

No. 25-1238

In the Supreme Court of the United States

MARTIN MIZRAHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit

REPLY BRIEF

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REPLY BRIEF

The government does not contest that this petition raises an important, recurring question of criminal law involving thousands of cases each year and billions of dollars. Pet. 2–3. Nor does the government dispute that this case is a clean vehicle to resolve the question presented. Pet. 14. The government does not even disagree that, for centuries prior to our Founding, English law required juries—not judges—to identify the specific property subject to criminal forfeiture. Pet. 18–19. Nevertheless, the government urges this Court to reaffirm *Libretti v. United States*, 516 U.S. 29 (1995), but it has not given the Court any rationale for upholding *Libretti* that this Court has not already rejected.

Every case that *Libretti* relied upon to conclude, in *dicta*, that “the right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection” has been overruled. *Id.* at 49; see Pet. 20–21. The government does not dispute this or even try to defend *Libretti*’s flawed analysis. Instead, the government offers only a single, new rationale to support *Libretti*’s conclusion, and that rationale was explicitly rejected in *Southern Union Co. v. United States*, 567 U.S. 343 (2012).

Subsequent to *Libretti*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires that “[v]irtually ‘any fact’ that ‘increase[s] the prescribed range of penalties to which a criminal defendant is exposed’ must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea).” *Erlinger v. United States*, 602 U.S. 821, 834 (2024) (quoting *Apprendi*, 530 U.S. at 490). *Apprendi* imposes a bright-line rule. See *United States v. Haymond*, 588 U.S. 634,

656 n.9 (2019); *Southern Union*, 567 U.S. at 352; *Cunningham v. California*, 549 U.S. 270, 288–89 (2007); *Blakely v. Washington*, 542 U.S. 296, 308 (2004). Here, the district court violated that rule by finding for itself, by a mere preponderance of the evidence, the amount of money that it believed was laundered and subject to forfeiture.

Nevertheless, the government claims there is an exception from the *Apprendi* rule for factfinding in the criminal forfeiture context, noting that “the rule in *Apprendi* and *Southern Union* applies only to determine sentencing schemes,” and erroneously claiming that “the amount of money or property that a defendant may be required to forfeit is not subject to any such statutory maximum.” BIO. 5. But as Justice Gorsuch, joined by Justice Sotomayor, explained, that “argument misunderstands the teaching of our cases. We’ve used the term ‘statutory maximum’ to refer to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted.” *Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from denial of certiorari). Here, the harshest statutory maximum criminal forfeiture is no greater than the amount of money that was laundered, and that amount should be found by the jury.

Southern Union expressly found that *Apprendi* applied to maximum fine ranges that fluctuated with the number of days that a defendant committed the offense, or with the amount of financial gain or loss that resulted from the offense. *S. Union*, 567 U.S. at 351–52. At oral argument in *Southern Union*, the government even acknowledged that under “a strict application of *Apprendi*” that reached fines, “it’s difficult to see why forfeiture” would not be subject to *Apprendi* as well and “that [conclusion] would involve overruling

the Court’s decision in *Libretti v. United States*.” Transcript of Oral Argument at 36-37, *S. Union*, 567 U.S. 343 (2012) (No. 11-94).

This Court recently explained that *Apprendi*’s principles “are so firmly entrenched that we have now overruled several decisions inconsistent with them.” *Erlinger*, 602 U.S. at 833–34 (listing cases). *Libretti* should join that list of overruled cases.

I. *LIBRETTI* IS NOT SUPPORTED BY THIS COURT’S POST-*APPRENDI* DECISIONS OR BY HISTORY

A. The government’s defense of *Libretti* is half-hearted at best. The government makes no effort to defend *Libretti*’s rationale for its conclusion that criminal forfeiture is not subject to the Sixth Amendment because every case that *Libretti* cited for that proposition has been overruled. Pet. 20–21. And as with *Libretti* itself, the government also fails to address the historical fact that English common law juries decided what property was subject to criminal forfeiture through special jury findings. *See, e.g.*, Pet. 18–19; Fed. R. Crim. P. 7 advisory committee’s note to 1972 amendment (“Under the common law, in a criminal forfeiture proceeding[,] the defendant was apparently entitled to notice, trial, and a *special jury finding* on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction.”) (emphasis added); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 450 (1721) (reporting forfeitability “is to be left to a Jury on the whole Circumstances of the Case, and shall never be presumed by the Court where it is not expressly found”). That is a major concession because the Court has been clear since *Libretti* that “the scope of the constitutional jury right must be informed by the historical role of the jury at common

law.” *S. Union*, 567 U.S. at 353 (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)). Thus, *Libretti*’s conclusion is inconsistent with the historical role of the jury and can no longer be defended through its exclusive reliance upon a string of overruled cases.

B. Instead, the government offers a newfound explanation to uphold *Libretti*, but one the Court has already rejected. The government correctly notes that *Apprendi* and *Southern Union* apply only where there is a statutory maximum. BIO. 5. The government then erroneously claims that there is no statutory maximum for money laundering because the amount of money subject to forfeiture is as great as the amount of money laundered, and is not otherwise capped. BIO. 6. Again though, as Justice Gorsuch, joined by Justice Sotomayor, explained that makes no sense:

[That] argument misunderstands the teaching of our cases. We’ve used the term ‘statutory maximum’ to refer to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted. In that sense, the statutory maximum for restitution is usually *zero*, because a court can’t award *any* restitution without finding additional facts about the victim’s loss. And just as a jury must find facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order.

Hester, 586 U.S. at 1107 (Gorsuch, J., dissenting from denial of certiorari). Criminal forfeiture is an elastic penalty under the money laundering statute that rises and falls based on the amount of money laundered, but a statutory maximum *does* exist: criminal forfeiture can be no greater than the amount of money actually laundered. *See* 18 U.S.C. § 982(a)(1). Consequently, a

factual finding by a jury as to the amount of money laundered is required to determine the maximum amount subject to criminal forfeiture.

In extending *Apprendi* to criminal fines, *Southern Union* rejected the very sort of argument the government makes here. *Southern Union* explained that a jury’s finding must “peg the amount of a fine to the determination of specified facts—often, the value of damaged or stolen property.” 567 U.S. at 354; *see also Apprendi*, 530 U.S. at 503 (Thomas, J., concurring, joined by Scalia, J.) (“Value was an element [requiring a jury finding] because punishment varied with value[.]”). *Southern Union* considered an elastic maximum fine range under the Clean Air Act, which exposed the defendant to a maximum fine of \$50,000 per day for its unlawful emissions. 567 U.S. at 347. The district court imposed a \$6 million fine, based on its finding by a preponderance of the evidence, that the violations occurred on 762 days. *Id.* The Court reversed because the jury’s general verdict revealed no more than that a fine occurred on a single day. *Id.* at 347, 352.

Southern Union reiterated the applicability of *Apprendi* in discussing the Alternative Fines Act, 18 U.S.C. § 3571(d), which the Court dubbed the “federal twice-the-gain-or-loss statute.” 567 U.S. at 351. Under the Alternative Fines Act, which pegs a fine to a defendant’s gain or the victim’s loss, the fine range is virtually limitless—but a factual finding as to the actual gain or loss dictates the maximum fine. *See* 18 U.S.C. § 3571(d). The same is true of criminal forfeiture for money laundering, which pegs the maximum forfeiture to the amount of money laundered. *See* 18 U.S.C. § 982(a)(1). *Southern Union* explained, “the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts,” including “the

defendant's gain or the victim's loss, or some other factor." 567 U.S. at 349–50. "In all such cases, requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s 'animating principle': the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.'" *Id.* at 350 (quoting *Ice*, 555 U.S. at 168).

The government's effort to resurrect its failed argument in *Southern Union* should fail here too. At oral argument in *Southern Union*, the government urged the Court not to adopt its eventual ruling because, under "a strict application of *Apprendi*" that reached fines, "it's difficult to see why forfeiture" would not be subject to *Apprendi* and "that would involve overruling the Court's decision in *Libretti v. United States*." Transcript of Oral Argument at 36-37, *Southern Union*, 567 U.S. 343 (2012) (No. 11-94). The government was right then.

C. The government also is mistaken in seeking solace in the fact that the lower courts have not concluded for themselves that *Libretti* has been implicitly overruled. BIO. 7. Those decisions do not reflect an endorsement of *Libretti*. They only show that lower courts feel "compelled to apply *Libretti*" until this Court exercises its "prerogative of overruling its own decisions." *United States v. Sigillito*, 759 F.3d 913, 935 (8th Cir. 2014) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); see *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012) ("Because *Libretti* has direct application in this case, we are bound by its holding even if it might appear 'to rest on reasons rejected in some other line of decisions.'" (quoting *United States v. Fruchter*, 411 F.3d 377, 380 (2d Cir. 2005)); *United States v. Leahy*,

438 F.3d 328, 339 (3d Cir. 2006) (en banc) (McKee, J., concurring, joined by Rendell, Ambro, Smith, and Becker, JJ.) (finding it “difficult to reconcile *Libretti* with the Court’s subsequent decisions” but concluding that “any tension between *Libretti* and those cases must be resolved by the Supreme Court.”); *Fruchter*, 411 F.3d at 381 (“*Libretti* remains the law until the Supreme Court expressly overturns it[.]”).

In the *Apprendi* context, lower courts did the same thing after *Ring v. Arizona*, 536 U.S. 584 (2002), invalidated the imposition of the death penalty based on judicial factfinding. Because this Court had upheld Florida’s death penalty process in *Spaziano v. Florida*, 468 U.S. 447 (1984), lower courts continued to rely upon *Spaziano*’s specific holding despite its inconsistency with *Ring*. This Court had to “expressly overrule *Spaziano*” in *Hurst v. Florida*, 577 U.S. 92, 101–02 (2016), because lower courts felt compelled to adhere to *Spaziano* until it was expressly overruled by this Court.

Additionally, *Libretti* has come under considerable criticism because it is blatantly inconsistent with this Court’s more recent *Apprendi* line of cases. See Pet. 24–25 (providing extensive citations). Indeed, ten former Article III judges, along with the Washington Legal Foundation, Due Process Institute, National Association of Criminal Defense Lawyers, and National Association for Public Defense filed *amici* briefs encouraging the Court to grant the petition and overrule *Libretti*.

The government emphasizes that the Court has previously denied review of the question and the lower courts have adhered to *Libretti*, but that only underscores that the question is recurring and no further percolation is warranted. BIO. 4 n.*; 7. The lower courts will continue to follow *Libretti* until this Court tells them otherwise. The Court granted certiorari in

Apprendi itself and in several cases in its wake where there was no split among the lower courts, and it should do so again here. Pet. 26-27 (citing numerous instances where certiorari was granted).

II. THE QUESTION PRESENTED IS EXTREMELY IMPORTANT, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT

A. The constitutional deficiencies in criminal forfeiture procedures raise important issues in thousands of cases filed each year, which collectively involve billions of dollars. Pet. 2–3. Our Founders recognized the crippling effect of criminal forfeitures on defendants’ families as unduly harsh, so the First Congress “explicitly rejected *in personam* forfeitures as punishments for federal crimes, and Congress reenacted this ban several times over the course of two centuries.” *United States v. Bajakajian*, 524 U.S. 321, 332 n.7 (1998). The resurrection of criminal forfeitures severely burdens defendants’ families and makes it difficult for defendants to climb out of debt upon release from prison. To be sure, Congress has the prerogative to reinstate criminal forfeiture as punishment, but such a severe sanction should not be imposed absent the very jury protections that restrained that sanction at common law, as incorporated into the Sixth Amendment.

A majority of the Court recently raised significant due process concerns with the now expansive imposition of civil forfeiture in this country. *Culley v. Marshall*, 601 U.S. 377, 393 (2024) (Gorsuch, J., joined by Thomas, J., concurring); *id.* at 403–04 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). Those justices noted that civil forfeiture does not always come with the same protections afforded by criminal

forfeiture proceedings. *Id.* at 395 (Gorsuch, J., concurring) (“To secure a criminal penalty . . . , the government must comply with strict procedural rules and prove the defendant’s guilt beyond a reasonable doubt.”); *id.* at 404 (Sotomayor, J., dissenting) (“Criminal forfeiture is part of a defendant’s criminal punishment. The government must therefore proceed against the person (*in personam*) to obtain someone’s property via criminal forfeiture, which generally requires notice of intent to forfeit the property in a criminal indictment and full criminal procedural protections for the defendant.”). But those same deficiencies exist in the criminal forfeiture space where the required criminal protections are not followed.

That is what happened here, and it is why this petition is an ideal vehicle for revisiting *Libretti*. To begin, Mizrahi was ordered to forfeit \$3,855,704 for laundering alleged narcotics trafficking proceeds, App.23a, 27a–28a, but the jury never explicitly found that Mizrahi committed this crime, *see* App.127a. The indictment contained a duplicitous money laundering charge, *see* App.150a, and the jury was told to convict if it found him guilty of laundering the proceeds of bank fraud *or* wire fraud *or* drug trafficking; any one would do, *see* App.128a, 133a–36a. Mizrahi was not charged with any drug trafficking offense and vigorously contested at trial that he knowingly or actually laundered drug trafficking proceeds. For all we know, the jury may have agreed with him. The jury’s general conviction does not reflect which theory of guilt the jury accepted. The error in the district judge—and not the jury—concluding that Mizrahi laundered drug trafficking proceeds was then compounded by the district judge concluding, without the aid of the jury, how much funds were laundered. *See* App.58a (stating that

the criminal forfeiture was “based on *my finding* that \$693,000 in wire fraud proceeds was involved in the offense,” and “*more likely than not*, an additional \$3,854,704 was actually involved in narcotic trafficking.”) (emphasis added). When it comes to the criminal forfeiture imposed on the alleged drug trafficking proceeds, the jury had no role at all.

B. The government identifies no vehicle problems. There is no question that Mizrahi carefully preserved this issue. Pet. 13. And Mizrahi’s petition, like his appeal, is not encumbered with challenges to his conviction or other legal issues. The government further acknowledges that the question of whether *Libretti* should be overruled is a recurring question before this Court. BIO. 4. It is time to put that question to rest.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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