No. 18-7262

IN THE SUPREME COURT OF THE UNITED STATES

ARTAK OVSEPIAN AND
KENNETH WAYNE JOHNSON,

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioners respectfully submit this reply to the Brief for the United States in Opposition ("Opp.").[1] Just a few days after the petition was filed, Justice Gorsuch, joined by Justice Sotomayor, issued an opinion explaining why this Court should review the first question presented regarding whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to restitution. *See Hester v. United States*, 139 S. Ct. 509 (2019) (Gorsuch, J., dissenting from denial of *certiorari*). The government ignores Justice Gorsuch's opinion in *Hester*. The government also incorrectly asserts that plain error review applies making this case a poor vehicle for review, as the government essentially waived a claim of plain error below and the lower court decided the issue without applying plain error review and even remanded for resentencing after rejecting the *Apprendi* challenge, making any further objections in the district court futile. This case is a better vehicle for review than *Hester* because petitioners were convicted after a jury trial, whereas the petitioners in *Hester* pled guilty. The government does not dispute the importance of the constitutional issue presented, and this Court should therefore grant review to correct the flawed, albeit uniform, view of the lower courts, just as it recently corrected the longstanding and uniform view of the lower courts in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

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[1] The government's brief does not include page numbers, but petitioners have inserted the page number corresponding to the page in the brief.

ARGUMENT

I. This Court should grant review to consider whether *Apprendi* applies to restitution based on the reasons given by Justice Gorsuch in his dissent from the denial of a writ of *certiorari* in *Hester*.

Shortly after the petition was filed, Justice Gorsuch, joined by Justice Sotomayor, dissented from the denial of *certiorari* in *Hester*. The government offers the same "defense" of the restitution exception to *Apprendi* that failed to "dispel" the concerns articulated by Justice Gorsuch in *Hester*, 139 S. Ct. at 510, an opinion the government essentially ignores.

The government's primary argument is that restitution has no "statutory maximum." Opp. 11-12. However, this Court has "used the term 'statutory maximum' to refer to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted." *Hester*, 139 S. Ct. at 510 (citing *Blakely v. Washington*, 542 U.S. 296, 303 (2004)). "In that sense, the statutory maximum for restitution is usually *zero*, because a court can't award *any* restitution without finding additional facts about the victim's loss. And just as a jury must find 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." *Id.* The "no statutory maximum" rationale is also undercut by *Alleyne v. United States*, 570 U.S. 99 (2013), where

this Court held that *Apprendi* applies to mandatory minimums, not just statutory maximums. After *Alleyne*, the no-statutory-maximum rationale to distinguish restitution has no force.

The government's "backup argument" has "problems of its own." *Hester*, 139 S. Ct. at 510. The government has alternatively contended that restitution is only a "restorative" remedy, Opp. 12, but restitution "is imposed as part of a defendant's criminal conviction[,]" and federal statutes "describe restitution as a 'penalty' imposed on the defendant as part of his criminal sentence, as do [Supreme Court] cases." *Hester*, 139 S. Ct. at 510-11; *see also Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635, 1642-45 (2017); *Federal Trade Commission v. AMG Capital Management, LLC*, 910 F.3d 417, 433-35 (9th Cir. 2018) (O'Scannlain, J., concurring). "Besides, if restitution really fell beyond the reach of the Sixth Amendment's protections in *criminal* prosecutions, [the Court] would then have to consider the Seventh Amendment and its independent protection of the right to a jury trial in *civil* cases." *Hester*, 139 S. Ct. at 511.

The government's contention that the historical record does not support applying *Apprendi* to restitution, Opp. 17, is "difficult to reconcile with the Constitution's original meaning." *Hester*, 139 S. Ct. at 511. At common law, "the jury usually had to find the value of the stolen property before restitution to

the victim could be ordered[,]" and "it's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption." *Id.*

While the substantive legal bases for exempting restitution from *Apprendi* are weak, the procedural considerations offered by the government for denying review are similarly unpersuasive. The government maintains that there is no conflict in the lower courts, which continue to apply a restitution exemption to *Apprendi* after *Southern Union Co. v. United States*, 567 U.S. 343 (2012). Opp. 13-14, 17-18. Based on a prior opinion by Justice Gorsuch noting the flaw in the circuits' approach, this Court recently granted review and then reversed the longstanding and unanimous view of the lower courts on a statutory construction issue. *See Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). The need to take such action is more compelling as to the *constitutional* issue presented here.

Furthermore, the lower court here "itself has conceded that allowing judges, rather than juries, to decide the facts necessary to support restitution orders isn't 'well-harmonized' with this Court's Sixth Amendment decisions." *Hester*, 139 S. Ct. at 510 (quoting *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013). In essence, the lower courts have questioned their own precedent, which is based on suspect reasoning, and are waiting for guidance from this Court. In the

Ninth Circuit, for example, the restitution exception to *Apprendi* was originally created by a three-word declaration that the restitution statutes are "unaffected by *Blakely*" with a supporting citation to a pre-*Apprendi* case stating that restitution is different from the Sentencing Guidelines. *United States v. DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004) (citing *United States v. Baker*, 25 F.3d 1452, 1456 (9th Cir. 1994)). Other Ninth Circuit cases simply piggy-backed on *DeGeorge*, despite its perplexing and unsatisfying explanation. *See Green*, 722 F.3d at 1149 (citing the *DeGeorge* followers). Uniformity in the lower courts is not necessarily desirable, particularly when it is based on this type of analysis.

The government contends that this case is "an unsuitable vehicle" for review because plain error review applies. Opp. 20. In the first appeal, petitioner raised an *Apprendi* challenge to the restitution order and asserted that plain error review did not apply pursuant to binding Ninth Circuit precedent. *See Green*, 722 F.3d at 1148 n.2. In its answering brief, the government acknowledged *Green* and did not urge plain error review, thereby waiving its current complaint. The Ninth Circuit then passed on the question *without* applying plain error review, and therefore the government's reliance on the plain error standard to assert a "vehicle" complaint is without merit. *See United States v. Williams*, 504 U.S. 36, 41-44 (1992). The Ninth Circuit also remanded for resentencing after rejecting the

Apprendi challenge in the first appeal, making any further objections in the district court futile. *See Henderson v. United States*, 568 U.S. 266, 285 (2013) (Scalia, J., dissenting). This case is actually a better "vehicle" for review than *Hester* because petitioners were convicted after a jury trial, whereas the petitioners in *Hester* were convicted after guilty pleas. The government maintains that the lack of jury findings regarding restitution was not prejudicial, Opp. 20-21, but the restitution order was $2 million more than the loss alleged in the indictment and $1 million more than the government's allegations at trial. Petitioner Ovsepian also maintained that he was not involved for the entire conspiracy and should not be liable for the entire amount of loss, an issue that the jury never considered.

Finally, the government does not dispute that the issue presented is "important." *Hester*, 139 S. Ct. at 510. "Restitution plays an increasing role in federal criminal sentencing today. . . . [F]rom 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution. . . . The effects of restitution orders, too, can be profound. Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Id.* In sum, this Court should grant review on this important constitutional issue to correct the flawed, albeit uniform, view of the lower courts, just as it recently corrected the unanimous view of the lower courts in *Rehaif*.

II. This Court should grant review to resolve the confusion regarding application of 18 U.S.C. § 1028A and U.S.S.G. § 2B1.6.

As for the second question presented, the government contends that review is inappropriate because the issue "relates solely to the interpretation and application of the advisory Sentencing Guidelines[,]" which can always be amended by the Sentencing Commission. Opp. 21. The issue presented does not relate "solely" to the Guidelines. Instead, it relates to the interplay between the Guidelines and a mandatory minimum penalty created by statute. It is doubtful that Congress intended petitioners to receive both a two-year consecutive sentence under 18 U.S.C. § 1028A and a guidelines enhancement under the circumstances.

The government contends that the application of both the mandatory minimum and the guidelines enhancement was permissible because the mandatory minimum was for a "means of identification," whereas the guidelines enhancement was for use of an "authentication feature." Opp. 23-24. The Seventh and Eighth Circuits have rejected such reasoning. *See United States v. Zheng*, 762 F.3d 605, 610 (7th Cir. 2014); *United States v. Doss*, 741 F.3d 763, 767-68 (7th Cir. 2013); *United States v. Lyons*, 556 F.3d 703, 708 (8th Cir. 2009). The government's efforts to distinguish these cases are unclear and without substance. In sum, the Ninth Circuit's decision in this case conflicts with other circuits, and therefore this Court should also grant review on the second question presented.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Dated: August 6, 2019

Respectfully submitted,

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