No. _________

IN THE SUPREME COURT OF THE UNITED STATES

MARCO MANUEL LUIS and JOSHUA JOHN HESTER,

Petitioners,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), 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." In *Southern Union Co. v. United States*, 567 U.S. 343, 360 (2012), the Court held "that the rule of *Apprendi* applies to the imposition of criminal fines." That holding was based largely on how criminal fines were treated historically, under common law. *See id.* at 353-56. Despite the fact that the historical records with respect to requiring jury findings to support criminal fines and criminal restitution are the same, and that restitution is part of a criminal sentence, the circuit courts have all declined to apply the rule of *Apprendi* (and *Southern Union*) to criminal restitution. The question presented is: should the rule of *Apprendi* apply to the imposition of criminal restitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW . . . i

TABLE OF AUTHORITIES . . . iv

OPINION BELOW . . . 1

JURISDICTION . . . 1

RELEVANT CONSTITUTIONAL PROVISIONS . . . 1

STATEMENT OF THE CASE . . . 1

- I. Introduction . . . 1
- II. First District Court Proceedings . . . 2
  - A. Mr. Luis's *Apprendi* Claim . . . 2
  - B. The District Court's Restitution Calculation For Mr. Luis . . . 3
  - C. The District Court's Restitution Calculation For Mr. Hester . . . 6
- III. First Ninth Circuit Appeals By Messrs. Luis And Hester . . . 7
- IV. Petitions For Writ Of Certiorari By Messrs. Luis And Hester . . . 8
- V. District Court Proceedings On Remand . . . 8
- VI. Second Ninth Circuit Appeal . . . 9

REASONS FOR ALLOWING THE WRIT . . . 9

CONCLUSION . . . 18

APPENDIX

Portion of Transcript of District Court Hearing dated October 26, 2012 . . . 1

Portion of Transcript of District Court Hearing dated June 24, 2013 . . . 3

Opinion in *United States v. Luis*, 765 F.3d 1061 (9th Cir. 2014) 6

Opinion in *United States v. Hester*, 584 Fed. App'x 805 (9th Cir. 2014) 13

Portion of January 13, 2016 Luis Motion 15

Portion of January 13, 2016 Hester Motion 17

Portion of March 14, 2016 Order Regarding Restitution 18

Portion of December 16, 2016 Joint Opening Brief 22

Opinion in *United States v. Hester*, 708 Fed.Appx. 441 (9th Cir. 2018). 24

Portion of January 16, 2018 Petition for Panel Rehearing 26

February 27, 2018 Order Denying Petition for Panel Rehearing 30

PROOF OF SERVICE

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alleyne v. United States,
570 U.S. 99 (2013) 10, 16

Apprendi v. New Jersey,
530 U.S. 466 (2000) . . . . *passim*

Blakely v. Washington,
542 U.S. 296 (2004) 10, 16, 17

Commonwealth v. Smith,
1 Mass. 245 (1804) 15

Cunningham v. California,
549 U.S. 270 (2007) 10

Hester v. United States,
135 S. Ct. 1873 (2015) 8

Kelly v. Robinson,
479 U.S. 36 (1986) 14

Luis v. United States,
135 S. Ct. 1572 (2015) 8

Oregon v. Ice,
555 U.S. 160 (2009) 10

Pasquantino v. United States,
544 U.S. 349 (2005) 14

Southern Union Co. v. United States,
567 U.S. 343 (2012) . . . . *passim*

United States v. Bengis,
783 F.3d 407 (2d Cir. 2015) 13

United States v. Broughton-Jones,
71 F.3d 1143 (4th Cir. 1995) 15

United States v. Burns,
800 F.3d 1258 (10th Cir. 2015) 14

United States v. Bussell,
414 F.3d 1048 (9th Cir. 2005) 13, 15

United States v. Carruth,
418 F.3d 900 (8th Cir. 2005) 16, 17

United States v. Day,
700 F.3d 713 (4th Cir. 2012) 13

United States v. Garza,
429 F.3d 165 (5th Cir. 2005) 13

United States v. Green,
722 F.3d 1146 (9th Cir. 2013) 7, 8, 9, 14, 17

United States v. Hester,
708 Fed. App'x 441 (9th Cir. 2018). 1, 9

United States v. Hester,
584 Fed. App'x 805 (9th Cir. 2014). 8

United States v. Jarjis,
551 Fed. Appx. 261 (6th Cir. 2014) (unpublished opinion) 13

United States v. Keifer,
596 Fed. App'x 653 (10th Cir. 2014) (unpublishd opinion) 14

United States v. Leahy,
438 F.3d 328 (3rd Cir. 2006) (*en banc*) 12, 17

United States v. Luis,
765 F.3d 1061 (9th Cir. 2014) 2, 7

United States v. Milkiewicz,
470 F.3d 390 (1st Cir. 2006) 12

United States v. Nichols,
149 Fed. App'x 149 (4th Cir. 2005) (unpublished opinion) 13

United States v. Paroline,
134 S. Ct. 1710 (2014) 15

United States v. Reifler,
446 F.3d 65 (2d Cir. 2006) 12

United States v. Robers,
134 S. Ct. 1854 (2014) 6

United States v. Rosbottom,
763 F.3d 408 (5th Cir. 2014) 13

United States v. Sharma,
703 F.3d 318 (5th Cir. 2012) 15

United States v. Sosebee,
419 F.3d 451 (6th Cir. 2005) 13

United States v. Thunderhawk,
799 F.3d 1203 (8th Cir. 2015) 13

United States v. Williams,
445 F.3d 1302 (11th Cir. 2006) 13

United States v. Wolfe,
701 F.3d 1206 (7th Cir. 2012) 13

CONSTITUTIONAL PROVISIONS

Fifth Amendment 1, 3

Sixth Amendment 1, 3, 11, 13, 17

Eighth Amendment 15

Excessive Fines Clause 15

FEDERAL STATUTES

18 U.S.C. §1956(h) 2

18 U.S.C. §1957 . . . . . 2, 3, 7

18 U.S.C. §3663A . . . . . *passim*

18 U.S.C. §3664 12

28 U.S.C. §1254(1) 1

Mandatory Victims Restitution Act (MVRA) . . . . *passim*

FEDERAL RULES

Supreme Court Rule 12.4 1

Supreme Court Rule 13. 1

MISCELLANEOUS

Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After Southern Union v. United States?* 64 Ala. L. Rev. 803 (2013) 15

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 (Spring 2014) 11, 12

Edward Hyde East, 2 *A Treatise of the Pleas of the Crown* §171(1806) 11

Matthew Hale, 1 *Historia Placitorum Coronae: the History of the Pleas of the Crown*, (1736) 11

Theodore F. T. Plucknett, *A Concise History of the Common Law*, (1929) 11

OPINION BELOW

On January 14, 2018, a Ninth Circuit panel filed an unpublished opinion affirming the district court's order that Petitioners Marco Luis and Joshua Hester pay $329,767 in restitution to CitiGroup, Inc. *See United States v. Hester*, 708 Fed. App'x 441 (9th Cir. 2018) (attached in Appendix at 24-25). On February 27, 2018, the Ninth Circuit denied Messrs. Luis's and Hester's joint petition for panel rehearing. *See* 2/27/18 Order (attached in Appendix at 30).

JURISDICTION

Petitioners were charged in the same indictment and both seek review of the constitutionality of the same joint-and-several restitution order. Thus they are proceeding with this joint petition under Supreme Court Rule 12.4. The petition is timely filed under Supreme Court Rule 13, and this Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law . . . ."

The Sixth Amendment to the Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

STATEMENT OF THE CASE

I. Introduction

This petition addresses the constitutionality of the district court's order that Petitioners Marco Luis and Joshua Hester pay $329,767 in criminal restitution to CitiGroup. There have been two district court proceedings and two Ninth Circuit appeals related to this case. Much of the

relevant background occurred during the first district court and appellate proceedings. Below, Petitioners summarizes that background, and the proceedings that led up to this petition.

II. First District Court Proceedings

Petitioners were charged in the same indictment but pleaded guilty to different offenses in that indictment. The government sought identical joint-and-several liability restitution orders for both, based on the same facts. The district court dealt with restitution with respect to Mr. Luis first, then several months later it applied the same findings and holdings when imposing a restitution order on Mr. Hester. The upshot is that Petitioners are subject to a restitution order that makes them jointly-and-severally liable to pay $329,767 in restitution to CitiGroup. The background and litigation related to that order is summarized below.

A. Mr. Luis's *Apprendi* Claim

Mr. Luis pleaded guilty to two counts of conspiring to engage in transactions with money derived from specified unlawful activity. *See* 18 U.S.C. §§1956(h) & 1957(a). The specified unlawful activity underlying those convictions was bank fraud. Mr. Luis worked as a mortgage broker, and he aided and abetted two of his co-defendants when they lied on their applications to obtain loans to purchase two homes. After the district court imposed Mr. Luis's custodial sentence, the government asked that the court also order restitution to the two alleged victim banks, pursuant to the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §3663A. That statute requires a district court to make fact findings to determine how much, if any, restitution should be ordered.

As an initial matter, Mr. Luis argued that the MVRA did not apply because he had not pleaded guilty to an "offense against property," the trigger for the MVRA on which the government relied. 18 U.S.C. §3663A(c)(1)(ii). The district court rejected that argument, as did the Ninth Circuit in a subsequent published opinion. *See United States v. Luis*, 765 F.3d 1061, 1065-66 (9th

Cir. 2014). While that issue is not raised in this petition, it is nonetheless relevant to consider that when Mr. Luis entered his guilty plea he did not have notice that he would be subject to a substantial mandatory restitution order, because he was unaware that the government would later allege, and the court would find, that he owed restitution because engaging in a prohibited financial transaction is an "offense against property."

More central to this petition, Mr. Luis also argued that the district court could not, consistent with the Fifth and Sixth Amendments, impose restitution because there were no allegations in the indictment with respect to restitution, and when Mr. Luis pleaded guilty he did not make any admissions that would support a restitution order. Mr. Luis pointed out that restitution under the MVRA is part of a criminal sentence, and therefore the district court could not increase the available sentence based solely on its own fact findings. For this, Mr. Luis relied on *Southern Union Co. v. United States*, 567 U.S. 343, 346 (2012), which applied the principles set out in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in the context of criminal fines. The district court rejected that argument, noting that the fines involved in *Southern Union* were capped by a statutory maximum, whereas restitution under the MVRA has no statutory cap. Thus, according to the district court, its imposition of restitution could not exceed an otherwise applicable statutory maximum, meaning it could not violate *Apprendi*'s rule. *See* 10/26/12 Reporter's Transcript at 11 (attached in Appendix at 2).

B. The District Court's Restitution Calculation For Mr. Luis

Having concluded that it could permissibly make fact findings to determine the appropriate amount of restitution, the district court then held an evidentiary hearing. There were four bank loans involved in the specified unlawful activity underlying Mr. Luis's convictions for violating §1957, which were taken to buy two properties. Those loans have been referred to as the Palomar Mountain

Property loans and the Rancho Santa Fe Property loans. The district court ultimately ordered Mr. Luis to pay $615,935 restitution to JP Morgan Chase with respect to the Rancho Santa Fe Property loans. Because that aspect of the restitution order was subsequently ordered vacated, and is no longer at issue, Mr. Luis does not describe the district court's reasoning for arriving at that figure. The district court's restitution calculation with respect to the Palomar Mountain Property loans is addressed here, however, because that restitution order remains in effect, and the discussion below highlights the disputed factual issues involved, which should have been submitted to a jury.

The restitution ordered with respect to the Palomar Mountain Property loans related to two loans taken from CitiGroup to purchase that property, the first for $448,000, the second for $112,000. Both loans were taken by one of Petitioners' co-defendants, Jay Hansen, whom Mr. Luis pleaded guilty to assisting with submitting fraudulent loan applications. Mr. Hansen subsequently defaulted on both loans. The second was written off as a complete loss because the property value was not sufficient for CitiGroup to recover anything on that loan. The circumstances were different with respect to the first loan.

Mr. Hansen defaulted on the first loan on December 18, 2008. Rather than foreclosing on the property, CitiGroup spent a year-and-half trying to coax Mr. Hansen to pay. Then, on April 19, 2010, CitiGroup sold its interest in the first loan to a company called Salene, for $230,068. That was part of a bulk sale of $184 million of mortgage loans, which CitiGroup sold to Salene for $.51 per dollar of outstanding principal. According to a representative from CitiGroup who testified during the district court evidentiary hearing, the price that Salene paid "wasn't based on appraisals [of the properties that served as security on the loans]. It was based on unpaid principal balance." Though there was no evidence submitted in the district court as to the exact value of the Palomar Mountain Property at the time that CitiGroup sold the loan rights to Salene in April 2010, there was evidence

that (1) a year before the loan was sold, CitiGroup received a $370,000 appraisal for the property, and (2) a year after the loan was sold, Salene sold the property for $270,000. Thus, it is apparent that when CitiGroup sold the rights to the loan/property to Salene, the property was worth much more than the $230,068 that Salene paid CitiGroup for the rights to the loan.

The district court nonetheless calculated restitution on the first Palomar Mountain Property loan by subtracting $230,068 (*i.e.*, what Salene paid CitiGroup) from the principal due on the loan (*i.e.*, $447,977), and ordered Mr. Luis to pay CitiGroup $217,909 restitution with respect to the first loan. The district court then added to that figure the loss from the second loan to arrive at its total $329,767 restitution figure for CitiGroup. Mr. Luis argued, unsuccessfully, that when Mr. Hansen (aided by Mr. Luis) took the loans from CitiGroup, both sides understood that the Palomar Mountain Property limited the potential loss to CitiGroup and Mr. Hansen, should Mr. Hansen default. That is, if Mr. Hansen defaulted, CitiGroup would then take the property and mitigate its loss on the unpaid loan to the extent of the value of the property. CitiGroup changed that dynamic when it sold its right to the first loan (and thus its right to the Palomar Mountain Property) without any consideration for the value of the property. And, as mentioned, there was strong reason to believe that when CitiGroup transferred its rights to the first loan (and the property) to Salene, the property was worth much more than the $230,000 Salene paid CitiGroup. In fact, a year later, with the real estate market having continued to decline, Salene sold the property, in a foreclosure sale, for $270,000. Salene made $40,000 on the deal, and in effect the district court's restitution order made Mr. Luis fund Salene's profit.

Given these dynamics, Mr. Luis argued that his offense conduct did not "directly and proximately" cause a substantial portion of the loss on the first loan for which he was ordered to pay restitution to CitiGroup. 18 U.S.C. §3663A(a)(2). Notably, in this Court's subsequent opinion in

United States v. Robers, 134 S. Ct. 1854 (2014), which addressed restitution in mortgage fraud cases, the Court noted that "an offender is [not] responsible for everything that reduces the amount of money a victim receives for collateral. Market fluctuations are normally unlike, say, an unexpected natural disaster that destroys collateral or a victim's donation of collateral or its sale to a friend for a nominal sum – any of which, as the Government concedes – could break the causal chain" between the defendant's conduct and the loss involved. *Id*. at 1859. And as the government conceded at oral argument in *Robers,* "if the collateral loses value after the victim chooses to hold it, then that 'part of the victim's net los[s]' is 'attributable to' the victim's 'independent decisions.'" *Id.* at 1860 (Sotomayor, J., concurring); *id.* at 1859 (majority opinion cite to same concession). Here, CitiGroup made the type of independent decision that increased its loss, and Mr. Luis was nonetheless ordered to pay for that increased loss. To reiterate, while this is not an issue for review raised in this petition, it is nonetheless discussed to highlight the substantial factual disputes involved, factual disputes that should have been submitted to a jury.

C. The District Court's Restitution Calculation For Mr. Hester

Although Mr. Hester pleaded guilty to different offenses than did Mr. Luis, he was also ordered to pay restitution based on the same legal and factual conclusions the district court arrived at with respect to Mr. Luis. In short, the district court: (1) rejected Mr. Hester's *Apprendi* argument, on the same basis as it rejected the identical argument by Mr. Luis; and (2) ordered that Mr. Hester was jointly-and-severally liable, with Mr. Luis, to pay $329,767 in restitution to CitiGroup for the Palomar Mountain Property loans, and $615,935 in restitution to JP Morgan Chase for the Ranch Santa Fe Property loans. *See* 6/24/2013 Reporter's Transcript at 8-9 (attached in Appendix at 4-5).

III. First Ninth Circuit Appeals By Messrs. Luis And Hester

Messrs. Luis and Hester both filed appeals raising several issues. Those appeals proceeded separately.

With respect to Mr. Luis's appeal, in a published opinion filed on August 28, 2014, the Ninth Circuit affirmed in part and reversed in part. *See United States v. Luis*, 765 F.3d 1061 (9th Cir. 2014) (attached in Appendix at 6-12).

As an initial matter, the Ninth Circuit affirmed the district court's holding that 18 U.S.C. §1957 sets out an "offense against property," thus the MVRA applied. *See id.* at 1065-66.

With respect to Mr. Luis's *Apprendi* argument, the Ninth Circuit affirmed, stating that Mr. Luis's argument was foreclosed by the Ninth Circuit's then-recent opinion in *United States v. Green*, 722 F.3d 1146 (9th Cir. 2013). *See Luis*, 765 F.3d at 1068 n.4.

With respect to the district court's calculation of restitution for the Palomar Mountain Property loans, the Ninth Circuit affirmed, rejecting Mr. Luis's argument (1) that CitiGroup had made an independent decision to sell the loan rights to Salene, (2) that independent decision increased its loss, and (3) Mr. Luis should not be held liable for that increase. *See Luis*, 765 F.3d at 1067-68.

With respect to the district court's calculation of restitution for the Rancho Santa Fe Property loans, the district court reversed and remanded for the district court to determine how much JP Morgan Chase was harmed by Mr. Luis's conduct, if at all. *See id.* at 1067.

Shortly after the Ninth Circuit decided Mr. Luis's appeal, it decided Mr. Hester's appeal in an unpublished memorandum opinion. In doing so, the court tracked its opinion in Mr. Luis's case. Specifically, the Ninth Circuit: (1) rejected the *Apprendi* argument based on its then-recent opinion in *Green*; (2) affirmed the restitution order with respect to CitiGroup and the Palomar Mountain

Property loans; and (3) reversed the restitution order with respect to JP Mogan Chase and the Rancho Santa Fe Property loans. *See United States v. Hester*, 584 Fed. App'x 805, 806 & n.2 (9th Cir. 2014) (unpublished opinion) (attached in Appendix at 13-14).

IV. Petitions For Writ Of Certiorari By Messrs. Luis And Hester

On February 9, 2015, Mr. Luis filed a petition for writ of certiorari with this Court, raising the *Apprendi* restitution issue. On March 23, 2015, the Court denied that petition. *See Luis v. United States*, 135 S. Ct. 1572 (2015).

On March 2, 2015, Mr. Hester filed a petition for writ of certiorari with this Court, raising the *Apprendi* restitution issue. On April 20, 2015, the Court denied that petition. *See Hester v. United States*, 135 S. Ct. 1873 (2015).

V. District Court Proceedings On Remand

Petitioners' cases were dealt with jointly on remand from their first Ninth Circuit appeals.

As an initial matter, the district court found that no restitution was due to JP Morgan Chase, and thus vacated that portion of its prior restitution order.

Petitioners also renewed their *Apprendi*/*Southern Union* challenge to the restitution order, and thus argued that the restitution order with respect to CitiGroup should also be vacated. Petitioners acknowledged, however, that this argument was foreclosed by the Ninth Circuit's opinion in *Green*, but they raised the issue to preserve it. *See* 1/13/2016 Luis Mtn. at 4 (attached in Appendix at 16); 1/13/16 Hester Joinder Mtn. at 1 (attached in Appendix at 17). The district court rejected the *Apprendi* argument without comment and confirmed its joint-and-several restitution order for Petitioners with respect to CitiGroup. *See* 3/14/16 Order (attached in Appendix at 20-21).

VI. Second Ninth Circuit Appeal

Petitioners proceeded with a consolidated case for their second appeals. They again argued, among other things, that the principles announced in *Apprendi* rendered the restitution order to CitiGroup invalid. Petitioners noted, however, that relief on that argument was foreclosed by the Ninth Circuit's opinion in *Green*, but they sought to preserve the issue for potential later review by this Court. *See* 12/15/16 Joint Opening Brief at 23 (attached in Appendix at 23).

On January 14, 2018, the Ninth Circuit affirmed the restitution order for Petitioners with respect to CitiGroup, but did not explicitly address the *Apprendi* issue. *See United States v. Hester*, 708 Fed. App'x 441 (9th Cir. 2018) (attached in Appendix at 24-25). On January 16, 2018, Messrs. Luis and Hester filed a petition for rehearing asking the Ninth Circuit to explicitly rule on the *Apprendi* issue. *See* 1/16/2018 Petition for Rehearing at 1-2 (attached in Appendix at 27-28). On February 27, 2018, the Ninth Circuit denied the petition for panel rehearing without comment. *See* 2/27/18 Order (attached in Appendix at 30). The Ninth Circuit panel evidently accepted Petitioners' concession that it was bound by *Green* and concluded that nothing more needed to be said on the issue. Petitioner now seeks this Court's review of the *Apprendi* restitution issue.

REASONS FOR ALLOWING THE WRIT

In *Southern Union*, the Court held "that the rule of *Apprendi* applies to the imposition of criminal fines." 567 U.S. at 360. The Court's reasoning in *Southern Union*, including its reliance on the historical record, applies equally to criminal restitution. But the Ninth Circuit – and seven other circuits that have addressed the issue – has concluded that *Southern Union* does not provide sufficient justification to overrule prior, uniform circuit precedent holding that *Apprendi* does not apply to criminal restitution. Petitioners request that the Court grant their petition because this error

is entrenched across all the circuits and relates to an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

Apprendi 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. "[T]he 'statutory maximum' for *Apprendi* purposes 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." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). "In other words, the relevant 'statutory maximum' . . . is not the maximum sentence a judge may impose after finding additional facts, but the maximum [she] may impose *without* any additional findings." *Id.*

Apprendi's rule is "rooted in longstanding common-law practice." *Cunningham v. California*, 549 U.S. 270, 281 (2007); *see also Alleyne v. United States*, 570 U.S. 99, 109-10 (2013). It's core concern is to the ensure that the jury determines "facts that warrant punishment for a specific statutory offense." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). But it also serves an important notice function, because its requirement that "a fact that increas[es] punishment must be charged in the indictment" allows a defendant to "predict with certainty the judgment from the face of the felony indictment . . . ." *Alleyne*, 570 U.S. at 109-10 (quoting *Apprendi*, 530 U.S. at 478).

In *Southern Union*, the Court applied the *Apprendi* rule to criminal fines, because "[c]riminal fines, like . . . other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses." 567 U.S. at 349. The Court noted that "[i]n stating *Apprendi*'s rule, [it had] never distinguished one form of punishment from another. Instead, [the Court's] decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment [s]'—terms that each undeniably embrace fines." *Id.* at 350 (citations omitted).

As it had done in every case in the *Apprendi* line, the Court in *Southern Union* based its holding largely on its "examin[ation of] the historical record, because 'the 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 *Ice*, 555 U.S. at 170). In that regard, the Court noted that "the salient question . . . is what role the jury played in prosecutions for offenses that [fixed] the amount of a fine to the determination of specified facts – often, the value of damaged or stolen property." *Southern Union*, 567 U.S. at 353-56. The Court concluded from its "review of state and federal decisions . . . that the predominant practice was for such facts to be alleged in the indictment and proved to the jury." *Id.* at 354. The historical record is the same with respect to criminal restitution.

Prior to 1529, there was no method for awarding criminal restitution, and anything seized from a criminal defendant became property of the Crown. In that year, "King Henry VIII and Parliament authorized a writ of restitution in successful larceny indictments," which allowed a victim to recover stolen property. 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 (Spring 2014) (citing Matthew Hale, 1 *Historia Placitorum Coronae: the History of the Pleas of the Crown*, at 541-43 (1736), and Theodore F. T. Plucknett, *A Concise History of the Common Law*, at 451-52 (1929)). That recovery was limited to "goods listed in the indictment and found in the felon's possession." Barta, *supra*, at 473 (citing Hale, 1 *Pleas of the Crown*, at 541-43, and Edward Hyde East, 2 *A Treatise of the Pleas of the Crown* §171, at 787-89 (1806)). This practice became standard over time:

> Such was the influence of the 1529 statute that, by the eighteenth century, courts no longer required a writ of restitution. Instead, courts awarded restitution in successful prosecutions as a matter of common law in both England and America. After a larceny conviction, William Blackstone says that courts would "order, (without any writ), immediate restitution of such goods as are brought into court . . . ." Where the

> goods were no longer in the culprit's possession, a court would sometimes allow victims to recover the monetary value of the goods. Likewise, the American treatise-writer Joel Prentiss Bishop reports that American courts in the nineteenth-century would award restitution in the manner that Blackstone described.

Barta, *supra*, at 473 (citing several common law treatises). "[T]he relative consistency [of the historical record] is striking. Courts imposed restitution primarily for property crimes. Courts and legislatures often tied the amount of restitution owed to the loss the victim had sustained. And courts generally required the stolen property to be described in the indictment or valued in a special verdict." *Id.* at 476.

The district court imposed restitution in this case under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §3663A, which deviates substantially from the historical practice discussed above. Under the MVRA, a district court is tasked with identifying victims who have "suffered a physical injury or pecuniary loss" as a result of the defendant's offense conduct. 18 U.S.C. §3663A(c)(1)(B). The procedures for making that determination are set out in 18 U.S.C. §3664. *See* 18 U.S.C. §3663A(d). Section 3664(e) places on the government the burden of proving that an entity or person is a victim, and, if so, the appropriate amount of restitution to award. Evidence on this matter is first presented to the district court post-conviction, through allegations made by the government and in the presentence report. The district court may then "require additional documentation or hear testimony," or it may order restitution based on the papers submitted. 18 U.S.C. §3663A(d)(4). Of course, these procedures come up far short of what is required by *Apprendi*.

Prior to this Court's decision in *Southern Union*, nearly every circuit considered whether the principles set out in *Apprendi* apply to criminal restitution, and all concluded the answer is no.[1]

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[1] *See, e.g., United States v. Milkiewicz*, 470 F.3d 390, 391 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 104 (2d Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 331 (3d Cir. 2007)

Since *Southern Union* was decided, eight circuit courts have assessed that opinion's impact on those prior holdings, and each has held that the prior, uniform circuit precedent has not been undermined. Courts have given two reasons for that conclusion.

The Seventh and Eighth Circuits noted that they had previously concluded that *Apprendi* principles do not apply to criminal restitution because it is civil in nature, rather than criminal punishment, and both courts found that *Southern Union* did not undermine that conclusion. *See United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012).

The Second, Fourth, Fifth, and Sixth Circuits distinguished *Southern Union* by pointing out that the fines in that case were capped by an explicit statutory maximum, whereas restitution under the MVRA has no statutory cap, thus a court's imposition of restitution cannot exceed a statutory maximum. *See United States v. Bengis*, 783 F.3d 407, 412-13 (2d Cir. 2015) (holding that because MVRA does not state a maximum restitution amount, it "does not implicate a defendant's Sixth Amendment rights"); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (relying on prior Fifth Circuit precedent to reject challenge to restitution based on *Southern Union*, "because no statutory maximum applies to restitution"); *United States v. Jarjis*, 551 Fed. Appx. 261 (6th Cir. 2014) (same with respect to Sixth Circuit precedent) (unpublished opinion); *United States v. Day*, 700 F.3d 713, 731 (4th Cir. 2012) ("Critically, however, there is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense").

(*en banc*); *United States v. Nichols*, 149 Fed. App'x 149, 153 (4th Cir. 2005) (unpublished opinion); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 453 (6th Cir. 2005); *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005); *United States v. Williams*, 445 F.3d 1302, 1310 (11th Cir. 2006).

The Ninth and Tenth Circuits have relied on both the not-punishment and no-maximum rationales to conclude that *Southern Union* does not apply to imposition of restitution under the MVRA. *See United States v. Burns*, 800 F.3d 1258, 1261 (10th Cir. 2015) (relying on conclusion that "there is no statutory maximum" for restitution); *United States v. Keifer*, 596 Fed. App'x 653, 664 (10th Cir. 2014) (relying on conclusion that "Tenth Circuit precedent is clear that restitution is a civil remedy designed to compensate victims – not a criminal penalty") (unpublished opinion); *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (relying on both reasons). Both reasons are lacking, as addressed below.

First, however, it is useful to point out a major flaw in both lines of cases: they ignore the historical requirement that any claimed criminal restitution had to be charged in the indictment, and the facts supporting that restitution had to be found by a jury. Yet attention to historical practice has driven the Court's *Apprendi* line of cases. Indeed, in *Southern Union* this Court emphasized that the "Court of Appeals [in that case] was correct to examine the historical record, because 'the scope of the constitutional jury right must be informed by the historical role of the jury at common law.'" 567 U.S. at 353 (quoting *Ice*, 555 U.S. at 170).

Turning to the rationale that restitution does not amount to "criminal punishment," that is an extremely weak basis for declining to apply *Apprendi* to imposition of restitution under the MVRA. This Court has explicitly stated that "[t]he purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment for [the defendant's criminal] conduct." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). Moreover, restitution is imposed as part of the criminal "sentence," at the behest of the government. *See* 18 U.S.C. §3663A (a)(1). "The 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). For exactly those reasons, this Court has analogized restitution

to criminal fines and said that there is strong reason to believe that the Excessive Fines Clause of the Eighth Amendment applies to criminal restitution. *See United States v. Paroline*, 134 S. Ct. 1710, 1726 (2014).

Equally wrong is the reasoning that *Apprendi* does not apply to the MVRA because there is no statutory maximum for restitution. There are several flaws with that assertion.

First, *Southern Union* relied on common law cases in which there was no explicit maximum fine, and instead the fine was based on the victim's loss. 567 U.S. at 353-56. For example, *Southern Union* relied on *Commonwealth v. Smith*, 1 Mass. 245, 247 (1804), a larceny case in which the court was authorized to order a fine of three times the amount of money stolen, which the court declined to do with respect to property that was not listed or valued in the indictment. There was no statutory maximum applicable to that fine. The same holds true for the other historical cases relied on in *Southern Union*, which all dealt with offenses for which the available fine was determined by the value of property stolen or damaged. 567 U.S. at 354-55.

Second, "[t]he MVRA does, in fact, prescribe a statutory maximum" penalty – the amount of the victim's loss. Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After Southern Union v. United States?*, 64 Ala. L. Rev. 803, 828 (2013); *see also United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012) ("[a]n award of restitution greater than a victim's actual loss exceeds the MVRA's statutory maximum"); *United States v. Bussell*, 414 F.3d 1048, 1061 (9th Cir. 2005) ("the amount of restitution is limited by the victim's actual losses"); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) (an unauthorized restitution order "is no less illegal than a sentence of imprisonment that exceeds the statutory maximum").

Third, the no-statutory-maximum distinction is akin to that rejected by the Court in *Alleyne*. There the government argued that *Apprendi* should not be applied to facts that support imposing a mandatory minimum sentence because those facts do not alter the maximum penalty, which in that case permitted life imprisonment. The Court rejected that argument, stating that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of the new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact." *Alleyne*, 570 U.S. at 115. Here, the circumstances even more strongly favor application of the *Apprendi* rule, because without the district court's fact finding *no* restitution could have been imposed under the MVRA.

Finally, and relatedly, the no-statutory-maximum distinction does not jibe with the definition of "statutory maximum sentence" set out in *Blakely*. There the Court said that "the 'statutory maximum' for *Apprendi* purposes 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. at 303. Without the district court making additional fact findings in Petitioners' case, it could not have ordered any restitution under the MVRA. Thus, by making those findings the court necessarily increased the punishment available. As Eighth Circuit Judge Bye said in his dissent in *United States v. Carruth*, 418 F.3d 900 (8th Cir. 2005):

> Once we recognize restitution as being a "criminal penalty" the proverbial *Apprendi* dominoes begin to fall. While many in the pre-*Blakely* world understandably subscribed to the notion *Apprendi* does not apply to restitution because restitution statutes do not prescribe a maximum amount . . . this notion is no longer viable in the post-*Blakely* world which operates under a completely different understanding of the term prescribed statutory maximum. To this end, *Blakely*'s definition of "statutory maximum" bears repeating again, "the statutory maximum for Apprendi purposes 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." *Blakely*, 124 S.Ct. at 2537 (emphasis added). Applying this definition to the present case, it dictates a conclusion that the district court's order imposing a $26,400 restitution amount

> violates the Sixth Amendment's jury guarantee because all but $8,000 of said amount was based upon facts not admitted to by Carruth or found by a jury beyond a reasonable doubt.

Carruth, 418 F.3d at 905 (Bye, J., dissenting). Third Circuit Judge McKee made the same point in his dissent from the *en banc* opinion in *United States v. Leahy*, 438 F.3d 328 (3[d] Cir. 2006) (*en banc*):

> The majority's analysis requires that we accept the proposition that an order of restitution rests upon the jury's verdict alone, even though no restitution can be imposed until the judge determines the amount of loss. We must also accept that adding a set dollar amount of restitution to a sentence does not "enhance" the sentence beyond that authorized by the jury's verdict alone. I suspect that a defendant who is sentenced to a period of imprisonment and ordered to pay restitution in the amount of $1,000,000 would be surprised to learn that his/her sentence has not been enhanced by the additional penalty of $1,000,000 in restitution. "*Apprendi* held[ ] [that] every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313 (emphasis in original). Determining the amount of loss is "legally essential" to an order of restitution.

Leahy, 438 F.3d at 343-44 (McKee, J., dissenting)

The discussion above makes clear that the principles set out in *Apprendi* and *Southern Union* apply equally to criminal restitution. However, the circuit courts do not view *Southern Union* as a strong enough indicator of Constitutional law to overrule their contrary precedent. This is well illustrated in the controlling Ninth Circuit case, which stated:

> Our precedents are clear that *Apprendi* doesn't apply to restitution, but that doesn't mean our caselaw's well-harmonized with *Southern Union*. Had *Southern Union* come down before our cases, those cases might have come out differently. Nonetheless, our panel can't base its decision on what the law might have been. Such rewriting of doctrine is the sole province of the court sitting *en banc*. Faced with the question whether *Southern Union* has 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable,' we can answer only: No.

Green, 722 F.3d at 1151. Given the circuit courts' uniform unwillingness to revisit the issue following *Southern Union*, this Court should resolve the issue.

CONCLUSION

Because the error raised in this petition is entrenched across the circuits, and relates to an important issue with wide-ranging impact, Petitioners request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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