

In the
Supreme Court of the United States

TAYLOR ARNETT AND ROBERT JAMES ROBISON III,

Petitioners,

v.

STATE OF KANSAS,

Respondent.

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

**BRIEF FOR PROFESSOR CORTNEY E. LOLLAR
AND THE RODERICK & SOLANGE MACARTHUR
JUSTICE CENTER AS AMICI CURIAE IN
SUPPORT OF PETITIONERS**

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INTERESTS OF AMICI CURIAE¹

Cortney E. Lollar is the James and Mary Lassiter Professor of Law at the University of Kentucky J. David Rosenberg College of Law. Professor Lollar researches and teaches in the areas of criminal law, criminal procedure, and evidence. She has written extensively about criminal restitution, including on whether juries must find the facts necessary to support an award of criminal restitution—the question presented in this case. *See, e.g.*, Cortney E. Lollar, *Punishment Through Restitution*, 34 Fed. Sent. Rep. 98 (2022) (“*Punishment Through Restitution*”); Cortney E. Lollar, *Punitive Compensation*, 51 Tulsa L. Rev. 99 (2015); Cortney E. Lollar, *What Is Criminal Restitution*, 100 Iowa L. Rev. 93 (2014) (“*What Is Criminal Restitution?*”). Professor Lollar has a strong interest in seeing the Court take up this important question.

The Roderick & Solange MacArthur Justice Center (“MJC”) is a nonprofit organization founded by the family of J. Roderick MacArthur to advocate for civil rights and a fair and humane criminal justice system. MJC has represented clients facing myriad civil rights injustices, and has an interest in the sound and fair administration of the criminal justice system. MJC is particularly interested in shedding light on the ways in which the system imposes cruel and often debilitating economic burdens on those accused and

¹ The parties have consented in writing to the filing of this brief, and received timely notice of the intent to file. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

convicted of crimes, which create barriers to people re-entering society after conviction. MJC has litigated numerous cases challenging the ways in which fines, fees, and restitution are imposed and collected in criminal cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past several decades, the criminal justice system has expanded significantly, and the monetary obligations imposed on alleged offenders have grown along with it. At the same time, public opinion, spurred in part by a robust victims' rights movement, has shifted in victims' favor, and legislative action has followed. This confluence of events has led to a dramatic broadening of criminal restitution. *See, e.g.*, *What Is Criminal Restitution?*, *supra*, at 99-100.

Historically, restitution was limited in scope, focusing on the disgorgement of specific, concrete, and unlawful gains by criminal defendants. But federal and state statutes have expanded restitution far beyond its historical roots to become a major component of the criminal justice system. Each year, courts order criminal defendants to pay billions of dollars in restitution to cover a broad range of losses and costs supposedly connected to their conduct. In essence, restitution is now the criminal version of civil damages. Unlike civil damages, however, restitution is punitive in nature. Restitution is awarded during the criminal process, is part of the criminal sentence, and is backed by the government's uniquely coercive powers. As a result, failing to pay restitution carries consequences that have few parallels in the civil system, including the loss of liberty and other fundamental rights. *See id.* at 99-105, 123-29.

Yet restitution is awarded without giving criminal defendants the constitutional protections that are generally available during the criminal process and that would be available to similarly situated civil litigants. Judges award restitution based on facts they find, not based on facts found by a jury. *See, e.g.*, Pet. App. 2a-3a, 40a-41a. Under the line of decisions beginning with *Apprendi v. New Jersey*, this practice cannot stand. 530 U.S. 466 (2000). These cases make clear that the Sixth Amendment to the United States Constitution requires a jury—not a judge—to find facts that increase the minimum or maximum punishment for a crime. The reasoning and holdings of these decisions apply equally to facts necessary to support an award of criminal restitution.

As this Court and many others have recognized, restitution constitutes punishment for a crime. Just like other forms of criminal punishment, restitution is awarded during criminal proceedings, requires an underlying criminal conviction, and is part of the sentence for a crime. “The purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment,” *Pasquantino v. United States*, 544 U.S. 349, 365 (2005), in service of the government’s “penal and rehabilitative interests,” *Kelly v. Robinson*, 479 U.S. 36, 53 (1986). As with other forms of punishment, the government is responsible for enforcing restitution orders. Largely for that reason, failing to pay restitution is often met with swift, severe, and *punitive* sanctions, such as incarceration and the suspension of the right to vote.

Awarding restitution also requires finding facts—typically the amount of the defendant’s gain or the victim’s loss—that are not encompassed in a guilty verdict or plea. *Someone* must find those facts to

award restitution. Because finding those facts “alters the legally prescribed punishment so as to aggravate it,” *Apprendi* requires that “someone” to be the jury. *Alleyne v. United States*, 570 U.S. 99, 114 (2013). Indeed, the Court has already held that criminal *fines* are subject to *Apprendi*’s rule—including fines “calculated by reference to particular facts” such as “the defendant’s gain or the victim’s loss.” *Southern Union Co. v. United States*, 567 U.S. 343, 349-50 (2012). Restitution, which is computed essentially the same way as fact-dependent fines, is another form of criminal punishment to which *Apprendi*’s rule applies.

Decisions that have found the Sixth Amendment inapplicable to restitution, including the decisions below, cannot be reconciled with cases like *Apprendi* and *Southern Union* and often cling to obsolete precedents. But because of those decisions, billions of dollars of restitution continue to be awarded against criminal defendants each year without fundamental constitutional protections. The Court’s intervention is badly needed to end this widespread trampling of defendants’ rights. In fact, this case mirrors *Apprendi* itself. There, as here, the Court’s prior decisions had “foreshadowed” the rule that *Apprendi* announced, but lower courts continued to apply old precedents. *Apprendi*, 530 U.S. at 476. As it did there, the Court should grant certiorari to ensure that criminal defendants’ Sixth Amendment right to a jury trial is not lost “by gross denial” or “by erosion.” *Id.* at 483 (citation omitted).

ARGUMENT

I. A Jury Must Find the Facts Necessary to Support an Award of Criminal Restitution

As petitioners explain, in a line of cases beginning with *Apprendi v. New Jersey*, this Court has recognized that juries—not judges—were historically responsible for finding the facts that determine the punishment for a crime. *See* 530 U.S. 466, 476-85 (2000); Pet. 4-9. As a result, the Court has significantly curtailed the modern and anomalous practice of judges finding such facts. *See, e.g.*, *Apprendi*, 530 U.S. at 485-90.

Under *Apprendi*’s rule, judges retain discretion to choose a sentence “within a permissible range,” *id.* at 481, and may engage in limited factfinding to that end, but that range “is limited by[] the jury’s factual findings of criminal conduct,” *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019). A judge may impose a sentence up to the “maximum [allowed] . . . solely on the basis of the facts reflected in the jury verdict”—or, if the defendant pleads guilty, the facts “admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted). But if particular facts permit a sentence above that maximum or trigger a mandatory minimum sentence, a jury must find those facts before a judge can impose such a sentence. *See Alleyne v. United States*, 570 U.S. 99, 111-16 (2013).

These rules apply in full force to punishment other than incarceration, including monetary fines or penalties. As the Court recognized in *Southern Union Co. v. United States*, there is “no principled basis under *Apprendi* for treating criminal fines differently” from incarceration. 567 U.S. 343, 349

(2012). Just as juries must find facts that set a maximum term of imprisonment, juries must also “determine facts that set a fine’s maximum amount.” *Id.* at 356. That rule extends to facts that “quantify[] the harm caused by the defendant’s offense,” including the defendant’s gains or the victim’s losses. *Id.* at 358 (citation omitted); *see id.* at 354-56.²

Awards of criminal restitution fall squarely within the ambit of the *Apprendi* line of cases. Criminal restitution is generally “calculated by reference to . . . the defendant’s gain or the victim’s loss.” *Id.* at 349-50; *see, e.g.*, *What Is Criminal Restitution?*, *supra*, at 99-100. Just like other kinds of punishment, restitution is pursued by the government, is part of the sentence for a crime, and serves the government’s penal purposes. And awarding restitution requires finding additional facts—*e.g.*, the extent of the harm that the defendant caused the victim—that are not typically reflected in a jury verdict or a defendant’s admissions. Courts that have held that the Sixth Amendment does not apply to criminal restitution, including the Kansas Supreme Court below, have misunderstood the nature of criminal restitution and how it is awarded.

A. Criminal Restitution Is Punishment

The purpose and effect of criminal restitution show that it constitutes punishment, and precedents

² The Court has qualified *Apprendi*’s rule in two significant respects. *First*, the Court has held that “the fact of an earlier conviction” need not be found by a jury. *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998). *Second*, the Court has held that the Sixth Amendment jury-trial right does not apply when “the underlying offense is considered ‘petty.’” *Southern Union*, 567 U.S. at 350. Neither qualification is at issue here.

from this Court and others have recognized it as such. While restitution may also resemble a form of compensation for the victim, that aspect of restitution does not alter restitution’s fundamental character as criminal punishment.

1. While there is no universal test for determining whether a statute prescribes criminal punishment, Professor Lollar has advanced a two-part test that—like most other tests for punishment—considers the purpose and effects of a statutory sanction. *See What Is Criminal Restitution?*, *supra*, at 105-23; *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (listing non-exhaustive factors that focus on purpose and effects). *First*, the sanction must be a government action “subsequent to a criminal allegation” that results in a “substantial deprivation and/or obligation.” *What Is Criminal Restitution?*, *supra*, at 106. *Second*, that action is punishment if it is imposed (a) pursuant to a statute that reveals retributive or punitive intent; (b) “pursuant to a statute with unclear intent, but applied in a consistently condemnatory manner”; or (c) with the effect of “substantially diminishing a person’s well-being,” “in a way consistent with other criminal punishments.” *Id.* at 106, 123; *see id.* at 105-23.

Restitution plainly satisfies both parts of this test. As to the first part, a restitution order requires the defendant to pay money; it is entered after not only a criminal *allegation* but a criminal *conviction*; and the government bears responsibility for seeking, obtaining, and enforcing restitution orders. *See id.* at 129; *infra* at 8-9. As to the second prong, restitution is now a common feature of criminal statutes and processes that expressly or implicitly serve the government’s penal goals, and it burdens defendants

in much the same way as other forms of criminal punishment. *See What Is Criminal Restitution?*, *supra*, at 122-48, *infra* at 9-14. The Court need not adopt Professor Lollar’s test, however, to conclude that restitution is punishment.

2. Indeed, the conclusion that restitution is punishment follows from *any* reasonable analysis of restitution’s purpose and effects.

a. Many statutes reveal, on their face, that restitution is punitive and deeply intertwined with other kinds of criminal punishment. For example, a federal restitution statute permits courts to award restitution “in addition to or . . . in lieu of *any other penalty* authorized by law”—showing that Congress considered restitution to be a “penalty.” 18 U.S.C. § 3663(a)(1)(A) (emphasis added). The Kansas statute at issue here and other statutes are similar, allowing restitution “[i]n addition to or in lieu of” a long list of punitive consequences, including imprisonment, fines, and probation. Kan. Stat. § 21-6604(b)(1); *see id.* § 21-6604(a); Mich. Comp. Laws § 769.1a(2); W. Va. Code § 61-11A-4. Indeed, the legislators who enact restitution statutes understand that restitution serves punitive purposes. *See, e.g.*, S. Rep. No. 104-179, at 12 (1995) (federal statute was needed “to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society”).

Restitution is also remarkably similar to other recognized forms of criminal punishment. Restitution is “imposed by the Government ‘at the culmination of a criminal proceeding,’” “requires conviction of an underlying’ crime,” and “implicates ‘the prosecutorial powers of the government.’” *Paroline v. United States*, 572 U.S. 434, 456 (2014) (citations omitted).

Restitution “is part of the sentence” for a crime. *United States v. Oladimeji*, 463 F.3d 152, 156 (2d Cir. 2006). If a criminal conviction is overturned on appeal, the basis for the sentence and the punishment imposed, *including restitution*, disappear, so the government must refund restitution that the defendant paid. *See Nelson v. Colorado*, 137 S. Ct. 1249, 1256-58 (2017). And restitution, like other criminal punishment, abates if the defendant dies before the underlying conviction becomes final. *See, e.g., United States v. Brooks*, 872 F.3d 78, 87-91 (2d Cir. 2017), *cert. denied*, 139 S. Ct. 171 (2018); *People v. Johnson*, 499 P.3d 1045, 1049-50 (Colo. 2021).

Moreover, restitution is imposed and enforced in the same way as other widely recognized forms of punishment. In the federal system, for example, the probation office collects “information sufficient for the court to . . . fashion[] a restitution order,” the sentencing court orders restitution, restitution is included in the criminal judgment under the category of criminal monetary penalties, and the government enforces restitution using the same tools it uses to enforce criminal fines. 18 U.S.C. § 3664(a); *see id.* §§ 3613(f), 3664(d)-(e); Fed. R. Crim. P. 32(c)(1)(B); (d)(2)(B); *Dolan v. United States*, 560 U.S. 605, 608-09 (2010); Admin. Office of the U.S. Courts, *Judgment in a Criminal Case (AO 245B)* (rev. Sept. 2019).³ There is no meaningful difference between restitution and these sanctions.

To be clear, a statutory sanction can be punitive even if it does not follow a criminal conviction, lacks some or all of the essential characteristics of

³ Available at <https://www.uscourts.gov/sites/default/files/ao245b.pdf>.

commonly recognized forms of punishment, and is enforced differently from other punitive remedies. *See supra* at 7-8. But the fact that restitution is so similar to other recognized forms of punishment places its status as punishment beyond doubt. Indeed, for reasons such as these, this Court and others have recognized restitution's punitive purpose.

In *Kelly v. Robinson*, 479 U.S. 36 (1986), for example, this Court held that state criminal restitution orders are not dischargeable in bankruptcy because they fall within a provision precluding the discharge of debts that are "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit." 11 U.S.C. § 523(a)(7); *see Kelly*, 479 U.S. at 51-53. As the Court said there, restitution is imposed in the context of criminal proceedings that "focus on the State's interest in rehabilitation and punishment," *Kelly*, 479 U.S. at 53, and the decision to impose restitution turns "on the penal goals of the State and the situation of the defendant," *id.* at 52.

Pasquantino v. United States, 544 U.S. 349 (2005), is similar. There, the defendants were convicted of federal wire fraud because of their "scheme to defraud a foreign government of tax revenue." *Id.* at 354. They argued that the prosecution was barred by the common-law revenue rule—which prohibits domestic enforcement of foreign revenue laws—because they would have to pay "restitution of the lost tax revenue." *Id.* at 365. This Court held otherwise, recognizing that "the wire fraud statute advances the Federal Government's independent interest in punishing fraudulent domestic criminal conduct," and "[t]he purpose of awarding restitution . . . is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct." *Id.*

The Court’s decision in *Paroline* echoed *Kelly* and *Pasquantino*. That case concerned how to determine causation for measuring restitution in a child pornography case, where the victim is harmed by the collective actions of a large—and often anonymous—group of people who share images of the victim on the internet. *See* 572 U.S. at 449. The Court rejected the idea that *each* offender could be held liable for *all* of the victim’s losses, recognizing that restitution “serves punitive purposes” and that “holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors” would implicate concerns under the Excessive Fines Clause. *Id.* at 456. At the same time, the Court found that denying restitution altogether would “be at odds with the penological purposes” of the restitution scheme, which “impress[es] upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims.” *Id.* at 457. Balancing these concerns—which, again, centered on restitution’s role as *punishment*—the Court ultimately settled on an approach that would make each offender liable for a portion of the victim’s total losses. *See id.* at 458-62.

Lower courts, including almost every federal court of appeals and the Kansas Supreme Court below, have also found, in various contexts, that restitution is punitive. *See, e.g., Jones v. Governor of Fla.*, 975 F.3d 1016, 1038 (11th Cir. 2020) (en banc); *United States v. Crisp*, 820 F.3d 910, 915-16 (7th Cir. 2016); *United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006), *cert. denied*, 549 U.S. 1316 (2007); *Oladimeji*, 463 F.3d at 156; *United States v. Vandeberg*, 201 F.3d 805, 814 (6th Cir. 2000); *United States v. Edwards*, 162 F.3d 87, 89-90 (3d Cir. 1998); *United States v. Petersen*, 98 F.3d 502, 510 (9th Cir. 1996); *United*

States v. Bapack, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); *United States v. Williams*, 128 F.3d 1239, 1241-42 (8th Cir. 1997); *United States v. Rico Indus., Inc.*, 854 F.2d 710, 714 (5th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *United States v. Bruchey*, 810 F.2d 456, 461 (4th Cir. 1987); Pet. App. 7a, 12a-14a; *State v. Kinneman*, 119 P.3d 350, 355 (Wash. 2005).

b. Restitution has the same punitive effects as other forms of criminal punishment. As with other aspects of the criminal legal system, restitution disproportionately impacts low-income defendants who usually cannot pay it. *See infra* at 20-21. Yet, because restitution orders are backed by the full coercive power of the government, the failure to pay restitution can lead to the deprivation of the most basic rights and privileges. Defendants can lose their ability to register to vote, to serve on a jury, to run for office, to possess a firearm, and to drive a vehicle. *See, e.g.*, Tenn. Stat. § 40-29-202(b)(1); *Johnson v. Bredesen*, 624 F.3d 742, 747 (6th Cir. 2010), *cert. denied*, 563 U.S. 1008 (2011); *What Is Criminal Restitution?*, *supra*, at 123-29. And at least when the failure to pay is “willful[]”—a term that is loosely applied—courts can revoke probation or supervised release, and defendants can be re-incarcerated as a result. *Bearden v. Georgia*, 461 U.S. 660, 668 (1983); *see United States v. Montgomery*, 532 F.3d 811, 813-14 (8th Cir. 2008) (defendant sentenced to 11 months’ imprisonment for failing to pay restitution despite evidence of her mental illnesses and desire to work).

With these sanctions at their disposal, judges wield enormous power over defendants’ lives. One federal district court judge, for instance, has been known to order those who owe restitution to sell their homes, liquidate their retirement accounts, or even

empty their wallets in the middle of the courtroom. *See generally* Br. for Amicus Curiae Roderick & Solange MacArthur Justice Center, *United States v. Sensing*, No. 21-60662 (5th Cir. filed Mar. 2, 2022).

Restitution can also trap defendants in a vicious cycle. Having been convicted of a crime, a defendant may face significant difficulty finding a job. If the defendant does find a job, a suspended driver's license and lack of other transportation options may make it hard to keep that job. And if the defendant loses that job and is consequently unable to make restitution payments, the defendant may be re-incarcerated and other rights may continue to be suspended. *See What Is Criminal Restitution?*, *supra*, at 124-26.

Moreover, defendants need not necessarily *fail* to make restitution payments to lose their liberty. Mississippi assigns certain defendants to "restitution centers" if they "appear[] unlikely to meet obligations of the restitution program." Miss. Stat. § 99-37-19. Such defendants toil at low-wage jobs during the day and return to restitution centers run by the Mississippi Department of Corrections at night until they repay their restitution obligations and other fees—including room and board charges for the centers. *See* Anna Wolfe & Michelle Liu, *Think Debtors Prisons Are a Thing of the Past? Not in Mississippi*, Marshall Project (Jan. 9, 2020);⁴ Miss. Dep't of Corr., *Restitution Centers*.⁵ Hundreds of

⁴ Available at <https://www.themarshallproject.org/2020/01/09/think-debtors-prisons-are-a-thing-of-the-past-not-in-mississippi>.

⁵ Available at <https://www.mdoc.ms.gov/Community-Corrections/Pages/Restitution-Centers.aspx> (last visited Mar. 15, 2022).

defendants have been assigned to restitution centers, where they have spent months to years in these modern-day debtor's prisons. *See Wolfe & Liu, supra.* Although programs like Mississippi's have not (yet) become widespread, they underscore that restitution is treated like—and has all the same effects of—other forms of criminal punishment.

2. To be sure, criminal restitution is typically paid to crime victims and resembles compensation for the victim. For that reason, some courts have suggested that restitution is a restorative remedy—not a punitive sanction—for purposes of certain constitutional rights, including the Sixth Amendment jury-trial right. *See, e.g., United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012), *cert. denied*, 569 U.S. 1029 (2013); *United States v. Speakman*, 594 F.3d 1165, 1177-78 (10th Cir. 2010); *State v. Johnson*, 430 P.3d 494, 501 (Mont. 2018). Those courts generally analogize criminal restitution to a civil remedy. The Seventh Circuit, for example, has said that criminal restitution “enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution.” *United States v. Bach*, 172 F.3d 520, 523 (7th Cir.), *cert. denied*, 528 U.S. 950 (1999). But that is a false analogy, for three principal reasons.

First, restitution is not limited to giving supposed “tort victim[s]” their “damages.” *Id.* Restitution is not necessarily awarded to a specific victim; under federal law, for example, judges may award restitution based on community harms in drug cases “in which there is no identifiable victim.” 18 U.S.C. § 3663(c)(1). Moreover, the definition of “victim” for restitution purposes has expanded well beyond actual victims. Defendants may have to pay the government for the

cost of responding to, investigating, and prosecuting their crimes—effectively “fund[ing] the very law enforcement agencies that prosecuted them.” *What Is Criminal Restitution?*, *supra*, at 98-99; *see, e.g.*, *United States v. De La Fuente*, 353 F.3d 766, 773 (9th Cir. 2003) (costs of cleanup and decontamination for anthrax scare); *Dubois v. People*, 211 P.3d 41, 42 (Colo. 2009) (cost of police car wrecked while responding to call for assistance).

Restitution also is not limited to victims’ damages. Judges may award restitution even when a victim suffers no actual loss. *See, e.g.*, *United States v. Cliatt*, 338 F.3d 1089, 1093-94 (9th Cir. 2003). And even when there is an identifiable victim who has suffered concrete losses, a restitution award can far exceed those losses. *See, e.g.*, Mich. Comp. Laws § 780.766(5) (allowing judges, in some cases, to award “up to 3 times the amount of restitution otherwise allowed”); Okla. Stat. § 991f(A)(1) (similar).

Second, judges frequently award restitution based on conduct for which the defendant was *not* held legally responsible. Often under the guise of ordering restitution for conduct that is part of a “scheme, conspiracy, or pattern of criminal activity,” judges may order restitution for uncharged or unproven conduct, conduct underlying dismissed counts—and even conduct for which the defendant was *acquitted*. *E.g.*, 18 U.S.C. § 3663(a)(2); *see, e.g.*, *United States v. Wright*, 496 F.3d 371, 381-82 (5th Cir. 2007) (similar, but unindicted, fraud scheme); *United States v. Boyd*, 222 F.3d 47, 51 (2d Cir. 2000) (federal statute “confers authority to order a participant in a conspiracy to pay restitution even on uncharged or acquitted counts”); *Moore v. State*, 673 A.2d 171, 172-73 (Del. 1996) (upholding restitution for items stolen even though

defendant was acquitted of theft, and collecting state cases); *What Is Criminal Restitution?*, *supra*, at 130-33. This has no obvious tort analog. It is, however, akin to considering “relevant conduct” at sentencing, which concerns *punishment* of the offender. *See, e.g.*, U.S. Sent’g Guidelines Manual § 1B1.3 (U.S. Sent’g Comm’n 2021).

Finally, government agencies—not individual victims—are responsible for obtaining restitution, and restitution orders are backed by the full coercive power of the government. *See supra* at 9-10. By contrast, victims—the would-be tort plaintiffs—are not required to participate in restitution proceedings, have a “limited opportunity to influence the process,” and may not be able to enforce any resulting order. *Doe v. Hesketh*, 828 F.3d 159, 173 (3d Cir. 2016); *see* 18 U.S.C. § 3664(g)(1); Pet. App. 18a. In fact, if restitution is mandatory, courts may be obligated to order restitution even when “the victim doesn’t want” it. *United States v. Byrd*, __ F. Supp. 3d __, 2021 WL 6926468, at *1 (W.D. Ky. 2021). At the same time, restitution does not displace traditional civil remedies based on the same conduct. *See, e.g.*, *Brooks*, 872 F.3d at 90 n.16. Indeed, for reasons such as these, this Court has already recognized that restitution “operate[s] ‘for the benefit of’ the State” and is not “‘for . . . compensation’ of the victim.” *Kelly*, 479 U.S. at 53 (second alteration in original) (citation omitted).

B. Additional Facts Are Necessary to Support an Award of Criminal Restitution

Criminal restitution is a form of punishment that cannot be awarded without finding facts beyond those “reflected in the jury verdict” or “admitted by the

defendant.” *Blakely*, 542 U.S. at 303 (emphasis omitted).

1. To see why, consider a basic theft statute that criminalizes taking property with the intent to deprive the owner of it. *See, e.g.*, Kan. Stat. § 21-5801(a). The theft is complete once the defendant *takes* the property. *See, e.g.*, *State v. Plummer*, 283 P.3d 202, 210-11 (Kan. 2012). A guilty verdict or plea may establish that the defendant took property from the victim, but it does not establish the loss that a restitution award could cover. If, for example, the property is returned to the owner, the defendant can still be convicted of theft, but the owner may suffer no loss at all, or possibly only a loss for the temporary deprivation of the property. And even where the property is not returned to the owner, the property value used to determine restitution is not usually fixed by a guilty verdict or plea: A verdict or plea rarely determines a specific property value and, in any event, the relevant property value may change after the crime forming the basis of the verdict or plea. *See, e.g.*, 18 U.S.C. § 3663A(b)(1)(B)(i) (requiring restitution of “the greater of” the property’s value “on the date of the damage, loss, or destruction” or “on the date of sentencing”). In short, the verdict or plea is not by itself enough to establish whether the owner suffered a loss or the amount of that loss—facts critical to awarding restitution.

The facts that go into a restitution award can be far more numerous and complex than in this simple example. Restitution is often awarded for financial, physical, emotional, psychological, and hedonic harms that are difficult to quantify and to trace to the defendant. *See, e.g.*, *What Is Criminal Restitution?*, *supra*, at 133-35. Restitution awards thus depend on

many highly factual questions, such as: In a bank fraud case, what losses attributable to another co-conspirator are reasonably foreseeable? In a child pornography case, what is the economic harm inflicted by a defendant who viewed images but did not know or have sexual contact with the depicted victim? Did the defendant cause losses incurred by a third party? *See Punishment Through Restitution, supra*, at 101; *cf.*, *e.g.*, *Paroline*, 572 U.S. at 441 (government sought restitution of \$3.4 million for victim's lost income, future treatment and counseling costs, and attorneys' fees).

These questions must be decided before restitution may be awarded. As *Southern Union* recognized, they are exactly the kinds of questions that the Sixth Amendment assigns to the jury in fixing a maximum criminal fine. *See* 567 U.S. at 349-50, 354. They are also the kinds of questions that the Seventh Amendment and analogous state provisions routinely assign to the jury in civil cases. *See, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707-11 (1999). The Sixth Amendment likewise requires that a jury decide them when criminal restitution is at issue.

2. Courts have tried to avoid this obvious conclusion by holding that restitution statutes do not set a maximum amount of restitution or impose a maximum in the amount of the losses linked to the offense of conviction. *See, e.g.*, *United States v. Leahy*, 438 F.3d 328, 337-38 (3d Cir.) (en banc), *cert. denied*, 549 U.S. 1071 (2006); Pet. App. 6a; *see also, e.g.*, *United States v. Freeman*, 640 F.3d 180, 193 (6th Cir. 2011); *What Is Criminal Restitution?*, *supra*, at 150 n.217 (collecting cases). According to these courts, a guilty verdict or plea establishes that the defendant

is liable for restitution, at least up to the losses caused by the criminal conduct, so restitution does not *increase* punishment beyond that authorized by the verdict or plea. Rather, these courts view restitution orders as akin to the judge's selection of a particular sentence within the range authorized by the verdict or plea. *See, e.g., Leahy*, 438 F.3d at 337-38.

This line of reasoning is untenable. Statutes do not, for example, authorize infinite restitution and allow a judge to pick any amount of restitution between zero and infinity. Nor does a guilty verdict or plea by itself necessarily establish that the victim is entitled to restitution. Only *after* additional facts are found—typically, the amount of losses caused by the defendant's conduct—is restitution in any amount authorized. The maximum restitution a judge may award is therefore zero *unless* the jury finds additional facts that would support a non-zero award. *See Southern Union*, 567 U.S. at 349-50, 353-56 (if a criminal fine is linked to victim's losses, a jury must find the amount of those losses); *Blakely*, 542 U.S. at 303-04 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."); *see also Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Mem.) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) ("[T]he statutory maximum for restitution is usually *zero*, because a court can't award *any* restitution without finding additional facts about the victim's loss."); *Leahy*, 438 F.3d at 344 n.15 (McKee, J., joined by four other judges, dissenting in part) (similar).

Moreover, this line of reasoning ignores *Alleyne*. Many statutes *require* a court to order restitution for

losses created by the defendant’s conduct. *See, e.g.*, 18 U.S.C. §§ 2259(a), 3663A(a)(1), 3664(f)(1)(A); *United States v. Desnoyers*, 708 F.3d 378, 389 (2d Cir. 2013) (“[A] district court lacks discretion under the [Mandatory Victim Restitution Act] ‘to deny an award of restitution or to award restitution for anything less than the full amount of the victim’s losses.’” (citation omitted)). These statutes thus impose a mandatory increase to the minimum punishment for which *Alleyne* requires jury factfinding. *See* 570 U.S. at 114. Whether restitution is considered an increase in the maximum or the minimum punishment for a crime, however, juries unquestionably have a role to play in determining the extent to which restitution can be awarded.

II. This Court’s Review Is Needed Now

This is exactly the sort of case in which this Court’s intervention is appropriate—and badly needed.

1. Many federal and state statutes authorize or require restitution, and restitution awards are common. While the precise amount of restitution awarded in criminal cases is unknown, it is clearly substantial. Data for the federal system show that, in fiscal year 2020, over \$6 billion of restitution was ordered—and restitution was ordered in 60% to 90% of theft, fraud, and similar cases in which there is likely to be an identifiable victim. U.S. Sent’g Comm’n, *Fiscal Year 2020 Overview of Federal Criminal Cases* 10 (Apr. 2021);⁶ *see also* Charles

⁶ Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf. The restitution ordered in

Doyle, *Restitution in Federal Criminal Cases: A Sketch* 1, Cong. Rsch. Serv. No. RS22708 (Oct. 2019).⁷ But, “because of the defendants’ inability to pay,” the overwhelming majority of restitution goes uncollected. Doyle, *supra*, at 1. According to recent federal data, over *\$125 billion* of restitution remains outstanding. Exec. Office for U.S. Attorneys, *United States Attorneys’ Annual Statistical Report Fiscal Year 2021*, at 44.⁸ The limited state data available suggest that state courts also frequently award restitution. *See, e.g.*, Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Socio. 1753, 1770 (2010).⁹ Restitution is, by any measure, a major component of criminal punishment.

2. The defendants burdened by these massive and widespread restitution orders do not receive the same constitutional protections as they do for other forms of criminal punishment. Indeed, criminal defendants do not receive the jury-trial right that similarly situated *civil* defendants would receive. *See Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). This is indefensible.

Moreover, as explained above, the reasons for denying this fundamental right lack merit. *See supra* at 5-20; Pet. 22-23, 29-31. Some courts essentially

fiscal year 2020 dropped compared to prior years, likely because of the COVID-19 pandemic.

⁷ Available at <https://sgp.fas.org/crs/misc/RS22708.pdf>.

⁸ Available at <https://www.justice.gov/usaio/page/file/1476856/download> (last visited Mar. 15, 2022).

⁹ Available at <https://faculty.washington.edu/kbeckett/articles/AJS.pdf>.

admit as much, yet still cling to old precedents that are admittedly at odds with cases like *Apprendi* and *Southern Union*. See, e.g., *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir.) (“Our precedents are clear that *Apprendi* doesn’t apply to restitution, but that doesn’t mean our caselaw’s well-harmonized with *Southern Union*.”), cert. denied, 571 U.S. 1025 (2013); Pet. 20-21; *Punishment Through Restitution*, *supra*, at 100-01. Others, like the Kansas Supreme Court below, refuse to seriously grapple with the issue until this Court weighs in. See Pet. App. 7a. The ball is clearly in this Court to protect countless criminal defendants from further violations of their Sixth Amendment jury-trial right.

3. In some ways, this case mirrors *Apprendi* itself. Before *Apprendi*, the Court decided *Jones v. United States*, which construed a federal statute to require the jury to find facts that increased the maximum sentence for a crime in part because holding otherwise would have raised “grave and doubtful constitutional questions.” 526 U.S. 227, 239 (1999) (citation omitted); *see id.* at 239-51. The reasoning in *Jones* “foreshadowed” *Apprendi*’s rule. *Apprendi*, 530 U.S. at 476. But after *Jones*, the lower court in *Apprendi*, over a strong dissent, did not take the hint—and even acknowledged that “the United States Supreme Court will have to resolve the issue.” *State v. Apprendi*, 731 A.2d 485, 493 (N.J. 1999), *rev’d*, 530 U.S. 466 (2000). Despite the lack of an identified split of authority, this Court granted certiorari and showed that it meant what it said in *Jones*. All the same circumstances are present in this case: Cases like *Apprendi*, *Southern Union*, and *Alleyne* at least foreshadow that *Apprendi* applies to restitution, as many judges—including the dissenting judges below—have recognized, and only

this Court can resolve this issue. The Court should follow the same course here as it did in *Apprendi*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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