not juries, found numerous facts that resulted in specific sentencing ranges for defendants. *See United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004). The Court has extended *Apprendi*'s reasoning to apply to monetary penalties as well. *See Southern Union Co. v. United States*, 567 U.S. 343, 346 (2012) (applying *Apprendi* to criminal fines). Indeed, the government itself anticipated that *Southern Union*'s reach would extend to criminal forfeiture. At oral argument in *Southern Union*, the Deputy Solicitor General stated that while "extending" *Apprendi* to forfeiture "would involve overruling the Court's decision in *Libretti v. United States*," under a "strict application of *Apprendi*, . . . it's difficult to see why" *Apprendi* should not apply to forfeiture. Transcript of Oral Argument at 36–37, *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (No. 11-94).

While *Apprendi*, the Guidelines cases, and *Southern Union* all involved the question of whether the Sixth Amendment requires jurors to find facts (other than the fact of a prior conviction) beyond a reasonable doubt that result in an elevated *maximum* penalty, in *Alleyne v. United States*, the Court held that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory

minimum." 570 U.S. 99, 112 (2013). Thus, under the Sixth Amendment, any fact triggering a mandatory minimum sentence (other than the fact of a prior conviction) must either be admitted by the defendant or found by a jury beyond a reasonable doubt. *Id.* at 111–12.

Prior to *Alleyne*, some courts of appeals, including the Ninth Circuit, had attempted to distinguish criminal forfeiture from criminal fines for Sixth Amendment purposes by reasoning that there was never any statutory maximum for forfeitures. *See, e.g., Phillips*, 704 F.3d at 770–71 (distinguishing *Southern Union* because criminal forfeiture does not have any statutory maximum limit, even though criminal forfeiture is mandatory). But after *Alleyne*, which recognized that the Sixth Amendment also guarantees a right to a jury finding of facts necessary to trigger a mandatory minimum punishment, this reasoning no longer holds. Criminal forfeiture is no doubt a punishment. *E.g., Alexander v. United States*, 509 U.S. 544, 558 (1993) ("The *in personam* criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"). And criminal forfeiture is mandatory. *E.g., United States v. Monsanto*, 491 U.S. 600, 607 (1989).

Thus, *Alleyne*'s reasoning compels the conclusion that the *Apprendi* rule applies also to criminal forfeiture, a mandatory criminal punishment, which can only be triggered based on certain factual findings. This Court should therefore grant certiorari to clarify the continuing vitality of *Libretti*'s Sixth Amendment dictum in light of the *Apprendi* line of cases.

C. This case is an excellent vehicle to determine *Libretti*'s continuing vitality.

Fong's case is also an excellent vehicle to reconsider *Libretti*'s statement that the Sixth Amendment jury-trial right does not apply to criminal forfeitures. The issue was fully litigated before the Ninth Circuit, which resolved Fong's claim on the merits. *See* Pet. App. 5a. Further, the Ninth Circuit relied on its *Phillips* opinion in rejecting Fong's argument, stating that it was still bound by *Libretti*, notwithstanding *Apprendi* and *Southern Union*. *See id.*; *Phillips*, 704 F.3d at 769.

The Sixth Amendment question presented in this case would also be dispositive to Fong's forfeiture order, as the district court's $1,756,566 forfeiture order did not comport with the interpretation of the Sixth Amendment right that Fong advances here. First, the district court, not a jury, made the critical factual determination of the amount of RICO "proceeds" that were subject to forfeiture. Although Fong pleaded guilty to the substantive criminal charges against him, he did not admit any facts in his plea colloquy that would support the district court's "proceeds" finding. *See* ER 367–415 (transcript of plea hearing). Accordingly, Fong's Sixth Amendment rights were violated by the judge-made "proceeds" finding here, just as much as a defendant's Sixth Amendment rights would be violated if a district court imposed a mandatory minimum penalty under the drug statutes on a defendant who pleaded guilty to selling drugs, but did not admit to selling a sufficient amount required to trigger a mandatory minimum sentence. *See Alleyne*, 570 U.S. at 111–12.

Second, the district court's forfeiture finding was only by a preponderance of the evidence, not proof beyond a reasonable doubt. *See* Pet. App. 6a-8a; *see also United*

*States v. Christensen*, 828 F.3d 763, 822 (9th Cir. 2015) (holding that district courts "need only find facts warranting forfeiture by a preponderance of the evidence."). Because the Sixth Amendment right recognized in *Apprendi* and its progeny also requires proof beyond a reasonable doubt, *e.g., Alleyne*, 570 U.S. at 111, Fong's Sixth Amendment rights were likewise violated here when the district court applied a lower evidentiary standard to its forfeiture "proceeds" finding. This case thus presents an excellent vehicle to determine whether the Sixth Amendment right to a jury trial extends to facts necessary to support a criminal forfeiture order.

## II. This Court should address whether district courts may impose forfeiture money judgments in the absence of statutory authority, and contrary to traditional historical forfeiture practice.

This case also presents an important question of statutory interpretation related to this Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017): whether the RICO and other federal forfeiture statutes permit *in personam* forfeiture money judgments.

### A. In the last three decades, the courts of appeals have authorized *in personam* forfeiture money judgments, despite recognizing the lack of textual support.

Although the RICO forfeiture statute contains no reference to money judgments and only speaks of specific "property" being subject to forfeiture, *see* 18 U.S.C. § 1963, starting in 1985, the lower courts began to authorize the government to seek *in personam* money judgments. *See United States v. Conner*, 752 F.2d 566, 577 (11th Cir. 1985) (concluding that because criminal forfeiture was *in personam*, "a money judgment against the defendant" was lawful); *see also* 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 13.02(4) (2021) (recounting history of

judicial creation of forfeiture money judgments). This view gained traction in the lower courts, which largely reasoned that because *in personam* money judgments were not expressly forbidden, they were therefore lawful. *See, e.g., United States v. Day*, 524 F.3d 1361, 1377 (D.C. Cir. 2008).

A number of district courts concluded that forfeiture money judgments were not authorized by the statutory language. *See, e.g., United States v. Surgent*, 2009 WL 2525137 (E.D.N.Y. 2009) (Gleeson, J.); *United States v. Day*, 416 F. Supp. 2d 79, 88–92 (D.D.C. 2006); *United States v. Croce*, 334 F. Supp. 2d 781 (E.D. Pa. 2004), *adhered to on reconsideration*, 345 F. Supp. 2d 492 (E.D. Pa. 2004); *see also United States v. Reiner*, 397 F. Supp. 2d 101, 104 n.10 (D. Me. 2005) (agreeing with *Croce*'s reasoning, but recognizing that court was nonetheless bound by First Circuit's contrary decision). But the courts of appeals with criminal jurisdiction have all permitted forfeiture money judgments. *See United States v. Hall*, 434 F.3d 42, 59–60 (1st Cir. 2006); *United States v. Awad*, 598 F.3d 76, 78–79 (2d Cir. 2010) (per curiam); *United States v. Vampire Nation*, 451 F.3d 189, 202–03 (3d Cir. 2006); *United States v. Blackman,* 764 F.3d 137, 145 (4th Cir. 2014); *United States v. Olguin*, 643 F.3d 384, 397–98 (5th Cir. 2011); *United States v. Hampton*, 732 F.3d 687, 691–92 (6th Cir. 2013); *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000); *United States v. Smith,* 656 F.3d 821, 827 (8th Cir. 2011); *United States v. Casey*, 444 F.3d 1071, 1073–77 (9th Cir. 2006); *United States v. McGinty*, 610 F.3d 1242, 1245–49 (10th Cir. 2010); *United States v. Padron*, 527 F.3d 1156, 1161–62 (11th Cir. 2008); *Day*, 524 F.3d at 1377–78.

The lower courts' interpretation cannot stand in light of this Court's more recent decision in *Honeycutt*. Certiorari is appropriate because the imposition of money judgments under the RICO forfeiture statute is fundamentally incompatible with *Honeycutt*'s interpretation of historical forfeiture practice and the plain text and structure of section 1963. This entrenched misapplication of the lower courts' authority requires the exercise of this Court's jurisdiction.

B. The text and structure of the RICO forfeiture statute and historical forfeiture practice do not authorizes *in personam* money judgments.

The RICO forfeiture statute contains no textual reference to "money judgments." *See* 18 U.S.C. § 1963. Instead, it speaks only of forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." 18 U.S.C. § 1963(a)(3). The RICO forfeiture provision further defines property subject to forfeiture as "real property" and "tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 18 U.S.C. § 1963(b). Simply put, the forfeiture statute only addresses specific property being subject to forfeiture, not money judgments.

The Ninth Circuit itself recently acknowledged that the similarly worded drug forfeiture statute, section 853, "lack[s] any textual basis for imposing a personal money judgment." *See United States v. Nejad*, 933 F.3d 1162, 1165 (9th Cir. 2019) (nevertheless affirming the money judgment based on prior circuit precedent). Further, during the oral argument in *Honeycutt*, multiple Justices of this Court likewise expressed skepticism about whether money judgments were authorized by

statute, with Justice Kagan calling such judgments "extrastatutory money judgments." *See* Tr. of Oral Argument at 46:13-14, *Honeycutt v. United States*, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-142_4gc5.pdf.

If the statutory text itself does not supply the form of punishment, there is nothing for courts to do except invite Congress to amend the statute. *See Monsanto*, 491 U.S. at 614. Indeed, going back to the Civil War era Confiscation Acts, this Court has emphasized that forfeiture penalties can only be authorized by Congress, and that courts exceed their jurisdiction when they fashion any forfeiture penalty beyond those authorized by Congress. *See Bigelow v. Forrest*, 76 U.S. 339, 351 (1870) (holding that a district court "had no power to order" a forfeiture beyond what was authorized by Congress and would have "transcended its jurisdiction" with such an order); *see also Ex Parte Lange*, 85 U.S. 163, 176–77 (1874) (holding that a judgment imposing punishment in excess of statutory authorization is inherently void); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

The structure of the RICO forfeiture statute likewise does not support imposing *in personam* money judgments. That statute contains a specific provision for forfeiture of "substitute property" if the particular property subject to forfeiture is unavailable. *See* 18 U.S.C. § 1963(m).[2] If the RICO forfeiture statute authorized *in*

[2] Title 21 U.S.C. § 853(p)—the drug forfeiture statute—contains an identical substitute-property provision, which applies to all criminal forfeiture proceedings. *See* 18 U.S.C. § 982(b)(1).

*personam* forfeiture money judgments—rather than the forfeiture of specific tainted property—then the separate mechanism for forfeiting untainted substitute property would be superfluous, because the government could simply seek to enforce the money judgment without the need for any substitute property provision. *See Croce*, 334 F. Supp. 2d at 791 (holding that RICO's substitute property provision "would have been unnecessary if . . . RICO's original *in personam* forfeiture provision empowered courts to enter nonspecific forfeiture money judgments"), *overruled by Vampire Nation*, 451 F.3d at 201.

In supporting this atextual criminal penalty, a number of circuits have relied on the theory that, while the forfeiture statute does not authorize money judgments, neither does it explicitly forbid them. *Day*, 524 F.3d at 1377 ("Nothing in the relevant statutes suggests that money judgments are forbidden."); *Blackman*, 746 F.3d at 145 (same); *Hampton*, 732 F.3d at 691–92 (same); *Casey*, 444 F.3d at 1073. But the absence of an express prohibition on a penalty 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).

Further, this reasoning is all the more troubling in the criminal-law context, where the rule of lenity demands that courts interpret ambiguous criminal statutes in favor of the defendant. *E.g., Hughey v. United States*, 495 U.S. 411, 422 (1990) (noting that the rule of lenity applies to sentencing statutes). Indeed, this court has long and consistently applied the rule of lenity (or strict construction) even to civil

*in rem* forfeitures. *See, e.g., United States v. One 1936 Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."); *Shipp v. Miller's Heirs*, 15 U.S. 316, 325 (1817) ("[A]cts, imposing forfeitures, are always construed strictly as against the government, and liberally as to the other parties."). The court of appeals' reasoning, however, turns the rule of lenity on its head: in the criminal law, the fact a statute does not expressly forbid a penalty does not mean that the penalty is implicitly authorized. *See Hughey*, 495 U.S. at 422.

More troubling still, Congress knows how to authorize money judgments. In the bulk cash smuggling statute, Congress specifically authorized a "personal money judgment" as an alternative forfeiture penalty. 31 U.S.C. § 5332(b)(4). The fact that neither section 1963(m) nor section 853(p) include any such language shows that Congress did not intend courts to create a personal money judgment remedy by implication. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[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." (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

Lower courts have also cited the Federal Rule of Criminal Procedure 32.2(b)(1), which refers to "a personal money judgment," as a basis for inferring the existence of such judgments under the RICO (and other) forfeiture statutes. *See, e.g., Casey*,

444 F.3d at 1076. But, under the Rules Enabling Act, a procedural rule like Rule 32.2 cannot create any substantive right. *See* 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."); *see also Day*, 416 F. Supp. 2d at 91 ("Simply stated, Rule 32.2 cannot authorize a practice not permitted by statute."); *Croce*, 334 F. Supp. 2d at 785 n.12 (same). Further, the Advisory Committee itself took no position on the substantive question of whether *in personam* money judgments were authorized by statute. *See* Fed. R. Crim. P. 32.2, Advisory Committee Notes ("A number of cases have approved use of money judgment forfeitures. The Committee takes no position on the correctness of those rulings."). Thus, Rule 32.2 sheds no light on whether the RICO forfeiture statute authorizes money judgments.

Finally, some lower courts have relied on liberal-construction clauses contained in RICO and the Controlled Substances Act as supporting the judicial creation of forfeiture money judgments. *See, e.g., Casey*, 444 F.3d at 1073 (citing 21 U.S.C. § 853(o)). In *Honeycutt*, however, this Court rejected this very argument when offered to justify the imposition of joint and several liability not authorized by the plain text used by Congress. *Honeycutt*, 137 S. Ct. at 1635 n.2 ("But the 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.").

In *Honeycutt*, the Court also relied on the "background" forfeiture principle that Congress intended to restrict forfeitures only to tainted property. 137 S. Ct. at 1635. Congress intended to extend this longstanding limitation on *in rem* civil forfeitures to the more recently created *in personam* criminal forfeitures. *Id.* at

1635 (holding that "§ 853 maintains traditional *in rem* forfeiture's focus on tainted property unless one of the preconditions of § 853(p) exists."). *Honeycutt* thus interpreted the "background" principles of forfeiture law to preclude judge-made theories that expanded the scope of criminal forfeiture under common law attribution doctrines such as conspiracy or joint and several liability. This reasoning applies with equal force to forfeiture money judgments, which were likewise not a feature of traditional *in rem* forfeiture, which was always centered on specific property. *See Honeycutt*, 137 S. Ct. at 1634–35 ("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.'" (quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827))).

Specifically, going back to the Magna Carta, *in personam* money judgments were prohibited. "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, *supra*, at 372. Thus, the recent practice of imposing enormous forfeiture money judgments like that imposed here is far harsher than what was allowed at common law. *Cf. 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 deep historical roots of forfeiture.

In sum, forfeiture money judgments represent a judicially created form of liability untethered to any statutory language, which conflicts with (and renders futile) the substitute-property forfeiture provisions of sections 853(p) and 1963(m). They also conflict with the longstanding historical practice of forfeiture both in the United States and England. This Court should therefore grant certiorari to address the important question lurking in *Honeycutt* but left unanswered: whether *in personam* forfeiture money judgments are authorized by forfeiture statutes like section 1963, which contain no mention of money judgments.

C. This case presents an excellent vehicle to address whether *in personam* forfeiture money judgments are authorized after *Honeycutt*.

This case also presents an excellent vehicle to address the second question presented. Fong argued before the district court and Ninth Circuit that the RICO forfeiture statute did not authorize *in personam* forfeiture money judgments. *See* ER 167–68; Pet. App. 3a. The Ninth Circuit addressed his claim on the merits. *See* Pet. App. 3a. Further, the RICO forfeiture statute here, section 1963, is essentially identical to the drug forfeiture statute in *Honeycutt*, 21 U.S.C. § 853. *See, e.g., United States v. Bennett*, 147 F.3d 912, 914 n.3 (9th Cir. 1998) (noting that § 853 and § 1963 are "substantially identical" and that cases construing either statute rely on "cases and legislative history discussing § 1963 and § 853 interchangeably"). And like all criminal forfeiture statutes, with the exception of the bulk-cash-

smuggling provision, 31 U.S.C. § 5332(b)(4), the RICO forfeiture statute contains no express provision allowing for money judgments. Accordingly, this case represents an excellent vehicle to address whether any judge-made *in personam* forfeiture money judgment remedies are lawful.

## CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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