

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RODNEY DILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sixth Amendment guarantees a criminal defendant the right to have a jury find, beyond a reasonable doubt, any fact that increases the penalty for his crime beyond what is authorized by the jury's verdict or his own admissions. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 103 (2013). Restitution ordered under 18 U.S.C. § 2259 is calculated from judge-found facts about a victim's losses and a defendant's relative role in causing them, and this Court has now held that restitution under a closely related statute is a criminal punishment for purposes of the Ex Post Facto Clause. *Ellingburg v. United States*, 607 U.S. ___, 146 S. Ct. 564 (2026).

The question presented is: Whether the Sixth Amendment requires that the facts necessary to support an order of restitution under 18 U.S.C. § 2259 be found by a jury, or admitted by the defendant, rather than found by a judge under a preponderance-of-the-evidence standard.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are Rodney Dill, petitioner, and the United States of America, respondent, as reflected in the caption. Neither party has a stock ticker symbol. *See* Sup. Ct. R. 14.1(b)(i).

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- United States District Court for the Southern District of Texas:
United States v. Rodney Dill, No. 6:25-CR-28-1 (Nov. 25, 2025)
- United States Court of Appeals for the Fifth Circuit:
United States v. Rodney Dill, No. 25-40763 (Aug. 5, 2026)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rodney Dill petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's opinion (App. 1a-8a) is unpublished. *See United States v. Dill*, No. 25-40763, 2026 WL 2268397 (5th Cir. Aug. 5, 2026) (per curiam). It has not been designated for publication. *See* 5th Cir. R. 47.5.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Fifth Circuit entered judgment on August 5, 2026. App. 1a. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 13.3. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

18 U.S.C. § 2259(b)(2) provides, in relevant part:

(A) Determining the full amount of a victim’s losses.—The court shall determine the full amount of the victim’s losses that were incurred or are reasonably projected to be incurred by the victim as a result of the trafficking in child pornography depicting the victim.

(B) Determining a restitution amount.—After completing the determination required under subparagraph (A), the court shall order restitution in an amount that reflects the defendant’s relative role in the causal process that underlies the victim’s losses, but which is no less than \$3,000.

18 U.S.C. § 2259(c)(2) provides, in relevant part:

[T]he term ‘full amount of the victim’s losses’ includes any costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim..., including—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) reasonable attorneys’ fees, as well as other costs incurred; and

(F) any other relevant losses incurred by the victim.

STATEMENT OF THE CASE

1. The prosecution in this case arose from an online relationship between Petitioner Rodney Dill, then a 59-year-old man living in Pinehill, New Mexico, and D.S.G., a 17-year-old male whom Mr. Dill met in an internet chatroom. App. 2a.

2. In their online communications, Mr. Dill told D.S.G. that he wanted the relationship to “be very sexual.” D.S.G. then sent Mr. Dill three images of himself that constituted child pornography, which Mr. Dill accepted and encouraged, responding with sexually explicit messages and images of his own. App. 2a. D.S.G. said he could go and stay with Mr. Dill only if he “disappear[ed],” and Mr. Dill offered to travel to Texas to retrieve him; on March 10, 2025, Mr. Dill met D.S.G. at a store in Port Lavaca, Texas, and drove him back to Mr. Dill’s residence in New Mexico. App. 2a. D.S.G.’s disappearance prompted a multi-day search by his family and an FBI investigation that led agents to the messages between Mr. Dill and D.S.G. and, ultimately, to Mr. Dill’s arrest. App. 2a-3a.

3. A grand jury indicted Mr. Dill on a single count of receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1), and he pleaded guilty without an agreement. App. 3a. The presentence report determined that restitution was mandatory under 18 U.S.C. § 2259(b) and calculated that Mr. Dill was responsible for \$8,000 in restitution, payable to D.S.G.’s mother, reflecting lost wages and relocation costs after an offset for compensation the family had already received from the state Crime Victim’s Compensation Board. App. 3a & n.1.

4. At sentencing, Mr. Dill objected that the proposed restitution award was not proximately caused by his offense of conviction, the receipt of child pornography, because the images were never used to coerce D.S.G., App. 4a, and, per the sentencing record, were never shared with anyone else, Pet. C.A. Br. 9 (quoting ROA.239). He argued specifically that D.S.G.’s mother’s lost wages and the family’s moving expenses were too far removed from the receipt offense to qualify as a reasonably foreseeable consequence of it. Those losses and expenses, he argued, flowed from D.S.G.’s own decision to leave home and the family’s later, independent decision to relocate for safety, not from Mr. Dill’s receipt of the images itself. *See* Pet. C.A. Br. 28-29 (citing *Roberts v. United States*, 572 U.S. 639, 645 (2014)). The district court overruled the objection, finding that “the sending of the images and the running away from home are inextricable” and “part of the same fact pattern.” App. 4a. The court adopted the presentence report’s findings as its own and ordered \$8,000 in restitution, payable to D.S.G.’s family. App. 4a. No jury found, and Mr. Dill did not admit, any fact regarding the amount of the family’s losses or Mr. Dill’s causal role in them; the district court found those facts itself, by a preponderance of the evidence, based on a victim-impact statement and supporting documentation submitted after Mr. Dill’s guilty plea. App. 3a-4a.

5. On appeal, Mr. Dill argued, first, that the restitution award violated his Sixth Amendment right to a jury trial because it rested on judge-found facts that increased his punishment beyond what his guilty plea alone authorized, and second, that the family’s

losses were not the proximate result of the offense conduct, *i.e.*, his receipt of child pornography. App. 5a. Mr. Dill acknowledged that his first argument was foreclosed by circuit precedent and raised it only to preserve it for further review. App. 5a; *see United States v. Caudillo*, 110 F.4th 808, 810-11 (5th Cir. 2024); *United States v. Rosbottom*, 763 F.3d 408, 419-20 (5th Cir. 2014); *United States v. Read*, 710 F.3d 219, 231 (5th Cir. 2012).

6. The court of appeals affirmed in an unpublished per curiam opinion. App. 1a, 8a. The court explained that it reviews “a restitution order’s legality *de novo* and its amount for abuse of discretion.” App. 5a (citing *United States v. Villalobos*, 879 F.3d 169, 171 (5th Cir. 2018)). As to the Sixth Amendment question, the court noted only that Mr. Dill conceded the argument was foreclosed and cited *Caudillo*, *Rosbottom*, and *Read*. App. 5a. The court then held that the district court did not abuse its discretion in finding that Mr. Dill’s offense conduct proximately caused the family’s lost wages and moving expenses. App. 5a-8a.¹ This petition seeks review of the Sixth Amendment question only.²

¹ The panel noted, in a footnote of its own, that “the amount of the restitution order was supported by ample documentation,” pointing to the family’s submissions of “transportation costs, such as gas,” a “moving truck,” and “pay stubs” for the lost wages. App. 6a n.3. That observation goes only to the amount of the family’s expenses; it does not, and could not, establish that Mr. Dill’s offense of conviction proximately caused those expenses, as Section 2259(c)(2) requires. *See* 18 U.S.C. § 2259(c)(2). Evidence of what a victim’s family spent is not evidence of why they spent it, or whether their expenditures were a foreseeable (proximate) result of Mr. Dill’s receipt of child pornography, which he disputed.

² Mr. Dill does not seek review of the court of appeals’ fact-bound holding that the district court did not abuse its discretion in finding proximate cause. That holding does not, independent of the Sixth Amendment question presented here, warrant this Court’s review.

REASONS FOR GRANTING THE PETITION

This case presents a clean vehicle for resolving whether the Sixth Amendment requires that facts increasing a defendant’s restitution obligation under 18 U.S.C. § 2259 be found by a jury beyond a reasonable doubt, rather than by a judge under a preponderance standard. Every circuit to consider the question has held that *Apprendi* does not apply to restitution, but that unanimous rule rests on reasoning this Court’s own precedents have since undermined. In *Ellingburg v. United States*, 607 U.S. ___, 146 S. Ct. 564 (2026), this Court held that restitution under the Mandatory Victims Restitution Act of 1996 (MVRA) is criminal punishment for purposes of the Ex Post Facto Clause, based on features that Section 2259 restitution shares. That holding leaves the lower courts’ *Apprendi* analysis without its foundation. The question recurs whenever a court orders restitution under Section 2259, since the statute directs the court, not a jury, to find the victim’s losses and the defendant’s causal responsibility for them. This case comes without the vehicle problems that led the Court to deny review in *Stroud v. United States*, 146 S. Ct. 1472 (2026), just eight days before deciding *Ellingburg*. The Court should grant certiorari to resolve the question now.

I. The decision below rests on a rule that cannot be reconciled with this Court’s Sixth Amendment precedents, especially after *Ellingburg*.

1. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. In *Alleyne v. United*

States, 570 U.S. 99 (2013), the Court extended that rule to facts that increase a mandatory minimum, explaining that “[a]ny fact that, by law, increases the penalty for a crime” must go to the jury, whether it raises a floor or a ceiling. *Id.* at 103, 108. And in *Southern Union Co. v. United States*, 567 U.S. 343 (2012), the Court applied *Apprendi* to an open-ended criminal fine, holding that the Sixth Amendment does not “distinguish[] one form of punishment from another.” *Id.* at 350. Most recently, in *Erlinger v. United States*, 602 U.S. 821 (2024), the Court reaffirmed that “[o]nly a jury may find ‘facts that increase the prescribed range of penalties to which a criminal defendant is exposed,’” and that the guarantee applies equally to facts increasing exposure to imprisonment and facts increasing exposure to monetary fines. *Id.* at 833 (quoting *Apprendi*, 530 U.S. at 490).

2. Restitution ordered under 18 U.S.C. § 2259 fits the same pattern. The statute requires a court to determine “the full amount of the victim’s losses,” 18 U.S.C. § 2259(b)(2)(A), defined to include only those costs incurred “as a proximate result of the offense,” *id.* § 2259(c)(2), and to order restitution that “reflects the defendant’s relative role in the causal process that underlies the victim’s losses,” *id.* § 2259(b)(2)(B). Each of those determinations is a fact: the amount of a victim’s losses, whether those losses were the proximate result of the offense,³ and the defendant’s causal role in those losses.

³“Whether the evidence establishes proximate cause with respect to restitution is a question of fact reviewed under a clear error standard.” *United States v. Efthimiatos*, 603 Fed. Appx. 503, 506 (8th Cir. 2015) (unpublished); *accord United States v. Osman*, 853 F.3d 1184, 1188 (11th Cir. 2017); *United States v. De La Fuente*, 353 F.3d 766, 772 (9th Cir. 2003). Consistent with that characterization, the panel below reviewed the district court’s fact-bound determination of proximate cause for abuse of discretion, not *de novo*. App. 5a-8a; *accord United States v. Barnes*, 979 F.3d 283, 313 (5th Cir. 2020).

Here, the necessary factual determinations included how much D.S.G.’s mother lost in wages, how much the family spent to relocate, and whether Mr. Dill’s offense of conviction proximately caused those losses at all, as opposed to D.S.G.’s own decision to leave home. App. 3a-4a. No jury found any of those facts, and Mr. Dill admitted none of them in his guilty plea. The district court found them itself, on a preponderance standard, based on a victim-impact statement and receipts submitted months after the plea. App. 3a-4a.

3. The courts of appeals, including the Fifth Circuit below, have declined to apply *Apprendi* to restitution on the theory that “no statutory maximum applies to restitution.” *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (quoting *United States v. Read*, 710 F.3d 219, 231 (5th Cir. 2012)); App. 5a. That reasoning cannot be reconciled with this Court’s own precedents. *Blakely v. Washington*, 542 U.S. 296 (2004), already clarified that the relevant “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. Under that definition, as Justice Gorsuch has observed, “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 v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from denial of certiorari). Under Section 2259, a defendant owes at least \$3,000 in restitution upon conviction alone, but any amount above that floor exists only because a judge, not a jury, found additional facts. Here, the district court’s own findings about D.S.G.’s family’s losses, facts that neither a

jury found nor Mr. Dill admitted, raised the award from that \$3,000 floor to the \$8,000 total ordered.

4. *Southern Union* confirms that an open-ended monetary penalty is not exempt from *Apprendi* simply because the statute sets no numerical ceiling. The Resource Conservation and Recovery Act (RCRA) fine at issue there could vary indeterminately with the number of days of a defendant's violation, yet the Court held the Sixth Amendment applied because the fine was "calculated by reference to particular facts." 567 U.S. at 349-50. Restitution under Section 2259 is calculated the same way, by reference to the particular facts of a victim's losses and a defendant's causal contribution to them. The absence of a legislatively fixed ceiling on those losses is not a meaningful distinction. If anything, it is the feature of restitution that makes judicial factfinding most consequential, because the amount at stake is bounded only by the facts a court is willing to find.

5. This Court's recent decision in *Ellingburg* reinforces the point. There, the Court held unanimously that restitution under the Mandatory Victims Restitution Act of 1996 (MVRA) is a criminal punishment for purposes of the Ex Post Facto Clause. 146 S. Ct. at 567. The Court based that holding on the statute's text and structure: restitution is imposed only after a criminal conviction, set at sentencing alongside other criminal sanctions, and enforced by the government rather than initiated or compromised by the victim as a civil claim would be. *Id.* at 566-69. Restitution under 18 U.S.C. § 2259 shares each of those features. It, too, is imposed as part of a criminal sentence, calculated through the same kind

of “full amount of the losses” inquiry, and payable to the victims of the offense of conviction, not something the victim controls. *See* 18 U.S.C. § 2259(b), (c); *see also United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004) (restitution is a “criminal penalty and a component of the defendant’s sentence”). *Ellingburg* addressed the Ex Post Facto Clause, not the Sixth Amendment, but its method—asking whether a statute’s text and structure make restitution function as punishment—does not turn on which constitutional guarantee is at issue. Having now confirmed that restitution functions as punishment, this Court should extend that recognition to the Sixth Amendment as well. The facts that increase the amount of that punishment are subject to the same jury-trial guarantee that applies to every other component of a criminal sentence. *See Southern Union*, 567 U.S. at 350 (the Sixth Amendment does not “distinguish[] one form of punishment from another”).

6. The government has already signaled that it will resist that conclusion. In *Stroud v. United States*, 146 S. Ct. 1472 (2026), where the petitioner raised this same issue, the Solicitor General responded that “[e]ven if this Court construes restitution as criminal punishment for Sixth Amendment purposes, *Apprendi* does not apply to restitution for the independent reason that the [statute] establishes an indeterminate framework not subject to any statutory maximum.” Brief for the United States in Opposition at 10 n.3, *Stroud*, *supra* (filed Dec. 1, 2025). That position gets *Blakely* backward. The “statutory maximum” for *Apprendi* purposes is not a number written into a statute; it is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely*, 542 U.S. at 303 (emphasis omitted). A statute that authorizes

an amount capped only by facts a judge finds after conviction does not escape *Apprendi* for lack of a legislated ceiling; it triggers *Apprendi* because the ceiling authorized by the plea or verdict alone is zero until a factfinder acts. An indeterminate framework is not a reason to exempt restitution from *Apprendi*; under *Southern Union*, it is the reason *Apprendi* applies.

7. The Fifth Circuit has acknowledged the tension between its restitution precedents and this Court’s intervening decisions. *See United States v. Elliott*, 600 Fed. Appx. 225, 227 (5th Cir. 2015) (unpublished) (recognizing “some tension between statements of the Supreme Court in *Southern Union*...and [the Fifth Circuit’s] conclusion that the Sixth Amendment does not require a jury to find the amount of restitution”). The Ninth Circuit has conceded the same, acknowledging that allowing judges rather than juries to find these facts is not “well-harmonized” with this Court’s Sixth Amendment decisions. *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013); *see Hester*, 586 U.S. at 1106 (Gorsuch, J., dissenting) (quoting *Green*). The panel below did not need to resolve that tension itself, because it considered itself bound by circuit precedent, App. 5a, but that is precisely the posture in which this Court’s guidance is needed.

II. The question presented is recurring and important, and this case is an unusually clean vehicle for resolving it.

1. Whenever restitution is ordered for trafficking in child pornography, 18 U.S.C. § 2259(a)-(b), the amount rests on that same judge-found, victim-loss inquiry,

and the inquiry recurs across a much wider swath of federal sentencing. The MVRA requires restitution, calculated by the court rather than a jury, for every crime of violence and for any property offense committed by fraud or deceit, among other enumerated categories. 18 U.S.C. § 3663A(c)(1)(A)(i)-(ii); *see id.* § 3664(e) (directing the court to resolve restitution disputes by a preponderance of the evidence). Courts have confronted the identical Sixth Amendment question presented here in cases spanning bank fraud, *see United States v. Leahy*, 438 F.3d 328, 337 (3d Cir. 2006) (*en banc*), healthcare fraud, *see United States v. Shah*, 95 F.4th 328, 389 (5th Cir. 2024), and check counterfeiting, *see United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005), not to mention the financial-fraud scheme underlying *Hester* itself, *see* 586 U.S. at 1105 (Gorsuch, J., dissenting). In each of those cases, as here, a court, not a jury, determined the amount of the victim’s losses and the defendant’s causal responsibility for them. The question presented therefore recurs in a wide variety of federal sentencings each year, not just the subset arising under Section 2259.

From 2014 to 2016 alone, federal courts ordered more than \$33 billion in restitution in over 33,000 cases, and unpaid federal restitution has grown from less than \$6 billion in 1996 to more than \$110 billion. *See Hester*, 586 U.S. at 1105-06 (Gorsuch, J., dissenting) (citing reports of the U.S. Government Accountability Office (GAO)). The trend continues. In fiscal year 2024 alone, federal courts ordered \$13.5 billion in restitution in individual cases, the highest annual total in more than two decades, up from \$13.1 billion the year before. *See* U.S. Sent’g Comm’n, 2024 Annual Report (2025); U.S. Sent’g Comm’n, 2023 Annual Report (2024). Current practice never submits the restitution determination to a

jury, whether the defendant pleaded guilty or was convicted at trial, and the overwhelming majority of federal defendants, including Mr. Dill, plead guilty,⁴ so most never receive a jury finding on any fact at all.

2. The Fifth Circuit reviews the legality of a restitution order *de novo*, as the panel did here. App. 5a (citing *Villalobos*, 879 F.3d at 171). It has explained that, “[b]ecause a restitution order that exceeds the court’s statutory authority is an illegal sentence, which always constitutes plain error, [the court] review[s] *de novo* the legality of a restitution order, regardless of whether the defendant raised this objection at sentencing.” *United States v. Penn*, 969 F.3d 450, 458 (5th Cir. 2020); accord *United States v. Swenson*, 25 F.4th 309, 322 (5th Cir. 2022); see also *United States v. Sepulveda*, 64 F.4th 700, 712 (5th Cir. 2023) (restating the rule); *United States v. Caudillo*, 110 F.4th 808, 810 (5th Cir. 2024) (same, applied to an identical Sixth Amendment restitution claim).⁵ The panel accordingly applied no heightened standard of review, even though Mr. Dill raised

⁴ See U.S. Sent’g Comm’n, 2025 Annual Report (2026) (reporting that 98% of federal cases resulted in a guilty plea in fiscal year 2025); U.S. Sent’g Comm’n, 2024 Annual Report (2025) (reporting a 97% guilty-plea rate in fiscal year 2024).

⁵ Some Fifth Circuit panels have suggested this rule is less settled where a defendant made no objection to restitution in any form below. See *United States v. Brann*, ____ F.4th ____, 2026 WL 2333927, at *7 (5th Cir. Aug. 12, 2026) (describing the standard of review for an unobjected-to restitution challenge as “not clear,” and identifying tension between *United States v. No-len*, 472 F.3d 362, 382 (5th Cir. 2006), and *United States v. Maturin*, 488 F.3d 657, 660 (5th Cir. 2007)). Unlike *Brann*, Mr. Dill objected to the restitution award below, *supra* ¶ 4, and the panel applied *de novo* review here without hesitation. App. 5a.

his Sixth Amendment argument for the first time on appeal. Nor does resolving this question require any additional factfinding about the amount of the award; the only question is whether the underlying facts, themselves litigated below, needed to go to a jury in the first place.⁶ App. 5a. That question is a purely legal one. No factual development, no additional record, and no exercise of discretion stands between this Court and a decision on the merits.

3. The amount of restitution at issue, \$8,000, is modest, but the constitutional principle is not diminished by the size of an individual award. This Court’s jury-trial precedents do not turn on the size of the punishment at stake. In *Southern Union*, this Court found “no principled basis” for treating a criminal fine differently from imprisonment or a death sentence, because *Apprendi*’s “core concern” is reserving to the jury “the determination of facts that warrant punishment for a specific statutory offense”—a concern that does not depend on the dollar amount involved, so long as the underlying offense is not itself “petty.” *Southern Union Co. v. United States*, 567 U.S. 343, 350-52 (2012) (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)). Mr. Dill’s offense of conviction is a felony, not a petty offense, so the Sixth Amendment applies with full force regardless of the restitution amount at stake. *See Alleyne*, 570 U.S. at 108-09 (describing the “intimate connection between crime and punishment” at common law without regard to the amount at stake). A

⁶ Mr. Dill’s brief below did not dispute that the lost wages and moving expenses are the type of loss recoverable under Section 2259(c)(2) if proximately caused by the offense; he disputed only whether his offense conduct, as opposed to D.S.G.’s independent decision to leave home, was the proximate cause of those losses. Pet. C.A. Br. 17.

rule that jury factfinding is required only above some unstated dollar threshold would itself require line-drawing this Court has never endorsed.

III. The Court should grant review now, and this case is a better vehicle than *Stroud*, which this Court denied eight days before deciding *Ellingburg*.

1. This is not the first time a party has asked this Court to address whether restitution facts must go to a jury. In *Hester*, Justice Gorsuch, joined by Justice Sotomayor, dissented from the denial of certiorari and urged the Court to confront the question directly, describing the lower courts' contrary rule as difficult to reconcile with *Blakely*'s definition of the statutory maximum. 586 U.S. at 1107. Justice Gorsuch renewed that call six years later, dissenting from the denial of certiorari in three consolidated cases arising from this same Fifth Circuit rule. *Rimlawi v. United States*, 604 U.S. ___, 145 S. Ct. 518 (2025) (Gorsuch, J., dissenting from denial of certiorari). Pointing to this Court's intervening decision in *Erlinger*, he explained that a jury must find the facts that increase a defendant's exposure to monetary fines no less than the facts that increase exposure to imprisonment. As he put it, "it is difficult to see how a judge's factual findings might suffice to increase a criminal defendant's exposure to a restitution award." *Rimlawi*, 145 S. Ct. at 518.

The Third Circuit, sitting *en banc*, likewise divided over the question, with Judge McKee, joined by four colleagues, concluding that "[r]estitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed." *United States v. Leahy*, 438 F.3d 328, 343-44 (3d Cir. 2006) (*en banc*) (McKee, J., concurring in part and dissenting in part). Judge Bye voiced the same doubt dissenting from the

Eighth Circuit's own restitution precedent. *Carruth*, 418 F.3d at 905-06 (Bye, J., dissenting).

2. Historical practice supports that view. As long ago as the reign of Henry VIII, an English statute entitling victims to the restitution of stolen goods allowed courts to order the return only of goods mentioned in the indictment and found by a jury to be stolen. *See Hester*, 586 U.S. at 1107 (Gorsuch, J., dissenting) (citing 1 J. Chitty, *Criminal Law* 817-820 (2d ed. 1816); 1 M. Hale, *Pleas of the Crown* 545 (1736)). American courts followed the same practice. In prosecutions for larceny, the jury usually had to find the value of the stolen property before a court could order restitution to the victim. *See id.* (citing *Schoonover v. State*, 17 Ohio St. 294 (1867); *Jones v. State*, 13 Ala. 153 (1848); *State v. Somerville*, 21 Me. 20 (1842); *Commonwealth v. Smith*, 1 Mass. 245 (1804)); 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, 472-76 (2014) (documenting the common-law practice of submitting restitution-related facts to the jury).

3. No court of appeals has yet accepted that reasoning. Every circuit to consider the question has held that *Apprendi* does not apply to restitution, whether under 18 U.S.C. § 2259 or the general federal restitution statutes, relying either on the absence of a legislated statutory maximum or on the premise that restitution is not punitive.⁷ This

⁷ *See United States v. Milkiewicz*, 470 F.3d 390, 403-04 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 114-20 (2d Cir. 2006); *Leahy*, 438 F.3d at 337-38 (3d Cir.) (majority opinion); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *Rosbottom*, 763 F.3d at 420 (5th Cir.); *United States v. Churn*, 800 F.3d 768, 782 (6th Cir. 2015); *United States v. George*,

petition accordingly does not present a circuit split. But unanimity among the circuits is not, by itself, a reason to deny review when every one of those decisions rests on a rationale that this Court’s own precedents have since undermined. *See* Sup. Ct. R. 10(c) (certiorari may be warranted when a court of appeals “has decided an important federal question in a way that conflicts with relevant decisions of this Court”). *Ellingburg* supplies the missing piece. This Court has now held that MVRA restitution is criminal punishment for Ex Post Facto purposes, based on features that Section 2259 restitution shares. That holding leaves this Court well positioned to decide whether the facts that increase that punishment must be found the way the Sixth Amendment requires for every other kind of criminal penalty.

4. This case is a good vehicle for deciding the question. *Stroud*—the petition this Court denied just eight days before deciding *Ellingburg*, discussed above and in Part I—is the clearest point of comparison. That petition also arose from the Fifth Circuit, so the same rule described in Part II, *supra*, technically governed Mr. Stroud’s claim too. The difference is not the applicable legal standard, but how the case was litigated, starting with Mr. Stroud’s own briefing below. His opening brief in the court of appeals conceded that because he “did not raise his constitutional claim below,” it “can be reviewed only for plain error,” without ever citing the Fifth Circuit’s rule that a restitution order’s legality is reviewed *de novo* regardless of preservation. *Penn*, 969 F.3d at 458; *see* Brief of Defendant-

403 F.3d 470, 473 (7th Cir. 2005); *Carruth*, 418 F.3d at 902-04 (8th Cir.); *United States v. Brock-Davis*, 504 F.3d 991, 994 n.1 (9th Cir. 2007); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005); *United States v. Williams*, 445 F.3d 1302, 1310-11 (11th Cir. 2006), *abrogated on other grounds by United States v. Lewis*, 492 F.3d 1219 (11th Cir. 2007) (*en banc*).

Appellant Bruce Stroud at 23, *United States v. Stroud*, No. 22-11208 (5th Cir. filed July 3, 2024), 2024 WL 3328381, at *23. The government adopted that mistaken concession, characterizing Mr. Stroud’s claim as forfeited and reviewable only for plain error under the ordinary four-part standard of *United States v. Olano*, 507 U.S. 725 (1993), and argued that because every court of appeals to consider the question had rejected the argument, Mr. Stroud could not show “clear or obvious” error, the second *Olano* prong. *See* Brief for the United States in Opposition at 13-14, *Stroud*, *supra* (citing *United States v. Marcus*, 560 U.S. 258, 262 (2010)). The government also argued that Mr. Stroud could not satisfy the third *Olano* prong, that the error affected his substantial rights, because he never disputed the amount of loss. He did not object to the presentence report’s finding that the actual loss was \$6,603,967.30, and he affirmatively agreed at sentencing that the figure was correct. *See* Brief for the United States in Opposition at 14, *Stroud*, *supra* (citing Sent. Tr. 26). Mr. Stroud’s reply did not correct that mistake either. It never invoked the Fifth Circuit’s rule that a restitution order’s legality is reviewed *de novo* regardless of preservation because an award exceeding statutory authority is treated as an illegal sentence. *See Penn*, 969 F.3d at 458. The plain-error characterization, introduced by Mr. Stroud’s briefing and never corrected, accordingly went unrebutted in the record before this Court when it denied certiorari.

5. This case does not share that vulnerability. The panel below itself recited the governing standard, explaining that it reviews “a restitution order’s legality *de novo*,”

App. 5a (citing *Villalobos*, 879 F.3d at 171), and then rejected Mr. Dill’s Sixth Amendment argument as foreclosed by circuit precedent without ever invoking *Olano*’s plain-error prongs. The vehicle problem that shadowed *Stroud* cannot be manufactured here from a record that forecloses it on its face. That kind of standard-of-review uncertainty is what produces vehicle problems like *Stroud*’s in the first place. It does not touch this case. Mr. Dill objected below, and the panel applied *de novo* review without qualification.

6. Nor does this case present the harmlessness problem that doomed *Stroud*’s vehicle. Mr. Dill contested the causal link between his offense and the family’s losses at both sentencing and on appeal, arguing that the award was not, in fact, the proximate result of his offense of conviction. App. 4a, 5a. That causal determination is itself one of the facts this petition contends the Sixth Amendment assigns to a jury rather than a judge. *See* Part I, *supra*. The district court and the panel rejected that argument on the merits, App. 4a, 5a-8a, but for vehicle purposes what matters is that Mr. Dill never conceded the underlying facts the way Mr. Stroud did. Mr. Stroud agreed at sentencing that the loss figure the government proposed was correct, *supra* ¶ 4; Mr. Dill never agreed that a jury would have found the same amount regardless of who did the finding. This point is not an invitation to revisit the panel’s causation ruling, which this petition does not challenge, *see supra* note 2; it shows only that the facts underlying that ruling were genuinely disputed below, unlike the facts Mr. Stroud conceded, which is precisely why the question here is who should have found them.

7. Timing also favors this petition, though not because this Court lacked insight into how *Ellingburg* would come out. *Stroud*'s petition and reply were briefed while *Ellingburg* was pending. The government's opposition, filed December 1, 2025, urged this Court not to hold the petition for *Ellingburg* on the theory that the "independent" no-statutory-maximum ground would resolve the case "regardless of the resolution of the question presented in *Ellingburg*." Brief for the United States in Opposition at 10 n.3, *Stroud*, *supra*. That argument was necessarily speculation about an opinion not yet public, and Mr. Stroud had no opportunity to test it against this Court's actual reasoning. This Court denied certiorari in *Stroud* on January 12, 2026, eight days before deciding *Ellingburg* on January 20, 2026. The order denying certiorari is unreasoned, as usual, and thus reflects no considered judgment that *Ellingburg*'s reasoning leaves the government's independent ground intact. This petition can test that argument against what *Ellingburg* actually held, on a full and public record, rather than against the government's forecast of it.

8. The question will not resolve itself through further percolation. Most restitution orders arise after a guilty plea, and the courts of appeals review those orders only for the legality of the award or the reasonableness of the amount—not for the constitutional predicate this petition raises. The foreclosed rule will keep repeating unless this Court intervenes. The Fifth Circuit's rule alone has drawn at least two other certiorari petitions in the past two years, *see Rimlawi*, 145 S. Ct. 518; *Stroud*, *supra*. Here, the panel simply noted that Mr. Dill's Sixth Amendment argument was foreclosed by circuit precedent and cited

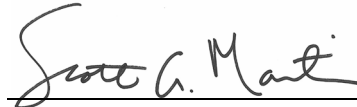
Caudillo, Rosbottom, and Read. App. 5a. The Fifth Circuit, like other courts of appeals, has said all it intends to say.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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A handwritten signature in black ink, reading "Scott A. Martin", is written over a horizontal line.

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