No. 25-222

In the
Supreme Court of the United States

VICTOR EVERETTE SILVERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF PROFESSOR HALEY PROCTOR AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether taking judicial notice to conclusively determine that a location is within the "special maritime and territorial jurisdiction of the United States" violates the Fifth and Sixth Amendments' right to a trial by jury.

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INTEREST OF THE *AMICUS CURIAE*[1]

Haley Proctor is an Associate Professor of Law at Notre Dame Law School. She teaches civil procedure and evidence, and she writes about the distinction between law and fact and the separation of powers. She has an interest in the proper preservation of the courts' and the jury's respective roles.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important opportunity for the Court to clarify the confounding distinction between legislative and adjudicative facts in the context of a criminal defendant's fundamental constitutional right to a trial by jury. The lower courts widely misunderstand legislative facts, and that misunderstanding has serious consequences, as this case illustrates.

Our legal system has long distinguished between legislative and adjudicative facts. Adjudicative facts, as everyone agrees, include those facts that establish the elements of a criminal charge or a particular party's claim for relief. *See* Haley N. Proctor, *Rethinking Legislative Facts*, 99 Notre Dame L. Rev. 955, 962 (2024) ("*Rethinking Legislative Facts*"). For example, did the defendant pull the trigger? Legislative facts, by contrast, are trickier to define. Properly understood, they comprise

[1] No party's counsel authored any part of this brief. No person or entity, other than *amicus curiae* and her counsel, paid for the preparation or submission of this brief. All parties received timely notice of *amicus curiae's* intent to file this brief.

only those facts that provide a premise for a ruling on an issue of law. For example, did the legislature repeal the criminal statute under which the defendant has been charged? But the lower courts have adopted a host of vague and contradictory definitions that reach well beyond that category. *See Rethinking Legislative Facts* 976-79.

This confusion has constitutional implications in criminal cases. A court may, consistent with the Constitution, instruct the jury on true legislative facts when it is discharging its duty to instruct the jury on the law. But the Constitution protects a criminal defendant's right to have a jury find all adjudicative facts that support a criminal conviction. Consistent with that constitutional division of labor, Federal Rule of Evidence 201 requires a criminal court that takes judicial notice of an adjudicative fact to "instruct the jury that it may or may not accept the noticed fact as conclusive," while exempting "legislative facts" from its provisions. Fed. R. Evid. 201(f). Unfortunately, courts have used this exemption for "legislative facts" to take great latitude in instructing juries conclusively on facts that a jury was constitutionally entitled to consider.

That is what happened here, and this Court should take this opportunity to remedy the widespread confusion in the lower courts. The facts that the district court took from Petitioner's jury were adjudicative facts, not legislative facts, because they were not premises for any ruling on an issue of law. The Sixth Circuit's contrary conclusion results from, and is typical of, the confusion in

this area of law. That confusion infects many federal prosecutions, especially those involving prisoners, tribal members, and servicemembers and their families. Contrary to the concurring opinion below, there is no apparent historical justification for depriving these groups of their full jury trial rights. Nor is it sufficient, as the majority below reasoned, that courts might be more comfortable finding the kinds of facts at issue here. It is time for this Court to step in and provide needed guidance in this area of law.

ARGUMENT

The Constitution entitles a criminal defendant to have a jury of his peers determine whether the Government has proved each element of a crime beyond a reasonable doubt. *See United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Torres v. Lynch*, 578 U.S. 452, 467 (2016); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). The distinction between law and fact is critical to implementing this constitutional promise. "Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be." *Sparf v. United States*, 156 U.S. 51, 102 (1895); *see Gaudin*, 515 U.S. at 513-14. In this case, the Sixth Circuit erroneously concluded that whether the site of a shooting was "within the special maritime and territorial jurisdiction of the United States" counted as a question of law that the court should declare, rather than a fact to be found by the jury.

Petitioner was charged with several federal crimes for murdering his wife, Brittney Silvers, at her home (4217 Contreras Court). Each charge required the Government to prove that Petitioner committed his crimes "within the special maritime and territorial jurisdiction of the United States." App. 6-7a; *see, e.g.*, 18 U.S.C. § 1111(b). The Constitution assigned the question whether the Government proved that jurisdictional element beyond a reasonable doubt to the jury. The district court instead claimed part of that determination for itself, instructing the jury, on the basis of an evidentiary hearing and its own factual finding, that 4217 Contreras Court is "within the special maritime and territorial jurisdiction of the United States." And the Sixth Circuit affirmed, concluding that this aspect of the jurisdictional element could be found by the judge, rather than jury.

That error warrants this Court's review. The Sixth Circuit offered several justifications for its erroneous holdings, but none have merit. Most fundamentally, the Sixth Circuit erred in concluding the factual premises of the conclusion that 4217 Contreras Court is within federal jurisdiction are "legislative facts," and so subject to conclusive judicial notice. Moreover, the evidence marshalled in the concurring opinion below establishes no historical practice of turning jurisdictional determinations over to the judge. And finally, the jurisdictional status of property should not be left to judges simply because courts may consider themselves more competent than juries to resolve such facts.

I. The Sixth Circuit Erred in Deeming the Jurisdictional Status of Property a "Legislative Fact" to be Resolved by the Court.

The Sixth Circuit misclassified the facts about 4217 Contreras Court as legislative, rather than adjudicative. That error reflects widespread confusion about what constitutes a "legislative fact" that might be determined by a court, rather than a jury.

A. Lower courts are divided on the distinction between legislative and adjudicative facts.

The distinction between adjudicative and legislative facts plays an important role in criminal trials. Under Federal Rule of Evidence 201, courts may take notice of adjudicative facts, but they "must instruct the jury that it may or may not accept the noticed fact as conclusive." Fed. R. Evid. 201(f). By contrast, most courts have inferred that they may instruct the jury conclusively on a judicially noticed legislative fact, as the district court did below. *See, e.g.*, App.17a, 64a-65a. *But see Qualley v. Clo-Tex Int'l*, 212 F.3d 1123, 1128 (8th Cir. 2000) (reaching the opposite conclusion: that courts may not take judicial notice of legislative facts at all). As a practical matter, the distinction between legislative facts and adjudicative facts thus marks a boundary between judge and jury.

What counts as a legislative fact, however, remains deeply unsettled. Although Rule 201 distinguishes between "adjudicative facts" and "legislative facts," it leaves both terms undefined. "Judges, litigants, legislators, and scholars have grappled with legislative

facts for nigh on a century," and Congress's adoption of that distinction in Rule 201 without defining it has only exacerbated the confusion. *Rethinking Legislative Facts* 957.

Many courts focus on the fact's intrinsic characteristics. For example, some look to "the fact's generality: legislative facts are facts about the broader world, while adjudicative facts are facts about the parties and their dispute." *Rethinking Legislative Facts* 977 & n.152 (collecting cases); *see, e.g., United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976) (defining "legislative facts" as "established truths, facts or pronouncements that do not change from case to case but apply universally"). Others look to "the degree of judgment involved in finding" the fact: "legislative facts call for exercises of conjecture, prediction, or opinion, while adjudicative facts do not." *Rethinking Legislative Facts* 977-78 & n. 153-54 (collecting cases); *see, e.g., Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (deeming a fact legislative because it turns on "social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning").

Other courts focus on the fact's function—that is, its role in developing the law. *Rethinking Legislative Facts* 976 n.143 (collecting cases); *see, e.g., United States v. Bello*, 194 F.3d 18, 22 (1st Cir. 1999) ("Whether a fact is adjudicative or legislative depends not on the nature of the fact … but rather on the use made of it (i.e., whether it is a fact germane to what happened in the case or a fact

useful in formulating common law policy or interpreting a statute) ...."); *Ass'n of Nat. Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161-62 (D.C. Cir. 1979) ("Legislative facts are the facts which help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take." (quoting 2 K. Davis, Administrative Law Treatise § 15.03, at 353 (1958))).

Adding to the confusion, some courts muddle both approaches. *Compare Dayco Corp. v. FTC*, 362 F.2d 180, 186 (6th Cir. 1966) ("'[L]egislative facts' involve generalized factual propositions ..., while 'adjudicative facts' relate to, and are determinative of, one individual situation or course of conduct."), *with Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) ("Legislative facts ... are facts which have relevance to legal reasoning, whether in the formulation of a legal principle or ruling by a judge, or in the enactment of a legislative body.") (alterations omitted); *see* App. 17a (cataloging the many different definitions relied upon by the Sixth Circuit); *accord United States v. Perez*, 150 F.4th 237, 248-49 (4th Cir. 2025) (defining legislative facts as "established truths, facts or pronouncements that do not change from cases to case" and "have relevance to legal reasoning and the lawmaking process").

These competing definitions produce incoherent and unpredictable procedural practices in lower courts. For instance, in *Bello*, the First Circuit applied a functional definition and concluded that a jurisdictional element was an adjudicative fact, not a legislative one. 194 F.3d at 22-

24. So while the district court could take judicial notice of the element, it had to instruct the jury that it could disregard the court's conclusion. Contrast that with *Davis*, where the Second Circuit applied a characteristic-based definition, deemed the same jurisdictional element to be a legislative fact, and took judicial notice on appeal and upheld the conviction. *United States v. Davis*, 726 F.3d 357, 366, 369 (2d Cir. 2013); *accord Perez*, 150 F.4th at 249 (explicitly rejecting the First Circuit's functional approach and deeming the jurisdictional element a legislative fact because it is "unchanging").

The characteristic-based definition, followed by a majority of courts, is vague and inherently manipulable. *Rethinking Legislative Facts* 976-77. "It can be hard to conceptualize or identify the innate features of a fact." *Perez*, 150 F.4th at 263 (Harris, J., concurring in part). "Facts that can be described as universal also can be 'restated in ways that are both particular and concrete,' so that how a court chooses to formulate a finding may 'alter [the] procedural limits' that apply." *Id.* (quoting *Rethinking Legislative Facts* 979). "And perhaps most important, there is 'no obvious place to draw a line beyond which a fact becomes general enough to be legislative.'" *Id.* (quoting *Rethinking Legislative Facts* 979). The prevailing function-based definitions suffer from similar problems, as any fact could conceivably inform a legal or policy judgment.

And both definitions of legislative facts place Rule 201 "on a collision course with the Constitution's requirements for factfinding in criminal adjudications."

Id. The characteristic-based approach and the prevailing functional approach do not distinguish between facts that assist in "determining the content … of a rule of domestic law"—a judge's job—and facts that assist in "determining the … applicability of a rule of domestic law"—a jury's job. Fed. R. Evid. 201 advisory committee's note (noting that both types of facts may qualify as "legislative"). Juries often discharge their duty with the assistance of facts that are general, unchanging, and could inform policy judgments or legal rulings. If applied consistently, these definitions of "legislative fact" would capture facts that all "take for granted" are for the jury to find. *Perez*, 150 F.4th at 263 (Harris, J., concurring in part).

B. Properly understood, legislative facts are only those facts that support rulings of law, not facts to which the law is applied.

Properly understood, "legislative facts" are only those facts involved in "saying what the law is." *See Rethinking Legislative Facts* 1014 (referring to these as "premise facts"); *see, e.g.*, *Perez*, 150 F.4th at 265-66 (Harris, J., concurring in part) (recommending a similar approach). By contrast, if a fact is one to which the law is applied—even if the fact is generally known and likely to be relevant in many cases—it is an adjudicative fact. On this understanding, a fact is legislative not based on its inherent characteristics or its relevance to law-making, but on how it is used in the adjudicatory process. *Rethinking Legislative Facts* 1005-18.

This distinction—that facts are legislative if used to declare the law, and adjudicative if the law is applied to the facts—accords with the constitutional division of authority between the court and the jury. When a court discharges its "responsibility of declaring the law," *Sparf*, 156 U.S. at 102, it does more than read statutory words; it describes the legal rule that the statute creates. Some amount of specification is justified as a discharge of the court's duty to "say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *see, e.g., Taylor v. United States*, 579 U.S. 301, 308 (2016). Facts that inform that specification—that is, that a court relies on in deriving the rule—are legislative facts.

But once jurors receive the court's instruction on the law, they must "apply[ ] the law so declared to the facts as they, upon their conscience, believe them to be." *Sparf*, 156 U.S. at 102. Those are adjudicative facts. Some of the facts to which the jury applies the law will be specific to the case, in the sense that they are unlikely ever to be relevant to another case, while others will be general and relevant to many cases. Either way, those facts are adjudicative because they involve applying law to the facts, and that law application is part of the jury's constitutionally assigned role. *Gaudin*, 515 U.S. at 510.

Envision a jury tasked with deciding if a tomato falls within a statute that imposes duties on "vegetables." The court might instruct the jury that a vegetable is something "grown in kitchen gardens" and "served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast and not, like

fruits generally, as desert." *Nix v. Hedden*, 149 U.S. 304, 307 (1893). In doing so, the court will draw on facts about the world—how the word "vegetable" is commonly used—to describe the legal rule that the statute creates. Those facts are legislative because they are premises for the court's interpretation of the statute. But it will ultimately be up to the jury to apply that law and determine if a tomato is a "vegetable." The facts on which it relies to make that determination—even general facts like how tomatoes are used in cooking—are adjudicative.

To be sure, the line between legal interpretation and application is not always bright. But it exists. At some point, a judge ceases to "say what the law is" and begins to usurp the jurors' constitutionally protected duty to apply the law "to the facts as they, upon their conscience, believe them to be." *Sparf*, 156 U.S. at 102. A judge might, as a matter of interpretation, specify that "material" means "constitut[ing] an inducement or motive" to act. *Kousisis v. United States*, 145 S. Ct. 1382, 1396 (2025). But the judge could not instruct the jury that a specific statement by a specific defendant was in or out of the category of "materially false … statement[s]." *Gaudin*, 515 U.S. at 523; *see also Yates v. United States*, 574 U.S. 528, 568-69 (2015) (Kagan, J., dissenting) (recognizing that some questions about which things fall within statutory categories go to the jury).

The line beyond which specification cannot go is the line between interpretation (judicial duty) and application (jury duty). *Sparf*, 156 U.S. at 102. Properly understood,

facts that assist with interpretation are legislative; facts that assist with application are adjudicative.

C. The decisions below misclassified the facts the court took from the jury.

The jurisdictional status of a specific piece of property falls on the adjudicative side of the line, not the interpretation side. The jurisdictional status is not a premise for any ruling of law, but a fact to be decided in this particular prosecution. To say that "special maritime and territorial jurisdiction" *means* 4217 Contreras Court makes little sense. It is far more natural to say that "special maritime and territorial jurisdiction" supplies a *rule* that when applied to *facts* about 4217 Contreras Court yields a conclusion that 4217 Contreras Court is "within special maritime and territorial jurisdiction of the United States." That conclusion—law applied to facts—is for the jury to draw.

This Court's decision in *United States v. Jackalow*, 66 U.S. 484 (1861), illustrates the point. There, a jury issue turned on the jurisdictional status of waters lying off the coast of New York, where the defendant committed an act of piracy. This Court explained "that the boundary of a State, when a material fact in the determination of the extent of the jurisdiction of the court, is *not* a simple question of law." *Id.* at 487 (emphasis added).[2] While "[t]he description of a boundary may be a matter of *construction*, which belongs to the court," "the

[2] Here, "jurisdiction of the court" referred to venue. *Id.* at 486; *see infra*, pp. 17; *Smith v. United States*, 599 U.S. 236, 250 (2023).

application of the evidence in the ascertainment of it as *thus described and interpreted*, with a view to its location and settlement, belongs to the jury." *Id.* (emphasis added).

Jackalow's jury was not limited—as Petitioner's jury was—to determining *where* the crime occurred. To the contrary, the jury had already identified the location by means of a special verdict. *Id.* at 487. It was also up to the jury to determine if that location fell within the boundary of New York or was instead on the high seas. "All the testimony bearing upon this question, whether of maps, surveys, practical location, and the like, should be submitted to [the jury] under proper instructions to find the fact." *Id.* at 487-88. In other words, facts about the waters in which the piracy occurred—though general and unchanging—were adjudicative facts, for the jury to find.

D. Confusion about legislative facts harms criminal defendants and disrupts the constitutional balance between judges and juries.

Misclassifying an adjudicative fact as "legislative" has serious consequences, both for defendants and for the broader legal system. The criminal defendant is deprived of his right to have every element found by a jury of his peers. And questions of law carry no express burden of proof. Gary Lawson, *Proving the Law*, 86 Nw. U. L. Rev. 859, 860 (1992). Thus, if a court resolves the jurisdictional status as a "legal" matter, then the Government may prevail without proving its factual premises beyond a

reasonable doubt, in violation of the Due Process Clause. *See Taylor*, 579 U.S. at 319-20 (Thomas, J., dissenting).

Moreover, a judge who applies law to fact in instructing the jury not only usurps the jury's role but also the role of the legislature. The "law" he commands the jury to apply is not only the law enacted by those with whom the People have entrusted the legislative power. He engrafts his own views about the world onto that law. *Cf. United States v. Rahimi*, 602 U.S. 680, 717 (2024) (Kavanaugh, J., concurring) (disapproving an approach to adjudication that layers "the philosophical or policy dispositions of the individual judge" onto the law).

These problems arise most frequently where, as here, a jurisdictional element has been taken from the jury. And, thus, they are more likely to be felt by prisoners, tribal members, and servicemembers and their families, as charges against these groups often involve the special maritime and territorial jurisdiction of the United States. But the effects will not stop there: The lack of clarity surrounding the "legislative fact" concept has resulted in courts taking factual questions from the jury even outside the jurisdictional context. *See, e.g.*, *United States v. Turner*, 47 F.4th 509, 525 (7th Cir. 2022) (nature of drug); *Gould*, 536 F.2d at 218 (same). As the practice becomes more entrenched, the jury role we "take for granted" today is likely to erode further. *Perez*, 150 F.4th at 263 (Harris, J., concurring in part). This Court's intervention is warranted now to prevent that erosion.

II. Neither Historical Practice Nor Comparative Competencies of Judges and Juries Provides an Alternative Basis for the Sixth Circuit's Rule.

Beyond misunderstanding legislative facts, the opinions below offered two additional reasons for taking the jurisdictional element away from the jury: history and policy. Neither provides a basis for this Court to stay its hand. To be sure, the Sixth Amendment protects a historically defined right and thus history may justify departures from the default rule for certain issues, as Judge Thapar recognized below. But the history offered below is too uncertain to take this factfinding away from the jury. And while history alone may sometimes be enough, policy judgments about the comparative competencies of juries and courts to find certain facts are not. No matter how complicated or technical a fact is, it is still the jury's prerogative.

A. The historical evidence does not clear the high bar needed to justify taking law application from the jury.

Judge Thapar, in his concurrence below, sidestepped the confusion about the distinction between legislative and adjudicative facts and instead relied on a purported historical practice of sending jurisdictional questions to judges. App. 43a. Historical practice could, in theory, warrant taking factfinding away from the jury. *See Gaudin*, 515 U.S. at 515; *Apprendi*, 530 U.S. at 483. But recognizing such an historical exception is a high bar: "The existence of a unique historical exception … would

be so extraordinary that the evidence for it would have to be convincing indeed." *Gaudin*, 515 U.S. at 515. The evidence collected below is at best inconclusive.

As an initial matter, the decisions upon which Judge Thapar relies post-date the ratification of the Constitution and the Sixth Amendment by many decades, with the earliest one coming in 1819 and most dating to the late nineteenth and early twentieth centuries. These later cases are, at a minimum, less probative than pre-ratification history in ascertaining the contours of the right Article III and the Sixth Amendment codified. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 66 (2022); *see also Rahimi*, 602 U.S. at 738-39 (Barrett, J., concurring). Also less probative are *state* practices, practices in *territorial courts*, practices in *civil* cases, and practices in cases not tried to a jury, which make up a substantial part of Judge Thapar's authority. App. 44a-50a; *see United States v. Wonson*, 28 F. Cas. 745, 749-50 (C.C.D. Mass. 1812) (No. 16,750) (limited relevance of state practices); *Bruen*, 597 U.S. at 69 (limited relevance of territorial practices); *Gaudin*, 515 U.S. at 516-17 (limited relevance of practices in civil cases). [3]

In any event, these belated cases do not support a historical practice of taking the jurisdictional status of territory from the jury when it pertains to an element of the crime. Jurisdiction "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523

[3] State decisions may be of even less relevance here because "state criminal laws do not include … jurisdictional elements." *Torres*, 578 U.S. at 457.

U.S. 83, 90 (1998). In a criminal prosecution in federal court, there are often four distinct jurisdictional concepts at work:

> (1) *Subject-matter jurisdiction*, or the court's power to decide the case. *Id.* at 89.
>
> (2) *Legislative jurisdiction*, or the United States' power to criminalize the conduct in the first place. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting, in part).
>
> (3) The *jurisdictional element*, or the element that Congress has added to the crime in an effort to bring the crime within the United States' legislative jurisdiction. *Torres*, 578 U.S. at 457.
>
> (4) *Venue*, or the proper location of the trial. Trial must occur where the crime was committed. U.S. Const. art. III, § 2, cl. 3. Although modern courts refer to this concept as *venue*, older decisions often use the word "jurisdiction." *E.g.*, *Jackalow*, 66 U.S. at 486; *see supra* n. 1.

Because of this linguistic imprecision, not every example of a judge "determin[ing] jurisdictional status," App. 43a, will be relevant to addressing who decides whether the Government has proven a jurisdictional element in a criminal case. And the few decisions Judge Thapar identified that do shine light on that role tend to support the conclusion that questions about the jurisdictional status of territory go to the jury when they pertain to a jury issue.

For example, several decisions seem to involve *subject-matter* jurisdiction. *See, e.g.*, *Peyroux v. Howard*, 32 U.S. (7 Pet.) 324 (1833); *Beebe v. United States*, 11 N.W. 505, 506-07 (1882). In *Beebe,* the defendant moved to dismiss the indictment, claiming that the charges had not been brought "in a court having jurisdiction of the offence charged." *Id.* at 508-09; *see id.* at 506 (seventh and eighth assignments of error). The Supreme Court of the Territory of Dakota rejected this challenge to subject-matter jurisdiction, reasoning that the indictment "sufficiently alleged" that the crime occurred "in the said second judicial district and territory of Dakota, and within the jurisdiction of this court." *Ibid.* So the *Beebe* court did not, as Judge Thapar asserted, decline to "submit the jurisdictional status of the land as a question to the jury." App. 46a. In fact, the court separately rejected a request for a directed verdict on whether the jurisdictional element of the crime had been met. To convict, the jury had to find that the "place near the Crow Creek Indian Agency" where the crime occurred was within "Indian country." *Beebe*, 11 N.W. at 505. The court explained that the prosecution had introduced "abundant and undoubted" "evidence on this subject," including executive orders, a treaty, surveys, and maps. *Id.* 507. So "to have … instructed the jury" that the Government fell short of its burden of proof "would have been a violation of duty and law." *Ibid.*

Other decisions on which Judge Thapar relied concern the United States' *legislative* jurisdiction. *See, e.g., Jones v. United States*, 137 U.S. 202 (1890); *People v. Godfrey*, 17 Johns. 225, 233 (N.Y. 1819). In *Jones*, for example, the

defendant was charged by federal prosecutors for crimes committed on an uninhabited island in the middle of the Caribbean Sea. 137 U.S. at 203-04. The defendant brought a facial challenge to the statute that purported to extend the United States' legislative jurisdiction to the island. *Id.* at 209. The Supreme Court—relying on the papers of discovery, a proclamation by the Secretary of State, and a statute claiming federal jurisdiction over such uninhabited islands discovered by U.S. citizens—rejected the facial challenge and held that Congress had appropriately extended its jurisdiction. *Id*. at 217-24. In doing so, the Court stated that "courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer." *Id.* at 214, 216. But that statement was about jurisdictional power, not a jurisdictional element of the crime. After all, the Government had already proved to the jury the jurisdictional status of the territory where the crime was committed by "offer[ing] in evidence certified copies of papers, from the records of the state department of the United States." *Id.* at 204. *Jones* thus offers no support for the proposition that judges may conclusively notice facts going to the question whether the Government had proved the jurisdictional element of a crime.

Finally, other cases are best understood as courts interpreting the *scope* of jurisdictional elements. For instance, in *United States v. Donnelly*, the Government had to prove that a murder occurred in "Indian country." 228 U.S. 243, 254 & n.2 (1913). The defendant, accepting that the crime occurred where the Government charged,

argued that the site of the crime did *not*, as a matter of statutory interpretation, count as "Indian country," because it was a reservation set aside by the federal government and not land "previously occupied by the Indians." *Id.* at 268; *see* App. 46a. In rejecting that challenge, the Court found no facts about the riverbed on which Donnelly allegedly committed his crime and offered no law-application conclusion about whether that piece of property was within "Indian country." *Donnelly*, 228 U.S. at 268-69. So the *Donnelly* Court's analysis fell entirely on the "interpretation" side of the line. It therefore supplies no support for taking questions of adjudicative fact or law application from a jury.[4] Instead, *Donnelly* seems to have left to the jury the ultimate question whether the land where the crime occurred was within Indian country, to be decided on evidence in the record. *See id.* at 252, 264-65; *see also Donnelly v. United States*, 228 U.S. 708, 710-11 (1913) (on petition for rehearing) (at trial, the defendant requested that the court "instruct the jury that the river was not within the

[4] *Pelican* and *Leathers* likewise involve interpretation rather than application. *See United States v. Pelican*, 232 U.S. 442, 449 (1914) ("The present question, then, is . . . whether it can be said that the descriptive term 'Indian country,' as it is used in § 2145 of the Revised Statutes, is adequate to embrace these allotments," i.e., the legal category of allotments, rather than the specific allotment identified in the indictment); *United States v. Leathers*, 26 F. Cas. 897, 899 (D.C.D. Nev. 1879) (No. 15,581) ("The third point made by the defendant is that if this be an Indian reservation it is not 'Indian country,' as that term is used in Sections 2133 and 2139 of the Revised Statutes.").

limits of the Reservation" or rule on the jurisdictional element "as a matter of law," but the trial court declined).

Despite his reliance on other types of "jurisdictional" cases, Judge Thapar dismissed the only case that is actually analogous. *Jackalow* held that factual questions about the "jurisdictional" status of the waters where the crime occurred—facts found by examining "maps, surveys … and the like"—"should be submitted to" the jury as a question of fact. 66 U.S. at 488. Judge Thapar disregarded *Jackalow* because it concerned venue. App. 51a. But venue, like the elements of the crime, must be proved to a jury. *Jackalow*, 66 U.S. at 485. And both jury issues may turn on whether the place where the jury finds that the crime occurred is within the boundaries ("jurisdiction") of a State or of the United States. There is no obvious reason why that question would go to the jury when the ultimate issue is venue, but not when the ultimate issue is an element of the crime. If anything, one would expect historical practice to be *more protective* of a criminal defendant's right to have a jury determine an element of the crime. *Cf. Smith*, 599 U.S. at 253 (double jeopardy does not bar retrial after a venue error because "[a] judicial decision on venue is fundamentally different from a jury's general verdict of acquittal.").[5]

[5] If *Jackalow* is distinguishable, then so are at least some of the state cases on which Judge Thapar relies. Those decisions, like *Jackalow*, use "jurisdiction" to refer to a concept that is more akin to "venue." *E.g.*, *State v. Wagner*, 61 Me. 178, 181 (1873); *see generally People v. Gleason*, 1 Nev. 173, 178 (1865) ("It is well settled that the allegation of venue in a criminal case is a material allegation and must

In the end, the evidence that Judge Thapar marshals falls well short of the "convincing" historical evidence required to justify the result below. *Gaudin*, 515 U.S. at 515.

B. Factfinding cannot be taken away from the jury simply because a court considers itself better suited to find that particular fact.

Finally, the panel's only other rationale likewise fails to justify its conclusion. Other than the legislative v. adjudicative fact divide, the majority below relied on the perceived incompetence of juries in finding jurisdictional facts. On the majority's reading, the jurisdictional status of 4217 Contreras Court is a legal issue *not* because answering it is an act of interpretation, but instead because jurisdiction is a legal concept; the sorts of "facts" it implicates—facts discerned through an examination of deeds and legally operative state correspondence, for example—are facts that judges are uniquely competent to find and ought to remain the same from case to case. App. 20a, 62a; *accord Davis*, 726 F.3d at 368 (deeming jurisdictional element to be question for the court because it "involve[d] consideration of source materials (such as deeds, statutes, and treaties) that judges are better suited to evaluate than juries").

But that emphasis on comparative competencies misunderstands the constitutional protections promised to criminal defendants. Neither Article III nor the Sixth

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be proved," because "[a] grand jury of Lander county can have no *jurisdiction* of a case in Storey county.") (emphasis added).

Amendment permits judges to reclassify questions as "legal" simply because lawyers are more comfortable with the inquiry. *See Gaudin*, 515 U.S. at 511-15; *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring) ("But it is not arguable that, just because one thinks it is a better system, it must be … the system envisioned by a Constitution that guarantees trial by jury."). Although this Court sometimes approaches allocation questions functionally in civil cases, *see Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388-91 (1996), the Constitution forecloses that approach in criminal cases, as *Gaudin* rightly recognizes. 515 U.S. at 517. The Sixth Amendment would offer no meaningful protection if a judge could take from the jury any question he felt he would do a better job at answering. *See* Haley N. Proctor, *"Just the Facts, Ma'am"? A Response to Professors Blocher and Garret*, 73 Duke L. J. Online 199, 202 & n.21 (2024).

The Sixth Circuit erred in taking the jurisdictional element away from the jury, relying on misunderstandings about legislative facts, history, and the competency of juries. This Court's intervention is needed to provide guidance to lower courts and to protect the ever-essential jury right.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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