No. 14-1006

IN THE
Supreme Court of the United States

SARA JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not (and cannot) contest that this case squarely presents an important and recurring question of constitutional law: Whether the Sixth Amendment requires that the facts necessary to impose restitution as part of a criminal sentence be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. Opp. at I.

Furthermore, the government does not (and cannot) contest that, although the circuits are bound by their precedent holding that restitution is exempt from Sixth Amendment protection, they have repeatedly expressed doubt about the viability of that precedent in light of this Court's more recent Sixth Amendment jurisprudence. Indeed, numerous circuits have expressly called upon this Court to address the issue precisely because of the obvious tension between their precedent and this Court's case law. *See* Pet. at 16-19.

Finally, the government does not (and cannot) contest that this fundamental issue arrives at the Court perfectly preserved. Indeed, the government does not offer *a single reason* to question that this case provides an ideal vehicle for addressing the issue presented.

Every time this issue has been presented to the Court in the past, the government has acknowledged the split among the circuits and urged this Court to deny certiorari based primarily on the presence of vehicle problems. *See* Brief for the United States in Opposition at 6, *Wolfe v. United States*, 133 S. Ct. 2797 (2013) (No. 12-1065), 2013 WL 1945146; Brief for the

United States in Opposition at 4, *Holmich v. United States*, 135 S. Ct. 1155 (2015) (No. 14-337), 2014 WL 7336431. Here, given the absence of any vehicle problem, the government finds itself forced to argue the merits. It has offered no reason why the Court should not take the case given the repeated calls for review from lower courts.

Instead—entirely sidestepping the disarray among the lower courts—the government attempts to defend the decision below on the bases that the MVRA has no "statutory maximum" and that it serves a "restorative" or "compensatory" purpose. In doing so, the government fails to acknowledge, let alone address, the obvious problems with these arguments that were raised in Petitioner's petition. Moreover, by attempting to characterize restitution as merely compensatory in nature, the government adopts the minority position in the deep, 8-4 split over the nature of restitution, highlighting the importance of resolving the question presented by this case.

1. The government does not dispute that the issue presented is of surpassing importance. As Petitioner observed in her petition, the question presented implicates the literally *billions* of dollars of restitution imposed based on judicial factfinding each year. Pet. at 10. And—as the 21 state defender associations make clear—the issue is of equally immense importance to the states. *See* Brief of Amici Criminal Defense Attorneys of Mich., et al.

Moreover, the government does not even attempt to question that this case provides an excellent vehicle to resolve the issue. Rather, the government's brief

makes clear that this case is exemplary of the fundamental problem: Petitioner repeatedly asserted her right to have a jury determine the facts required to impose restitution. She was nonetheless ordered to pay restitution based on the trial judge's finding that the $315,740 recommended in her PSR "would be the appropriate amount." Pet. at 5-7; Opp. at 3-4.

The government acknowledges that Petitioner has raised her objection at every stage in these proceedings, leading to the rare circumstance in which this issue has arrived at this Court perfectly preserved. Opp. at 3-4; Pet. at 25-26.[1]

2. According to the government, this Court's review of the question presented is not warranted because "[t]he 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." Opp. at 14.

But that argument is beside the point: it does not address the fact that, although the circuits have clung to their precedent exempting restitution from Sixth Amendment protections, the case law has reached a state of inconsistency and, as a result, numerous circuits have expressly called for this Court's intervention. *See* Pet. at 16-19. For example, the government conveniently ignores *United States v.*

[1] Indeed, in stating that "[t]his Court has recently and repeatedly declined to consider the question presented," the government offers a slew of cases in which defendants failed to preserve the issue at various stages in the proceedings. *See* Opp. at. 6; Pet. at 25-26.

Green, 722 F.3d 1146 (9th Cir.), *cert. denied*, 134 S. Ct. 658 (2013), in which Judge Kozinski explains: "Our precedents are clear that *Apprendi* doesn't apply to restitution, but that doesn't mean our caselaw's well-harmonized with *Southern Union*. Had *Southern Union* come down before our cases, those cases might have come out differently." *Id.* at 1151. And it conveniently ignores that numerous other circuits have acknowledged the same. *See, e.g.*, *United States v. Elliott*, No. 13-20560, __ F. App'x __, 2015 WL 327648, at *2 (5th Cir. Jan. 27, 2015) (describing the "tension between statements of the Supreme Court in *Southern Union Co. v. United States* and our court's conclusion that the Sixth Amendment does not require a jury to find the amount of restitution," but concluding that it was "not a matter for this panel to resolve . . . in light of this circuit's precedent" (footnote omitted)); *United States v. Kieffer*, 596 F. App'x 653, 664 & n.3 (10th Cir. 2014) (stating that there are "compelling reasons" that circuit precedent exempting restitution from the Sixth Amendment may be wrong and that the case for applying *Apprendi* to restitution may be *even stronger* than for the fines considered in *Southern Union*, but concluding that it remains "bound by [its] ample precedent unless the Supreme Court instructs otherwise"); *United States v. Wolfe*, 701 F.3d 1206, 1215-17 (7th Cir. 2012) (observing that its precedent is "against" this Court's "recent trend . . . to submit more facts to the jury," but concluding that it lacked the requisite "compelling reason . . . to overturn [its] long-standing Circuit precedent"), *cert. denied*, 133 S. Ct. 2797 (2013); *United States v. Cannon*, 560 F. App'x 599, 605 (7th Cir. 2014) (advising defendant to "petition the

Supreme Court for a writ of certiorari" resolve conflict across the circuits); *United States v. Holmich*, 563 F. App'x 483, 485 (7th Cir. 2014) (advising defendant that precedent results in "no possibility of succeeding here" and he must "seek review of this question in the Supreme Court"), *cert. denied*, 135 S. Ct. 1155 (2015); *United States v. Serawop*, 505 F.3d 1112, 1122-23 & n.4 (10th Cir. 2007) ("We are without power to revisit this precedent[.]"); *People v. Kyle*, No. B244023, 2014 WL 1024250, at *9 (Cal. Ct. App. Mar. 17 2014) (declining to depart from precedent "[u]ntil either of the Supreme Courts directs otherwise"). Indeed, in the proceedings below, the district court itself expressed the view that Sixth Circuit precedent appeared to conflict with the direction of this Court. Pet. at 7.[2,3]

Furthermore, it is telling that the government, on the one hand, tries to dismiss the split over whether

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[2] The district court stated:

> It could be that the Supreme Court might hold at some point in time, some justices seem to be going that way, that just about every decision has to be made by a jury if there's a jury trial. But right now I think the law is quite clear and certainly the practice is quite clear everywhere you go that restitution is a matter for the Court to determine and not for a jury. If that changes, fine with me.

Pet. App. 44a.

[3] Moreover, as the government itself agrees, this is not an issue that needs more time to percolate—the circuits are unanimous that they remain bound by their pre-*Southern Union* and pre-*Alleyne* precedent absent this Court's intervention. *See* Opp. at 12-13; Pet. at 16-17.

restitution is criminal or civil as a "technical matter," Opp. at 14, and, on the other, repeatedly invokes the distinction to defend the position of the court of appeal below. *See, e.g.*, Opp. at 8 ("while restitution is imposed as part of a defendant's criminal conviction, [it] is, at its essence, a restorative remedy that compensates victims for economic losses" (internal quotation marks omitted)); Opp. at 8 ("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" (quotation marks omitted) (ellipsis in original)); Opp. at 11 (distinguishing restitution from fines on the basis that it "has compensatory and remedial purposes"). This simply reinforces the importance of this Court's guidance on the issue presented. As the government acknowledges, courts continue to rationalize their precedent on the basis that restitution is civil in nature. *See* Opp. at 9; *see also, e.g.*, *Kieffer*, 596 F. App'x at 664; *Wolfe*, 701 F.3d at 1217.

The Court's review is warranted to resolve the confusion and split among the circuits.

3. Entirely sidestepping the disarray among lower courts, the government argues the merits of whether the Sixth Amendment applies to restitution. None of the government's arguments is persuasive.

The government's chief defense of the decision below is that the MVRA has "no prescribed statutory maximum" because it "establishes an indeterminate framework." Opp. at 7-8 (internal quotation marks omitted). In advancing that argument, the government does not address any of the fatal flaws that Petitioner raised in her petition. *See* Pet. at 12-16.

To begin with, though the government pays lip service to this Court's admonition that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original), in its very next breath it claims there is no "statutory maximum" simply because "[t]he MVRA requires that restitution be ordered 'in the full amount of each victim's losses.'" Opp. at 7 (quoting 18 U.S.C. § 3664(f)(1)(A)); *see also* Opp. at 11 (no statutory maximum because "the MVRA sets no maximum amount of restitution, but rather requires that restitution be ordered in the total amount of the victims' losses"). The government makes no attempt to confront Petitioner's argument that absent a jury finding as to the loss caused by the defendant's crime, "the maximum sentence a judge may impose . . . *without* any additional findings," *Blakely*, 542 U.S. at 303-04 (emphasis in original), is zero and a trial judge necessarily makes additional findings of fact to impose restitution. Pet. at 13; *see also Southern Union Co. v. United States*, 132 S. Ct. 2344, 2352 (2012) ("This is exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow.").[4]

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[4] Recognizing that its position cannot be reconciled with *Blakely*, the government makes an overt attempt to narrow *Blakely* to its specific facts. *See* Opp. at 13 n.4. That the government's chief position is that the MVRA "lacks a statutory maximum," yet it relegates to a footnote the very decision of this Court that defines

The government attempts to distinguish *Southern Union* on the same basis—that the MVRA prescribes an "indeterminate scheme" that "requires that restitution be ordered in the total amount of the victims' losses." Opp. at 11. But as the government admitted at oral argument in *Southern Union*, a Sixth Amendment exception for restitution is "hard to justify" having applied *Apprendi* and *Blakely* to fines. *See* Pet. at 15-16.

First, the government fails to acknowledge that the statute at issue in *Southern Union* "itself prescribed an 'indeterminate' penalty of '*not more* than $50,000 for *each day of violation*.'" Pet. at 14-15 (quoting *Southern Union*, 132 S. Ct. at 2349). The statute set no limit on the number of days that a defendant could be found to violate it and thus set no "maximum amount" or "concrete cap[]" as the government suggests. Opp. at 11. Just as restitution ultimately requires a determination as to the amount of loss, the fine in *Southern Union* was "ultimately determine[d] . . . [by] the number of days the company violated the statute." 132 S. Ct. at 2356.

Moreover, the Court in *Southern Union* specifically observed that often fines—much like restitution—are calculated by reference to "the amount of . . . the victim's loss" and held that "*[i]n all such cases*" the facts required to determine the amount of the penalty must be found by a jury "to implement *Apprendi*'s

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"the 'statutory maximum' for *Apprendi* purposes," *Blakely*, 542 U.S. at 303, is telling.

'animating principle.'" *Id.* at 2351; Pet. at 15; *see also* 132 S. Ct. at 2356 (expressly rejecting the government's argument that "'judicially found facts [that] involve only quantifying the harm caused by the defendant's offense'—for example, how long did the violation last, or how much money did the defendant gain (or the victim lose)?" should be exempt from *Apprendi* (quoting Br. for the United States at 25)). Finally, to the extent the government implies that *Southern Union* is distinguishable based on the "historical role of the jury at common law" with respect to fines, it is wrong. *See, e.g.*, 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, 481 (2014) (concluding, based on an analysis of Blackstone and common law jurisprudence that "[a]t common law, the rules governing the relationship between an indictment and award of restitution were little different than those that applied in the context of imprisonment and criminal fines" and thus "the jury trial right thus requires extending the logic of *Apprendi* to criminal restitution").

Ultimately, the government falls back on the argument that restitution is "at its essence, a restorative remedy that compensates victims for economic losses." Opp. 8 (quotation marks omitted). Because "[t]he purpose of restitution under the MVRA * * * is * * * to make the victim[] whole again," the government argues, restitution "does not transform a defendant's punishment into something more severe than that authorized." *Id.* Borrowing the words of

Judge McKee: "[T]hat is not the question." *United States v. Leahy*, 438 F.3d 328, 342 (3d Cir. 2006) (McKee, J., concurring in part and dissenting in part). "Rather, the question is whether the verdict '*alone*' allows the judge to impose restitution with no additional finding of fact." *Id.*; *see also Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("The dispositive question . . . 'is one not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (quoting *Apprendi*, 530 U.S. at 494) (internal citations omitted)). As Judge McKee explained, the government's position

> requires that we accept the proposition that an order of restitution rests upon the jury's verdict alone, even though no restitution can be imposed until the judge determines the amount of loss. We must also accept that adding a set dollar amount of restitution to a sentence does not "enhance" the sentence beyond that authorized by the jury's verdict alone. I suspect that a defendant who is sentenced to a period of imprisonment and ordered to pay restitution in the amount of $1,000,000 would be surprised to learn that his/her sentence has not been enhanced by the additional penalty of $1,000,000 in restitution.

Leahy, 438 F.3d at 343.

Moreover, in asserting that the Sixth Amendment does not attach to restitution because it is "restorative" and "has compensatory and remedial purposes," Opp. at 8, 11, the government effectively adopts the minority

position in the 8-4 split among circuits, Pet at 19-22, and belies its own contention that the circuit split is merely "a technical matter." And, that position is wrong. This Court has consistently characterized restitution as a criminal penalty. *See Pasquantino v. United States*, 544 U.S. 349, 365 (2005) ("[t]he purpose of awarding restitution [under the MVRA] . . . is not to collect a foreign tax, but to mete out appropriate *criminal punishment* for that conduct." (emphasis added)); *Kelly v. Robinson*, 479 U.S. 36, 52 (1986) (recognizing that "[a]lthough restitution does resemble a judgment 'for the benefit of' the victim, the context in which it is imposed undermines that conclusion . . . the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose"). The MVRA itself characterizes restitution as a "penalty," 18 U.S.C. § 3663A(a)(1), and sets forth a statutory scheme that bears no resemblance to a civil judgment. *See, e.g.*, 18 U.S.C. § 3613A(a)(1) (providing that a defendant can serve jail time for failing to pay restitution). Furthermore, restitution has always served a penological purpose as a historical matter. *See* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 933-34 (1984) ("In ancient societies, before the conceptual separation of civil and criminal law, . . . [t]he primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community[] . . . a means by which the offender could buy back the peace he had broken.").

The Sixth Circuit's decision that restitution is exempt from the Sixth Amendment is wrong, and this petition should be granted to correct it.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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