No. 11-

IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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July 15, 2011

QUESTION PRESENTED

Whether the Fifth and Sixth Amendment principles that this Court established in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Southern Union Company states that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock. New England Gas Company is a division of Southern Union Company. The Company has entered into a merger agreement with Energy Transfer Equity, L.P. ("ETE"), a publicly traded partnership, pursuant to which ETE will acquire the Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Southern Union Company respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals, Pet. App. 1a-38a, is reported at 630 F.3d 17. Its order denying the petition for rehearing en banc, Pet. App. 49a-50a, is unreported. The opinion of the district court, Pet. App. 39a-48a, is reported at 2009 WL 2032097.

JURISDICTION

The court of appeals issued its decision on December 22, 2010. Pet. App. 1a. A timely petition for rehearing en banc was denied on February 17, 2011. *Id.* at 49a-50a. On April 12, 2011, Justice Breyer extended the time for filing this petition to and including June 17, 2011, and on June 9, 2011, granted a further extension to and including July 17, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor [shall] be deprived of life, liberty, or property, without due process of law."

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. . . ."

42 U.S.C. § 6928 provides, in relevant part:

> (d) Criminal penalties. Any person who –
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter –
>
> (A) without a permit . . .
>
> shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both.

STATEMENT OF THE CASE

The decision of the First Circuit conflicts with decisions of other federal courts of appeals on the question whether the Fifth and Sixth Amendment principles that this Court established in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines. In *Apprendi*, this Court held that "any fact" other than the fact of a prior conviction "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. While three courts of appeals have vacated criminal fines based on the principles established by *Apprendi* and its progeny, the First Circuit categorically held that "the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines," Pet. App. 2a, and, as a result, left intact the district court's fine, which was 360 times greater than the maximum fine that could

have been imposed based on the jury's verdict, finding a single day's violation of the applicable criminal statute. In so holding, the First Circuit recognized the conflict with its sister circuits and essentially invited this Court's review by acknowledging that the issue is "close" and determines the outcome in this case. *Id.*

The decision below cannot be squared with either this Court's decision in *Apprendi* or its subsequent holdings applying that decision, which do not limit *Apprendi* to incarceration. In addition, the decision presents a recurring issue of national importance because fines are a significant element of criminal sentencing and the issue posed here can be outcome determinative in numerous sentencing contexts. This Court should grant review to ensure consistent application of *Apprendi*'s principles to all penalties including criminal fines.

A. Factual Background.

Southern Union, a diversified natural gas company, was found guilty by a jury of a single count of knowingly storing mercury without a permit in violation of 42 U.S.C. § 6928(d)(2)(A), a provision of the Resource Conservation and Recovery Act ("RCRA").[1] The mercury had been collected by a division of Southern Union, New England Gas Company, in connection with an environmentally-favorable program to replace mercury seal gas pressure regulators in customers' homes with non-mercury regulators. Pet. App. 3a. The charges against Southern Union resulted from an unfortunate incident in which vandals illegally entered a storage facility owned by Southern Union in Pawtucket,

[1] Southern Union was acquitted of two other counts, which are not at issue here.

Rhode Island, broke into a locked cabinet that contained liquid mercury, and spilled some of it on the property as well as at a nearby apartment complex. After the spill was discovered, Southern Union fully cooperated with local and state officials and the Red Cross to remediate the spill's effects and to compensate the residents of the apartment complex who were temporarily displaced – spending more than $6 million to do so. *Id.* at. 6a. This incident was the first time in Southern Union's 80-year history that it was even charged with any crime much less convicted of one.

B. Proceedings Below.

The indictment charged Southern Union with storing mercury without a permit "'[f]rom on or about September 19, 2002 until on or about October 19, 2004.'" Pet. App. 25a. As the court of appeals acknowledged, Southern Union's "prime defense at trial was that the mercury was not a waste, but rather was a commercial chemical product that the company intended to recycle."[2] *Id.* at 7a. Accordingly, the company "presented evidence at trial from which the jury could have found that for at least some of the period of the indictment, it had treated the [liquid] mercury as a recyclable resource rather than as waste." *Id.* at. 24a. For example, "Southern Union produced evidence that at several points throughout the indictment period, and as late as the

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[2] Under EPA regulations, liquid mercury is a "commercial chemical product[]" that is only regulated as a waste "if and when" it is "discarded or intended to be discarded." 40 C.F.R § 261.33. Therefore, even though mercury is a hazardous substance, it is also a commercial chemical product that can be stored for any length of time if it is being held for eventual reclamation. Such storage requires no hazardous waste permit because the material is a product, not a waste.

summer of 2004 [shortly before the end of the period charged in the indictment], Southern Union employees discussed a potential mercury recycling project." *Id.* at 33a.

The jury instructions did not direct the jury to determine the number of days or the duration of any violation that it found. As the court of appeals explained, the district court instructed the jury that in order to convict it "needed only to 'determine . . . whether at *some point* in time the liquid mercury was discarded by being abandoned' and therefore ceased to be legally held for future recycling and began to be stored as waste." Pet. App. 33a (emphasis in original). The government did not request a special interrogatory that would have asked the jury to determine the number of days or duration of any violation. The general verdict form simply tracked the indictment, and inquired "guilty" or "not guilty." *Id.* at 25a. Under RCRA, a single day's violation was sufficient for the jury to return a guilty verdict.

At sentencing, the district court applied the penalty provision of 42 U.S.C. § 6928(d), which provides for a fine of "not more than $50,000 for each day of violation." The pre-sentence report ("PSR") prepared by the U.S. Office of Probation set the maximum fine for Southern Union's offense at $38.1 million, which it arrived at by multiplying $50,000 times 762, the full number of days referred to in the indictment. Southern Union objected to this calculation on the ground that a fine of more than $50,000 would violate its constitutional rights under *Apprendi* because the jury did not determine the number of days or duration of the RCRA violation and, therefore, the maximum sentence supported by the jury's verdict was the maximum fine for a one-day violation.

The district court requested briefs on the *Apprendi* issue and produced a written decision prior to the sentencing hearing. The government's brief conceded that the jury was not asked to find, and did not find, a particular number or span of days of illegal storage. The government argued, however, that based on the dictum and reasoning of this Court's decision in *Oregon* v. *Ice,* 129 S. Ct. 711 (2009), *Apprendi* does not apply to the imposition of criminal fines, and thus the district court was authorized to find facts that increased the available fine from $50,000 (corresponding to the one day of violation reflected by the jury's verdict) to $38 million (corresponding to 762 days of violation).

District Court Decision and Sentencing. The district court initially concluded that Southern Union waived its *Apprendi* argument because of its "failure to respond to the Court's invitation for even greater specificity in the verdict form, its assent to the use of the Indictment language, and its failure to formally place an objection on the record." Pet. App. 43a n.1. The court nevertheless addressed "the substance" of Southern Union's argument. *Id.*

On the merits, the district court "reject[ed] the notion that *Apprendi* does not apply to fines," expressly stating that it "does not believe, as the Government argues, that the Supreme Court recently indicated in *dicta* anything to the contrary." Pet. App. 44a (citing *Oregon* v. *Ice*, 129 S. Ct. 711, 719 (2009)). With respect to the *Ice* dicta, the district court concluded that "[t]he best that can be said about" the question is that "*Apprendi* does not prevent a Court from engaging in judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum range, which is something entirely different from finding a fact that

determines the range." *Id.* at 45a (emphasis in original).

Applying the *Apprendi* principles, the district court examined § 6928(d) and found that "the statutory maximum penalty" under this provision "can only be determined in any particular case after a factual finding is made concerning the number of days a defendant violated the statute." Pet. App. 45a. It then concluded that "[b]ecause the maximum statutory penalty is tied to the length of the violation, *Apprendi* and its progeny requires the jury, and not the Court, to find the dates needed to calculate the maximum fine." *Id.*

The district court nevertheless concluded that there was no *Apprendi* violation in its finding a RCRA violation of 762 days because the "content and context of the verdict all together" indicated that the jury determined the necessary dates, Pet. App. 46a, notwithstanding its instruction to the jury that it could convict if it found that Southern Union "'at *some point* in time'" began storing the mercury as waste (and thereby violated RCRA), *id.* at 33a (emphasis in original). The district court reasoned that "[f]rom the verdict form, it is clear that the jury conclusively found beyond a reasonable doubt that the Defendant's conduct ended on October 19, 2004 and that it began 'on or about' September 19, 2002." *Id.*; see also *id.* at 47a (noting that "the evidence introduced was clear. . . . that the precise date for establishing the maximum penalty is in fact September 19, 2002").

The district court therefore overruled Southern Union's objection to the PSR and "set the maximum fine that may be imposed against the Defendant at $38.1 million as stated in the pre-sentence report."

Pet. App. 48a. After a sentencing hearing, the district court imposed a $6 million fine and a $12 million "'community service obligation.'" *Id.* at 24a.[3] Southern Union appealed both the verdict and its sentence.

First Circuit Decision. In addition to rejecting Southern Union's other challenges to the verdict, which are not at issue here, the First Circuit rejected Southern Union's challenges to its sentence. The court of appeals first held that "Southern Union adequately preserved an objection" to the fine on the ground that it was imposed in violation of *Apprendi* because Southern Union had raised this objection at sentencing. Pet. App. 24a. The court of appeals specifically noted that "[t]he prosecution did not seek the district court's waiver ruling and does not press it on appeal." *Id.* at 24a n.12; see also Br. for the Appellee, United States of America at 38, *United States* v. *S. Union Co.*, No. 09-2403 (1st Cir. Apr. 7, 2010) ("U.S. First Cir. Br.") (the government "does not press the [district] court's waiver ruling – a ruling it did not seek below").

On the merits, the court of appeals described the *Apprendi* issue as one of "initial impression" that was both "important" and "close." Pet. App. 1a-2a. The court first considered this Court's holdings in *Apprendi* and its progeny. It acknowledged that "[t]hese cases do not distinguish among types of 'penalties' or 'punishment,' leaving the broad language unglossed," but concluded that none of the

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[3] The district court specifically noted that the $12 million community service obligation was not restitution. *See* Sentencing Transcript at 54, *United States* v. *S. Union Co.*, No. 07-1345 (D.R.I. Oct. 2, 2009) ("The fourth [sentencing] factor [the court must consider] is restitution, and I don't see that to be a factor at all in this case.").

cases expressly addresses whether criminal fines are encompassed within the *Apprendi* rule. *Id.* at 27a.

It then concluded that "the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines," Pet. App. 2a, relying on two aspects of this Court's decision in *Oregon* v. *Ice*, 129 S. Ct. 711 (2009). This Court in *Ice* rejected an *Apprendi* challenge to a state sentencing provision that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences of incarceration following the jury's verdict convicting the defendant of multiple crimes. *First*, the court of appeals relied on a reference in *Ice* to criminal fines, although it conceded the reference was "dicta." Pet. App. 28a. The court of appeals stated:

> Observing that many states permit judicial fact-finding on matters 'other than the length of incarceration,' the Court explained that '[t]rial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and *the imposition of statutorily prescribed fines* and orders of restitution.' The Court warned that applying *Apprendi* to these types of determinations 'surely would cut the rule loose from its moorings.'

Id. at 28a-29a (quoting *Ice*, 129 S. Ct. at 719) (emphasis in original; internal citation and footnote omitted). The court of appeals concluded that this dicta was entitled to "great weight" and characterized it as "an express statement . . . that it is inappropriate to extend *Apprendi* to criminal fines." *Id.* at 28a.

Second, the First Circuit relied on this Court's consideration in *Ice* of "the history at common law of the practice . . . challenged," which the court of appeals viewed as a "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." Pet. App. 28a; see also *id.* at 31a (noting that its view that *Ice* "has effected a change in the application of the *Apprendi* rule" is supported by the dissent in *Ice*, which "stated that the majority opinion had altered the method of analysis underlying *Apprendi*"). Applying what it viewed to be *Ice*'s "reasoning and logic," the court of appeals stated that "it is now highly relevant that, historically, judges assessed fines without input from the jury." *Id.* at 30a. Indeed, the court of appeals concluded that the government presented "strong evidence of historic practice that at common law, judges' discretion in imposing fines was largely unfettered." *Id.* at 31a.

The First Circuit, however, acknowledged that its decision conflicts with that of its sister circuits. In a footnote, the First Circuit pointed out that two circuits "have applied *Apprendi* to criminal fines" – one before *Ice* and one after – but simply noted that these cases "could not or did not discuss *Ice*." Pet. App. 32a n.17 (citing *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), and *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585 (7th Cir. 2006)).

The First Circuit also held, "[i]n the interest of judicial economy and efficiency," that "if we are wrong and if *Apprendi* does apply to criminal fines, it would be necessary to remand for resentencing" because "[t]he district court erred in holding, despite the absence of a special interrogatory, that the jury necessarily found beyond a reasonable doubt that Southern Union had violated RCRA during all or nearly all of the date range in the indictment." Pet.

App. 32a-33a. The court of appeals noted that the government "essentially concedes and we agree" that "the jury did not necessarily determine the number of days of violation." See U.S. First Cir. Br. at 38 ("the government concedes that the [district] court's verdict-based ruling reads too much into the 'on or about' dates and the quoted instruction. Put simply, the jury was not asked to find a particular number or span of days of illegal storage"). The court also "reject[ed] the prosecution's suggestion that the evidence was so overwhelming that no reasonable jury could conclude other than that the mercury was treated as waste throughout the period in the indictment." Pet. App. 33a-34a. In short, the court of appeals concluded that "any error under *Apprendi* was not harmless." *Id.* at 2a.[4]

The First Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The decision below merits review because it conflicts with the decisions of other courts of appeals on the important question of whether the *Apprendi* principle applies to criminal fines. The decision also conflicts with the clear holding in *Apprendi* and this Court's subsequent decisions. To the extent the issue has been clouded by the dicta in *Ice*, only this Court's review can bring the needed clarity to this important and recurring Fifth and Sixth Amendment issue.

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[4] The court of appeals also rejected Southern Union's argument that the fine imposed was excessive. Pet. App. 35a-38a. That ruling is not challenged here.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS THAT APPLY THE *APPRENDI* PRINCIPLE TO CRIMINAL FINES.

This Court held in *Apprendi* that "any fact" other than the fact of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Apprendi* does not speak only to incarceration, and this Court has not construed it that way. Since *Apprendi* was decided, this Court has applied its holding in contexts involving enhanced penalties, including death. See, *e.g., Blakely* v. *Washington*, 542 U.S. 296 (2004); *Ring* v. *Arizona*, 536 U.S. 584 (2002); *United States* v. *Booker*, 543 U.S. 220 (2005); and *Cunningham* v. *California*, 549 U.S. 270 (2007). It also has clarified 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*, 542 U.S. at 303 (emphasis in original).

Other courts of appeals have applied the principles established in *Apprendi* and its progeny to criminal fines, and have vacated and remanded criminal fines as a result. In *United States* v. *LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 594 (7th Cir. 2006), for example, the Seventh Circuit vacated and remanded a $1 million fine imposed pursuant to 18 U.S.C. § 3571(d)[5] on a corporate defendant that was

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[5] Pursuant to 18 U.S.C. § 3571(c), an organizational defendant that has been found guilty of a felony offense may be sentenced to a statutory fine of $500,000. Alternatively, under § 3571(d), any person who derives a pecuniary gain from an offense, or causes a pecuniary loss, can be fined not more than the greater

convicted by a jury of violating federal food safety laws, where "at sentencing, it was the district judge using a preponderance of the evidence standard to find the loss amount, not a jury finding loss amount beyond a reasonable doubt." The Seventh Circuit held that this procedure constituted "error" because "[t]he Sixth Amendment requires that any fact (other than the fact of prior conviction) that increases the maximum 'penalty' for a crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt." 466 F.3d at 594 (quoting *Apprendi*, 530 U.S. at 490).

Notably, the government confessed error in *LaGrou*. It "concede[d] that the [*Apprendi*] rule does apply to criminal fines because they are penalties for criminal offenses" and "concede[d]" that the $1 million fine had to be vacated and remanded for resentencing because "the district court did not purport to apply a beyond-a-reasonable doubt standard of proof as to the gross loss amount that was the basis for increasing the fine beyond the prescribed $500,000 maximum." Br. and App. of the United States at 33-34, *United States* v. *LaGrou*, No. 05-3361 (7th Cir. Dec. 20, 2005); see also *id.* at 33 ("*Apprendi* does apply to monetary fines, that is, any fact increasing the maximum fine above the prescribed statutory maximum must be proven beyond a reasonable doubt"). The government expressly noted in its brief that "[t]his concession was made in consultation with the Office of the Solicitor General." *Id.* at 33 n.12.

The Second Circuit similarly vacated and remanded a criminal fine as violating the *Apprendi* principle in

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of twice the defendant's gross gain or twice the victim's gross loss.

United States v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), *cert. denied*, 79 U.S.L.W. 3728 (June 27, 2011) (Nos. 10-1049 & 10-1061), applying a plain error standard. In *Pfaff*, an individual was convicted of twelve counts of tax evasion and fined $6 million pursuant to § 3571(d). The "jury, however, made no findings regarding the amount of pecuniary loss caused, or gain derived, by [the defendant] through his crimes." *Id.* at 174. Instead, the district court made a finding of the amount of pecuniary loss caused, and used its finding to calculate the defendant's maximum fine under § 3571(d). *Id.*

The Second Circuit held that this was error under *Apprendi* because the $6 million fine was "supported only by the district court's own pecuniary loss finding," absent which the maximum fine supported by the jury's verdict alone would have been $3 million. *Id.* at 175; see also *id.* ("it is the clear implication of *Apprendi* and *Blakely* that when a jury does not make a pecuniary gain or loss finding, § 3571's default statutory maximums cap the amount a district court may fine the defendant"). The court of appeals further found this error to be "plain" because the analysis "flow[ed] ineluctably from *Apprendi* and *Blakely*." *Id.* at 175-76.[6]

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[6] The government did not argue in *Pfaff* that the *Apprendi* principle is inapplicable to criminal fines. Instead, the government argued that there was no *Apprendi* violation in that case because the fine did not exceed the statutory maximum. Br. for the United States at 205-08, *United States* v. *Pfaff*, No. 09-1702 (2d Cir. Jan. 15, 2010). The government's brief in *Pfaff* was filed one year after this Court issued its decision in *Ice*, and also after the government argued in its district court brief in this case that the *Apprendi* principle does not apply to fines. In addition, the government did not seek *certiorari* on the sentencing issue.

Similarly, in *United States* v. *Yang*, 144 F. App'x. 521 (6th Cir. 2005), the Sixth Circuit vacated and remanded a $5 million criminal fine against a closely-held corporation on the ground that it violated *Booker*, again applying a plain error standard. The court of appeals noted that it was "undisputed that, pursuant to the mandatory federal sentencing guidelines in place at the time, the district court enhanced [the corporation's] sentence based on the court's factual findings" concerning the amount of the loss caused by the corporation's criminal acts, and held that this enhancement of the fine "based on judge-found facts under a mandatory guidelines system" constituted Sixth Amendment error that was "plain." *Id.* at 524.

At least one other court of appeals has assumed that the *Apprendi* principle applies to the imposition of criminal fines. In *United States* v. *West Coast Aluminum Heat Treating Co.*, 265 F.3d 986, 994 (9th Cir. 2001), the Ninth Circuit addressed the merits of an *Apprendi* challenge to a corporate criminal fine imposed under § 3571, and found no *Apprendi* violation only because the fine did not exceed the statutory maximum. In addition, several federal district courts[7] and state supreme courts[8] have

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[7] *See, e.g., Damper* v. *United States*, 2006 U.S. Dist. LEXIS 53800, at *7 (S.D. Miss. July 11, 2006) (addressing *Apprendi* challenge to fine, but finding no violation because the fine was within the statutory maximum); *Lauria* v. *United States*, 2006 U.S. Dist. LEXIS 90010, at *63 n.14 (D. Conn. Dec. 13, 2006) (same); *Shkolir* v. *United States*, 2002 U.S. Dist. LEXIS 9830, at *5 (S.D.N.Y. May 31, 2002) (same); *United States* v. *Boothe*, 2001 U.S. Dist. LEXIS 16745, at *18-19 (E.D. La. Oct. 5, 2001) (same).

[8] *State* v. *Cain*, 888 A.2d 276, 279-81 (Me. 2006) (addressing *Apprendi* challenge to fine, but finding no violation because the

assumed that the *Apprendi* principle applies to the imposition of criminal fines. Commentators likewise have observed that the *Apprendi* principle logically applies to the imposition of criminal fines.[9]

The court of appeals' ruling below is wholly at odds with all of these authorities. The First Circuit unequivocally held that "the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines." Pet. App. 2a. As a result, it did not address the merits of Southern Union's *Apprendi* challenge, and affirmed the fine in its entirety – a fine 360 times greater than that supported by the jury's verdict. Moreover, the court of appeals acknowledged that the Second and Seventh Circuits "have applied *Apprendi* to criminal fines," but made no attempt to harmonize the conflict, other than to note that these other cases "could not or did not discuss *Ice*." *Id.* at 32a n.17. At the same time, the court of appeals essentially invited this Court's review by acknowledging that the issue is "close" and by stating several times in its opinion that if its holding that the *Apprendi* principle does not apply to criminal fines is "wrong," then a

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fine was within the statutory maximum); *State* v. *Kozlowski*, 898 N.E.2d 891, 909 (N.Y. 2008) (addressing *Apprendi* challenge to fines, but finding that any *Apprendi* violation was harmless because defendants' own trial testimony established the facts supporting the fines).

[9] *See, e.g.,* Phillip C. Zane, *Booker Unbound: How the New Sixth Amendment Jurisprudence Affects Deterring and Punishing Major Financial Crimes and What to Do About It*, 17 Fed. Sent'g Rep. 263, 263 (2005) ("The recent Sixth Amendment jurisprudence that culminated in *Booker* will have an effect on the determination of a fine. . . ."); John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, 562-63 (2005); Timothy A. Johnson, *Sentencing Organizations After* Booker, 116 Yale L. J. 632, 661 n.201 (2006).

remand is necessary. *Id.* at 2a, 32a-33a, 34a. Of course, only this Court is in a position to decide that question.

In sum, it is clear that if Southern Union had challenged the fine levied against it based on *Apprendi* in the Second, Sixth, and Seventh Circuits, those courts would have addressed the claim on the merits. Accordingly, the decision below creates a fundamentally different legal regime for the imposition of criminal fines in the First Circuit. The prospect that criminal defendants in the First Circuit who receive and challenge criminal fines have categorically different protections under the Fifth and Sixth Amendments is intolerable. This is precisely the kind of decision by geography that this Court grants certiorari to prevent.

This case is an appropriate vehicle for resolving this circuit conflict because the facts governing the *Apprendi* issue are straightforward and fully developed in the record. In addition, the First Circuit conceded that the question of *Apprendi*"s applicability is dispositive and outcome determinative in this case. Pet App. 32a-33a ("if we are wrong and if *Apprendi* does apply to criminal fines, it would be necessary to remand for resentencing"); see also *id.* at 2a ("any error under *Apprendi* was not harmless"). By granting the petition, this Court would provide meaningful guidance concerning whether *Apprendi* applies to the imposition of criminal fines.[10]

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[10] This petition does not raise or implicate the distinct question whether *Apprendi* applies to the imposition of restitution in criminal cases. *See* Pet. App. 29a n.14 (noting that the First Circuit previously has held that the statutory scheme for restitution "does not trigger the principles underlying *Apprendi* because the jury's verdict of guilt automatically

II. THE COURT OF APPEALS' RULING UNDERMINES CRIMINAL DEFENDANTS' FIFTH AND SIXTH AMENDMENT RIGHTS.

The court of appeals' ruling merits this Court's review because it is not faithful to the Fifth and Sixth Amendments, and undermines the fundamental protections that this Court held in *Apprendi* and subsequent cases derive from those Amendments.

The language of *Apprendi* and its progeny broadly applies to the imposition of criminal *punishment* or *penalties* – without any qualification or limitation. See*, e.g., Apprendi*, 530 U.S. at 490 (holding that "any fact" other than the fact of a prior conviction "that increases the *penalty for a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added); *Ring*, 536 U.S. at 602 ("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") (emphasis added); *Blakely*, 542 U.S. at 304 (a judge exceeds his authority when he "inflicts *punishment* that the jury's verdict alone does not allow") (emphasis added); *Booker*, 543 U.S. at 232 (the jury must "find the existence of any particular fact that

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authorizes restitution in the full amount of the victim's losses"); *Pfaff*, 619 F.3d at 175 (noting prior Second Circuit holdings that *Apprendi* does not apply to criminal restitution or forfeiture based on court-determined loss or gain amounts because "criminal restitution and forfeiture are indeterminate schemes without statutory maximums"); *LaGrou*, 466 F.3d at 593 (noting that the Seventh Circuit "has consistently held that restitution is a civil remedy, not penal," and therefore the *Apprendi* line of cases does not apply). As shown, the district court expressly stated that the sentence did not involve restitution. *See* n.3, *supra*.

the law makes essential to [a defendant's] *punishment*") (internal quotation marks omitted; emphasis added). As the court of appeals itself acknowledged, "[t]hese cases do not distinguish among types of 'penalties' or 'punishment,' leaving the broad language unglossed." Pet. App. 27a.

As we already have shown, courts other than the First Circuit below consistently have held (or assumed) that the *Apprendi* principle applies to the imposition of criminal fines. See Section I, *supra*. The First Circuit departed from its sister circuits and what it acknowledged is the "unglossed" language of this Court's prior decisions based on its interpretation of this Court's opinion in *Ice*. As noted, the court of appeals relied on a reference in *Ice* to criminal fines that it conceded was "dicta." Pet. App. 28a. The court of appeals also relied on this Court's consideration in *Ice* of "the history at common law of the practice . . . challenged," which the court of appeals viewed as a "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." *Id.* Neither rationale provides a valid basis for the court of appeals' holding that *Apprendi* does not apply to the imposition of criminal fines.

With respect to this Court's reference in *Ice* to criminal fines, it is undisputed that *Ice* itself did not involve any issue concerning a criminal fine. Rather, the question before the Court was whether "the Sixth Amendment mandate[s] jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences[.]" *Ice*, 129 S. Ct. at 714. Moreover, *Ice* specifically limited its holding to the multiple conviction context: "When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions. . . . " *Id*. Accordingly, under this

Court's long-standing precedent, its dicta in *Ice* concerning fines cannot be controlling because "this Court does not decide important questions of law by cursory dicta inserted in unrelated cases." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968); see also *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (this Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated").

In any event, to the extent that the "cursory dicta" in *Ice* should be construed, the district court correctly determined that "[t]he best that can be said about" the question is that this Court was suggesting that *Apprendi* should not be construed to "prevent a Court from engaging in judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum range, which is something entirely different from finding a fact that determines the range." Pet. App. 45a (emphasis in original). In the *Ice* dicta, this Court was addressing judicial fact-finding "about the nature of the offense or the character of the defendant" – classic inquiries that sentencing courts undertake to assess the amount of a fine *within a prescribed range*. Accordingly, nothing in *Ice* suggests that this Court was addressing the fundamentally different type of judicial fact-finding at issue here: judicial fact-finding that determines whether a crime was committed on any of the days charged in the indictment, and if so, on which days.

As *Ice* itself recognized, *Apprendi* and its progeny "are rooted in the historic jury function – determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." 129 S. Ct. at 714. Yet here, where the jury's verdict was limited to a single day's violation, the First Circuit affirmed the

district court's imposition of a sentence based on its own finding that the prosecution had proved each element of the offense beyond a reasonable doubt for each of the 762 days charged in the indictment.

The First Circuit also declared that *Ice* "alter[ed] any previous broad understanding of *Apprendi*" by requiring an analysis of historic sentencing practices. Pet. App. 28a. As an initial matter, the court of appeals' suggestion that *Ice* employed a new "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*," *id.*, is puzzling because this Court in *Apprendi* engaged in that very analysis of common law and historic sentencing practices and relied upon those practices in ascertaining the Founders' understanding of the Sixth Amendment's jury trial guarantee. *Apprendi*, 530 U.S. at 478-83; *id.* at 501-18 (Thomas, J., concurring). As this Court has stated, the *Apprendi* "rule is rooted in longstanding common-law practice." *Cunningham*, 549 U.S. at 281; see also *Harris* v. *United States*, 536 U.S. 545, 557 (2002) (plurality opinion) ("*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime – and thus the domain of the jury – *by those who framed the Bill of Rights*") (emphasis added); *Blakely*, 542 U.S. at 302 (stating that the *Apprendi* principles "have been acknowledged by courts and treatises since the earliest days of graduated sentencing" and that this Court "compiled the relevant authorities in *Apprendi*").

In any event, the First Circuit's historical analysis is fundamentally flawed because it misapprehends this Court's reasoning and conclusions in *Apprendi* that were based on historical sentencing practices. When this Court's reasoning and conclusions are

properly understood, the First Circuit's holding that the *Apprendi* principles do not apply to the imposition of criminal fines cannot withstand scrutiny.

In *Apprendi*, this Court found that any distinction between an element of an offense and a sentencing factor was "unknown" to criminal practice "as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478. This was so, the Court explained, because judges in that period had "very little explicit discretion in sentencing" with respect to felonies because substantive criminal laws were "sanction-specific," *i.e.*, they "prescribed a particular sentence for each offense." *Id.* at 479. This distinction was also unknown in the common law of punishment for misdemeanors, which was "dependent upon judicial discretion" because judges were subject to few restraints in sentencing offenders to the most commonly imposed punishments of "fines or whippings." *Id.* at 480 n.7. This Court also noted that there was a "19th century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range." *Id.* at 481; see also *id.* ("We have often noted that judges in this country have long exercised discretion . . . in imposing sentences *within statutory limits* in the individual case") (emphasis in original) (citing *Williams* v. *New York*, 337 U.S. 241, 246 (1949)).

Based on this "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided," this Court concluded in *Apprendi* that the proper understanding of the Sixth Amendment jury trial guarantee is that it does not permit "a legislative scheme that removes the jury

from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 482-83 (emphasis in original). As this Court further explained in *Blakely*, this rule gives "intelligible content to the right of jury trial" by "ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 U.S. at 305-06.

Against the background of this Court's historical analysis in *Apprendi*, the First Circuit's reasoning and conclusion are misguided. The court of appeals first noted that in light of *Ice*, "it is now highly relevant that, historically, judges assessed fines without input from the jury." Pet. App. 30a. This ignores, however, that, as *Apprendi*'s discussion makes clear, judges historically assessed *all forms of criminal punishment* without input from the jury. Accordingly, the fact that judges historically imposed fines does not provide any support for the court of appeals' conclusion that the *Apprendi* rule does not apply to the imposition of criminal fines.

The courts of appeals further relied on the fact that judges historically had "discretion to determine the amount of any fine imposed." Pet. App. 30a; see also *id.* at 31a (noting that "at common law, judges' discretion in imposing fines was largely unfettered"). The court of appeals stated that this sentencing practice was "in direct contrast with the Supreme Court's reasoning in the *Apprendi* context" that English judges had little sentencing discretion. *Id.* at. 30a. The First Circuit's attempt to distinguish *Apprendi* on this ground misapprehends this Court's

historical discussion in *Apprendi*. *Apprendi* did not hold or suggest that modern sentencing practices are subject to the *Apprendi* rule only if they derive from common law sentencing practices that minimized judicial discretion. Instead, this Court in *Apprendi* simply compiled and examined common law sentencing practices – some of which constrained judicial discretion and some of which did not – as well as the subsequent American shift to sentencing ranges, to determine the nature and extent of judicial discretion in sentencing that is consistent with the Sixth Amendment's jury trial guarantee.

As noted, the Court concluded from all of the historical evidence that the fundamental limit that the Sixth Amendment imposes on judicial sentencing is that judicial fact-finding cannot "expose[] the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 482-83 (emphasis in original). See also *id.* at 481 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute") (emphasis in original). Nothing in this analysis supports the First Circuit's conclusion that *Apprendi* does not apply to fines because judges at common law had discretion in assessing fines.

Moreover, the fact that this Court in *Apprendi* was well aware of and expressly noted that judges historically had discretion in assessing fines and certain other forms of punishment further underscores that the First Circuit reached the wrong result. Because this Court's historical analysis in

Apprendi relied in part on sentencing practices concerning fines and encompassed all forms of punishment imposed at common law without qualification, the First Circuit was wrong to conclude that there is a separate common law history concerning the imposition of fines that leads to a different interpretation of the Sixth Amendment as applied to them.

Indeed, this Court's conclusions in *Apprendi* about the Founders' understanding of the Sixth Amendment's jury trial guarantee are arguably on a stronger historical footing with respect to fines than incarceration because in both England and the colonies, fines were one of "the two main forms of noncapital punishment" at the time the Bill of Rights was drafted (the other being corporal punishments such as "whippings"), while imprisonment did not even emerge as a common penological practice in the United States until the late eighteenth and the early nineteenth century.[11] Therefore, the historical analysis that this Court relied on to derive the *Apprendi* rule applies with equal force to both criminal fines and incarceration. The First Circuit's holding to the contrary simply cannot be squared with *Apprendi*'s historical analysis.

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[11] Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. Rev. 621, 640-41 (2004); *see also id.* at 642-43 (noting that some States "initially resisted imprisonment as a punishment" and "a few did not change their practices at all" until after the Civil War); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 329 (1982) ("Imprisonment, although provided for as a punishment in some colonies, was not a central feature of criminal punishment until a later time").

III. THE COURT OF APPEALS' RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' ruling that the *Apprendi* principle does not apply to the imposition of criminal fines also presents a recurring and "important question" of federal law that warrants this Court's review. See Sup. Ct. R. 10(c).

As a general matter, this Court's frequent return in recent years to issues raised by its *Apprendi* decision reflects its commitment to ensuring that the Fifth and Sixth Amendment principles governing criminal sentencing are applied consistently across the country. This Court has granted certiorari in a number of cases to resolve conflicts and issues concerning the scope and application of *Apprendi* and its growing progeny. See, *e.g., Harris*, 536 U.S. 545; *Ring*, 536 U.S. 584; *Blakely*, 542 U.S. 296; *Booker*, 543 U.S. 220; *Cunningham*, 549 U.S. 270; *Rita* v. *United States*, 551 U.S. 338 (2007); and *Ice*, 129 S. Ct. 711.

In addition, the implications of the issues raised in this case are enormous. Criminal fines are a significant element of criminal sentencing, both for individuals and corporations, particularly in an era of increasing criminal enforcement of regulatory violations and vigorous enforcement of anti-corruption laws. In 2010, 9.3% of criminal sentences in the federal courts involved fines.[12] For

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[12] *See* U.S. Sentencing Comm'n, *2010 Annual Report*, at 32 (chart), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/ar10toc.htm. The U.S. Sentencing Commission receives reports of the sentences imposed for "all felony offenses and all Class A misdemeanors in the United States courts." *Id.* at 30 n.57.

corporations and other organizational defendants, 77% of criminal sentences in the federal courts involved fines.[13] The average fine imposed on an organizational defendant in 2010 was more than $16.3 million, and the largest fine was $1.195 billion (on a pharmaceutical corporation for violations of food and drug laws).[14] In total, federal courts imposed fines on more than 7700 offenders in 2010.[15]

Moreover, as the United States has conceded, there are numerous sentencing provisions in the United States Code and in state codes that can give rise to *Apprendi* issues. The United States told the First Circuit that holding that *Apprendi* applies to fines would "have far-reaching ramifications" because "[m]any other federal statutes have similar maximum-fine-per-day-of-violation provisions" that implicate *Apprendi* issues in precisely the way the RCRA provision did here. U.S. First Cir. Br. at 43 (citing numerous federal statutes); *id.* at 43-46 (citing multiple statutes from more than 40 States). In addition, *Apprendi* issues can arise in connection with penalty provisions that assess fines based on monetary gain to the wrongdoer or loss to the victims, such as 18 U.S.C. § 3571, the federal criminal code's general fine provision that gave rise to the *Apprendi* issues in *LaGrou* and *Pfaff*.

Given the multitude of sentencing contexts in which this issue has arisen and will continue to arise, and the numerous criminal defendants who are

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[13] *Id.* at 38.

[14] *Id.*

[15] U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics*, Table 15, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table15.pdf.

affected by it, the First Circuit's ruling poses a recurring question of fundamental importance that warrants this Court's attention. It is vital that this Court grant review to ensure that defendants' Fifth and Sixth Amendment rights are protected when they are sentenced to criminal fines.

CONCLUSION

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

Respectfully submitted,

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July 15, 2011

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

No. 09-2403.

UNITED STATES OF AMERICA,
Appellee,

v.

SOUTHERN UNION COMPANY,
Defendant, Appellant.

Heard Oct. 6, 2010.
Decided Dec. 22, 2010.

As Corrected Jan. 6, 2011.
As Corrected Feb. 16, 2011

Before LYNCH, *Chief Judge*, SELYA and THOMPSON, *Circuit Judges*.

LYNCH, *Chief Judge*.

This appeal by Southern Union, a natural gas company convicted by a jury of storing hazardous waste without a permit, raises two issues of initial impression. First, the case tests whether *federal* criminal enforcement may be used under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d), where certain federally approved *state* regulations as to hazardous waste storage have been violated. Second, the case also raises the important question of whether a criminal fine must be vacated under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where a judge, and not a jury, determined the facts as to the number of days of violation under a schedule of fines.

The hazardous waste at issue in this case is mercury, which can poison and kill those exposed to it. *See* 40 C.F.R. § 261.33(f) tbl. (listing mercury as hazardous waste due to toxicity). Here, 140 pounds of mercury became the play toy of young vandals who spread it about, including at their homes in a local apartment complex, after they spilled it around Southern Union's largely abandoned and ill-guarded Tidewater site in Pawtucket, Rhode Island.

We affirm the district court's rulings on Southern Union's conviction, as set forth in *United States v. Southern Union*, 643 F.Supp.2d 201 (D.R.I.2009) (*Southern Union I*). We conclude that:

> (1) Southern Union is precluded by 42 U.S.C. § 6976(b) from challenging the EPA's 2002 Immediate Final Rule authorizing Rhode Island's RCRA regulations. Having failed to use the statutory procedure for judicial review, Southern Union may not raise the issue by collateral attack;
>
> (2) the 2002 Rule, in any event, is valid and was within the EPA's authority to adopt; and
>
> (3) the conviction does not violate Southern Union's right to fair notice under the Due Process Clause.

We also affirm the fine imposed. The *Apprendi* issue is close but the Supreme Court's recent decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), leads us to hold that the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines. If, however, we were wrong in our assessment of the *Apprendi* issue, we would find that any error under *Apprendi* was not harmless and that the issue of the fine would need to be remanded.

Finally, we also hold that the financial penalties imposed did not constitute an abuse of the district court's discretion.

I. *SOUTHERN UNION'S MERCURY STORAGE AND RELEASE*

Southern Union, a Texas-based natural gas distributor, began supplying natural gas to Rhode Island and Massachusetts customers in 2000 through a subsidiary, New England Gas Company, that it formed after acquiring several local gas companies. It stopped serving Rhode Island customers in 2006.

As part of the transactions in 2000, Southern Union acquired a twelve-acre complex, once used as a gas manufacturing plant, on Tidewater Street in Pawtucket, Rhode Island. Most of the complex sat unused, but Southern Union used a few buildings for automated monitoring and used outdoor spaces to store construction supplies and waste.

The Tidewater property was not maintained and had fallen into disrepair. The perimeter fence was rusted, with gaps that were left unrepaired. There were no security cameras, and Southern Union had removed the single part-time security guard from the site by September 2004. Southern Union was aware that homeless people were staying in a tin shed on the property, and that the property was frequently vandalized.

In June 2001, Southern Union began removing outdated mercury-sealed gas regulators (MSRs) from customers' homes and replacing them with updated regulators. The old MSRs were taken to a brick building at the Tidewater facility. There, for about five months, an environmental firm removed the mercury from the regulators and shipped it to a

recycling facility, leaving the regulators to be cleaned and scrapped. Southern Union stopped removing MSRs as a matter of course in November 2001, and its arrangement with the environmental firm ended in December 2001. However, Southern Union continued to remove MSRs whenever they malfunctioned, bringing them to Tidewater, where they were "stored" in doubled plastic bags placed in plastic kiddie pools on the floor of the brick building.

Employees were also encouraged to bring any loose mercury they found in their departments to Tidewater, where it was placed in the same building as the gas regulators. The loose mercury was stored in the various containers in which it arrived, including a milk jug, a paint can, glass jars, and plastic containers. Southern Union kept the containers in a locked wooden cabinet that was not designed for mercury storage. The brick building was in poor condition and had suffered break-in attempts and vandalism. It had many broken windows and its walls were covered in graffiti. Neither the cabinet nor the building itself contained any warning notice that hazardous substances were inside.

Southern Union had no use for any of the mercury it accumulated. By July 2004, when a Southern Union employee catalogued the contents of the brick building, it held 165 MSRs and approximately 1.25 gallons, or more than 140 pounds, of loose mercury (two tablespoons of mercury weigh just under one pound). That cataloging did not lead the company to arrange for recycling, to secure the building, or to secure a storage permit from the state.

Southern Union was well aware that the mercury was piling up and that it was kept in unsafe conditions. The Environmental Services Manager for

its New England Gas Company division, who testified that he was concerned about the safety risk the mercury posed to the company's employees, drafted proposed Requests for Proposals (RFPs) in 2002, 2003, and 2004 to solicit bids to remove and dispose of or recycle the regulators "and associated wastes."

The 2002 draft was sent to Southern Union's Texas corporate headquarters for review by the Director of Environmental Services, where it died. Not only was the RFP not issued, but the New England Gas Company engineer who oversaw the environmental department became angry when he was repeatedly asked about it. The 2003 proposed RFP met the same fate, even though it specified the contents of a number of different containers of mercury. The draft, titled "Request for Proposals for Waste Segregation, Packaging, Transportation, and Disposal," sought a bid to "[r]emove liquid mercury from several small containers" and "[t]ransport and dispose (or recycle) of all *waste* generated" by this work (emphasis added). Nor did anything come of the 2004 proposed RFP, even though the environmental manager went outside his chain of command trying to get the RFP issued to vendors.

The safety risk posed by the conditions under which the mercury was stored was discussed at joint employee-management safety committee meetings in May, June, and September 2004. Indeed, the employee who brought a regulator in on September 20, 2004 was so concerned about the accumulating mercury that he raised the issue with his supervisor. No action was taken.

In late September 2004, youths from a nearby apartment complex broke into the brick building, broke open the wooden cabinet, found the mercury,

and, playing with it, spilled some of it in and around the building. They also took some of the mercury back to their apartment complex, where they spilled more on the ground, dipped cigarettes in it, and tossed some in the air. Mercury was tracked into the residences when people walked through it and was found in several homes.

Southern Union discovered the break-in and spills on October 19, roughly three weeks later, when a worker found pancake-sized puddles of mercury around the brick building. Southern Union immediately called in a contractor to begin cleaning up the spills at Tidewater and the apartment complex.

A Southern Union employee also left a voicemail message that day for Jim Ball, the Emergency Response Coordinator at the state Department of Environmental Management. However, Southern Union did not contact the Pawtucket Fire Department or the state Fire Marshal, the designated points of contact for a release of more than a pound of mercury. The Fire Department did not arrive at Tidewater until the next day, after having found out about the spill from the Department of Environmental Management. By that time, the contractor had already removed the remaining mercury from the building and begun to ship it offsite.

Altogether, the company spent more than $6 million remediating the two spill sites. All five buildings in the apartment complex were evacuated. Residents, 150 of them, were displaced for two months. Most were tested for mercury levels in their blood. While some had elevated levels, none met current standards for hazardous exposure.

II. *CHALLENGES TO THE CONVICTION*

In 2007, a federal grand jury returned a three-count indictment against Southern Union. The indictment charged Southern Union with two counts of storing hazardous waste without a permit in violation of RCRA. *See* 42 U.S.C. § 6928(d)(2)(A). Count One of the indictment covered the loose liquid mercury, and Count Three covered the mercury-embedded gas regulators. Count Two of the indictment charged Southern Union with failing to properly report a mercury release of more than one pound, a violation of the Emergency Planning and Community Right-to-Know Act.[1] *See* 42 U.S.C. §§ 11004, 11045(b)(4).

Southern Union's prime defense at trial was that the mercury was not a waste, but rather was a commercial chemical product that the company intended to recycle. Even if the mercury was not a commercial chemical product, the Company argued, it had not "knowingly stored a hazardous waste" because it believed the mercury was recyclable. After a nearly four-week trial, a jury convicted Southern Union on Count One only. *Southern Union I*, 643 F.Supp.2d at 207.

Just before trial, Southern Union filed a motion arguing that the federal government lacked authority to enforce Rhode Island's regulations governing small quantity generators, under which Southern Union was prosecuted, because they were "broader in scope" than the federal RCRA program and therefore not part of the federally approved and federally enforceable state program. The district court denied the

[1] Fifty-five plaintiffs filed related civil litigation.

motion, and Southern Union renewed it after the jury verdict in a motion for a judgment of acquittal.[2]

The district court denied the motion for acquittal in a published opinion issued July 22, 2009, finding Southern Union's challenge untimely under 42 U.S.C. § 6976(b), which governs judicial review of the EPA's authorization of state hazardous waste programs. *Southern Union I*, 643 F.Supp.2d at 209-10. The court highlighted the statute's specific prohibition against judicial review of such authorizations in "criminal proceedings for enforcement." *Id*. (quoting 42 U.S.C. § 6976(b)). The court in the alternative rejected Southern Union's challenge on the merits, finding that the authorization was a valid, binding legislative rule that authorized federal enforcement. *Id*. at 210-13.

Southern Union challenges the district court's application of RCRA and the 2002 Rule and claims that the prosecution violated due process. We review legal and constitutional questions de novo. *United States v. Sampson*, 486 F.3d 13, 19 (1st Cir.2007). Southern Union does not challenge the district court's factual determinations pertinent to the issue. Both of Southern Union's claims of error fail.

A. *Legal Structure*

RCRA, 42 U.S.C. § 6901 *et seq*., regulates the "treatment, storage, and disposal of solid and hazardous waste" in order to minimize the waste generated and the harm done by that waste. *Meghrig v. KFC W., Inc*., 516 U.S. 479, 483, 116 S.Ct. 1251, 134

[2] Southern Union also filed a Rule 33 motion for a new trial. The district court denied the motion, *United States v. Southern Union Co*., 643 F.Supp.2d 201, 217 (D.R.I.2009) (*Southern Union I*), and Southern Union does not appeal the denial.

L.Ed.2d 121 (1996). It is a federal crime to knowingly store hazardous waste, such as mercury waste, "without a permit under this subchapter," that is, under 42 U.S.C. §§ 6921-6939f, inclusive. 42 U.S.C. § 6928(d)(2)(A); 40 C.F.R. § 261.33(f) tbl (listing mercury as hazardous waste). Within that subchapter, § 6926 directs the EPA to authorize states to enforce their own hazardous waste programs "in lieu of" the federal program, if the state programs are "equivalent to" and "consistent with" the baseline federal program. 42 U.S.C. § 6926(b).

The effect of the statute is that there is federal enforcement, including federal criminal enforcement, of state rules that are part of federally authorized state plans under RCRA. This court so held in *United States v. MacDonald & Watson Waste Oil Co*., 933 F.2d 35, 44 (1st Cir.1991). Southern Union does not contest this proposition. Rather, it argues that the Rhode Island regulations enforced here are not part of a federally authorized state plan.

Under § 6926, the EPA has promulgated regulations governing federal approval of state programs, which provide that states may adopt and enforce requirements that are "more stringent" or have a "greater scope of coverage" than the federal baseline program. 40 C.F.R. § 271.1(i). However, for state programs with "a greater scope of coverage," the "additional coverage" does not become part of the federally approved program. 40 C.F.R. § 271.1(i)(2). Southern Union argues that the Rhode Island regulations applicable here provide additional coverage.

Rhode Island has administered its own federally authorized hazardous waste program since 1986, and has secured federal approval of amendments from time to time. *See* 67 Fed.Reg. 51,765, 51,766 (Aug. 9,

2002). Pertinent here is the EPA's authorization of further amendments to the state program on August 9, 2002. *Id*. at 51,765. On that date, the EPA published an "Immediate final rule" (the "2002 Rule") in the Federal Register under which the authorization would automatically go into effect on October 8, 2002, unless the EPA received a comment in opposition to the authorization within thirty days. *Id*. at 51,765, 51,766.

The 2002 Rule explained that the major difference between the new Rhode Island program and the federal baseline program was that Rhode Island now regulated conditionally exempt small quantity generators (CESQGs) more stringently than did the federal regulations.[3] Under the federal baseline program, CESQGs are exempt from many requirements—including the permit requirement—that are imposed on generators of higher quantities of hazardous waste. 40 C.F.R. §§ 261.5(a)(2) (outlining limited regulation of CESQGs), 270.1(c) (generally requiring permits to store hazardous waste).

Relying on the federal conditional exemption, Southern Union says it was a CESQG and therefore not required to have a permit. But the 2002 Rule made two things clear. One was that under Rhode

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[3] The federal program categorizes hazardous waste generators by the amount of hazardous waste they produce monthly. A hazardous waste generator qualifies as a conditionally exempt small quantity generator (CESQG) for a given month if it produces less than 100 kilograms of hazardous waste in that month and has accumulated no more than 1000 kilograms on-site. 40 C.F.R. § 261.5(a), (g)(2). In addition to complying with these limits, CESQGs must comply with regulations governing the categorization, treatment, and disposal of hazardous wastes. *See* 40 C.F.R. §§ 261.5(g)(1), (3); 262.11.

Island law, Southern Union needed a permit. The second, tellingly, was that this tighter regulation was going to be federally enforced.[4]

Southern Union did not comment; in fact, the EPA received no comments from the public. Nor did Southern Union take any action to seek judicial review of the EPA's final determination.

B. *Southern Union's Challenge*

Southern Union argues that Rhode Island's regulation of CESQGs, under which it was prosecuted for storing loose mercury without a permit, cannot, merely by virtue of the 2002 Rule, be the basis for federal criminal prosecution. From this it argues that the district court erred in refusing to put the question of whether it was a CESQG under federal law to the jury. It argues that only the part of a state's hazardous waste program that is "required by federal law" becomes part of the state's federally authorized—and therefore federally enforceable—program. Southern Union has put the cart before the horse.

1. *Southern Union Is Precluded By 42 U.S.C. § 6976(b) from Attacking Federal Criminal Enforcement of the Federally Authorized State Rule*

In enacting RCRA, Congress clearly channeled and limited the mechanism for judicial review of EPA authorizations:

> Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any

[4] The Rule also made it clear that a different part of the regulation, not at issue here, would not be federally enforced, indicating that the EPA did not simply assume all additional state requirements were federally enforceable.

> permit under section 6925 of this title . . . or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. *Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement*. Such review shall be in accordance with sections 701 through 706 of Title 5.

42 U.S.C. § 6976(b) (emphasis added).

Two of the statute's mechanisms are involved here. First, under § 6976(b), judicial review of the EPA Administrator's actions in granting authorization (or interim authorization) to state programs under RCRA may be had in the pertinent federal court of appeals within ninety days of issuance of the authorization. Such review is to be in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 701-706. It is undisputed that Southern Union failed to challenge the 2002 Rule in this manner. Second, when review of the Administrator's actions could have been obtained under § 6976, the statute denies judicial

review of the Administrator's action in "civil or criminal proceedings for enforcement."[5]

This congressional channeling of the forum, method, and timing of judicial review and exclusion of collateral attacks is not unusual. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) has a similar provision, *see* 42 U.S.C. § 9613(a), as do several other environmental statutes, *see* 33 U.S.C. §§ 1369(b), 2717(a); 42 U.S.C. §§ 300j-7, 4915(a), 7607(b). Courts have upheld such channeling. *See, e.g., United States v. Walsh*, 8 F.3d 659, 664 (9th Cir.1993) ("[T]here is nothing to prevent Congress from providing a single national forum for the litigation of [asbestos removal] standards [under 42 U.S.C. § 7607(b)]."); *Chrysler Corp. v. EPA*, 600 F.2d 904, 912-14 (D.C.Cir.1979) (applying 42 U.S.C. § 4915). The CERCLA provision, to take one example, was enforced in a cost-recovery action to preclude the corporate defendant's collateral attack on a Superfund site listing. *See United States v. Asarco, Inc.*, 214 F.3d 1104, 1107 (9th Cir.2000).[6] Southern Union has not argued that § 6976(b) is itself unconstitutional.

The federal circuit courts construing § 6976(b) and the similar review provision in § 6976(a) have unanimously rejected later collateral attacks on the Administrator's decisions. *See Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1267 (D.C.Cir.2003) (rejecting,

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[5] The extension of time for challenging actions of the Administrator on grounds that arise after the ninetieth day is not applicable here.

[6] Southern Union's argument about § 6976(b) is presented in its reply brief. Arguments initially made in a reply brief are usually deemed waived. *See United States v. Hall*, 557 F.3d 15, 20 n. 3 (1st Cir.2009). But we bypass any issue of waiver and resolve the preclusion issue on the merits.

under § 6976(a), an "impermissible 'back-door' challenge" to rulemaking); *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1491-93 (10th Cir.1997); *Greenpeace, Inc. v. Waste Techs. Indus.*, 9 F.3d 1174, 1180-82 (6th Cir.1993); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159-62 (4th Cir.1993).

In its reply brief, Southern Union argues that there is a distinction between a challenge to an authorization and "a challenge to the [federal] [g]overnment's authority to enforce Rhode Island's CESQG permit requirement." There is no such distinction. It is the Administrator's authorization in the 2002 Rule that is under attack. Once that authorization is given through the Administrator's findings under 40 C.F.R. Part 271, which provides the requirements for federal authorization of state programs, federal enforcement follows automatically as a matter of law. *MacDonald*, 933 F.2d at 44. As Judge Wilkinson noted in *Palumbo*, the defendant's position "[a]t bottom . . . is nothing more than a collateral attack on the prior . . . decisions of the federal EPA. The RCRA judicial review provision plainly forbids such an attack, in place of a direct appeal." *Palumbo*, 989 F.2d at 159.

We wish to be clear: whether or not Southern Union had filed an action within ninety days of October 8, 2002 challenging the 2002 Rule, we may not under § 6976 review a defense in a criminal proceeding that the EPA's action was legally in error.[7]

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[7] In its reply brief Southern Union attempts to argue that it could not have challenged the 2002 Rule within ninety days because there was no final agency action to challenge. That, it argues, is because the operative language was a mere "preamble." It then merges this into an attack on the merits of the regulation, arguing that it is not a "binding" or "enforceable"

Nonetheless, in an abundance of caution we go on to examine the legality of the EPA's actions and conclude in an alternate holding that those actions withstand challenge.

2. *Southern Union's Attack on the Legality of the Federal Authorization of Rhode Island's Regulation of CESQGs Fails*

Southern Union's arguments fall into several general categories. It argues (1) that the 2002 Rule is not a binding legislative rule on its face for several reasons; (2) that the agency erred in its interpretation of the requirements in 40 C.F.R. § 271.1(i), because the state rule provides a "greater scope of coverage" and so cannot be within federal enforcement authority; and (3) that the 2002 Rule is invalid because it is inconsistent with prior EPA practice and that inconsistency has not been adequately explained or justified.

First, Southern Union challenges the authority under which the 2002 Rule was promulgated and the legal force of the Rule's statement that Rhode Island's regulation of CESQGs is federally enforceable. Southern Union claims, without citing authority, that the "EPA delegated to the Regions only the responsibility to authorize state RCRA programs under Section 6926(b)," not "to determine or expand the breadth of federal enforcement authority." But the EPA has a statutory duty to approve state programs to the extent they meet the statutory and regulatory criteria. Southern Union does not explain how the EPA—including the regional administrators exercising their delegated authorization responsibilities—can

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determination by the Administrator. We address this argument below.

fulfill that duty without specifying which parts of a state's program fulfill the criteria, thereby becoming federally approved and enforceable.

Still pursuing its attack on the legal force of the 2002 Rule, Southern Union argues that the portion of the Rule that discusses federal enforceability is a mere unenforceable preamble. *Cf. Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-20 (D.C.Cir.1998) (describing preamble to a proposed rule as not a final action for purposes of 42 U.S.C. § 6976(a)). It argues that the 2002 Rule neither purports to be a binding rule nor can be one, since it was not simultaneously codified in the Code of Federal Regulations. *Cf. Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C.Cir.1986) (characterizing publication in Federal Register as minimum threshold requirement for status as regulation, *id.* at 538, but stating "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations," *id.* at 539).

As a threshold matter, Southern Union's preamble argument is factually wrong. Unlike the Federal Register notices in the cases Southern Union cites, the 2002 Rule was not divided into separate preamble and rule sections and did not portray *any* part of the notice as "preamble."[8] Southern Union mischaracterizes other salient features of the 2002 Rule as well.

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[8] *Compare Natural Res. Def. Council v. EPA*, 559 F.3d 561, 565 (D.C.Cir.2009) *with* 72 Fed.Reg. 13,560, 13,560, 13,580 (Mar. 2, 2007) (Federal Register notice at issue in *Natural Res. Def. Council); compare Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1414-18 (D.C.Cir.1998), *with* 59 Fed.Reg. 55,778, 55,778, 55,792 (Nov. 4, 1994) (Federal Register notice at issue in *Florida Power & Light*).

The EPA authorization expressly stated that the action the EPA was taking was an "[i]mmediate final rule," 67 Fed.Reg. at 51,765; that it was a "final authorization" under 42 U.S.C. § 6926, 67 Fed.Reg. at 51,765, 51,768; and that the rule would later be codified in the Code of Federal Regulations, *id*. at 51,768. Moreover, the EPA clearly treated the 2002 authorization as having binding legal force, promulgating it through formal notice-and-comment rulemaking, and stating in the rule itself that the rule represented final agency action.[9]

Second, Southern Union presents an argument construing the relevant federal regulation. It argues that since the baseline federal program does not require CESQGs to obtain hazardous waste storage permits, the United States cannot enforce state rules that do. We reject this strained interpretation of 40 C.F.R. § 271.1(i), which governs federal authorization of state hazardous waste programs. The provision reads as follows:

> (i) Except as provided in § 271.4, nothing in this subpart[10] precludes a State from:

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[9] In applying the similar review provision in § 6976(a), the D.C. Circuit examines three factors to determine whether the EPA has issued a "final regulation" under RCRA: (1) EPA's characterization of the action, (2) whether the action was published in the Federal Register or the Code of Federal Regulations, and (3) most importantly, whether the action has a binding effect on either private parties or the EPA. *E.g., Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 226-27 (D.C.Cir.2007); *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C.Cir.2004) (stating third factor most important). We need not address whether this circuit would take a similar view.

[10] This subpart includes 40 C.F.R. §§ 271.1-271.27 inclusive, all of which sections specify requirements for federal authorization of state programs.

> (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this subpart;
>
> (2) Operating a program with a greater scope of coverage than that required under this subpart. Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program.

On Southern Union's interpretation of the regulation, any state rule that is not "required" by the federal baseline program necessarily imposes "a greater scope of coverage," and so the district court erred when it held that "more stringent" requirements are federally approved while only greater-in-scope requirements are not. We reject Southern Union's interpretation because it vitiates the clear distinction between "more stringent" and "greater in scope," collapsing the two terms into one.

Beyond that, if there were any ambiguity, we would "afford [ ] 'considerable deference' to the agency's interpretation of regulations promulgated under [its statutory] authority." *Rhode Island Hosp. v. Leavitt*, 548 F.3d 29, 34 (1st Cir.2008); *see also Martex Farms, S.E. v. EPA*, 559 F.3d 29, 32 (1st Cir.2009). Here, where the agency has expressed that interpretation in a legislative rule promulgated through notice-and-comment rulemaking, the agency's interpretation is binding unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or otherwise defective under the APA. *See Levesque v. Block*, 723 F.2d 175, 182 (1st Cir.1983); *see also Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed.Cir.2006)

(stating that a substantive rule has the force and effect of law).

Southern Union offers no argument that the EPA's interpretation is arbitrary or capricious, or that the agency somehow exceeded its statutory authority. It argues only that its own reading is better on the plain language of the regulation. We do not agree about the reading and in any event this is not enough. The EPA's interpretation of 40 C.F.R. § 271.1(i) to permit federal enforcement of "more stringent" state regulations is a reasonable one based on the text and structure of the regulation.[11]

Southern Union argues in the alternative that even if "more stringent" requirements are federally authorized, a state's regulation of CESQGs is "additional coverage" rather than merely a "more stringent" requirement because it expands the universe of regulated entities to include entities that would not otherwise be covered by RCRA.

Southern Union's argument is based on its misreading of 40 C.F.R. § 261.5. This federal regulation clearly regulates CESQGs, governing how they categorize their waste, where they may store it, and how they may dispose of it. 40 C.F.R. § 261.5(c), (g). This is in addition to the eligibility requirements for categorization as a CESQG in a given month. 40 C.F.R. § 261.5(a), (g)(2). Further, because the eligibility requirements are based on the amount of hazardous waste generated or stored in a particular month, CESQG status is transient, so that some generators will be CESQGs only some of the time. It

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[11] Southern Union does not challenge the validity of 40 C.F.R. § 271.1(i) itself (nor could it, since such a challenge would be untimely under 42 U.S.C. § 6976(a)).

does not expand the universe of regulated entities to subject already-regulated entities to fuller regulation in Rhode Island.

Third, and finally, Southern Union strongly urges that the 2002 Rule is invalid because it is irrationally inconsistent with prior pronouncements of the EPA's position on the regulation of CESQGs and on which state regulations will receive federal authorization. Southern Union's argument relies primarily on various nonbinding EPA guidance documents stemming from the agency's interpretations, in the 1980s, that state regulation of CESQGs was not federally enforceable. However, these internal guidance documents have not been put forth as legally binding and were not promulgated through notice-and-comment rulemaking, and therefore cannot trump the agency's formal regulatory promulgations. *Cf. Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

Southern Union also points in passing to prior formal EPA authorizations of state programs—in 1992 as to California and in 2001 as to the District of Columbia—determining that state regulation of CESQGs was not then, in the EPA's view, federally enforceable. *See* 66 Fed.Reg. 46,961, 46,965 (Sept. 10, 2001) (District of Columbia); 57 Fed.Reg. 32,726, 32,729 (July 23, 1992) (California). Southern Union argues the 2002 EPA Rule authorizing Rhode Island's program cannot be binding on the regulated community because it is inconsistent with these prior determinations.

We briefly explain why the 2002 Rule is not subject to attack on grounds of irrational inconsistency with other EPA authorizations of state programs. The facts show that Southern Union overstates the sup-

posed conflict. Since 1999, with the sole exception of the District of Columbia in 2001, EPA has consistently characterized state regulation of CESQGs as federally enforceable. *See* 72 Fed.Reg. 12,568, 12,570 (Mar. 16, 2007) (Vermont); 71 Fed.Reg. 9727, 9732, 9733 (Feb. 27, 2006) (New Hampshire); 69 Fed.Reg. 57,842, 57,856 (Sept. 28, 2004) (Connecticut); 64 Fed.Reg. 48,099, 48,101 (Sept. 2, 1999) (Louisiana). The District of Columbia decision in 2001 demonstrates, at worst, an aberration, and the agency has maintained a consistent position ever since. In this vein, EPA has issued a proposed rule making California's CESQG regulations federally enforceable. 75 Fed.Reg. 60,398, 60,401-02 (Sept. 20, 2010).

Policy change over time is not irrational inconsistency. Agencies may change their policies provided substantive changes in an agency's position are accomplished by notice-and-comment rulemaking, *see Shalala v. Guernsey Mem'l Hosp*., 514 U.S. 87, 100, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C.Cir.2005), and accompanied by "some indication that the shift is rational," *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 291 (1st Cir.1995) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (stating agency's rationale must be clear "so that the reviewing court may understand the basis of the agency's action.")). These conditions are met here. Each state program authorization has been promulgated through notice-and-comment rulemaking. And the change was clearly rational; the EPA's "reasoned basis" for deciding state CESQG regulations are federally enforceable is clearly discernible from the very text and structure of the regulation. *See Bowman Transp., Inc. v. Arkansas-*

Best Freight Sys., Inc., 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).

C. *Southern Union's Due Process Claim*

There was no lack of due notice to Southern Union that its behavior could lead to criminal prosecution.

The law embodies two commonsense notions in the face of protestations of innocence by reason of ignorance. One is that those who keep dangerous materials on hand know their activity is regulated. *United States v. Int'l Minerals & Chem. Corp*., 402 U.S. 558, 565, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971) ("[W]here . . . obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."). The other is that those who manage companies in highly regulated industries are not unsophisticated. Southern Union is in the natural gas industry, which is highly regulated both federally and locally. It is part of its business to keep abreast of government regulation. *See United States v. Lachman*, 387 F.3d 42, 56-57 (1st Cir.2004) (stating that companies in highly regulated industries are presumed to be on notice of applicable regulatory regime).

Further, the company's activities put it in violation of state law. R.I. Gen. Laws § 23-19.1-18 (making violation of state hazardous waste rules a felony punishable by imprisonment, $25,000 fine for each day's violation, and remediation costs). Southern Union does not argue it lacked notice of that. Rather, it argues it lacked notice that it could be federally prosecuted for activity it acknowledges was a state crime. We have held in a parallel situation that

notice that conduct violates state law constitutes fair notice of a counterpart federal violation. *United States v. Gagnon*, 621 F.3d 30, 33 (1st Cir.2010).

In any event, the Environmental Services Manager for Southern Union's New England Gas Company subsidiary received a letter in July 2002 explaining that the EPA would soon authorize revisions to Rhode Island's hazardous waste program and inviting the company to comment. The company had actual notice of the publication of a Final Rule. The ensuing federal 2002 Rule was crystal clear on its face that the state standards would be federally enforced. It became effective twenty-three months before the event which led to the prosecution of Southern Union. There was no trap for the unwitting here. Obliviousness is not a defense.

Southern Union also claims that because in 1992 and 2001 the EPA declined federal enforcement of CESQG regulations in California and the District of Columbia, respectively, federal enforcement of Rhode Island's CESQG regulations is so irrational as to violate due process. As we have noted, the EPA has proposed federal enforcement in California, and all enforcement decisions since 1999, save for the aberration of the District of Columbia, have been consistent with the Rhode Island enforcement decision. Southern Union has failed to show meaningful inconsistency, much less irrational inconsistency. Our conclusion above that the EPA has over time engaged in a rational shift toward a policy of federal enforcement disposes of this due process argument as well.

III. *CHALLENGES TO THE FINE*

The statutory fine for knowing storage of hazardous waste without a permit is "not more than $50,000 for

each day of violation." 42 U.S.C. § 6928(d). The district court imposed a $6 million fine and a $12 million "community service obligation." Southern Union adequately preserved an objection to these penalties on the grounds that the $38.1 million maximum fine calculated in the pre-sentence report violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).[12]

Apprendi requires that "any fact" other than that of a prior conviction "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, 120 S.Ct. 2348. Southern Union argued at sentencing that the court could not impose a fine greater than $50,000, the maximum fine for a one-day violation. That was because Southern Union presented evidence at trial from which the jury could have found that for at least some of the period of the indictment, it had treated the loose mercury as a recyclable resource rather than as waste. The jury, it notes, was not asked to determine the number of days of violation, but only "to determine whether . . . *at some point* in time the

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[12] The district court found Southern Union had waived the *Apprendi* argument by failing to raise the issue during discussions about the structure of the jury verdict form, and raising the issue for the first time in objecting to the presentence report. *United States v. Southern Union Co.*, No. 07-134, 2009 WL 2032097, at *2 (D.R.I. July 9, 2009) (*Southern Union II*). Southern Union disagrees that there was waiver, given that in *United States v. Pérez-Ruiz*, 353 F.3d 1, 14 (1st Cir.2003), we found that "[i]n order to preserve a claim of *Apprendi* error for appeal, it is enough that a defendant offer a timely objection at sentencing." *Id.* The prosecution did not seek the district court's waiver ruling and does not press it on appeal.

liquid mercury was discarded by being abandoned" (emphasis added).

The prosecution argued that the *Apprendi* rule against judicial factfinding does not apply in the context of criminal fines. The district court held that *Apprendi* does apply, but found it implicit in the jury verdict and the indictment on which the verdict form was based that Southern Union had violated RCRA for the full 762 days charged in the indictment. *United States v. Southern Union Co.*, No. 07-134, 2009 WL 2032097, at *3-4 (D.R.I. July 9, 2009) (*Southern Union II*). It then used that information to calculate the maximum fine of $38.1 million. *Id.* at *4. The indictment charged conduct "[f]rom on or about September 19, 2002 until on or about October 19, 2004," and the verdict form encompassed Southern Union's conduct "[a]s to Count 1 of the Indictment, on or about September 19, 2002 to October 19, 2004." From these, the court concluded that the jury had found beyond a reasonable doubt that Southern Union violated RCRA during the entire period from approximately September 19, 2002 until October 19, 2004. *Southern Union II*, 2009 WL 2032097, at *3.

On appeal, Southern Union makes two arguments challenging the fine. First, it argues that where the statute of conviction sets a maximum fine of $50,000 "for each day of violation," 42 U.S.C. § 6928(d), then the issue of the number of days of violation must be submitted to the jury under *Apprendi*. Second, it argues that the penalties imposed constituted an abuse of discretion. While we disagree with the district court on the *Apprendi* issue, we also reject Southern Union's arguments.

A. *Apprendi Does Not Apply to Criminal Fines*

We start with the *Apprendi* argument, which presents a pure issue of law, reviewed de novo. *United States v. González-Vélez*, 466 F.3d 27, 40 (1st Cir.2006). It is an open question in this circuit whether *Apprendi* applies to criminal fines, though we have assumed that criminal fines are subject to the rule of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), a post-*Apprendi* case on the Federal Sentencing Guidelines. *United States v. Bevilacqua*, 447 F.3d 124, 127 (1st Cir.2006); *see also United States v. Uribe-Londoño*, 409 F.3d 1, 5 n. 5 (1st Cir.2005).

Southern Union argues that the question of whether *Apprendi* applies is resolved by the plain language of the Supreme Court's opinion in that case, which states that the rule covers "any fact that increases the *penalty* for a crime" beyond the statutory maximum. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 (emphasis added). If *Apprendi* applies only to facts increasing terms of incarceration, and not to criminal fines, Southern Union argues, the Court's use of the broad word "penalty" becomes superfluous, and corporations, which cannot be incarcerated, are left outside *Apprendi's* protection.

The Supreme Court extended the *Apprendi* rule to new contexts in several post-*Apprendi* decisions. *See Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (applying rule to statute authorizing death penalty upon judge's finding of aggravating factor); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (applying rule to statute authorizing "exceptional sentence" upon judge's finding of aggravating factor); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)

(applying rule to mandatory Federal Sentencing Guidelines enhancements); *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (applying rule to scheme authorizing schedule of longer prison terms if judge finds aggravating circumstance). Under these decisions, a judge may not mete out any "punishment" for which the jury has not found all the necessary "facts." *Blakely*, 542 U.S. at 304, 124 S.Ct. 2531. This has been called a "bright-line rule." *Cunningham*, 549 U.S. at 288, 127 S.Ct. 856. These cases do not distinguish among types of "penalties" or "punishment," leaving the broad language unglossed. From this one might conclude that a fine is like all other penalties, or one could reach a different conclusion. What is clear is that none of these cases deals with the question of whether the imposition of a fine falls under the *Apprendi* rule.

The prosecution argues that both the reasoning and the express language in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), mean that *Apprendi* does not apply to criminal fines, which have historically been within the discretion of judges, and not assigned to juries for determination. In *Ice*, the Court upheld a state sentencing regime that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences of incarceration. *Id*. at 720. The Court characterized its decisions under *Apprendi* as curtailing any "legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense." *Id*. at 718 (quoting *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348) (alteration in original). The Court, reasoning from historical practice, cautioned that "preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense" is the

"animating principle" in which the *Apprendi* rule must remain rooted. *Id*. at 717. The Court expressly considered the history at common law of the practice *Ice* challenged. Finding that at the time of the Founding, it was judges who chose whether to impose sentences concurrently or consecutively, and that therefore no traditional jury function had been curtailed by Oregon's scheme, the Court declined to extend the *Apprendi* rule to this determination.[13] *Id*. at 717-18. The logic and method of *Ice* alter any previous broad understanding of *Apprendi*.

The prosecution argues that we should follow not only the method of historical analysis endorsed by *Ice* but also the opinion's express language about criminal fines. The Court made an express statement in *Ice*, albeit in dicta, that it is inappropriate to extend *Apprendi* to criminal fines. Observing that many states permit judicial factfinding on matters "other than the length of incarceration," the Court explained that "[t]rial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms

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[13] The Court explained that its decision was also justified by states' sovereign interest in maintaining authority over their criminal justice systems and by the administrative difficulties the contrary rule, which could necessitate bifurcated or trifurcated trials, would place on state court systems. *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 718-19, 172 L.Ed.2d 517 (2009). The prosecution has provided a long list of state statutes that impose fines per day of violation, urging this court to consider the impact on state sovereignty that the application of *Apprendi* to fines could have on these statutes. Because we find ample reason not to extend the rule here, we need not decide the merits of this argument.

of community service; and *the imposition of statutorily prescribed fines* and orders of restitution."[14] *Id*. at 719. The Court warned that applying *Apprendi* to these types of determinations "surely would cut the rule loose from its moorings." *Id*.

We agree that we must give this language great weight. We do not discount the Supreme Court's language merely because it was used in dicta. We "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement." *Rossiter v. Potter*, 357 F.3d 26, 31 n. 3 (1st Cir.2004) (alteration in original) (quoting *McCoy v. MIT*, 950 F.2d 13, 19 (1st Cir.1991)) (internal quotation mark omitted).

Turning again to the method of reasoning the Court used in *Ice*, we agree with the prosecution that we must follow the logic of *Ice's* reasoning, which further supports the conclusion that *Apprendi* does not apply to criminal fines. As the Supreme Court recently stated, "[a] holding . . . can extend through its logic beyond the specific facts of the particular

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[14] We have previously held that orders of restitution are not subject to the *Apprendi* rule. *See United States v. Milkiewicz*, 470 F.3d 390 (1st Cir.2006). There, we explained that the statutory scheme for restitution, under which the court determines the victim's losses by a preponderance of the evidence, *id*. at 403, does not trigger the principles underlying *Apprendi* because the jury's verdict of guilt automatically authorizes restitution in the full amount of the victim's losses, *id*. at 404. We reached this result despite noting that a "literal application of the Supreme Court's language might suggest" that the *Apprendi* rule does apply, *id*. at 403, indicating that even before *Ice* the Supreme Court's *Apprendi* line of cases tolerated nuanced application despite the cases' broad language.

case." *Los Angeles County v. Humphries*, — U.S. —, 131 S.Ct. 447, 453, 178 L.Ed.2d 460 (2010).

Applying *Ice's* reasoning and logic to the issue in this case, it is now highly relevant that, historically, judges assessed fines without input from the jury.[15] Judges had discretion to determine the amount of any fine imposed, and "[t]he range was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid." Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982). This is in direct contrast with the Supreme Court's reasoning in the *Apprendi* context that the "English trial judge of the later eighteenth century had very little explicit discretion in sentencing." *Apprendi*, 530 U.S. at 479, 120 S.Ct. 2348 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in The Trial Jury in England, France, Germany 1700-1900, at 13, 36-37 (A. Schiappa ed., 1987)). Judicial discretion was limited in this context because the jury decided what level of crime the defendant had committed, which in turn largely determined the sentence. *Id*. at 479-80, 120 S.Ct. 2348.

Southern Union's main rejoinder is that historical practices do not speak to the specific issue here, the determination of the duration of an offense on which

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[15] Before incarceration became widely used, "the two main forms of noncapital punishment were whippings and fines, and in both cases, the judge could set the amount or even elect between the two, depending on the nature of the defendant and the crime." Erik Lillquist, *The Puzzling Return of Jury Sentencing*: *Misgivings about Apprendi*, 82 N.C. L.Rev. 621, 641 (2004).

a fine is determined.[16] Even assuming fines are similar to sentences of incarceration, this argument misses the point of the analogy and the flow of the logic used by the *Ice* majority. The historical record presented in *Ice* showed that at common law, judges chose within their unfettered discretion whether to impose consecutive or concurrent sentences, and consecutive sentences were the default rule. *Ice*, 129 S.Ct. at 717. The prosecution here presents strong evidence of historic practice that at common law, judges' discretion in imposing fines was largely unfettered. The Court in *Ice* specifically cautioned that it would be senseless to use *Apprendi* to nullify sentencing schemes in which legislatures have *curtailed* the discretion judges had at common law. *Id*. at 719.

Our view that *Ice* has effected a change in the application of the *Apprendi* rule to the issue in this case is directly supported by the dissent in *Ice*. The four dissenting Justices stated that the majority opinion had altered the method of analysis underlying *Apprendi* in at least five different ways. *Id*. at 721-22 (Scalia, J., dissenting). They protested that the majority had constructed formal limits narrowing the broad, "nonformalistic rule" originally set forth in *Apprendi*. *Id.* at 720. The dissent stated that the *Ice* majority had accepted arguments the Court had previously rejected under *Apprendi* about the relevance

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[16] Southern Union also argues that there is evidence that ten states allowed juries to determine fines at the turn of the twentieth century. Such evidence, however, is of little utility where the inquiry concerns the role of the jury at common law. *See Ice*, 129 S.Ct. at 717 ("Our application of *Apprendi's* rule must honor the 'longstanding common-law practice' in which the rule is rooted.") (quoting *Cunningham v. California*, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)).

of common-law sentencing practices to the constitutionality of modern legislative sentencing schemes. *Id*. at 720-22. The dissent, colorfully accusing the majority of giving life to arguments previously "dead and buried," insisted that the Court's opinion in *Ice* "gives cause to doubt whether the Court is willing to stand by" the *Apprendi* rule. *Id*. at 723.

Our holding is based on the Supreme Court's language in *Ice* that "[i]ntruding *Apprendi's* rule into" decisions such as "the imposition of statutorily prescribed fines . . . surely would cut the rule loose from its moorings." *Id*. at 719 (majority opinion). To the extent that excluding criminal fines from *Apprendi* requires a more restrained view of the rule's scope than did the Court's previous *Apprendi*-line decisions, it is the Supreme Court in *Ice* that has imposed the restraint. *See id*. ("Members of this Court have warned against 'wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries.'") (quoting *Cunningham*, 549 U.S. at 295, 127 S.Ct. 856 (Kennedy, J., dissenting)).[17]

In the interest of judicial economy and efficiency we reach an additional issue. We hold that if we are wrong and if *Apprendi* does apply to criminal fines, it

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[17] We recognize that two circuits, which could not or did not discuss *Ice*, have applied *Apprendi* to criminal fines. *See United States v. Pfaff*, 619 F.3d 172 (2d Cir.2010); *United States v. LaGrou Distribution Sys., Inc*., 466 F.3d 585 (7th Cir.2006). In *LaGrou*, which was decided before the Supreme Court's decision in *Ice*, the Seventh Circuit simply quoted the rule in *Apprendi* and held that the fine imposed in that case violated the rule. *LaGrou*, 466 F.3d at 594. In *Pfaff*, the Second Circuit cited to *LaGrou* without adding analysis of its own, other than to distinguish criminal fines from restitution on the stated grounds that only criminal fines are subject to statutory maximums. *Pfaff*, 619 F.3d at 174-75.

would be necessary to remand for resentencing. The district court erred in holding, despite the absence of a special interrogatory, that the jury necessarily found beyond a reasonable doubt that Southern Union had violated RCRA during all or nearly all of the date range in the indictment. *Southern Union II*, 2009 WL 2032097, at *3. The court reasoned that the indictment's description of the date range—from "on or about September 19, 2002 to October 19, 2004"—was "listed on the verdict form and found by the jury beyond a reasonable doubt." *Id*. From this date range the court calculated a period of violation of 762 days, resulting in a statutory maximum fine of $38.1 million, reduced a bit at the margin due to the "on or about" language in the verdict form. *Id*.

The prosecution essentially concedes and we agree that if *Apprendi* did apply to criminal fines, the jury did not necessarily determine the number of days of violation. The jury did not need to find that Southern Union began to violate RCRA "on or about" September 19, 2002 in order to convict Southern Union on Count 1. As the court instructed the jury, the jury needed only to "determine . . . whether at *some point* in time the liquid mercury was discarded by being abandoned" and therefore ceased to be legally held for future recycling and began to be stored as waste (emphasis added). Southern Union produced evidence that at several points throughout the indictment period, and as late as the summer of 2004, Southern Union employees discussed a potential mercury recycling project. The district court could not conclude from the verdict form the number of days of violation the jury had necessarily found.

Where an error is constitutional in nature, "the government has the burden of proving beyond a

reasonable doubt that the error did not affect the defendant's substantial rights." *United States v. Sepúlveda-Contreras*, 466 F.3d 166, 171 (1st Cir.2006). *Apprendi* error is harmless "where the evidence overwhelmingly establishes" the facts necessary "to justify the statutory maximum under which the defendants were sentenced." *United States v. Soto-Beníquez*, 356 F.3d 1, 46 (1st Cir.2004). That is not this case. We reject the prosecution's suggestion that the evidence was so overwhelming that no reasonable jury could conclude other than that the mercury was treated as waste throughout the period in the indictment.

If, then, we are wrong about whether the *Apprendi* rule applies to criminal fines, the case would need to be remanded to the district court for resentencing. The district court would need to address several issues that we mention but do not resolve here.

First, it would need to address the prosecution's argument at sentencing that even if *Apprendi* applied, Southern Union could be assessed a $500,000 fine under the alternative fine statute. *See* 18 U.S.C. § 3571(c).

Second, it may need to clarify the nature of the financial penalties it imposed. At sentencing, after determining that the statute "yields a maximum fine . . . of $38.1 million," the district court characterized the $18 million in financial penalties it imposed as two separate pools of funds, including a "fine" of $6 million and a "community service obligation," listed in the court's judgment as a special condition of probation, of $12 million.[18] In describing

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[18] $1 million of the $12 million obligation is designated for the following recipients: $200,000 each for the Rhode Island

the community service obligation, the court did not use the term "restitution," but neither did the court specify that it was part of a total fine.

The prosecution argues that the district court should be "permitted to clarify the status of the $12 million" it assessed in community service obligations as "restitution." Restitution is exempt from *Apprendi* under our circuit law. *United States v. Milkiewicz*, 470 F.3d 390, 402-04 (1st Cir.2006).

Southern Union, in its opening brief, ignored the district court's treatment of the financial penalties as having two separate components, and described its obligations as a single $18 million penalty. In its reply brief, it argues that the district court cannot recharacterize the community service obligations as restitution because it did not invoke the statutory restitution procedure before sentencing. *See* 18 U.S.C. § 3664. If a remand were necessary, the district court may need to address these issues in the first instance and determine which arguments Southern Union has preserved.

B. *The Fine Imposed Was Reasonable*

We review the reasonableness of the sentence imposed, upholding the sentence unless the district court abused its discretion. *United States v. Carrasco-De-Jesús*, 589 F.3d 22, 26 (1st Cir.2009); *United States*

Chapter of the American Red Cross, the Rhode Island Environmental Response Fund, the Hasbro Children's Hospital in Providence, the state Distressed Communities Recreation and Acquisition Fund, and the Pawtucket Fire Department. The remaining $11 million is designated to endow a grantmaking fund, to be managed by the Rhode Island Foundation, in order to fund grants in environmental education, remediation, conservation, and children's health issues related to toxic waste.

v. Thurston, 544 F.3d 22, 24-25 (1st Cir.2008). First, we determine whether the district court considered the relevant statutory sentencing factors and adequately explained the sentence it chose.[19] *See United States v. Martin*, 520 F.3d 87, 92 (1st Cir.2008) (quoting *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). Second, we consider whether the sentence is substantively reasonable under the totality of the circumstances, giving due deference to the district court's experience and familiarity with the facts of the case. *Id*.

The Sentencing Guidelines on fines do not apply here, and so in addition to the relevant RCRA provision, 42 U.S.C. § 6928(d), the district court was obliged to consider only the sentencing factors in 18 U.S.C. §§ 3553 and 3572. U.S.S.G. §§ 8C2.1 cmt. background, 8C2.10 (2009); *see also United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310-11 (2d Cir.2009) (explaining review of fine imposed when Sentencing Guidelines do not apply). Even assuming arguendo that the $12 million community service obligation was a fine, the financial penalties imposed were within the discretion of the district court.

Southern Union argues that the district court misapplied the statutory sentencing factors, placing too much emphasis on factors likely to increase the fine, such as the company's profitability, and too little on mitigating factors, such as its prior history as a clean, responsible corporate citizen and its out-lays in remediating the damage from the mercury distribution. The prosecution urges us to review these claims only for plain error, because Southern Union failed

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[19] Southern Union does not challenge the district court's pertinent findings of fact.

to present them to the district court despite clear opportunity to do so after the court announced the sentence. *See United States v. Almenas*, 553 F.3d 27, 36 (1st Cir.2009) (applying plain error review); *United States v. Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007) (same). In any event we hold there was no procedural error, let alone plain error, in the district court's methodical, detailed consideration of each sentencing factor.

Southern Union also claims the $18 million penalty was substantively unreasonable, arguing that it was grossly excessive in comparison to the penalties of $75,000-$250,000 imposed in what it describes as cases of more egregious RCRA violations. *See* 18 U.S.C. § 3553(a)(6) (requiring courts to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"). But the district court made "an individualized assessment based on the facts presented," and "adequately explain[ed] the chosen sentence." *Gall*, 552 U.S. at 50, 128 S.Ct. 586.

The district court explained why the statutory factors justified the penalties, noting that Congress measured the seriousness of long-term RCRA violations by imposing a high, per-day statutory maximum fine; that Southern Union's willingness to put a densely-populated residential community, local public safety employees, and its own employees at risk by storing hazardous waste under deplorable conditions in their midst indicated great culpability; and that there was a need for a penalty substantial enough to attract the attention of large corporations, thereby achieving not only specific, but also general, deterrence. Further, the district court specifically acknowledged the need to avoid creating unwarranted

disparities, but explained that it had concluded that "sentencing in criminal environmental matters is a very individualistic task" in which case-to-case comparisons are difficult to make.[20] Reviewing the totality of the circumstances, we find no abuse of discretion in the sentence imposed by the district court.

IV.

In this case each side has been well represented by able counsel.

For the reasons stated above, we affirm Southern Union's conviction as well as the sentence and financial penalties imposed.

So ordered.

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[20] Based on the five cases Southern Union encourages us to consider, the court's conclusion was warranted. Four were resolved by plea agreements. The fifth, *United States v. Kelley Technical Coatings, Inc*., 157 F.3d 432 (6th Cir.1998), upheld an RCRA conviction for which a $225,000 fine was imposed. *Id*. at 444. Kelley's sentence was not at issue on appeal, and the opinion lacks information necessary to any reasoned comparison—for instance, whether Kelley's manufacturing plants were in a populated area, or how large or profitable Kelley was. *See id*. at 435-36. Further, the Sixth Circuit affirmed the conviction of Kelley's vice president and his sentence to a fine and imprisonment, *id*. at 443-44—a substantial penalty imposing individual responsibility that is completely absent in Southern Union's case since, as the district court noted, there is no evidence of any individual shouldering any responsibility for the company's RCRA violation.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. RHODE ISLAND

Cr. No. 07-134 S

UNITED STATES OF AMERICA

v.

SOUTHERN UNION COMPANY.

July 9, 2009

PRELIMINARY SENTENCING MEMORANDUM

WILLIAM E. SMITH, United States District Judge.

Defendant in this matter, Southern Union Company, has filed an objection to the pre-sentence report, prepared by the U.S. Office of Probation, which sets the maximum fine that may be imposed as a result of the Defendant's crime of conviction at $38.1 million, the equivalent of $50,000 per day for each day the Defendant illegally stored hazardous waste, liquid mercury, without a permit in violation of 42 U.S.C. § 6928(d)(2). In order to give the parties the ability to argue more meaningfully and effectively in both their written submissions and oral presentations at the upcoming sentencing hearing, the Court, after conferring with counsel, asked for briefs on this issue. For these same reasons the Court believes a ruling on Defendant's objection in advance of

sentencing is in order. For the reasons set forth below, Defendant's objection will be overruled.

I. *Background*

The Defendant, Southern Union Company, is a Delaware corporation based in Texas and primarily engaged in the business of transporting and distributing natural gas. The Defendant was convicted after a jury trial of knowingly storing hazardous waste, liquid mercury, from on or about September 19, 2002 to October 19, 2004. The penalty for this violation is a fine of not more than $50,000 for each day of violation. 42 U.S.C. § 6928(d).

The Defendant now argues that the jury's verdict is ambiguous with respect to the exact date range of the violation and that without a more exact finding by the jury on the date range of its violation the maximum penalty that the Court may legally impose is only $50,000 for one day of violation. The Defendant further contends that any factual finding clarifying the verdict would violate *Apprendi*, which requires that any fact (other than a prior conviction) that would raise the defendant's sentence beyond the prescribed statutory maximum must be proved beyond a reasonable doubt to a jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Government contends that *Apprendi* is inapplicable to fines in general; the finding of the jury is sufficient to support the $38.1 million fine maximum and no *Apprendi*-violating judicial findings are required; and, finally, even if it does apply the so-called alternative fine statute would apply and set the maximum fine at $500,000. *See* 18 U.S.C. § 3571.

The analysis of Defendant's arguments begins with the charging document. The Grand Jury charged the Defendant in a three count indictment with crimes relating to the illegal storage of hazardous waste in the form of liquid mercury and mercury sealed gas regulators and the failure to provide emergency notice of the release of liquid mercury into the environment. The jury returned a guilty verdict on Count I—relating to the storage of the liquid mercury—but acquitted the Defendant on the two other counts. In pertinent part, Count I of the Indictment charged as follows:

> 29. From on or about September 19, 2002 until or on or about October 19, 2004, within the District of Rhode Island, Southern Union Company defendant herein, did knowingly store, and cause to be stored, hazardous wastes, namely, waste liquid mercury, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, without a permit issued pursuant to RCRA.
>
> All in violation of 42 U.S.C. § 6928(d)(2)(A) and 18 U.S.C. § 2.
>
> (*See* Indictment (Doc. 1).)

During the trial the Government offered and the Court admitted into evidence daily work logs kept by the Defendant's Environmental Services Manager, which specifically referenced the storage of ten pounds of liquid mercury at Defendant's Tidewater Street facility in Pawtucket, Rhode Island on September 19, 2002. (*See* Gov'ts Ex. 303; *see also* Trial Tr. Vol. 4, 110-112, Sept. 25, 2008 (Doc. 108); Trial Tr. Vol 5, 116-20, Sept. 29, 2008 (Doc. 109).) The jury also heard testimony that on October 19, 2004 one of the Defendant's employees discovered

that the liquid mercury the Defendant had been illegally storing had been spilled by vandals who had broken into the mercury storage building, and the cabinet containing the liquid mercury. (*See* Trial Tr. Vol 6, 22-25, Sept. 30, 2008 (Doc. 111).) Following a nearly four week trial, in its closing argument, the Government explained that September 19, 2002 was the earliest date the Government could establish with direct evidence that the Defendant was illegally storing liquid mercury. (*See* Trial Tr. Vol. 13, 40:21-25, 41:1-12, Oct. 14, 2008 (Doc. 119).) Thereafter, the jury convicted the Defendant on Count I of the Indictment relating to the storage of the liquid mercury. In its verdict, the jury specifically found, beyond a reasonable doubt, that:

> As to Count 1 of the Indictment, on or about September 19, 2002 to October 19, 2004, knowingly storing a hazardous waste, liquid mercury, without a permit, we the jury find the Defendant, Southern Union Company GUILTY.
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> (*See* Verdict Form (Doc. 98).)[1]

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[1] Defendant's objection is reminiscent of Captain Renault's exclamation in the classic movie "Casablanca" that "I'm shocked, shocked to find that gambling is going on in here!" *See* The Internet Movie Database at %ihttp://www.imdb.com/title/tt0034583/quotes. In similar fashion Defendant seems shocked that the fine in this case may be as high as $38.1 million. Yet, at the conclusion of the twelfth day of trial and the presentation of evidence, the Court instructed the parties that:

> I need you to come prepared to the charge conference with your suggestions as to the verdict form in this case and whether you feel there is a need for special interrogatories to the jury on some or all of the counts. We need to have a discussion about that as well.
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> (Trial Tr. Vol. 12, 47: 6-11, Oct. 8, 2008 (Doc. 122).)

II. *Discussion*

The Sixth Amendment requires that "any fact that exposes a defendant to a greater potential sentence

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On October 9, 2008, the Court engaged counsel in an extensive charge conference at which time the verdict form was discussed.

While the initial conference discussion is off the record, the Court's notes reflect that one of the topics for discussion was "dates." The Court's recollection is that the Government and the Defendant took the position that the dates in the Indictment were sufficient for the jury to render a verdict. Per the Court's usual practice, the Defendant was allowed to state its objections to the jury charge and the verdict form after the conference. No objections were asserted by the Defendant to the proposed verdict form. To be absolutely sure, just before the jury began deliberations, the Court gave each party another opportunity to object to the verdict form, and the Defendant remained silent. (*See* Trial Tr. Vol. 13, 194:21-25, 195:1-5, Oct. 14, 2008 (Doc. 119).)

There can be little doubt that the Defendant, with its experienced and able counsel, knew at the time of the conference of the supposed ambiguity of which it now complains, but declined to seek clarification or more precision in the verdict form. Indeed, it is beyond dispute that counsel expressed satisfaction with using the Indictment's "on or about September 19, 2002" language in the verdict form. This hide the ball tactic is not without consequence. In the Court's view the Defendant's failure to respond to the Court's invitation for even greater specificity in the verdict form, its assent to the use of the Indictment language, and its failure to formally place an objection on the record is a clear waiver of its newly minted objection. *See United States v. Fisher*, 494 F.3d 5, 9 (1st Cir.2007); Fed.R.Crim.P. 30; *see generally Petsch-Schmid v. Boston Edison Co.*, 1997 WL 100904, *1 (1st Cir.1997) ("We have stated repeatedly that the failure to object before the jury retires to the charge or the verdict form constitutes a waiver."). In spite of this waiver, the Court will go on to address the substance of Defendant's objection, which clearly lacks merit. *See* Fed.R.Crim.P. 52(b) (indicating that Court should review for plain error).

must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California*, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). However, "[a] sentencing court may make factual findings that result in an increase to a defendant's sentence as long as the sentence imposed is within the default statutory maximum." *United States v. Vasco*, 564 F.3d 12, 23 (1st Cir.2009) (citing *United States v. Perez-Ruiz*, 353 F.3d 1, 15 (1st Cir.2003)). The Supreme Court has defined "statutory maximum" as "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, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (emphasis in original). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow . . . the judge exceeds his proper authority." *Id*. at 303-04 (emphasis in original).

The Court rejects the notion that *Apprendi* does not apply to fines and does not believe, as the Government argues, that the Supreme Court recently indicated in *dicta* anything to the contrary. *See Oregon v. Ice*, — U.S. —, —, 129 S.Ct. 711, 719, 172 L.Ed.2d 517 (2009). The language the Government cites for the proposition that *Apprendi* does not apply to fines reads:

> Trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sen-

> tence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution. Intruding *Apprendi's* rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings.
>
> *Id*. (internal citation omitted).

The best that can be said about this passage is that *Apprendi* does not prevent a Court from engaging in judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum range, which is something entirely different from finding a fact that determines the range.

With this guidance in mind, the actual issue for the Court to decide is what is the statutory maximum punishment for the Defendant's crime of conviction. The statute under which the Defendant was convicted, 42 U.S.C. § 6928, prescribes that any person convicted shall be subject to a fine that is calculated based on the number of days (or length) of the violation. *Id*. at § 6928(d). Thus, the statutory maximum penalty for violations of § 6928 can and will vary from case to case, and can only be determined in any particular case after a factual finding is made concerning the number of days a defendant violated the statute. Because the maximum statutory penalty is tied to the length of the violation, *Apprendi* and its progeny requires the jury, and not the Court, to find the dates needed to calculate the maximum fine. In practical terms what this means is that the maximum penalty must derive from the facts proven at trial to the jury and reflected by the verdict. So for example, if the verdict form inquired whether the Defendant violated § 6928 by storing liquid mercury

without a permit, with no date reference at all, and this Court proceeded to find beginning and end dates thereby increasing the penalty, it could be fairly said the judge was finding facts that increased the statutory maximum. This case, however, is not a situation where the jury gave no indication as to the dates of the Defendant's violation under § 6928.

In determining the statutory maximum in this case, the starting point is the date range contained in the jury's verdict and derived from the Indictment, that is "on or about September 19, 2002 to October 19, 2004." This was the range listed on the verdict form and found by the jury beyond a reasonable doubt. The Defendant's argument that the Court may only impose a fine of $50,000 because the jury did not report a finding as to the precise first date or last date when Southern Union violated RCRA ignores both the content and context of the verdict all together. From the verdict form, it is clear that the jury conclusively found beyond a reasonable doubt that the Defendant's conduct ended on October 19, 2004 and that it began "on or about" September 19, 2002. No other conclusion is logical or possible.

Strictly based on the dates listed in the verdict form the maximum length of the violation is 762 days, which when multiplied by $50,000 allows for a maximum fine of $38.1 million. But that is not the end of the analysis of course, because the Indictment and the verdict form use the standard term "on or about" preceding the earlier date, September 19, 2002. But while this common phrase may put a little play in the joints, it does not cut the legs out altogether.

In its instructions to the jury, the Court stated that the meaning of "on or about" is a date "reasonably

near" the date alleged and the Defendant made no objection to that instruction. (*See* Trial Tr. Vol. 13, 14-33, 148:10-16 (Doc. 119).) Therefore, it defies reason to suggest the Defendant's illegal storage of liquid mercury began on any other date than a date reasonably near September 19, 2002. From this, it follows that the maximum statutory penalty that may be imposed based solely on the facts reflected in the jury verdict is a fine that is "reasonably near" $38.1 million.

Within this range of reasonably near $38.1 million, the Court is free, as the holding of *Ice* makes clear, to find facts that pinpoint the maximum fine, or establish a sentence that is at or below the maximum. At trial, the Government introduced direct evidence (work logs and testimony) that indicated that mercury was stored at least as early as September 19, 2002. Had there not been evidence of this date, no doubt the Defendant would have moved for dismissal of the Indictment on this ground and/or insisted on a verdict form that conformed to the evidence. Moreover, if such evidence were lacking the jury could have (and likely would have) returned a verdict of not guilty (as it did on Counts II & III). But the evidence introduced was clear and essentially irrefutable. From this it is easily found that the precise date for establishing the maximum penalty is in fact September 19, 2002. So long as the Court determines that the statutory maximum is at or below the amount that derives from the verdict itself—which is $38.1 million—there can be no *Apprendi* violation.

III. *Conclusion*

For the foregoing reasons, the Defendant's objection to the pre-sentence report on the maximum allowable fine that may be imposed is OVERRULED.

The Court will set the maximum fine that may be imposed against the Defendant at $38.1 million as stated in the pre-sentence report.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-2403

UNITED STATES

Appellee

v.

SOUTHERN UNION COMPANY

Defendant - Appellant

Before

Lynch, *Chief Judge*,
Torruella, Selya, Boudin, Lipez,
Howard and Thompson,
Circuit Judges.

Entered: February 17, 2011

ORDER OF COURT

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered

that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk