No.

IN THE SUPREME COURT OF THE UNITED STATES

_____

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CHRISTOPHER PAUL GEORGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

_____

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

_____

_____

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Dissenting from the denial of *certiorari* in *Hester v. United States*, 139 S. Ct. 509 (2019), Justices Gorsuch and Sotomayor urged this Court to review whether the right to a jury trial under the Fifth and Sixth Amendments, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000) (also requiring proof beyond a reasonable doubt), and the Seventh Amendment apply to restitution imposed as part of a criminal sentence. Since *Hester*, this Court has issued two opinions enhancing the case for review. In *United States v. Haymond*, 139 S. Ct. 2369 (2019), this Court rejected an argument similar to the no-statutory-maximum argument that the government has offered for exempting restitution from *Apprendi*. And, *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936 (2020) provides guidance on the limitations of traditional equitable restitution that undermines the government's other argument that restitution is exempt from *Apprendi* as a civil compensatory remedy. The questions presented are:

1. Whether *Apprendi* applies to a mandatory criminal restitution order, and whether the Seventh Amendment requires a restitution order to comply with traditional equity practice and to be bound by the jury's verdict.

2. Whether this Court should grant, vacate, and remand for reconsideration in light of *Liu*, 140 S. Ct. 1936.

STATEMENT OF RELATED CASES

- *United States v. Christopher Paul George*, No. 12CR00065-VAP, U.S. District Court for the Central District of California. Judgment entered August 9, 2018.

- *United States v. Christopher Paul George*, No. 15-50435, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 27, 2018.

- *United States v. Christopher Paul George*, No. 18-50268, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 4, 2020, rehearing denied April 13, 2020.

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OPINIONS BELOW

The Ninth Circuit's published opinion is found at *United States v. George*, 949 F.3d 1181 (9th Cir. 2020). In a prior appeal, the Ninth Circuit issued an unpublished memorandum found at *United States v. George*, 713 Fed. Appx. 704 (9th Cir. 2018).

JURISDICTION

The court of appeals entered its decision on February 4, 2020 and denied a petition for rehearing and rehearing *en banc* on April 13, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *See* Order, March 19, 2020 (extending deadline for petitions for a writ of *certiorari* to 150 days).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

> ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A federal grand jury in the Central District of California returned what ultimately became a 12-count indictment charging petitioner and several codefendants with mail fraud, wire fraud, and conspiracy. D. Ct. Doc. 442. The indictment alleged that, from July 2008 to December 2009, the codefendants operated a company in Rancho Cucamonga, California called 21st Century, which fraudulently represented to "distressed" homeowners that it could obtain loan modifications from their mortgage lenders for a fee ranging from approximately $1,000 to $3,000. *Id.* To convince the homeowners to retain their services, 21st Century made false representations, including that the company had a 98% success rate, it could guarantee interest rates and reduced mortgage payments, and it would refund fees if a modification was not obtained. *Id.* The indictment alleged that the company received $7 million from more than 4,000 homeowners. *Id.*

Petitioner proceeded to a joint jury trial with two codefendants commencing in May of 2015. D. Ct. Doc. 629. The government called victims who generally testified that they were promised by codefendants that they would receive a refund if the company could not obtain a loan modification; each victim paid approximately $1,500 to $3,000 to 21st Century but did not receive a loan modification or a refund. Tr. 14-54 (May 12, 2015 AM); Tr. 13-36 (May 19, 2015 AM); Tr. 21-42 (May 20, 2015 AM). The government also called several individuals who had worked at 21st Century, but some provided *exculpatory* testimony, stating that petitioner instructed telemarketers to be honest and to ignore any contrary pressure to close customers. Tr. 78-87 (May 13, 2015 AM); Tr. 50 (May 13, 2015 PM).

Petitioner testified in his defense. After honorably serving five years in the Marines, he worked in real estate for approximately ten years before his involvement with 21st Century. Tr. 10 (May 21, 2015 AM). The lead codefendant, Andrea Ramirez, was in the loan modification business, which he was unfamiliar with, and she asked him to become a partner in 21st Century. *Id.* at 15. While petitioner was with 21st Century, he heard rumors that customers were being told false information, and he created a form instructing workers not to make misrepresentations or else they would be fired, and some individuals were

fired. *Id.* at 18-19. He believed, however, that most people at 21st Century were being honest with customers. *Id.* at 28. The company worked with an attorney who petitioner thought was being paid $10,000 per month, but he later learned that the attorney received much more in fees. *Id.* at 29-30. While at 21st Century, he supervised people in one building, and Ramirez supervised people in another building; with the exception of him, all of the people charged in the case worked with Ramirez in her building. *Id.* at 33-35. He trained the people working with him to be honest. *Id.* at 35. Petitioner testified that he signed a resignation letter on April 22, 2009 because he did not approve of the way Ramirez was doing business and she would not adjust her ways to respond to the customers' complaints, leaving him with no other choice but to resign. *Id.* at 19-20. He did, however, accede to her request that he continue to help out closing files and handling problems until she could find a new partner, as that seemed like the responsible thing to do. *Id.* at 21, 24.

At the government's request, the district court gave a *Pinkerton v. United States*, 328 U.S. 640 (1946) jury instruction permitting liability if a substantive offense was within the scope of the conspiracy "and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement." D. Ct. Doc. 715. Similarly, the instructions informed the jurors that petitioner could be found guilty of the substantive counts under a "co-schemer" theory if he could

reasonably foresee the substantive offenses "as a necessary and natural consequence of the scheme to defraud." *Id.* Despite the *Pinkerton* and co-schemer instructions, the jury acquitted petitioner on four substantive counts (Counts 1-4), but convicted him on a conspiracy count and six substantive counts (Counts 6-12). D. Ct. Doc. 734.[1] The verdict did not contain a finding regarding the amount of restitution. *Id.*

On September 28, 2015, the district court sentenced petitioner to 20 years in custody and imposed $7,065,117.27 in restitution. D. Ct. Doc. 911. The restitution amount reflected the total amount of money received by 21st Century and did not account for the fact that petitioner was acquitted on numerous counts despite a *Pinkerton* instruction, that he was not involved with 21st Century for its entire existence, and that he only made $178,000 from working with 21 Century. PSR 11, 33; Tr. 9 (Aug. 6, 2018). The restitution figure also did not account for the expenses of 21st Century or even make a determination as to whether all of the individuals who had paid 21st Century claimed to have been defrauded. PSR 11, 33.

On February 27, 2018, the Ninth Circuit affirmed petitioner's convictions but reversed his sentence. App. 14-18. On August 6, 2018, the district court held

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[1] Count 5 was dismissed on the government's motion. D. Ct. Doc. 811.

a resentencing hearing and imposed a minimally lesser custodial sentence of 235 months. D. Ct. Doc. 1155. Over petitioner's *Apprendi* objection, the district court again imposed the same $7,065,117.27 in restitution pursuant to 18 U.S.C. § 3663A. Tr. 21-25 (Aug. 6, 2018); D. Ct. Doc. 1156.

Petitioner appealed again, and this time the Ninth Circuit affirmed his sentence. The Ninth Circuit spent most of its published opinion addressing petitioner's challenges to the Sentencing Guidelines and the reasonableness of his custodial sentence. *See George*, 949 F.3d at 1184-88. At the end of the opinion, the Ninth Circuit rejected petitioner's *Apprendi* challenge to the restitution order, simply stating: "[W]e have held that *Apprendi* does not apply to restitution orders. *See United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013)." *Id.* at 1188. App. 13.

ARGUMENT

Dissenting from the denial of *certiorari* in *Hester v. United States*, 139 S. Ct. 509 (2019), Justices Gorsuch and Sotomayor explained why this Court should consider whether the protections guaranteed by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) apply to criminal restitution. Since *Hester*, developments in this Court's jurisprudence have undermined the two reasons proffered by the government for exempting restitution from *Apprendi* and the jury trial right, thereby solidifying the issue as an appropriate candidate for review. The

government's first rationale is that restitution has no purported statutory maximum, but the post-*Hester* opinion in *United States v. Haymond*, 139 S. Ct. 2369 (2019) gutted whatever merit remained of this tenuous justification. The second rationale that a *criminal* restitution order is actually a *civil* compensatory remedy is undermined by *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936 (2020), and, even if civil, the federal restitution statutes exceed the limits of equitable restitution articulated in *Liu*, as did the order in this case, violating the Seventh Amendment. Simply placing a "restitution" label on a monetary sanction in a criminal judgment should not dictate the constitutional outcome. Given the developments since *Hester*, this Court should now grant review, and this case, where the jury acquitted on several counts even though given a *Pinkerton* instruction, is an excellent vehicle to consider these important questions.

I. This Court should grant review to consider whether *Apprendi* applies to a mandatory criminal restitution order, and whether the Seventh Amendment requires a restitution order to comply with traditional equity practice and to be bound by the jury's verdict.

A. Justice Gorsuch's opinion in *Hester* explains why this petition should be granted

The *Apprendi v. New Jersey*, 530 U.S. 466 (2000) line of cases now hold that all facts necessary to sustain maximum and mandatory minimum penalties must be proved to a jury beyond a reasonable doubt. Justices Gorsuch and

Sotomayor have recently explained why this Court should review whether *Apprendi* applies to criminal restitution. *See Hester v. United States*, 139 S. Ct. 509 (2019) (Gorsuch, J., dissenting from denial of *certiorari*). This Court should grant review to correct the flawed view of the lower courts, which continue to apply a restitution exemption to *Apprendi* even after this Court held that *Apprendi* applies to fines. *See Southern Union Co. v. United States*, 567 U.S. 343 (2012).

The government's primary argument against applying *Apprendi* in this context is that restitution has no "statutory maximum." 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 "backup argument" for exempting restitution from *Apprendi*'s protections has "problems of its own." *Hester*, 139 S. Ct. at 510. The government has alternatively contended that restitution is only a civil compensatory remedy, 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 (citing *Paroline v. United States*, 572 U.S. 434, 456 (2014); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)). "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.

Furthermore, exempting restitution from *Apprendi* protections 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.* (citing several cases from the nineteenth century and 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, 472-76 (2014)).

While *Hester* convincingly explains why this Court should grant review, developments in this Court's precedent since *Hester* have made the need for review all the more important. As set forth below, the post-*Hester* opinion in *United States v. Haymond*, 139 S. Ct. 2369 (2019) has undermined the no-statutory-maximum rationale. And, this Court's recent decision in *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936 (2020) demonstrates that "restitution," as defined under the governing federal statutes and as imposed in this case, is penal; even if civil, it is not limited to traditional equitable restitution and therefore must at least comply with the Seventh Amendment.

B. *Haymond* undermines the no-statutory-maximum rationale

In *Haymond*, this Court held that a mandatory minimum prison sentence imposed for a violation of supervised release violated *Apprendi*. The defendant in *Haymond* was convicted of a child pornography offense that carried a statutory maximum penalty of 10 years, and he was sentenced to approximately 3 years; he then violated his supervised release, and a provision in 18 U.S.C. § 3583 required a court to impose a minimum sentence of at least 5 years if it found such a violation by a preponderance of the evidence. This Court held that the 5-year minimum term violated the Fifth and Sixth Amendments under *Alleyne* and rejected the argument that there was no constitutional problem because the

original conviction authorized a term of up to 10 years. *See Haymond*, 139 S. Ct. at 2380-81 ("A mandatory minimum 5-year sentence that comes into play only as a result of additional judicial factual findings by a preponderance of the evidence cannot stand.").

In rejecting the government's similar statutory-maximum argument, the lead opinion in *Haymond* succinctly stated: "we have been down this road before." *Haymond*, 139 S. Ct. at 2379. This Court emphasized that "following the government down this road . . . lead[s] to the same destination" as in cases like *Alleyne*. *Id*. at 2381. Justice Breyer concurred, emphasizing the mandatory nature of the sentence at issue. *Id.* at 2396 (Breyer, J., concurring). In this case, the district court imposed mandatory restitution under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, and thus the reasoning in *Haymond* and *Alleyne* applies.

Moreover, in rejecting the government's argument that the revocation sentence did not trigger an increase in a maximum sentence, *Haymond* reasoned: "As this Court has repeatedly explained, any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise." *Haymond*, 139 S. Ct. at 2379 (citation omitted). And this is where the flaw in the government's no-statutory-maximum argument overlaps with the flaw in its other

civil-remedy argument. As discussed below, simply placing the label "restitution" on the monetary sanction does not eliminate the constitutional right to a jury trial, even if criminal restitution is somehow a civil remedy.

C. *Liu* clarifies that criminal restitution is penal, and the Seventh Amendment applies even if it is civil

The government's other tenuous argument is that criminal restitution is actually a civil compensatory remedy. *See Hester*, 139 S. Ct. at 510-11. While cases like *Paroline* and *Pasquantino* refute this characterization, this Court's opinion in *Kelly v. Robinson*, 479 U.S. 36, 53 (1986) also found that restitution orders in criminal cases are "penal." Indeed, in interpreting the former federal criminal restitution statutes before *Apprendi*, the lower courts had unanimously held that a criminal defendant is not entitled to a jury trial on restitution under the Seventh Amendment by adopting the government's argument that restitution is "penal." *Id.* at 53 n.14. Thus, it comes as a bit of a surprise that the government is now arguing that restitution is not penal. The Third Circuit, for one, recognized the hypocrisy. *See United States v. Leahy*, 438 F.3d 328, 333-35 (3d Cir. 2006) (*en banc*). This Court's post-*Hester* opinion in *Liu* further clarifies that a mandatory criminal restitution order is penal, and, even if it is civil, a defendant is still entitled to a jury trial under the Seventh Amendment because such orders are not limited to traditional equitable restitution.

Simply placing the label of "restitution" on the exercise does not mean that the monetary judgment is not a penalty or that a jury finding is not constitutionally required under the Seventh Amendment. *See Hester*, 139 S. Ct. at 511; *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990); *Tull v. United States*, 481 U.S. 412, 417 (1987). As *Liu* makes clear, a critical inquiry is whether the "restitution" imposed is consistent with the traditional limitations on *equitable* restitution. *See Liu*, 140 S. Ct. at 1942-50. That is because "not all relief falling under the rubric of restitution is available in equity." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-13 (2002).

"To be sure," most purported restitution awards "exceed the bounds of traditional equitable principles." *Liu*, 140 S. Ct. at 1946. Indeed, as *Liu* recognized, this Court confronted such a situation just a few years ago in the form of a disgorgement order. *See Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017).

In *Kokesh*, this Court explained that, as applied in practice, disgorgement orders were often a "penalty" because they were "imposed by the courts as a consequence for violating . . . public laws." *Id.* at 1643. Furthermore, the "violation for which the remedy is sought is committed against the United States rather than an aggrieved individual – this is why, for example, a[n] enforcement

action may proceed even if victims do not support or are not parties to the prosecution." *Id.* Thus, a disgorgement order can be "imposed for punitive purposes" and "is not compensatory." *Id.* at 1643-44. Disgorgement is "paid to the district court, and it is 'within the court's discretion to determine how and to whom the money will be distributed.'" *Id.* at 1644. Disgorgement "sometimes exceeds the profits gained as a result of the violation" and "is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit." *Id.* Because such orders "'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, they represent a penalty" and are not simply compensatory or equitable. *Id.* at 1645.

This description in *Kokesh* neatly fits federal criminal restitution orders in general and the specific restitution order imposed in this case. As a threshold matter, *mandatory* restitution was imposed in this case under the MVRA, *see* 18 U.S.C. § 3663A, which would seem to fly in the face of an *equitable* remedy. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

The restitution order in this case, like restitution in general under the governing federal statutes, 18 U.S.C. §§ 3663, 3663A, 3664, exceeded profits and

was imposed without regard to expenses; likewise, restitution was imposed regardless of whether the victims supported restitution. Indeed, in this case, the restitution was simply based on the total amount of receipts collected by 21st Century, there was no determination as to whether thousands of the alleged victims actually believed that they had been defrauded and requested restitution, and the restitution order included alleged victims for which petitioner was *acquitted*. The restitution order entered against petitioner was imposed for the violation of public laws, and it is to be paid to the court. Paying restitution is a condition of petitioner's supervised release, and if he does not pay the restitution, it "can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 139 S. Ct. at 510. Thus, a federal criminal restitution order in general, like the one in this particular case, is penal. *See Kelly*, 479 U.S. at 53.

But, even if a mandatory criminal restitution order is a civil remedy, it is not limited to traditional equitable restitution under *Liu*, and therefore a defendant is entitled to a jury trial under the Seventh Amendment. *See, e.g.*, *Tull*, 481 U.S. at 417. The district court here did not purport to act in equity, and, as discussed above, its order is inconsistent with equitable restitution and therefore violated the Seventh Amendment. The district court's imposition of restitution in contravention of the jury's acquittals also violated the Seventh Amendment

because "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States . . . ." U.S. Const. Amend. VII; *Fogg v. Ashcroft*, 254 F.3d 103, 110 (D.C. Cir. 2001) ("the right to a jury trial usually demands that the jury bind the court, rather than vice versa"); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993). By acquitting petitioner on several counts despite a *Pinkerton* instruction, the jury implicitly found that he could not reasonably foresee the entire scope of fraudulent conduct, undermining the fairness of the restitution order and demonstrating that it was penal and certainly not equitable. *Cf. Honeycutt v. United States*, 137 S. Ct. 1626 (2017).

In sum, at common law, restitution in a criminal case had to be determined by the jury beyond a reasonable doubt, and the Constitution should be interpreted accordingly. *See Hester*, 139 S. Ct. at 511. This Court's precedent now makes clear that criminal restitution is a penalty, and, even if considered a civil remedy, the Seventh Amendment applies because a mandatory criminal restitution order does not comply with traditional equitable restitution. Particularly given these additional considerations as clarified by post-*Hester* precedent, this Court should now grant review.

D. The time is right for review, and this case is an excellent vehicle

"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." *Hester*, 139 S. Ct. at 510. The issue raised in this petition is clearly "important[,]" *id.*, and it is now ripe for review.

After *Hester*, the invalidity of the view of the lower courts has become more clear based on *Liu* and *Haymond*, but the lower courts refuse to budge. *See George*, 949 F.3d at 1188. Below, petitioner argued the points made by Justice Gorsuch in *Hester*, and they did not even generate a mention in the Ninth Circuit's published opinion, *id.*, and even though the prior circuit precedent cited, *United States v. Green*, 722 F.3d 1146 (9th Cir. 2013), "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 *Green*, 722 F.3d at 1151).

As far as petitioner is aware, no circuit has even cited *Hester* in the 20 months since it was published. The state courts have only given *Hester* slightly more attention, with one intermediate appellate court rejecting an *Apprendi* challenge to a restitution order without even mentioning it over a dissent which cited it, *see State v. Robison*, ___ P.3d ___, No. 120,903, 2020 WL 3487475 (Kan. Ct. App. June 26, 2020), and another noting that *Apprendi* may apply to restitution but declining to resolve the issue. *See Her v. State*, No. A-12535, 2019 WL 3318138, at *4-5 (Alaska Ct. App. July 24, 2019).

Absent intervention by this Court, the lower courts are content to leave things as is, despite the views of some dissenting judges, *see, e.g.*, *Leahy*, 438 F.3d at 339-48 (McKee, J., concurring in part and dissenting in part, with four other judges joining); *United States v. Carruth*, 418 F.3d 900, 905-06 (8th Cir. 2005) (Bye, J., dissenting), and scholars who continue to criticize the prevailing rule. *See* 6 LaFave, Israel, King & Kerr, *Criminal Procedure* § 26.6(c) (4th ed. 2019); Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93 (2014). A frustrating feature of this state of affairs is that the lower courts have ignored differences between criminal and equitable restitution and have often developed their view based on the most cursory analysis. *See, e.g.*, *Leahy*, 438 F.3d at 345 (McKee, J., concurring in part and dissenting in part) ("the cases . . . from other circuit courts are not very helpful"). For example, Ninth Circuit precedent 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. *See 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).

In *Hester*, 139 S. Ct. at 509, Justice Alito concurred in the denial of the writ,

expressing his continued belief that the *Apprendi* line of cases represents a "questionable interpretation of the original meaning of the Sixth Amendment" and therefore "counsels against further extension of these suspect precedents." As mentioned, the *Apprendi* line of precedent was reaffirmed yet again after *Hester* in *Haymond*. Moreover, it is actually the current federal restitution statutes and the order in this case that represent an "extension" of the original meaning of "restitution."

One of the reasons why this petition presents a particularly good vehicle for review is that the restitution order in this case does not simply amount to judicial factfinding; it amounts to factfinding in contravention of the jury's verdict because the jury *acquitted* petitioner on several counts. The traditional rule prohibited a court from ordering "restitution" based on conduct for which the defendant was acquitted, *see Hughey v. United States*, 495 U.S. 411 (1990), and the original meaning of the Constitution should be similarly understood. *See Fogg*, 254 F.3d at 110; *Los Angeles Police Protective League*, 995 F.2d at 1473; *People v. Beck*, 939 N.W. 2d 213 (Mich. 2019), *cert. denied*, 140 S. Ct. 1243 (2020); *see also United States v. Watts*, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting) ("to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal"). The multiple acquittals by the jury in this case make this petition a better vehicle

for review than *Hester*, which arose from a guilty plea.

In sum, this case presents the right posture, and it presents the right timing. The post-*Hester* opinions in *Haymond* and *Liu* have enhanced the merits of petitioner's claim. This Court is also currently considering whether restitution can be ordered by a court as a form of injunctive relief in *AMG Capital Management, LLC v. Federal Trade Commission*, No. 19-508 and *Federal Trade Commission v. Credit Bureau Center, LLC*, No. 19-825. As Judge O'Scannlain explained in the pending *AMG Capital* case, the form of "restitution" ordered here is a penalty and different from "traditional forms of equitable restitution." *Federal Trade Commission v. AMG Capital Management, LLC*, 910 F.3d 417, 433-35 (9th Cir. 2018) (O'Scannlain, J., concurring). This petition is similarly deserving of review, as criminal restitution should have at least the same if not greater restrictions as civil restitution or disgorgement.

II. This Court should grant, vacate, and remand for reconsideration in light of *Liu*.

This Court decided *Liu* after the Ninth Circuit issued its published opinion and denied rehearing and rehearing *en banc*. In *Liu*, 140 S. Ct. at 1947-50, this Court provided guidance on the limits of equitable restitution and sent the case back to the Ninth Circuit to determine whether the disgorgement order in that case crossed the bounds of traditional equity practice. Similarly, this Court should send

this case back to the Ninth Circuit to determine whether criminal restitution orders without jury findings (and in this case, contrary to jury findings) are at least subject to the limits of traditional equitable restitution, and whether the order here exceeded those limits.

As mentioned, this Court is also currently considering whether restitution can be ordered by a court as a form of injunctive relief in *AMG Capital Management, LLC v. Federal Trade Commission*, No. 19-508 and *Federal Trade Commission v. Credit Bureau Center, LLC*, No. 19-825. At the very least, this Court should hold this petition pending the decisions in those cases, which could provide more guidance on the limits of traditional equitable restitution.

CONCLUSION

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

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Respectfully submitted,

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