No. 24-5366

IN THE
SUPREME COURT OF THE UNITED STATES

MARQUISE THOMAS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government doesn't dispute that the Sixth Amendment issue presented in Mr. Thomas's petition is important and recurring. Instead, relying largely on its opposition in *Shah v. United States*, No. 24-25, it argues that the principles underlying *Apprendi*[1] do not apply because, it claims, 18 U.S.C. § 2259 establishes an indeterminate restitution framework with no statutory maximum. BIO at 6–7. Mr. Thomas explained in his petition why the "no statutory maximum" reasoning is wrong in the first instance. Pet. at 16–17, 21–24. But even if that reasoning were correct, it wouldn't ameliorate the constitutional problem with judicial factfinding under § 2259(b).

Unlike the restitution statute at issue in *Shah*, § 2259(b) has a mandatory minimum. 18 U.S.C. § 2259(b)(2)(B). Mr. Thomas's petition is the only petition to squarely present the Sixth Amendment issue posed by that minimum. *See* Pet at 11–13; *Alleyne v. United States*, 570 U.S. 99 (2013). The government's response fails to grapple with the constitutional significance of § 2259(b)'s plain language. And the Eleventh Circuit's refusal to apply *Alleyne* to § 2259(b)—which, contrary

[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

to the government's brief, is not a position shared by the other circuits—cannot be squared with this Court's precedent. *See* Part A, *infra*.

Without acknowledging that the circuits are split on whether restitution is punishment for a criminal offense, the government also argues that restitution is "a restorative remedy that compensates victims for economic losses suffered as a result of the defendant's criminal conduct." BIO at 8. But that position—adopted by a minority of the courts of appeals—is inconsistent with the text of the Sixth Amendment, this Court's precedent, and the statutory scheme, to say nothing of the punitive consequences associated with failure to comply with criminal restitution orders. This Court's intervention is needed to resolve the split of authority. *See* Part B, *infra*.

Finally, this case is an excellent vehicle, despite the government's assertion to the contrary. BIO at 10. The government's claim that Mr. Thomas waived his right to a jury trial and that "uncontested" evidence supports the restitution order distorts the record and fundamentally misunderstands the Sixth Amendment and this Court's precedent. *See* Part C, *infra*. And in any event, issues like harmlessness can be addressed on remand if necessary. This Court should grant the petition

to address this important and recurring legal issue that the circuits cannot resolve themselves. Pet. at 24–27.

A. Restitution orders under 18 U.S.C. § 2259(b) pose distinct constitutional issues because of the statute's mandatory minimum.

The government fails to contend with the plain language of 18 U.S.C. § 2259(b). The statute does not, as the government claims, "establish[ ] an indeterminate framework." BIO at 7. To the contrary, § 2259(b) contains an express mandatory minimum of $3,000 per victim. *See* 18 U.S.C. § 2259(b)(2)(B). The government handwaves that critical component by pointing to another subprovision stating that courts may terminate orders after a victim recovers her total losses. BIO at 8–9 (citing 18 U.S.C. § 2259(b)(2)(C)). But as Mr. Thomas explained in his petition, § 2259(b)(2)(C) does not negate the mandatory minimum in § 2259(b)(2)(B). Pet. at 17 n.4. Instead, it operates separately and gives a mechanism by which to terminate liability for defendants ordered to pay restitution.

Even if that subprovision could be construed, as the government claims, to prevent application of $3,000 mandatory minimum in some cases, that's immaterial for Sixth Amendment purposes. Other statutes

similarly provide relief from mandatory minimums. *See id.* (discussing 18 U.S.C. § 3553(e) (substantial assistance), 18 U.S.C. § 3553(f) (safety valve)). Yet a jury still must find (or the defendant admit during his guilty plea) the facts necessary to convict the defendant of, for example, certain drug quantities that trigger a mandatory minimum. The government has no response to Mr. Thomas's argument on that point.

The government's suggestion that the circuits have unanimously rejected that restitution orders under § 2259(b) violate the Sixth Amendment as described in *Alleyne*, BIO at 9 & 9 n.3, is highly misleading. Only one of the cases in the government's string cite considered restitution orders under § 2259(b) after Congress added the $3,000 statutory minimum. That case, *United States v. Finnell*, No. 22-13892, 2023 WL 657444, at *4 (11th Cir. Oct. 10, 2023), is also from the Eleventh Circuit. And just like in Mr. Thomas's case, the Eleventh Circuit rejected an *Alleyne* argument by relying on the same prior circuit precedent regarding the applicability of *Apprendi* to a restitution statute

that, unlike § 2259(b), does not have a discrete statutory maximum. *Compare* 2023 WL 657444 at *4, *with* Pet. at 18.[2]

The Eleventh Circuit's approach has been rejected by at least one other circuit. The Fifth Circuit has expressly recognized that the $3,000 statutory minimum distinguishes § 2259(b) from the other restitution statutes for which courts have held *Apprendi* doesn't apply. *See United States v. Caudillo*, 110 F.4th 808 (2024); Pet. at 18–19. Although the Fifth Circuit did not ultimately answer the Sixth Amendment question, its reasoning defies both the Eleventh Circuit's decision below and the government's argument to this Court that § 2259(b)'s mandatory minimum is of no constitutional significance.

B. Despite this Court's precedent explaining that criminal restitution is punitive, the circuits are split on whether criminal restitution is punishment for the criminal offense.

The government's argument that there are no Sixth Amendment implications for restitution because it is a restorative remedy, BIO at 8, is wrong for the reasons Mr. Thomas explained in his petition. Pet. at 20–

[2] The government notes that this Court denied Finnell's petition for a writ of certiorari. BIO at 6 n.2, 9 n.3. But as Mr. Thomas explained, Finnell's petition did not focus on *Alleyne* and § 2259(b)'s mandatory minimum; it also had procedural problems that are not present in Mr. Thomas's case. Pet. at 28 n.7.

21 (discussing the Sixth Amendment, precedent, and statutory scheme). This Court has repeatedly explained that, contrary to the government's position in its brief, criminal restitution "serves punitive purposes." *Paroline v. United States*, 572 U.S. 434, 456 (2014); *see Pasquantino v. United States*, 544 U.S. 349, 365 (2005); *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986). And restitution orders pursuant to a mandatory minimum, like Mr. Thomas's under § 2259(b), are particularly punitive because they impose monetary penalties regardless of whether the amount represents the victim's actual losses proximately caused by the defendant's offense.

Yet, as the government fails to acknowledge, the circuits are expressly split on whether restitution is a criminal penalty. *See* Pet. at 19. The majority of circuits have held that "restitution is penal and part of the criminal sentence." *United States v. Anthony*, 25 F.4th 792, 798 n.6 (10th Cir. 2022); *see id.* (collecting cases from the First, Second, Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits).[3] By contrast, the Seventh Circuit has held tight to its minority view that criminal

[3] The decision below parted ways with Eleventh Circuit precedent holding that criminal restitution is penal by suggesting its agreement with the contrary, minority position. *See* Pet. at 19; Pet. App. 8A n.2.

restitution is not criminal punishment. *See United States v. Wolfe*, 701 F.3d 1206 (7th Cir. 2012). The Eighth Circuit has similarly embraced the view that restitution is not a criminal penalty because it is "designed to make victims whole, not to punish perpetrators" and is "essentially a civil remedy . . . incorporated into criminal proceedings for reasons of economy and practicality." *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005). *But see United States v. United Security Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) ("A criminal restitution order is penal, not compensatory.").[4]

In its brief, the government endorses the minority view that criminal restitution is not punishment for a criminal offense. BIO at 8. At the very least, this Court's intervention is needed to unify the discordant positions of the circuits and the Department of Justice on an issue that can trigger "profound" consequences for indigent defendants.

[4] In his petition, Mr. Thomas also cited the Tenth Circuit as holding the minority view. Pet. at 19 (citing *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007)). But the Tenth Circuit seems to have since reconsidered that view in light of this Court's decision in *Paroline*. *See Anthony*, 25 F.4th at 798 n.5.

Hester v. United States, 586 U.S. 1104, 1106 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); *see* Pet. at 25.[5]

C. This case is an excellent vehicle.

At every stage of the proceeding, Mr. Thomas has raised his objection that relying on judicial factfinding by a preponderance of the evidence to order restitution under § 2259(b)'s mandatory minimum was unconstitutional. And the district court did just that in his case, finding based on a preponderance that there were five "victims" in his case and imposing § 2259(b)'s mandatory minimum restitution amount for each victim. Pet. at 9, 28.

Contrary to the government's suggestion at page 10 of its response, that Mr. Thomas elected to proceed to a stipulated-fact bench trial on his offense of conviction is of no moment. He did not waive his jury trial right to the factfinding underlying the restitution order any more than the

[5] This Court is currently considering a related issue in another pending petition for a writ of certiorari: "Whether criminal restitution under the Mandatory Victim Restitution Act (MVRA) is penal for purposes of the Ex Post Facto Clause." *Ellingburg v. United States*, No. 24-482. On November 7, 2024, the Court requested the United States respond to the petition in *Ellingburg*. Because the outcome in *Ellingburg* could have implications for Mr. Thomas's case, he respectfully suggests that, should this Court not grant his petition outright, it should hold the petition pending its decision in *Ellingburg*.

defendant in *Erlinger v. United States*, 602 U.S. 821 (2024), waived his jury trial right on whether he had committed his prior offenses "on occasions different from one another" for purposes of the Armed Career Criminal Act enhancement by pleading guilty to a being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).

This government's argument that pleading guilty (or, in Mr. Thomas's case, agreeing to a stipulated-fact bench trial)[6] waives the jury trial right as to different facts that increase the defendant's mandatory minimum and maximum penalty but were never charged in the indictment, found by a jury, or admitted by the defendant has no basis in precedent. Instead, as this Court has explained, a defendant may waive his *Apprendi* rights by either stipulating to relevant facts or consenting to judicial factfinding "as to sentence enhancements." *Blakely v. Washington*, 542 U.S. 296, 310 (2004). Mr. Thomas did neither.

Finally, Mr. Thomas demanded a jury trial on restitution and objected to the district court's factfinding by a preponderance of the

[6] In the Middle District of Florida, where Mr. Thomas was convicted, defendants must proceed to stipulated-fact bench trials, rather enter Rule 11(a)(2) conditional pleas, to preserve pretrial motion issues for appeal. Mr. Thomas did so to preserve a suppression issue that is not relevant to this petition.

evidence. Doc. 153. The government's claim at page 10 of its brief that evidence of the victims and their losses was "uncontested" because Mr. Thomas did not additionally object to the admission of exhibits after the district court made clear it was denying his motion for a jury trial, *see* Doc. 180 at 3, 8, is irrelevant to the Sixth Amendment issue here. And any harmlessness question can be addressed on remand, as this Court has routinely explained.

To be clear, however: In the face of his constitutional objection, the government never claimed it could prove to a jury beyond a reasonable doubt the identity of the victims and their losses proximately caused by Mr. Thomas's offense. To the extent it now asks the Court to take on an "efficiency exception" to the Sixth Amendment, this Court has already rejected that misguided invitation. *Erlinger*, 602 U.S. at 842.

* * *

Not to be lost in the legal morass are the real-life consequences of this constitutional violation. Mr. Thomas is indigent. He must pay $15,000 in restitution—a penalty ordered with no consideration of indigency and without any requirement that the government prove to a jury (or Mr. Thomas admit) the victims of his offense or the losses he

caused. If he doesn't or can't pay, he can be sent back to prison. Is it really "too much to ask the government to prove its case . . . with reliable evidence" before exposing Mr. Thomas to enhanced punishment in the form of an onerous restitution order? *Id.* at 835 n.1; *see* Pet. at 25.

CONCLUSION

The Court should grant the petition for writ of certiorari. Alternatively, the Court should hold the petition pending its decisions in *Shah*, No. 24-25, and *Ellingburg*, 24-482.

Respectfully submitted,

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