No. 24-25

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Statutes

Other Authorities

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The government does not dispute that two Members of this Court, as well as jurists across the country, have all but called out for this Court to review whether the Sixth Amendment *Apprendi* rule requires juries, not judges, to determine any fact underlying a criminal restitution order. Pet. 1-2, 17-20.

The government further concedes that the question presented is recurring, Opp. 11 n.3, and does not contest the importance of the issue to the thousands of defendants saddled with billions of dollars in crippling restitution orders every year. Pet. 2, 21-22. And, in a rare and telling omission, the government can identify no vehicle issues that could prevent review.

Instead, the government maintains that lower courts have generally "held that *Apprendi* does not apply to criminal restitution." Opp. 13; *see id.* at 10, 14, 17-18. But this Court has repeatedly granted review in other *Apprendi* contexts despite the lack of lower court disagreement, including *Southern Union*, *Ring*, and—just last Term—*Erlinger*. *See infra* at 9-11. As those cases illustrate, lower courts have shown extreme

reluctance—absent this Court's specific direction—to apply *Apprendi* to new contexts, even when the reasoning of this Court's decisions compels that result. It is precisely because of this reluctance that this Court should intervene now.

Beyond urging deference to the lower courts, the government argues the merits. Its principal contention is that *Apprendi* is inapplicable because the Mandatory Victims Restitution Act requires restitution of "a specific sum—'the full amount of each victim's losses'—rather than prescribing a maximum amount that may be ordered." Opp. 12. But the government's framing of the issue simply assumes away the very matter in dispute. As Justices Gorsuch and Sotomayor have explained, "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 any 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 v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). Thus, any imposition of restitution by definition involves an increase in the "maximum sentence."

The government's fallback argument that criminal "restitution is not a penalty," Opp. 14, fares no better: Criminal restitution is imposed at the culmination of a criminal prosecution, is listed in Title 18 along with other criminal penalties, and "serves punitive purposes," *Paroline v. United States*, 572 U.S. 434, 456 (2014). The MVRA itself refers to restitution as a "penalty." *E.g.*, 18 U.S.C. § 3663A(a)(1). That is why even courts that decline to apply *Apprendi* to restitution have rejected the "not a penalty" rationale adopted by a minority of circuits. *See* Pet. 17; Opp. 14. At a minimum, the lower courts' division

on the doctrinal bases for their rulings underscores the need for this Court's clarification and guidance.

This case presents a particularly compelling context to resolve this important question. After repeatedly calling for responses to petitions presenting this same issue, the Court finally has before it one where the government has identified no obstacles to review. It has before it one where the government does not dispute that the judge imposed restitution based on facts the jury never found. Opp. 6. And it has before it one where jury involvement would have clearly made a difference: the court here ordered petitioner to pay tens of thousands of dollars to private insurers even though the jury *found no improper referrals to private insurers*. And it did so while recognizing that the actual victim (the federal government) suffered no financial losses from the counts on which petitioner was convicted. *See* Opp. 7 n.2.

If ever there were an ideal case to address the question presented, this is it.

ARGUMENT

I. *Apprendi* Applies to Criminal Restitution Orders

1. This Court repeatedly has reiterated that the Sixth Amendment reserves to juries—not judges—the determination of facts that increase a defendant's allowable criminal punishment, whatever form punishment may take. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (facts underlying sentencing enhancement); *Ring v. Arizona*, 536 U.S. 584 (2002) (facts underlying death sentence); *Blakely v. Washington*, 542 U.S. 296 (2004) (facts underlying mandatory sentencing guidelines range); *Alleyne v. United States*, 570 U.S. 99 (2013) (facts underlying statutory minimum); *Erlinger v. United States*, 602 U.S. 821 (2024) (facts underlying career offender classification). In *Southern Union Co. v. United States*, the Court refused to make an exception to

this "bright-line rule" for monetary punishments and held that juries must find facts that increase the amount of a criminal fine. 567 U.S. 343, 352 (2012).

Southern Union requires the same result for criminal restitution. As the Court explained, it has "never distinguished one form of punishment from another" for purposes of the Sixth Amendment jury right. *Id.* at 350. And the MVRA, which mandates courts impose restitution in the full amount of the victim's loss (but no more), functions identically to the founding-era precedents the Court in *Southern Union* relied on in determining that juries must find all facts underlying a criminal fine. Pet. 10-12; *see Southern Union*, 567 U.S. at 354-55; *Apprendi*, 530 U.S. at 502 (Thomas, J., concurring). Indeed, one of those founding-era statutes *was* functionally a restitution statute, requiring payment of three times the value of stolen goods to the victim upon conviction. *See* Act of March 15, 1785, 1785 Mass. Sess. Laws 263, 264.

2. The government's efforts to distinguish *Southern Union* fail.

a. Principally, the government contends that because the MVRA requires "restitution of a specific sum," it establishes an "indeterminate" sentencing framework. Opp. 12. That argument makes no sense. A sentencing regime that mandates a specific penalty is determinate, not indeterminate, because the specific sentence prescribed is also the maximum sentence allowed. The MVRA does not permit the court to impose whatever amount of restitution it wants as a matter of judicial discretion. *See Lagos v. United States*, 584 U.S. 577, 585 (2018) (holding that restitution order exceeding amount of properly computed loss was unauthorized by statute). Indeed, the MVRA was enacted to address perceived inadequacies in the previously discretionary federal restitution regime. *See* 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. 565, 568-69 (2014). Any factual finding that increases the specific (and thus maximum) penalty prescribed is reserved exclusively to the jury, just as a jury must find any facts that support a determinate statutory enhancement to a custodial sentence.

The government's treatment of the historical record, Opp. 16-17, underscores the weakness of its "indeterminate framework" argument. Seeking to explain away the founding-era larceny statutes that required loss amounts be proved to the jury, the government asserts that these statutes—unlike the MVRA—established a "maximum penalty" because the penalty varied based on the value of the stolen goods. Opp. 17. But the same is true of restitution: The MVRA "peg[s] the amount of [restitution] to the determination of specified facts," *Southern Union*, 567 U.S. at 354—here, the amount (if any) insurers lost from patient referrals.

For example, the founding-era Massachusetts larceny statute discussed in *Southern Union*—like the MVRA—mandated a *specific* penalty based on the amount of loss: The defendant "shall be sentenced to forfeit treble the value of the goods or other articles stolen, to the owner thereof." 1785 Mass. Sess. Laws 264. And the Court in *Southern Union* distinguished between monetary penalties in England that were "dependent upon judicial discretion" and the early American larceny statutes that mandated specific penalties based on the amount of loss. 567 U.S. at 353-55 (citation omitted).[1] The

[1] The government also contends that under some English larceny statutes, failure to allege the value of stolen goods in the indictment affected only the disbursement of any monetary penalties, not their amount. Opp. 16-17. But as the Court recognized in *Southern*

"predominant practice" with respect to statutes that imposed specific monetary penalties tied to victim loss "was for such facts to be alleged in the indictment and proved to the jury." *Id.* at 354.

For these reasons, Members of this Court, lower court judges, and commentators have rightly observed that this Court's Sixth Amendment precedents prohibit judicial factfinding for a criminal restitution order. "[B]ecause a court can't award *any* restitution without finding additional facts about the victim's loss," "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., joined by Sotomayor, J., dissenting from denial of certiorari); *see also United States v. Leahy*, 438 F.3d 328, 344 (3d Cir. 2006) (McKee, J., dissenting) (criticizing the arguments the government makes here as "hairsplitting" and "analogous to the 'constitutionally novel and elusive distinction between elements and sentencing factors'" *Apprendi* rejected). As a leading criminal law treatise has observed, to determine the mandatory amount of restitution under the MVRA, "the court must identify the 'victim' entitled to payment" and "precisely what losses can be considered"—often disputed factual questions. LaFave, *Criminal Procedure* § 26.6(c). Under *Apprendi*, a defendant "should have the right to insist that the government prove that loss beyond a reasonable doubt to a jury." *Id.*

b. As a fallback, the government half-heartedly contends that the Sixth Amendment has no bearing on criminal restitution because it serves restorative rather than punitive purposes. Opp. 16. There is a reason the

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Union, "there is authority suggesting that English juries were required to find facts that determined the authorized pecuniary punishment" in a variety of contexts, including larceny, trespass, and usury. *See* 567 U.S. at 354.

government makes that argument only in passing. For one, even if "purposes" were relevant, this Court has repeatedly held that restitution "serves punitive purposes," *Paroline v. United States*, 572 U.S. 434, 456 (2014), and is designed to "mete out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005).

Further, the government simply ignores the host of other factors showing that criminal restitution is a form of punishment. Pet. 15-17. Criminal restitution is "imposed by the Government at the culmination of a criminal proceeding and requires conviction of an underlying crime." *Paroline*, 572 U.S. at 456 (quotation marks and citation omitted). It is collected by the Attorney General. 18 U.S.C. § 3612(c). It is listed in Title 18 along with other criminal sentences. It is a mandatory condition of supervised release subjecting a defendant to further penalties or reincarceration for nonpayment. 18 U.S.C. § 3563(a)(6). And the MVRA itself describes restitution as a "penalty." *E.g.*, 18 U.S.C. § 3663A(a)(1). The government's *ipse dixit* here that criminal restitution "is not designed to punish offenders," Opp. 13, thus fails. Indeed, the government has previously argued to this Court that the "nature and underlying penological objectives" of criminal restitution make clear that it "unquestionably is a criminal penalty." U.S. Br. at 13-15, *Hughey v. United States*, No. 89-5691.

As Justices Gorsuch and Sotomayor explained, "the Sixth Amendment's jury trial right expressly applies '[i]n all criminal prosecutions,' and the government concedes that 'restitution is imposed as part of a defendant's criminal conviction.' Federal statutes, too, describe restitution as a 'penalty' imposed on the defendant as part of his criminal sentence, as do our cases." *Hester*, 586 U.S. at 1107 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

Even courts that exempt restitution from *Apprendi* under the government's "statutory maximum" theory have rejected the notion that restitution is not a punishment, reflecting a doctrinal tension that itself warrants this Court's review. *E.g.*, *Leahy*, 438 F.3d at 334 (majority opinion) (noting conflict). Indeed, the decision below did not rely on the "no penalty" rationale employed by only two circuits. *See United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (restitution falls outside *Apprendi* "because no statutory maximum applies to restitution"); Pet. App. 83a (relying on *Rosbottom*).[2] This division supports certiorari.

Finally, state high courts are split. The Kansas Supreme Court has held that the Constitution does not require juries to find facts underlying criminal restitution, *see State v. Robison*, 496 P.3d 892, 901 (Kan. 2021), while the Iowa Supreme Court has held that "restitution must be based on jury findings," *State v. Davison*, 973 N.W.2d 276, 279 (Iowa 2022). While the Iowa court was not interpreting the MVRA, the majority and dissenting judges relied on *Apprendi* jurisprudence. *See id.* at 283; *id.* at 296 (Waterman, J., dissenting in part). And these state high courts disagreed on the meaning of this Court's jurisprudence. The Court should provide the states that will continue to grapple with this question definitive guidance.

II. Now Is the Time to Resolve This Important Question

1. In a departure from its usual practice, the government does not even purport to identify any obstacle to this Court's review. Opp. 10-19. With good reason. Petitioner preserved the argument at every stage

[2] To the contrary, the Fifth Circuit has held that restitution under the Victim Witness Protection Act "is a criminal penalty and a component of the defendant's criminal sentence." *United States v. Chaney*, 964 F.2d 437, 451 (5th Cir. 1992).

of the proceedings below. Pet. 6. And the court of appeals squarely addressed it. *Id.*

This case is a particularly suitable vehicle because it illustrates why the Sixth Amendment's protections are critical for criminal restitution. Here, as in most cases, the presentence report and government's accompanying sentencing memorandum were "the sole 'evidentiary' source[s] for the restitution order." William Acker, *The Mandatory Victims Restitution Act is Unconstitutional: Will the Court Say So After Southern Union*, 64 Ala. L. Rev. 803, 819 (2013); *see* Opp. 6 (petitioner's restitution amount was "[b]ased on the Probation Office's calculations"). Although the jury convicted petitioner of accepting referral fees only for *publicly* insured patients, the district court uncritically adopted the Probation Office's factfinding that petitioner harmed private insurers and Probation's untested calculations of the amount of those losses. Pet. 6. And it did so although the actual victim of any improper federal referrals (the federal government) suffered no financial losses at all because, as the government concedes, federal plans "operated on a fixed-fee schedule and would have paid the same amount regardless of where the surgery was performed." Opp. 7 n.2.

2. The government's reliance on lower court decisions that have not applied *Apprendi* to restitution underscores that there would be no benefit to delaying this Court's review for further percolation. And history has shown why the Court should not give deference to that lower court resistance to applying *Apprendi* here. "[B]efore *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., dissenting). Just last Term, the Court granted certiorari and reversed on an *Apprendi* issue

where the courts of appeals had unanimously held that no jury finding was needed. *See Erlinger*, 602 U.S. at 828. The Court has similarly granted certiorari over contentions that no split of authority justified review in other Sixth Amendment cases, including in *Apprendi* itself. *See, e.g.*, Br. in Opp. at 9, *Southern Union*, No. 11-94 ("This case therefore does not present any circuit conflict that warrants this Court's review at this time."); Br. in Opp. at 6, *Ring v. Arizona*, No. 01-488 ("No conflict exists between the Arizona Supreme Court's decision and any decision of a United States court of appeals."); Br. in Opp. at 9 n.4, *Apprendi v. New Jersey*, No. 99-478 (observing that the decision below "d[id] not conflict with any decision of any other state court of last resort or of a United States court of appeals"). The same course is warranted here.

That is particularly true given that judges in at least four circuits have recognized that the prevailing approach in the lower courts flouts this Court's Sixth Amendment jurisprudence, but none will depart from their precedent absent direction from this Court. Declining to revisit its pre-*Southern Union* precedent, the Ninth Circuit acknowledged that its cases were not "well-harmonized with *Southern Union*" and "might have come out differently" had *Southern Union* been decided first. *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013). A Fifth Circuit panel likewise recognized "some tension between statements of the Supreme Court in *Southern Union* [and the] court's conclusion that the Sixth Amendment does not require the jury to find the amount of restitution," but declined to change course absent direction from this Court. *United States v. Elliott*, 600 F. App'x 225, 227 (5th Cir. 2015). Five dissenting judges in the Third Circuit explained that this Court's Sixth Amendment precedents are at odds with exempting restitution from *Apprendi*. *Leahy*, 438 F.3d at 348

(McKee, J., dissenting). And an Eighth Circuit panel also split on the question. *United States v. Carruth*, 418 F.3d 900, 904-06 (8th Cir. 2005) (Bye, J., dissenting).

The lower courts are waiting for this Court to provide guidance.

3. Last, the government does not dispute that the question presented is profoundly important. Every year, federal courts order thousands of criminal defendants to pay billions of dollars in restitution, with more than $111 billion in criminal restitution outstanding as of 2023. Pet. 21. Beyond the immediate financial burden, criminal restitution has significant collateral consequences. "Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 586 U.S. at 1106 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). And trial judges regularly impose criminal restitution against defendants, including petitioner, based on nothing more than "bureaucratically prepared, hearsay riddled" reports by probation officers. Acker, *supra*, at 819.

With no vehicle problems and no prospects for further percolation, it is time for the Court to take up this question and confirm that criminal restitution—like criminal fines—is subject the Sixth Amendment's protections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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