

No. 25-1238

In the Supreme Court of the United States

MARTIN MIZRAHI, PETITIONER,

v.

UNITED STATES OF AMERICA

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

**BRIEF OF *AMICI CURIAE* FORMER FEDERAL
JUDGES SUPPORTING PETITIONER**

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INTERESTS OF *AMICI CURIAE*¹

Amici curiae are former Article III judges who have devoted much of their professional lives to the criminal justice system and who have extensive experience presiding over federal criminal trials, sentencing proceedings, and forfeiture determinations.²

Collectively, they served decades in the federal judiciary. Based on that experience, *Amici* submit this brief to explain why it is time to close the books on *Libretti v. United States*, 516 U.S. 29 (1995), as out of step with the Court's *Apprendi* jurisprudence.

Amici are:

Judge Dennis M. Cavanaugh (Ret.)—District Judge (2000–2014), Magistrate Judge (1993–2000) for the U.S. District Court for the District of New Jersey.

Judge Robert J. Cindrich (Resigned)—District Judge (1994–2004) for the U.S. District Court for the Western District of Pennsylvania.

Judge W. Royal Furgeson, Jr. (Ret.)—District Judge (1994–2008), Senior Judge (2008–2013) for the U.S. District Court for the Western District of Texas.

Judge Nancy M. Gertner (Ret.)—District Judge (1994–2011), Senior Judge (2011) for the U.S. District Court for the District of Massachusetts.

Judge Richard J. Holwell (Resigned)—District Judge (2003–2012) for the U.S. District Court for the Southern District of New York.

¹ No counsel for a party authored this brief in whole or in part. No person other than *amici* or its counsel made a monetary contribution to its preparation or submission. The parties were given timely notice of *amici*'s intent to file this brief.

² The views in this brief are those of the *amici* only and not necessarily of any institutions with which they are or have been affiliated.

Judge Kent A. Jordan (Resigned)—Circuit Judge (2006–2025), U.S. Court of Appeals for the Third Circuit; District Judge (2002–2006) for the U.S. District Court for the District of Delaware.

Judge Beverly B. Martin (Ret.)—Circuit Judge (2010–2021), U.S. Court of Appeals for the Eleventh Circuit; District Judge (2000–2010) for the U.S. District Court for the Northern District of Georgia.

Judge Stephen M. Orlofsky (Resigned)—District Judge (1995–2003), Magistrate Judge (1976–1980) for the U.S. District Court for the District of New Jersey.

Judge Kevin H. Sharp (Resigned)—District Judge (2011–2017), Chief Judge (2014–2017) for the U.S. District Court for the Middle District of Tennessee.

Judge Thomas I. Vanaskie (Ret.)—Circuit Judge (2010–2019), Senior Judge (2018–2019), U.S. Court of Appeals for the Third Circuit; District Judge (1994–2010), Chief Judge (1999–2006) for the U.S. District Court for the Middle District of Pennsylvania.

SUMMARY OF ARGUMENT

This case presents the question whether *Libretti v. United States*, 516 U.S. 29 (1995)—which held that the Sixth Amendment does not require a jury to find the facts underlying a criminal forfeiture—should be overruled. It should.

Criminal forfeiture is among the most consequential forms of punishment the federal government imposes. The federal forfeiture inventory was approximately \$8.2 billion in FY2025. U.S. Marshals Serv., Fact Sheet: Asset Forfeiture 2026 (Oct. 1, 2025) (“U.S. Marshals 2026 Forfeiture Fact Sheet”), *available at*: <https://bit.ly/49hhK3s>. Under *Libretti*, judges are permitted to determine whether forfeiture is authorized. That practice squarely conflicts with the longstanding rule in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000),

that any fact (other than a prior conviction) that increases a criminal punishment beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

Members of this Court have recognized in the restitution context that it is “difficult to reconcile . . . the Constitution’s original meaning” with the idea that the Sixth Amendment does not apply to criminal penalties. *E.g., Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citations omitted). This Court has also repeatedly overruled decisions incompatible with *Apprendi*. *E.g., Erlinger v. United States*, 602 U.S. 821, 833-34 (2024). It is time to do the same with *Libretti*.

Unless this Court overrules *Libretti*, lower courts will continue to feel “compelled to apply” its rule that “the right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection.” *United States v. Sigillito*, 759 F.3d 913, 935-36 (8th Cir. 2014) (citation omitted); *see Libretti*, 516 U.S. at 49. Courts will thus continue to impose criminal forfeiture and other sentence enhancements in ways that conflict with the Sixth Amendment so long as *Libretti* remains controlling.

This case squarely presents *Libretti*’s constitutional defect. The jury returned a general guilty verdict on the money laundering counts against petitioner without identifying the alleged predicate offenses—wire fraud, bank fraud, or narcotics trafficking—underlying the conviction. The district court then found, by a preponderance of the evidence, that the funds were mostly derived from narcotics trafficking and imposed a \$3.9 million forfeiture on that basis. The court thus made factual findings in imposing punishment that the jury’s verdict did not authorize. The Sixth Amendment protects against that outcome.

Amici submit this brief based on their collective experience presiding over criminal trials, sentencing proceedings, and forfeiture determinations. For three reasons, the Court should grant the petition.

First, *Libretti* rests on constitutional premises this Court has since rejected.

Second, the Constitution preserves the common law tradition that juries decide the facts, while judges decide the sentence. But where a factual finding is necessary to sustain a sentence greater than is otherwise authorized, this Court's jurisprudence makes clear that the jury must determine that fact.

Third, only this Court can resolve the conflicts lower courts uniformly acknowledge but lack authority to correct.

ARGUMENT

I. *LIBRETTI* CONTRADICTS *APPRENDI* AND THIS COURT'S SIXTH AMENDMENT JURISPRUDENCE

A. This Court's modern Sixth Amendment cases establish a coherent constitutional rule that is fundamentally incompatible with *Libretti's* treatment of criminal forfeiture. In *Apprendi*, the Court held 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, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). *Blakely v. Washington* clarified that the relevant "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. 296, 303 (2004) (emphasis omitted).

This Court has since reaffirmed and extended this rule across a range of sentencing contexts. *United States v. Booker* applied that principle to the Federal Sentencing Guidelines, holding that the Sixth Amendment prevents

courts from determining facts that increase a defendant’s mandatory sentencing exposure. 543 U.S. 220, 226-45 (2005). *Southern Union Co. v. United States* extended *Apprendi* to criminal fines, explaining that the Sixth Amendment applies to all forms of criminal punishment and that there is “no principled basis” for treating monetary penalties differently from imprisonment or death. 567 U.S. 343, 349-50 (2012). *Alleyne v. United States* then confirmed that any fact that increases a mandatory *minimum* sentence must be found by a jury because such facts alter the legally prescribed punishment. 570 U.S. 99, 111-16 (2013). And *Erlinger v. United States* reaffirmed that a jury must find facts previously treated as sentencing considerations—there, whether prior offenses occurred on “separate occasions”—when those findings increase punishment. 602 U.S. 821, 838-45 (2024).³ Together, these decisions establish the general, coherent principle that judges may not determine punishment-increasing facts.

That rule should apply to criminal forfeiture. Criminal forfeiture is punishment. *See Alexander v. United States*, 509 U.S. 544, 558 (1993) (“[C]riminal forfeiture [under RICO] is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional ‘fine.’” (citation omitted)); *see also Austin v. United States*, 509 U.S. 602, 615 (1993) (“The same understanding of forfeiture as punishment runs through our cases rejecting the ‘innocence’ of the owner as a common-law defense to forfeiture.” (collecting cases)). And criminal forfeiture functions identically to the mandatory penalties governed by *Apprendi* and its

³ The Court has similarly applied this rule in the Armed Career Criminal Act context, holding that courts may not probe a jury’s verdict to guess which of several possible factual theories the jury adopted. *See, e.g., Mathis v. United States*, 579 U.S. 500, 511-17 (2016).

progeny: the legally authorized forfeiture “range” is zero unless statutory predicate facts are found, and once those facts are established, forfeiture becomes mandatory. *See* 21 U.S.C. § 853(a); 18 U.S.C. § 1963(a). In light of *Apprendi* and the original understanding of the jury’s role, members of this Court have called for reexamination of lower courts’ approaches to financial penalties like restitution. *See Rimlawi v. United States*, 145 S. Ct. 518, 518-19 (2025) (Gorsuch, J., dissenting from denial of certiorari); *see also Hester v. United States*, 586 U.S. 1104, 1104-07 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). Criminal forfeiture should no longer be insulated from the rule that governs criminal punishment.

B. Nevertheless, *Libretti* treated criminal forfeiture as a sentencing matter exempt from the Sixth Amendment jury right based on constitutional premises this Court has since rejected. The Court reasoned that its “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.” *Libretti*, 516 U.S. at 49. *Libretti* relied on this Court’s earlier cases emphasizing that “a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed.” *Id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984); *Cabana v. Bullock*, 474 U.S. 376, 385 (1986)).

That is no longer the prevailing rule. To start, *Libretti* relied on *McMillan*’s holding that there is “no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.” *McMillan*, 477 U.S. at 93. But in *Alleyne v. United States*, this Court expressly rejected that conclusion and overruled *McMillan*, holding that *any* fact that increases a

mandatory minimum sentence must be found by a jury because such facts alter the legally prescribed punishment. 570 U.S. at 111-16 (Sixth Amendment violation where judge found that defendant “brandished” firearm for purposes of increased mandatory minimum). Then in *United States v. Haymond*, the Court explicitly recognized that *Alleyne* overruled *McMillan*. 588 U.S. 634, 645 (2019) (“Finding no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* . . . the Court expressly overruled [it].”).

Spaziano was “expressly overrule[d]” in *Hurst v. Florida*, where the Court held that judicial factfinding authorizing capital punishment violates the Sixth Amendment. 577 U.S. 92, 101-02 (2016). And although *Cabana* (which held that findings required before imposing the death penalty need not be made by a jury) has not been formally overruled, its doctrinal premises cannot be reconciled with *Ring v. Arizona*, 536 U.S. 584, 609 (2002), which held that findings required to impose the death penalty must be made by a jury, not a judge.

Put simply, *Libretti* rests on constitutional assumptions that this Court has repeatedly renounced: that punishment-triggering facts may be assigned to judges; that sentencing facts fall outside the jury right; and that criminal punishment may be expanded based on judicial findings alone. Each of those propositions has been rejected. *Libretti*’s pre-*Apprendi* exception for criminal forfeiture cannot be reconciled with this Court’s modern cases.

C. The scale of the forfeiture awarded here exemplifies what the *Apprendi* rule is designed to prevent. The jury returned a general verdict on the money laundering counts without identifying which of the three alleged predicates it found—wire fraud, bank fraud, or narcotics trafficking—were proven beyond a reasonable doubt. Pet. App. 127a (jury verdict);

Pet. App. 133a-134a (jury instructed that conviction required proof of “wire fraud, bank fraud, or the sale and distribution of narcotics” without specifying which); Pet. App. 135a-136a (“It is not necessary for the defendant [to] know that the proceeds came from wire fraud, bank fraud or narcotics trafficking specifically. It is sufficient that the defendant knew that the proceeds came from some unlawful activity.”).

The court then decided that issue itself, finding by a preponderance that the bulk cash was narcotics proceeds, imposing a nearly \$3.9 million forfeiture on that basis alone. Pet. App. 51a (court: “what I would have to find to get the three-point-whatever million would be that more likely than not that that was drug proceeds”); Pet. App. 58a (“more likely than not, an additional \$3,854,704 was actually involved in narcotic trafficking”).

But identifying the offense of conviction is a jury function, not a judicial one. *See Haymond*, 588 U.S. at 643 (judicial factfinding cannot “swell the penalty above what the law . . . provided for the acts charged and found by the jury” (internal quotation marks and citation omitted)). That principle applies with particular force here. As the Second Circuit has recognized, criminal forfeiture must be closely tied to the specific offense of conviction. *See United States v. Capoccia*, 503 F.3d 103, 115 (2d Cir. 2007) (forfeiture requires a finding that the property bears the “requisite nexus” to the specific offense of conviction); *United States v. Elias*, 154 F.4th 56, 71 (2d Cir. 2025) (same). Where the jury’s general verdict does not identify which predicate offense it found, there is no settled offense of conviction to which a forfeiture can be tied. The court below filled that gap by unilaterally finding, by a preponderance, that petitioner’s proceeds came from narcotics trafficking. Pet. App. 58a. The jury’s verdict required no such finding.

A general verdict tells the court whether the jury found a defendant innocent or guilty; it does not tell the court what facts the jury found in making its decision. Inferring the factual theory underlying a general verdict is not a sentencing function. It encroaches on the jury's fact-finding role. The Sixth Amendment draws that line clearly, and this case falls on the wrong side.

II. THE SIXTH AMENDMENT PRESERVES THE HISTORIC RELATIONSHIP BETWEEN VERDICT AND PUNISHMENT

This Court's post-*Apprendi* decisions reflect more than a modern sentencing rule. They preserve a structural constitutional principle deeply rooted in American law: that only the jury—not the judge—determines the facts authorizing criminal punishment.

As *Blakely* explained, “[t]he Framers’ paradigm for criminal justice” is the “common-law ideal of limited state power accomplished by strict division of authority between judge and jury.” 542 U.S. at 313. The jury-trial guarantee “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” *Id.* at 305-06. “The judge’s authority to sentence derives *wholly from* the jury’s verdict.” *Id.* at 306 (emphasis added).

Blackstone explained that “the truth of every accusation” must “afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours.” 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769). Hamilton described the jury right as “a valuable safeguard to liberty” and “the very palladium of free government,” noting that both “friends and adversaries of the . . . convention” could agree on the importance of the jury right. *The Federalist No. 83*, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And John Adams similarly described “tryals by jury” as “the heart and lungs, the main spring, and the

center wheel” of “popular power” without which there would be no safeguard for the “liberty and security of the people.” Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 *Papers of John Adams* 169 (R. Taylor ed. 1977)); *Erlinger*, 602 U.S. at 829 (citing same); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1182-95 (1991) (describing jury clauses as structural protections preserving “popular” participation in criminal proceedings and reserving core criminal adjudicatory authority to the people rather than government officials). The jury’s historic role was therefore not only procedural but represented a deliberate constitutional check on concentrated governmental power.

This Court has long recognized those structural functions. In *Duncan v. Louisiana*, the Court explained that the jury serves as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” 391 U.S. 145, 156 (1968). The Court reinforced that understanding in *Taylor v. Louisiana*. 419 U.S. 522, 530 (1975) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”). In *United States v. Gaudin*, the Court reaffirmed that the Constitution “gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.” 515 U.S. 506, 522-23 (1995). The jury’s constitutional role thus extends beyond factfinding; it preserves the people’s authority to determine the factual predicates that justify criminal punishment.

Verdict fidelity requires that punishment remain faithful to the factual findings reflected in the jury’s

verdict, because “[t]he judge’s authority to sentence derives wholly from [it].” *Blakely*, 542 U.S. at 306. The jury right loses force if the judge may impose a higher sentence than the “jury’s verdict alone” authorizes. *Id.* at 304-05. That boundary is not a modern invention. Even before *Apprendi*, this Court was sufficiently concerned about legislative evasion of the jury guarantee that it construed a federal criminal statute to avoid the constitutional question of whether Congress could recharacterize punishment-authorizing facts as sentencing factors beyond the jury’s reach. *See Jones v. United States*, 526 U.S. 227, 239-52 & n.6 (1999).

Criminal forfeiture is no exception—if anything, the case for jury involvement is stronger. As Justice Gorsuch has observed, “more than a little evidence suggests that, at the time of the founding, juries found the facts” needed to “justify” criminal financial penalties imposed as part of a criminal sentence. *Rimlawi*, 145 S. Ct. at 518-19 (Gorsuch, J., dissenting from denial of certiorari) (discussing restitution); *see also Hester*, 586 U.S. at 1105-07 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (same). That criminal forfeiture has expanded into an oft-used enhancement that reaches billions of dollars in assets and applies to a broad range of offenses only strengthens the constitutional case for jury involvement, not the reverse.

III. THIS COURT SHOULD CLARIFY THAT ITS POST-*APPRENDI* JURY-RIGHTS JURISPRUDENCE APPLIES TO CRIMINAL FORFEITURE

This Court’s intervention is crucial. Lower court jurists have repeatedly acknowledged *Libretti*’s tension with the *Apprendi* line of cases, but only this Court can overrule *Libretti*. As long as *Libretti* survives, the Sixth Amendment will continue to go unheeded in thousands of forfeiture cases every year, amounting to billions in assets. *See, e.g., U.S. Marshals 2026 Forfeiture Fact*

Sheet; U.S. Marshals Serv., Fact Sheet: Asset Forfeiture 2025 (Oct. 1, 2024), *available at*: <https://bit.ly/4fiivgC>; U.S. Marshals Serv., Fact Sheet: Asset Forfeiture 2024 (Oct. 1, 2023), *available at*: <https://bit.ly/4o2i6B1> (showing federal forfeiture inventory increased by over \$2 billion between FY23 and FY25, from \$5.99 to \$8.2 billion).

A. Judges on the circuit courts have found it “difficult to reconcile *Libretti* with the Court’s subsequent decisions,” *United States v. Leahy*, 438 F.3d 328, 339 (3d Cir. 2006) (en banc) (McKee, J., concurring and dissenting in part, joined by Rendell, Ambro, Smith, and Becker, JJ.), yet they are bound by *Libretti* “even if it might appear ‘to rest on reasons rejected in some other line of decisions,’” *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012) (quoting *United States v. Fruchter*, 411 F.3d 377, 380 (2d Cir. 2005)); *accord United States v. Sigillito*, 759 F.3d 913, 935 (8th Cir. 2014) (applying *Libretti* because lower courts lack the “prerogative of overruling [the Supreme Court’s] decisions” (quotation marks and citation omitted)); *United States v. Bradley*, 969 F.3d 585, 591 (6th Cir. 2020) (“[I]n situations like this, where an advocate insists a new Supreme Court decision undermines a previous decision, the earlier decision stands until the Court says otherwise.”); *Fruchter*, 411 F.3d at 381 (2d Cir. 2005) (court “bound by [*Libretti*’s] holding even if it might appear to rest on reasons rejected in some other line of decisions” (internal quotation marks and citation omitted)). *But see, e.g., United States v. Dermen*, 143 F.4th 1148, 1227-28 (10th Cir. 2025) (court “unpersuaded” that *Apprendi* and *Southern Union* “implicitly overruled *Libretti*” because “weight of persuasive authority . . . counsels that . . . *Apprendi* and [its progeny] do not supplant *Libretti* and require application of a beyond-a-reasonable-doubt standard”). Even the government has acknowledged the conflict, stating during oral argument in *Southern Union* that

applying *Apprendi* faithfully to forfeiture “would involve overruling” *Libretti* and that, under a “strict application of *Apprendi*,” “it’s difficult to see why” forfeiture should be exempt from the Sixth Amendment. Transcript of Oral Argument at 36-37, *Southern Union Co.*, 567 U.S. 343 (2012) (No. 11-94).

Further, Members of this Court have acknowledged that the key premise underlying *Libretti*—that it is permissible for judges to decide facts necessary to support financial penalty orders—is not “well-harmonized’ with this Court’s Sixth Amendment decisions.” *Hester*, 586 U.S. at 1106 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (quoting *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013)). “[I]t is difficult to see how a judge’s factual findings might suffice to increase a criminal defendant’s exposure to” a financial penalty imposed as part of a criminal sentence. *Rimlawi*, 145 S. Ct. at 518 (Gorsuch, J., dissenting from denial of certiorari). Yet that is exactly what *Libretti* allows with respect to criminal forfeiture.

B. *Libretti*’s constitutional problem is compounded by the significant expansion of criminal forfeiture in recent years. When Congress first reintroduced criminal forfeiture into American law in 1970, it applied narrowly. See David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. Crim. L. & Criminology 328, 329 (1988) (citation omitted). Congress then expanded criminal forfeiture to apply federal drug offenses, among other offenses. *Id.* at 330 (citation omitted). Federal forfeiture activity has expanded considerably since then as well, with forfeiture recoveries increasing from \$459 million to \$2.5 billion in the last twenty years. Compare U.S. Att’ys’ Ann. Stat. Rep., Fiscal Year 2005, at 5 (2006), available at: <https://bit.ly/3ReW5CW> (government sought criminal forfeiture in 3,800 criminal cases and received approximately \$459,079,898 in total forfeited cash and

property across civil and criminal forfeitures), *with* U.S. Att'ys' Ann. Stat. Rep., Fiscal Year 2024, tbl. 16 (2025), *available at*: <http://bit.ly/4fA8ATu> (government sought criminal forfeiture in 13,082 pending cases and 8,331 completed cases, obtaining \$2,543,967,370 in criminally forfeited property). These figures underscore the importance of requiring juries to determine what property was involved in or traceable to the offense. And they reinforce the need for this Court to grant review and reevaluate *Libretti* in light of the Court's modern *Apprendi* jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2026