No.

In the Supreme Court of the United States

PHILIP ESFORMES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

While investigating petitioner for alleged health-care fraud, federal prosecutors seized hundreds of petitioner's attorney-client privileged documents and used those documents for months. The government now concedes that its conduct was "reckless," "sloppy, careless, clumsy, and ineffective." C.A. Oral Arg. Recording 12:38-13:16. Notwithstanding this prosecutorial misconduct, the court of appeals affirmed petitioner's conviction because he could not demonstrate that the government's invasion of privilege actually prejudiced the outcome of his trial. The court of appeals also affirmed an order requiring petitioner to forfeit $38.7 million based on the district court's own fact-finding that the amount represented "property … involved in [the] offense" or traceable thereto. *See* 18 U.S.C. § 982(a)(1).

The questions presented are:

1. Whether a criminal defendant must show actual prejudice to establish a Sixth Amendment violation warranting dismissal of the indictment or disqualification of prosecutors when prosecutors wrongfully invade the defendant's attorney-client privilege.

2. Whether a court may order a criminal defendant to forfeit a sum of money based on a factual finding by the court, rather than a jury, that the amount of money was property tainted by the offense. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); 18 U.S.C. § 982(a)(1).

PARTIES TO THE PROCEEDING

Petitioner Philip Esformes was appellant in the court of appeals and defendant in the district court.

Respondent United States was appellee in the court of appeals and plaintiff in the district court.

Sherri Esformes was a petitioner/claimant in the district court forfeiture proceedings. Adirhu Associates LLC, ALF Holdings Inc., Almovea Associates LLC d/b/a North Dade Nursing and Rehabilitation Center, Ayintove Associates LLC d/b/a Harmony Health Center, Courtyard Manor Retirement Investors Ltd., Courtyard Manor Retirement Living, Inc., Fair Havens Center, LLC, Eden Gardens LLC, Flamingo Park Manor LLC d/b/a The Pointe, Jene's Retirement Living, Inc. d/b/a North Miami Retirement Living, Kabirhu Associates LLC d/b/a Golden Glades Nursing and Rehabilitation Center, La Hacienda Gardens LLC, Lake Erswin LLC d/b/a South Hialeah Manor, Lauderhill Manor LLC, Morsey LC, The Pointe Retirement Investors Ltd., Rainbow Retirement Investors Ltd., Jene's Retirement Investors Ltd., Sefardik Associates, LLC d/b/a The Nursing Center at Mercy, Sierra ALF Management LLC, Takifhu Associates LLC d/b/a South Dade Nursing and Rehabilitation Center, ADME Investment Partners LTD d/b/a Oceanside Extended Care Center, and 1st Equity Bank were intervenors in the district court forfeiture proceedings.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Esformes v. United States*, No. 22A854 (U.S. Apr. 4, 2023) (denying stay pending certiorari)
- *United States v. Esformes*, Nos. 19-13830, 19-148748 (11th Cir. Jan. 6, 2023) (affirming conviction and sentence)
- *United States v. Esformes*, No. 18-15170 (11th Cir. Feb. 5, 2019) (denying pretrial release)
- *United States v. Esformes*, No. 16-16485 (11th Cir. Feb. 28, 2017) (denying pretrial release)
- *United States v. Esformes*, No. 16-20549 (S.D. Fla. Nov. 25, 2019) (entering amended judgment of conviction)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Page

Cases—continued:

Page

Statutes and Rule:

Other Authorities:

Page

Other Authorities—continued:

Page

Other Authorities—continued:

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Philip Esformes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's decision (Pet.App.2a-34a) is reported at 60 F.4th 621. The district court's denial of the motion to dismiss the indictment or disqualify the prosecution team (Pet.App.78a-160a) and the magistrate judge's report and recommendation (Pet.App.161a-313a) are unreported but available at 2018 WL 5919517 and 2018 WL 6626233, respectively. The district court's forfeiture money judgment (Pet.App.52a-54a) is unreported.

JURISDICTION

The court of appeals entered judgment on January 6, 2023, and denied rehearing en banc on March 3, 2023. On June 16, 2023, Justice Thomas extended the time to file this petition to July 31, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury … and to have the Assistance of Counsel for his defence.

18 U.S.C. § 982(a)(1) provides:

> The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

STATEMENT

This case presents two important, recurring questions of criminal law that independently warrant this Court's review. *First*, the Court should resolve whether, when the government improperly invades a defendant's attorney-client privilege, the defendant must prove actual prejudice to demonstrate a Sixth Amendment violation warranting dismissal of the indictment or disqualification of the prosecution team. That question is the subject of a longstanding, three-way circuit split. *Second*, the Court should resolve whether the Sixth Amendment's jury fact-finding right forbids courts from imposing forfeiture money judgments based on their own factual findings. Notwithstanding the steady advance of *Apprendi v. New Jersey*, 530

U.S. 466 (2000), lower courts have been stymied by this Court's remark in a pre-*Apprendi* case that the Sixth Amendment does not apply to criminal forfeiture. Only this Court can set the law straight on both questions.

In affirming a conviction tainted by flagrant prosecutorial invasions of the attorney-client privilege, the Eleventh Circuit entrenched a longstanding circuit split on the showing required to establish a Sixth Amendment violation warranting dismissal or disqualification. Like the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, the Eleventh Circuit requires defendants to show actual prejudice. But as the Eleventh Circuit acknowledged below, other circuits disagree. The Third and Tenth Circuits, plus one State supreme court, irrebuttably presume prejudice. The First and Ninth Circuits, joined by six State supreme courts, occupy a middle ground, presuming prejudice unless the government rebuts that presumption.

This deep, widely acknowledged split—including eleven circuits and seven State supreme courts—is immensely important to defendants, like Mr. Esformes, subjected to prosecutorial misconduct. Here, the government seized hundreds of privileged documents from Mr. Esformes' lawyer, and a so-called "taint team" provided those documents to the prosecution. Despite multiple red flags, prosecutors plowed ahead, using the privileged documents extensively in their investigation and trial preparation. The misconduct was so egregious that four former U.S. Attorneys General filed an amicus brief below urging the government to confess error. The government itself conceded that its conduct was "reckless," "sloppy, careless, clumsy, and ineffective." C.A. Oral Arg. Recording 12:38-13:16.

But in the Eleventh Circuit, dismissal and disqualification were unavailable unless Mr. Esformes demonstrated actual prejudice. Mr. Esformes thus faced the nearly impossible task of peering into prosecutors' minds and pinpointing how their knowledge of his privileged communications affected their case. He would not have borne that burden in four other circuits or seven States. Instead, the court would have presumed prejudice, and Mr. Esformes would have had a strong argument for dismissal or disqualification. This important issue recurs with growing frequency, especially as the Justice Department uses "taint teams" (like the one here) to seize privileged documents. Because geographic happenstance should not dictate whether someone goes to prison, this Court's review is imperative.

This case also presents the Court with an ideal opportunity to decide whether *Apprendi*'s Sixth Amendment jury fact-finding right applies to criminal forfeiture. *Apprendi* held that, other than the fact of prior conviction, all facts necessary to punishment must be found by a jury, not a judge. Criminal forfeiture requires factual findings. Absent a finding that property was tainted by the offense, no forfeiture is authorized by law. *Apprendi* therefore applies: Because the fact that property was tainted is necessary to punishment, that fact must be found by a jury. Courts may not impose forfeiture money judgments, like the one here, based on their own fact-finding.

Yet five years before *Apprendi*, this Court remarked that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." *Libretti v. United States*, 516 U.S. 29, 49 (1995). That statement does not survive *Apprendi*. *Libretti* cited cases denying *any* jury fact-finding right at sentencing that have since been overruled. But lower courts, bound

by decisions of this Court, have continued to deny forfeiture defendants their Sixth Amendment rights, notwithstanding *Apprendi* and its progeny. Only this Court can correct this defect in Sixth Amendment law.

This issue also is exceptionally important. Without juries to serve their historical role as bulwarks against abuse, the government has sought and obtained massive money judgments against countless defendants. Indeed, this case well illustrates the potential for abuse. Initially, the government asked the jury to find that 54 assets were tainted by the offense and thus subject to forfeiture. The jury largely rejected those requests, identifying only 7 tainted assets. Rather than accepting defeat, the government successfully moved the district court to make its *own* findings and order the forfeiture of $38.7 million, in addition to the 7 assets found by the jury. Because Mr. Esformes no longer possessed the $38.7 million, the court then ordered him to forfeit other assets—including many of the same assets the jury refused to award. This Court's intervention is needed to ensure that juries can safeguard against such abusive forfeiture money judgments.

A. Factual Background

Mr. Esformes operated and partially owned nursing homes and assisted-living facilities around Miami, Florida. Pet.App.3a. On July 22, 2016, the government unsealed an indictment alleging that Mr. Esformes committed health-care fraud, money laundering, and related charges by improperly paying doctors for referrals. D. Ct. Dkt. 3, 11.

That same day, the government searched an office suite at one of Mr. Esformes' assisted-living facilities. Pet.App.124a. The government knew that one of Mr. Esformes' civil attorneys had an office there. Pet.App.124a-

125a. Indeed, Mr. Esformes' criminal-defense attorney showed up the morning of the search, warned the agents about the presence of privileged documents at the facility, and told the lead prosecutor that agents were "seizing attorney-client privileged materials." Pet.App.126a. The attorney made clear: "These are privileged files. We are not waiving any privilege." Pet.App.126a.

Given that it anticipated finding privileged documents, the government had assembled a so-called "taint team." Pet.App.125a. Law-enforcement agents and prosecutors unconnected to the investigation were supposed to segregate and review potentially privileged materials before transmitting them to the prosecution team. Pet.App.125a.

As the government now admits, however, that protocol "suffered from several flaws." U.S. C.A. Br. 32. Among other failures:

- No one told the taint agents the names of Mr. Esformes' attorneys or their firms. Pet.App.126a-127a.
- No one told the taint agents that they were searching Mr. Esformes' attorney's office. Pet.App.172a. To the contrary, case agents told taint agents that the lawyer was Mr. Esformes' "business associate." Pet.App.174a.
- Taint agents put "[h]undreds of documents, clearly prepared by law firms," with markings like "privileged and confidential" or "attorney/client privilege" in non-taint boxes and sent those directly to the prosecution team. Pet.App.127a.

- One seized document, apparently placed in a non-taint box, was titled "Outline of potential defenses"—"Memo protected by attorney/client privilege." Pet.App.172a.
- Entire boxes labeled "legal," "court documents," or with the name of Mr. Esformes' defense firm were not marked "taint." Pet.App.169a.
- Taint agents sent seized computer files directly to prosecutors with "no review at all." Pet.App.301a.
- Many of the taint agents had participated in related investigations, "some in a significant way." Pet.App.125a.
- Taint agents later became "actively involved" in the investigation. Pet.App.125a.

The prosecution team promptly began reviewing the seized materials, which were replete with privileged documents. Pet.App.133a-134a. One set of documents became especially significant: printed spreadsheets that Mr. Esformes' civil attorney asked his legal assistant to prepare to assist Mr. Esformes' criminal-defense attorney, as well as the civil attorney's and assistant's handwritten notes about the spreadsheets. Pet.App.136a.

As a magistrate judge later found, prosecutors used these privileged documents "extensively" in their investigation. Pet.App.302a. For example, in September 2016, they presented the documents to Mr. Esformes' civil attorney in an effort to persuade him to cooperate. Pet.App.138a-139a. And in September and October 2016, prosecutors "exhaustive[ly] question[ed]" the legal assistant about the documents. Pet.App.194a, 305a.

The legal assistant's attorney immediately warned prosecutors that the documents might be privileged.

Pet.App.133a. Undeterred, prosecutors continued using the documents, even after the legal assistant identified the attorney's handwriting. Pet.App.141a-142a. Subsequently, in November 2016, the civil attorney's lawyer also raised the privilege issue. Pet.App.133a. Yet neither the assertions of privilege nor the appearance of privileged materials in supposed "non-taint" boxes dissuaded the lead prosecutor from continuing her review. Pet.App.133a-134a.

It was not until December 2016, more than two months after first being told about the privilege problem, that the lead prosecutor finally stopped her review after coming across yet another privileged document. Pet.App.133a-134a. At that point, she brought in different prosecutors to review the materials. Pet.App.134a. But she failed to inform either the court or Mr. Esformes about the privilege invasion. Pet.App.134a. The defense team did not discover the violation until February 2017, when they reviewed prosecutors' hard-copy files. Pet.App.134a.

B. Proceedings Below

1. In April 2017, Mr. Esformes moved to dismiss the indictment or disqualify the prosecution team in light of these and other privilege violations. Pet.App.161a. The motion was referred to a magistrate judge, who heard 9 days of testimony from 18 witnesses. Pet.App.162a, 167a-168a. The magistrate judge issued a 117-page report, detailing the government's misconduct. Pet.App.161a-313a. The magistrate judge found that the government's taint protocol "was both inadequate and ineffective" and that prosecutors "improperly reviewed" unscreened materials. Pet.App.300a-301a.

The magistrate judge took particular issue with prosecutors' handling of the privileged spreadsheets. Despite initially acknowledging that the privilege assertion covered the legal assistant's "notes" (plural), the lead prosecutor later claimed the assertion covered only a single bullet point. Pet.App.149a. The magistrate found this explanation "not credible" and "facially inconsistent with [the prosecutors'] prior sworn narratives" indicating that the privilege claim "extended to the entirety of the … notes." Pet.App.303a. The magistrate gave "no credibility to the prosecution team's 'new' narrative," which made "no logical sense." Pet.App.303a. And she condemned the prosecutors' "deplorable" "attempt to obfuscate the evidentiary record" by changing their story. Pet.App.309a.

Ultimately, the magistrate judge found that "the government's disregard for the attorney client and work product privileges ha[d] not been limited to a single instance or event." Pet.App.309a. But the magistrate judge read Eleventh Circuit precedent to require a defendant to show actual prejudice to support dismissal or disqualification. Pet.App.164a-166a. Because she found that Mr. Esformes had not met that burden, she recommended "the less drastic remedy of suppression" of privileged evidence. Pet.App.309a-311a.

2. Mr. Esformes objected to the magistrate's suppression-only remedy. Pet.App.81a-82a. The government filed its own objections, including to the adverse credibility findings. Pet.App.80a-81a. For their part, the prosecutors hired private counsel to represent them. D. Ct. Dkt. 948, 961, 969. The lead prosecutor's private counsel warned that the magistrate's findings "could seriously jeopardize her career in public service." D. Ct. Dkt. 961, at 3. At oral argument, the district court claimed a "moral burden" to consider "the career of a prosecutor" and

asked the prosecutors' private lawyers what "specific wording" in the report they wanted changed. D. Ct. Dkt. 974, at 217-19.

In November 2018, the district court adopted the magistrate's report and recommendation in part. The court agreed "that the prosecutors and agents in this case failed to uphold the high standards expected from federal agents and prosecutors." Pet.App.157a-158a. The search was "clumsy and border-line incompetent." Pet.App.131a. And the court lambasted the prosecutors for their "sloppy, careless, clumsy, [and] ineffective" behavior, "clouded by their stubborn refusal to be sufficiently sensitive to issues impacting the attorney client privilege." Pet.App.158a.

The district court nonetheless held that, because Mr. Esformes "ha[d] not sufficiently demonstrated that he was prejudiced," it was "unnecessary" to adopt the magistrate's "conclusion that the prosecutors acted in bad faith," "particularly given the adverse consequences of such findings to the careers of the prosecutors." Pet.App.150a-151a, 158a. The court alternatively found, based on its reading of the hearing transcript, that the prosecutors acted "in good faith." Pet.App.158a. The court theorized that their "inconsistent recollections" resulted from "differences in memories and from misunderstandings." Pet.App.151a-152a. The court thus declined to dismiss the indictment or disqualify the prosecution team. Pet.App.159a. Because the government agreed not to use the seized privileged materials at trial, the court deemed suppression moot. Pet.App.158a.

3. The case proceeded to trial. In April 2019, a jury found Mr. Esformes guilty of conspiracy to defraud the United States, obstruction of justice, and other kickback, bribery, and money-laundering counts. D. Ct. Dkt. 1245. The jury hung on the six remaining counts, including the

principal healthcare-fraud conspiracy charge. *Id.* The district court sentenced Mr. Esformes to 20-years' imprisonment. Pet.App.10a-11a.

Mr. Esformes' money-laundering convictions also required forfeiture of "any property, real or personal" that the government proved was "involved in [the] offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1). The government claimed that 54 assets were so-tainted by the offense: 19 bank accounts, Mr. Esformes' share of 29 health-care companies, 4 pieces of real property, a wristwatch, and a purse. Pet.App.60a-77a.

At Mr. Esformes' request, the district court retained the jury to determine whether those assets had the required factual taint, *i.e.*, that they were "involved in" the offense or "traceable to such property." Pet.App.37a; *see* Fed. R. Crim. P. 32.2(b)(5)(A). The jury made that factual finding for 7 health-care companies, but refused the government's other 47 forfeiture requests. Pet.App.60a-77a.

Largely rebuffed by the jury, the government moved the district court to make its own factual findings and order a "forfeiture money judgment" of $38,700,795 (the government's calculation of the total revenue of Mr. Esformes' health-care facilities over seven years). D. Ct. Dkt. 1372, at 1; Pet.App.53a-54a. Sitting without a jury, the district court found that the entire $38.7 million was "traceable to" property "involved in" the offense and ordered Mr. Esformes to forfeit that amount, plus the 7 assets identified by the jury. Pet.App.50a-51a, 53a-54a. Because Mr. Esformes no longer possessed the $38.7 million, the court ordered Mr. Esformes to forfeit "substitute property," including 11 bank accounts and all of the real property the jury had declined to award. Pet.App.40a-43a.

4. Mr. Esformes appealed to the Eleventh Circuit, where he garnered the support of former Justice Department leaders, including Attorneys General Edwin Meese, John Ashcroft, Alberto Gonzales, and Michael Mukasey. In their amicus brief, those leaders urged the Eleventh Circuit to reverse and order dismissal given "the government's wholesale, protracted, and deliberate disregard for the defendant's attorney-client privilege." C.A. Former DOJ Br. 33-34.

The President took notice too. In December 2020, President Trump commuted Mr. Esformes' term of imprisonment after nearly 4.5 years served but left intact the rest of the sentence, including the forfeiture order. The President cited Mr. Esformes' ongoing prosecutorial-misconduct appeal and the former Attorneys Generals' support. *Statement from the Press Secretary Regarding Executive Grants of Clemency* (Dec. 22, 2020), https://bit.ly/3LTG3tl. Notwithstanding the commutation, the government announced in April 2021 that it would seek to retry Mr. Esformes on the hung counts, whatever happened on appeal. D. Ct. Dkt. 1565, at 4.

5. In January 2023, the Eleventh Circuit affirmed the judgment of conviction. As relevant here, the court held that Mr. Esformes could not obtain dismissal or disqualification for "even the most egregious prosecutorial misconduct" unless he proved "demonstrable prejudice." Pet.App.14a-15a (citation omitted). The court explicitly rejected Ninth Circuit case law presuming prejudice for deliberate privilege violations as "foreclosed by [Eleventh Circuit] precedent." Pet.App.15a. Because Mr. Esformes had not demonstrated actual prejudice, the court held that "the issue of bad faith … cannot affect our disposition of this appeal." Pet.App.16a.

The Eleventh Circuit also affirmed the $38.7 million forfeiture money judgment. Pet.App.26a-27a. The court rejected Mr. Esformes' Sixth Amendment challenge, holding that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment[]." Pet.App.29a (quoting *Libretti*, 516 U.S. at 49).

The Eleventh Circuit denied rehearing en banc. Pet.App.1a. Justice Thomas denied a stay pending certiorari.

REASONS FOR GRANTING THE PETITION

This case is an ideal vehicle to resolve two important and recurring criminal-law issues. The first is the deep, longstanding, and widely acknowledged circuit split over whether defendants must show prejudice to establish a Sixth Amendment violation warranting dismissal or disqualification when prosecutors wrongfully invade attorney-client privilege. Nearly every circuit has weighed in. Two circuits and one State supreme court apply an irrebuttable presumption of prejudice. Two circuits, along with six State supreme courts, permit the government to rebut that presumption. And seven circuits, including the Eleventh Circuit below, require defendants to show actual prejudice. This Court's review is needed to resolve this entrenched conflict.

This Court also should grant certiorari to resolve whether the Sixth Amendment's jury fact-finding right applies to criminal forfeiture. *Apprendi*'s logic applies squarely here. The district court imposed a sentence based on judge-found facts. Yet, relying on this Court's pre-*Apprendi* precedent, the circuits have held that the Sixth Amendment's jury fact-finding right does not apply to criminal forfeiture. No percolation is possible. Only

this Court can vindicate forfeiture defendants' Sixth Amendment rights.

I. The Court Should Grant Certiorari on the Privilege Question

This Court should grant certiorari to decide whether defendants must show actual prejudice to establish a Sixth Amendment violation warranting dismissal or disqualification when prosecutors wrongfully invade attorney-client privilege.

A. Circuits and State Supreme Courts Are Deeply Split on the Prejudice Required for Dismissal or Disqualification

The Sixth Amendment right to counsel shields defendants from wrongful government invasions into the attorney-client relationship. *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4, 558 (1977); *see Kaur v. Maryland*, 141 S. Ct. 5, 5-6 (2020) (Sotomayor, J., respecting denial of certiorari). To warrant dismissal, the invasion must result in "demonstrable prejudice, or substantial threat thereof." *United States v. Morrison*, 449 U.S. 361, 365 (1981). As three Justices observed in 1988, however, lower courts have taken three "conflicting approaches" to "the issue of who bears the burden of persuasion for establishing prejudice" when prosecutors obtain "confidential defense strategy information." *Cutillo v. Cinelli*, 485 U.S. 1037, 1037-38 (1988) (White, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting from denial of certiorari). Since then, "many federal and state courts have struggled to define what burden, if any, a defendant must meet to demonstrate prejudice from a prosecutor's wrongful or negligent acquisition of privileged information." *Kaur*, 141 S. Ct. at 6 (Sotomayor, J., respecting denial of certiorari).

1. The Third and Tenth Circuits, joined by the South Carolina Supreme Court, irrebuttably presume prejudice when prosecutors wrongfully invade attorney-client privilege.

The Third Circuit applies an irrebuttable presumption of prejudice where "defense strategy was actually disclosed or where … government enforcement officials sought such confidential information." *United States v. Levy*, 577 F.2d 200, 210 (3d Cir. 1978). The Third Circuit thus holds that the "availability of relief" does not turn on a showing of prejudice. *Id.* And "where the trial has already taken place," "dismissal of the indictment is the only appropriate remedy." *Id.*

The Third Circuit has questioned whether that per se rule survived *Morrison*. *United States v. Mitan*, 499 F. App'x 187, 192 n.6 (3d Cir. 2012). But post-*Morrison* the court reaffirmed that prejudice is "presumed to occur when confidential defense strategy is disclosed to the government by an informer." *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984) (citing *Levy*, 577 F.2d 200).

The Tenth Circuit employs the same approach. Prejudice "must be presumed" when the government "becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so." *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995). This presumption is "irrebuttable," even when "the government presents evidence to the contrary." *United States v. Orduno-Ramirez*, 61 F.4th 1263, 1269 & n.4 (10th Cir. 2023), *petition for cert. filed*, No. 23-5034 (June 30, 2023).

Courts in the Tenth Circuit thus hold that intentional privilege violations "are not subject to harmless-error review." *In re CCA Recordings 2255 Litig.*, 543 F. Supp. 3d 1030, 1039 (D. Kan. 2021). "[T]he violation itself warrants relief," *id.*, and when prejudice "taint[s] the entire proceeding," appropriate relief includes "retrial by a new prosecutor" or "dismissal of the indictment," *Shillinger*, 70 F.3d at 1143; *e.g.*, *United States v. Carter*, 429 F. Supp. 3d 788, 885-90, 904 (D. Kan. 2019) (dismissing indictment).

The South Carolina Supreme Court follows suit. That court holds that "[d]eliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice." *State v. Quattlebaum*, 527 S.E.2d 105, 109 (S.C. 2000). Based on that irrebuttable presumption, that court has disqualified an entire prosecutor's office when one prosecutor invaded the defendant's privilege. *See id.*

2. The First and Ninth Circuits, plus six State supreme courts, take a middle position. When prosecutors wrongfully invade attorney-client privilege, these courts presume prejudice unless the government rebuts that presumption.

Start with the First Circuit. Once a defendant shows that "confidential communications were conveyed as a result of the government intrusion into the attorney-client relationship," "the burden … shifts to the government to show that the defendant was not prejudiced." *United States v. DeCologero*, 530 F.3d 36, 64 (1st Cir. 2008) (cleaned up); *accord Cinelli v. City of Revere*, 820 F.2d 474, 478 (1st Cir. 1987); *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984). When the government fails to meet that "demanding" burden, *DeCologero*, 540 F.3d at 64, disqualification is an available remedy. *E.g.*, *United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H.

1992), *rev'd in part on other grounds*, 29 F.3d 754 (1st Cir. 1994).

Similarly, in the Ninth Circuit, if a defendant makes a *prima facie* showing that a "wrongful intrusion result[ed] in the prosecution obtaining the defendant's trial strategy," "the burden shifts to the government to show that there has been no prejudice." *United States v. Danielson*, 325 F.3d 1054, 1070-71 (9th Cir. 2003) (alteration adopted) (quoting *Mastroianni*, 749 F.2d at 908). That burden is "heavy." *Id.* at 1072 (citation omitted). The government must demonstrate that the privileged evidence did not affect its "pre-trial and trial strategy," including "decisions about the scope and nature of the investigation." *Id.* at 1074.

Six State supreme courts also rebuttably presume prejudice:

- **Connecticut**: The disclosure of defense trial strategy is "*inherently prejudicial*," so "prejudice should be presumed." *State v. Lenarz*, 22 A.3d 536, 549 (Conn. 2011). If the government fails to rebut that presumption, the default remedy is dismissal. *Id.* at 553.
- **Hawaii**: The Hawaii Supreme Court has "expressly approve[d] and adopt[ed]" the First Circuit's presumption of prejudice. *State v. Soto*, 933 P.2d 66, 79-80 (Haw. 1997) (citing *Mastroianni*, 749 F.2d at 907-08).
- **Idaho**: The Idaho Supreme Court follows the Ninth Circuit's *Danielson* decision, which "seamlessly complement[s]" Idaho precedent. *State v. Robins*, 431 P.3d 260, 267 (Idaho 2018).

- **Indiana**: The prosecution bears "the burden of disproving prejudice." *State v. Taylor*, 49 N.E.3d 1019, 1028 (Ind. 2016). "[I]f that means a loss for the prosecution, so be it." *Id.*
- **Nebraska**: The Nebraska Supreme Court "agree[s] with courts that hold a presumption of prejudice arises when the State becomes privy to a defendant's confidential trial strategy." *State v. Bain*, 872 N.W.2d 777, 790-91 (Neb. 2016).
- **Washington**: "[T]he presumption of prejudice arising from … eavesdropping [on attorney-client conversations] is rebuttable," although it will be the "rare" case with "no possibility of prejudice." *State v. Fuentes*, 318 P.3d 257, 262 (Wash. 2014).

3. In stark contrast, the Eleventh Circuit below required Mr. Esformes to show actual prejudice before dismissal or disqualification were even on the table. Pet.App.14a. Six other circuits hold the same.

Take the Second Circuit. Although it has suggested that a "per se rule of dismissal" might apply when privilege violations are "manifestly and avowedly corrupt," *United States v. Gartner*, 518 F.2d 633, 637 (2d Cir. 1975), the circuit has never encountered a case that met that description. Instead, the court consistently holds that "a defendant must show prejudice resulting from the intentional invasion of the attorney-client privilege." *United States v. Schwimmer*, 924 F.2d 443, 447 (2d Cir. 1991); *accord United States v. Chandler*, 56 F.4th 27, 37 (2d Cir. 2022); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985). When defendants fail to show prejudice, dismissal and disqualification are denied. *See United States v. Dien*, 609 F.2d 1038, 1043 (2d Cir. 1979); *United States v. Sharma*, 2019 WL 3802223, at *4 (S.D.N.Y. Aug. 13, 2019).

In the Fourth Circuit, "[i]t is well settled" that defendants must make "some showing of prejudice" to establish "a Sixth Amendment claim based on an invasion of the attorney-client relationship." *United States v. Allen*, 491 F.3d 178, 192 (4th Cir. 2007) (quoting *United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990)). If defendants cannot make that showing, the Fourth Circuit does not permit any relief, *id.*, much less dismissal or disqualification.

The Fifth Circuit agrees: Defendants must show "that the intrusion into [their] attorney-client relationship prejudiced the ability of their attorneys to provide adequate representation or otherwise prejudiced their defense." *United States v. Melvin*, 650 F.2d 641, 644 (5th Cir. Unit B July 1981). If defendants fail to make that showing, dismissal is unavailable. *Id.*; *accord United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000); *United States v. Rodriguez*, 948 F.2d 914, 916 (5th Cir. 1991).

The Sixth Circuit applies the same rule. When "there has been an invasion of the attorney-client privilege in violation of the Sixth Amendment," "prejudice to the defendant must be shown before any remedy is granted." *United States v. Steele*, 727 F.2d 580, 585-86 (6th Cir. 1984). Thus, absent "discernable prejudice," that court has rejected disqualification as a remedy. *United States v. Dobson*, 626 F. App'x 117, 125 (6th Cir. 2015).

The Seventh Circuit also requires actual prejudice. Only "if the defendant c[an] show prejudice" does a "prosecutorial violation of [the attorney-client] privilege … require a hearing or dismissal of the charge." *United States v. Castor*, 937 F.2d 293, 297 (7th Cir. 1991).

Likewise, the Eighth Circuit puts "[t]he burden … on the defendant to show that the representation or the proceedings leading to his conviction were adversely affected by virtue of a Sixth Amendment violation in order to obtain a dismissal of the indictment." *United States v. Kriens*, 270 F.3d 597, 603 (8th Cir. 2001); *accord United States v. Hari*, 67 F.4th 903, 912-13 (8th Cir. 2023); *United States v. Singer*, 785 F.2d 228, 234-36 (8th Cir. 1986).

4. Notably, the split does not turn on the particular way that the government invades the defendant's privilege. In many of the above cases, the government sent informants into the defense camp that reported on privileged conversations. *E.g.*, *Danielson*, 325 F.3d at 1073-74. But in other cases, like this one, the government improperly obtained a "confidential attorney-client file," *Singer*, 785 F.2d at 234, "handwritten notes" prepared for an attorney meeting, *Robins*, 431 P.3d at 263, or privileged computer files seized pursuant to a warrant, *Lenarz*, 22 A.3d at 539.

Moreover, courts apply their preferred tests, regardless of the type of intrusion. For example, the Connecticut Supreme Court has presumed prejudice in a search-warrant case, finding no "distinction between privileged information" obtained by an informant or pursuant to a search warrant. *Id.* at 545 n.10. And the Idaho Supreme Court likewise recognizes that the presumption of prejudice applies "beyond the informant context." *Robins*, 431 P.3d at 268. Indeed, in the decision below, the Eleventh Circuit contrasted its approach with the Ninth Circuit's approach in informant cases, without suggesting that factual distinction made any difference. Pet.App.15a (citing *Danielson*, 325 F.3d at 1072).

Courts presuming prejudice also have highlighted different degrees of willfulness by government agents violating privilege. For instance, the First Circuit merely asks whether the government "intru[ded] into the attorney-client relationship" with no inquiry into willfulness. *DeCologero*, 530 F.3d at 64. The Ninth Circuit asks whether the government intruded "wrongful[ly]" or "affirmatively." *Danielson*, 325 F.3d at 1070-71. And the Tenth Circuit asks whether the intrusion was "purposeful" and unjustified. *Shillinger*, 70 F.3d at 1139-40. But the Eleventh Circuit deems all those facts irrelevant, holding that even "bad faith" will not permit relief. Pet.App.16a. That courts have articulated their tests in different ways only underscores the need for this Court's intervention.

Unsurprisingly, the different standards yield different outcomes on the same facts. Here, for example, the government's invasion of Mr. Esformes' privilege was, at minimum, "reckless." C.A. Oral Arg. Recording 13:10-13:16. If this case had arisen in the First Circuit the government would have faced a "high" burden of showing that Mr. Esformes was not prejudiced. *Mastroianni*, 749 F.2d at 908. And in the Ninth Circuit, the government's "wrongful" conduct would likewise have required it to disprove prejudice. *Danielson*, 325 F.3d at 1070. But in the Eleventh Circuit, Mr. Esformes had to peer inside the prosecutors' minds and divine how their ill-gotten knowledge affected the outcome. This glaring inconsistency merits this Court's review.

5. Courts, academics, and leading treatises have acknowledged this longstanding circuit split. As mentioned, so have three former Justices of this Court. *Cutillo*, 485 F.3d at 1037-38 (White, J., dissenting from denial of certiorari); *see also Kaur*, 141 S. Ct. at 6 (Sotomayor, J., respecting denial of certiorari) (noting that

lower courts have "struggled" with the question presented). Below, the Eleventh Circuit stated that its precedent "foreclosed" "the Ninth Circuit's burden-shifting approach." Pet.App.15a (citing *Danielson*, 325 F.3d at 1072). Other circuits too acknowledge the "split on" "what constitutes prejudice and who bears the burden of proving it." *Mastroianni*, 749 F.2d at 907; *accord Orduno-Ramirez*, 61 F.4th at 1269 n.3; *Shillinger*, 70 F.3d at 1140-41.

State courts also have decried how "federal courts are divided on important aspects of the analysis, including whether a showing of prejudice to the defendant is required[,]… who bears the burden of proof[,] and the standard of proof in analyzing prejudice in the remedy analysis." *State v. Robinson*, 209 A.3d 25, 47 (Del. 2019); *accord People v. Ervine*, 220 P.3d 820, 840-41 (Cal. 2009); *Quattlebaum*, 527 S.E.2d at 108-09; *Bain*, 872 N.W.2d at 786-90. A leading treatise explains that "federal lower courts have divided." 3 Wayne R. LaFave et al., *Criminal Procedure* § 11.8(b) (4th ed. Nov. 2022 update). And law-review articles bemoan the "untenable" and "confused mixture of rules." Blake R. Hills, *Unsettled Weather: The Need for Clear Rules Governing Intrusion into Attorney-Client Communications*, 50 N.M. L. Rev. 135, 160 (2020); *see id.* at 141-53.[1] Only this Court can resolve this entrenched, longstanding split.

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[1] *Accord* Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. Crim. L. & Criminology 397, 437-40 (2000); Avidan Y. Cover, Note, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 Cornell L. Rev. 1233, 1249-51 (2002); Joshua T. Friedman, Note, *The Sixth Amendment, Attorney-Client Relationship and Government*

B. The Question Presented Is Important, Recurring, and Squarely Presented

1. Whether a defendant whose privilege has been wrongfully invaded must demonstrate actual prejudice is a question of exceptional importance.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "[I]ts central concern" is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *United States v. Zolin*, 491 U.S. 554, 562 (1989) (quoting *Upjohn*, 449 U.S. at 389). Without that protection, "apprehension of disclosure" chills effective advocacy. *Upjohn*, 449 U.S. at 389 (citation omitted).

Yet, taint teams—like the one here—can profoundly threaten attorney-client privilege. Taint teams sidestep the traditional safeguard of *in camera* review. The government takes it upon itself to determine a defendant's privilege. That setup creates an "obvious flaw in the taint team procedure: the government's fox is left in charge of the … henhouse." *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

Consequently, privilege violations are not just "foreseeable," but "inevitable." *Id.* A taint team "possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obli-

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Intrusions: Who Bears the Unbearable Burden of Proving Prejudice?, 40 Wash. U. J. Urb. & Contemp. L. 109, 132-36 (1991).

gations." *Id.* Worse, many taint teams include non-attorneys, unsuited to making privilege determinations. *In re Search Warrant*, 942 F.3d 159, 177 (4th Cir. 2019).

No wonder that "obviously protected" documents frequently make their way to prosecutors. *In re Grand Jury Subpoenas*, 454 F.3d at 523. Or that prosecutors have shown "callous disregard" for a party's rights by making "no attempt to respect … attorney-client privilege." *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021). The privilege problems caused by taint teams are recurrent and well documented. *See* Law Profs. Br. 10-21, *Korf v. United States*, 143 S. Ct. 88 (2022) (No. 21-1364) (collecting examples). These intrusions erode "the Sixth Amendment's guarantee of effective assistance of counsel." *In re Search Warrant*, 942 F.3d at 174.

The Eleventh Circuit's holding only invites further abuses. Under its actual-prejudice rule, all the government needs to do when caught with its hand in the privileged cookie jar is put aside the wrongfully seized documents it has reviewed and carry on. That standard offers cold comfort to the victims of governmental overreach. But other circuits appropriately place the burden on the government, since it is in the best position to demonstrate why its misconduct purportedly did not prejudice the defendant.

2. This case is the optimal vehicle to resolve the split. The Eleventh Circuit squarely acknowledged its divergence from the Ninth Circuit and held that defendants must show actual prejudice. Pet.App.15a.

That decision was outcome determinative. The government undisputedly engaged in serious misconduct. This "now infamous filter team" is repeatedly cited as a prototypical example of how taint teams can go off the

rails. Christina M. Frohock, *Special Matters: Filtering Privileged Materials in Federal Prosecutions*, 49 Am. J. Crim. L. 63, 83 (2021); *Korf* Law Profs. Br. 14-16. On this record, Mr. Esformes would have a strong argument for dismissal or disqualification in at least four other circuits and seven States. The Eleventh Circuit, however, saw no need to consider the gravity of the government's misconduct. The court's decision exclusively rested on the ground that Mr. Esformes could not prove actual prejudice. Pet.App.16a.

No further percolation is necessary. Nearly every circuit has weighed in. None has changed sides since three Justices documented this split over three decades ago. This recurring and important issue cries out for this Court's review.

C. The Eleventh Circuit's Actual-Prejudice Standard Is Incorrect

The Eleventh Circuit's actual-prejudice requirement is inconsistent with *Morrison*, 449 U.S. 361. There, this Court held that dismissal is not an appropriate remedy for a Sixth Amendment violation "absent demonstrable prejudice, *or substantial threat thereof*." *Id.* at 365 (emphasis added). *Morrison* also cautioned that "a pattern of recurring violations ... might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *Id.* at 366 n.2. Thus, the Court recognized both that violations bad enough to create a "substantial threat" of prejudice can warrant dismissal, and that recurrent violations might justify dismissal as a sanction for governmental misconduct even absent prejudice. *Id.* at 365-66 & n.2. Although the Eleventh Circuit cited *Morrison*, Pet.App.15a, its actual-prejudice requirement is inconsistent with that decision.

Instead of categorically rejecting dismissal as a remedy, *Morrison* made clear that Sixth Amendment violations "are subject to the general rule that remedies should be tailored to the injury suffered." *Morrison*, 449 U.S. at 364. Courts must therefore determine what relief would "assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. Such relief restores the defendant to the status quo ante. With wrongful privilege violations, there is no going back. As the former DOJ leaders observed in their amicus brief below, prosecutors "cannot forget what they have learned." C.A. Former DOJ Br. 24. And it is often impossible to pinpoint the effect of that ill-gotten knowledge.

Thus, when a defendant seeks dismissal or disqualification based on wrongful privilege invasions, a presumption of prejudice should apply. Any other standard would eviscerate the Sixth Amendment right. As several circuits recognize, "placing the entire burden on the defendant to prove both the disclosure and use of confidential information is unreasonable." *Mastroianni*, 749 F.2d at 907; *accord Danielson*, 325 F.3d at 1071; *Shillinger*, 70 F.3d at 1141-42. There are myriad different ways that "prosecutors' possession of [a defendant's] privileged information [can] subtly but indelibly affect[] the course of her trial." *Kaur*, 141 S. Ct. at 7 (Sotomayor, J., respecting denial of certiorari). Defendants and courts cannot "sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into" the "host of discretionary and judgmental decisions" that go into a prosecution. *Danielson*, 325 F.3d at 1071 (citation omitted). The government, by contrast, "knows what it did and why." *Id.* at 1070.

The disadvantage is particularly pronounced where, as here, privilege invasions were recurring and pervasive.

The proceedings below predominantly focused on the privileged spreadsheets that Mr. Esformes knew the government had used—since it questioned his attorney about them. But the government also seized hundreds of other privileged documents that may well have affected its investigation. Yet Mr. Esformes "can only guess" what the government did with those files. *See id.*

The knowledge-imbalance is also heightened where, as the magistrate judge (but not the district court) found, prosecutors engage in a calculated, "deplorable" campaign "to obfuscate the evidentiary record." Pet.App.309a. In these circumstances, a presumption of prejudice makes eminent sense and is necessary to deter misconduct. *See Morrison*, 449 U.S. at 366 n.2. When the government consistently refuses to turn square corners, defendants' liberty should not turn on the fortuity of identifying specific instances where those shortcuts altered the result.

II. The Court Should Grant Certiorari on the Forfeiture Question

This Court should also grant certiorari to settle whether judges may impose criminal-forfeiture money judgments based on their own factual findings. *Apprendi* demands that juries, not judges, find facts necessary to impose punishment. Criminal forfeiture is a form of punishment not authorized absent a finding that specific property was tainted by the offense. So, under *Apprendi*, that finding must be made by a jury, not a judge.

But five years before *Apprendi*, this Court stated that the Sixth Amendment does *not* apply to criminal forfeiture. *Libretti*, 516 U.S. at 49. That has left the circuits in a jam. While *Libretti*'s reasoning is incompatible with current doctrine, this Court alone enjoys "the prerogative of

overruling its own decisions," as the Eleventh Circuit recognized. Pet.App.29a (citation omitted). This case presents an ideal vehicle for the Court to do so and ensure that forfeiture defendants enjoy the same Sixth Amendment rights that apply in other contexts.

A. Courts May Not Impose Forfeiture Money Judgments Based on Judicial Fact-Finding

1. For the last two decades, this Court has zealously guarded the jury's fact-finding role in criminal cases. In 2000, this Court held in *Apprendi* that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." 530 U.S. at 490. The Court therefore rejected a state procedure permitting judges to enhance sentences by ten years upon finding that the defendant acted out of racial animus. *Id.* at 491-92. Taking that question from the jury "unacceptabl[y] depart[ed] from the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497.

In the decades since, this Court has steadily applied *Apprendi* to new contexts: capital punishment,[2] tiered sentencing ranges,[3] sentencing guidelines,[4] mandatory minimums,[5] and, most analogous here, criminal fines.[6] In *Southern Union*, this Court acknowledged that previous cases all involved imprisonment or death, but saw "no

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[2] *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002); *Hurst v. Florida*, 577 U.S. 92, 99 (2016).

[3] *Blakely v. Washington*, 542 U.S. 296, 299-300 (2004); *Cunningham v. California*, 549 U.S. 270, 274-75 (2007).

[4] *United States v. Booker*, 543 U.S. 220, 226-27 (2005).

[5] *Alleyne v. United States*, 570 U.S. 99, 111-12 (2013).

[6] *S. Union Co. v. United States*, 567 U.S. 343, 360 (2012).

principled basis" for limiting *Apprendi* to those punishments. 567 U.S. at 349. Instead, *Apprendi* "broadly prohibit[s] judicial factfinding" without "distinguish[ing] one form of punishment from another." *Id.* at 350. Because fines are "undeniably" punishment, *Apprendi* applies. *Id.*

2. That logic applies fully to criminal forfeiture. It is a "simple fact" that criminal forfeiture is "punishment." *Libretti*, 516 U.S. at 41; *accord United States v. Bajakajian*, 524 U.S. 321, 328 (1998). In the Eighth Amendment context, this Court has recognized that criminal forfeiture is "clearly a form of monetary punishment no different … from a traditional 'fine.'" *Alexander v. United States*, 509 U.S. 544, 558 (1993). Because criminal forfeiture is punishment, all facts necessary for the sentence must be found by a jury.

Modern criminal forfeiture statutes demand factual findings. For example, the money-laundering statute here requires that the property be "involved in [the] offense" or "traceable to such property." 18 U.S.C. § 982(a)(1). Other federal criminal-forfeiture statutes demand similar factual links between property and the offense.[7]

Thus, as Justice Gorsuch has observed in the restitution context, without fact-finding, the statutory maximum "is usually *zero*, because a court can't award *any* [money] without finding additional facts." *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., dissenting from denial of certiorari). Here too, the jury's guilty verdict does

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[7] *E.g.*, 7 U.S.C. § 2024(f)(2); 13 U.S.C. § 305(a)(3); 16 U.S.C. §§ 1540(e)(4)(B), 3374(a)(2); 17 U.S.C. § 506(b); 18 U.S.C. §§ 38(d)(1), 982(a)(2), (a)(3), (a)(5), (a)(6)(A), (a)(7), (a)(8), 1030(i)(1), 1037(c)(1), 1467(a), 1594(e)(1), 1963(a), 2253(a), 2323(b)(1), 2328(a), 2428(a); 21 U.S.C. § 853(a); 31 U.S.C. §§ 5317(c)(1), 5332(b)(2); 42 U.S.C. § 1786(p)(3); 50 U.S.C. § 4819(d)(1).

not authorize the forfeiture of one penny. Only a factual finding that the property is tainted by the offense makes forfeiture permissible. The Sixth Amendment therefore requires juries, not judges, to find that factual taint.

3. This Court's pre-*Apprendi* decision in *Libretti*, on which the Eleventh Circuit relied, Pet.App.29a, does not compel a different result. In *Libretti*, this Court held that a defendant's guilty plea waived a Federal Rule of Criminal Procedure permitting a jury trial on certain aspects of criminal forfeiture. 516 U.S. at 51. In so holding, the Court stated: "[T]he right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." *Id.* at 49.

That portion of *Libretti* warrants no significant *stare decisis* weight. "[I]n the *Apprendi* context, … *stare decisis* does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law." *Hurst*, 577 U.S. at 102 (citation omitted). The Court has repeatedly discarded older decisions "irreconcilable with *Apprendi*." *Id.* at 101; *e.g.*, *id.* (overruling *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989)); *Ring*, 536 U.S. at 609 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *Alleyne*, 570 U.S. at 116 (overruling *Harris v. United States*, 536 U.S. 545 (2002), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)); *see id.* at 119-21 (Sotomayor, J., concurring).

Like those decisions, *Libretti* is irreconcilable with *Apprendi*. *Libretti* offered no rationale unique to the forfeiture context. The sum total of the decision's reasoning was that precedent made "abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed." *Li-*

bretti, 516 U.S. at 49 (citing *McMillan*, 477 U.S. at 93; *Cabana v. Bullock*, 474 U.S. 376, 385 (1986); and *Spaziano*, 468 U.S. at 459). But today, it is abundantly clear that defendants *do* enjoy a constitutional right to jury fact-finding in sentencing. The contrary cases on which *Libretti* relied are no longer good law. *See United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (plurality opinion) (describing *McMillan* as "expressly overruled"); *Hurst*, 577 U.S. at 101 (overruling *Spaziano*). *Libretti*'s Sixth Amendment conclusion belongs in the same dustbin.

Following *Apprendi*, multiple scholars have recognized that *Libretti*'s "reasoning [is] no longer valid." 3 LaFave et al., *supra*, § 26.6(d).[8] Just like the fine in *Southern Union*, criminal forfeiture is "determined by factual findings" which, under *Apprendi*, must be decided by a jury. Brynn Applebaum, Note, *Criminal Asset Forfeiture and the Sixth Amendment After* Southern Union *and* Alleyne*: State-Level Ramifications*, 68 Vand. L. Rev. 549, 564-65 (2015).

The government previously recognized as much, cautioning at oral argument in *Southern Union* that applying *Apprendi* to fines might require the same for forfeiture. Oral Arg. Tr. 37, *S. Union*, 567 U.S. 343 (No. 11-94). In

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[8] *E.g.*, David B. Smith, *A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?*, 158 Heritage Found. Legal Memorandum 1, 9 n.20 (2015); Matthew R. Ford, Comment, *Criminal Forfeiture and the Sixth Amendment's Jury Trial Post*-Booker, 101 Nw. U. L. Rev. 1371, 1377-79 (2007); *see also* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1481 n.51 (2001) (*Libretti* "at risk" of overruling); Myeonki Kim, *Conviction Beyond a Reasonable Suspicion? The Need for Strengthening the Factual Basis Requirement in Guilty Pleas*, 3 Concordia L. Rev. 102, 138 n.254 (2018) (same).

the government's words, under "a mathematically, geometrically accurate application of the rule stated in *Apprendi*, it's difficult to see why forfeiture" would not also require jury fact-finding. *Id.* That concession was spot on.

4. The need for jury fact-finding in the forfeiture context is particularly acute because the courts of appeals, including the Eleventh Circuit, have read forfeiture statutes broadly to permit sweeping "forfeiture money judgment[s]." *United States v. Olguin*, 643 F.3d 384, 397 (5th Cir. 2011) (collecting cases); *see* Pet.App.29a. Those orders—which compel defendants to forfeit often massive sums of money instead of specific tainted assets—magnify the potential for abuse and make the jury safeguard that much more important.

Here, for example, the forfeiture statute at issue covers only "property, real or personal, involved in [the] offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1). The government identified 54 pieces of real and personal property that it alleged were so tainted by the offense. But a jury retained at Mr. Esformes' request largely disagreed, finding only 7 assets so tainted. Pet.App.60a-77a.

Under the statute, that should have been the end of the inquiry. The government had gone to the jury on what "property" was "involved in [the] offense" or "traceable" thereto and largely lost. Yet, the district court, on the government's motion, ordered Mr. Esformes to forfeit an additional $38.7 million—the government's calculation of the total revenue from Mr. Esformes' health-care businesses. Pet.App.53a. The district court recognized that this dollar amount was not "property" tainted by the offense but instead a general "sum of money equal in value" to such property. Pet.App.54a. Circuits have blessed similarly

gargantuan money judgments against other defendants. *E.g.*, *United States v. Peters*, 732 F.3d 93, 95 (2d Cir. 2013) ($23,154,259); *United States v. Haberman*, 338 F. App'x 442, 443 (5th Cir. 2009) ($20,000,000).

But as the Ninth Circuit has observed, there is no "textual basis for imposing a personal money judgment." *United States v. Nejad*, 933 F.3d 1162, 1165 (9th Cir. 2019). Such judgments do not seek "property" tainted by the offense, 18 U.S.C. § 982(a)(1); instead, they put defendants on the hook for a general sum of money, regardless of whether identifiable property was tainted by the crime. Therefore, as commentators have observed, personal "money judgment forfeitures are not currently authorized by statute." Matthew L. Allison, Comment, *To Curb or Not to Curb: Applying* Honeycutt *to the Judicial Overreach of Money Judgment Forfeitures*, 48 U. Balt. L. Rev. 271, 289 (2019); *accord* Martha Boersch, *Forfeiture Money Judgments: Will the Supreme Court Clamp Down on These Unconstitutional Judicial Punishments?*, 45 Champion 38, 39 (June 2021).

The statute's focus on specific, tainted property tracks forfeiture's historical roots. "[T]he common law drew a clear line between tainted and untainted assets." *Luis v. United States*, 578 U.S. 5, 29 (2016) (Thomas, J., concurring in judgment). Forfeiture was traditionally an *in rem* "action against the tainted property itself." *Honeycutt v. United States*, 581 U.S. 443, 453 (2017). Modern *in personam* forfeiture statutes "maintain[] traditional *in rem* forfeiture's focus on tainted property." *Id.* Personal money judgments put the cart before the horse, ordering the defendant to forfeit an amount of money, not specific property. That statutory violation compounds the *Apprendi* problem, letting the government seek virtually boundless penalties without any jury check.

B. Only This Court Can Resolve the Forfeiture Question

While *Libretti* poses no barrier to this Court's resolution of the question presented, that case has proved an insuperable hurdle for the circuits.

This Court has instructed courts of appeals to follow this Court's "directly controlling precedents, even those that rest on reasons rejected in other decisions." *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). The Eleventh Circuit dutifully followed that instruction, brushing aside Mr. Esformes' Sixth Amendment challenge based on *Libretti*. Pet.App.29a. Nine other circuits have likewise held that *Libretti* binds them, notwithstanding *Apprendi*.[9]

Only this Court can break the logjam and hold that *Apprendi* meant what it said: juries must find facts necessary to enhance punishment. Criminal forfeiture is no exception.

C. The Question Presented Is Important, Recurring, and Squarely Presented

1. The question presented is undeniably important. After rejecting criminal forfeiture for 180 years, Congress introduced the practice to the American legal system in 1970. *Bajakajian*, 524 U.S. at 332 & n.7. Today, criminal forfeiture is "a routine part of criminal law enforcement in federal cases." Stefan D. Cassella, *Criminal Forfeiture*

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[9] *United States v. Carpenter*, 941 F.3d 1, 11-12 (1st Cir. 2019); *United States v. Stevenson*, 834 F.3d 80, 85-86 (2d Cir. 2016); *United States v. Leahy*, 438 F.3d 328, 332 (3d Cir. 2006) (en banc); *United States v. Day*, 700 F.3d 713, 733 (4th Cir. 2012); *United States v. Simpson*, 741 F.3d 539, 559-60 (5th Cir. 2014); *United States v. Bradley*, 969 F.3d 585, 591 (6th Cir. 2020); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005); *United States v. Sigillito*, 759 F.3d 913, 935 (8th Cir. 2014); *United States v. Wilkes*, 744 F.3d 1101, 1109 (9th Cir. 2014).

Procedure, 32 Am. J. Crim. L. 55, 56 (2004). The U.S. Code is replete with criminal-forfeiture provisions for crimes from food-stamp fraud, 42 U.S.C. § 1786(p), to copyright infringement, 17 U.S.C. § 506(b); *see also supra* p. 29 n.7. While those statutes generally demand tainted "property," the circuits uniformly permit judges to award forfeiture money judgments, untethered to specific, tainted assets. *See Olguin*, 643 F.3d at 397.

In fiscal year 2022, U.S. Attorneys' Offices obtained more than $1 billion in criminal-forfeiture orders across thousands of cases—double the federal government's take from civil forfeiture. USDOJ, *United States Attorneys' Annual Statistical Report* tbl. 16 (2022), https://bit.ly/3rVvUUQ. Absent this Court's intervention, in every one of those cases, the government can seek money judgments without jury fact-finding.

As this Court has noted, "broad forfeiture provisions carry the potential for Government abuse." *Libretti*, 516 U.S. at 43. Federal criminal forfeiture goes straight to the Justice Department, giving it everything from "fast cars, boats and planes" to cash. David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. Crim. L. & Criminology 328, 362 (1988). That self-interest creates the risk that prosecutors' "charging decisions may be distorted by considerations of the most profitable course." *Id.* at 365.

Juries traditionally check any overreach, serving "as a bulwark between the State and the accused." *Oregon v. Ice*, 555 U.S. 160, 168 (2009). Protecting that "historic role" is *Apprendi*'s "animating principle." *Id.* Yet the government routinely skirts juries in forfeiture cases, magnifying the potential for abuse.

2. This case offers an ideal vehicle to resolve *Apprendi*'s application to criminal forfeiture. The Eleventh

Circuit rejected Mr. Esformes' argument solely based on *Libretti*, leaving to this "Court the prerogative of overruling its own decisions." Pet.App.29a (citation omitted).

This case also illustrates the real-world difference that juries can make. As noted, initially, the government asked the jury to find that 54 specific assets were tainted by the offense. The jury found, however, that the government had not met its burden as to 47 of those assets.

Instead of taking no for an answer, the government asked the district court to make its own findings as to the amount of money tainted by the offense. The court did so and ordered Mr. Esformes to forfeit an *additional* $38.7 million—an order that ultimately forced him to give up many of the same assets the jury declined to award. That heads-you-lose-tails-I-win scheme makes a mockery of the Sixth Amendment. Absent this Court's intervention, defendants nationwide will continue to be denied their jury-trial right in forfeiture cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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