

No. 17-8462

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN KHALID PETRAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on the elements of the offense defined in 49 U.S.C. 46504, which prohibits "interfer[ing] with the performance of the duties of" a flight crew member or flight attendant by "assaulting or intimidating" that crew member or attendant.

2. Whether the Sixth Amendment requires that facts affecting the amount of restitution ordered under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663 et seq., be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 879 F.3d 155.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on January 8, 2018. The petition for a writ of certiorari was filed on April 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of interfering with the performance of the duties of a flight crew by intimidation, in violation of 49 U.S.C. 46504. Pet. App. 1a. Petitioner Petras was sentenced to seven months of imprisonment, to be followed by three years of supervised release. Id. at 5a. Petitioner Shaker was sentenced to five months of imprisonment, to be followed by three years of supervised release. Ibid. Both were ordered to pay restitution. Ibid. The court of appeals affirmed. Id. at 1a-20a.

1. Petitioners, two Chaldean Christians,¹ boarded a commercial flight from San Diego to Chicago in a group of 12 individuals traveling to a soccer tournament for Chaldean and Assyrian refugees. Pet. App. 1a-2a. As petitioner Shaker was coming down the aisle, he angrily told one flight attendant, Victoria Clark, to "move out of the way." Id. at 2a. After petitioners' group was seated (in rows 20 and 21) and as the flight attendants prepared for takeoff, petitioner Shaker was playing loud music and repeatedly refused Clark's requests to turn off the music or to use earbuds. Ibid. Petitioner Petras stood up to use the overhead bins after the announcement that everyone must be

¹ "Chaldeans are an ethnic-religious group of people indigenous to Iraq and Syria." Pet. App. 2a n.1.

seated. Ibid. And Clark was forced to stop her safety demonstration multiple times to ask the members of petitioners' group to put up their tray tables and incline their seats. Ibid.

After takeoff, Clark began making her way down the aisle to provide the in-flight drink service. Pet. App. 2a. When she had difficulty hearing other passengers' drink orders because petitioners' group was "being loud and obnoxious," she asked Shaker once again to turn off his music. Ibid. Petitioner Shaker refused, and petitioner Petras told Clark, "You can't tell us to be quiet." Ibid. After another passenger asked the flight attendant about an alcoholic drink, Shaker demanded, "Bring us some alcohol." Ibid. Clark was fearful that alcohol would only exacerbate the group's already boisterous and noncompliant behavior. Id. at 2a-3a. She told petitioners that she would not be serving alcohol to any member of petitioners' group during the flight. Id. at 2a.

Several members of the group immediately protested. Pet. App. 3a. Petitioner Shaker declared, "We can have whatever we want," and rose from his seat toward Clark, before getting caught in his seatbelt. Ibid. Petitioner Petras then similarly announced, "We can have whatever the fuck we want, and we'll do whatever to get what we want." Ibid. He "slammed" his armrest and tray table up and "lunged" at Clark, rising "most of the way" from his seat and coming face-to-face with Clark. Ibid. Now

fearful of being hurt, Clark quickly left to consult with another flight attendant, Jamie Bergen, in the front of the cabin. Ibid.

When someone in petitioners' group hit the call button, a third flight attendant, Leslie Rouch, unwittingly came from the back of the aircraft to answer the call. Pet. App. 3a. Petitioner Petras asked Rouch why Clark refused to serve them alcohol. Ibid. Rouch indicated that she did not know and would talk to Clark, but also declined to serve them alcohol. Ibid. Petitioner Shaker objected: "You can't tell us no . . . This is America . . . You can't do that." Ibid. When Rouch told the group to "tone it down," petitioner Petras accused her of being racist. Ibid. As Rouch walked away, petitioner Petras continued, calling her a "racist pig" in a "hostile and hateful" tone. Ibid.

The pilot was alerted to the situation when she left the cockpit to use the restroom and noticed that Clark "looked scared." Pet. App. 3a. After discussing the situation with Clark, the pilot declared a "Level 1 Threat," indicating that "the plane had passengers who were being verbally assaultive." Ibid. She secured the cockpit and began discussing the possibility of diverting the plane. Ibid.

After an unsuccessful attempt by Bergen to defuse the situation, a passenger seated near petitioners' group came to the rear galley and confirmed that a member of the group had called Rouch a "racist pig." Pet. App. 4a. Bergen approached petitioner

group for a second time, explaining that another passenger had confirmed the group's inappropriate language. Ibid. Petitioner Shaker rose out of his seat again, this time "lung[ing] towards" Bergen, but was again stopped by his seatbelt. Ibid. (brackets in original). He asked, "[w]ho was saying that," and added that "I want to talk to them You can't talk to me this way. I'm a United States fucking citizen. You won't disrespect me. Not even my mom disrespects me." Ibid. Bergen later testified that she was "worried about [petitioner Shaker] trying to get a hold of [her]." Ibid. (second set of brackets in original). At this point, the crew began looking for cities to which to divert the flight. Ibid.

Finally, a few minutes later, the same passenger who had provided information earlier reported that petitioners' group had been "threatening" her, "flipping her off," and calling her "fucking ugly." Pet. App. 4a. The pilots made the final decision to divert. Ibid. Bergen asked Clark to stay in the front of the plane "for her own safety." Ibid. And Bergen was herself shaking and crying during landing. Ibid. The plane touched down in Amarillo, Texas, about 45 minutes later, and police officers escorted petitioners and their companions from the plane. Ibid.

2. A federal grand jury in the Northern District of Texas charged four men from the group, including petitioners, with interfering with a flight crew by intimidation, in violation of 49

U.S.C. 46504 and 2. Pet. App. 4a. Section 46504 makes it a crime for an "individual on an aircraft in the special aircraft jurisdiction of the United States" to, "by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interfere[] with the performance of the duties of the member or attendant or lessen[] the ability of the member or attendant to perform those duties." 49 U.S.C. 46504. After a six-day trial, a jury found petitioners guilty, but acquitted their co-defendants. Pet. App. 5a. The district court sentenced petitioner Petras to seven months of imprisonment, to be followed by three years of supervised release, and sentenced petitioner Shaker to five months of imprisonment, to be followed by three years of supervised release. Ibid. The court further ordered petitioners, jointly and severally, to pay restitution to the airline in the amount of \$6890. Ibid.; C.A. App. 2173, 2873.

3. The court of appeals affirmed. Pet. App. 1a-20a.

a. The court of appeals rejected petitioners' challenge to the jury instructions on the elements of interfering with the performance of the duties of a flight crew by intimidation. Pet. App. 10a-14a. Petitioners argued that the district court erred by defining intimidation as "words and conduct [that] would place an ordinary, reasonable person in fear," rather than as the "intent of placing the victim in fear of bodily harm or death." Id. at 10a (brackets in original). They further argued that the court

erred by not instructing the jury that a "specific intent to intimidate" was required. Ibid. The court of appeals observed, however, that it "ha[d] already upheld materially identical instructions in the context of [Section] 46504's predecessor, 49 U.S.C. § 1472(j)." Id. at 10a & n.8 (citing United States v. Hicks, 980 F.2d 963 (5th Cir. 1992), cert. denied, 507 U.S. 998 and 508 U.S. 941 (1993)).

The court of appeals rejected petitioners' assertion that the instructions here were inconsistent with Virginia v. Black, 538 U.S. 343 (2003). Pet. App. 11a. The court explained that "Black's statement that '[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death,'" ibid. (quoting Black, 538 U.S. at 360) (brackets in original), was interpreting a different statute and "did not mandate that all statutes with 'intimidation' be interpreted accordingly." Id. at 12a.

The court of appeals also rejected petitioner's contention that Elonis v. United States, 135 S. Ct. 2001 (2015), which interpreted a federal law criminalizing communications containing threats to "require[] mens rea both as to making the communication and as to the fact that the communication contained a threat," required the jury to find that petitioners acted with "the purpose

of intimidating a crew member.” Pet. App. 13a. The court of appeals explained that Elonis, like Black, “interpret[ed] a different statute” and “did not mandate that all federal statutes be interpreted as specific-intent crimes.” Id. at 13a-14a. The court also observed that, since Elonis, other federal courts have “continued to find general intent crimes in criminal statutes dealing with intimidation.” Id. at 14a n.17 (citing, e.g., United States v. Williams, 864 F.3d 826, 829-830 (7th Cir.), cert. denied, 138 S. Ct. 272 (2017)).

The court of appeals additionally determined that Section 46504 was constitutional and that sufficient evidence supported petitioners’ convictions under that statute. Pet. App. 14a-19a. Petitioners have not challenged those determinations in this Court.

b. The court of appeals separately rejected petitioner Petras’s argument that the district court “violated his Sixth Amendment right to a jury finding for any facts that alter his punishment” “by ordering restitution based on its own findings.” Pet. App. 20a. Relying on its earlier decision in United States v. Rosbottom, 763 F.3d 408, 419-420 (5th Cir. 2014), cert. denied, 135 S. Ct. 985 and 135 S. Ct. 989 (2015), the court explained that “the Sixth Amendment jury right does not apply to restitution awards.” Ibid.

ARGUMENT

Petitioners renew their contention (Pet. 11-27) that the district court erred in its instructions to the jury on the elements of interfering with the performance of the duties of a flight crew by intimidation, in violation of 49 U.S.C. 46504. They also contend (Pet. 27-34) that the district court's restitution order violated their Sixth Amendment rights to a jury trial. The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly rejected petitioners' challenge to the jury instructions in this case.

a. Section 46504 makes it a crime for "[a]n individual on an aircraft in the special aircraft jurisdiction of the United States [to], by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interfere[] with the performance of the duties of the member or attendant or lessen[] the ability of the member or attendant to perform those duties." 49 U.S.C. 46504. The district court properly instructed the jury that a violation of that provision requires proof that a defendant "intentionally intimidated a flight crew member," where "intimidation" is defined to mean "words and conduct [that] would place an ordinary, reasonable person in fear." Pet. App. 10a (brackets in original).

Those instructions reflect the ordinary meaning of the term "intimidate." See, e.g., Webster's Third New International Dictionary 1184 (1961) (defining "intimidation" as "the act of intimidating or the state of being intimidated"); ibid. (defining "intimidate" as "to make timid or fearful: inspire or affect with fear"). And they reflect the natural construction of that term in the context of Section 46504, which prohibits "intimidating" airline personnel in a way that interferes with or impedes their important duties, including maintaining safety in "the special context of air travel -- pressurized vehicles routinely carrying hundreds of passengers and traveling at speeds of up to 600 miles per hour and 40,000 feet above the ground." United States v. Hicks, 980 F.2d 963, 971-972 (5th Cir. 1992), cert. denied, 507 U.S. 998 and 508 U.S. 941 (1993). Accordingly, courts of appeals have consistently endorsed similar constructions of "intimidating" in Section 46504 and its predecessor. See, e.g., United States v. Persing, 318 Fed. Appx. 152, 155 (4th Cir. 2008), cert. denied, 556 U.S. 1144 (2009); United States v. Naghani, 361 F.3d 1255, 1260 (9th Cir.), cert. denied, 543 U.S. 939 (2004); United States v. Tabacca, 924 F.2d 906, 911 (9th Cir. 1991); United States v. Meeker, 527 F.2d 12, 15 (9th Cir. 1975).

b. Petitioners nevertheless contend (Pet. 11) that the district court should have defined "intimidation" narrowly, to include only threats of violence. The text and context of Section

46504, however, do not support any inference that Congress intended to restrict the ordinary meaning of intimidation in that manner. Petitioners err in suggesting (Pet. 18) that Section 46504's prohibition on "assaulting or intimidating" a flight crew member indicates that "intimidation" in this context requires a threat of violence. 49 U.S.C. 46504 (emphasis added). To the contrary, as petitioners recognize (Pet. 18), the term "assault" already includes threats of violence. See Black's Law Dictionary 137 (10th ed. 2014) (defining "assault" to mean "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact"). If "intimidation" included nothing more, it would be redundant in Section 46504. See Clark v. Rameker, 134 S. Ct. 2242, 2248 (2014) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.") (citation omitted).

Petitioners' reliance (Pet. 11-13, 16) on Virginia v. Black, 538 U.S. 343 (2003), is misplaced. The Court in Black addressed a constitutional challenge to a Virginia law banning cross-burning with "an intent to intimidate." Id. at 347. The Court upheld that prohibition, in relevant part, as a constitutionally permissible proscription on a "true threat." Id. at 359; see id. at 360-363. In that context, the Court explained that "[i]ntimidation in the constitutionally proscribable sense of the

word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Id. at 360 (citation omitted). The Court did not purport to announce a universal statutory definition of the term or to place constitutional limits on the term's interpretation in every conceivable context. Black did not consider a statute like Section 46504; the court of appeals in this case determined -- and petitioners have not challenged in this Court -- that, in the limited context of air travel, Section 46504 does not impose an unconstitutional restraint on speech even if "intimidation" is not restricted to "true threats." Pet. App. 14a-17a.

Petitioners also argue (Pet. 12, 17-18) that the definition of "intimidation" employed by the district court is inconsistent with definitions that courts (including the Fifth Circuit) have used for other federal statutes. But the decisions on which petitioners rely neither apply nor require a uniform construction of "intimidation" in every context. Compare United States v. Norton, 808 F.2d 908, 909 (1st Cir. 1987) (defining "intimidation" in 18 U.S.C. 844(d) (1982) to mean "to scare or frighten a person" "for coercive purposes"), with United States v. Evans, 848 F.3d 242, 247 (4th Cir.) (determining that carjacking "by force and violence or by intimidation" in 18 U.S.C. 2119 requires "the use of violent physical force" or "the threatened use of such force"),

cert. denied, 137 S. Ct. 2253 (2017).² Rather, in each decision, the court of appeals construed the term based on the statutory context in which it appeared, as well as the history and design of the particular provision at issue. As this Court has recognized, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." Deal v. United States, 508 U.S. 129, 132 (1993).³

Finally, neither the doctrine of constitutional avoidance nor the rule of lenity requires petitioners' interpretation. Pet. 20-27. The court of appeals rejected petitioners' "serious constitutional questions" (ibid.) on their merits, see Pet. App.

² United States v. St. Hubert, 883 F.3d 1319 (11th Cir. 2018) does not define "intimidation" at all. In that case, the court of appeals considered the elements of Hobbs Act robbery, which prohibits "the unlawful taking or obtaining of personal property * * * by means of actual or threatened force, or violence, or fear of injury, immediate or future," 18 U.S.C. 1951(b)(1), not by "intimidation." See 883 F.3d at 1322.

³ The United States' brief in United States v. Diaz, No. 16-4226 (4th Cir. Sept. 2, 2016), did not directly address proper instructions for a Section 46504 prosecution. Rather, the court of appeals considered whether Section 46504 qualified as a "crime of violence" under this Court's categorical approach, Taylor v. United States, 495 U.S. 575 (1990). The government argued that it did because, "[r]ealistically speaking," it was not possible to violate Section 46504 "without threatening physical force capable of producing [bodily] harm." U.S. Br. at 27-28, Diaz, supra (No. 16-4226). Whether or not that argument is a correct application of the categorical approach, it does not reflect the jury instructions that the government views Section 46504 to require.

14a-18a, as have every other court of appeals to consider them. See, e.g., United States v. Lynch, 881 F.3d 812, 817-819 (10th Cir. 2018) (rejecting First Amendment, vagueness, and arbitrary enforcement challenges); Hicks, 980 F.3d at 968-972 (rejecting First Amendment and vagueness challenges); Tabacca, 924 F.2d at 912-913 (rejecting vagueness and arbitrary enforcement challenges). And petitioners do not ask this Court to review their constitutional claims. Petitioners' invocation (Pet. 21) of the rule of lenity is similarly unsound. Although it is certainly true that, in the abstract, "'intimidating' can be defined in [at least] two ways," (ibid.) this Court has "repeatedly emphasized that is not the appropriate test." Abramski v. United States, 134 S. Ct. 2259, 2272 n.10 (2014). Even if the term alone "creates some ambiguity," the rule of lenity does not apply where, as here, "the context, structure, history, and purpose resolve it." Ibid.

c. Petitioners separately contend (Pet. 13-14) that the district court should have instructed the jury that the government was required to prove that petitioners not only intentionally engaged in the prohibited conduct, but also possessed the specific intent to intimidate the flight crew. That contention lacks merit. When Congress incorporates a specific-intent requirement into a statute, it typically does so expressly. See, e.g., 18 U.S.C. 113(a)(1) ("[a]ssault with intent to commit murder"); 18 U.S.C. 113(a)(2) ("[a]ssault with intent to commit any felony, except

murder or a [felony under chapter 109A]"); 18 U.S.C. 113(a)(3) ("[a]ssault with a dangerous weapon, with intent to do bodily harm"); 18 U.S.C. 1512(b)(1) ("knowingly uses intimidation * * * with intent to * * * influence, delay, or prevent the testimony of any person in an official proceeding"). Section 46504 does not have any express specific-intent requirement. Accordingly, the courts of appeals that have addressed the question have uniformly concluded that Section 46504 (like its predecessor provision, Section 1472(j)) is a "general intent statute." Lynch, 881 F.3d at 815-816 (citing cases); see Hicks, 980 F.2d at 974. Those courts have also observed that requiring proof of specific intent would be inconsistent with the design of the statute, which seeks to "ensure that passengers do not impede airline crew members' duties, many of which are critical to the safe operation of the aircraft." Hicks, 980 F.2d at 974; accord Lynch, 881 F.2d at 816.

Petitioners err in suggesting (Pet. 13-14, 20-21) that this Court's decision in Elonis v. United States, 135 S. Ct. 2001 (2015), requires otherwise. Elonis addressed the proper interpretation of 18 U.S.C. 875(c), which makes it a crime to transmit in interstate commerce "any communication containing any threat * * * to injure the person of another," not Section 46504. See 135 S. Ct. at 2004. In so doing, the Court reiterated that "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that

mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" Id. at 2010 (citation omitted). Applying that principle, the Court determined that Section 875(c) required the defendant to have transmitted the relevant communication either for the purpose of issuing a threat, knowing that the communication would be viewed as a threat, or potentially reckless to its threatening nature. Id. at 2012; see ibid. (declining to decide whether recklessness would be sufficient).

Determining the mens rea "necessary to separate wrongful conduct from 'otherwise innocent conduct,'" Elonis, 135 S. Ct. at 2010, however, is a statute-specific inquiry. See ibid. ("In some cases, a general requirement that a defendant act knowingly is itself an adequate safeguard."). And the only courts to have addressed it in the context of Section 46504 have determined that "[a] general intent reading of § 46504," which still requires that a defendant voluntarily and deliberately engaged in conduct on an aircraft that would place an ordinary, reasonable person in fear and interfered with the flight crew's ability to do its job "readily satisfies Elonis' mens rea standard." Lynch, 881 F.3d at 816.

2. The court of appeals also correctly rejected petitioners' contention that Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which 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,” applies to the calculation of restitution. Petitioners argue (Pet. 28-33) that this Court’s more recent decisions in Southern Union Co. v. United States, 567 U.S. 343 (2012), which held that facts increasing a criminal fine above the statutory maximum should be found by a jury, and Alleyne v. United States, 570 U.S. 99 (2013), which held that facts increasing a mandatory minimum sentence should be found by a jury, indicate that Apprendi applies to restitution. Petitioners are incorrect. Every court of appeals to consider Apprendi’s application to restitution has determined that the imposition of restitution does not implicate Apprendi. This Court has repeatedly denied petitions for a writ of certiorari presenting the same issue,⁴ and should do the same here.⁵

a. The court of appeals correctly held that Apprendi does not apply to restitution. Pet. App. 20a. In Apprendi, this Court held that any fact other than a prior conviction that increases

⁴ See, e.g., Johnson v. United States, 135 S. Ct. 2857 (2015); Basile v. United States, 135 S. Ct. 1529 (2015); Ligon v. United States, 135 S. Ct. 1468 (2015); Holmich v. United States, 135 S. Ct. 1155 (2015); Roscoe v. United States, 134 S. Ct. 2717 (2014); Green v. United States, 571 U.S. 1025 (2013); Wolfe v. United States, 569 U.S. 1029 (2013); Read v. United States, 569 U.S. 1031 (2013).

⁵ Petitioner Shaker did not raise this claim in the courts below. His claim could therefore be reviewed only under the plain-error standard. Fed. R. Crim. P. 52(b). Petitioner Shaker cannot establish any error, much less reversible plain error. See Johnson v. United States, 520 U.S. 461, 467 (1997).

the penalty for a crime beyond the prescribed statutory maximum must be proved beyond a reasonable doubt and found by a jury. 530 U.S. at 490; see also United States v. Cotton, 535 U.S. 625, 627 (2002) (making clear that, in a federal prosecution, "such facts must also be charged in the indictment"). 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." Blakely v. Washington, 542 U.S. 296, 303 (2004) (emphasis omitted).

The district court ordered petitioners to pay restitution pursuant to the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. 3663 et seq. See C.A. App. 2173, 2873. The VWPA provides in pertinent part that, "when sentencing a defendant convicted of an offense * * * under * * * [S]ection * * * 46504 of title 49," the court "may order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to any victim of such offense." 18 U.S.C. 3663(a)(1)(A). "[I]n determining whether to order restitution," the court must consider both "the amount of the loss sustained by each victim as a result of the offense" and "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. 3663(a)(1)(B). If "the court determines that the complication and prolongation of the sentencing process

resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make [a restitution] order.” Ibid. But if the court orders restitution, it must be in “the full amount of each victim’s losses as determined by the court.” 18 U.S.C. 3664(f)(1)(A); 18 U.S.C. 3663(d).

By authorizing restitution of a specific sum -- “the full amount of each victim’s losses” -- rather than prescribing a maximum amount that may be ordered, the VWPA establishes an indeterminate framework. 18 U.S.C. 3663(a)(1)(A)-(B); see, e.g., United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012) (“Critically, * * * there is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense.”) (emphasis omitted), cert. denied, 569 U.S. 959 (2013). Thus, when a sentencing court determines the amount of the victim’s loss, it “is merely giving definite shape to the restitution penalty [that is] born out of the conviction” and that, under the VWPA, is contingent on the district court’s exercise of discretion, not “imposing a punishment beyond that authorized by jury-found or admitted facts.” United States v. Leahy, 438 F.3d 328, 337 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006).

Moreover, while restitution is imposed as part of a defendant's criminal conviction, Pasquantino v. United States, 544 U.S. 349, 365 (2005), "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct." Leahy, 438 F.3d at 338. In that additional sense, restitution "does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." Ibid.

Every court of appeals to have considered the question has held that the rule of Apprendi does not apply to restitution, whether ordered under the VWPA or the other primary federal restitution statute, the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A. See, e.g., United States v. Churn, 800 F.3d 768, 782 (6th Cir. 2015); United States v. Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 135 S. Ct. 985 and 135 S. Ct. 989 (2015); Day, 700 F.3d at 732 (4th Cir.); United States v. Brock-Davis, 504 F.3d 991, 994 n.1 (9th Cir. 2007); United States v. Milkiewicz, 470 F.3d 390, 403-404 (1st Cir. 2006); United States v. Reifler, 446 F.3d 65, 114-120 (2d Cir. 2006); United States v. Williams, 445 F.3d 1302, 1310-1311 (11th Cir. 2006), abrogated on other grounds by United States v. Lewis, 492 F.3d 1219, 1221-1222 (11th Cir. 2007) (en banc); Leahy, 438 F.3d at 337-338 (3d Cir.); United States v. Visinaiz, 428 F.3d 1300,

1316 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006); United States v. Carruth, 418 F.3d 900, 902-904 (8th Cir. 2005); United States v. George, 403 F.3d 470, 473 (7th Cir.), cert. denied, 546 U.S. 1008 (2005).

Those courts have relied primarily on the absence of a statutory maximum for restitution in determining that, when the court fixes the amount of restitution based on the victim's losses, it is not increasing the punishment beyond that authorized by the conviction. See, e.g., Leahy, 438 F.3d at 337 n.11 ("the jury's verdict automatically triggers restitution in the 'full amount of each victim's losses'" (quoting 18 U.S.C. 3664(f)(1)(A))). Some courts have additionally reasoned that "restitution is not a penalty for a crime for Appendi purposes," or that, even if restitution is criminal, its compensatory purpose distinguishes it from purely punitive measures. United States v. LaGrou Distrib. Sys., Inc., 466 F.3d 585, 593 (7th Cir. 2006); see Visinaiz, 428 F.3d at 1316; Carruth, 418 F.3d at 904; see also Leahy, 438 F.3d at 338.

b. This Court's holding in Southern Union that "the rule of Appendi applies to the imposition of criminal fines," 567 U.S. at 360, does not undermine the uniform line of precedent holding that restitution is not subject to Appendi. In Southern Union, the Court found that a \$6 million criminal fine imposed by the district court -- which was well above the \$50,000 fine that the defendant

argued was the maximum supported by the jury's verdict -- violated the Sixth Amendment. Id. at 347. The Court explained that criminal fines, like imprisonment or death, "are penalties inflicted by the sovereign for the commission of offenses." Id. at 349. Observing that, "[i]n stating Apprendi's rule, [it] ha[d] never distinguished one form of punishment from another," id. at 350, the Court concluded that criminal fines implicate "Apprendi's 'core concern' [of] reserv[ing] to the jury 'the determination of facts that warrant punishment for a specific statutory offense,'" id. at 349 (quoting Oregon v. Ice, 555 U.S. 160, 170 (2009)). The Court also examined the historical record, explaining that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." Id. at 353 (quoting Ice, 555 U.S. at 170). Finding that "English juries were required to find facts that determined the authorized pecuniary punishment," and that "the predominant practice" in early America was for facts that determined the amount of a fine "to be alleged in the indictment and proved to the jury," the Court concluded that the historical record "support[ed] applying Apprendi to criminal fines." Id. at 353-354.

Contrary to petitioners' argument (Pet. 29), Southern Union does not require applying Apprendi to restitution. The Court in Southern Union considered only criminal fines, which are "undeniably" imposed as criminal penalties in order to punish

illegal conduct, 567 U.S. at 350, and it held only that such fines are subject to Apprendi. Id. at 360. The Court had no occasion to, and did not, address restitution, which has compensatory and remedial purposes that fines do not, and which is imposed pursuant to an indeterminate scheme that lacks a statutory maximum. Indeed, Southern Union supports distinguishing restitution under the VWPA from the type of sentences subject to Apprendi because, in acknowledging that many fines during the founding era were not subject to concrete caps, the Court reaffirmed that there cannot “be an Apprendi violation where no maximum is prescribed.” Id. at 353. Unlike the statute in Southern Union, which prescribed a \$50,000 maximum fine for each day of violation, the VWPA sets no maximum amount of restitution, but rather authorizes restitution to be ordered in the total amount of the victims’ losses. 18 U.S.C. 3663(d), 3664(f)(1)(A); see Day, 700 F.3d at 732 (stating that, “in Southern Union itself, the Apprendi issue was triggered by the fact that the district court imposed a fine in excess of the statutory maximum that applied in that case,” and distinguishing restitution on the ground that it is not subject to a “prescribed statutory maximum”) (emphasis omitted).

Since Southern Union, at least six courts of appeals have addressed in published opinions whether the Apprendi rule should be applied to restitution. Each determined, without dissent, that Apprendi does not apply. See Day, 700 F.3d at 732 (4th Cir.) (the

"logic of Southern Union actually reinforces the correctness of the uniform rule adopted in the federal courts" that Apprendi does not apply because restitution lacks a statutory maximum); see also United States v. Thunderhawk, 799 F.3d 1203, 1209 (8th Cir. 2015); United States v. Bengis, 783 F.3d 407, 412 (2d Cir. 2015); United States v. Green, 722 F.3d 1146, 1148-1149 (9th Cir.), cert. denied, 571 U.S. 1025 (2013); United States v. Wolfe, 701 F.3d 1206, 1216-1217 (7th Cir. 2012), cert. denied, 569 U.S. 1029 (2013); United States v. Read, 710 F.3d 219 (5th Cir. 2012) (per curiam), cert. denied, 569 U.S. 1031 (2013).

c. Similarly, this Court's holding in Alleyne that Apprendi also applies to facts that increase a mandatory minimum because such facts "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment," 570 U.S. at 108, does not undermine the uniform line of precedent holding that restitution is not subject to Apprendi. Restitution under the VWPA does not set a mandatory minimum amount, a "prescribed range" of amounts that a defendant may be ordered to pay, or even require restitution at all. Rather, the amount -- if any -- is based on the loss caused to the victim by the defendant. Alleyne is thus inapplicable. Since Alleyne, every court of appeals to consider whether the decision in Alleyne requires that the Apprendi rule extend to restitution has determined that it does not. See, e.g., United States v. Kieffer, 596 Fed. Appx.

653, 664 (10th Cir. 2014), cert. denied, 135 S. Ct. 2825 (2015); United States v. Holmich, 563 Fed. Appx. 483, 484-485 (7th Cir. 2014), cert. denied, 135 S. Ct. 1155 (2015); United States v. Roemmele, 589 Fed. Appx. 470, 470-471 (11th Cir. 2014) (per curiam) (rejecting Alleyne challenge to restitution), cert. denied, 136 S. Ct. 255 (2015); United States v. Agbebiyi, 575 Fed. Appx. 624, 632-633 (6th Cir. 2014); United States v. Basile, 570 Fed. Appx. 252, 258 (3d Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015); Pet. App. 20a. This Court's review is therefore not warranted.

d. Although no conflict exists among the courts of appeals concerning the question presented -- whether Apprendi applies to restitution -- petitioners observe (Pet. 30-31) that the decision below implicates a circuit split concerning a subsidiary issue: i.e., whether restitution should be characterized as a civil remedy or a criminal penalty. The Seventh and Tenth Circuits view restitution as a civil remedy. See Wolfe, 701 F.3d at 1217 (7th Cir.); Visinaiz, 428 F.3d at 1316 (10th Cir.). Other circuits treat restitution as criminal punishment, albeit one with a remedial purpose. See, e.g., United States v. Ziskind, 471 F.3d 266, 270 (1st Cir. 2006), cert. denied, 549 U.S. 1316 (2007); Leahy, 438 F.3d at 335 (3d Cir.); United States v. Adams, 363 F.3d 363, 365 (5th Cir. 2004); United States v. Sosebee, 419 F.3d 451, 461 (6th Cir. 2005). The Eighth Circuit has made conflicting pronouncements on the issue. Compare Carruth, 418 F.3d at 904

(stating that restitution is a civil penalty), with United States v. Ross, 279 F.3d 600, 609 (8th Cir. 2002) (stating that "restitution is a criminal 'penalty'") (citation omitted).

This Court's review of that issue is not warranted. The courts of appeals agree that Appendi does not apply to restitution, regardless of whether, as a technical matter, they view restitution as a purely civil remedy or as a criminal penalty with compensatory aspects. In those circuits that treat restitution as civil in nature, the civil/criminal question is not outcome-determinative: those courts have held that Appendi does not apply to restitution for the additional reason that the primary federal restitution statutes do not prescribe a maximum amount of restitution, but rather require, or authorize the court in its discretion to order, restitution in a specific amount, *i.e.*, the full amount of the victim's loss. See United States v. Bonner, 522 F.3d 804, 807 (7th Cir.) ("[E]ven if we were to * * * recharacterize restitution as a criminal punishment, Appendi and its progeny would not require us to invalidate the defendants' sentences."), cert. denied, 555 U.S. 883 (2008); United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000); see also Carruth, 418 F.3d at 904 (8th Cir.); United States v. Wooten, 377 F.3d 1134, 1144-1145 (10th Cir.), cert. denied, 543 U.S. 993 (2004). At the same time, those courts that view restitution as a criminal penalty have correctly recognized that restitution has compensatory

purposes that should be taken into account in the Appendi analysis. See, e.g., Leahy, 438 F.3d at 338. The circuit conflict that petitioners identify thus pertains only to a technical question of characterization that has not materially affected the courts' analysis of the ultimate Appendi issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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