No.

In the Supreme Court of the United States

RYAN RANDALL GILBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment prohibits a court from imposing criminal restitution on a defendant based on facts not found by the jury beyond a reasonable doubt.

RELATED PROCEEDINGS

United States District Court (D. Minn.):

United States v. *Gilbertson*, Crim. No. 17-66(1) (Jan. 2, 2019) (second amended sentencing judgment)

United States Court of Appeals (8th Cir.):

United States v. *Gilbertson*, No. 18-3745 (July 30, 2020)

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Petitioner Ryan Randall Gilbertson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 970 F.3d 939.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 3663A of Title 18 of the United States Code provides in relevant part:

> (a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.
>
> * * *
>
> (c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—
>
> (A) that is—
>
> (i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 3 of the Rodchenkov Anti-Doping Act of 2019;

(iv) an offense described in section 1365 (relating to tampering with consumer products); or

(v) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

STATEMENT

This case presents a straightforward question: does the Sixth Amendment prohibit a court from imposing criminal restitution on a defendant based on facts not found by the jury beyond a reasonable doubt? Under this Court's precedent, and consistent with the historical role of the jury, the answer is plainly yes. The lower courts have resisted that conclusion even as the Court has made clear that the Sixth Amendment's protections apply to any fact used to increase an authorized penalty for a crime, including where the penalty is a monetary one. While a number of lower courts and judges have expressed significant reservations about restitution based on judicial factfinding, those courts have nonetheless refused to change course. It is apparent that only this Court can correct the path the lower courts have taken.

In this case, petitioner was charged with various counts of wire fraud, securities fraud, and conspiracy to commit securities fraud on the basis of a single theory: that petitioner manipulated the stock price of a company

he co-founded. At trial, the government argued that petitioner was motivated to do so in order to benefit from a contractual provision in certain notes entitling the company's lenders, of which he was one, to a bonus payment tied to the average stock price in the initial days of trading. A jury found petitioner guilty on all but one count.

At sentencing, the government sought restitution of over $15 million, primarily based on the purported cash value of the shares the noteholders received in satisfaction of the bonus-payment provision in the notes. But throughout trial, the government had admitted that there was nothing unlawful about the bonus-payment provision—a provision the company's board had approved. Beyond that, the debt was ultimately restructured such that it was no longer based on the trading days in which the alleged stock manipulation occurred.

The district court nonetheless agreed with the government and imposed restitution. Its order was not based on any direct connection between the market manipulation and the ultimate bonus payment, but was instead based on its own finding that the bonus-payment provision was part of the criminal scheme. The court of appeals rejected petitioner's argument that the restitution award violated his Sixth Amendment right to a jury trial, adhering to circuit precedent that a jury need not find facts in support of a restitution award.

This Court's review is desperately needed. In this case, as in the many thousands of cases in which restitution is ordered every year, the district court imposed a substantial punishment based on facts that were never found by the jury. And the judicial factfinding in this case was especially problematic: the judge based restitution on his own finding that a concededly legal bonus-payment provision was part of the criminal scheme, even though the ultimate bonus payment to the noteholders was not

based on the stock price on the days in which the alleged manipulation occurred. That result is irreconcilable with the Sixth Amendment and this Court's decisions interpreting it. Because the courts of appeals have failed to recognize the import of those decisions, and because this case presents an ideal vehicle for resolving an exceptionally important question of constitutional law, the petition for a writ of certiorari should be granted.

A. Background

The Sixth Amendment prohibits a judge from "inflict[ing] punishment that the jury's verdict alone does not allow." *Blakely* v. *Washington*, 542 U.S. 296, 304 (2004). In *Apprendi* v. *New Jersey,* 530 U.S. 466 (2000), the Court held that "any fact" other than a prior conviction that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. That rule is rooted in "two longstanding tenets of common-law criminal jurisprudence." *Blakely*, 542 U.S. at 301. The first is that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" *Ibid.* (quoting 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769)). The second is that "'an accusation which lacks any particular fact which the law makes essential to the punishment is * * * no accusation within the requirements of the common law, and it is no accusation in reason.'" *Id.* at 301-302 (quoting 1 Joel Prentiss Bishop, *Criminal Procedure* 55 (2d ed. 1872)); see *Cunningham* v. *California*, 549 U.S. 270, 281 (2007).

In the last twenty years, the Court has repeatedly reaffirmed *Apprendi*'s "bright-line rule" that a jury must find any fact that increases the prescribed penalty for a crime. *Blakely*, 542 U.S. at 308. In *Blakely*, the Court

explained 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." *Id.* at 303 (internal quotation marks, citations, and emphasis omitted). In so holding, the Court rejected the argument that *Apprendi* permitted the judge to depart upward from the crime's standard sentence because the relevant "statutory maximum" was the maximum sentence allowed after such departures. *Ibid.* The Court emphasized that the "statutory maximum" under *Apprendi* is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-304.

In *Southern Union Co.* v. *United States*, 567 U.S. 343 (2012), the Court held that *Apprendi*'s rule applied to the imposition of criminal fines. The Court explained that it had already applied *Apprendi*'s rule to a "variety of sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence," and that it had never "distinguished one form of punishment from another." *Id.* at 348, 350. Although the Court's prior decisions involved terms of imprisonment, the Court saw "no principled basis under *Apprendi* for treating criminal fines differently." *Id.* at 348-349. As the Court explained, *Apprendi* and its progeny "broadly prohibit judicial factfinding that increases maximum criminal sentences, penalties, or punishments," and those terms "undeniably embrace fines." *Id.* at 350 (internal quotation marks, brackets, and citations omitted).

The next Term, in *Alleyne* v. *United States*, 570 U.S. 99 (2013), the Court held that a jury must make factual findings that increase a mandatory *minimum* penalty for an offense. The Court reasoned that "a fact triggering a

mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed" and thus produces a "new penalty" to which the *Apprendi* rule applies. *Id.* at 112. The Court explained that such a holding was consistent with the "well-established" practice at common law that "every fact that was a basis for imposing or increasing punishment" would be included in the indictment and submitted to the jury. *Id.* at 109-110. According to the Court, applying *Apprendi*'s rule to statutory minimums "preserve[d] the historic role of the jury as an intermediary between the State and criminal defendants." *Id.* at 109, 113-114.

B. Facts And Procedural History

1. In 2008, petitioner co-founded an oil-transporting company called Dakota Plains. As the company grew, petitioner served in a consulting role; Dakota Plains naturally conferred with petitioner as a large shareholder regarding company decisions that required capital or strategic guidance. By 2011, Dakota Plains needed additional investment to continue to expand. While plans for a potential public offering were underway, Dakota Plains issued two series of promissory notes to various lenders including petitioner, with a value totaling around $9 million. App., *infra*, 2a-3a; Trial Tr. 370, 536-537, 1697.

When an investment bank advised that an initial public offering was not viable, petitioner proposed that Dakota Plains go public through a merger with a publicly traded acquisition vehicle—a common practice, also known as a reverse merger, in which a private company becomes public by merging with a publicly traded company that has no operations. Dakota Plains' board and shareholders ultimately approved the merger. App., *infra*, 4a-5a; Trial Tr. 90-91, 378-379.

At the same time, petitioner, on behalf of the other noteholders, proposed a consolidation and extension of the promissory notes. Under that proposal, the noteholders agreed to extend the maturity date of their loans and to provide Dakota Plains with an additional standby line of credit. In return, and as part of the larger restructuring of the company's debt, Dakota Plains agreed to pay an extension fee and to include a bonus-payment provision similar to a provision in one of the two series of the previously issued notes, but with terms tied to the publicly traded company resulting from the planned merger. The provision specified that, if the average closing price of the stock exceeded $2.50 per share during the first 20 days of public trading after the merger, the noteholders would receive an additional payment based on the average closing price of the stock. Dakota Plains' board discussed and unanimously approved the consolidation and the revised terms, including the bonus-payment provision. App., *infra*, 3a-4a; Trial Tr. 358-360, 1869-1870.

The merger with the acquisition vehicle closed on March 22, 2012, and public trading started the next day. (Dakota Plains traded on an "over-the-counter" market, which is a market primarily used by smaller companies that do not trade with enough volume or otherwise meet the standards for national exchanges.) The average closing price of Dakota Plains stock in the first 20 days of public trading would have entitled the noteholders, including petitioner, to an additional payment of approximately $32 million. But when Dakota Plains struggled to obtain sufficient financing, the noteholders agreed to restructure the debt. They received shares rather than cash, and the value of the additional payment was adjusted based on the average trading price during the first 150 days, rather than the first 20 days, of trading (with adjustments to eliminate the highest and lowest prices). Over the spring

and summer of 2012, the price of Dakota Plains' stock gradually decreased as oil prices declined across the country. Dakota Plains ultimately declared bankruptcy in 2016 for reasons unrelated to the payment to the noteholders. App., *infra*, 8a; Trial Tr. 99-101, 503-504, 1722-1726, 1966-1967.

2. On March 20, 2018, petitioner and two others were charged in a superseding indictment with various counts of wire fraud, securities fraud, and conspiracy to commit securities fraud related to an alleged scheme to manipulate the price of Dakota Plains stock during its first 20 days of public trading. The indictment alleged that petitioner had coordinated the purchase and sale of Dakota Plains shares, purportedly in an effort to increase the stock's trading price and thereby trigger a larger noteholder payment. App., *infra*, 10a; D. Ct. Dkt. 133.

At trial, the government conceded that the structure of the bonus-payment provision in the notes was not illegal. Specifically, after describing the negotiations involving the bonus payment in opening argument, counsel for the government emphasized: "None of the financial transactions that I've been describing up to this point is by itself against the law. It's not a crime to be sharp elbowed in business or to negotiate financial transactions for your own benefit." Trial Tr. 25. The government also acknowledged that petitioner was not on trial because of his actions relating to the bonus-payment provision; rather, he was on trial because of the alleged manipulation of Dakota Plains' stock price. *Id.* at 25-26.

Similarly, during its closing argument, the government told the jury that "the reason" it was talking about the bonus-payment provision was *not* because it was illegal, but rather because the provision simply "provided the motive to manipulate the price of the stock." Trial Tr.

2228. The government concluded by arguing that petitioner "engaged in a scheme to defraud [the company] by manipulating the price of the stock over th[e] 20-day period * * * [in order] to trigger th[e] bonus payment." *Id.* at 2246.

At the close of trial, the district court instructed the jury that the government's "central allegation"—the "allegation to which all of the charges relate[d]"—was that petitioner "schemed to manipulate the price of Dakota Plains stock during the first 20 days of public trading following the reverse merger." D. Ct. Dkt. 214, at 22. Referring to evidence that had been presented regarding the restructuring of the bonus payment, the district court instructed the jury that the evidence was merely "about whether and to what extent [petitioner] may have benefitted from any manipulation of the price of Dakota Plains stock during the 20-day period." *Ibid.*

The district court admonished the jury to "keep this evidence in perspective." D. Ct. Dkt. 214, at 22. According to the court, "[i]f no crime was committed during the 20-day period, then [petitioner] violated no law in taking advantage of the increase in the price of Dakota Plains stock." *Ibid.* Conversely, "if a crime was committed during the 20-day period, nothing that happened after the 20-day period changed that fact." *Ibid.* The district court did not otherwise mention the bonus-payment provision in its instructions to the jury.

The jury returned a verdict convicting petitioner on all counts except for one count of wire fraud. D. Ct. Dkt. 309, at 1. Petitioner then moved for a judgment of acquittal and a new trial, arguing, *inter alia*, that the government had pursued an invalid theory of market manipulation because it offered no evidence that petitioner actually communicated any inaccurate information to the market and thus failed to show that the trades at issue had any price

impact. The district court denied petitioner's motions. D. Ct. Dkt. 291.

3. At sentencing, the government sought over $15 million in restitution under the Mandatory Victims Restitution Act, 18 U.S.C. 3663A. That amount was purportedly based on the cash value of the shares the noteholders received in satisfaction of the bonus payment (as restructured), as well as interest payments Dakota Plains made to the noteholders who elected to take payment in the form of debt. App., *infra*, 32a; D. Ct. Dkt. 294, at 24-26.

The government did not attempt to show a connection between the payments Dakota Plains made to the noteholders and the alleged market manipulation. Indeed, the government ultimately disavowed any need to prove that petitioner's conduct actually affected the price of the stock during the relevant 20-day period, and in any event the bonus had been restructured to remove from the calculation the stock price during that period. D. Ct. Dkt. 286, at 13-15, 46-48; D. Ct. Dkt. 294, at 11-12. Instead, the government asserted at sentencing that the entire bonus payment counted as a loss simply because "there would have been no bonus payment whatsoever but for [petitioner's] fraud scheme." D. Ct. Dkt. 294, at 3.

Over petitioner's objections, the district court agreed with the government, apparently applying a preponderance-of-the-evidence standard. See App., *infra*, 34a-35a; cf. 18 U.S.C. 3664(e) (mandating preponderance standard for "[a]ny dispute as to the proper amount or type of restitution"). The court acknowledged that "[r]easonable people could disagree about the extent to which [petitioner's] criminal behavior actually affected the price of Dakota Plains stock during the relevant 20-day period." App., *infra*, 32a. But it concluded that Dakota Plains was nonetheless owed the full amount of the restructured bonus payment because it found that the bonus provision

was "part of [the] fraudulent scheme." *Ibid.*; see also *id.* at 34a. Specifically, the court found that petitioner's negotiation of the bonus provision was done "with criminal intent and in furtherance of the fraudulent scheme." *Id.* at 32a. It therefore ordered petitioner to pay $15,135,361 in restitution. *Id.* at 34a-35a. It also sentenced petitioner to 12 years of imprisonment and ordered him to pay a $2 million fine. D. Ct. Dkt. 309, at 2, 6.

4. Petitioner appealed his convictions and the restitution award. As is relevant here, petitioner argued that the district court violated his Sixth Amendment right to a jury trial by basing its restitution award on facts that were not found by the jury, especially in light of the government's repeated representations to the jury that the bonus provision was not improper.

The court of appeals affirmed. App, *infra*, 1a-24a. As to petitioner's argument that the district court erred in basing restitution on facts not found by the jury, the court of appeals noted, without elaboration, that it had rejected that argument in prior decisions. *Id.* at 24a.

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding the application of the Sixth Amendment to criminal restitution. Consistent with the original meaning of the Constitution, the Court has held that a jury must find any fact that increases a defendant's maximum authorized penalty. Criminal restitution is undoubtedly subject to the protection of the Sixth Amendment. Yet in the face of this Court's silence on the question presented here, the fundamental guarantee of a jury trial has been eroded by the widespread practice of imposing restitution on criminal defendants based on facts not found by a jury beyond a reasonable doubt. Although a number of courts of appeals have countenanced that practice, the reasoning employed

by those courts cannot sustain serious scrutiny. It is time for the Court to step in and preserve the "jury's historic role as a bulwark between the State and the accused." *Southern Union Co.* v. *United States*, 567 U.S. 343, 350 (2012) (citation omitted).

This case is an optimal vehicle for addressing and finally resolving the question presented. And the deeply unjust result in this case—where there is such a vast disconnect between the facts found by the jury and the restitution order—highlights the need for the Court's intervention. The Court should not permit a question this important to fester any longer. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With This Court's Sixth Amendment Jurisprudence

1. In its landmark decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that the Sixth Amendment requires that "any fact" other than the fact of a prior conviction that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Court has since applied *Apprendi*'s bright-line rule to a "variety of sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence," including the imposition of criminal fines. *Southern Union*, 567 U.S. at 348-349. In so doing, the Court has made clear that the Sixth Amendment right to a jury trial does not "distinguish[] one form of punishment from another." *Id.* at 350.

It necessarily follows from this Court's precedent that the Sixth Amendment requires a jury to find the facts necessary to justify a restitution order. Like a criminal fine, restitution is "calculated by reference to particular facts," such as "the amount of the defendant's gain or the victim's

loss." *Southern Union*, 567 U.S. at 349-350. The Mandatory Victims Restitution Act (MVRA), the statute at issue here, requires a sentencing court to impose criminal restitution in the full amount of losses by each victim who was "directly and proximately" harmed by the offense. 18 U.S.C. 3663A(a)(2), (c)(1)(B), 3664(f)(1)(A). Accordingly, the MVRA asks judges to make determinations regarding (1) what the scope of the offense was, (2) who may be considered a victim, (3) whether a defendant's conduct caused the victim's losses, and (4) how to calculate such losses. That kind of judicial factfinding to increase the prescribed penalty is squarely prohibited by the Sixth Amendment.

Any other view is "difficult to reconcile with the Constitution's original meaning." *Hester* v. *United States*, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., dissenting from denial of certiorari). As this Court has recognized, the Sixth Amendment has been understood as preserving the "historical role of the jury at common law." *Southern Union*, 567 U.S. at 353 (citation omitted). At common law and in early American history, there was a strong "linkage" between the facts of the offense—which were found by a jury—and the particular sentence, reflecting the "intimate connection between crime and punishment." *Alleyne* v. *United States*, 570 U.S. 99, 108-109 (2013). That connection enabled the defendant to "predict with certainty the judgment from the face of the felony indictment." *Id.* at 109, 111 (citation omitted).

Of particular relevance here, courts held at common law that, in prosecutions for larceny, the jury had to find the value of stolen property before ordering payment to the victim. See, *e.g.*, *Jones* v. *State*, 13 Ala. 153, 157 (1848); *State* v. *Somerville*, 21 Me. 14, 17-19 (1842); *Commonwealth* v. *Smith*, 1 Mass. 245, 247 (1804); *Schoonover* v. *State*, 17 Ohio St. 294, 298 (1867); *Huntzinger* v. *Commonwealth*, 97 Pa. 336, 336 (1881); see also *Alleyne*, 570 U.S.

at 108-109; James Barta, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 473-475 (2014). The Sixth Amendment requires nothing less. Allowing a court to order restitution on the basis of facts not found by the jury infringes on the fundamental right to a jury trial as that right was originally understood.

2. The contrary decisions of the courts of appeals are incorrect, and the reasoning of those decisions is badly flawed. The courts of appeals have relied on two grounds to hold that judges can engage in factfinding to impose restitution under the MVRA: first, that restitution is not a penalty, and second, that the MVRA does not contain a "statutory maximum." Those grounds are invalid.

a. The rule of *Apprendi* applies to a fact that "increases the penalty for a crime." 530 U.S. at 490. There can be no doubt that restitution is a criminal penalty subject to *Apprendi*'s rule. Yet several courts of appeals, including the Eighth Circuit, have held that the Sixth Amendment's protections do not apply to restitution under the MVRA because it is not a criminal penalty. See *United States* v. *Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015). That reasoning is flatly contradicted by the Sixth Amendment, this Court's precedent, and the text and operation of the MVRA.

As to the Sixth Amendment: the constitutional right to a jury trial applies, by its terms, "[i]n all criminal prosecutions." U.S. Const. Amend. VI. Of course, restitution under the MVRA is imposed as a part of the defendant's criminal conviction. See 18 U.S.C. 3663A(a), (c).

As to this Court's precedent: the Court has repeatedly described criminal restitution as a punishment. For example, in *Pasquantino* v. *United States*, 544 U.S. 349 (2005)—a wire-fraud case in which the MVRA applied—

the Court noted that "[t]he purpose of awarding restitution" is "to mete out appropriate *criminal punishment* for [the defendant's] conduct." *Id.* at 365 (emphasis added). And in *Kelly* v. *Robinson*, 479 U.S. 36 (1986), the Court held that criminal restitution, which it characterized as a "penal sanction," could not be discharged in bankruptcy. *Id.* at 51. The Court observed that "the decision to impose restitution generally does not turn on the victim's injury, but on the *penal goals* of the State and the situation of the defendant." *Id.* at 52 (emphasis added).

As to the MVRA: by its text and operation, the MVRA plainly imposes punishment on criminal defendants. The MVRA makes restitution a mandatory component of sentencing for certain crimes, and a district court cannot even consider a defendant's ability to pay when determining a restitution amount. See 18 U.S.C. 3663A, 3664(f)(1)(A). Critically, the MVRA's plain language belies the notion that criminal restitution is anything other than a penalty. The MVRA provides that "the court shall order, in addition to * * * *any other penalty* authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1).

Unlike in a regime that serves purely compensatory purposes, moreover, a court awarding restitution is prohibited from considering whether the victim has received or is entitled to receive compensation from insurance or any other source, or whether the victim has filed a civil action or obtained a judgment against the defendant. See 18 U.S.C. 3664(f)(1)(B). (In this case, the purported victim—Dakota Plains—has never filed a civil suit against petitioner.) Finally on this score, restitution functions as a punishment even beyond the requirement to pay: a convicted defendant with unpaid restitution risks the loss of certain civil rights, continued court monitoring, and even

reincarceration. See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 127 (2014).

Unsurprisingly, most courts of appeals have concluded that restitution is a criminal penalty. See, *e.g.*, *United States* v. *Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006), cert. denied, 549 U.S. 1316 (2007); *United States* v. *Leahy*, 438 F.3d 328, 335 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006); *United States* v. *Cohen*, 459 F.3d 490, 496 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007); *United States* v. *Adams*, 363 F.3d 363, 365 (5th Cir. 2004); *United States* v. *Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005); *Creel* v. *Commissioner*, 419 F.3d 1135, 1140 (11th Cir. 2005). A number of courts have nonetheless gone astray by holding that *Apprendi* does not apply to the MVRA on the ground that it does not prescribe a "statutory maximum." That, too, is incorrect.

b. Seizing on *Apprendi*'s statement that judicial fact-finding is prohibited when it increases a penalty beyond a "statutory maximum," certain courts of appeals have concluded that the MVRA does not set a "statutory maximum" because it only requires restitution of a specific sum—the full amount of the victim's losses. Those courts reason that the Sixth Amendment does not apply to such an "uncapped" or "indeterminate" scheme. See, *e.g.*, *United States* v. *Day,* 700 F.3d 713, 732 (4th Cir. 2012), cert. denied, 569 U.S. 959 (2013); *United States* v. *Reifler,* 446 F.3d 65, 117-118 (2d Cir. 2006); *Leahy*, 438 F.3d at 337; *Sosebee*, 419 F.3d at 454. That understanding of the Sixth Amendment cannot be reconciled with this Court's precedent.

As a preliminary matter, there is reason to doubt that *Apprendi*'s "statutory maximum" formulation is the right framework for thinking about criminal restitution, as opposed to terms of imprisonment or other types of penalties. In *Alleyne*, the Court applied the Sixth Amendment

to a mandatory minimum sentence, even though *Apprendi* did not explicitly address minimums. See 570 U.S. at 103. Consistent with the original meaning of the Sixth Amendment, the Court reasoned that "[a]ny fact that, by law, increases the penalty for a crime * * * must be submitted to the jury and proved beyond a reasonable doubt." *Ibid.*; see *Southern Union*, 567 U.S. at 348 (stating that the *Apprendi* rule applies to "facts that increase[] a defendant's maximum *authorized sentence*" (emphasis added)). There can be no serious doubt that restitution increases the penalty for a crime, nor that it does so based on facts about a victim's loss. See p. 14, *supra*. Those facts must be found by a jury.

In any event, in *Blakely* v. *Washington*, 542 U.S. 296 (2004), the Court clarified 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*." *Id.* at 303. To the extent *Apprendi*'s "statutory maximum" language is even applicable here, therefore, "the statutory maximum for restitution is usually *zero*, because a court can't award any restitution without finding additional facts about the victim's loss." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., dissenting from denial of certiorari) (citation omitted). Put another way, "[r]estitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed." *Leahy*, 438 F.3d at 342, 344 (McKee, J., concurring in part and dissenting in part).

If there was any lingering uncertainty on this issue after *Blakely*, the Court's decision in *Southern Union* should have put it to rest. There, the Court applied *Apprendi*'s rule to an indeterminate fine under the Resource Conservation and Recovery Act (RCRA). That law requires a judge to impose a fine of not more than $50,000 for each day that the defendant polluted; the amount of

the fine can therefore vary indeterminately based on the number of days of a violation. See *Southern Union*, 567 U.S. at 347. Just as a fine under RCRA is predicated on a finding of the number of days of violations, so too is a penalty of restitution under the MVRA determined by a finding of the value of loss caused by the offense. Under both statutes, therefore, the authorized penalty is pegged to "the determination of specified facts." *Id.* at 354. Even the government has recognized that it is "hard to justify" treating restitution differently from the fines at issue in *Southern Union*. See Oral Arg. Tr. at 31-32, *Southern Union*, *supra* (No. 11-94). Indeed it is.

3. Given this Court's precedent, it is no surprise that a number of lower courts and judges have acknowledged that permitting judicial factfinding to determine restitution is likely inconsistent with the Sixth Amendment. Even before *Southern Union*, Judge McKee recognized that restitution ordered under the MVRA violated the Constitution because "the jury's verdict alone does not authorize the sentence." *Leahy,* 438 F.3d at 343-344 (opinion concurring in part and dissenting in part) (citations omitted). Likewise, Judge Bye explained that, after this Court's decision in *Blakely*, the question was "no longer difficult to answer"—"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." *United States* v. *Carruth*, 418 F.3d 900, 905 (8th Cir. 2005) (dissenting opinion).

After *Southern Union*, courts of appeals have expressed growing uneasiness with staying the course. The Ninth Circuit conceded that its precedent on restitution was not "well-harmonized" with the Court's Sixth Amendment jurisprudence, acknowledging 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 (2013), cert. denied, 571 U.S. 1025 (2013). Other circuits have expressed similar doubts, but have ultimately held that they were bound by circuit precedent despite the "tension" with *Southern Union*. *United States* v. *Elliott*, 600 Fed. Appx. 225, 227 (5th Cir. 2015); see, *e.g.*, *United States* v. *Wolfe*, 701 F.3d 1206, 1215, 1217 (7th Cir. 2012), cert. denied, 569 U.S. 1029 (2013); *United States* v. *Kieffer*, 596 Fed. Appx. 653, 664 (10th Cir. 2014), cert. denied, 576 U.S. 1012 (2015).

The Court should grant review to make clear what its precedent all but states: an order of restitution based on facts found by a judge violates the Sixth Amendment right to a jury trial.

B. The Question Presented Is An Exceptionally Important One That Warrants The Court's Review In This Case

It is past time for this Court to take up the question presented. That question is one of "surpassing importance" and has enormous practical consequences. *Apprendi*, 530 U.S. at 476. This case is an excellent vehicle for review of the question.

1. Restitution orders have become increasingly common in federal criminal sentencing. In 2019 alone, federal courts sentenced 8,830 criminal defendants to pay over $7.7 billion in restitution. See United States Sentencing Commission, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics*, tbl. 17. The mean amount of restitution ordered was $899,520. See *ibid.* And restitution is ubiquitous in certain types of cases: restitution was ordered in over 67% of robbery cases, 68% of fraud cases, and 73% of tax cases. See *id.*, tbl. 16. Remarkably, as of 2016, federal defendants owed more than $110 billion in unpaid criminal restitution. Gretta L. Goodwin, GAO, *Federal Criminal Restitution* 25 (Feb. 2018).

Defendants who fail to pay their restitution face harsh consequences. For starters, the government can attempt to collect the debt by filing a lien against the defendant's property or garnishing the defendant's wages. See Gretta L. Goodwin, GAO, *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. 2020). The failure to pay restitution can also result in the suspension of civil rights such as the right to vote, serve on a jury, and carry a firearm. See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 123-129 (2014). It can even lead to revocation of supervised release and reincarceration. See *id.* at 124. Those draconian consequences are particularly troubling in the context of the MVRA, where restitution is mandatory and courts are not permitted to take an offender's economic circumstances into account when determining the amount of restitution. See 18 U.S.C. 3663A, 3664(f)(1)(A).

2. This case is an ideal vehicle for the Court's review. It cleanly presents the question whether a court may impose restitution on a criminal defendant based on facts not found by a jury beyond a reasonable doubt. That question was raised in the court of appeals, and the court rejected petitioner's argument based on prior circuit precedent holding that restitution need not be proved to a jury. See App., *infra*, 24a (citing *United States* v. *Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015)).

What is more, this case perfectly illustrates the problems with the path the lower courts have taken. In most cases, as in this one, the government's presentence report and accompanying sentence memoranda are "the sole 'evidentiary' source[s] for the restitution order." William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After Southern*

Union v. *United States?*, 64 Ala. L. Rev. 803, 819 (2013). Presentence reports are routinely based on hearsay and facts not found by a jury at trial. See *ibid.* As a result, trial judges are regularly adopting "bureaucratically prepared, hearsay-riddled" reports to order restitution. *Ibid.* (quoting *United States* v. *Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part)).

To be sure, this Court has previously declined to resolve the question presented here. See, *e.g.*, *George* v. *United States*, No. 20-5669, 2020 WL 6037386 (Oct. 13, 2020); *Hester* v. *United States*, 139 S. Ct. 509 (2019); *Fontana* v. *United States*, 138 S. Ct. 1022 (2018). But there is a heightened need for the Court's review in the instant case, where the disconnect between the facts found by the jury and the sentence imposed is especially egregious. At sentencing, the government sought restitution based on losses purportedly caused by the payment of the bonus to noteholders. But throughout the trial, the government affirmatively told the jury that the bonus provision was not illegal. See, *e.g.*, Trial Tr. 25, 2228. And, in any event, the restructured payment was tied to the average stock price for the first 150 days of trading, rather than the average for the 20 days in which the alleged market manipulation occurred. The district court nonetheless imposed over $15 million in restitution based on its own finding that the bonus payment was part of a fraudulent scheme—a finding never made by the jury and based on a theory that the government specifically disavowed throughout the trial. The Constitution demands better.

* * * * *

For too long, courts have imposed restitution on criminal defendants in violation of the Sixth Amendment. In the face of this Court's silence on the question presented, the courts of appeals have sanctioned that practice, even

while a number of courts and judges have expressed significant reservations. This Court's intervention is necessary to put a stop to the unconstitutional practice of ordering restitution based on facts not found by a jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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