No. ____

IN THE

Supreme Court of the United States

SEAN CHRISTOPHER FINNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Packingham v. North Carolina*, 582 U.S. 98 (2017), the Court held that a North Carolina statute prohibiting registered sex offenders from accessing social media websites was unconstitutional. In so holding, the Court recognized that the First Amendment protected the right to access the internet for defendants who had completed their sentences. In the wake of *Packingham*, the lower courts have divided on whether that First Amendment right applies to defendants who have not yet completed their sentences and are subject to internet restrictions on supervision.

The first question presented is:

Whether the First Amendment right to access the internet recognized in *Packingham* applies to criminal defendants who are on supervised release.

* * *

2. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." In *Southern Union Co. v. United States*, 567 U.S. 343, 360 (2012), the Court "h[e]ld that the rule of *Apprendi* applies to the imposition of criminal fines."

The second question presented is:

Whether the Sixth Amendment prohibits a court from ordering criminal restitution based on facts not found by a jury beyond a reasonable doubt.[1]

[1] A similar *Apprendi* question—in the distinct context of criminal *forfeiture*—is presented in *Esformes v. United States*, U.S. No. 23-95 (pet. filed July 31, 2013).

RELATED PROCEEDINGS

- *United States v. Sean Christopher Finnell*,
  Nos. 22-13892 & 23-10358 (11th Cir. Oct. 10, 2023);

- *United States v. Sean Christopher Finnell*,
  No. 20-cr-80086 (S.D. Fla. Feb. 2, 2023).

There are no other related proceedings within the meaning of Rule 14.1(b)(iii).

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Petitioner Sean Finnell respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 2023 WL 6577444 and reproduced as Appendix ("App.") A, 1a–15a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on October 10, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are set out in App. C, 24a–28a.

INTRODUCTION

This petition presents two questions that independently warrant review.

1. In *Packingham v. North Carolina*, 582 U.S. 98 (2017), the Court held that a North Carolina statute making it a felony for registered sex offenders to access social media websites was unconstitutionally overbroad. In so holding, the Court recognized for the first time a robust First Amendment right to access the internet.

The law in *Packingham* applied to all registered sex offenders, including those who had already completed their sentences. But federal courts regularly impose internet restrictions on sex offenders as a condition of supervised release. And over the last six-plus years, lower state and federal courts have reached different conclusions about whether *Packingham* applies to defendants under supervision.

Four circuits—including the Eleventh Circuit below—have held that the First Amendment right in *Packingham* does *not* apply to such defendants, and these courts have therefore upheld broad internet restrictions. In contrast, three circuits and three state courts of last resort have held that *Packingham does* apply to defendants on supervision, and these courts have therefore invalidated broad internet restrictions.

Only this Court can resolve this confusion, and it should do so. Courts routinely impose broad internet conditions of supervision, so this question recurs with great frequency. And these internet restrictions implicate significant liberty interests.

This case is an ideal vehicle to intervene. Petitioner is subject to a sweeping, lifetime computer restriction. He preserved his *Packingham* argument at every stage. And the Eleventh Circuit squarely held that "*Packingham* does not apply." App. 5a.

2. The second question presented warrants review as well. Must a jury find the facts necessary to justify an award of criminal restitution? The answer is clearly yes under this Court's Sixth Amendment precedents. Indeed, this Court has squarely held that, under the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a jury must find the facts necessary to justify a criminal fine. *Southern Union Co. v. United States*, 567 U.S. 343 (2012). That precedent applies equally to criminal restitution.

Yet over the past decade, the courts of appeals have refused to give effect to this Court's precedents. Instead, they have reaffirmed their own pre-*Southern Union* precedents exempting restitution from the Sixth Amendment's jury protections. In addition to invoking *stare decisis*, they have also attempted to distinguish restitution from fines. But those distinctions themselves are contrary to this Court's precedents.

At this point, only this Court can ensure fidelity to the Sixth Amendment and its original meaning. And it is imperative that the Court do so. Each year alone, federal judges impose *billions* in restitution on *thousands* of defendants. Yet not a penny of that punishment is authorized by a jury finding beyond a reasonable doubt.

Accordingly, two Justices have recognized that this question warrants review. *Hester v. United States*, 139 S. Ct. 509 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari). While the Court has denied review in a few post-*Hester* petitions, they were all defective vehicles. But this case is not: Petitioner preserved his *Apprendi* argument at every stage below, and a judge ordered over $100,000 in restitution based on facts not submitted to, much less found by, a jury.

STATEMENT

A federal grand jury in the Southern District of Florida returned an indictment charging Petitioner with one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). Following a five-day trial, a jury found him guilty. The jury was not asked to, and did not in fact, make any findings about the victims or the amount of losses they suffered. The district court sentenced Petitioner 160 months in prison, as well as a lifetime term of supervised released and $106,500 in restitution. App. 2a–3a, 16a–18a, 22a; *see* Dist. Ct. ECF No. 15 (indictment), No. 61 (jury verdict).

I. The Internet Restriction of Supervised Release

Federal courts may impose conditions of supervised release that they consider appropriate, but only "to the extent that such condition . . . involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in sections 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)." 18 U.S.C. § 3583(d)(2). Those purposes are the need for the sentence to "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(B)–(D).

1. In the pre-sentence investigation report (PSR) here, the probation officer recommended as a special condition of supervised release that Petitioner "not possess or use any computer, except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment." Petitioner filed a written objection to this recommended restriction. Dist. Ct. ECF No. 73 at 11–17.

He argued that this restriction involved a greater restriction on liberty than necessary in light of this Court's decision in *Packingham v. North Carolina*, 582 U.S. 98 (2017), which held that a statute prohibiting registered sex offenders from accessing social-media websites violated the First Amendment. *Id.* at 12–13. Petitioner acknowledged that, in *United States v. Bobal*, 981 F.3d 971 (11th Cir. 2020), the Eleventh Circuit (like other circuits) had rejected a similar argument, though it did so under the plain-error standard of review. *Id.* at 13–14. And he observed that, contrary to those decisions, the Second and Third Circuits had applied *Packingham* to individuals on supervised release. *Id.* at 13–16 (citing *United States v. Eaglin*, 913 F.3d 88 (2d Cir. 2019) and *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018)). Petitioner emphasized that the computer restriction would prevent him from using the internet for everyday purposes (*e.g.*, accessing weather alerts, bus schedules, and even his own medical information), unnecessarily preventing him from engaging in the legitimate exercise of his First Amendment rights. *Id.* at 16–17.

The government responded simply that "Eleventh Circuit precedent precludes" Petitioner's argument, citing *Bobal* and other cases. Dist. Ct. ECF No. 79 at 5.

At sentencing, Petitioner reiterated his objection, relying on the "extensive[ ]" briefing he had submitted. Dist. Ct. ECF No. 106 at 6. He added that there was a "circuit split as to this issue," *Bobal* did not control because it was decided on plain-error review, "the importance of computers in today's society cannot be understated," and the restriction therefore "would violate his First Amendment rights." *Id.* at 6–7. After hearing from the government, the district court overruled the objection, noting

that he could move to modify the restriction after his release from prison. *Id.* at 7. The court thus imposed the computer restriction. App. 20a (amended judgment).

2. On appeal, Petitioner renewed his *Packingham*-based arguments. Again, he argued that the computer restriction was overbroad in light of *Packingham*; the Second and Third Circuits had vacated internet restrictions in light of *Packingham*; the Eleventh Circuit had never upheld a lifetime computer restriction in a published opinion addressing a preserved challenge; and dicta in that court's *Bobal* decision was unpersuasive. Pet. C.A. Br. 10, 12–24; Pet. C.A. Reply Br. 2–5.

In response, the government again argued that Petitioner's argument was foreclosed by precedent, especially *Bobal*. In that regard, the government observed that *Bobal* had "rejected the [contrary] holding in *Holena*" by the Third Circuit. Thus, the government argued that "Finnell's invitation to this Court to follow the *Holena* decision or other Circuits' cases should be rejected." U.S. C.A. Br. 20, 23–27.

3. The Eleventh Circuit affirmed the lifetime computer restriction. App. 5a–9a. The court "agree[d] with the government" that its "precedent establishes that *Packingham* does not apply to this type of supervised release condition." App. 5a.

The court explained that, in *Bobal*, it had "distinguished *Packingham*" for three reasons. App. 6a. "First," and most importantly here, "we reasoned that, although the law in *Packinham* restricted sex offenders beyond the completion of their sentence, Bobal's restriction did not extend beyond his supervised release." *Id.* "Second, we noted that the law in *Packingham* applied to all registered sex offenders, not just those who used a computer . . . to commit their offenses." *Id.* And, third,

"unlike the law in *Packingham*, Bobal's restriction allowed him to use a computer for his employment, and Bobal could seek a modification of his release for other reasons." *Id*. "Thus, we held that Bobal's condition on his supervised release were distinguishable from *Packingham* and did not violate the First Amendment." *Id*.

The court rejected Petitioner's efforts to distinguish *Bobal*. First, the court "reject[ed] Finnell's argument that *Bobal* is inapposite because we applied the plain error standard of review." App. 6a–7a. The court stated that the parties "disagree[d] about whether Finnell stated his objection to the conditions in the district court, and therefore about what standard of review should apply." App. 7a. (In fact, this was incorrect; the government asserted that Petitioner had failed to preserve a challenge to a different restriction of supervised release about adult pornography, but not the computer restriction at issue here. U.S. C.A. Br. 27–28). But the court concluded that this supposed disagreement did not matter because the court had since upheld a computer restriction under *Bobal* even where the objection was preserved. App. 7a (citing *United States v. Coglianese*, 34 F.4th 1002, 1010 (11th Cir. 2022)).

Second, the court rejected Petitioner's "attempt to distinguish *Bobal* on the grounds that he accessed child pornography on the internet and did not communicate with the minors directly like the defendant in *Bobal*." App. 6a, 8a. The court simply observed that Petitioner had lacked remorse. App. 8a. And, third, the court clarified that Petitioner could later seek to modify his supervised release upon release from prison, though the court acknowledged that "a defendant cannot contest the legality or constitutionality of his supervised release" in such a proceeding. App. 6a, 8a–9a.

II. The $106,500 Restitution Award

Under the Violence Against Women Act of 1994, Congress made restitution mandatory for certain offenses, including possession of child pornography, regardless of the "economic circumstances of the defendant." 18 U.S.C. §§ 2259(a), (c)(4). By statute, the court must determine the "full amount of the victim's losses" that were incurred or are reasonably projected to be incurred as a result of the offense. § 2259(b)(1); *see id*. § 2259(c)(2) (defining "full amount of the victim's losses); *id*. § 2259(c)(4) (defining "victim"). The court must then order restitution in amount that reflects the defendant's "relative role in the causal process that underlies the victims' losses, but which is no less than $3,000." § 2259(b)(2)(B); *see Paroline v. United States*, 572 U.S. 434 (2014) (explaining how to conduct this calculation). "Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." § 3664(e); *see* § 2559(b)(3) (incorporating § 3664).

1. In the PSR here, the probation officer explained that restitution was mandatory, and the statute required no less than $3,000 per victim. In his written objections to the PSR, Petitioner argued that imposing restitution would violate his Fifth and Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny because the victims' losses had not been charged in the indictment or found by a jury beyond a reasonable doubt. He relied heavily on Justice Gorsuch's dissent from the denial of certiorari in *Hester v. United States*, 139 S. Ct. 509 (2019). Dist. Ct. ECF No. 73 at 1–4. Petitioner acknowledged that the Eleventh Circuit had previously held that *Apprendi* did not apply to criminal restitution in *Dohrmann v.*

United States, 442 F.3d 1279 (11th Cir. 2006). But he argued that this Court's subsequent decision in *Southern Union Co. v. United States*, 567 U.S. 343 (2012), which extended *Apprendi* to criminal fines, had abrogated *Dohrmann*. *Id*. at 5–7. Finally, he argued that this Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013), which extended *Apprendi* to facts triggering a mandatory minimum, applied because the restitution statute set a $3,000 minimum per victim. *Id*. at 7–9.

The government responded that Petitioner's arguments were foreclosed by circuit precedent, *Southern Union* applied only to criminal fines, and no circuit had accepted Petitioner's arguments after *Southern Union*. Dist. Ct. ECF No. 79 at 1–4.

At the sentencing hearing, the parties reiterated their arguments on this issue. Dist. Ct. ECF No. 106 at 3–5. The court deferred restitution until a later hearing.

Before the restitution hearing, the government submitted a memorandum seeking $106,500 in restitution on behalf of 17 victims. The government argued that this represented the "full amount of the victims' losses" based on evidence supplied by the victims and this Court's decision in *Paroline*. *See* Dist. Ct. ECF No. 88.

At the restitution hearing, the government relied on its memorandum and evidence. Dist. Ct. ECF No. 126 at 3–6. Petitioner reiterated his legal objections based on *Apprendi* and its progeny, noting that restitution was "particularly troubling here where the Government did not provide evidence of 17 victims to the jury." *Id*. at 6–7. The district court overruled the objection and imposed restitution in the amount requested by the government: $106,500. *Id*. at 11; *see* App. 22a (amended judgment).

2. On appeal, Petitioner renewed all of his *Apprendi*-based arguments. Again, he reiterated that *Apprendi* and its progeny prohibited restitution because the jury had not made any findings about the victims' losses; *Southern Union* had abrogated the Eleventh Circuit's contrary precedent in *Dohrmann*; and the $3,000 mandatory minimum per victim violated *Alleyne* because the jury had made no findings about the victims. Pet. C.A. Br. 11, 30–36; Pet. C.A. Reply Br. 10–16.

The government responded that the district court "did not err by ordering restitution without a jury finding." The government largely reiterated its position that *Southern Union* had not abrogated *Dohrmann*. U.S. C.A. Br. 21, 31–34.

3. The Eleventh Circuit affirmed the restitution award. App. 10a–12a. It "disagree[d]" with Petitioner's argument that *Southern Union*'s "holding extends to criminal restitution" because it did not abrogate the contrary holding in *Dohrmann*. App. 11a. The court explained that its "analysis in *Dohrmann* turned on the absence of a maximum award in the restitution statute, and there is similarly no maximum here." *Id*. The court also observed that eight circuits had "declined to extend *Apprendi* to restitution" after *Southern Union*. *Id*. (citing cases). It "thus conclude[d] that the district court was not required to submit the question about the victims' losses to the jury." *Id*. The court reached the same conclusion as to the victims themselves. Although the statute required a $3,000 minimum per victim, the court concluded that Petitioner's reliance on *Alleyne* "fail[s] for the same reason his first argument does: *Apprendi* does not apply to restitution orders, and nothing in our precedent or the Supreme Court's precedent has abrogated" *Dohrmann*. App. 11a–12a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted on both of the questions presented here.

I. This Court's review is warranted on the *Packingham* question.

In *Packingham*, the Court reaffirmed that content-neutral laws are subject to intermediate scrutiny, which means that they must be "narrowly tailored to serve a significant governmental interest." 582 U.S. at 105–06 (quotation omitted). "In other words, the law must not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 106 (quotation omitted). The federal supervised release statute requires similar narrow tailoring with respect to conditions of supervision. As relevant here, it authorizes courts to impose such conditions, provided that they "involve no greater deprivation of liberty than is reasonably necessary for" certain sentencing purposes. 18 U.S.C. § 3583(d)(2).

To analyze whether a condition involves a greater deprivation of liberty than necessary, courts must ascertain the liberty that is being restricted. In *Packingham*, the Court recognized that the First Amendment's free speech clause protected a right to access the internet—a major form of "liberty." But the lower courts have divided on whether that right applies to criminal defendants who have not yet completed their sentence and remain under supervision. And the answer to that question will significantly inform, if not determine, whether internet restrictions will be deemed unconstitutionally overbroad. As the cases below reflect, if *Packingham* does not apply to such defendants, then broad internet restrictions will be readily upheld. But if *Packingham* does apply to such defendants, then such restrictions will be invalid.

A. The lower courts are divided on the question presented.

1. The Fifth, Eighth, Eleventh, and D.C. Circuits have all rejected *Packingham*-based challenges to internet restrictions of supervised release, reasoning that *Packingham* is limited to those who have completed their sentences.

a. The D.C. Circuit was the first circuit to consider and reject such a challenge to an internet restriction of supervised release, doing so under plain error. The court had previously upheld such restrictions, and it concluded that *Packingham* did "not make the error plain because Rock's condition is imposed as part of his supervised-release sentence, and is not a post-custodial restriction of the sort imposed on Packingham." *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017).

Shortly thereafter, the Second Circuit drew the same distinction, albeit in dicta. *See United States v. Browder*, 866 F.3d 504, 511 n.26 (2d Cir. 2017) (noting that, unlike the internet restriction being challenged in that case on different grounds, the law in *Packingham* "extended beyond the completion of a sentence").

b. The Fifth Circuit next rejected an internet restriction of supervised release in *United States v. Halverson*, 897 F.3d 465 (5th Cir. 2018). Although it too applied plain error, its reasoning went to the merits. The court emphasized that "the driving concern of the Court [in *Packingham*] was the imposition of a severe restriction on persons who had served their sentences and were no longer subject to the supervision of the criminal justice system." *Id*. at 658. The court also approvingly referenced the government's argument "that *Packingham* is limited to post-custodial restrictions—*i.e.*, when a defendant has already fully completed his sentence." *Id*. The

court also observed that the D.C. and Second Circuits had shared that understanding, and the Fifth Circuit found that "these decisions—which are consistent with *Packingham*'s limited holding—to be well-reasoned." *Id.* (citing *Rock* and *Browder*). Although the court concluded that there was no "plain error," it again emphasized that "*Packingham* addresses circumstances in which the state has completely banned much of a sex offender's internet access *after* he has completed his sentence," whereas "supervised release is part of Halverson's sentence (rather than a post-sentence penalty)." *Id.* (emphasis in original). Thus, it concluded that "*Packingham* does not—and certainly not 'plainly'—apply to the supervised-release context." *Id.*

c. The Eighth Circuit reached the same conclusion in *United States v. Perrin*, 926 F.3d 1044 (8th Cir. 2019). Although plain error applied there again, *id.* at 1047, the court ultimately concluded that "the district court did not err, much less plainly err, in imposing the special condition," *id.* at 1050. The court found *Packingham* to be "of no help." *Id.* at 1048. Citing the D.C., Second, and Fifth Circuit decisions above, the court emphasized that, while "the statute at issue in *Packingham* prohibited registered sex offenders from accessing commercial social-networking sites, even after having completed their sentences," a "term of supervised release . . . is part of the sentence rather than a post-sentence penalty." *Id.* at 1049 (quotations omitted). The court also added that, "unlike in *Packingham*, Perrin *did* contact a minor." *Id.* at 1048–49. Finally, the court added that, "unlike in *Packingham*," the condition was not a complete ban on internet access because Perrin could use a computer if he obtained approval from his probation officer. *Id.* at 1049–50.

d. Favorably citing the Fifth, Eighth, and D.C. Circuit decisions discussed above, the Eleventh Circuit followed suit in *Bobal*, 981 F.3d at 977–78—the precedent applied in the decision below, App. 5a–9a. Although *Bobal* reviewed the internet restriction for plain error, it too rejected the *Packingham* challenge on the merits. And the decision below makes clear that the court applies *Bobal* to cases where the objection has been properly preserved. App. 7a (citing *Coglianese*, 34 F.4th at 1010).

Like the Eighth Circuit in *Perrin*, and as the decision below explains, *Bobal* distinguished *Packingham* on three bases. First, and most important here, it emphasized that "the state law in Packingham restricted sex offenders even after they had completed their sentences," whereas the internet restriction there was a "special condition of his supervised release and does not extend beyond his sentence." *Id*. at 977; *see id*. at 973. The court concluded that *Packingham* did not "appl[y] to all computer restrictions, regardless of whether the defendant is on supervised release or has completed his sentence," and "[n]othing in *Packingham* undermines the settled principled" that a district court may impose reasonable conditions on those on supervision. *Id*' at 977–78. Second, *Bobal* explained that the law in *Packingham* "applied to all registered sex offenders, not only those who had used a computer . . . to commit their offenses." *Id*. at 977. And, third, *Bobal* explained that, "unlike the state law in *Packingham*," the internet restriction was not a complete ban on First Amendment activity because the defendant could seek court permission to use a computer and could later move to modify the terms of his supervision. *Id*.

2. By contrast, the Second, Third, and Fourth Circuits, as well as the Supreme Courts of West Virginia, Illinois, and Nevada have applied *Packingham* to invalidate internet restrictions imposed on defendants subject to court supervision.

a. In *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018), the Third Circuit vacated an internet restriction of supervised release for a defendant convicted of enticing a minor online. In determining that the condition restricted more liberty than necessary, the court emphasized its lifetime duration, *id*. at 292, and that it extended to "websites where he will probably never encounter a child, like Google Maps or Amazon," *id*. at 292–93, preventing him "from doing everyday tasks that have migrated to the internet, like shopping, or searching for jobs or housing" or reviewing "news, maps, traffic, or weather," *id*. at 294. The court then explained that the restriction "fail[ed]" under *Packingham*, which "informs the shaping of supervised-release conditions." *Id*. at 294–95. While "[d]efendants on supervised release enjoy less freedom than those who have finished serving their sentences," they still possessed First Amendment rights. *Id*. at 295. The restriction there thus "limit[ed] an array of First Amendment activity" and, "[u]nder *Packingham*, blanket internet restrictions will rarely be tailored enough to pass constitutional muster." *Id*. at 294–95. Such restrictions, it concluded, cannot restrict "First Amendment rights more than reasonably necessary or appropriate to protect the public." *Id*. at 295.

b. In *United States v. Eaglin*, 913 F.3d 88 (2d Cir. 2019), the Second Circuit vacated an 11-year internet restriction because, based on the record, it unnecessarily and "severely encroached on his First Amendment rights." *Id*. at 97–99. The court

expressly "reject[ed]" the government's argument "that Eaglin has no constitutional right to access the internet" as "outdated and in conflict with" *Packingham*, where the "Supreme Court forcefully identified such a right." *Id.* at 95. The court acknowledged that, unlike the law in *Packingham*, the internet restriction there "was imposed as a condition of supervised release" for a limited duration, but it believed that "*Packingham* nevertheless establishes that . . . Eaglin has a First Amendment right" to access the internet "while he is on supervised release." *Id.* at 96. The court further observed that, even before *Packingham*, it and other circuits had "rejected absolute Internet bans even where the defendant had used the computer for ill in his crime of conviction." *Id.* at 96–97. In light of those precedents, "and as emphasized by *Packingham*'s recognition of a First Amendment right to access" the internet, the court concluded that "the imposition of a total Internet ban as a condition of supervised release inflicts a severe deprivation of liberty," and such restrictions will be permissible "[i]n only highly unusual circumstances." *Id.* at 97.

c. In *United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2021), the Fourth Circuit held that an "internet restriction [wa]s overbroad" where there was no evidence that the defendant's sex offenses involved the internet. *Id.* at 1104. It recognized that "the majority of circuits have held that a complete ban on internet access is overbroad even where the record contains evidence of non-contact child pornography activity, or similar conduct, on the internet." *Id.* at 1104–05. The court's overbreadth conclusion was based on the assumption that those on supervised release enjoy a First Amendment right to access the internet. The court cited *Packingham*

for the proposition that "[a] complete ban on internet access is a particularly broad restriction that imposes a massive deprivation of liberty." *Id*. at 1104. And the court cited *Eaglin*, which in turn cited *Packingham*, for the proposition that "an internet ban implicates fundamental rights" under the First Amendment. *Id*. at 1105. The court emphasized that, "as a practical matter, the internet is likely to be vital to Mr. Ellis's reentry to society, including for securing housing and employment." *Id*.

d. At least three state courts of last resort have applied *Packingham* to invalidate internet restrictions imposed on defendants still subject to court supervision. In *Mutter v. Ross*, 811 S.E.2d 866 (W. Va. 2018), the Supreme Court of Appeals of West Virginia held that a parole condition barring computer access violated the First Amendment under *Packingham*. In so holding, the court expressly rejected the state's argument that *Packingham* did not apply, since "*Packingham* made no exception for parolees," who had First Amendment rights. *Id*. at 870–73.

In *People v. Morger*, 160 N.E.3d 53 (Ill. 2019), the Supreme Court of Illinois held that a condition of probation banning access to social media websites for all sex offenders was unconstitutionally overbroad. In so holding, the court "[a]ppl[ied] the tenets of *Packingham*" and concluded that the probation condition "prohibits constitutionally protected activity." *Id*. at 69–70 (quotation omitted). The court acknowledged that some federal courts had "limit[ed] the reach of *Packingham*" by "find[ing] that the principles of *Packingham* do not apply to those still serving their sentences," but the court rejected that limited interpretation. *Id*. at 68.

Most recently, in *Aldape v. State*, __ P.3d __, 2023 WL 6353315 (Nev. Sept. 28, 2023), the Supreme Court of Nevada held that, under *Packingham*, a statutory condition of probation prohibiting sex offenders from accessing the internet without permission violated the First Amendment. The court expressly rejected the state's effort to "limit the rights recognized in *Packingham* to people who, unlike Aldape, have completed their sentence and are no longer under court-supervised release." *Id.* at *4. The court acknowledged that defendants on probation enjoyed less liberty, "[b]ut that does not mean that the First Amendment right to internet access recognized in *Packingham* has no application to probationers." *Id*. "*Packingham* therefore assists us in holding that the First Amendment protects the right of court supervisees, including Aldape, to access the internet." *Id*. at *5.

3. The conflict in authority has been acknowledged for years now. In 2020, the Eleventh Circuit in *Bobal* criticized the Third Circuit in *Holena* for "reach[ing] the opposite conclusion" as it did, opining that "*Holena* read the opinions in *Packingham* too broadly." 981 F.3d at 978. And other courts have noted the fractured landscape more broadly. *See, e.g.*, *Doss v. State*, 961 N.W.2d 701, 722 & n.12 (Iowa 2021) ("Since *Packingham*, there have been a host of court decisions dealing with supervised release conditions that broadly limit Internet use. The results in these cases have been mixed.") (internal citation omitted); *Jennings v. Commonwealth*, 2019 WL 1575570, at *3 (Ky. Ct. App. 2019) ("Although *Packingham* resolved the issue of internet access for defendants who had served their sentences and were no longer subject to supervision, the issue relating to whether internet restrictions are

permissible for sex offenders who are on active supervision (*i.e.*, parole, probation, or supervised release) continues to show variation."), *rev'd* 613 S.W.3d 14 (Ky. 2020).

B. The question presented is important and recurring.

The Court should resolve the confusion that *Packingham* has wrought.

1. To begin, the conflict among the lower courts means that geography alone now determines whether criminal defendants enjoy a vital First Amendment right. In the jurisdictions where they do enjoy that right, then courts may restrict access to the internet while they are on supervision only if the restriction is carefully narrowed and individually tailored. But in jurisdictions where they do not enjoy such a right while on supervision, then courts may freely impose sweeping restrictions on internet access. Given the necessity and ubiquity of the internet in the modern era, those restrictions "impose[ ] a massive deprivation of liberty." *Ellis*, 984 F.3d at 1104. The happenstance of geography should not determine who gets to enjoy that liberty.

2. As the numerous cases above reflect, this issue recurs frequently. *Packingham* was decided in 2017. And in the six years since then, numerous state and federal courts have struggled with how to apply it to defendants on supervision. The cases cited above are by no means exclusive; they are just a snapshot of some of the key precedential appellate decisions. Excluded are the dozens of non-precedential appellate decisions and trial-court rulings that are unreported or not appealed.

3. This issue is not going away. In the federal context, for example, the Sentencing Guidelines recommend that courts impose a computer restriction as a special condition of supervised release when sentencing "sex offenses" where the

defendant used a computer in the offense. U.S.S.G. § 5D1.3(d)(7). As a result, probation officers regularly recommend this special condition. That is exactly what happened here (which is why Petitioner was able to object to it before sentencing).

"Sex offenses," moreover, are broadly defined to include any offense against a minor under chapters 109A, 110 and 117 of title 18 of the U.S. Code. § 5D1.3(d)(7), *cross referencing* § 5D1.2 cmt. n.1 (defining the term). Those chapters contain the most commonly prosecuted federal offenses—dealing with sexual abuse (chapter 109A), sexual exploitation and child pornography (chapter 110), and transportation and enticement (chapter 117). Thus, these internet restrictions are routinely imposed as part of supervised release in the most common federal sex offense cases.

4. Finally, only this Court can resolve the confusion. After all, the confusion is about the applicability of one of this Court's own precedents. And because it involves a constitutional right—*i.e.*, whether criminal defendants on supervision enjoy a First Amendment right to access the internet—Congress could not resolve the confusion even if it wanted to. Because only this Court can resolve the confusion, and because that confusion will only continue to deepen, the Court should intervene now.

C. This case is an ideal vehicle.

1. Petitioner expressly preserved his *Packingham* argument below.

Before sentencing, Petitioner submitted a detailed written objection to the lifetime computer restriction, arguing that it was overbroad under *Packingham*. He further argued that the Eleventh Circuit's decision in *Bobal* did not control. And he relied on the Second Circuit's decision in in *Eaglin* and the Third Circuit's decision in

in *Holena*. Dist. Ct. ECF No. 11–17. At sentencing, Petitioner reiterated those arguments, noting that there was a "circuit split." Dist. Ct. ECF No. 106 at 6. After the government responded that Petitioner's *Packingham* argument was foreclosed by circuit precedent, Dist. Ct. ECF Nos. 79 at 5 and 106 at 7, the district court overruled the objection and imposed the restriction, Dist. Ct. ECF No. 106 at 7; App. 20a.

On appeal, Petitioner reiterated his *Packingham* arguments in full. Pet. C.A. Br. 10, 12–24; Pet. C.A. Reply Br. 2–5. Contrary to the Eleventh Circuit's mistaken suggestion below, the government did not dispute that Petitioner had preserved those arguments. *See supra* p. 7. In any event, the Eleventh Circuit said this did not matter because it squarely held that "*Packingham* does not apply" to computer restrictions of supervised release. App. 5a. And the court applied *Bobal*, which rejected *Holena* and distinguished *Packingham* on the ground that, while "the law in *Packingham* restricted sex offenders beyond the completion of their sentence, Bobal's restriction did not extend beyond the completion of his supervised release term." App. 6a.

Because Petitioner thoroughly preserved his *Packingham* argument at every stage, and because the lower courts squarely rejected it on the merits, this issue is cleanly presented for review in this Court—unencumbered by plain-error review.

2. Factually, this case is also an excellent vehicle for at least two reasons.

First, this case involves a lifetime term of supervised release. As the Third Circuit emphasized in *Holena*, the computer restriction "will last as long as [Petitioner] does." 906 F.3d at 292 (quotation omitted). Thus, this case illustrates the significant amount of liberty at stake. And unlike defendants with finite terms of

supervised release, there is little dispute that Petitioner would have prevailed in his challenge had he been sentenced in the Third Circuit, especially given that the defendant in *Holena* was convicted of enticing a minor to engage in sexual activity.

That brings up the second reason. Unlike in *Holena*, "[t]here was no evidence of distribution or chat room conversations about child exploitation" here. PSR ¶ 15. Rather, Petitioner did no more than download and possess child pornography. Even before *Packingham*, "the majority of circuits ha[d] held that a complete ban on internet access is overbroad even where the record contains evidence of non-contact child pornography activity, or similar conduct, on the internet." *Ellis*, 984 F.3d at 1104–05 & n.10 (citing cases); *see United States v. Hamilton*, 986 F.3d 413, 422 (4th Cir. 2021) (explaining that the circuits have upheld internet restrictions in "contact" cases but not in "non-contact" cases). Thus, were the Court to hold that *Packingham* applies to those on supervised release, Petitioner would be far more likely to prevail in his challenge than a defendant who was convicted of a "contact" sex offense.

D. The decision below is wrong.

In the decision below, the Eleventh Circuit held that "*Packingham* does not apply" to internet restrictions of supervised release. App. 5a. That was incorrect.

1. In *Packingham*, this Court recognized that the internet serves as the "modern public square," with social-media sites in particular acting as "the principle sources for knowing current events, checking ads for employment, speaking and listening . . . , and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms

available to private citizens to make his or her voice heard. They allow a person with an Internet connection to become a town crier with a voice that resonates farther than it could from any soapbox." 582 U.S. at 107 (quotation omitted). The Court thus "forcefully identified" a First Amendment right to access the internet. *Eaglin*, 913 F.3d at 95. So "to foreclose access" to the web "is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Packingham*, 582 U.S. at 108.

"[I]n applying the First Amendment to 21st century norms, *Packingham* formalized an undeniable truth—there is simply no way to participate in modern society without internet access." *Aldape*, 2023 WL 6353315, at *5. The internet "is vital for a wide range of routine activities in today's world," such as "finding and applying for work, obtaining government services, engaging in commerce, communicating with friends and family, and gathering information on just about anything," and thus "[c]utting off all access to the Internet constrains a defendant's freedom in ways that make it difficult to participate fully in society and the economy." *United States v. LaCoste*, 821 F.3d 1187, 1191 (9th Cir. 2016). This was apparent to courts well over a decade ago: "[t]he ubiquitous presence of the internet and the all-encompassing nature of information it contains are too obvious to require extensive citation or discussion." *United States v. Voelker*, 489 F.3d 139, 145 (3d Cir. 2007).

But this reality "does not change, and perhaps becomes even more salient, when applied to people under active court supervision." *Aldape*, 2023 WL 6353315, at *5. *Packingham* itself recognized that "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from

[internet] access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." 582 U.S. at 108. "Convicted criminals," of course, include those subject to court supervision. *Morger*, 160 N.E.3d at 68. As a practical matter, it would "be hopelessly difficult to meet with one's probation officer without using a cell phone to make the appointment, get directions, arrange transportation, and set reminders. Then there are the rehabilitative steps: finding a job, renting a home, communicating with family and friends, and civic participation all often require an internet connection." *Aldape*, 2023 WL 6353315, at *5. In short, it "makes little sense to differentiate by supervision status a constitutionally protected right to access these everyday necessities when modern life makes no such distinctions." *Id*.

2. In the decision below, however, the Eleventh Circuit (like three others) reasoned that "*Packingham* does not apply" to those under court supervision because the "law in *Packingham* restricted sex offenders beyond the completion of their sentence." App. 5a–6a (citing *Bobal*, 981 F.3d at 977); *see supra* at pp. 12–14 (discussing cases). But nothing in *Packingham* turned on that fact. Some courts have seized on one sentence in *Packingham*: "It unsettling to suggest that only a limited set of websites can be used even by person who have completed their sentences." 582 U.S. at 108. However, this suggests only that the Court found it more troubling to apply the law to those who had completed their sentence than those who had not; it does not suggest that the law or the Court's holding was limited only to the former. And another sentence contained in a parenthetical reinforces that this was just dicta: "(Of importance, the troubling fact that the law imposes severe restrictions on

persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.)." *Id*. at 107. As mentioned, the Court also made clear that internet access was essential to reintegrate and rehabilitate "convicted criminals," without limiting that category to those who had already completed their sentences. *See Morger*, 160 N.E.3d at 68.

Some lower courts have also reasoned that defendants subject to supervision enjoy less liberty than those who have finished serving their sentences. *See United States v. Knights*, 534 U.S. 112, 119 (2001). "But this does not mean that [someone on supervision] is not entitled to any constitutional rights whatsoever." *Mutter*, 811 N.E.2d at 872. And nothing in *Knights* (a Fourth Amendment case) or any other case "mean[s] that the First Amendment right to internet access recognized in *Packingham* has no application" to those who are on supervision. *Aldape*, 2023 WL 353315, at *4. Thus, even assuming that their "First Amendment rights may be restricted, under *Packingham* those restrictions must be narrowly tailored with a view to the goals of supervised release—deterring crime, protecting the public, and rehabilitating the defendant." *Id*. (quotations and brackets omitted).

In that regard, although the law in *Packingham* covered those whose sentences were complete, it extended *only* to social media websites. 582 U.S. at 106. Here, however, the restriction prohibits Petitioner from even using a computer, thus prohibiting him from accessing any websites at all. *See Eaglin*, 913 F.3d at 96. And while Petitioner could later move to modify this condition after his release, that relief is subject to the broad discretion of the same judge who imposed it in the first place.

II. This Court's review is warranted on the *Apprendi* question.

By refusing to apply *Apprendi*'s rule to restitution, the courts of appeals are contravening this Court's precedents and the Sixth Amendment's original meaning. That intransigence is allowing judges to impose *billions* in restitution on *thousands* of defendants every year—all without the protections of a jury. The time has come to end to this unconstitutional practice. This is a clean vehicle for the Court to do so.

A. The decision below contravenes this Court's precedents.

Under this Court's precedents, *Apprendi*'s rule applies to criminal restitution.

1. In its landmark decision in *Apprendi*, this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The "animating principle" of *Apprendi*'s rule is to ensure "the preservation of the jury's historic role as a bulwark between the State and the accused." *Southern Union*, 567 U.S. at 350 (quotation omitted).

"[I]n the years since *Apprendi* this Court has not hesitated to strike down" various sentencing procedures "that fail[ed] to respect the jury's supervisory function." *United States v. Haymond*, 139 S. Ct. 2369, 2377 (2019) (plurality); *see, e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002) (imposition of death penalty based on judicial fact-finding); *Blakely v. Washington*, 542 U.S. 296 (2004) (mandatory state sentencing guidelines); *Cunningham v. California*, 549 U.S. 270 (2007) (same); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory federal sentencing guidelines); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fine based on

judicial fact-finding); *Alleyne v. United States*, 570 U.S. 99 (2013) (imposition of mandatory minimum); *Haymond*, 139 S. Ct. at 2378–78; *id.* at 2386 (Breyer, J., concurring in the judgment) (imposition of mandatory minimum term of imprisonment upon violating supervised release). It should continue that course here.

Southern Union is all but dispositive. The Court emphasized that there was "no principled basis under *Apprendi* for treating criminal fines differently" than imprisonment or the death penalty. *Southern Union*, 567 U.S. at 349. The Court explained: "In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentences,' 'penalties,' or 'punishments'—terms that each undeniably embrace fines." *Id.* at 350 (brackets and citations omitted).

That rationale applies with full force here. If there is no principled basis to distinguish incarceration/death from a monetary penalty like a fine, then there is no principled basis to distinguish fines from restitution. That is especially true because the Court in *Southern Union* observed that "the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts," including "the amount of the defendant's gain or the victim's loss." *Id.* at 349–50 & n.4. The same is true under the statute here: restitution is calculated by reference to that same fact—namely, the "full amount of the victim's losses" caused by the offense. *See* 18 U.S.C. §§ 2259(b)(1), (b)(2), (c)(2). That fact must therefore be submitted to a jury and found beyond a reasonable doubt, just as it is for criminal fines. Indeed, given the obvious similarities between criminal fines and

restitution, the government acknowledged at oral argument in *Southern Union* that any distinction between the two would be "hard to justify" under this Court's precedents. *Southern Union*, Oral Arg. Tr. 31 (U.S. No. 11-94) (Mar. 19, 2012).

Southern Union also reiterated that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." 567 U.S. at 353 (quotation omitted). In that regard, "as long ago as the time of Henry VIII, an English statute entitling victims to the restitution of stolen goods allowed courts to order the return only of those goods mentioned in the indictment and found stolen by a jury." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting from the denial of certiorari) (citations omitted). "In America, too, courts held that in prosecutions for larceny, the jury usually had to find the value of the stolen property before restitution to the victim could be ordered." *Id*. (citing 19th century cases). As one commentator has put it, "the relative consistency of historical practice is striking": common-law courts "required the stolen property to be described in the indictment or valued in a special verdict." James Barta, Note, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 476 (2014). "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" Founding. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting from the denial of certiorari).

2. In reaching the contrary conclusion, the courts of appeals have stubbornly clung to their own pre-*Southern Union* precedents as a matter of *stare*

decisis.[2] Take this case. In the decision below, the Eleventh Circuit declined to apply *Apprendi* to restitution because, in its view, *Southern Union* did not "abrogate" *Dohrmann*, a circuit precedent from 2006. App. 11a–12a. Despite following that same course, other circuits have more candidly acknowledged that their earlier precedent is not "well-harmonized with *Southern Union*," and that "[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). But given the lower courts' refusal to change course, only this Court can ensure compliance with the Sixth Amendment.

In addition to *stare decisis*, the courts of appeals have offered two reasons for declining to apply *Apprendi* to restitution. But neither reason withstands scrutiny.

a. Some courts of appeals, including the Eleventh Circuit below, have reasoned that, because restitution is based on the victim's loss, there is no determinate "statutory maximum." App. 11a; *see also United States v. Vega-Martinez*, 949 F.3d 43, 54–55 (1st Cir. 2020); *Sawyer*, 825 F.3d at 297; *United States v. Bengis*, 783 F.3d 407, 412–13 (2d Cir. 2015); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012). But that reasoning is incompatible with a pair of this Court's precedents.

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[2] *See, e.g.*, *United States v. Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016) (reaffirming *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005)); *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015) (reaffirming *United States v. Thomas*, 422 F.3d 665, 670 (8th Cir. 2005) and *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005)); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (reaffirming *United States v. Read*, 710 F.3d 219, 231 (5th Cir. 2012) (citing *United States v. Gasanova*, 332 F.3d 297, 310 (5th Cir. 2003))); *United States v. Wolfe*, 701 F.3d 1206, 1216–18 (7th Cir. 2012) (reaffirming *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008)).

First, this reasoning is contrary to *Blakely*. The Court could not have been more clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the 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." 542 U.S. at 303–04 (internal citations omitted; emphases in original). Under *Blakely*, 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. 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." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., dissenting from the denial of certiorari).

Shortly after *Blakely*, and even before *Southern Union*, several circuit judges had recognized that implication. In dissent, Judge Bye explained that, in light of *Blakely*, the *Apprendi*-restitution question was "no longer difficult to answer. . . . With [*Blakely*'s 'statutory maximum'] clarification, precedent dictates a conclusion that any dispute over the amount of restitution due and owing a victim of crime must be submitted to a jury and proved beyond a reasonable doubt." *Carruth*, 418 F.3d at 905 (Bye, J., dissenting). The pre-*Blakely* thinking that "*Apprendi* does not apply to restitution because restitution statutes do not prescribe a maximum amount . . . is no longer viable in the post-*Blakely* world which operates under a completely different understanding of the term prescribed statutory maximum." *Id*. at 906 (Bye, J.,

dissenting). Five Third Circuit Judges soon made that same point in dissent. *United States v. Leahy*, 438 F.3d 328, 343–44 (3d Cir. 2006) (en banc) (McKee, J., joined by Rendell, Ambro, Smith, and Becker, JJ., concurring in part and dissenting in part).

Blakely also forecloses the lower courts' attempt to distinguish *Southern Union*. The statute in that case prescribed a $50,000 maximum fine for each day of a criminal violation; while the jury had necessarily found only a one-day violation, the sentencing judge found a 762-day violation, increasing the maximum fine from $50,000 to $38 million. *Southern Union*, 567 U.S. at 347, 352. Some courts of appeals have said that *Southern Union* does not apply to restitution because, unlike the fine statute there, restitution statutes prescribe no determinate maximum. But, under *Blakely*, they *do* prescribe a maximum: the full amount of the victim's losses. That fact determines the maximum restitution award, just as that fact determines the maximum fine award under many fine statutes. *Southern Union*, 567 U.S. at 349–50 & n.4. And just as a jury was required to find the duration of the criminal violation for the fine in *Southern Union*, a jury is required to find the victim's losses for restitution here. Again, without such a finding, the "statutory maximum" is zero.

Second, Apprendi's rule does not apply *only* where judicial fact-finding increases a "statutory maximum." In *Alleyne*, the Court held that *Apprendi* applies equally to judicial fact-finding that triggers a mandatory *minimum* punishment. Consistent with the original meaning of the Sixth Amendment, *Alleyne* explained that such fact-finding "alters the prescribe range of sentences to which a criminal defendant is exposed." 570 U.S. at 111–12. "And because the legally prescribed range

is the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense" that must be submitted to a jury. *Id*. at 112 (internal citation omitted).

That principle applies with full force here. Again, the statute here requires that restitution be awarded in the full amount of the victim's losses. In the absence of such a loss finding, there can be no restitution at all. Because that loss finding mandates restitution where no restitution would otherwise be imposed, it necessarily increases the minimum penalty for the crime. Under *Alleyne*, then, the victim's loss amount must be submitted to a jury and found beyond a reasonable doubt.

Alleyne also applies here for an even more obvious reason: the statute imposes a $3,000 minimum restitution award per victim. 18 U.S.C. § 2259(b)(2)(B). A jury must therefore identify the victims of the offense. *See id*. § 2259(c)(4) (defining "victim" as "individual harmed as a result of a commission of a crime under this chapter"). Despite this $3,000 minimum, the court below brushed aside *Alleyne*, simply repeating that "*Apprendi* does not apply to restitution orders." App. 11a–12a.

b. Some courts of appeals have alternatively declined to apply *Apprendi* to restitution on the ground that restitution is a civil remedy designed to compensate the victims of the offense. *See, e.g.*, *Thunderhawk*, 799 F.3d at 1209; *Wolfe*, 701 F.3d at 1216–17. But that argument is contrary to both constitutional and statutory text, as well as this Court's precedents characterizing restitution as a criminal penalty.

First, under the plain text of the Sixth Amendment, the right to a jury trial applies "[i]n all criminal prosecutions." U.S. Const., amend. VI; *see Hester*, 139 S. Ct.

at 510 (Gorsuch, J., dissenting from the denial of certiorari). As this Court has recognized, "[s]entencing courts are required to impose restitution as part of the sentence for specified *crimes*." *Manrique v. United States*, 137 S. Ct. 1266, 1270 (2017) (emphasis added). That is the case here. *See, e.g.*, 18 U.S.C. § 2259(a) ("the court shall order restitution for *any offense* under this chapter"); *id.* § 2259(c)(2) (defining "full amount of the victim's losses" as those that were a proximate result "the *offenses* involving the victim"); *id.* § 2259(c)(4) (defining "victim" as an "individual harmed as a result of a commission of *crime* under this chapter") (emphases added). Thus, there can be no question that restitution was imposed as part of a "criminal prosecution."

Second, other federal statutes also "describe restitution as a 'penalty' imposed on the defendant as part of his criminal sentence." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., dissenting from the denial of certiorari) (citing statutes)). That includes the Mandatory Victim Restitution Act (MVRA). *See* 18 U.S.C. § 3663A(a)(1) ("the court shall order, in addition to . . . *any other penalty* authorized by law, that the defendant make restitution to the victim") (emphasis added); § 3663A(c) ("This section shall apply in all sentencing proceedings for convictions of" certain "offense[s]").

Third, this Court's precedents confirm that restitution is a criminal penalty. In *Kelly v. Robinson*, 479 U.S. 36 (1986), the Court explained that "[r]estitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused," and it therefore has a "more precise deterrent effect than a traditional fine." *Id.* at 49 n.10. In that case, the Court held that restitution was not dischargeable in bankruptcy because it was a "penalty"

"payable to and for the benefit of a governmental unit," not "compensation for actual pecuniary loss." *See id.* at 50–53 (quoting 11 U.S.C. § 523(a)(7)).

In so holding, the Court emphasized that restitution was part of "[t]he criminal justice system," which "is not operated primarily for the benefit of victims, but for the benefit of society as a whole." *Id.* at 52. While "restitution does resemble a judgment 'for the benefit' of the victim, the context in which it is imposed undermines that conclusion," for "the decision to impose restitution" turns "on the penal goals of the State and the situation of the defendant," not the victim. *Id.* "Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, [this Court] conclude[d] that restitution orders imposed in such proceedings operate 'for the benefit of' the State. Similarly, they are not assessed 'for compensation' of the victim." *Id.* at 53 (ellipsis omitted).

Two decade later, in *Pasquantino v. United States*, 544 U.S. 349 (2005), the defendants argued that their wire-fraud prosecution—for defrauding Canada of tax revenue—was barred by the "revenue rule," which prohibits the enforcement of foreign revenue laws. In support, they emphasized that "restitution of the lost tax revenue to Canada is required under the Mandatory Victims Restitution Act." *Id.* at 365. This Court rejected that argument, explaining that "the wire fraud statute advances the Federal Government's interest in punishing fraudulent domestic criminal conduct," and that "[t]he purpose of awarding restitution . . . is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct." *Id.*

Put simply: restitution is a criminal penalty. So the Sixth Amendment applies.

B. The question presented is important and recurring.

Two Justices of this Court have previously deemed the question presented "important" and "worthy of our review." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari). That assessment is correct.

1. Numbers alone demonstrate that "[r]estitution plays an increasing role in federal criminal sentencing today." *Id*. In 2022 alone, federal courts ordered over 8,000 defendants to pay over $13 *billion* in restitution, with a mean award of more than $1.6 million. U.S. Sentencing Comm'n, 2022 Annual Report and Sourcebook of Federal Sentencing Statistics 66, tbl. 17.[3] And restitution is particularly common in white-collar cases; fraud cases alone accounted about $9 billion of the total. *Id*.; *see, e.g.*, *United States v. Kachkar*, 2022 WL 2704358, at *10 (11th Cir. 2022) (affirming, over an *Apprendi* challenge, a $100 *million* restitution award in a wire-fraud case).

Far from being an aberration, last year continued a trend. Before enactment of the MVRA in 1996, "restitution orders were comparatively rare. But from 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., dissenting from the denial of certiorari) (citation omitted). "And between 1996 and 2016, the amount of unpaid federal criminal restitution rose from less than $6 billion to more than $110 billion."

[3] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf.

Id. (citations omitted). It is now up to $130 billion. *See* Exec. Office for U.S. Attorneys, United States Attorneys' Annual Statistical Report Fiscal Year 2022, at 44.[4]

2. From the perspective of defendants, restitution can be crippling, especially for those who are indigent. Recall that the statute here, as well as the general restitution statute it incorporates, mandates restitution without regard to the defendant's economic circumstances. 18 U.S.C. § 2259(b)(4)(B)(i); §§ 2259(b)(3), 3664(f)(1)(A). Yet because restitution is backed by the coercive power of the government, "[f]ailure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 130 S. Ct. at 510 (Gorsuch, J., dissenting from the denial of certiorari). In some jurisdictions, it can also result in suspension of the right to serve on a jury, run for office, possess a firearm, or even drive a car. *See* Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 123–29 (2014). And the federal government can file a lien against a defendant's property or garnish his wages. *See* Gretta L. Goodwin, GAO-20-676R, *Federal Criminal Restitution: Department of Justice Has Ongoing Efforts to Improve its Oversight of the Collection of Restitution and Tracking the Use of Forfeited Assets* 3 (Sept. 30, 2020).[5] By any measure, these are major restrictions on individual liberty.

In short: for the past few decades, federal judges have required thousands of criminal defendants to pay billions in restitution. Those awards are financially

[4] https://www.justice.gov/media/1279221/dl?inline.

[5] https://www.gao.gov/assets/gao-20-676r.pdf.

crushing and liberty depriving. Yet they have not been authorized by a jury. Only this Court can put a stop to this long-running, systemic Sixth Amendment violation.

C. This case is a clean vehicle.

This case affords the Court a clean and much-awaited opportunity to do so.

1. Petitioner expressly preserved his Sixth Amendment argument in the lower courts. Both before and during sentencing, and then again at the restitution hearing, he objected to restitution under *Apprendi* and *Southern Union*, emphasizing that the jury had made no finding about the victims or their losses. Dist. Ct. ECF No. 73 at 1–9 (PSR objection); ECF No. 106 at 4 (sentencing hearing); ECF No. 126 at 6–7 (restitution hearing). Petitioner reiterated those arguments on appeal. Pet. C.A. Br. 11, 30–36; Pet. C.A. Reply Br. 10–16. And after the government fully responded to those arguments, both the district court and the Eleventh Circuit rejected them, refusing to apply *Apprendi* and *Southern Union* to restitution. App. 10a–12a; *see* Dist. Ct. ECF No. 126 at 11. Because Petitioner preserved his *Apprendi* arguments at every stage, and the lower courts rejected them, that issue is squarely before this Court.

2. This case well illustrates the dangers of exempting restitution from the Sixth Amendment. The court imposed restitution in the amount of $106,500 on a pauper. That sort of significant criminal penalty should be authorized only by a jury of one's peers, and only after the jury makes the necessary findings of fact beyond a reasonable doubt. In this case, however, a judge (not a jury) made the necessary factual findings about the victims and their losses by a preponderance of the evidence. *See* 18 U.S.C. § 3664(e) ("Any dispute as to the proper amount or type of restitution

shall be resolved by the court by the preponderance of the evidence."); § 2259(b)(3) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664"). That was so even though, as Petitioner pointed out at below, the government presented no evidence at trial to the jury about any of the 17 victims who ultimately sought and received restitution. Dist. Ct. ECF No. 126 at 6–7.

3. Finally, this case lacks any of the vehicle problems that have plagued recent petitions. Following *Hester*, the Court has continued to call for responses to petitions presenting the same question here. *See, e.g.*, *Arnett v. Kansas*, No. 21-1126 (response requested Mar. 25, 2022); *Gilbertson v. United States*, No. 20-860 (response requested Feb. 11, 2021). But while this Court has denied review in a handful of post-*Hester* petitions, they all suffered from fatal vehicle defects. *See, e.g.*, *Arnett*, Kan. BIO 12–13 (No. 21-1126) (May 24, 2022) (petitioners acquiesced in having a judge impose restitution); *Flynn v. United States*, U.S. BIO 24, 26 (No. 20-1129) (May 19, 2021) (petitioner admitted loss amount in plea agreement); *Gilbertson*, U.S. BIO 11, 20–22 (No. 20-860) (May 14, 2021) (petitioner forfeited his *Apprendi* argument by failing to raise it in the district court); *Budagova v. United States*, U.S. BIO 4–5, 14–15 (No. 18-8938) (July 22, 2019) (same). There is no such procedural defect here.

* * *

In sum, the lower courts are refusing to give effect to this Court's precedents on an important and recurring Sixth Amendment question. The Court should grant certiorari to ensure "the preservation of the jury's historic role as a bulwark between the State and the accused." *Southern Union*, 567 U.S. at 350 (quotation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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