No. 21-____

In the Supreme Court of the United States

TAYLOR ARNETT AND ROBERT JAMES ROBISON III,
PETITIONERS

v.

STATE OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a series of decisions beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court has held that the Sixth Amendment (incorporated against the states by the Fourteenth) requires a jury to find any fact necessary to support a criminal sentence. A jury must find any fact increasing the penalty for a crime beyond the statutory maximum, *id.* at 489; any fact necessary to increase the sentencing range even under a statutory maximum, *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); any fact necessary to establish a statutory minimum, *Alleyne v. United States*, 570 U.S. 99, 116 (2013); and any fact necessary to impose a death sentence, *Ring v. Arizona*, 536 U.S. 584, 609 (2002). And in *Southern Union Co. v. United States*, 567 U.S. 343, 346 (2012), the Court held that the Sixth Amendment guarantees the right to have a jury find the facts necessary to impose criminal fines.

Despite a well-reasoned dissent relying on this Court's precedents and the jury's role at common law, the Kansas Supreme Court held here that *Apprendi* does not apply to criminal restitution. In its view, that holding followed from this Court's silence, and particularly the denial of certiorari in *Hester v. United States*, 139 S. Ct. 509 (2019), over a dissent from Justice Gorsuch and Justice Sotomayor. The question presented is:

Whether the Sixth Amendment right to have a jury determine beyond a reasonable doubt every fact necessary to support criminal punishment applies not only to imprisonment, capital punishment, and fines, but also to criminal restitution.

PARTIES TO THE PROCEEDING

Petitioners Taylor Arnett and Robert James Robison III were defendants in separate criminal proceedings before the Kansas state courts. Respondent, the State of Kansas, prosecuted Petitioners and was the appellee in each case before the Kansas Court of Appeals and the Kansas Supreme Court.

RELATED PROCEEDINGS

These cases arise from the following proceedings:

Wyandotte County District Court of Kansas:

- *State v. Arnett*, No. 13-CR-442 (Dec. 17, 2013) (plea hearing resulting in conviction)
- *State v. Arnett*, No. 13-CR-442 (Feb. 20, 2014) (sentence of probation imposed)
- *State v. Arnett*, No. 13-CR-442 (June 25, 2014) (restitution hearing)
- *State v. Arnett*, No. 13-CR-442 (July 1, 2014) (restitution imposed)
- *State v. Arnett*, No. 13-CR-442 (Aug. 27, 2014) (restitution order)

Lyon County District Court of Kansas:

- *State v. Robison*, No. 18-CR-04 (Mar. 20, 2018) (plea hearing resulting in conviction)
- *State v. Robison*, No. 18-CR-04 (July 3, 2018) (sentence of incarceration imposed)
- *State v. Robison*, No. 18-CR-04 (Aug. 21, 2018) (restitution hearing, imposition, and order)

Kansas Court of Appeals:

- *State v. Arnett*, 359 P.3d 1071 (Table), 2015 WL 6835244 (Kan. Ct. App. 2015) (opinion holding

that state had not proven sufficient causation to order criminal restitution)

State v. Arnett, 417 P.3d 268 (Table), 2018 WL 2072804 (Kan. Ct. App. 2018) (opinion rejecting claim that order of criminal restitution violated right to jury trial)

State v. Robison, 469 P.3d 83 (Kan. Ct. App. 2020) (opinion rejecting claim that order of criminal restitution violated right to jury trial)

Kansas Supreme Court:

State v. Arnett, 413 P.3d 787 (Kan. 2018) (opinion reversing Kansas Court of Appeals decision and remanding for consideration of constitutional arguments)

State v. Arnett, 496 P.3d 928 (Kan. 2021) (opinion affirming Kansas Court of Appeals decision)

State v. Robison, 469 P.3d 892 (Kan. 2021) (opinion affirming Kansas Court of Appeals decision)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case presents an exceptionally important question that has divided Members of this Court and the lower courts: Does the Sixth Amendment right to have a jury determine beyond a reasonable doubt every fact necessary to support criminal punishment apply to criminal restitution, just as it applies to fines, imprisonment, and capital punishment? The Kansas Supreme Court below said "no." But logic and history say otherwise. Only this Court can ensure that "the right to a jury trial" does not "mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption." *Hester v. United States*, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial from denial of certiorari).

1. In decision after decision, this Court has held that the Sixth Amendment guarantees the defendant's right to have a jury find, beyond a reasonable doubt, every fact necessary to impose a criminal penalty. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held that a jury must find any fact increasing the penalty beyond a statutory maximum term of imprisonment. The Court then applied that rule to any finding necessary to increase a sentencing range, *Blakely v. Washington*, 542 U.S. 296, 306 (2004); to trigger a mandatory minimum sentence, *Alleyne v. United States*, 570 U.S. 99, 116 (2013); or to authorize a death sentence, *Ring v. Arizona*, 536 U.S. 584, 609 (2002). And ten years ago, the Court held in *Southern Union Co. v. United States*, 567 U.S. 343, 346 (2012), that a jury must also make any finding necessary to impose criminal fines. These holdings all honored the text of the Sixth Amendment and the role of the jury at common law.

Despite this Court's guidance, and over a well-reasoned dissent, the Kansas Supreme Court refused to apply *Apprendi* to criminal restitution. Instead, it affirmed orders of restitution, based solely on disputed findings made by a judge, against Petitioners Taylor Arnett and Robert James Robison III. In the Kansas court's view, this Court's "silen[ce]" and refusal to take up the question several years ago in *Hester* were good reasons to deny relief. App. 7a.

2. It is time for this Court to take up this exceptionally important question. Judges order countless criminal defendants to pay restitution every year, often causing crippling financial burdens. Those orders rest on findings made by judges, not juries. And as several judges have recognized, that approach is not "well-harmonized with *Southern Union*." *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013).

But their arguments have fallen on deaf ears. In the decade since *Southern Union*, the lower courts have largely clung to their precedents. So constrained, they have rejected compelling arguments that criminal restitution is a penalty just like any other, and that both logically and historically it must rest on the truth of accusations tested by a jury. This case proves the point. A majority of the Kansas Supreme Court surveyed lower-court holdings and inferred from this Court's silence "that restitution does not implicate a defendant's Sixth Amendment right to a jury." App. 7a. So all eyes are now on this Court. Whatever good might have come from letting the issue percolate after *Hester* has not come to pass.

3. This Court's decisions and the jury's role at common law show that the Sixth Amendment requires a jury to find every fact necessary to support criminal

restitution. As this Court and others have recognized, restitution is a penalty; it is part of a sentence imposing criminal punishment. And the law often imposes severe consequences, including reincarceration, for failure to pay. Restitution is as much a criminal penalty as the fines in *Southern Union*.

What's more, historical practice confirms that juries, not judges, found the facts necessary to impose criminal restitution. From the reign of Henry VIII, if not earlier, restitution turned on conviction by jury on an indictment or appeal of felony specifying particular items or sums. That tradition continued through early American law. Common-law practice thus shows that juries determined the truth of any criminal accusation necessary to impose restitution, just like they did for any other criminal penalty.

4. These cases are ideal vehicles for resolving the question presented. If this Court were to grant review and reverse, the restitution orders against Ms. Arnett and Mr. Robison would need to be vacated, and jury findings would need to support any future restitution order. And there are no jurisdictional or procedural hurdles to prevent this Court from resolving this issue of exceptional importance.

The Sixth Amendment doesn't treat criminal restitution any differently than criminal fines. A judge cannot impose either unless the jury first makes the necessary factual findings. That is the only logical rule under this Court's caselaw, and it is the only result that aligns with the original meaning of the Sixth Amendment and honors the historical role of the jury at common law. The Court should grant review.

OPINIONS BELOW

The opinions of the Kansas Supreme Court (Arnett: App. 1a-37a; Robison: App. 38a-58a) are reported at 496 P.3d 928 (Arnett) and 496 P.3d 892 (Robison). The opinion of the Kansas Court of Appeals in Arnett's case (App. 59a-64a) is unpublished but available at 2015 WL 6835244. The opinion of the Kansas Court of Appeals in Robison's case (App. 65a-105a) is published at 469 P.3d 83.

JURISDICTION

The Kansas Supreme Court entered judgment in both cases on October 15, 2021. On January 4, 2022, Justice Gorsuch extended the time to file a petition for a writ of certiorari to February 12, 2022, 121 days from the judgments of the Kansas Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the U.S. Constitution, as well as the relevant Kansas statutes, are reproduced in the appendix. App. 124a-48a.

STATEMENT

A. Legal background

In a series of decisions, this Court has held that a jury must find any fact necessary to impose a criminal sentence, whether that sentence involves imprisonment, capital punishment, or criminal fines.

1. In *Apprendi*, the Court held that a jury must determine any fact that increases the maximum penalty for a crime. 530 U.S. at 490. After the defendant pleaded guilty, the sentencing judge found that the crime was motivated by racial bias and imposed an

increased term of imprisonment under a statute allowing the judge to increase the penalty for hate crimes. *Id.* at 471-72. The Court held that the judge's factfinding was unconstitutional because criminal penalties, like criminal convictions, are subject to the Sixth Amendment right to a jury trial. "Other 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." *Id.* at 490.

In reaching that decision, the Court looked to the jury's role at common law. "[T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing." *Id.* at 479 (citation omitted). Instead, the law tended to prescribe a particular sanction for each offense. *Id.* Thus, the judgment, "though pronounced or awarded by the judges, [was] not their determination or sentence, but the determination and sentence of *the law*." *Id.* at 479-80 (quoting 3 William Blackstone, *Commentaries* 396 (1769)).

The Court made "clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Id.* at 481. But it also made clear that the judge's discretion is limited to the range prescribed by statute and found by the jury. History highlighted "the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83.

2. a. The Court clarified *Apprendi* in *Blakely*. *See* 542 U.S. at 303. While *Apprendi* held that a jury must determine facts that increase a statutory maximum sentence, *Blakely* made clear that the relevant "statutory maximum" is the highest sentence the judge may impose based solely on the jury's findings, even if the statute allows a higher sentence based on further judicial findings. *Id.* at 303-04.

To illustrate: Blakely pleaded guilty to kidnapping, which carried a statutory "standard range" sentence of 49 to 53 months and a statutory maximum of 10 years' imprisonment. *Id.* at 299. Finding that the defendant had acted with "deliberate cruelty," the judge imposed an "exceptional sentence" of 90 months. *Id.* at 299-300. But the "facts supporting that finding were neither admitted by petitioner nor found by a jury." *Id.* at 303.

The Court held that Blakely's sentencing violated *Apprendi* because the jury verdict alone did not authorize the enhanced sentence the judge imposed. *See id.* at 304-14. Although there was a 10-year statutory maximum, the court explained that the relevant maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04. Thus, the relevant maximum could not require factual findings beyond "the facts admitted in the guilty plea." *Id.* at 304. The Court explained that its holding was faithful to common-law principles "by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Id.* at 306.

b. The Court soon extended and reaffirmed *Blakely* and *Apprendi*. In *United States v. Booker*, 543 U.S. 220, 227, 233-34 (2005), for example, the Court held that the then-mandatory U.S. Sentencing Guidelines violated the Sixth Amendment by requiring a judicial finding to exceed a certain sentencing range. And in *Cunningham v. California*, 549 U.S. 270, 288-93 (2007), the Court held that California's sentencing scheme likewise violated the Sixth Amendment because it "authorize[d] the judge, not the jury, to find the facts permitting an upper term sentence."

3. Two years after *Apprendi*, the Court held in *Ring* that *Apprendi* applies not just to terms of imprisonment, but also to capital punishment. 536 U.S. at 609. "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished," the Court reasoned, "if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Id.* The Court thus held that the jury must find any fact necessary to support a death sentence. *Id.*; *accord Hurst v. Florida*, 577 U.S. 92, 97-99 (2016).

4. In *Southern Union*, the Court held that *Apprendi* applies to criminal fines, finding "no principled basis under *Apprendi* for treating criminal fines differently" from "imprisonment or death." 567 U.S. at 346, 349. The case centered on the sentencing judge's imposition of a fine on Southern Union Company for environmental pollution. *Id.* at 347. Although the statute prescribed a penalty of up to $50,000 per day of in violation, the jury was not asked to find the precise duration of the violation. *Id.* Thus, the sentencing judge relied only on his interpretation of the jury's general findings, rather than any specific finding about the duration of the violation, in calculating

Southern Union's fine. *See id.* And the court of appeals detected no problem because it thought that *Apprendi* didn't apply to criminal fines. *Id.*

This Court reversed. *Id.* at 349. The Court reasoned that "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.'" *Id.* (citation omitted). "That concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses." *Id.* The Court emphasized that it had "never distinguished one form of punishment from another" when "stating *Apprendi*'s rule." *Id.* at 350.

History confirmed that logic. The Court found "ample historical evidence showing that juries routinely found facts that set the maximum amounts of fines." *Id.* at 358. "English juries were required to find facts that determined the authorized pecuniary punishment." *Id.* at 354. And "[f]ines were by far the most common form of noncapital punishment in colonial America." *Id.* at 349. The Court's "review of state and federal decisions disclose[d] that the predominant practice was for [the] facts [determining the amount of the fine] to be alleged in the indictment and proved to the jury." *Id.* at 354 (citing decisions). The Court discerned from this practice "[t]he rule that juries must determine facts that set a fine's maximum amount." *Id.* at 356. That rule reflected the "two longstanding tenets" that a jury should decide every accusation against a defendant and that punishment must be based on specific facts. *Id.* (citation omitted).

5. Finally, the Court applied *Apprendi* in *Alleyne* to hold that the jury must determine any fact that

increases the statutory minimum for an offense. 570 U.S. at 116. The Court reasoned that "the legally prescribed [sentencing] range *is* the penalty affixed to the crime," so "a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id.* at 112. The Court reaffirmed that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 103.

B. Factual and procedural background

Kansas' restitution scheme requires judges to determine how much restitution to order based on their findings about the losses caused by the defendant's crime. Under this scheme, the judges in Ms. Arnett's and Mr. Robison's cases ordered restitution based on their own findings of fact.

1. Kansas' restitution scheme makes judges, not juries, responsible for finding the facts necessary to impose restitution—the amount of "damage or loss caused by the defendant's crime." Kan. Stat. Ann. § 21-6604(b)(1); *see id.* § 21-6607(c)(2). "In addition to or in lieu of" imprisonment, probation, or fines, *id.* § 21-6604(b)(1), a defendant must "make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime," *id.* § 21-6607(c)(2).

Once the judge determines the amount of restitution, "the restitution shall be a judgment against the defendant that may be collected by the court by garnishment or other execution as on judgments in civil cases." *Id.* § 21-6604(b)(2). But victims may not civilly enforce restitution orders, as the Kansas Supreme Court held separately below as a matter of state law. *See* App. 2a, 8a-20a.

2. a. In Taylor Arnett's case, the sentencing judge ordered $33,248.83 in restitution to burglary victims. App. 2a-3a, 107a. Arnett pleaded guilty to one count of conspiracy to commit burglary after she let her boyfriend use her mother's car, in exchange for $200, to burglarize two houses. *Id.* Arnett's guilty plea did not mention restitution. App. 2a. The trial court found that Arnett proximately caused $33,248.83 in losses and ordered her to pay that sum, jointly and severally with her codefendants, to the burglary victims. App. 2a-3a, 107a. The judge calculated that amount by adding the "losses suffered by the victims" to the amount of property damage to one of the homes and "undisclosed 'out-of-pocket' expenses for the other victim." App. 120a. The court rejected Arnett's argument that she should be responsible only for the $200 she received from her boyfriend for the use of her car. App. 2a-3a, 107a.

After an initial unsuccessful round of appeals addressing Arnett's state-law causation arguments, *see* App. 59a-64a, 118a-23a, the Kansas Supreme Court remanded to the Kansas Court of Appeals to consider Arnett's claim that the restitution order violated *Apprendi*. App. 3a, 60a, 116a-17a. The Kansas Court of Appeals rejected that argument, holding that "restitution is not considered punishment in the same way incarceration or a fine paid to the State would be" and that the Kansas statutes "impose neither mandatory minimum amounts nor maximum amounts." App. 63a-64a.

b. The Kansas Supreme Court affirmed. It reasoned that "restitution serves many purposes separate from criminal punishment." App. 7a. The court relied mainly on federal court of appeals' holdings—despite their "nonuniform approach"—that

Apprendi does not apply to criminal restitution. *Id.* Although it acknowledged Justice Gorsuch's dissent from denial of cert in *Hester*, the court saw "no reason why [it] should take up th[e] mantle" when the Supreme Court "has thus far been content to allow the lower courts to continue ruling that restitution does not implicate a defendant's Sixth Amendment right to a jury." *Id.*

c. Justice Standridge, joined by Justice Rosen, dissented. App. 20a-37a. In her view, *Apprendi* applies to criminal restitution. First, "[r]estitution is part of the criminal prosecution because it is part of the defendant's sentence." App. 22a. Relying on examples from English common law, Justice Standridge reasoned that juries historically determined every fact necessary to support a defendant's penalty. And "[l]ike a criminal fine, restitution is a penalty imposed by the State against a defendant for committing an offense. And punitive consequences attach to the failure to pay restitution, just like they do to the failure to pay criminal fines." App. 24a.

3. In Robert James Robison III's case, the sentencing judge ordered $2,648.56 in restitution. App. 40a. Robison pled no contest to one count of battery after hitting two officers at a county jail. App. 39a. After sentencing Robison to 32 months' imprisonment and 24 months' post-release supervision, the court ordered Robison to pay $2,648.56 in restitution to the workers compensation insurance carrier that paid one of the officer's medical bills. App. 39a-40a.

The Kansas Court of Appeals rejected Robison's argument that Kansas' restitution statute violates the Sixth Amendment. App. 73a-83a. But Judge Leben dissented. App. 86a-105a. First, he explained that

criminal restitution is punishment, especially given the severe consequences under Kansas law for not paying restitution. App. 90a-91a. Next, he relied on the role of the jury at common law, explaining that "[t]he earliest examples of restitution in England required jury findings." App. 91a. Finally, he analogized criminal restitution to the criminal fines in *Southern Union*, noting that both are penalties "inflicted by the government for committing an offense." App. 92a-93a. For those reasons, he would have held that Kansas's restitution scheme violates the Sixth Amendment.

Following its analysis in Arnett's case, the Kansas Supreme Court affirmed. App. 43a-46a. Justice Rosen dissented, explaining that he "would adopt the reasoning set forth in Judge Leben's dissent in this case … and Justice Standridge's dissent that [he] joined in *Arnett*." App. 58a. (Justice Standridge did not participate. *Id.*)

REASONS FOR GRANTING THE PETITION

Whether the Sixth Amendment right to trial by jury applies to criminal restitution is a question of exceptional importance. Restitution imposes crippling burdens on countless criminal defendants in both state and federal court. And despite the lower-court holdings that the Sixth Amendment doesn't extend to criminal restitution, dissenting Members of this Court and judges of federal and state appellate courts, including the dissenters below, have all made a compelling case that it does. Restitution is a criminal penalty, these jurists have noted, and it turns on accusations that must be submitted to a jury just like any other question of fact, as the jury's common-law role confirms.

These powerful dissents and the enormous practical importance of the question presented underscore the need for this Court's review. Despite all the reasons to doubt the lower courts' refusal to extend *Apprendi* to criminal restitution, courts have adhered to their pre–*Southern Union* precedents. So the Kansas Supreme Court here figured that it should join them. Even worse, the Kansas high court inferred from this Court's silence, including its denial of review in *Hester*, that these ill-considered holdings must be right, or at least not important enough to contradict. The need for this Court's intervention is thus greater now than it was even in *Hester*, because further percolation is unlikely to make a difference.

And the merits case is strong indeed. Logic and history alike prove that the Sixth Amendment right to trial by jury applies to criminal restitution. As this Court's decisions confirm, criminal restitution is a penalty; it is imposed by the state and serves the state's ends of justice, even if it also compensates victims. And like any other penalty—criminal fines, imprisonment, or capital punishment—the facts necessary to support criminal restitution must be submitted to the jury. That's the way it was at common law, when restitution required both specific allegations in an appeal of felony or indictment and confirmation of those accusations by a jury.

Finally, this case is an excellent vehicle. The question presented is outcome-determinative: Ms. Arnett and Mr. Robison both suffer under restitution orders imposed only on judicial factfinding, and reversal would require a jury to decide the disputed questions of fact. This Court should wait no longer to grant review and ensure that "the right to a jury trial" does not "mean less to the people today than it did to those

at the time" of the Founding. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting from denial of certiorari).

I. The question presented is exceptionally important and has generated considerable judicial disagreement.

The question presented is vital to countless criminal defendants nationwide who face the onerous burden of criminal restitution based solely on a judge's findings of fact. Members of both this Court and the lower courts have advanced compelling arguments that refusing to extend *Apprendi* to criminal restitution makes no logical sense and ignores original meaning and the historical role of the jury, which found the facts necessary to support restitution at common law. Given lower courts' refusal to reengage with these arguments in the decade since *Southern Union*, only this Court can ensure that the Sixth Amendment's protections are as robust as they were at the Founding.

A. Criminal restitution imposes crippling burdens on many defendants, all without constitutional protections.

Many states and the federal government have statutory schemes authorizing or requiring criminal restitution for a wide range of harms. These schemes base the amount of restitution on the nature of the crime. Despite the fact-intensive nature of the restitution inquiry, these statutes give complete power to the judge to single-handedly find the facts supporting this punishment.

Kansas provides a good example: a judge must find the amount of "the damage or loss caused by the defendant's crime." Kan. Stat. Ann. § 21-6607(c)(2). Many other states have statutes requiring or allowing

for restitution to victims, the community, or the state. See Cortney E. Lollar, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93, 100-02 (2014). And the federal government requires criminal restitution under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. Under the MVRA, the judge must find (1) the value of property, (2) the amount of medical care, including rehabilitative treatment, (3) the amount of funeral and related expenses, and (4) the amount necessary to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *Id.*§ 3663A(b)(2)(C).

Besides compensating victims for pecuniary losses, many restitution schemes "compensate for emotional, psychological, and hedonic harms." Lollar, *supra*, at 102. Some schemes "order defendants to pay 'restitution' to the state for the costs of investigating and prosecuting the crime(s) with which they are charged." *Id.* at 142. Similarly, some restitution schemes include "costs victims incur in hiring their own lawyers," where applicable, as well as "past and future lost wages, and other financial losses previously deemed 'consequential damages.'" *Id.* at 102; *see In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012).

Restitution also has a significant punitive impact as a practical matter. Restitution orders can result in substantial sums, and "statistics confirm the vast majority of criminal defendants are indigent." Lollar, *supra*, at 125. At the end of 2016, the total outstanding restitution debt owed in federal cases was $110.2 billion. GAO, *Federal Criminal Restitution: Factors to*

Consider for a Potential Expansion of Federal Courts' Authority to Order Restitution 14 (Oct. 2017).

B. The question presented has divided Members of this Court as well as judges of the courts of appeals and state courts.

Whether the Sixth Amendment applies to criminal restitution has divided judges nationwide, from Members of this Court to judges of the courts of appeals and state courts. Although courts have rejected arguments that *Apprendi* applies to criminal restitution, the dissenting voices confirm that the issue is important and warrants this Court's attention. Indeed, as the Kansas Supreme Court's decision shows, further percolation is unlikely to make a difference.

1. a. Dissenting from the denial of certiorari in *Hester*, Justice Gorsuch and Justice Sotomayor expressed serious concerns with the prevailing view that the Sixth Amendment does not apply to criminal restitution. 139 S. Ct. at 509-11 (Gorsuch, J., dissenting from denial of certiorari). The question is "worthy of [the Court's] review," they explained, noting that the Ninth Circuit below had "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" and that "[j]udges in other circuits have made the same point." *Id.* at 510 (quoting *Green*, 722 F.3d at 1151). And the question is "important" because criminal restitution "plays an increasing role in federal criminal sentencing today," involving significant sums of money and threatening serious consequences for nonpayment, such as "suspension of the right to vote, continued court supervision, or even reincarceration." *Id.*

In Justice Gorsuch and Justice Sotomayor's view, the arguments against applying *Apprendi* to criminal restitution "seem[] doubtful." *Id.* Under *Blakely*, "the term 'statutory maximum'" refers "to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted." *Id.* If the jury has made no findings, they reasoned, then "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." *Id.*

The dissenters also emphasized that criminal restitution is a penalty just like any other criminal punishment. Federal statutes "describe restitution as a 'penalty' imposed on the defendant as part of his criminal sentence, as do [the Court's] cases." *Id.* at 511 (citing, among others, *Pasquantino v. United States*, 544 U.S. 349, 365 (2005) (Thomas, J.)). Those authorities align with the understanding of the "historical role of the jury at common law." *Id.* (quoting *Southern Union*, 567 U.S. at 353). "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.* What's more, the dissenters concluded, "if restitution really fell beyond the reach of the Sixth Amendment's protections in *criminal* prosecutions, we would then have to consider the Seventh Amendment and its independent protection of the right to a jury trial in *civil* cases." *Id.*

b. Justices have also expressed serious concerns about allowing judges, rather than juries, to determine punishment in related contexts. In his concurrence in *Apprendi*, for example, Justice Thomas explained that "the Constitution requires a broader rule than the Court adopts"—that a crime constitutes

"every fact that is by law a basis for imposing or increasing punishment." 530 U.S. at 499-501 (Thomas, J., concurring). Justice Thomas relied on "[c]ases from the founding to roughly the end of the Civil War" in which the jury, not the judge, found each element necessary to support a defendant's punishment. And Justice Thomas reiterated that view while writing for the Court in *Alleyne*, relying on "the relationship between crime and punishment" at common law to hold that the jury must determine facts supporting an increase in a minimum sentence. 570 U.S. at 108-09.

Consistent with his view of the jury's role at common law, Justice Thomas has argued that the Court should expand the *Apprendi* rule. For instance, he has urged the Court to overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), because *Apprendi* should make no "exception for the 'fact of a prior conviction.'" *Mathis v. United States*, 136 S. Ct. 2243, 2259 (2016) (Thomas, J., concurring). Similarly, he joined Justice Scalia and Justice Ginsburg in urging the Court to grant review to hold that "any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury." *Jones v. United States*, 135 S. Ct. 8, 8 (2014) (Scalia, J., joined by Thomas, J., and Ginsburg, J., dissenting from denial of certiorari). Particularly disturbing in *Jones* was the sentencing judge's reliance on *acquitted conduct* to increase the defendant's sentence. *Id.* at 9. As then-Judge Kavanaugh wrote, sentencing based on acquitted conduct likely is unconstitutional because *Blakely*'s logic "would require a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence." *United States v. Bell*, 808 F.3d

926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

Finally, in his dissent in *Paroline v. United States*, 572 U.S. 434, 471 (2014), the Chief Justice, joined by Justice Thomas and Justice Scalia, explained that judge-ordered criminal restitution may raise due process concerns. A restitution scheme "that asks district judges to impose restitution and other criminal punishment guided solely by their own intuitions regarding comparative fault," he explained, "would undermine the requirement that every criminal defendant receive due process of law." *Id.*

2. Dissenting judges in the courts of appeals, too, have made a strong case that *Apprendi* applies to criminal restitution. In the Eighth Circuit, Judge Bye explained that "the determination of the amount of restitution is a 'fact'" and that "restitution must be considered a 'criminal penalty.'" *United States v. Carruth*, 418 F.3d 900, 905 (8th Cir. 2005) (Bye, J., dissenting). And in the Third Circuit, Judge McKee would have held that a jury, not a judge, needed to "determine the amount of restitution under either the [MVRA] or the Victim Witness Protection Act." *United States v. Leahy*, 438 F.3d 328, 339 (3d Cir. 2006) (McKee, concurring in part and dissenting in part).

3. Consider too the dissents below. In the Kansas Supreme Court, Justice Standridge explained that *Apprendi* should apply to criminal restitution because "[t]he Sixth Amendment right to a jury trial applies in 'all criminal prosecutions,'" and "[r]estitution is part of the criminal prosecution because it is part of the defendant's sentence." App. 21a-22a (quoting U.S. Const. amend. VI). She also pointed to *Southern Union*: "Like a criminal fine, restitution is a penalty

imposed by the State against a defendant for committing an offense. And punitive consequences attach to the failure to pay restitution, just like they do to the failure to pay criminal fines." App. 24a. History, too, supported her analysis, with English common-law decisions showing that larceny victims could recover stolen property only if they filed "a writ of restitution that listed the property in the indictment" and the jury made a finding of ownership. App. 22a. Judge Leben made similar points in his dissent in the Kansas Court of Appeals. *See* App. 86a-105a.

C. This Court's intervention is critical given lower courts' refusal to revisit misguided precedent.

This Court's review of the question presented is crucial. As the decision in Arnett's case shows, courts often follow existing holdings that *Apprendi* doesn't apply to criminal restitution because those holdings are already on the books—in most cases, in precedents decided before *Southern Union*. *See, e.g.*, *United States v. Milkiewicz*, 470 F.3d 390, 403-04 (1st Cir. 2006) (collecting decisions from seven courts of appeals decided between 2004 and 2006). And despite Justice Standridge's argument in dissent that this Court's "silence" on the issue "tells us nothing," App. 28a, the lower courts seem to think just the opposite. After all, the Kansas Supreme Court thought that absent some "signal" from this Court, lower courts must be correct to "continue ruling that restitution does not implicate a defendant's Sixth Amendment right to a jury." App. 7a.

But this Court's "silen[ce]," *id.*, doesn't mean the Kansas court took the right approach or that this Court should leave the issue to the lower courts. The

Ninth Circuit put it this way: "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." *Green*, 722 F.3d at 1151. Yet the courts of appeals continue to follow such pre–*Southern Union* holdings, and likely will do so if this Court doesn't intervene. *See also, e.g.*, *United States v. Churn*, 800 F.3d 768, 782 (6th Cir. 2015); *United States v. Burns*, 800 F.3d 1258, 1261-62 (10th Cir. 2015); *United States v. Vega-Martínez*, 949 F.3d 43, 55 (1st Cir. 2020) (citing decisions "conclud[ing] that *Southern Union* does not overrule their previous holdings that *Apprendi* does not apply to restitution calculations").

To be clear, the lower courts' refusal to apply *Apprendi* to criminal restitution provides no reason to *deny* review. As Judge McKee has observed, "before *Booker* was decided, one could have developed an even more impressive list of the courts that had incorrectly concluded that *Apprendi* does not apply to the federal sentencing guidelines." *Leahy*, 438 F.3d at 345 (McKee, J., concurring in part and dissenting in part). The lower courts' holdings require review precisely because further percolation will not give the Court a better opportunity to ensure that the Sixth Amendment means today what it meant at the Founding.

II. The Sixth Amendment demands a jury trial before imposition of criminal restitution.

Both the logic of this Court's cases and the historical role of the jury in imposing restitution make clear that the Sixth Amendment applies to restitution. The Kansas Supreme Court's contrary ruling is wrong. Criminal restitution is a penalty, just like criminal

fines, imprisonment, or capital punishment, and so the jury must find the facts necessary to support it. Indeed, that's exactly what happened at common law.

A. The logic of the Court's decisions requires a jury to find the facts necessary to support criminal restitution.

Apprendi's logic proves that a jury, not a judge, must find the facts necessary to impose criminal restitution. Restitution is a criminal punishment just like imprisonment or fines. And just as there is "no principled basis under *Apprendi* for treating criminal fines differently" from other punishments, such as imprisonment or a death sentence, *Southern Union*, 567 U.S. at 349, there is no principled basis for treating criminal restitution differently from criminal fines.

The Court has said time and again that criminal restitution is a penalty. In *Kelly v. Robinson*, 479 U.S. 36, 51-52 (1986), for example, the Court classified restitution as a "penal sanction[]" then exempt from discharge under the Bankruptcy Code. The Court explained that "[a]lthough restitution does resemble a judgment 'for the benefit' of the victim," it turns "on the penal goals of the State," including "rehabilitation and punishment, rather than the victim's desire for compensation." *Id.* at 52-53; *see also id.* at 49 n.10 ("[r]estitution is an effective rehabilitative penalty"). And in *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 559-60 (1990), the Court noted that criminal restitution under Pennsylvania law was "enforceable by the substantial threat of revocation of probation and incarceration," meaning that it was "secured by the debtor's freedom rather than his property." That is the consequence in many states, including Kansas, where probation and thus

ineligibility for expungement of a conviction may continue so long as the defendant owes restitution. *See* Kan. Stat. Ann. §§ 21-6607(c), 21-6608(c)(7), 21-6614.

Similarly, in describing restitution under the MVRA, the Court has explained that the purpose of restitution is "to mete out appropriate criminal punishment." *Pasquantino*, 544 U.S. at 365. Indeed, restitution is required "as part of the sentence for specified crimes." *Manrique v. United States*, 137 S. Ct. 1266, 1270 (2017); *see, e.g.*, 11 U.S.C. § 1328(a)(3) (excluding from bankruptcy discharge debts "for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime"). The dissenters in *Paroline* referred to restitution the same way, lumping it together with "other criminal punishment." 572 U.S. at 471 (Roberts, C.J., dissenting).

In short, criminal restitution is just like the fines in *Southern Union*. Restitution too is "inflicted by the sovereign for the commission of offenses." *Southern Union*, 567 U.S. at 349. Even though restitution typically goes to the victims, the "obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." *Kelly*, 479 U.S. at 52 (citation omitted). And the consequences for noncompliance—incarceration—leave no doubt that restitution is a penalty.

Once it is clear that restitution is a criminal penalty, the Sixth Amendment analysis under *Apprendi* is straightforward. The jury must find any fact necessary to support a restitution order.

B. The historical role of the jury confirms that the Sixth Amendment extends to criminal restitution.

More than a page of history supports applying *Apprendi*'s logic to criminal restitution. *See Apprendi*, 530 U.S. at 476-77; *Southern Union*, 567 U.S. at 353; *cf.* Amy Coney Barrett & John Copeland Nagel, *Congressional Originalism*, 19 U. Pa. J. Const. L. 1, 11 (2016). Start with the proposition that restitution is a criminal penalty. "The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time." S. Rep. No. 104-179, at 12-13 (1995). Indeed, "[t]he concept of restitution—an offender compensating a victim for a wrong the offender inflicted on the victim—goes back millennia and is recorded in the writings of the early civilization of Sumer over four thousand years ago." *See* Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 Fordham L. Rev. 2711, 2711 (2005).

Unsurprisingly, the common law treated restitution as a penalty by requiring a jury to find the necessary facts. Before the court could order restitution, the wrongdoer had to be convicted on an indictment or on an appeal of felony listing the items subject to restitution. The specific indictment or appeal and the conviction, taken together, ensured the jury found the facts necessary to impose restitution.

1. Medieval-era common law and statutory practices laid the groundwork for restitution in England and the United States during the Founding. *See* 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, 471-72 (2014). As early as the Middle Ages, juries convicted wrongdoers in appeals of felony or on indictments specifying the goods stolen—thus finding the crucial facts supporting any restitution order.

Take the "ancient English form of prosecution" known as the "appeal of felony," *id.* at 472, "an oral accusation of crime made by" a victim or accomplice, John Baker, *An Introduction to English Legal History* 543 (5th ed. 2019). "Such prosecutions were 'criminal,' … in the sense that their purpose was the punishment of felony by death and forfeiture." *Id.* at 543-44. And if the wrongdoer was "convicted or attained on such appeal," the victim-appellant was entitled to "restitution of such of the goods as are mentioned in the appeal." 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* 787 (1806); *see also* Barta, *supra*, at 472.

Over time, the indictment overtook the appeal as the typical method of prosecution. Baker, *supra*, at 545. In 1529, King Henry VIII and the English Parliament passed a statute enabling victims of theft to obtain restitution on successful indictments. 21 Hen. 8 § 11 (1529); *see* 1 Theodore F. T. Plucknett, *Concise History of the Common Law* 452 (5th ed. 1929). Under the act, "the owner of stolen goods [wa]s not strictly entitled to have restitution of any other goods than those specified in the indictment." East, *supra*, at 789; *see also* Joseph Chitty, 1 *A Practical Treatise on the Criminal Law* 815, 815-20 (1847). And, of course, restitution required a conviction. *See* East, *supra*, at 789. The victim could obtain restitution only if the wrongdoer was "found guilty by reason of the evidence." Matthew Hale, 1 *Historia Placitorum Coronae: The*

History of the Pleas of the Crown 541-42, 546 (1847); *cf. Haris's Case* (1608) 74 Eng. Rep. 1092 (K.B.) (ordering restitution after wrongdoer was "arraigned and hang'd at the suit of the owner" for stealing his cattle).

2. English juries continued to find facts underlying restitution awards for theft throughout the eighteenth and nineteenth centuries. *See* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 933 (1984). As in medieval times, restitution was available for theft where the value and nature of the goods stolen were set forth in the indictment. *See* William Hawkins, *Treatise of the Pleas of the Crown* 234-35 (3d ed. 1739). After a specific indictment was presented, it was up to a jury to convict the wrongdoer. As early American courts recognized, "[i]n *England*, the owner cannot bring his action against the thief or a purchaser from him, until *after conviction*." *Hoffman v. Carrow*, 22 Wend. 285, 285 n.* (N.Y. 1839). Indeed, "[i]n *England*, the plaintiff could not recover merely because the goods had been stolen, without that fact having first been judicially ascertained." *Id.* at 297. To that end, in *Regina v. Macklin*, 5 Crim. L. Cases 216, 219 (Cent. Crim. Ct. 1850), the court declared it "shall therefore make the common order for restitution, subject, of course, to the identity of the goods being established."

3. Early American law took the same approach. From the Founding, federal and state laws alike provided for restitution for theft "only after a conviction and only if the indictment described the goods stolen or the jury made a special finding with respect to the goods." Barta, *supra*, at 475.

First, the indictment would specify the items allegedly stolen. For example, in *Commonwealth v.*

Smith, 1 Mass. (1 Will.) 245, 247 (1804) (citation omitted), the court held that the indictment needed "to state the value of the things stolen." And early courts attributed that specificity requirement to the possibility of restitution: "In indictments for larceny, it is necessary to allege the value of the property stolen … because the owner is entitled to restitution." *State v. Garner*, 8 Port. 447, 448 (Ala. 1839); *accord State v. Goodrich*, 46 N.H. 186, 187-88 (1865). Determining the exact value of the goods stolen was then the jury's job. *See State v. Somerville*, 21 Me. 20, 22 (1842); *Jones v. State*, 13 Ala. 153, 157 (1848).

Second, a court could order restitution only after conviction. A number of federal and state statutes, for example, provided for restitution upon conviction of theft. The federal Crimes Act of 1790 authorized restitution upon conviction "not exceeding the fourfold value of the property so stolen, embezzled or purloined … to be paid to the owner of the goods." 1 Stat. 2 ch. 9 § 16. And the 1802 Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, provided that a person who committed a crime within an Indian territory would "forfeit and pay" to the victim "a sum equal to twice the just value of the property so taken or destroyed." 2 Stat. 139, 141.

Early state statutes took a similar approach, providing for restitution after convictions for crimes like larceny, robbery, burglary, and horse-stealing. *E.g.*, 1829 Tenn. Pub. Acts ch. 23, §§ 27, 76; 1796 Va. Acts ch. 2, §§ V-VIII; 1860 Pa. Laws 382, § 179; *see Barker v. Almy*, 39 A. 185, 185 (R.I. 1898) (defendant found guilty of larceny twice the value of money or articles involved in restitution); *Salisbury v. State*, 6 Conn. 101, 105 (1826) (similar); *Smith v. Drew*, 5

Mass. (4 Tyng) 514, 515 (1809) (similar); *see also* 1 H. A. Washington, *The Writings of Thomas Jefferson* 147-62 (1858). For example, a Tennessee statute required "the jury before whom the trial is had" to find the property stolen and its value in the verdict. 1829 Tenn. Pub. Acts ch. 23, §§ 27, 76.

Courts implementing restitution schemes recognized that a judge had to follow the jury's findings. For example, the Pennsylvania Supreme Court noted that the "fact which gives rightfulness to the greater punishment should appear in the record." *Huntzinger v. Commonwealth*, 97 Pa. 336, 341 (1881) (quoting *Rauch v. Commonwealth*, 78 Pa. 490, 494 (1876)); *cf. Jones*, 13 Ala. at 157. "[T]o leave a judge to determine outside of the record," the court explained, "is to subject the defendant to an unconstitutional mode of trial." *Huntzinger*, 97 Pa. at 341 (citation omitted).

4. "[L]ooking at the historical parallels," then, "it makes sense that the jury trial right applies to criminal restitution." Laura I. Appleman, *Nickel and Dimed Into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. Rev. 1483, 1519 (2016). Juries determined the facts necessary to support restitution because restitution rested on specific allegations in an indictment proven upon conviction by jury. Indeed, restitution was considered "an effective element of state punishment of criminal acts." Kleinhaus, *supra*, at 2719; *cf.* 1 Daniel Rogers, *New York City-Hall Recorder* 113, 113 (1816) (*Penny's Case*). As the court put it in *Commonwealth v. Andrews*, 2 Mass. 14, 29-30 (1806), restitution of "treble damages," whether or not accompanied by "a fine or whipping," was part of the "*punishment*" to which "the convict shall be *sentenced*," and saying otherwise was "mere play upon words."

Blackstone explained that a jury should unanimously "confirm[]" the "truth of every accusation" against a defendant. 4 Blackstone, *supra*, at 343. And as historical practice makes clear, allegations relating to restitution were accusations like any others.

C. Lower courts' reasons for refusing to extend *Apprendi* to criminal restitution lack merit.

Neither of the two main reasons courts have given for refusing to apply the Sixth Amendment to criminal restitution has merit.

1. Some courts have reasoned that *Apprendi* does not apply to restitution because restitution is not a penalty but a civil remedy. *See, e.g.*, *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005); *Leahy*, 438 F.3d at 338. That conclusion is wrong.

First, this Court has already explained that restitution is criminal punishment that is part of the sentence, as courts of appeals have acknowledged in other contexts. *See, e.g.*, *United States v. Anthony*, No. 20-6134, 2022 WL 363770, at *3-5 & nn.5 & 6 (10th Cir. Feb. 8, 2022) (citing decisions). Restitution serves the state's goals, even though those goals include rehabilitation and victim compensation. What's more, it is often mandatory and usually enforced by threat of further penalties, including reincarceration. *Supra* pp. 14-16. Ms. Arnett's and Mr. Robison's cases confirm this point: civil enforcement of the restitution orders isn't an option under Kansas law. *See supra* pp. 9-10; App. 2a, 8a-20a.

Second, restitution's effect on the victim is "the wrong question." *Southern Union*, 567 U.S. at 351. As the Court put it when discussing fines, "[s]o far as *Apprendi* is concerned, the relevant question is the

significance of the fine from the perspective of the Sixth Amendment's jury trial guarantee." *Id.* at 352. Again, like fines, restitution is part of the defendant's sentence. And as historical practice shows, it rested on a jury's factfinding. *Supra* pp. 24-29. When restitution is "substantial enough to trigger" the right to a trial by jury, "*Apprendi* applies in full." *Southern Union*, 567 U.S. at 352.

Third, saying restitution isn't a penalty ignores practical reality. As discussed, restitution may be impossible for many defendants. *See supra* pp. 14-16. And in many ways, the only difference between a fine and restitution is who receives the funds. The day-to-day penal effect on the defendant is the same.

2. Courts have also reasoned that criminal restitution based on judicial factfinding does not violate the Sixth Amendment because restitution schemes create indeterminate frameworks with no maximum or minimum sentence. *See, e.g.*, *Burns*, 800 F.3d at 1261. But that rationale both fails on its own terms and misunderstands the logic of this Court's decisions, particularly *Blakely* and *Southern Union*.

First, as courts have recognized, "[t]he sentencing court has no authority to impose restitution in excess of the victims' losses." *Id.* at 1262. So there *is* a maximum sentence resting on findings of fact—the extent of the victim's losses.

Second, *Blakely* and *Southern Union* make clear why the indeterminate-sentencing objection makes no sense. Those decisions explain that the maximum (and minimum) penalty must rest on facts found by the jury. While judges have wide discretion "*within the range* prescribed by statute," a jury must find the facts necessary to support that range. *Southern*

Union, 567 U.S. at 353 (citation omitted); *Hester*, 139 S. Ct. at 510 (Gorsuch, J., dissenting from denial of certiorari). And the amount of the victims' losses (or some other statutory factor) is precisely what determines the range within which a judge may sentence.

Justice Gorsuch and Justice Sotomayor stressed this point. The term "statutory maximum" means "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 (Gorsuch, J., dissenting from denial of certiorari). Sentences include not just imprisonment or fines, but also restitution orders. "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.*

D. Restoring the jury's historical role in restitution is straightforward as a practical matter.

Restoring the jury's historical role in finding the facts necessary to support restitution is unlikely to pose any practical difficulties. Judges already make the required factual findings, and asking juries to take on that responsibility gives them little extra work. As Judge Tatel has put it, "insisting that restitution orders have an adequate factual basis imposes no significant limitation on restitution. The government can always ask the district court to craft a verdict form that ensures the jury is able to make factual findings sufficient to support a particular amount of restitution." *United States v. Pole*, 741 F.3d 120, 129 (D.C. Cir. 2013) (Tatel, J., joined by Kavanaugh, J., and Williams, J.).

Kansas' scheme provides a helpful example of the kinds of factual findings required to determine the amount of restitution and proves that a jury would be up to the task. "[R]estitution for a victim's damages or loss depends on the establishment of a causal link between the defendant's unlawful conduct and the victim's damages." App. 4a-5a (quoting *State v. Alcala*, 348 P.3d 570 (Kan. 2015)); *see also* Kan. Stat. Ann. § 21-6604(b)(1) (requiring the amount of criminal restitution "include, but not be limited to, damage or loss caused by the defendant's crime"). The statute requires at least two factual determinations: (1) the amount of the "damage or loss" that resulted from the crime, and (2) how much of that damage or loss was "caused by the defendant's crime"—a fact-intensive question, as in Ms. Arnett's case. Kan. Stat. Ann. § 21-6604(b)(1). Those are the kinds of determinations juries make all the time.

III. These cases are ideal vehicles for resolving the question presented.

These cases are excellent vehicles for resolving the question presented. The Kansas Supreme Court decided the question in both cases. App. 5a-8a, 43a-46a. Those holdings are outcome-determinative, and there are no jurisdictional problems or other procedural impediments. If this Court holds that *Apprendi* applies to criminal restitution, Ms. Arnett and Mr. Robison will have the right to have a jury decide the facts necessary to support any restitution.

And a jury would make a difference. Ms. Arnett and Mr. Robison both dispute the amount of restitution ordered. A jury could find that Ms. Arnett's boyfriend, not Ms. Arnett's act of loaning her boyfriend her mother's car, caused the victims' losses.

And in Mr. Robison's case, a jury could find that the loss to the insurer was less than the victim's medical bills. *See supra* pp. 9-12. The Sixth Amendment commits the state's accusations on these issues to the findings of a jury, not the discretion of a judge.

* * *

This Court should wait no longer to address whether the Sixth Amendment jury trial right applies to criminal restitution. Jurists across the country have called out lower courts' refusal to require jury findings illogical and contrary to historical practice and original meaning. Yet even after *Southern Union* and Justice Gorsuch and Justice Sotomayor's dissent in *Hester*, courts have taken this Court's silence as tacit approval of their misguided precedent.

This important constitutional question deserves far more than this Court's silence. As the Court explained in *Apprendi*, the right to trial by jury is "the great bulwark" of liberty. 530 U.S. at 477 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-41 (4th ed. 1873)). It requires "*the truth of every accusation*" to "be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." *Id.* (quoting 4 Blackstone, *supra*, at 343). Unless the Court grants review, "the right to a jury trial" may "mean less to people today than it did to those" at the Founding. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting from denial of certiorari). That result is untenable given the central role restitution plays in our system of criminal justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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