No. 14-1006

In the Supreme Court of the United States

SARA JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Amendment requires that facts affecting the amount of restitution ordered under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is not published in the *Federal Reporter* but is reprinted in 583 Fed. Appx. 503.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2014. Pet. App. 1a. On December 1, 2014, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 19, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of mail fraud, in violation of 18 U.S.C.

1341. Pet. App. 1a, 26a. The district court sentenced her to 36 months of imprisonment, to be followed by two years of supervised release, and ordered her to pay restitution in the amount of $315,470, jointly and severally with her co-defendant. *Id.* at 4a, 28a, 30a, 35a. The court of appeals affirmed. *Id.* at 1a-25a.

1. Petitioner's son and co-defendant, Kevin Johnson, owned a Michigan landscaping and snow-removal company called Lansing Total Lawn Care (LTLC). Pet. App. 2a. Petitioner was the company's Human Resources Officer. *Ibid.* Petitioner and her son implemented a scheme to secure the payment of unemployment benefits to LTLC employees who had not in fact been laid off. *Id.* at 2a-3a. At trial, several former LTLC employees testified that petitioner or her son had a practice of (1) applying for unemployment benefits on the employees' behalf, (2) reporting inflated past wages on the applications in order to increase the employees' benefits, (3) requiring the employees to continue working without a regular paycheck (sometimes threatening to cut off the employees' unemployment payments if they failed to come to work or reported the scheme to authorities), and (4) instructing the employees to report biweekly to the Michigan Unemployment Insurance Agency (UIA) to describe themselves as "unemployed" in order to be eligible for continuing benefits. *Ibid.* A federal investigator calculated that UIA overpaid $315,471 to LTLC employees based on LTLC's false representations. *Id.* at 3a.

Petitioner and her son were charged by indictment with mail fraud, in violation of 18 U.S.C. 1341, and her son also was charged with making a false statement to a federal investigator, in violation of 18 U.S.C. 1001.

Pet. App. 1a. After a jury trial, petitioner and her son were both convicted of the charged offenses. *Id.* at 4a.

2. Petitioner's presentence investigation report (PSR) recommended a total offense level of 22 and a criminal history category of I, which yielded a recommended sentencing range of 41-51 months of imprisonment. Sealed App. 11-12, 18 (¶¶ 30-38, 71).[1] The PSR also recommended that the court order restitution to the UIA in the amount of $315,471. *Id.* at 19 (¶ 81). That amount was based on a chart calculating the amount UIA overpaid in unemployment wages to each of 16 employees for each of the years 2006 through 2009, to the extent such overpayments were attributable to false representations by petitioner and her son. See *id.* at 5-11 (¶¶ 24, 25). Petitioner objected to portions of the calculated restitution, arguing that the calculated benefits received by certain employees exceeded the maximum allowable benefit and that she was not involved in the receipt of unemployment benefits by other employees. *Id.* at 22-23. Petitioner also objected to the award of any amount of restitution on the ground that the amount of restitution was not submitted to the jury for determination. *Id.* at 24.[2] Petitioner reiterated that objection in a

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[1] The PSR is included in a sealed appendix filed with the petition for a writ of certiorari.

[2] Petitioner's objection was:

> Furthermore, the sum of $315,417 as restitution is a form of punishment. It is contrary to law that any punishment be imposed upon a defendant when that punishment necessarily involves fact finding by the jury as trier of fact. The fact of the amount of restitution was not submitted to, nor decided by, the jury. There has been no finding of responsibility by the trier of

memorandum supporting her objections and at her sentencing hearing. See Pet. App. 41a-42a; 1:11-CR-306-2 Docket entry No. 143, at 1-6 (Mar. 21, 2013) (Doc. 143). Although petitioner reiterated in her memorandum her objection to including unemployment benefits paid to her son and one other employee, see *id.* at 8, she did not raise that objection at her sentencing hearing, Pet. App. 43a-44a. Petitioner did not reiterate her challenge to the accuracy of the loss calculated for the other employees either in her memorandum or at her sentencing hearing. *Id.* at 43a-44a; see generally Doc. 143.

The district court overruled petitioner's legal objection to the court's ordering restitution based on factual determinations made by the court rather than the jury. Pet. App. 44a. The court also accepted the PSR's recommendation that the appropriate restitution amount was $315,740, relying on the court's earlier resolution of objections to that amount at the sentencing hearing for petitioner's son. *Ibid.*

3. The court of appeals affirmed, rejecting petitioner's contention "that the district court violated the Sixth Amendment by determining the amount of restitution on its own without presenting the issue to the jury." Pet. App. 13a.[3] As petitioner acknowledged,

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> fact. This is not an issue to be determined by judicial fact finding.

Sealed App. 24.

[3] Petitioner did not challenge the district court's calculation of the amount of restitution on appeal. In addition to rejecting the argument raised in the petition for a writ of certiorari, the court of appeals rejected petitioner's other arguments on appeal, *i.e.*, (1) that the Sixth Amendment required a jury determination on whether the Guidelines offense-level adjustment for her role in the criminal conduct applied (Pet. App. 14a n.4), (2) that petitioner

her "argument directly contradict[ed] [the] holding in *United States v. Sosebee*, 419 F.3d 451, 461-62 (6th Cir.2005), that restitution falls outside the bounds of the Sixth Amendment." Pet. App. 13a. The court rejected petitioner's argument that this Court's recent decision in *Southern Union Co.* v. *United States*, 132 S. Ct. 2344 (2012)—which held that a jury must determine the amount of a fine to the extent that the amount exceeds an otherwise-applicable statutory maximum—called the holding in *Sosebee* into question. *Ibid.* The court of appeals noted that it had recently rejected an identical contention in *United States* v. *Jarjis*, 551 Fed. Appx. 261, 261-262 (6th Cir.), cert. denied, 134 S. Ct. 1571 (2014), "because restitution has no statutory maximum and because the Mandatory Victim Restitution Act mandates that judges determine the amount." Pet. App. 13a (quoting *Jarjis*, 551 Fed. Appx. at 261). The court similarly distinguished this Court's decision in *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), which held "that facts *increasing the statutory minimum* sentence of imprisonment must be presented to a jury." Pet. App. 14a. The court of appeals ultimately concluded that "[t]he district court thus committed no error in calculating restitution." *Ibid.*

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was prejudiced by the exclusion of her husband's medical records (*id.* at 7a), (3) that the prosecutor made various improper comments (*id.* at 8a-12a), and (4) that the jury instructions were erroneous (*id.* at 12a-13a). District Judge Walter H. Rice, sitting by designation, wrote separately to "concur fully with the conclusions reached by the majority," but to express his view that several of the prosecutor's comments "were improper, even if they were not flagrant enough to constitute prosecutorial misconduct" warranting a new trial. *Id.* at 14a.

ARGUMENT

Petitioner contends (Pet. 8-12) that *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), which held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," applies to the calculation of restitution. Petitioner argues (Pet. 14-16) that this Court's recent decisions in *Southern Union Co.* v. *United States*, 132 S. Ct. 2344 (2012), which held that facts increasing a criminal fine above the statutory maximum should be found by a jury, and *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), which held that facts increasing a mandatory minimum sentence should be found by a jury, indicate that *Apprendi* applies to restitution. Petitioner is incorrect. Every court of appeals to consider *Apprendi*'s application to restitution has concluded that the imposition of restitution does not implicate *Apprendi*. This Court has recently and repeatedly declined to consider the question presented. See, *e.g.*, *Basile* v. *United States*, 135 S. Ct. 1529 (2015); *Ligon* v. *United States*, 135 S. Ct. 1468 (2015); *Holmich* v. *United States*, 135 S. Ct. 1155 (2015); *Roscoe* v. *United States*, 134 S. Ct. 2717 (2014); *Green* v. *United States*, 134 S. Ct. 658 (2013); *Wolfe* v. *United States*, 133 S. Ct. 2797 (2013); *Read* v. *United States*, 133 S. Ct. 2796 (2013). The same disposition is warranted here.

1. a. The court of appeals correctly held that *Apprendi* does not apply to restitution. Pet. App. 13a. In *Apprendi*, this Court held that any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be proved beyond a reasonable doubt and found by a

jury. 530 U.S. at 490; see also *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (making clear that, in a federal prosecution, "such facts must also be charged in the indictment"). The "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted).

The district court ordered petitioner to pay restitution pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A. The MVRA provides that, "when sentencing a defendant convicted of an offense described in subsection (c)," which includes fraud offenses, "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1); see also 18 U.S.C. 3663A(c)(1)(A)(ii). The MVRA requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see 18 U.S.C. 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."); see also 18 U.S.C. 3663A(b)(1) (restitution order shall require return of property or payment of an amount equal to the value of lost or destroyed property).

By requiring restitution of a specific sum—"the full amount of each victim's losses"—rather than prescribing a maximum amount that may be ordered, the MVRA establishes an indeterminate framework. 18 U.S.C. 3664(f)(1)(A); see, *e.g.*, *United States* v. *Day*, 700 F.3d 713, 732 (4th Cir. 2012) ("Critically, * * * *there is no prescribed statutory maximum* in the

restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense."), cert. denied, 133 S. Ct. 2038 (2013); *United States* v. *Reifler*, 446 F.3d 65, 118-120 (2d Cir. 2006) (the MVRA "is an indeterminate system") (citing cases). Thus, when a sentencing court determines the amount of the victim's loss, it "is merely giving definite shape to the restitution penalty [that is] born out of the conviction," not "imposing a punishment beyond that authorized by jury-found or admitted facts." *United States* v. *Leahy*, 438 F.3d 328, 337 (3d Cir. 2006) (en banc).

Moreover, while restitution is imposed as part of a defendant's criminal conviction, *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005), "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct." *Leahy*, 438 F.3d at 338. "The purpose of restitution under the MVRA * * * is * * * to make the victim[] whole again by restoring to him or her the value of the losses suffered as a result of the defendant's crime." *United States* v. *Hunter*, 618 F.3d 1062, 1064 (9th Cir. 2010) (citation and internal quotation marks omitted; brackets in original). In that additional sense, restitution "does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." *Leahy*, 438 F.3d at 338.

Every court of appeals to have considered the question has held that the rule of *Apprendi* does not apply to restitution, whether ordered under the MVRA or the other primary federal restitution stat-

ute, the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663. See, *e.g.*, Pet. App. 13a (6th Cir.); *United States* v. *Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 135 S. Ct. 985, and 135 S. Ct. 989 (2015); *Day*, 700 F.3d at 732 (4th Cir.); *United States* v. *Brock-Davis*, 504 F.3d 991, 994 n.1 (9th Cir. 2007); *United States* v. *Milkiewicz*, 470 F.3d 390, 403-404 (1st Cir. 2006); *Reifler*, 446 F.3d at 114-120 (2d Cir.); *United States* v. *Williams*, 445 F.3d 1302, 1310-1311 (11th Cir. 2006), abrogated on other grounds by *United States* v. *Lewis*, 492 F.3d 1219, 1221-1222 (11th Cir. 2007) (en banc); *Leahy*, 438 F.3d at 337-338 (3d Cir.); *United States* v. *Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006); *United States* v. *Carruth*, 418 F.3d 900, 902-904 (8th Cir. 2005); *United States* v. *George*, 403 F.3d 470, 473 (7th Cir.), cert. denied, 546 U.S. 1008 (2005).

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

b. This Court's holding in *Southern Union* that "the rule of *Apprendi* applies to the imposition of criminal fines," 132 S. Ct. at 2357, does not undermine the uniform line of precedent holding that restitution is not subject to *Apprendi*. In *Southern Union*, the defendant company was charged with violating the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6928(d), by storing liquid mercury without a permit for 762 days. 132 S. Ct. at 2349. Violations of RCRA were punishable by a fine of up to $50,000 for each day of violation. 42 U.S.C. 6928(d)(7). Although the jury was not asked to determine the length of the violation, the district court concluded from the verdict and the evidence that the jury had found a 762-day violation, making the statutory maximum fine $38.1 million. *Southern Union*, 132 S. Ct. at 2349. The court imposed a $6 million fine, well above the $50,000 that the defendant argued was the maximum necessarily supported by the jury's verdict. *Ibid.*

In holding that the fine violated the Sixth Amendment, the Court explained that criminal fines, like imprisonment or death, "are penalties inflicted by the sovereign for the commission of offenses." *Southern Union*, 132 S. Ct. at 2350. Observing that, "[i]n stating *Apprendi*'s rule, [it] ha[d] never distinguished one form of punishment from another," *id.* at 2351, the Court concluded that criminal fines equally implicate "*Apprendi*'s 'core concern' [of] reserv[ing] to the jury 'the determination of facts that warrant punishment for a specific statutory offense,'" *id.* at 2350 (quoting *Oregon* v. *Ice*, 555 U.S. 160, 170 (2009)). The Court also examined the historical record, explaining that "the scope of the constitutional jury right must be

informed by the historical role of the jury at common law." *Id.* at 2353 (quoting *Ice*, 555 U.S. at 170). Finding that "English juries were required to find facts that determined the authorized pecuniary punishment," and that "the predominant practice" in early America was for facts that determined the amount of a fine "to be alleged in the indictment and proved to the jury," the Court concluded that the historical record "support[ed] applying *Apprendi* to criminal fines." *Id.* at 2353-2354.

Contrary to petitioner's argument (Pet. 14-16), *Southern Union* does not require applying *Apprendi* to restitution. The Court in *Southern Union* considered only criminal fines, which are "undeniably" imposed as criminal penalties in order to punish illegal conduct, 132 S. Ct. at 2351, and it held only that such fines are subject to *Apprendi*. *Id.* at 2357. The Court had no occasion to, and did not, address restitution, which has compensatory and remedial purposes that fines do not, and which is imposed pursuant to an indeterminate scheme that lacks a statutory maximum. Indeed, *Southern Union* supports distinguishing restitution under the MVRA from the type of sentences subject to *Apprendi* because, in acknowledging that many fines during the founding era were not subject to concrete caps, the Court reaffirmed that there cannot "be an *Apprendi* violation where no maximum is prescribed." *Id.* at 2353. Unlike the statute in *Southern Union*, which prescribed a $50,000 maximum fine for each day of violation, the MVRA sets no maximum amount of restitution, but rather requires that restitution be ordered in the total amount of the victims' losses. 18 U.S.C. 3663A(b)(1) and (d), 3664(f)(1)(A); see *Day*, 700 F.3d at 732 (stating that,

"in *Southern Union* itself, the *Apprendi* issue was triggered by the fact that the district court imposed a fine in excess of the statutory maximum that applied in that case," and distinguishing restitution on the ground that it is not subject to a "prescribed statutory maximum") (emphasis omitted).

Since *Southern Union*, at least five other courts of appeals have addressed in published opinions whether the *Apprendi* rule should be applied to restitution. Each concluded, without dissent, that *Apprendi* does not apply. See *Day*, 700 F.3d at 732 (4th Cir.) (the "logic of *Southern Union* actually reinforces the correctness of the uniform rule adopted in the federal courts" that *Apprendi* does not apply because restitution lacks a statutory maximum); see also *United States* v. *Bengis*, No. 13-2543, 2015 WL 1726801, at *4-*5 (2d Cir. Apr. 16, 2015); *United States* v. *Green*, 722 F.3d 1146, 1148-1149 (9th Cir.), cert. denied, 134 S. Ct. 658 (2013); *United States* v. *Wolfe*, 701 F.3d 1206, 1216-1217 (7th Cir. 2012), cert. denied, 133 S. Ct. 2797 (2013); *United States* v. *Read*, 710 F.3d 219 (5th Cir. 2012), cert. denied, 133 S. Ct. 2796 (2013).

c. Similarly, this Court's holding in *Alleyne* that *Apprendi* also applies to facts that increase a mandatory *minimum* because such facts "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment," 133 S. Ct. at 2158, does not undermine the uniform line of precedent holding that restitution is not subject to *Apprendi*. Restitution under the MVRA does not set a mandatory minimum amount or even a "prescribed range" of amounts that a defendant may be ordered to pay. Rather, the amount is based on the loss caused to the victim by the defend-

ant. *Alleyne* is thus inapplicable to restitution. Since *Alleyne*, every court of appeals to consider whether the decision in *Alleyne* requires that the *Apprendi* rule extend to restitution has concluded that it does not. See, *e.g.*, *United States* v. *Roemmele*, 589 Fed. Appx. 470, 470-471 (11th Cir. 2014) (per curiam) (rejecting *Alleyne* challenge to restitution); *United States* v. *Agbebiyi*, 575 Fed. Appx. 624, 632-633 (6th Cir. 2014); *United States* v. *Basile*, 570 Fed. Appx. 252, 258 (3d Cir. 2014); Pet. App. 13a-14a & n.4. This Court's review is therefore not warranted.[4]

2. Although no conflict exists among the courts of appeals concerning the question presented—whether *Apprendi* applies to restitution—petitioner argues (Pet. 19-22) that the decision below implicates a circuit split concerning a subsidiary issue: *i.e.*, whether restitution should be characterized as a civil remedy or a criminal penalty. The Seventh, Eighth, and Tenth Circuits view restitution as a civil remedy. See *Wolfe*, 701 F.3d at 1217 (7th Cir.); *Carruth*, 418 F.3d at 904 (8th Cir.); *Visinaiz*, 428 F.3d at 1316 (10th Cir.). Other circuits treat restitution as criminal punishment, albeit one with a remedial purpose. See, *e.g.*, *United States* v. *Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006), cert. denied, 549 U.S. 1316 (2007); *Leahy*, 438 F.3d at 335 (3d Cir.); *United States* v. *Adams*, 363

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[4] Petitioner's reliance (Pet. 12-14) on this Court's decision in *Blakely*, *supra*, is similarly misplaced. The Court in *Blakely* held that a state sentencing scheme that authorized a trial court to increase a defendant's sentence of incarceration beyond the statutory maximum on the basis of facts found by the judge violated *Apprendi*. *Blakely*, 542 U.S. at 303. Because *Blakely*, like *Apprendi*, involved only a maximum sentence of incarceration, it does not conflict with the court of appeals' holding as to restitution.

F.3d 363, 365 (5th Cir. 2004); *United States* v. *Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005).

This Court's review of that issue is not warranted. The courts of appeals agree that *Apprendi* does not apply to restitution, regardless of whether, as a technical matter, they view restitution as a purely civil remedy or as a criminal penalty with compensatory aspects. In those circuits that treat restitution as civil in nature, the civil/criminal question is not outcome-determinative: those courts have held that *Apprendi* does not apply to restitution for the additional reason that the MVRA does not prescribe a maximum amount of restitution, but rather requires restitution in a specific amount, *i.e.*, the full amount of the victim's loss. See *United States* v. *Bonner*, 522 F.3d 804, 807 (7th Cir.) ("[E]ven if we were to * * * recharacterize restitution as a criminal punishment, *Apprendi* and its progeny would not require us to invalidate the defendants' sentences."), cert. denied, 555 U.S. 883 (2008); *United States* v. *Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000); see also *Carruth*, 418 F.3d at 904 (8th Cir.); *United States* v. *Wooten*, 377 F.3d 1134, 1144-1145 (10th Cir.), cert. denied, 543 U.S. 993 (2004). At the same time, those courts that view restitution as a criminal penalty have correctly recognized that restitution has compensatory purposes that should be taken into account in the *Apprendi* analysis. See, *e.g.*, *Leahy*, 438 F.3d at 338. The circuit conflict that petitioner identifies thus pertains only to a technical question of characterization that has not materially affected the courts' analysis of the ultimate *Apprendi* issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2015