No. 20-860

In the Supreme Court of the United States

RYAN RANDALL GILBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible plain error in ordering restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, based on the court's finding of the amount of the victim's loss by a preponderance of the evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 970 F.3d 939.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2020. The petition for a writ of certiorari was filed on December 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of 14 counts of wire fraud, in violation of 18 U.S.C. 1343 and 2; one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; and six counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff and 18 U.S.C. 2. Second Am. Judgment 1. The district

court sentenced petitioner to 144 months of imprisonment, to be followed by two years of supervised release, and imposed a $2,000,000 fine. *Id.* at 2-6. The court also ordered petitioner to pay $15,135,361 in restitution. *Id.* at 6. The court of appeals affirmed. Pet. App. 1a-29a.

1. Petitioner was one of the co-founders of Dakota Plains, a publicly traded oil-transporting company. Pet. App. 2a. Between 2011 and 2013, petitioner orchestrated a stock-manipulation scheme involving stock in Dakota Plains in order to trigger fraudulent bonus obligations to himself and other promissory noteholders totaling $32.8 million See *id.* at 2a-10a & n.2.

a. Petitioner founded Dakota Plains in 2008 along with Michael Reger and another man. Pet. App. 2a. Petitioner and Reger concealed the extent of their involvement in the company by installing their fathers as officers and the sole members of the board of directors. *Ibid.* In reality, petitioner and Reger exercised complete control over the company, and petitioner effectively controlled the company's financial decisions. *Ibid.*

In January 2011, petitioner caused Dakota Plains to issue $3.5 million in promissory notes at 12% interest (the "Senior Notes"). Pet. App. 2a. Petitioner purchased a $1 million Senior Note for himself and another $100,000 Senior Note in the name of a nonprofit corporation that he controlled. *Ibid.* In April 2011, petitioner and Reger installed Gabe Claypool as CEO, though petitioner continued to drive all financial decisions for the company. *Ibid.* "Within two weeks after Claypool became CEO," petitioner and Reger "directed him to issue an additional $5.5 million in promissory notes at 12% interest" (the "Junior Notes"). *Ibid.* Petitioner and Reger held the majority of the Junior Notes directly or in-

directly. *Ibid.* The Junior Notes included a bonus-payment provision that entitled the noteholders to an additional payment if the company went public through an initial public offering (IPO), based on the initial offering price. *Id.* at 2a-3a. Claypool, the CEO, testified that he had no "role in crafting" the bonus provision and "did not understand it at the time," but he nevertheless approved it at petitioner's direction. *Id.* at 3a.

In late 2011, petitioner convinced the Dakota Plains board, which now included other members, to consolidate the Senior Notes and Junior Notes into consolidated promissory notes (the "Consolidated Notes"). Pet. App. 3a. Petitioner also convinced the board to amend the bonus-payment provision so that it would (1) apply to the total value of the Consolidated Notes ($9 million), not just the $5.5 million that had been lent under the Junior Notes; (2) be triggered not just by an IPO but by any public offering, including a reverse merger; and (3) be calculated not by the IPO price but by the average price of Dakota Plains stock during the first 20 days of public trading. *Ibid.* The amended bonus provision provided that noteholders would be entitled to the bonus payment if Dakota Plains stock traded above an average closing price of $2.50 per share during the first 20 days of public trading; the higher the price, the higher the bonus payment. *Ibid.*

Unbeknownst to Claypool and the board when they approved the restructured bonus provision, petitioner had already arranged to take Dakota Plains public through a reverse merger. Pet. App. 3a. More than nine months earlier, petitioner had approached Thomas Howells, a business consultant who specialized in reverse-merger transactions, about locating a public shell company that could be used in a reverse merger.

Id. at 3a-4a. Howells had identified a candidate in April 2011: Malibu Club Tan (MCT), a publicly traded company that had operated a tanning salon in Salt Lake City. *Id.* at 4a. Petitioner and Howells selected MCT because it had a "small 'float,'" *i.e.*, only a small number of shares that were allowed to be traded within the first six months after a reverse merger. *Ibid.* During negotiations with Howells, petitioner insisted that 50,000 of the 219,600 tradeable MCT shares be sold to a buyer of petitioner's choice before the merger, and petitioner further insisted that Howells keep that transaction "strictly confidential." *Ibid.*

Dakota Plains and MCT agreed to a reverse merger in November 2011. Pet. App. 4a. By December 2011, Howells had located 50,000 freely tradeable shares in MCT for petitioner's buyer. *Id.* at 4a-5a. MCT's attorney requested that petitioner sign an agreement prohibiting the sale of any of the 50,000 shares within 90 days after the merger to avoid "unduly influenc[ing] the stock," but petitioner refused and instead offered an unwritten "gentleman's agreement" that the shares would not be sold within 90 days after the merger. *Id.* at 5a.

Petitioner concealed his acquisition of the 50,000 freely tradeable shares by ensuring that the agreement to purchase them did not appear in any of the merger documents, and by having those shares nominally purchased by Doug Hoskins—a member of petitioner's polo team, who had no ties to Dakota Plains and no experience trading stock. Pet. App. 5a-6a. Petitioner then arranged for Hoskins to open a trading account at a brokerage firm by falsely representing that Hoskins was an "accredited investor," was purchasing stock only for himself and not in concert with any other person, and

was not insolvent. *Id.* at 5a. In anticipation of the reverse merger, petitioner wired $30,000 to Hoskins to be used to purchase shares. *Ibid.* On March 22, 2012—the day the reverse merger closed—Hoskins used $25,000 of petitioner's money to purchase 50,000 shares at $0.50 per share. *Id.* at 5a-6a.

b. Over the next 20 days, petitioner manipulated trading in the stock in order to increase its price and trigger the bonus payment that he had previously arranged for holders of the Consolidated Notes. See p. 3, *supra*. Starting on March 23, 2012, the first day of public trading following the reverse merger, petitioner directed Hoskins to sell the 50,000 shares that he had purchased at $0.50 for $12 per share. Pet. App. 6a. For the next 18 days, Hoskins was the largest single seller of the stock and, at petitioner's direction, sold for $12 per share. *Id.* at 7a.

Petitioner was also directing the largest single purchaser of the stock during that period, a Minneapolis-based stock broker, Nicholas Shermeta, to buy the stock for $12 per share. Pet. App. 6a-7a. Shermeta had a longstanding financial relationship with petitioner and Dakota Plains that he concealed from his brokerage firm and customers, in violation of federal securities regulations. *Id.* at 6a. On the first day of public trading after the reverse merger, Shermeta purchased 10,000 shares of Dakota Plains stock. *Id.* at 6a-7a. The next day, Shermeta purchased 50,000 shares for $12 per share. *Id.* at 7a. Shermeta placed both orders at petitioner's direction. *Id.* at 6a-7a. In the following days, Shermeta continued acceding to petitioner's instructions to purchase the stock at $12 per share, both personally and on behalf of Shermeta's brokerage clients (without their permission or knowledge), even though

"many of these purchases did not make financial sense for [Shermeta's] clients." *Id.* at 7a. During the 20-day period that would drive petitioner's bonus payment, Shermeta made almost 54% of the total purchases in Dakota Plains stock. *Ibid.*

Petitioner continued taking other steps to artificially increase and sustain the price of the stock during the 20-day bonus period. On April 4, 2012, while petitioner and Hoskins were both in Sarasota, Florida, Hoskins emailed his broker asking why he had only "25pct of the volume" of transactions in Dakota Plains, and petitioner sent a text message to Howells at the same time stating that "Hoskins should be getting more than 25pct of the volume." Pet. App. 7a. Howells was "concerned" about that message because he knew it showed that petitioner was engaging in "market interference." *Id.* at 7a-8a. Petitioner confirmed that by telling Howells that "[t]hey would be participating on sales at 7 bucks not 12 were it not for my involvement." *Id.* at 8a. Howells nevertheless called Hoskins's broker and relayed petitioner's complaint in an attempt to increase the trading volume. *Ibid.* Howells agreed to petitioner's attempt to manipulate trading on the sell side because he "had a large personal investment, pretty much most of [his] liquid net worth," in Dakota Plains, and he "chose to protect that." *Ibid.* Howells was also unaware of the bonus provision at the time, so he "failed to see any bigger picture" and believed that he was simply trying to "get a few extra dollars on a couple of trades for a friend and associate." *Ibid.* When Howells learned about the bonus provision in May 2012, he confronted petitioner about the text messages, which he felt had left him exposed. *Id.* at 8a-9a. Petitioner responded by paying off Howells in the form of 50,000 shares in Dakota Plains

for Howells and his business associate, which he "legitimized" though fake consulting agreements. *Id.* at 9a.

After the first 20 days, petitioner stopped directing Shermeta to purchase the stock, and when he did, the stock price fell dramatically. Pet. App. 8a. In June 2012, Hoskins returned most of his unsold shares to petitioner through a sham polo contract. *Id.* at 9a. In September 2012, when the restrictions lifted and all Dakota Plains stock became freely tradeable, the price quickly dropped from around $6.25 per share to $2.50 per share, and it never again traded at more than $4.13 per share. Gov't C.A. Br. 28.

As a result of the fraudulent sales and purchases that petitioner directed, the average price of the stock during the first 20 days of trading was $11.63, triggering almost $33 million in bonus-payment obligations to the Consolidated Noteholders—about $11 million to petitioner alone. Pet. App. 8a. Dakota Plains could not afford the bonus payments. *Id.* at 10a. The company's board approached petitioner and attempted to renegotiate or reduce the payment, but petitioner refused and told the company to raise money to pay off the debt. *Ibid.* Those efforts were unsuccessful, *ibid.*, because investors were not interested in loaning money to Dakota Plains to be used to pay off the "phantom debt" owed to petitioner and the other noteholders. Gov't C.A. Br. 30-31. Dakota Plains eventually agreed with petitioner and the other consolidated noteholders in November 2012 and December 2013 to issue them more than 6.1 million shares of stock as part of renegotiations of the bonus, and petitioner sold his portion of those shares for more than $5.5 million. See D. Ct. Doc. 294, at 12-15, 25 (Dec. 4, 2018) (Gov't Sentencing Br.). Dakota Plains ultimately declared bankruptcy. Pet. App. 10a.

2. A federal grand jury in the District of Minnesota indicted petitioner on 15 counts of wire fraud, in violation of 18 U.S.C. 1343 and 2, one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and six counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff and 18 U.S.C. 2. Superseding Indictment 3-23; see Pet. App. 10a. Following a ten-day trial, a jury convicted petitioner on all but one count against him. Pet. App. 10a.

The Probation Office prepared a Presentence Investigation Report (PSR) in which it calculated that the intended amount of the loss from petitioner's fraud was $32,851,800—the full amount of the fraudulent bonus payments triggered by petitioner's scheme. PSR ¶ 44. In a pre-sentencing filing, the government asked the district court to order petitioner to pay $15,310,361 in restitution, which was mandatory under 18 U.S.C. 3663A. See Gov't Sentencing Br. 24-26; 18 U.S.C. 3663A (the district court "shall" order restitution where the defendant has been convicted of an "offense against property," including any offense "committed by fraud or deceit"). Nearly all of that amount was attributable to the interest that Dakota Plains had paid to petitioner and the other consolidated noteholders on the fraudulent bonus, and a conservative estimate of the value of the shares into which the bonus had been converted during renegotiations. Gov't Sentencing Br. 24-26. In total, petitioner and the other noteholders had received 6,112,878 shares of Dakota Plains stock through the bonus, and the government valued those shares at $2.15—their market value at the time of the renegotiation in December 2013, which was the low point at which petitioner and other noteholders had received shares. *Id.* at 25.

Petitioner acknowledged that the district court should determine restitution using a preponderance-of-the-evidence standard. See Defendant's Position with Respect to Sentencing, D. Ct. Doc. 286, at 46 (Nov. 6, 2018). He argued, however, that he should not owe any restitution because there was no connection between his fraudulent scheme and the shares in Dakota Plains that he was granted when the parties renegotiated the bonus. See *id.* at 47-48.

At sentencing, petitioner again acknowledged that a preponderance-of-the-evidence standard applied to restitution. Sentencing Hearing Tr., D. Ct. Doc. 315, at 8 (Dec. 18, 2018). The district court rejected petitioner's argument that he owed no restitution and found that "every penny of the $32.8 million in bonuses that were triggered by the reverse merger was the result of [petitioner's] fraudulent scheme because the reverse-merger bonus provision itself was part of that scheme." Pet. App. 34a. "Accordingly," the court explained, "all loss directly and proximately caused by the bonus provision is compensable." *Ibid.* There was "no need to subtract any amount attributable to a legitimate amount of the bonus" because no part of the bonus was legitimate: "Dakota Plains would not have owed any bonus to any noteholder if not for" petitioner's fraudulent trading scheme. *Ibid.* The court thus determined that Dakota Plains was entitled to be repaid for the interest that petitioner had caused Dakota Plains to pay on the fraudulent bonus, and to recoup the value of the stock that it had transferred in renegotiating the bonus, because, were it not for petitioner's stock-manipulation fraud, there would have been no bonus and thus "nothing to renegotiate." *Ibid.* The court agreed with the government that "$2.15 per share is an eminently rea-

sonable value to assign to" the shares that petitioner unlawfully extracted from Dakota Plains. *Ibid.* Petitioner did not object to the district court's restitution calculations on Sixth Amendment grounds.[1]

The district court sentenced petitioner to 144 months of imprisonment, to be followed by two years of supervised release, and imposed a $2,000,000 fine. Second Am. Judgment 2-6. The court also ordered petitioner to pay $15,135,361 in restitution. *Id.* at 6.

3. The court of appeals affirmed. Pet. App. 1a-29a. As relevant here, petitioner argued for the first time on appeal that the district court had erred in imposing restitution by relying on facts not found by a jury beyond a reasonable doubt, although he acknowledged that his position was foreclosed by circuit precedent. Pet. C.A. Br. 50-51 (citing *United States* v. *Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015)). The court of appeals rejected petitioner's claim based on its prior decision in *Thunderhawk*, which had "reject[ed] the argument that restitution is a 'criminal punishment beyond the statutory maximum and therefore must be proved to a jury.'" Pet. App. 24a (quoting 799 F.3d at 1209).

ARGUMENT

Petitioner contends (Pet. 3-7, 12-23) that *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which 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

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[1] In a pre-sentencing filing, petitioner "object[ed] generally to reliance on facts not found by a jury beyond a reasonable doubt as a basis for increasing his sentence," D. Ct. Doc. 295, at 3 n.2 (Dec. 4, 2018), but that argument was plainly directed at the term of imprisonment, not restitution, see *id.* at 1-3 (arguing for a lower sentence under 18 U.S.C. 3553(a)).

proved beyond a reasonable doubt," *id.* at 490, applies to the calculation of restitution. The court of appeals correctly rejected that contention. Petitioner does not deny that every court of appeals to consider the question has determined that the imposition of restitution does not implicate *Apprendi*. And in any event, this case would be a poor vehicle for addressing the question presented because petitioner waived his Sixth Amendment argument by conceding in the district court that facts supporting his restitution obligation needed to be found only by a preponderance of the evidence. At a minimum, petitioner forfeited his Sixth Amendment argument, and thus any appellate review would be solely for plain error. This Court has recently and repeatedly denied petitions for a writ of certiorari seeking review of whether *Apprendi* applies to restitution, including in cases where the issue had been preserved.[2] The same result is warranted here.

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[2] See, *e.g.*, *George* v. *United States*, 141 S. Ct. 605 (2020) (No. 20-5669); *Budagova* v. *United States*, 140 S. Ct. 161 (2019) (No. 18-8938); *Ovsepian* v. *United States*, 140 S. Ct. 157 (2019) (No. 18-7262); *Hester* v. *United States*, 139 S. Ct. 509 (2019) (No. 17-9082); *Petras* v. *United States*, 139 S. Ct. 373 (2018) (No. 17-8462); *Fontana* v. *United States*, 138 S. Ct. 1022 (2018) (No. 17-7300); *Alvarez* v. *United States*, 137 S. Ct. 1389 (2017) (No. 16-8060); *Patel* v. *United States*, 137 S. Ct. 184 (2016) (No. 16-5129); *Santos* v. *United States*, 136 S. Ct. 1689 (2016) (No. 15-8471); *Roemmele* v. *United States*, 577 U.S. 904 (2015) (No. 15-5507); *Gomes* v. *United States*, 577 U.S. 852 (2015) (No. 14-10204); *Printz* v. *United States*, 577 U.S. 845 (2015) (No. 14-10068); *Johnson* v. *United States*, 576 U.S. 1035 (2015) (No. 14-1006); *Basile* v. *United States*, 575 U.S. 904 (2015) (No. 14-6980); *Ligon* v. *United States*, 574 U.S. 1182 (2015) (No. 14-7989); *Holmich* v. *United States*, 574 U.S. 1121 (2015) (No. 14-337); *Roscoe* v. *United States*, 572 U.S. 1151 (2014) (No. 13-1334); *Green* v. *United States*, 571 U.S. 1025 (2013)

1. a. The court of appeals correctly determined that *Apprendi* does not apply to restitution. Pet. App. 24a; see *United States* v. *Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *United States* v. *Carruth*, 418 F.3d 900, 904 (8th Cir. 2005). In *Apprendi*, this Court held that any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be proved beyond a reasonable doubt and found by a jury. 530 U.S. at 490; see also *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (making clear that, in a federal prosecution, "such facts must also be charged in the indictment"). 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* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted).

The district court ordered petitioner to pay restitution pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Title II, Subtitle A, 110 Stat. 1227. The MVRA provides that, "when sentencing a defendant convicted of an offense described in subsection (c)," which includes fraud offenses, "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1); see also 18 U.S.C. 3663A(c)(1)(A)(ii). The MVRA requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see 18 U.S.C.

(No. 13-472); *Read* v. *United States*, 569 U.S. 1031 (2013) (No. 12-8572); *Wolfe* v. *United States*, 569 U.S. 1029 (2013) (No. 12-1065). A similar issue is presented in the petition for a writ of certiorari in *Flynn* v. *United States*, No. 20-1129 (filed Feb. 11, 2021).

3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."); see also 18 U.S.C. 3663A(b)(1) (restitution order shall require return of property or payment of an amount equal to the value of lost or destroyed property).

By requiring restitution of a specific sum—"the full amount of each victim's losses"—rather than prescribing a maximum amount that may be ordered, the MVRA establishes an indeterminate framework. 18 U.S.C. 3664(f)(1)(A); see, *e.g.*, *United States* v. *Day*, 700 F.3d 713, 732 (4th Cir. 2012) ("Critically, * * * 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.") (emphasis omitted), cert. denied, 569 U.S. 959 (2013); *United States* v. *Reifler*, 446 F.3d 65, 118-120 (2d Cir. 2006) (the MVRA "is an indeterminate system") (citing cases). Thus, when a sentencing court determines the amount of the victim's loss, it "is merely giving definite shape to the restitution penalty [that is] born out of the conviction," not "imposing a punishment beyond that authorized by jury-found or admitted facts." *United States* v. *Leahy*, 438 F.3d 328, 337 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006).

Moreover, while restitution is imposed as part of a defendant's criminal conviction, *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005), "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct," *Leahy*, 438 F.3d at 338. "The purpose of restitution under the MVRA * * * is * * * to make the victim[] whole again by restoring to him or

her the value of the losses suffered as a result of the defendant's crime." *United States* v. *Hunter*, 618 F.3d 1062, 1064 (9th Cir. 2010) (citation and internal quotation marks omitted; brackets in original). In that additional sense, restitution "does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." *Leahy*, 438 F.3d at 338.

Nearly every court of appeals with criminal jurisdiction—and every court of appeals to have considered the question—has determined that the rule of *Apprendi* does not apply to restitution, whether under the MVRA or under the other primary federal restitution statute, the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5(a), 96 Stat. 1253 (18 U.S.C. 3663). See, *e.g.*, *United States* v. *Churn*, 800 F.3d 768, 782 (6th Cir. 2015); *United States* v. *Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 574 U.S. 1078, and 574 U.S. 1078 (2015); *Day*, 700 F.3d at 732 (4th Cir.); *United States* v. *Brock-Davis*, 504 F.3d 991, 994 n.1 (9th Cir. 2007); *United States* v. *Milkiewicz*, 470 F.3d 390, 403-404 (1st Cir. 2006); *Reifler*, 446 F.3d at 114-120 (2d Cir.); *United States* v. *Williams*, 445 F.3d 1302, 1310-1311 (11th Cir. 2006), abrogated on other grounds by *United States* v. *Lewis*, 492 F.3d 1219, 1221-1222 (11th Cir. 2007) (en banc); *Leahy*, 438 F.3d at 337-338 (3d Cir.); *United States* v. *Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006); *Carruth*, 418 F.3d at 902-904 (8th Cir.); *United States* v. *George*, 403 F.3d 470, 473 (7th Cir.), cert. denied, 546 U.S. 1008 (2005).

Those courts have relied primarily on the absence of a statutory maximum for restitution in reasoning that, when the district court fixes the amount of restitution

based on the victims' losses, it is not increasing the punishment beyond that authorized by the conviction itself. See, *e.g.*, *Leahy*, 438 F.3d at 337 n.11 ("[T]he jury's verdict automatically triggers restitution in the 'full amount of each victim's losses.'") (quoting 18 U.S.C. 3664(f)(1)(A)). Some courts have additionally reasoned that "restitution is not a penalty for a crime for *Apprendi* purposes," or that, even if restitution is criminal, its compensatory purpose distinguishes it from purely punitive measures. *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 593 (7th Cir. 2006); see *Visinaiz*, 428 F.3d at 1316; *Carruth*, 418 F.3d at 904; see also *Leahy*, 438 F.3d at 337-338.

b. This Court's holding in *Southern Union Co.* v. *United States*, 567 U.S. 343 (2012), that "the rule of *Apprendi* applies to the imposition of criminal fines," *id.* at 360, does not undermine the uniform line of precedent holding that restitution is not subject to *Apprendi*. In *Southern Union*, the Court found that a $6 million criminal fine imposed by the district court—which was well above the $50,000 fine that the defendant had argued was the maximum supported by the jury's verdict—violated the Sixth Amendment. *Id.* at 347. The Court explained that criminal fines, like imprisonment or death, "are penalties inflicted by the sovereign for the commission of offenses." *Id.* at 349. Observing that, "[i]n stating *Apprendi*'s rule, [it] ha[d] never distinguished one form of punishment from another," *id.* at 350, the Court concluded that criminal fines implicate "*Apprendi*'s 'core concern' [of] reserv[ing] to the jury 'the determination of facts that warrant punishment for a specific statutory offense,'" *id.* at 349 (quoting *Oregon* v. *Ice*, 555 U.S. 160, 170 (2009)). The Court also examined the historical record, explaining that "the scope of

the constitutional jury right must be informed by the historical role of the jury at common law." *Id.* at 353 (quoting *Ice*, 555 U.S. at 170). Finding that "English juries were required to find facts that determined the authorized pecuniary punishment," and that "the predominant practice" in nineteenth-century American courts was for facts that determined the amount of a fine "to be alleged in the indictment and proved to the jury," the Court concluded that the historical record "support[ed] applying *Apprendi* to criminal fines." *Id.* at 353-355.

Despite petitioner's contrary contention (Pet. 18-19), *Southern Union* does not require applying *Apprendi* to restitution. *Southern Union* considered only criminal fines, which are "undeniably" imposed as criminal penalties in order to punish illegal conduct, 567 U.S. at 350, and it held only that such fines are subject to *Apprendi*. *Id.* at 360. The Court had no occasion to, and did not, address restitution, which has compensatory and remedial purposes that fines do not, and which is imposed pursuant to an indeterminate scheme that lacks a statutory maximum. Indeed, *Southern Union* supports distinguishing restitution under the MVRA from the type of sentences subject to *Apprendi* because, in acknowledging that many fines during the founding era were not subject to concrete caps, the Court reaffirmed that there cannot "be an *Apprendi* violation where no maximum is prescribed." *Id.* at 353. Unlike the statute in *Southern Union*, which prescribed a $50,000 maximum fine for each day of violation, the MVRA sets no maximum amount of restitution, but rather requires that restitution be ordered in the total amount of the victims' losses. See 18 U.S.C. 3663A(b)(1) and (d); 18 U.S.C. 3664(f)(1)(A); see also *Day*, 700 F.3d at 732 (stating

that, "in *Southern Union* itself, the *Apprendi* issue was triggered by the fact that the district court imposed a fine in excess of the statutory maximum that applied in that case," and distinguishing restitution on the ground that it is not subject to a "prescribed statutory maximum") (emphasis omitted).

Petitioner contends (Pet. 7, 14-15) that the historical record supports extending *Apprendi* to restitution, asserting that, at common law, a victim could recover restitution for certain property crimes only if the stolen property was listed in the indictment. But petitioner's argument provides no sound basis for extending *Apprendi* to grant additional rights to defendants themselves in the context of restitution. Unlike facts that determined the amount of a criminal fine, the historical consequence of omitting facts from the indictment relevant only to restitution was not that the indictment was defective or that the defendant was permitted to retain the stolen property. Rather, the stolen property was simply "forfeit[ed], and confiscate[d] to the king," instead of to the victim. 1 Matthew Hale, *The History of the Pleas of the Crown* 538 (1736); see *id.* at 545; James Barta, Note, *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 (2014) ("Any goods omitted from the indictment were forfeited to the crown.").

Since *Southern Union*, at least eight courts of appeals have considered in published opinions whether to overrule their prior precedents declining to extend the *Apprendi* rule to restitution. Each determined, without dissent, that *Southern Union* did not call its previous analysis into question. See *United States* v. *Vega-Martínez*, 949 F.3d 43, 55 (1st Cir. 2020) (*Southern*

Union "is clearly distinguishable" with respect to restitution); *United States* v. *Sawyer*, 825 F.3d 287, 297 (6th Cir.) (reasoning that "*Southern Union* did nothing to call into question the key reasoning" of prior circuit precedent), cert. denied, 137 S. Ct. 386 (2016); *Thunderhawk*, 799 F.3d at 1209 (8th Cir.) (finding "nothing in the *Southern Union* opinion leading us to conclude that our controlling precedent * * * was implicitly overruled"); *United States* v. *Bengis*, 783 F.3d 407, 412-413 (2d Cir. 2015) ("adher[ing]" to the court's prior precedent after concluding that "*Southern Union* is inapposite"); *United States* v. *Green*, 722 F.3d 1146, 1148-1149 (9th Cir.), cert. denied, 571 U.S. 1025 (2013); *United States* v. *Read*, 710 F.3d 219, 231 (5th Cir. 2012) (per curiam), cert. denied, 569 U.S. 1031 (2013); *United States* v. *Wolfe*, 701 F.3d 1206, 1216-1217 (7th Cir. 2012), cert. denied, 569 U.S. 1029 (2013); *Day*, 700 F.3d at 732 (4th Cir.) (explaining that the "logic of *Southern Union* actually reinforces the correctness of the uniform rule adopted in the federal courts" that *Apprendi* does not apply because restitution lacks a statutory maximum); see also *United States* v. *Kieffer*, 596 Fed. Appx. 653, 664 (10th Cir. 2014), cert. denied, 576 U.S. 1012 (2015); *United States* v. *Basile*, 570 Fed. Appx. 252, 258 (3d Cir. 2014), cert. denied, 575 U.S. 904 (2015).

c. Similarly, the plurality's conclusion in *Alleyne* v. *United States*, 570 U.S. 99 (2013), that *Apprendi* also applies to facts that increase a mandatory minimum sentence, because such facts "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment," *id.* at 108 (plurality opinion), does not undermine the uniform line of precedent holding that restitution is not subject to *Apprendi*. Restitution under the MVRA does

not set a mandatory minimum amount or even a "prescribed range" of amounts that a defendant may be ordered to pay. Rather, the amount—if any—is based on the losses caused to the victims by the defendant. *Alleyne* is thus inapplicable.

Accordingly, since *Alleyne*, every court of appeals to consider whether the decision in *Alleyne* requires that the *Apprendi* rule extend to restitution has determined that it does not. See, *e.g.*, *United States* v. *Tartaglione*, 815 Fed. Appx. 648, 652-653 (3d Cir. 2020) ("[T]he jury's charge was to determine whether the evidence established the elements of her charged criminal offenses[, a]nd here, the amount of restitution is not an element of any of the charges against Tartaglione.") (citation omitted); *United States* v. *Odak*, 802 Fed. Appx. 153, 154 (5th Cir. 2020) (per curiam) (rejecting argument that prior circuit precedent holding that the Sixth Amendment does not apply to restitution findings was abrogated by *Alleyne*); *United States* v. *Ovsepian*, 674 Fed. Appx. 712, 714 (9th Cir. 2017); *Kieffer*, 596 Fed. Appx. at 664 (10th Cir.); *United States* v. *Roemmele*, 589 Fed. Appx. 470, 470-471 (11th Cir. 2014) (per curiam) (rejecting *Alleyne* challenge to restitution), cert. denied, 577 U.S. 904 (2015); *United States* v. *Agbebiyi*, 575 Fed. Appx. 624, 632-633 (6th Cir. 2014); *Basile*, 570 Fed. Appx. at 258 (3d Cir.); *United States* v. *Holmich*, 563 Fed. Appx. 483, 484-485 (7th Cir. 2014), cert. denied, 574 U.S. 1121 (2015).

2. Petitioner does not (and could not) contend that the courts of appeals are divided on the question presented. Although those courts employ somewhat different reasoning, they all agree that *Apprendi* does not apply to restitution. See pp. 14-15, *supra*. This Court's review is therefore not warranted.

In any event, this case would be an unsuitable vehicle for considering the question presented because petitioner waived his Sixth Amendment argument at the time he was sentenced. Petitioner says merely that he raised the issue "in the court of appeals." Pet. 21. During his sentencing proceeding in district court, however, petitioner not only failed to assert his Sixth Amendment argument; he conceded that the court should determine restitution using a preponderance-of-the-evidence standard. See Defendant's Position with Respect to Sentencing, D. Ct. Doc. 286, at 46. Petitioner's Sixth Amendment argument is therefore waived and reviewable, at most, for plain error. See Fed. R. Crim. P. 52(b); *Puckett* v. *United States*, 556 U.S. 129, 135 (2009).

On plain-error review, petitioner would be entitled to relief only if he could show (1) an error (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted); see *Cotton*, 535 U.S. at 631-632 (applying plain-error review to a claim of *Apprendi* error). In light of the unanimous rejection by the courts of appeals of petitioner's Sixth Amendment argument, he cannot demonstrate any error that is "clear or obvious, rather than subject to reasonable dispute." *Marcus*, 560 U.S. at 262 (citation omitted).

Nor can petitioner demonstrate that any error affected his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. The jury convicted petitioner on nearly every count charged, which shows that the jury agreed with the government's evidence that petitioner perpetrated

an extensive stock-manipulation fraud against Dakota Plains. And petitioner offers no sound basis to dispute the government's showing that the amount of the loss that his fraud caused to Dakota Plains was $15.1 million.

Petitioner briefly asserts (Pet. 22) that there is a "disconnect between the facts found by the jury and" the restitution imposed because, "throughout the trial, the government affirmatively told the jury that the bonus provision was not illegal," and because Dakota Plains ultimately paid the bonus as a "restructured payment" that did not depend on the stock price during the first 20 days of petitioner's market manipulation. That argument misunderstands what the trial evidence against petitioner established. The government explained to the jury that, while it was not illegal *per se* for petitioner to use the officers that he controlled at Dakota Plains to obtain the bonus provision for himself, petitioner obtained that provision as the means to profit from his stock-manipulation fraud. See Pet. App. 32a-33a; see also Pet. 9-10 (quoting trial argument). Thus, as the district court correctly explained, "every penny" of the bonus extracted from Dakota Plains—including after its restructuring was negotiated with petitioner—was the result of petitioner's crime. Pet. App. 34a. Indeed, petitioner does not contest in this Court the fundamental point made by both of the courts below: Without petitioner's fraudulent-trading scheme, "he would have received no bonus at all." *Id.* at 23a; see *id.* at 34a ("[B]ut for [petitioner's] fraud, Dakota Plains would not have owed any bonus to anyone.").

In short, as petitioner observes, the district court correctly instructed the jury that his trial was "about whether and to what extent [petitioner] may have benefitted from any manipulation of the price of Dakota

Plains stock during the 20-day period." Pet. 10 (citation omitted; brackets in original). The jury agreed with the government's evidence that petitioner *did* benefit at the expense of Dakota Plains, and the evidence showed that the extent of the losses that he caused was (conservatively) $15.1 million. Petitioner offers no reason to believe that the jury would have found some other, lesser amount of loss. Petitioner therefore cannot demonstrate any error at all in his restitution obligation, much less an error that affected his substantial rights and seriously affected the fairness, integrity, or public reputation of the proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2021