No. 11-94

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The United States' opposition does not contest that the decision below conflicts with the decisions of other courts of appeals on the important question whether the 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. The opposition also fails to refute petitioner's showing that the decision below conflicts with the clear holding in *Apprendi* and its progeny. This case thus raises a recurring and important question of criminal sentencing law that arises in a multitude of sentencing contexts and implicates the Fifth and Sixth Amendment rights of numerous criminal defendants. The purported vehicle issue raised by the United States amounts to nothing more than a premature and incautious attempt to litigate the merits of this case.

REASONS FOR GRANTING THE PETITION

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

A. The United States does not dispute that the Second, Sixth and Seventh Circuits have held that the *Apprendi* principle applies to the imposition of criminal fines and have vacated criminal fines as a result. See Pet. at 12-15; *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3059, 3060 (2011); *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585 (7th Cir. 2006); *United States* v. *Yang*, 144 F. App'x 521 (6th Cir. 2005). It also does not dispute that the Ninth Circuit, federal district courts, state supreme courts, and commentators have

assumed that the *Apprendi* principle applies to fines, and that the First Circuit's ruling below is at odds with all of those determinations. See Pet. at 15-17 & nn. 7-9. Instead, the United States contends that the decision below does not create a circuit conflict because "no other court of appeals has considered" the application of the *Apprendi* doctrine to fines "in light of this Court's decision in" *Oregon* v. *Ice*, 555 U.S. 160 (2009). Opp. at 9; see also *id.* at 11 (characterizing *Ice* as "intervening authority" and asserting that courts "have only begun to apply that refinement in the context of criminal fines"). This attempt to deny the clear conflict is unpersuasive.

First, there can be no question that the courts of appeals have issued conflicting rulings on the question presented in the Petition, regardless of the rationale that the First Circuit used in reaching its holding. These precedents are binding on lower courts in their respective circuits and will give rise to differential treatment of similarly-situated defendants absent intervention by this Court. The United States' suggestion that all of the federal and state courts that have aligned against the First Circuit on this issue could conceivably change their positions in light of *Ice* is fanciful speculation – and not a reason for this Court to defer considering the merits of an important constitutional question on which the courts of appeals are squarely split.

Second, even if the United States were correct that this Court should wait for a post-*Ice* conflict, such a conflict already exists. The Second Circuit's decision in *Pfaff* was issued more than a year and a half *after* this Court decided *Ice*, and *Pfaff* squarely conflicts with the decision below. The conflict is no less "genuine," Opp. at 11, merely because the United States – for reasons it chose not to explain – "did not

raise [the *Ice*] argument or cite *Ice*" in *Pfaff*, *id.* at 10, and the Second Circuit did not raise the issue *sua sponte*. That only serve to undermine the United States' recently-acquired view that *Ice* has relevance beyond the exceedingly narrow ruling in that case.

Third, the United States wholly fails to mention an even more recent federal court decision that clearly conflicts with the decision below, and also rebuts its speculation that courts will – at some unknowable future date – line up with the First Circuit and adopt its view of *Ice*. *United States* v. *AU Optronics Corp.*, No. C 09-00110 SI (N.D. Cal. filed Feb. 4, 2009), is a pending criminal price fixing case in which the United States is seeking up to $1 billion in fines under the alternative fine statute, 18 U.S.C. § 3571(d) – an amount that is *ten times* the fine that the Sherman Act authorizes. Expressly relying on the First Circuit's holding below that *Apprendi* does not apply to criminal fines, the United States filed a pretrial motion seeking an order that the evidence presented in the penalty phase need not be presented to the jury.

The district court denied the government's motion in an order issued a few days after the Petition in this case was filed. See *United States* v. *AU Optronics Corp.*, 2011 U.S. Dist. LEXIS 77494 (N.D. Cal. July 18, 2011). The court rejected the United States' argument that it "should follow the First Circuit," stating that it was "unconvinced" by the First Circuit's reliance on "*dicta*" in *Ice* to reach the conclusion that *Apprendi* does not apply to fines. *Id.* at *10-11. It also reasoned that "the sentencing decision in *Ice* – whether to impose concurrent or consecutive sentences – seems of a different character than the sentencing decision" in the case before it, which "much more closely resembles the sentencing

scheme in *Apprendi* than the binary decision between concurrent and consecutive sentences at issue in *Ice*." *Id.* at *11.

The *AU Optronics* decision confirms that the United States is laboring under a fantasy that the square conflict in the lower courts on *Apprendi* will magically disappear. The United States' underlying motion in that case illustrates the sort of sentences and sentencing procedures that it is now pursuing based on the decision below. Because the United States will continue to pursue fines exceeding the statutory maximum based on non-jury fact-finding in other district courts, and certainly in district courts in the First Circuit, the question presented in the Petition is ripe for review now.

B. Petitioner also demonstrated that this case is an appropriate vehicle for resolving the circuit conflict because the issue is squarely presented and the First Circuit expressly found that the question of *Apprendi*'s applicability is dispositive and outcome determinative in this case. See Pet. at 17; see also Pet. App. 2a ("any error under *Apprendi* was not harmless"), 32a-33a ("if we are wrong and if *Apprendi* does apply to criminal fines, it would be necessary to remand for resentencing"), 34a (same). The United States nonetheless now contends that the court of appeals "applied an incorrect harmless-error standard" and that "any Sixth Amendment violation was harmless," with the consequence that "petitioner would not be entitled to reversal even if it were to prevail on the question presented." Opp. at 16.

The United States' palpably desperate attempt to identify a vehicle problem is unavailing. The core *Apprendi* issue is cleanly and squarely presented in this case, and warrants this Court's review because of the indisputable conflict among the circuits that has

arisen on this vital constitutional question. The First Circuit's opinion all but screams out that result. Though the United States is wrong as regards the harmless error issue, that case-specific diversion does not present a reason for this Court to postpone deciding the fundamental constitutional issue presented here. The United States is free to defend the judgment on the alternative ground that the court of appeals erred in unanimously finding that any error on its part could not be harmless, but the threshold *Apprendi* issue still needs to be resolved.

Petitioner will fully respond to any such attempt to defend the judgment below at the appropriate time, but notes here that the United States is foreclosed from arguing (see Opp. at 16-18) that the First Circuit applied an incorrect legal standard when assessing harmless error because the standard that the First Circuit applied was the one that the United States itself proposed. The First Circuit applied the harmless error standard set forth in *United States* v. *Soto-Beniquez*, 356 F.3d 1, 46 (1st Cir. 2004), which held that "[a]n *Apprendi* error is harmless where the evidence overwhelmingly establishes" the facts "needed to justify the statutory maximum under which the defendants were sentenced." See Pet. App. 34a (quoting *Soto-Beniquez*). This is the very standard that the United States advocated in its brief to the First Circuit. See Br. for the Appellee, United States of America at 47, *United States* v. *S. Union Co.*, No. 09-2403 (1st Cir. Apr. 7, 2010) ("U.S. First Cir. Br.") (citing *Soto-Beniquez* as the applicable harmless error standard). Accordingly, any error on the First Circuit's part was invited by the United States and cannot provide a basis for a ruling in its favor. See *Puckett* v. *United States*, 129 S. Ct. 1423, 1428 (2009) ("If a litigant believes that an error has

occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited."); *cf. City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted in part because "there would be considerable prudential objection to reversing a judgment because of [jury] instructions that petitioner accepted, and indeed itself requested").[1]

In all events, the court of appeals' finding that the *Apprendi* violation was not harmless is fully supported by the record. As noted, Pet. at 4-5, the court of appeals acknowledged that Southern Union's primary defense at trial was that "the mercury was not a waste" that required a permit, but rather was "a commercial chemical product that the company intended to recycle," Pet. App. 7a, and the court found that "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," *id.* at 33a. This finding was amply supported by the record. See, *e.g.*, C.A. App. 1456-57 (Southern Union's environmental manager testifying that on July 9, 2004, only 100 days from the end of the period charged in the indictment (October 19,

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[1] Relatedly, the United States' argument (Opp. at 18) that "any *Apprendi* error is harmless so long as the evidence clearly establishes that petitioner violated RCRA for 120 days" – enough to authorize the "$6 million fine" – is not what the United States argued below. In the First Circuit, the United States conceded for purposes of the harmless error analysis that the fine was "$18 million," and that "the threshold necessary to support" such fine was at least "360 days of illegal storage." *See* U.S. First Cir. Br. at 48.

2004), he prepared a request to ship the mercury to a recycler); *id.* at 2297-99 (outside contractor testifying that in September 2004 – only 20 to 45 days before the end of the period charged – he discussed recycling the mercury with Southern Union's environmental manager). Given this and other evidence establishing that there were several points in time near the end of the indictment period when the jury could have concluded that Southern Union's intent first changed from storing the mercury as a commercial chemical product for recycling, to discarding it as a waste, the court of appeals correctly held that the district court's finding that the statutory maximum fine should be based on a violation of 762 days was not harmless error.[2]

The United States is likewise wrong that the court of appeals erred in finding that the *Apprendi* violation was not harmless because "[t]he evidence overwhelmingly established that the mercury was 'spent material,'" *i.e.*, contaminated or unusable without processing, and thus Southern Union was required to have a permit regardless of its intent to recycle. Opp. at 18-19. First, the government's "spent material" theory is unsound because if it had thought that the mercury was waste *ab initio*, it would have charged Southern Union with the illegal transportation of waste mercury to its Pawtucket, Rhode Island storage facility without a hazardous waste permit, *which it did not do*. In any event, testimony from both government and defense witnesses showed that the liquid mercury was "pure

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[2] This same evidence demonstrated that there was no harmless error as to the actual fine imposed of $18 million (the amount the United States conceded before the First Circuit) or even as to a fine of $6 million (the amount the United States now claims was the fine amount).

elemental mercury," was pourable, and was at least 99% pure, demonstrating that there was not "overwhelming" evidence that it was either contaminated or useless as a commercial product so as to render it "spent" material. See, *e.g.*, C.A. App. 2232, 2239-2240, 2242-2245, 3223 (Tr. Exh. 307), 2267-2268, 2284-2285, 2287-2290, 3136 (Tr. Exh. 185), 1891-1895, 1906-1907, 3360 (Tr. Exh. K-11).

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

Petitioner further demonstrated (Pet. at 18-25) that the decision below merits review because it is not faithful to the Fifth and Sixth Amendments, and undermines the fundamental protections that this Court identified in *Apprendi* and its progeny. In particular, petitioner demonstrated that the broad language of *Apprendi* and its progeny applies without qualification to criminal *punishment* and *penalties* – not merely incarceration – and that the historical analysis that this Court relied upon to derive the *Apprendi* principle applies with equal force to both criminal fines and incarceration. Petitioner then demonstrated that neither the dicta nor reasoning in *Ice* that the First Circuit relied upon provides a sound basis for its contrary conclusion that the *Apprendi* principle does not apply to fines.

The United States does not respond to petitioner's analysis of *Apprendi* and largely repeats the First Circuit's arguments with respect to *Ice*, without responding to most of petitioner's critique of those arguments. Opp. at 13-16. Since these issues go to the merits of the case, petitioners will not address them further here, other than to note that the parties' arguments at this stage make plain that the decision

below raises substantial and important constitutional issues that warrant this Court's review.

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

Petitioner also demonstrated (Pet. at 26-28) that the court of appeals' ruling presents a recurring and important question of criminal sentencing law that arises in a multitude of sentencing contexts and affects numerous criminal defendants. Petitioner's *amici* provide additional compelling evidence of the importance of the issue, demonstrating that fines are "a significant component of the penalties faced by individuals," particularly in white-collar prosecutions, and a "central component of the penalties faced by organizations," which cannot be incarcerated. Brief for the Chamber of Commerce of the United States of America and the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Petitioner at 2 ("Chamber/NACDL Br.").

Contrary to its representation below that the question whether the *Apprendi* principle applies to criminal fines "ha[s] far-reaching ramifications"[3] – and despite its acknowledgment that "a substantial number of federal and state statutes . . . calibrate criminal fines based on factual findings," Opp. at 12 – the United States now contends that "[t]he question presented does not recur with sufficient frequency to justify plenary review," *id.* at 13. Its principal argument is that *Apprendi* issues have "limited relevance in guilty-plea cases" and that "nearly all" defendants who receive fines are convicted pursuant to guilty pleas. *Id.* at 12. This argument, however,

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[3] *See* U.S. First Cir. Br. at 43.

proves too much. Nearly all federal criminal defendants who receive *any* type of sentence are convicted pursuant to guilty pleas,[4] yet this Court has never hesitated to address issues concerning the scope and application of *Apprendi*. See Pet. at 26. If anything, the prevalence of guilty pleas provides an additional reason for the Court *to address* the issue. As *amici* point out, "prosecutors regularly use criminal fines as bargaining chips in white-collar plea negotiations," and a "mere preponderance" burden of proof for fines would create a "perverse incentive" for "even innocent defendants . . . to plead guilty simply to avoid the risk of a large fine should they be convicted at trial." Chamber/NACDL Br. at 12, 13.

Finally, the fact that "relatively few cases have arisen" in which "the parties disputed the applicability of *Apprendi*'s holding to fines" is unsurprising, given that the United States itself apparently did not dispute the applicability of the *Apprendi* principle to fines before (and even after) *Ice* was decided. See Opp. at 13. Now that the United States has changed its position and a circuit split has developed, however, the Court should grant review to ensure that defendants' Fifth and Sixth Amendment rights are protected when they are sentenced to criminal fines.

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[4] U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* fig.C, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf (last viewed Oct. 27, 2011) (96.8 percent of all federal criminal convictions in 2010 involved guilty pleas).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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