No. ______

IN THE

Supreme Court of the United States

EARL LOVE,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

Rebecca Kurz
Counsel of Record
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Tel: (816) 471-8282
Becky_Kurz@fd.org

QUESTION PRESENTED

Many federal criminal offenses have a jurisdictional element requiring proof that the alleged crime was committed "within the special maritime and territorial jurisdiction of the United States." The question presented, on which the Courts of Appeals are divided, is whether a district or appellate court can take judicial notice of a jurisdictional element, such as territorial jurisdiction, without violating a defendant's Fifth and Sixth Amendment rights to due process of law and trial by jury? A subsidiary question is whether a court's mere labelling of a fact, as adjudicative or legislative, can remove a factual determination from a jury without violating the Sixth Amendment?

PARTIES TO THE PROCEEDING

Earl Love, petitioner on review, was the appellant-defendant below.

The United States of America, respondent on review, was the appellee-plaintiff below.

No corporate parties are involved in this case.

RELATED PROCEEDINGS

This case arises from the proceedings in:

- *United States v. Love,* 20 F.4th 407 (8th Cir. 2021).
- *United States v. Love*, No. 6:19-cr-03120-RK-1 (W.D. Mo. Nov. 10, 2020) (Judgment, R. Doc. 98).

There are no other related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 20 F.4th 407 and is reproduced in Appendix A at pages 1-8. The judgment of the district court is not reported but is reproduced in Appendix B at pages 9-15.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231, as Love was charged with an offense against the United States. The court of appeals had jurisdiction under 28 U.S.C. § 1291, which provides for jurisdiction over appeals from all final decisions of district courts of the United States.

The court of appeals entered its judgment on December 14, 2021, and issued its mandate on January 4, 2022.

On March 30, 2026, Love filed a *pro se* motion to recall the mandate and requested appointment of counsel based on appellate counsel's failure to file a petition for certiorari. On April 23, 2026, appointed counsel filed a supplemental motion to recall the mandate. On June 4, 2026, the United States Court of Appeals for the Eighth Circuit recalled its mandate and vacated its judgment dated December 14, 2021 (App. C at 16). On June 4, 2026, the Eighth Circuit also issued a new judgment affirming the district court's judgment (App. D at 17). Love did not file a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are:

The Fifth Amendment to the United States Constitution which provides: "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

The Sixth Amendment to the United States Constitution which 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…." U.S. Const. Amend. VI.

Section 113(a)(6) of Title 18 of the United States Code provides, in pertinent part:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
>
> * * *
>
> (6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

Section 7(3) of Title 18 of the United States Code provides:

> The term 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes:
>
> * * *
>
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort,

> magazine, arsenal, dockyard, or other needful building.

Section 3112(b) of Title 40 of the United States Code provides:

> When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the department, agency, or independent establishment, considers it desirable, that individual may accept or secure, from the State in which land or an interest in land that is under the immediate jurisdiction, custody, or control of the individual, is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.

Section 3112(c) of Title 40 of the United States Code provides: "It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section."

Section 12.010 of the Missouri Revised Statutes provides, in pertinent part:

> The consent of the state of Missouri is given in accordance with the seventeenth clause, eighth Section of the first Article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this state acquired for the purpose of establishing and maintaining post offices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries and land for reforestation, recreational and agricultural uses; … Land used exclusively for the erection of hospitals by the United States may also be acquired by condemnation.

Section 12.020 of the Missouri Revised Statutes provides, in pertinent part:

> The jurisdiction of the state of Missouri in and over all land acquired as provided in section 12.010 is granted and ceded to the United States so long as the United States owns the land; except that there is reserved to the state of Missouri,

> unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within the lands or the buildings.

STATEMENT OF THE CASE

Earl Love was indicted for assaulting another inmate at the United States Medical Center for Federal Prisoners in Springfield, Missouri (USMCFP), in violation of 18 U.S.C. § 113(a)(6) (R. Doc. 1). The indictment alleged that the assault occurred "within the special maritime and territorial jurisdiction of the United States … on land acquired for the used of the United States and under its exclusive or concurrent jurisdiction." *Id.* Love asserted his right to a jury trial.

On the first day of trial, the government provided the district court with a memorandum of law on whether the purported assault occurred "within the special maritime and territorial jurisdiction of the United States" (App. E at 1). The government cited authority holding that territorial jurisdiction exists if the federal government purchased or acquired land from a state, and the state consented to or ceded jurisdiction to the federal government (App. E at 2-3). The government explained that the federal government must accept also jurisdiction (App. E at 3). If these conditions are met, the government argued, then such land is "within the special maritime and territorial jurisdiction of the United States" (App. E at 3).

In the memorandum, the government made factual assertions it contended established jurisdiction. Specifically, the government alleged that: 1) Congress acted to create the USMCFP in 1930, construction began in 1931, and the first buildings were completed in 1933; 2) the people of Springfield, Missouri gave 620 acres of land to the federal government to build the prison hospital; and 3) the federal government returned some of the land to Springfield, Missouri, and kept the rest for the prison hospital (App. E at 4). The government cited no authority for its factual assertions, nor did it refer to any documents establishing the transfer of land from the state to the federal government. It summarily concluded that "[i]n light of this history, the USMCFP is indeed "within the special maritime and territorial jurisdiction of the United States" (App. E at 4).[1] Because the federal government purportedly purchased the property before 1940, the government asserted that it was entitled to a presumption that the federal government accepted jurisdiction (App. E at 3, 5).

Based on its factual assertions regarding the federal government's acquisition of the property where the USMCFP sits and the presumption of acceptance of jurisdiction, the government claimed that the district court could "take judicial notice of the territorial jurisdiction of the United States Bureau of Prisons in Springfield, Missouri" (App. E at 6).

At trial, three employees of the USMCFP testified in the government's case-in-chief. A registered nurse testified that the USMCFP housed federal inmates and was under the control of the Bureau of Prisons (Tr. at 115-16). She was not aware of any state authority with power over the USMCFP (Tr. at 116). On cross-examination, she admitted she was not a legal expert on property rights or property acquisition (Tr. 126).

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[1] The government also explained that Missouri ceded its jurisdiction to the federal government in two general consent statutes, Mo. Rev. Stat. §§ 12.010 and 12.020 (App. E at 4).

A special investigative agent testified similarly (Tr. at 141-43). Over objection, he was allowed to testify that the United States had "jurisdiction over the practical usage and dominion or regulatory authority of that prison" (Tr. at 142-43). Defense counsel argued that witness was "not someone who has legal knowledge about the transactions that created the medical center," and said the government was asking a legal question that the witness had "no expertise, authority or knowledge to answer" (Tr. 142). The district court responded, "I think this jurisdictional issue is a legal issue that I probably could just take judicial notice of, unless you have some evidence to the contrary" (Tr. 142). A third employee testified that the USMCFP was built in 1933 (Tr. at 243).

Before the government rested, the district court heard argument on whether it could take judicial notice of the jurisdictional element. The district court indicated that the government had met the threshold for establishing territorial jurisdiction through its witnesses and thus presented sufficient evidence to submit the case to the jury (Tr. at 173). Referring to a case from the United States Court of Appeals for the Second Circuit, *United States v. Hernandez-Fundora*, the district court stated that the jurisdictional element concerned legislative fact, rather than an adjudicative fact, of which it could take judicial notice (Tr. at 173). The court said it intended to instruct the jury that the USMCFP was within the territorial jurisdiction of the United States (Tr. 173-74). The court then discussed facts the court uncovered when conducting its own research: "I did more historical research of the Springfield medical facility, which is fascinating, and it clearly falls within the special territorial jurisdiction, especially in light of its history and that it returned some of the federal land back in 1977 that it had ownership of from 1930 when it began construction" (Tr. at 174). The court said it was inclined to take judicial notice of territorial jurisdiction but then reiterated that the government had met the threshold for establishing territorial jurisdiction through its witnesses and thus presented sufficient evidence to submit the case to the jury, unless the defense had "something to counter that" (Tr. 174-75).

Defense counsel argued that the government had presented no evidence in support of the factual assertions in its memorandum and had not shown that the federal government had acquired the property in 1933 (Tr. at 175-76). He pointed out that before a court can take judicial notice "there has to be something to take notice of," such as a deed showing that the federal government had acquired the property (Tr. at 176). The district court disagreed observing that an appellate court could "take judicial notice of jurisdiction after the fact" (Tr. at 176). Recognizing that the court was referring to *United States v. Davis*, 726 F.3d 357, 368 (2d Cir. 2013), defense counsel pointed out that in *Davis* the government had presented the appellate court with documents proving "acquisition by the federal government and then legislative consent or cession," proof "[t]hat we do not have here" (Tr. at 177). Counsel noted that acquisition was the issue, not whether the USMCFP was under federal control, as the witnesses had testified (Tr. at 177). Counsel concluded by reiterating that there was no evidence "showing when or how or if the federal government acquired ownership over this property" (Tr. 177). The court asked whether the defense had "any proffer to contradict the territorial jurisdiction" and, when defense counsel responded in the negative, said its ruling was unchanged (Tr. at 177).

After the defense moved for judgment of acquittal at the close of all evidence, the court asked whether the government wanted to make any further record on the "judicial notice … issue" (Tr. at 327). The government argued that it was only required to prove the prison was built before 1940, it was a federal facility, and it was within the Western District of Missouri (Tr. at 327-28). Defense counsel explained that the government was required to prove that the federal government had acquired the property and, had it acquired the property after 1940, the government also had to show that the federal government expressly accepted jurisdiction (Tr. at 329). Counsel argued that the testimony of the government witnesses failed to prove the jurisdictional element beyond a reasonable doubt and, since the government presented no documents establishing acquisition, the court could not take judicial notice of that element (Tr. at 329-31). The court said it would instruct the jury that USMCFP is a place within the special maritime and territorial jurisdiction of the United States (Tr. at 332). Jury instructions 20 (verdict director for the charged offense) and 21 (verdict director for the lesser included offense) contained the following charge to the jury:

> The United States Medical Center for Federal Prisoners in Springfield, Missouri is a place that falls within the special maritime and territorial jurisdiction of the United States. Therefore, if you find beyond a reasonable doubt that the act allegedly occurred at the United States Medical Center for Federal Prisoners in Springfield, Missouri, the third [or second] element of the offense has been met.

(Tr. at 340-42; R. Doc. 88 at 8-9).

The jury found Love guilty of the charged offense, and the district court sentenced him to 84 months' imprisonment (Tr. at 370; App. B at 10).

Love appealed and argued that the government failed to prove the jurisdictional element, and the district court erred in taking judicial notice of territorial jurisdiction and so instructing the jury. The United States Court of Appeals for the Eighth Circuit held, as a matter of first impression, that a district court may take judicial notice that a location is within the special maritime and territorial jurisdiction of the United States and instruct a jury accordingly without violating a defendant's Sixth Amendment right to a jury trial. *Love*, 20 F.4th at 412.

The appellate court then sidestepped whether the district court had abused its discretion in conducting its own research and, without naming the source material it relied upon, taking judicial notice that the USMCFP was within the special maritime and territorial jurisdiction of the United States. *Id*. The appellate court itself took judicial notice of territorial jurisdiction relying on public records that the government presented for the first time on appeal. *Id*. The government had included in an appendix to its brief a certified copy of the deed conveying the land to the United States in 1931. *Id*. The appellate court said judicial notice may be taken at any stage of a proceeding, including on appeal, "as long as it is not unfair to do so." *Id*. Because the appellate court took judicial notice that the USMCFP was within the special maritime and territorial jurisdiction of the United States, it said there was no need to decide whether the evidence at trial was sufficient for a jury to find the jurisdictional element. *Id.* at 413.

REASONS FOR GRANTING THE PETITION

I. This petition presents an important question of federal constitutional law.

The Fifth Amendment guarantees that a criminal defendant will not be deprived of his liberty without due process of law, and the Sixth Amendment provides all those accused of a crime with the right to a speedy and public trial, by an impartial jury. *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995). A jury must find *every* element of the crime with which the accused is charged beyond a reasonable doubt. *Id.* at 510, citing *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993). The right to a jury trial protects the accused from the "oppression and tyranny on the part of rulers" by interposing between the accused and his accuser "the commonsense judgment of a group of laymen." *Id.* at 510, n. 2.

Gaudin was charged with making false statements to a federal agency by knowingly inflating the appraised value on mortgaged property. *Id.* at 508. To obtain a conviction, the government had to prove beyond a reasonable doubt that the false statements were material to the activities and decisions of the federal agency. *Id.* The district court concluded that materiality was a matter of law to be decided by the court and instructed the jury that the statements made by the accused were material. *Id.*

The government's position in *Gaudin* was not as extreme as the government's position here. There the government argued that when the Court had in earlier decisions said a jury must decide all elements of a criminal offense, it meant only that a jury must decide factual components of the essential elements. *Id.* at 511-12. Whether a statement is material, the Court said, requires the decision of two questions of "purely historical fact": 1) what statement was made, and 2) what decision was the agency trying to make. *Id.* at 512. The ultimate question of whether the statement was material to the agency decision required applying the legal standard of materiality to the two historical facts. *Id.* According to the government, a jury should decide the two historical facts, leaving the court to decide materiality. *Id.*

The Court rejected the government's argument because mixed questions of law and fact are typically resolved by juries, and the government's position had "absolutely no historical support." *Id.* "Juries at the time of the framing could not be forced to produce mere 'factual findings," but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence." *Id.* at 513. The Court said it knew of no case in which a criminal jury made findings of fact as to each element but then left it to the judge to apply the law to those facts and render a verdict of "guilty" or "not guilty." *Id.* at 512-13.

Here, the government—and some Circuit Courts of Appeals which will be discussed more below—want to treat the element of territorial jurisdiction as one only for judges, who will determine both the factual and legal components of territorial jurisdiction. *See*, *United States v. Perez*, 150 F.4th 237, 259 (4th Cir. 2025) (Harris, J., concurring in part and dissenting in part) (agreeing that territorial jurisdiction has purely legal components but "others will call for findings of fact" such as "whether the government acquired property on which [a federal prison] sits, and if so, when that acquisition occurred, because the timing may be critical to whether jurisdiction has been accepted").

But the territorial jurisdiction issue does not differ from the materiality issue discussed in *Gaudin*. There is a three-part legal test for determining whether land falls within the territorial jurisdiction of the United States: 1) whether the federal government acquired the land and, if so, when; 2) did the state consent to federal jurisdiction or cede it own jurisdiction; and 3) did the federal government accept jurisdiction. *Id.* at 259-60. This is a mixed question of law and fact that under *Gaudin* must be decided by a jury and not broken up into components so a jury decides the factual questions (acquisition and when it occurred), and judges decide legal questions, such as a state's consent or cession and federal acceptance. Rather a court must instruct the jury on the law (the three-part test) and permit the jury to apply the facts it finds to the law and render a verdict of "guilty" or "not guilty."

Since this Court decided *Gaudin* in 1995, it has become increasingly protective of the Constitution's guarantee of the right to a jury trial. *See*, *Apprendi v. New Jersey*, 530 U.S.466, 476 (2000) (rejecting the argument that labelling certain facts as a "sentence enhancement" or "sentencing factor" meant they did not have to be determined by a jury); *United States v. Haymond*, 588 U.S. 634, 647 (2019) ("Calling part of a criminal prosecution a 'sentence modification' imposed at a 'postjudgment sentence-administration proceeding'" cannot escape the Sixth Amendment's requirement of "a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise").

Lower courts are permitting judges to conclusively judicially notice the existence of territorial jurisdiction, removing that element from the jury's consideration. Lower courts deem certain facts legislative and claim those facts may be decided by the court. But which facts are legislative and which are adjudicative is not as clear as what some lower courts say. Review is needed because the lower courts are eroding the Sixth Amendment right to a jury trial by deciding the jurisdictional elements of federal offenses. The federal government does not have plenary police power, but some circuits are empowering federal judges to declare that federal jurisdiction exists in criminal cases, usurping the jury's role of finding every element of a criminal offense beyond a reasonable doubt before the federal government may deprive an accused of his or her liberty.

What transpired below demonstrates the need for review. Regarding the jurisdictional element of Love's purported offense, the government made vague assertions of fact in a legal memorandum (App. E at 21). Those purported facts were never presented to the jury through admissible evidence. Instead, the district court did its "own research," without disclosing the source materials it relied upon, and took judicial notice that the USMCFP was within the special maritime and territorial jurisdiction. The district court denied Love's motions for judgment of acquittal.

On appeal, the government apparently realized it had failed to prove territorial jurisdiction beyond a reasonable doubt and presented the appellate court with documents outside the record on appeal. The appellate court considered the documents and itself took judicial notice of territorial jurisdiction. A criminal prosecution that should have resulted in acquittal became a conviction because two courts were willing to do the work reserved in our Constitution for a jury.

II. The Court of Appeals are split on whether a court may take judicial notice that a location is within the United States' territorial jurisdiction.

Some Circuits take the territorial jurisdiction element away from a jury on the theory that courts determine "legislative facts" while juries decide "adjudicative facts," and since territorial jurisdiction is determined using legislative facts, courts may judicially notice territorial jurisdiction and instruct a jury to treat that element as proven. *United States v. Davis*, 726 F.3d 357, 368 (2d Cir. 2013); *United States v. Silvers*, 129 F.4th 332, 342-44 (6th Cir. 2025); *Love*, 20 F.4th at 410-12.

Relying on the Second Circuit's panel decision in *Davis*, the Eighth Circuit explained why a court may take judicial notice of territorial jurisdiction and remove the element from a jury's consideration. *Love*, 20 F.4th at 410-12. First, the court said, "federal jurisdiction over a particular place is a question of law." *Id*. at 411. The location of a crime is a factual issue for the jury, but whether a particular piece of land is in Indian country or is part of the special maritime and territorial jurisdiction of the United States are questions for a court. *Id.*

Second, facts that resolve the question of jurisdiction are legislative, not adjudicative. *Id.* Adjudicative facts are those concerning the immediate parties and their activities—"who did what, where, when, how, and with what motive or intent." *Id.*, quoting *United States v. Gould*, 536 F.2d 216, 219-20 (8th Cir. 1976). "Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case." *Id.* at 412. According to *Love*, "whether a particular facility is within federal jurisdiction is a universal truth."[2] *Id.*

Third, judicially noticed legislative facts need not be submitted to the jury. *Id.* Rule 201 of the Federal Rules of Evidence does not apply to legislative facts; thus, a district court is not required to instruct the jury that it could disregard a judicially noticed fact. *Id.*; Fed. R. Evid. 201(a) and (f).

A panel of the Fourth Circuit reached a similar conclusion but was deeply fractured. *United States v. Perez*, 150 F.4th 237, 242 (4th Cir. 2025). The

[2] Contrary to Love's universal truth proclamation, courts have incorrectly taken judicial notice that a federal correctional facility was within the special maritime and territorial jurisdiction of the United States. *Davis*, 726 F.3d at 365 (discussing *United States v. Hernandez-Fundora*, 58 F.3d 802 (2d Cir. 1995)). Both the district and appellate court in *Hernandez-Fundora* incorrectly found territorial jurisdiction because on remand the government discovered, contrary to the evidence it had presented at trial, that the federal government did not in fact have jurisdiction over the federal correctional facility at issue. *Davis*, 726 F.3d at 366. Davis warned, "One cannot simply assume that a federal installation on federal land 'automatically comes within Federal jurisdiction.'" *Id.* at 366-67, citing *United States v. Williams*, 17 M.J. 207, 211 (Ct.Mil.App. 1984).

majority held that the jurisdictional element of a criminal statute must be proved to a jury beyond a reasonable doubt, but a location's jurisdictional status is a legal question for a court to determine. *Id.* at 242-47. Criminal jurisdictional elements can be broken down into a factual component and a legal component. *Id.* at 243. "Even though a location's jurisdictional status is a question of law for a court, facts underlie that determination." *Id.* at 247. The facts underlying that determination are legislative and a court may take judicial notice of such a fact and "charge a criminal jury with accepting its truth." *Id.* at 248. "Or a court of appeals can judicially notice a legislative fact in the first instance, even in criminal cases." *Id.* Because the district court applied the wrong legal test in determining the jurisdictional element, the appellate court remanded the case to the district court, declining to take judicial notice of the several hundred pages of documents provided by the government for the first time on appeal, saying it preferred to act as a court of review. *Id.* at 252-54.

Judge Wynn concurred but only because the "matter was tried as a bench trial, not before a jury." *Id.* at 254. Had the case been tried to a jury, Judge Wynn said remand would not be possible without infringing on the defendant's Sixth Amendment right to trial by jury. *Id.* at 255. Citing *Gaudin*, Judge Wynn recognized that a jury does not merely determine facts but applies the law to those facts to render a verdict. *Id.* Remanding the case for the judge to reconsider the legal component of the jurisdictional element without a jury to then apply the law to the facts would not respect the defendant's choice for trial by jury. *Id.*

Judge Harris dissented because she would have held that the district court's judicial notice of territorial jurisdiction violated the defendant's Fifth and Sixth Amendment rights, and the government's failure to prove the element entitled the defendant to acquittal. *Id.* at 262. Judge Harris recognized that the Second, Sixth, and Eighth Circuits sided with the majority but she disagreed that the distinction between legislative and adjudicative facts was meaningful because "the Supreme Court has come to embrace as a near bright-line rule that every element of a criminal offense, including jurisdictional elements, must be proven at trial beyond a reasonable doubt." *Id.* at 258, 262, citing *Gaudin*, 515 U.S. at 510 and *Apprendi,* 530 U.S. at 490. "[I]f the Constitution required the government to prove the facts around FCI Petersburg's acquisition at Perez's trial … then the terms of Rule 201 are beside the point." *Id.* at 262.

Taking on the legislative versus adjudicative distinction, Judge Harris noted that the distinction "is notoriously slippery." *Id.* at 263. "There is 'no obvious place to draw a line beyond which a fact becomes general enough to be legislative.'" *Id.*, citing Haley N. Proctor, *Rethinking Legislative Facts*, 99 Notre Dame L. Rev. 955, 979 (2024). It is widely accepted in a felon-in-possession case, for example, that the government must prove the defendant's gun traveled in interstate or foreign commerce, meaning that fact is treated as an adjudicative fact to be found by a jury even though it has the characteristics of a legislative fact because the "gun's history at the time it is possessed by the defendant" is an established truth that applies universally. *Id.* 263-64. "[W]here a gun was manufactured and sold does not change from case to case, and whether it has previously crossed state lines often will have nothing to do with the defendant's acts." *Id.* at 264.

The ease with which a fact may be categorized as universal and unchanging, and thus legislative and not adjudicative, means "there is no easy way to cabin the results." *Id.* Once a fact is categorized as legislative, it may be judicially noticed conclusively. *Id.* A jury is not free to reject it. "[A] court may take judicial notice, and it may do so by reference to sources whose accuracy is also reasonably disputed." *Id.* at 265. "It could do so without first giving a criminal defendant a meaningful opportunity to object." *Id.* An appellate court could take judicial notice of a fact it characterized as legislative in the first instance as the Second and Eighth Circuits did in *Davis* and *Love*. *Id.*

Judge Harris concluded that if a legislative versus adjudicative distinction is to be made, facts should be categorized based on their function rather than "their supposed innate characteristics." *Id.* If a fact is used in a legislature's lawmaking process or in a court's legal reasoning when deciding the meaning of a law or to formulate a legal principle, it is a legislative fact. *Id.* A fact that relates to a particular case to which the law is applied during adjudication is an adjudicative fact. *Id.*

This functional approach was used by the First Circuit in *United States v. Bello*, 194 F.3d 18 (1st Circuit 1999). In *Bello*, the court held that the jurisdictional element regarding whether a particular prison is within the special maritime and territorial jurisdiction of the United States is an adjudicative fact, not a legislative one. *Id.* at 22. Looking to the Advisory Committee note to Rule 201, *Bello* said legislative facts are those with relevance to the law-making process or interpreting a statute whereas adjudicative facts are "simply the facts of the particular case." *Id.* at 23. Where a prison sits does not have a legislative function.

The district court in *Bello* had taken judicial notice that the offense occurred within the special maritime and territorial jurisdiction of the United States but did so as an adjudicative fact and instructed the jury under Rule 201(f). *Id.* at 24-25. The First Circuit affirmed the conviction because the district court instructed the jury it could disregard the noticed fact, but the appellate court warned that to judicially notice a jurisdictional fact conclusively, as the district and appellate courts did in Love's case, would be constitutional error. *Id.* at 25-26.

The holdings of *Davis*, *Silvers*, and *Love* rely on the premise that facts can be categorized as either legislative or adjudicative and if labelled legislative, a court may take judicial notice of the fact and remove it from the jury's consideration. But this is nothing more than what this Court has rejected in *Apprendi* and *Haymond*—using labels to erode the right to a jury trial. *Id.* at 650, quoting *Apprendi*, 530 U.S. at 483 ("This displacement of the jury's traditional supervisory role, under cover of a welter of new labels, exemplifies the 'Framers' fears that the jury right could be lost not only by gross denial, but by erosion").

The procedural history of this case is emblematic of that erosion. The jury was not allowed to decide whether the land on which the USMCFP sits was acquired by the federal government and, if it was acquired, when that occurred. When defense counsel pointed out that the government had offered no evidence regarding acquisition, the district court dismissed the argument saying it had done its own research and, in any event, the appellate court could take judicial notice of that element. But for the district court's intervention taking the jurisdictional element away from the jury, an acquittal would have been required.

On appeal, the government presented 60 pages of documents on acquisition never admitted in evidence by the district court nor shown to defense counsel until the filing of the government's brief and appendix. Love's only opportunity to dispute the records was in his reply brief. Love's case is not an isolated incident. The government submitted documents not in the record on appeal in both *Perez* and in *Davis*. *Perez*, 150 F.4th at 253; *Davis*, 726 F.3d at 368. This procedure is not what one associates with due process and trial by jury.

This Court should review the question presented because it has broad implications. Most federal offenses include a jurisdictional element because Congress does not have plenary police power; "it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers." *Torres* *v. Lynch*, 578 U.S. 452, 457 (2016). Thus, how the government must prove jurisdictional elements is at issue in virtually all federal criminal prosecutions. "Special maritime and territorial jurisdiction" itself is an essential element of numerous federal offenses.[3] Because of the frequency with which this issue arises, this Court should clarify whether judges have the power to conclusively judicially notice the jurisdictional element of a federal offense.

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[3] *See, e.g.*, 15 U.S.C. §§ 1175(a) (manufacture, repair, sale, possession of gambling devices), 1243 (manufacture, sale, possession of switchblade knife); 16 U.S.C. § 3372(a)(3) (possession of fish or wildlife prohibited by state, foreign, Indian law); 18 U.S.C. §§ 81 (arson), 113(a) (assault), 114 (maiming), 116(d)(6) (female genital mutilation), 117(a) (domestic assault by habitual offender), 118 (interference with federal law enforcement engaged in protective functions), 661 (theft), 662 (receiving stolen property), 831(c)(1) (transactions involving nuclear materials), 1111(b) (murder), 1112(b) (manslaughter), 1113 (attempted murder or manslaughter), 1201(a)(2) (kidnapping), 1363 (destruction of property), 1460(a)(1) (possession with intent to sell obscene material), 1466A(d)(5) (produce, distribute, receive, possess obscene visual representation of sexual abuse of children), 1591(a)(1) (child sex trafficking), 1801(a) (video voyeurism), 2111 (robbery), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2261(a)(1) (domestic violence), 2261A(1) (stalking), 2262(a)(1) (violation of protective order).

CONCLUSION

The Court should grant Love's petition.

Respectfully submitted,

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

REBECCA L. KURZ
Appellate Chief
1000 Walnut, Suite 600
Kansas City, Missouri 64106
(816) 471-8282
Becky_kurz@fd.org

Counsel for Petitioner