No. 21-1126

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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

In decision after decision, this Court has held that the Sixth Amendment requires a jury to decide the facts necessary to authorize criminal punishment, from statutory minimums and maximums to the death penalty and criminal fines. Criminal restitution is no different. The amount of restitution a court can order—and often *must* order—turns, as here, on factual findings about the amount of loss the defendant caused. No findings of loss, no restitution. To put it differently, the maximum restitution depends directly on those findings of fact. Thus, under this Court's precedents, a jury must determine the facts necessary to support a restitution order.

That straightforward conclusion follows from both history and the logic of this Court's decisions, from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to *Southern Union Co. v. United States*, 567 U.S. 343 (2012). Indeed, two Members of this Court have already recognized as much. *See Hester v. United States*, 139 S. Ct. 509, 509-11 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). So have several lower-court judges. But the lower courts have largely refused to grapple with the issue, even in the decade following this Court's holding in *Southern Union* that a jury must find all the facts necessary to justify a fine. 567 U.S. at 346. Here, the Kansas Supreme Court followed suit, arguing that *this* Court must be the one to "take up th[e] mantle." App. 7a.

The consequence is that Petitioners, like countless other defendants, face crushing restitution obligations ordered without the fundamental protection the Sixth Amendment guarantees. And as the decisions below

show, that untenable situation will continue unless this Court intervenes.

Kansas offers no persuasive reason the Court should continue to let the issue percolate. Kansas doesn't dispute that Members of this Court, lower-court judges, and legal scholars have all advanced compelling arguments that the jury-trial right applies to criminal restitution and called for this Court's guidance. Nor does Kansas dispute the importance of the issue. And despite Kansas' attempts to identify a vehicle problem, the Kansas Supreme Court squarely decided the issue, and on remand a jury in either case could disagree with the judges' views of the facts.

Instead, Kansas' main argument is that its criminal restitution scheme "does not implicate *Apprendi*" because it is "indeterminate" and "does not establish a statutory maximum." Opp. 10. That makes no sense. In *Southern Union*, "the fact that w[ould] ultimately determine the maximum fine" was "the number of days the company violated the statute," so that fact had to be found by a jury. 567 U.S. at 359. Here, similarly, the fact that ultimately determines the maximum restitution amount is the "damage or loss caused by the defendant's crime." Kan. Stat. Ann. § 21-6604(b)(1). In other words, the statute—like most restitution schemes—ties the amount of restitution to specific facts. That is the opposite of "indeterminate." Opp. 10. *Apprendi* applies.

The Court should intervene now. The Sixth Amendment should not "mean less to the people today than it did to those at the time of [its] adoption." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting from denial of certiorari).

ARGUMENT

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

A. As the Petition explained, the question presented has divided both this Court and lower-court judges and is exceptionally important. Pet. 16-21.

1. Jurists have expressed serious concerns about exempting criminal restitution from the Sixth Amendment's jury-trial guarantee. In *Hester*, Justice Gorsuch and Justice Sotomayor urged the Court to address this "important" question. 139 S. Ct. at 509-11 (Gorsuch, J., dissenting from denial of certiorari). Multiple lower-court judges have likewise concluded that *Apprendi* applies to criminal restitution. *See* App. 20a-33a, 58a; *United States v. Leahy*, 438 F.3d 328, 348 (3d Cir. 2006) (en banc) (McKee, J., concurring in part and dissenting in part); *United States v. Carruth*, 418 F.3d 900, 905-06 (8th Cir. 2005) (Bye, J., dissenting). And other Members of this Court have noted concerns in similar contexts about allowing judges to determine the facts necessary to support criminal punishments. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2259 (2016) (Thomas, J., concurring); *Paroline v. United States*, 572 U.S. 434, 471 (2014) (Roberts, C.J., dissenting); *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

2. This Court's intervention is critical to enforce the Sixth Amendment's jury-trial guarantee. Pet. 14-16, 20-21. Criminal restitution ordered without constitutional protections continues to impose crippling burdens on countless (and often indigent) defendants. Indeed, the national restitution debt shot past $100

billion several years ago. *See* Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 125 (2014); Lollar & MacArthur Amicus Br. 21. Here, for example, the trial judge ordered Arnett to pay $33,248.83 based on his own determination that Arnett proximately caused that loss, even though all she did was loan a car to her boyfriend. Pet. 10. What's more, failure to pay restitution often results in "swift, severe, and *punitive* sanctions, such as incarceration and the suspension of the right to vote." Lollar & MacArthur Amicus Br. 3.

B. Kansas' responses are unpersuasive.

1. Kansas first says the Court should deny review because there is no split. Opp. 8-9. But that's no reason to deny cert on a critical constitutional question. Consider *Apprendi* itself, where New Jersey insisted that there was no split, Opp. 9 n.4, *Apprendi*, No. 99-478, 1999 WL 33611431, or *Carpenter v. United States*, 138 S. Ct. 2206 (2018), where the United States likewise asserted no conflict, Opp. 10, *Carpenter*, No. 16-402, 2017 WL 411305. The Court still granted review in both cases, explaining in *Apprendi* that "constitutional protections of surpassing importance" were "[a]t stake." 530 U.S. at 476. Here, just as in *Apprendi*, the state high court split, with the dissent arguing that the Constitution required jury findings. *Compare id.* at 473-74 *with* App. 20a-33a, 58a. And just as the Court "expressed serious doubt" the year before *Apprendi* about "the constitutionality of allowing penalty-enhancing findings to be determined by a judge," *Apprendi*, 530 U.S. at 472, two Members of this Court have concluded that whether the Sixth Amendment applies to restitution is "worthy of [the Court's] review." *Hester*, 139 S. Ct. at 510

(Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); *see supra* p. 3.

As the Petition explained, the lower courts' refusal to engage with the issue rests on stare decisis, not sound legal reasoning. Pet. 20-21. As one judge put it, "[h]ad *Southern Union* come down before our cases, those cases might have come out differently." *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013). The Kansas Supreme Court, for its part, was "content to side with" those lower-court precedents, suggesting that it is *this Court's* responsibility to "eventually take up the question." App. 7a-8a.

2. Kansas also claims that the Court should deny review because it has denied review of the question presented before. Opp. 6-7. For starters, past denials don't mean a question is unworthy of this Court's review. Indeed, this Court recently granted cert after several denials in *Jones v. Hendrix*, No. 21-857, 2022 WL 1528372 (May 16, 2022); *see* Opp. 7-8, *Jones*, No. 21-857, 2022 WL 1441379 (2022) (citing denials). What's more, most of the denials Kansas cites predate Justice Gorsuch and Justice Sotomayor's statement in *Hester*. And the few post-*Hester* denials were largely inadequate vehicles. *See* Opp. 26, *Flynn v. United States*, No. 20-1129, 2021 WL 2035209 (2021) (defendant admitted full extent of losses); Opp. 20-22, *Gilbertson v. United States*, No. 20-860, 2021 WL 1966546 (2021) (plain error); Opp. 14-15, *Budagova v. United States*, No. 18-8938 (2019) (same).

3. Finally, Kansas suggests that this Court need not intervene because two courts of appeals have reaffirmed their decisions refusing to apply the Sixth Amendment to criminal restitution after *Southern Union*. Opp. 8-9 n.3. That's not true.

In *United States v. Vega-Martínez*, 949 F.3d 43, 54-55 (1st Cir. 2020), the First Circuit found no *plain error* when reviewing the defendant's unpreserved argument "that the amount of restitution should have been found by the jury instead of by a judge." Contrary to Kansas' argument, the court explained that it "has not re-evaluated its reasoning … since *Southern Union* was decided." *Id.* at 55.

United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012), likewise confronted the question on plain-error review. The Fourth Circuit did not reevaluate its pre–*Southern Union* precedent or address Justice Gorsuch and Justice Sotomayor's point—which came several years later—that there *is* a statutory maximum in restitution cases. *See infra* pp. 8-9.

Ultimately, the lower courts have been unwilling to seriously grapple with the question presented in the decade since *Southern Union*. Kansas cannot show otherwise. Indeed, Kansas doesn't dispute that the Ninth Circuit acknowledged that "*Southern Union* provides reason to believe *Apprendi* might apply to restitution" and that its precedent to the contrary is therefore not "well-harmonized with *Southern Union*." *Green*, 722 F.3d at 1150-51. "Judges in other circuits have made the same point," too. *Hester*, 139 S. Ct. at 510 (Gorsuch, J., dissenting from denial of certiorari) (citing opinions); *see* Pet. 20-21. Despite ample opportunities to change course, the lower courts have adhered with little (or unpersuasive) reasoning to their pre–*Southern Union* precedent. This Court should intervene.

II. The Kansas Supreme Court's decisions are wrong because the Sixth Amendment requires a jury to find the facts necessary to support criminal restitution.

A. As the Petition explained, this Court's precedent and the historical role of the jury both make clear that a jury must determine the facts necessary to support criminal restitution. Pet. 21-32. This Court's decisions require a jury to find the facts necessary to impose a criminal penalty. Pet. 4-9. And restitution, as this Court has noted, is a criminal penalty, *Kelly v. Robinson*, 479 U.S. 36, 51-52 (1986); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005), just like criminal fines, imprisonment, or a death sentence. Pet. 22-24; Lollar & MacArthur Amicus Br. 6-16. Thus, *Apprendi* applies to criminal restitution just like it applies to criminal fines, imprisonment, and capital punishment.

Historical practice compels the same conclusion. Pet. 24-29. At common law, the indictment specified the items allegedly stolen, and a court would order those items to be returned to the victim in restitution only after a jury convicted the defendant of stealing them. Pet. 26-27; *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, 475 (2014). And more generally, restitution was understood as a punishment and juries were expected to find the facts necessary to support it. *See* Pet. 24-29. The modern jury should play no lesser role.

B. Kansas' contrary arguments lack merit.

1. Kansas reasons that *Apprendi* doesn't apply to restitution because restitution schemes establish

"indeterminate framework[s]" without statutory maximums. Opp. 10-11. But that argument misunderstands both *Apprendi* and *Southern Union*, on the one hand, and restitution frameworks, on the other. Pet. 22-23, 29-31; Lollar & MacArthur Amicus Br. 18-20.

Under *Apprendi*, a jury must find beyond a reasonable doubt the facts necessary to impose a criminal penalty. 530 U.S. at 490. And *Southern Union* held that criminal fines are not "indeterminate" where the maximum penalty turns on or is "calculated by reference to particular facts." 567 U.S. at 349; *see id.* at 347-52. In *Southern Union*, for instance, the statute subjected the company "to a maximum fine of $50,000 for each day of violation," so a jury had to determine "the number of days the company violated the statute." *Id.* at 352, 359; *see* Pet. 7-8.

Restitution too is a criminal penalty with a maximum turning on particular facts. A conviction is necessary, but not sufficient, to support restitution. That's because restitution often turns, as it does in Kansas, on the amount of the loss the defendant caused. Pet. 9. But the judge does not have discretion in determining the amount of restitution, or even to refrain from ordering restitution. Instead, the maximum restitution depends on the value of the losses incurred. Kan. Stat. Ann. § 21-6607(c)(2). The same is true under the federal Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(b)(2)(C), and other states' laws, *see* Pet. 14-15; Lollar & MacArthur Amicus Br. 18-20. Thus, as Justice Gorsuch and Justice Sotomayor put it, "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." *Hester*, 139 S. Ct. at 510 (Gorsuch,

J., dissenting from denial of certiorari). As a result, "just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, … a jury must find any facts necessary to support a (nonzero) restitution order." *Id.*

2. Kansas next asserts that *Southern Union* doesn't apply because restitution is "a restorative remedy that compensates victims." Opp. 11 (citation omitted). But restitution remains a criminal penalty all the same. Pet. 22, 29. As this Court has explained, "[a]lthough restitution does resemble a judgment 'for the benefit' of the victim," it turns "on the penal goals of the State," including "punishment." *Kelly*, 479 U.S. at 52-53. Restitution is no less a criminal penalty just because it serves dual goals—just as imprisonment is no less a penalty just because it may promote rehabilitation as well as retribution and deterrence. Lollar & MacArthur Amicus Br. 14-16.

3. Finally, Kansas argues that jury findings weren't historically required for forfeiture of stolen property to the crown. Opp. 11-12. But that's just another way to say that defendants couldn't keep stolen property. That doesn't mean that the common law permitted restitution orders based on judge-found facts about what kind of loss a defendant caused. And Kansas does not argue otherwise. In short, the requirement that a jury determine the facts required to support restitution has "firm historical roots." *Alleyne v. United States*, 570 U.S. 99, 117 (2013).

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

A. As the Petition explained, Arnett and Robison's cases are excellent vehicles for resolving the question presented. In each case, the Kansas Supreme

Court decided the question over a dissent. App 5a-8a, 43a-46a. If this Court reverses and remands, a jury could find that either or both were not responsible for all the victims' losses. Pet. 9-12, 32-33.

B. Kansas' vehicle arguments lack merit.

1. Kansas first contends that any error was harmless because Arnett and Robison did not challenge the victims' losses but rather their responsibility for those losses. Opp. 12-13. That argument fails. Both Arnett and Robison were entitled to require the state to prove to a jury, beyond a reasonable doubt, the facts necessary to support the restitution order. And a jury could decide, for instance, that the facts in Arnett's case did not support a $33,248.83 restitution order because not all the losses from her boyfriend's burglaries were foreseeable just because Arnett lent him a car. *See* Pet. 32-33; App. 114a-115a; *Puckett v. Mt. Carmel Reg'l Med. Ctr.*, 228 P.3d 1048, 1060, 1068 (Kan. 2010) (foreseeability is for factfinder). Likewise, in *Robison*, a jury could find that the State failed to prove beyond a reasonable doubt the existence or extent of the insurer's loss. In any event, Kansas' argument is one best suited for the state courts on remand. This Court is one "of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Kansas also says that Arnett and Robison didn't raise the question presented in the state trial court. Opp. 13. But "whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided" "is irrelevant." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991). And here, Petitioners raised the question presented before the Kansas Court of Appeals and Kansas

Supreme Court, and both courts decided the issue—over dissents, no less.

2. Finally, Kansas argues that these cases do "not present this Court with the opportunity to consider the influence of the Seventh Amendment" because the Seventh Amendment "has not been incorporated against the States." Opp. 13-14. That argument does not affect the question presented.

First, the question presented is whether the *Sixth* Amendment requires a jury to decide the facts supporting criminal restitution. The Sixth Amendment was also Justice Gorsuch and Justice Sotomayor's focus in *Hester*. *See* 139 S. Ct. at 509 (Gorsuch, J., dissenting from denial of certiorari). If the answer to the Sixth Amendment question is "no," then the Court can take up any remaining Seventh Amendment question in another case.

Second, nothing about this case prevents the Court from considering "the influence" of the Seventh Amendment anyway. Opp. 13-14. The Court need not blind itself to the full Constitution just because its decisions on "the Seventh Amendment's civil jury requirement long predate the era of selective incorporation." *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010); *see id.* at 784 n.30.

* * *

The question presented is "worthy of [this Court's] review." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). Restitution is widespread and its effects "can be profound." *Id.* The Kansas Supreme Court's rulings are "doubtful" and "difficult to reconcile with the Constitution's original meaning." *Id.* at 510-11. And there is no reason to think, several years after *Hester*, that the

lower courts will do anything but follow their own misguided precedent. Indeed, the Kansas Supreme Court here expressly left the issue for this Court. *See* App. 7a-8a. Petitioners and countless other defendants deserve better. "[T]he right to a jury trial" should not "mean less to the people today than it did to those at" the Founding. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting from denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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