No.

In the Supreme Court of the United States

MRUGESHKUMAR KUMAR SHAH, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Applying the longstanding *Apprendi* rule, this Court in *Southern Union Co. v. United States*, 567 U.S. 343 (2012), held that the Sixth Amendment reserves to juries the determination of any fact underlying a criminal fine. The Court reasoned that "[c]riminal fines, like other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses," and the allowable amount of a fine "is often calculated by reference to particular facts." *Id.* at 349.

As two Members of this Court have recognized, "it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order," and a lower court ruling to the contrary "is worthy of [the Court's] review." *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

Nevertheless, the Fifth Circuit below held that petitioner must pay tens of thousands of dollars in a criminal restitution penalty, based on facts the jury never found.

The question presented is:

Whether the Sixth Amendment reserves to juries the determination of any fact underlying a criminal restitution order.

PARTIES TO THE PROCEEDINGS

Petitioner Mrugeshkumar Kumar Shah was a defendant and appellant below.

Petitioner's co-defendants at trial were Michael Bassem Rimlawi, Jackson Jacob, Shawn Mark Henry, Iris Kathleen Forrest, Douglas Sung Won, Wilton McPherson Burt, William Daniel Nicholson IV, and Carli Adele Hempel. All of these co-defendants except Nicholson and Hempel were also appellants below.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States of America v. Alan Andrew Beauchamp, No. 3:16-cr-516 (Apr. 12, 2021)

United States Court Appeals (5th Cir.):

United States of America v. Mrugeshkumar Kumar Shah, No. 21-10292 (Oct. 2, 2023)

Supreme Court of the United States:

Shawn Mark Henry v. United States, No. 23-716

Jackson Jacob v. United States, No. 23A1059

Michael Bassem Rimlawi v. United States, No. 23A1069

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals and its order denying rehearing en banc (App. 1a-86a) are reported at 95 F.4th 328.

JURISDICTION

The judgment of the court of appeals was entered October 2, 2023. The court of appeals issued a superseding opinion and denied timely petitions for rehearing en banc March 8, 2024. On May 30, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(c)(1)(B), provides in relevant part that criminal restitution "shall" be imposed in the full amount of the victim's loss when "an identifiable victim or victims has suffered a physical injury or pecuniary loss."

INTRODUCTION

This case presents an important question that has divided Members of this Court and jurists throughout the country: whether the Sixth Amendment reserves to juries the determination of any fact underlying a criminal restitution order. The answer is *yes*.

Applying the longstanding *Apprendi* rule, this Court in *Southern Union Co. v. United States*, 567 U.S. 343 (2012), held that the Sixth Amendment prohibits a court

from ordering a criminal fine based on facts not found by the jury beyond a reasonable doubt. There is no principled reason for a different rule to govern criminal restitution.

Nevertheless, lower courts have resisted that conclusion based on reasoning that Members of this Court, federal court judges, state court judges, and leading criminal law treatises and commentators have said "isn't well-harmonized with" *Southern Union*, and is "difficult to reconcile with the Constitution's original meaning." *E.g., Hester v. United States*, 139 S. Ct. 509, 509-10 (2019) (citations omitted) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); *accord* LaFave, *Criminal Procedure* § 26.6(c) ("[I]f a judge must impose restitution upon finding loss, a defendant under *Apprendi* * * * should have the right to insist that the government prove that loss beyond a reasonable doubt to a jury.").

Instead, over multiple powerful dissents, lower courts have clung to their pre-*Southern Union* rulings that judges can find facts underlying criminal restitution orders, and have even read this Court's silence on the question as tacit approval for such judicial factfinding. Only this Court can correct course now.

The question is recurring and important. While once rare, courts now order restitution in thousands of cases every year. In 2023 alone, federal courts sentenced more than 8,000 criminal defendants to pay more than $13 billion in restitution. The effects of such massive restitution orders can be profound since inability to pay can result in reincarceration and deprive a defendant of other rights, including the right to carry a firearm, the right to serve on a jury, and the right to vote.

This case presents an ideal vehicle to resolve the question. Petitioner preserved this argument at every stage of the proceedings, and the Fifth Circuit squarely

addressed the issue, holding that it was bound by prior circuit precedent holding that the *Apprendi* rule does not apply to criminal restitution. App. 83a. And the record is clear that the jury never made any of the factual findings underlying the restitution order here.

Indeed, the judicial factfinding in this case illustrates the problems with the lower courts' approach. Adopting the facts set forth in the presentence report, the district court issued a restitution order irreconcilable with the facts found by the jury. The jury convicted petitioner only of charges related to the federal Anti-Kickback Statute, which prohibits physicians from paying or receiving any remuneration for arranging services payable by a *federal* health care program. But the jury rejected charges that petitioner engaged in a conspiracy to make unlawful referrals payable by *private* insurers, which fall outside the Anti-Kickback Statute's reach. The sentencing court, however, ordered petitioner to pay restitution to *private* insurers as the purported "victims." App. 81a-82a. And it did so despite the presentence report's recognition that the only victim of an Anti-Kickback Statute violation—the federal government—suffered no loss as a result of petitioner's conduct. Presentence Investigation Report (PSR) ¶ 111, D. Ct. Dkt. 1194.

Given lower courts' refusal to reengage on this question after *Southern Union*, further percolation is unlikely to result in course correction. This Court should thus grant review to ensure that the right to a jury does not "mean less to people today than it did to those at the time of the Sixth and Seventh Amendment's adoption." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

STATEMENT

1. Petitioner was a Dallas-area physician who primarily worked out of his self-owned clinic. From 2011 to 2012, petitioner also intermittently provided medical services at Forest Park Medical Center Dallas.

In 2016, the government charged numerous defendants, including the owners and operators of Forest Park, with what it characterized as a scheme to "enrich themselves through out-of-network billing and reimbursement." App. 100a. The government charged that Forest Park's owners, operators, and numerous doctors used bribes and kickbacks to steer privately insured patients to the clinic, for whom they could recoup higher out-of-network reimbursement rates. App. 98a-100a.

Though the indictment and trial centered on the owners of Forest Park and other defendant-physicians—who made millions from billing *private* insurers at out-of-network rates—petitioner was swept into the case even though nearly all his referrals involved patients who were not privately insured but rather had medical coverage under the Federal Employees' Compensation Act (FECA) or similar state workers' compensation programs. App. 105a. Because the government pays medical costs for FECA beneficiaries on a fixed-fee basis (with no co-pay), the costs it incurred for those patients were the same as they would have been had petitioner performed the procedures at his own clinic rather than refer them to Forest Park. PSR ¶ 111.

The operative indictment included counts under the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, the Travel Act, 18 U.S.C. § 1952, and a conspiracy to violate those statutes. App. 100a-126a. The Anti-Kickback Statute prohibits paying or receiving any remuneration for arranging services payable by a federal health care program. 42 U.S.C. § 1320a-7b(b). It does not cover

privately insured patients. *Id.* The Travel Act prohibits interstate travel with intent to further certain criminal activity; here, an alleged violation of Texas's commercial bribery statute related to kickbacks for privately insured patients. 18 U.S.C. § 1952(a); *see* App. 101a-102a.

2. The jury returned a partial guilty verdict against all defendants. App. 148a-172a. It found that petitioner did not conspire to violate the Travel Act by seeking kickbacks for privately insured patients in violation of Texas's commercial bribery law. App. 150a. But the jury convicted him of violations of the Anti-Kickback Statute and conspiracy to violate the AKS for paying or receiving remuneration for arranging services payable by a federal health care program (FECA). App. 150a-151a, 153a, 156a.

Those Anti-Kickback Statute violations consisted of receiving three payments, totaling $5,000, for referring FECA beneficiaries to Forest Park. App. 151a, 153a, 156a. The remuneration that petitioner received for these referrals was substantially less than what he would have earned had he performed the procedures at his own clinic, because he would not have had to share the FECA payment. *See* Sent. Tr. 12, D. Ct. Dkt. 1775. As the district court observed at sentencing, petitioner did not "profit[] like some of the other defendants," who earned millions of dollars from out-of-network reimbursements for privately insured patients. Sent. Tr. 36. Probation and Pretrial Services acknowledged in petitioner's presentence report that referring fixed-fee workers' compensation beneficiaries to Forest Park rather than performing the procedures himself cost the federal government nothing. PSR ¶ 111.

Notwithstanding the jury's determination that petitioner's conviction concerned only referral fees for federally insured patients, the presentence report recommended that the court order petitioner to pay more than $40,000 in restitution to two *private* insurers under

the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. PSR ¶ 110; *see also* App. 173a. Probation's restitution calculation was not based on any facts found by the jury; indeed, the jury did not convict petitioner of accepting kickbacks for any privately insured patient. Instead, Probation relied on its own assessment of billings for privately insured patients and an analysis by unnamed Probation "agents" who purported to have calculated, without providing any backup, "what the [private] insurance companies would have paid for in-network procedures." PSR ¶ 110.

Petitioner objected to Probation's restitution calculation on the grounds that private insurers cannot be victims of an Anti-Kickback Statute violation and that, in any case, the Sixth Amendment requires the jury to find all facts underlying a restitution order. Sent. Mem. 27-28, D. Ct. Dkt. 1541. At sentencing, the district court adopted Probation's factual findings and calculation without comment, and petitioner timely appealed. Sent. Tr. 37-38.

3. The court of appeals affirmed. App. 1a-85a. It concluded that although the Anti-Kickback Statute does not apply to private insurers, private insurers were "victims" here because they were "within the scope of the conspiracy" and "the MVRA's definition of 'victim' is quite broad." App. 81a. It also rejected petitioner's argument that the Sixth Amendment requires a jury to find facts supporting the allowable amount of restitution as foreclosed by circuit precedent. App. 83a (citing *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014)).

The court of appeals denied rehearing en banc. App. 86a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court's Sixth Amendment Jurisprudence

A. Like Criminal Fines, A Jury Must Find The Facts Underlying Criminal Restitution

1. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this 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."

Since then, the Court has applied this "bright-line rule" to a "variety of sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence." *Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012). The Court has thus held that a jury must find any fact necessary to increase the sentencing range under mandatory sentencing guidelines, *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); that a jury must find any fact necessary to establish a statutory minimum, *Alleyne v. United States*, 570 U.S. 99, 116 (2013); that a jury must find any fact necessary to impose a death sentence, *Ring v. Arizona*, 536 U.S. 584, 609 (2002); and, most recently, that a jury must find any fact necessary to increase the statutory maximum and minimum sentences. *Erlinger v. United States*, No. 23-370 (U.S. June 21, 2024), slip op. 11. And, critically, the Court has held that a jury must find any fact necessary to determine the allowable amount of a criminal fine. *Southern Union*, 567 U.S. at 348.

Southern Union controls the question here. In holding that the *Apprendi* rule "applies to sentences of criminal fines," the Court clarified that the Sixth Amendment governs both custodial and monetary punishments. *Id.* at 346, 348. It explained that it has

"never distinguished one form of punishment from another." *Id.* at 350. Instead, *Apprendi* and subsequent cases "broadly prohibit judicial factfinding that increases maximum criminal sentences, penalties, or punishments—terms that each undeniably embrace fines." *Id.* (cleaned up). The Court thus held that facts that increase the allowable amount of monetary penalties must be found by the jury, because "the amount of a fine, like the maximum term of imprisonment * * * is often calculated by reference to particular facts." *Id.* at 349.

A criminal restitution order is no different. Like a criminal fine, "[t]he purpose of awarding restitution * * * is to mete out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). And restitution, like a fine, is "calculated by reference to particular facts," such as "the amount of the defendant's gain or the victim's loss." *Southern Union*, 567 U.S. at 349-50. Under the Mandatory Victims Restitution Act, a sentencing court must impose criminal restitution in the full amount of losses by each victim who was "directly and proximately" harmed by the offense. *See* 18 U.S.C. § 3663A(a)(2), (c)(1)(B), 3664(f)(1)(A).

"[B]efore [restitution] may be imposed, the court must identify the 'victim' entitled to payment," which can "become[] more complicated when the offense relates to the interests of the public in general, as do many regulatory offenses." LaFave, *Criminal Procedure* § 26.6(c). "Once the victim is identified, the court must determine precisely what losses can be considered in measuring the amount of restitution." *Id.* Those facts determine the mandatory amount of any criminal restitution order, and thus have "the effect of increasing *both* the maximum and minimum sentences" a criminal defendant faces. *Erlinger*, slip op. 11.

In this case, the sentencing court, not the jury, determined these facts. Despite the jury's determination

that petitioner had obtained improper referral fees only for *federally* insured patients, the sentencing court adopted the presentence report's finding that the "victims" were two *private* insurers. PSR ¶ 110; *see also* App. 81a-82a. Relying on an unspecified analysis by Probation "agents," the sentencing court then calculated restitution based on the amount *private* insurers would have lost using reimbursement rates for privately insured patients. PSR ¶ 110. But the jury found no harm to any private insurer. To the contrary, the jury's verdict *precludes* such a finding because it rejected the only charges against petitioner related to privately insured patients and convicted him under the Anti-Kickback Statute alone. App. 150a. That statute, under the government's own characterization in the indictment, covers only services for which payment may be made under a "Federal health care program." App. 100a-101a; *see* 42 U.S.C. § 1320a-7b(b). Yet the district court imposed restitution based on the court's factfinding about privately insured patients. And the court of appeals approved that restitution order under the mistaken view that because the MVRA is "quite broad," the district court had carte blanche to award restitution to private insurers based on judicial factfinding.

In short, the jury did not find that petitioner victimized any private insurer—the jury rejected such a finding—but the sentencing court nevertheless ordered restitution based on its own finding that private insurers were victims and that they suffered an amount of loss never determined by the jury.

Had the sentencing court considered only the loss to the actual "victim" for Anti-Kickback Statute offenses—the federal government—the allowable restitution amount would have been zero. As Probation acknowledged in petitioner's presentence report, referring fixed-fee workers' compensation beneficiaries

to Forest Park rather than performing the procedures at his own clinic did not affect what the government (or beneficiaries) paid. PSR ¶ 111.

These are the precise circumstances where the *Apprendi* rule reserves factfinding to the jury. "If a judge is prohibited from imposing any restitution at all without first finding some loss, or, if a judge must impose restitution upon finding loss, a defendant under *Apprendi* * * * should have the right to insist that the government prove that loss beyond a reasonable doubt." LaFave, *supra*, § 26.6(c). Like criminal fines, there is "no principled basis under *Apprendi* for treating [criminal restitution] differently" from other forms of punishment. *Southern Union*, 567 U.S. at 349.

2. Any other view is "difficult to reconcile with the Constitution's original meaning." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). "[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Southern Union*, 567 U.S. at 353 (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)). And "as long ago as the time of Henry VIII, an English statute entitling victims to the restitution of stolen goods allowed courts to order the return only of those goods mentioned in the indictment and found stolen by a jury." *Hester*, 139 S. Ct. at 511; *see also* James Barta, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 473 n.111 (2014).

Practice was no different in America before the Founding. As Justice Thomas (joined by Justice Scalia) explained at length in his concurring opinion in *Apprendi*, early American larceny statutes required the value of stolen goods—which set the maximum monetary penalty—to be alleged in the indictment and proved to the jury. *See Apprendi*, 530 U.S. at 502 (Thomas, J.,

concurring); *see also Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (same). As punishment, these statutes typically prescribed criminal restitution to victims rather than a fine payable to the government. *See* Barta, *supra*, at 474. Massachusetts's 1785 criminal larceny statute, for example, required actual restitution or a payment of treble damages to the victim upon conviction. *See* Act of March 15, 1785, 1785 Mass. Sess. Laws 263, 264. Courts likewise held that no such restitution could be ordered unless the property's value was alleged in the indictment and proved to the jury at trial. *See Commonwealth v. Smith*, 1 Mass. 245, 246 (1804).

This well-established understanding of the jury right endured through the Republic's early years. The Crimes Act of 1790, for example—the very first federal criminal statute—imposed a penalty for certain larceny offenses of "four-fold value of the property so stolen." 1 Stat. 112, 116. The practice of the time, as the Court explained in *Southern Union*, was consistent with *Apprendi* and required that the value of the stolen goods be alleged in the indictment and proved to the jury. *See* 567 U.S. at 357. Today, the monetary penalty that the Crimes Act prescribed more closely resembles criminal restitution than a fine: the proceeds were to be divided among "the owner of the goods" and the private prosecutor who brought the case. *See* 1 Stat. 116. Thus, not only *Southern Union*'s reasoning, but also the historical examples on which the Court relied, show that the jury right applies to criminal restitution just as it does to criminal fines.

Throughout the nineteenth century, courts continued to hold "that in prosecutions for larceny, the jury usually had to find the value of the stolen property before restitution to the victim could be ordered." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). In *Schoonover v.*

State, 17 Ohio St. 294, 298 (1867), for example, the Ohio Supreme Court explained that when a statute provides for restitution based on "the value of the property stolen," "unless such value be found in the verdict, the judgment of restitution can not be rendered." And in *State v. Somerville*, 21 Me. 20, 22 (1842), the Supreme Judicial Court of Maine held that property subject to criminal restitution "must be ascertained from the allegations in the indictment and from the finding of the jury."

Consistent practice from pre-1789 England through the Civil War thus reflects that the allowable amount of criminal restitution was reserved to the jury at common law. No basis exists in this historical tradition to distinguish criminal restitution from criminal fines for purposes of the Sixth Amendment's jury right.

B. The Reasoning Underlying The Court Of Appeals Decisions Is Inconsistent And Wrong

Despite this Court's precedents and the historical treatment of restitution as an issue reserved to the jury, lower courts "have followed one of two analytical paths" to conclude that juries need not find facts supporting restitution. *State v. Robison*, 314 Kan. 245, 249 (2021); *accord* James Bertucci, *Apprendi-Land Opens its Borders: Will the Supreme Court's Decision in Southern Union Co. v. United States Extend Apprendi's Reach to Restitution?*, 58 St. Louis U. L.J. 582 (2014) (discussing the conflicting rationales employed by lower courts).

First, relying on *Apprendi*'s statement that judicial factfinding is prohibited when it increases a penalty beyond a "statutory maximum," the Fifth Circuit and other courts have concluded that the Mandatory Victims Restitution Act does not set a "statutory maximum" because it requires restitution only for a specific sum—the amount of the victim's loss. *See United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (restitution

falls outside *Apprendi* "because no statutory maximum applies to restitution."); App 83a.

Second, other courts have held that restitution falls outside *Apprendi* based on the supposition that restitution is a civil remedy, not a criminal penalty. Bertucci, *supra*, at 582 (surveying decisions).

As Members of this Court have observed, both rationales are "doubtful" under this Court's decisions and "difficult to reconcile with the Constitution's original meaning." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

1. The Fifth Circuit and other lower courts holding that criminal restitution is exempt from *Apprendi* because the Mandatory Victims Restitution Act prescribes no statutory maximum are incorrect, as a matter of both precedent and first principles. By its terms, the statute allows (and indeed, requires) restitution only in the amount of the victim's loss. 18 U.S.C. § 3663A(b). The amount of the victim's loss is thus the statutory maximum; that 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." *Southern Union*, 567 U.S. at 348 (quoting *Blakely*, 542 U.S. at 303). A restitution order that exceeds the victim's loss imposes a penalty beyond what the statute permits. *See Lagos v. United States*, 584 U.S. 577, 585 (2018) (holding that a defendant was "not obliged to pay" any amount of restitution exceeding the properly computed loss). Absent further factfinding, therefore, "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." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). And because the penalty authorized by statute depends on determination of a fact (the amount of loss), "[t]he Sixth Amendment

reserves to juries [that] determination." *Southern Union*, 567 U.S. at 346.

That the Mandatory Victims Restitution Act prescribes a specific restitution amount rather than a range makes no difference. Tautologically, a statute that prescribes a *specific* penalty also prescribes the *maximum* penalty. This Court has never limited *Apprendi* to sentencing regimes in which trial courts have sentencing discretion. "To the contrary, *Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.'" *Southern Union*, 567 U.S. at 349 (quoting *Ice*, 555 U.S. at 170). It applies to any "'fact that increases' a defendant's exposure to punishment." *Erlinger*, slip op. 10 (quoting *United States v. Haymond*, 588 U.S. 634, 642 (2019)). There is no doubt that if Congress imposed a similar determinate scheme for custodial sentences (for example, one requiring one day of imprisonment for each dollar the victim lost), *Apprendi* would require the jury to find the facts supporting the sentence. And under *Southern Union*, custodial and monetary penalties are treated alike.

The Mandatory Victims Restitution Act's sentencing regime also closely mirrors those the Court in *Southern Union* held would require jury findings. Allowable criminal fines under numerous federal statutes are "often calculated by reference to * * * the victim's loss." *Id.* at 349-50 & n.4; *see, e.g.*, 18 U.S.C. §§ 201(b), 645, 3571(d). Jurors must find the amount of the victim's loss "[i]n all such cases." *Southern Union*, 567 U.S. at 350. And decisions applying early American larceny statutes illustrate that this principle accords with "the historical role of the jury at common law," too. *Southern Union*, 567 U.S. at 353 (quoting *Ice*, 555 U.S. at 170). Laws like Massachusetts's criminal larceny statute provided for specific criminal restitution amounts—not a discretionary

range—yet courts consistently required the amount of the victim's loss to be alleged in the indictment and proved to the jury. *See Smith*, 1 Mass. at 246. And as the Court recently recognized, common-law crimes throughout much of American history typically "carried 'specific sanctions, and once the facts of the offense were determined by the jury, the judge was meant simply to impose the prescribed sentence.'" *Erlinger*, slip op. 7 (cleaned up) (quoting *Haymond*, 588 U.S. at 642). These determinate sentencing regimes have never been understood to be an exception to the general rule that juries must find all facts underlying an allowable criminal sentence.

2. Nor is criminal restitution exempt from *Apprendi* because it is civil in nature rather than criminal. For one, the Sixth Amendment right to a jury applies "[i]n all criminal *prosecutions*." U.S. Const. Amend. VI (emphasis added). Restitution indisputably is imposed as part of a criminal prosecution; it is "imposed by the Government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime." *Paroline v. United States*, 572 U.S. 434, 456 (2014) (quoting *United States v. Bajakajian*, 524 U.S. 321, 328 (1998)).

Beyond that, this Court has repeatedly held that criminal restitution "serves punitive purposes" in addition compensatory ones. *Id.* "The purpose of awarding restitution is * * * to mete out appropriate criminal punishment." *Pasquantino*, 544 U.S. at 365. Indeed, "[t]he victim has no control over the amount of restitution awarded or over the decision to award restitution." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986).

"Federal statutes, too, describe restitution as a 'penalty' imposed on the defendant as part of his criminal sentence * * * ." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). And it is significant that Congress chose to

place the Mandatory Victims Restitution Act in Title 18 along with other criminal penalties—a choice this Court has held is "relevant in determining whether its content is civil or criminal in nature." *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 659 (2015). For these reasons, criminal restitution may even implicate the Eighth Amendment's Excessive Fines Clause in extreme cases. *Paroline*, 572 U.S. at 456. And even if criminal restitution could plausibly be viewed as a civil remedy, the Seventh Amendment would guarantee a jury determination. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

Were there any doubt based on recent precedent that criminal restitution is a criminal penalty, history from the Founding era would dispel it. Early American larceny statutes requiring criminal restitution (like the English laws that preceded them) treated it like any other penalty, often discussing it in the same provision and with the same terms. *See, e.g.*, Act of March 15, 1785, 1785 Mass. Sess. Laws 264 (listing criminal restitution among other "punishment"); Crimes Act of 1790, 1 Stat. 112, 116 (describing money to be paid to the owner of stolen goods as a "fine"). Indeed, the Massachusetts Supreme Judicial Court expressly rejected the argument that restitution under the State's 1785 larceny statute was something other than "what the law contemplates as *punishment*," calling that suggestion "a mere play upon words." *Commonwealth v. Andrews*, 2 Mass. 14, 29-30 (1806). The cases applying those laws also required that the facts supporting criminal restitution, like those supporting other criminal penalties, be alleged in the indictment and proved to the jury. *See Smith*, 1 Mass. at 246; *Southern Union*, 567 U.S. at 357 (discussing application of the Crimes Act). Like in many jurisdictions today, those who failed to pay criminal restitution were subject to custodial

penalties without further trial. *See* 1785 Mass. Sess. Laws 264 (allowing for sentence of three years hard labor if convicted person failed to pay restitution).

For these reasons, even courts finding restitution exempt from *Apprendi* under the "statutory maximum" theory discussed above have rejected the notion that restitution is a civil remedy, though there is a split on the issue. *E.g.*, *United States v. Leahy*, 438 F.3d 328, 334 (3d Cir. 2006) (en banc) ("Of the other Courts of Appeals that have addressed this issue, only the Seventh and Tenth Circuits have held that restitution is a civil rather than a criminal penalty.").

C. The Question Presented Has Divided Members Of This Court And Lower Courts

Members of this Court and judges of federal and state appellate courts have made compelling arguments that allowing judges to make factual findings supporting criminal restitution is contrary to *Southern Union* and ignores the Constitution's original meaning. Nevertheless, most courts have clung to their pre-*Southern Union* rulings—even after acknowledging that these decisions are not "well-harmonized with *Southern Union*" and "might have come out differently" had *Southern Union* been decided first. *E.g.*, *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013).

The powerful dissenting voices confirm that the issue is important and warrants this Court's attention. So do state court decisions that have split on the question in fractured opinions. At a minimum, the availability of the critical right to a jury—"the heart of our criminal justice system," *Erlinger*, slip op. 7—merits this Court's review.

1. As noted, Members of this Court have expressed serious concerns with decisions holding that the Sixth Amendment does not apply to criminal restitution. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by

Sotomayor, J., dissenting from denial of certiorari). A contrary ruling, they explained is "worthy of [the Court's] review" because the two principal bases underlying lower court decisions "seem[] doubtful" and are "difficult to reconcile with the Constitution's original meaning." *Id.* at 511-12.

Court of appeals judges, even before *Southern Union*, have all but called out for this Court's review of decisions finding restitution outside the Sixth Amendment. In a sharply divided en banc decision of the Third Circuit, for instance, the majority found restitution exempt from the *Apprendi* rule over the vigorous dissent of five members of the court. *Leahy*, 438 F.3d at 339-48 (McKee, J., dissenting). Judge McKee persuasively explained that *Apprendi* and the historic treatment of criminal restitution as an issue reserved for juries undercut the two primary rationales courts have relied on to the contrary. Joined by four other judges, Judge McKee concluded that "given the Court's recent jurisprudence, we are not at liberty to rationalize a distinction between punishment in the form of incarceration on the one hand, and punishment in the form of restitution on the other * * * . [A]ny such distinction must be drawn by the Court in the first instance, and not by us." *Id.* at 348.

Likewise, Eighth Circuit judges are divided on the question. *United States v. Carruth*, 418 F.3d 900, 904-06 (8th Cir. 2005) (Bye, J., dissenting). Judge Bye aptly observed, that "[o]nce we recognize restitution as being a 'criminal penalty' the proverbial *Apprendi* dominoes begin to fall." *Id.* at 906. State court judges too have vigorously dissented in decisions finding criminal restitution not subject to the Sixth Amendment. *See*

Robison, 314 Kan. at 258-259 (Rosen, J., dissenting and adopting dissenting opinions from court of appeals).[1]

The divergent views—and conflicting rationales underlying lower court decisions—are reason enough for this Court to address the question.

2. Review would also resolve a state court split. The Kansas Supreme Court, in a fractured opinion, has held that the Constitution does not require juries to find facts underlying criminal restitution, *see Robison*, 314 Kan. at 258-259. By contrast, the Iowa Supreme Court, in a fractured decision, has held that "restitution must be based on jury findings." *State v. Davison*, 973 N.W.2d 276, 279 (Iowa 2022).

3. At a minimum, this Court should grant review because its previous denials of certiorari on the issue are being misread as an implicit holding that it views criminal restitution outside the Sixth Amendment's protection.

As the Supreme Court of Kansas recently explained, "[d]espite the nonuniform approach taken by federal circuits, the Supreme Court has remained silent on whether criminal restitution triggers the right to a jury as contemplated in *Apprendi*, even when presented with opportunities to take up the question * * * . We see no reason we should take up that mantle in its place."

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[1] Likewise, the leading criminal law treatise and numerous commentators argue that the *Apprendi* rule requires the jury to find facts for restitution, *see* LaFave, *supra*; William Acker, *The Mandatory Victims Restitution Act is Unconstitutional: Will the Court Say So After Southern Union*, 64 Ala. L. Rev. 803 (2013); Barta, *supra*; Cortney Lollar, *What is Criminal Restitution*, 100 Iowa L. Rev. 93 (2014); Laura Appleman, *Retributive Justice and Hidden Sentencing*, 68 Ohio St. L.F. 1307 (2007); Melanie Wilson, *In Booker's Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 Ind. L. Rev. 369 (2006); *accord Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citing commentary).

Robison, 314 Kan. at 250; *see also United States v. Kluge*, 2023 WL 3434035, at *2 (M.D. Fla. May 12, 2023) ("[T]he Supreme Court (fairly) recently denied a petition for a writ of certiorari on whether *Apprendi* applies to the imposition of criminal restitution. So until either the Supreme Court or Eleventh Circuit say otherwise, *Dohrman* remains binding precedent and forecloses Defendant's argument." (citations omitted)).

But a denial of certiorari, of course, says nothing of the merits. *See Ramos v. Louisiana*, 590 U.S. 83, 105 n.56 (2020) ("The significance of a denial of a petition for certiorari ought no longer require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim." (cleaned up)). And the number of decisions refusing to faithfully apply *Apprendi* does not mean those decisions are correct. As Judge McKee observed, "before *Booker* was decided, one could have developed an even more impressive list of the courts that had incorrectly concluded that *Apprendi* does not apply to the federal sentencing guidelines." *Leahy,* 438 F.3d at 345 (McKee, J., concurring in part and dissenting in part). Just this Term, the Court granted certiorari and reversed in *Erlinger*, where, like here, "the courts of appeals ha[d] uniformly persisted" in refusing to apply *Apprendi* consistent with this Court's precedents. Pet. at 19, *Erlinger v. United States*, No. 23-370.

The lower courts' holdings require review precisely because of this inertia. Only this Court can correct course now and bring treatment of criminal restitution back into alignment with what the Sixth Amendment and longstanding notions of the jury right require. The right to a jury—"the heart of our criminal justice system," *Erlinger*, slip op. 7—deserves more than reliance on this Court's silence.

II. This Case Provides An Ideal Vehicle To Address This Recurring Question Of Exceptional Importance

A. The question presented is recurring and exceedingly important. "Today, every jurisdiction provides for victim restitution to be included in a criminal sentence." LaFave, *supra*, § 26.6(c). And the federal statute here, the Mandatory Victims Restitution Act, has resulted in an extraordinary increase in restitution in federal criminal sentencing. "Before the passage of * * * the Mandatory Victims Restitution Act of 1996, 110 Stat. 1227, restitution orders were comparatively rare. But from 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citing Gretta L. Goodwin, GAO, *Federal Criminal Restitution* 25 (Feb. 2018)); Bertucci, *supra*, at 568 ("The authorization and use of restitution in the United States' federal criminal system was infrequent through most of the twentieth century.").

In 2023, federal courts sentenced 8,019 criminal defendants to pay more than $13 billion in restitution. *See* United States Sentencing Commission, 2023 Annual Report and Sourcebook of Federal Sentencing Statistics, tbl. 17. The average restitution ordered was $1,628,250. Remarkably, as of 2023, federal defendants owed more than $111 billion in unpaid criminal restitution to third parties. *See* Department of Justice, 2023 U.S. Attorneys' Annual Statistical Report, tbl. 8B.

"Although frequently ordered as part of a criminal sentence, restitution often is not paid." LaFave, *supra*, § 26.6(c). "More than 90% of criminal restitution ordered in federal court is never collected." *Id.* at n.46.70.

The question is thus of significant importance because "[f]ailure or inability to pay restitution can result in suspension of the right to vote, continued court

supervision, or even reincarceration." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); *see also* Gretta L. Goodwin, GAO, *Federal Criminal Restitution: Department of Justice Has Ongoing Efforts to Improve Its Oversight of the Collection of Restitution and Tracking the Use of Forfeited Assets* 3 (Sept. 2020). Those consequences are particularly troubling in the context of the Mandatory Victims Restitution Act, where restitution is mandatory and courts are not permitted to take an offender's economic circumstances into account. *See* 18 U.S.C. §§ 3663A, 3664(f)(1)(A). The question is thus critically important to defendants and the administration of the criminal justice system.

B. This case presents an optimal vehicle to resolve the question. The *Apprendi* issue was cleanly raised at every stage of this case, and the court of appeals rejected petitioner's argument based on circuit precedent holding that restitution need not be proved to a jury. *See* App. 83a.

Beyond that, this case illustrates the problems with the status quo. Here, as in most cases, the presentence report and government's accompanying sentencing memorandum are "the sole 'evidentiary' source[s] for the restitution order." Acker, *supra*, at 819. Presentence reports are routinely based on hearsay and facts not found by a jury at trial. *See id.* As a result, trial judges regularly adopt "bureaucratically prepared, hearsay-riddled" reports to order restitution. *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part)).

Here, by adopting the unarticulated "analysis" in the presentence report, the sentencing court issued a restitution order based not only on untested facts, but on facts that contradicted the jury's verdict. The court ordered petitioner to pay "victims" who suffered no loss

from the conduct underlying the verdict against him—private insurance companies—when petitioner was convicted of charges relating to the Anti-Kickback Statute, which applies only to federally insured patients. *See* App. 150a. And it ordered restitution despite the presentence report's recognition that the sole cognizable victim under the Anti-Kickback Statute—the federal government—suffered no loss as a result of petitioner's conduct. This case thus presents a compelling backdrop to consider the question.

* * * * *

More than a decade has passed since this Court held in *Southern Union* that "[t]he Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence"—including monetary penalties. 567 U.S. at 346. Yet lower courts continue to resist applying that straightforward rule to the billions of dollars in criminal restitution imposed each year without the protection of the jury trial right. It is time for this Court to step in and restore the "jury's historic role as a bulwark between the State and the accused." *Id.* at 350.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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