

No. 11-94

IN THE
Supreme Court of the United States

SOUTHERN UNION COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF FOR PETITIONER

DANIEL R. BENSON	CARTER G. PHILLIPS*
ERIC D. HERSCHMANN	JEFFREY T. GREEN
DAVID E. ROSS	JACQUELINE G. COOPER
SETH B. DAVIS	SIDLEY AUSTIN LLP
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP	1501 K Street, N.W. Washington, D.C. 20005
1633 Broadway	(202) 736-8000
New York, NY 10019	cphillips@sidley.com
(212) 506-1700	

Counsel for Petitioner

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* Counsel of Record

QUESTION PRESENTED

Whether the Fifth and Sixth Amendment principles that this Court embraced 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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OPINIONS BELOW

The opinion 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. The petition for a writ of certiorari was timely filed on July 15, 2011. This Court granted certiorari on November 28, 2011, and has jurisdiction under 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

This case raises the question whether the principle that this Court recognized and applied to sentences of incarceration in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, applies equally to the imposition of criminal fines. At the outset, the Court might wonder what the argument could be that the *Apprendi* principle does *not* apply to criminal fines, given that this Court's explicit holding in *Apprendi* was that any fact that increases the "penalty" for a crime must be submitted to the jury and proved beyond a reasonable doubt, and criminal fines are unquestionably "penalties." Indeed, prior to the decision below, federal and state courts uniformly held (or assumed) that *Apprendi* applies to the imposition of criminal fines. Even the United States agreed that the *Apprendi* principle applies to fines.

The decision below is the first to hold otherwise. It did so based on the court of appeals' view that this Court's opinion in *Oregon v. Ice*, 555 U.S. 160 (2009), announced a whole new methodology that fundamentally narrowed the *Apprendi* doctrine and also suggested that a court can use non-jury fact-finding to impose a fine that exceeds the maximum fine set by the legislature, which is what happened in this case. As shown below, this reading of *Ice*, a case which did not involve a criminal fine, is fundamentally flawed and ignores the fact that *Ice* was an exceedingly narrow ruling. In particular, the court of appeals' historical understanding was at a minimum

incomplete, and in all events did not support its conclusion that fines are outside the scope of *Apprendi*.

This Court should reverse the court of appeals' holding because it would deprive criminal defendants of their fundamental jury trial rights in cases involving fines, and should vacate the fine imposed in this case (which was 360 times greater than that authorized by the jury's verdict).

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, 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

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

were temporarily displaced. The company placed residents in hotels and retained environmental experts to fully remediate the residential property and the storage facility. In all, Southern Union spent more than \$6 million in the remediation efforts. *Id.* at 6a; J.A. 148.² In addition to the remediation costs, Southern Union settled all civil suits brought by the residents of the affected apartment complex. 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; J.A. 104. 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,” as it had previously done. Pet. App. 7a. 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 use or recla-

² The district court acknowledged at the sentencing hearing that Southern Union “did step forward and attempt to do everything that it could to alleviate losses suffered by the individuals who were affected by the spill in terms of providing housing, providing food.” J.A. 147; *see also id.* at 150-51 (acknowledging that Southern Union “pa[id] for the entire clean-up and attempt[ed] to be of assistance to the local families that were victims”).

mation. Such storage requires no hazardous waste permit because the material remains a product, not a waste.

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.” Pet. App. 24a. For example, “Southern Union produced evidence that at several points throughout the indictment period, and as late as the 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.³

The jury instructions did not direct the jury to determine the number of days or the duration of any violation that it found. The district court instead 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); J.A. 135-36. The government did not request a special interrogatory that would have called upon the jury to determine the number of days or duration of any violation. The general verdict form simply tracked the indictment and asked whether Southern Union

³ See, e.g., C.A. App. 1456-57 (Southern Union’s environmental manager testified that on July 9, 2004, only 100 days from the end of the period charged in the indictment, he prepared a request to ship the mercury to a recycler); *id.* at 2297-99 (outside contractor testified 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).

was “guilty” or “not guilty.” Pet. App. 25a; J.A. 140. Under RCRA, a single day’s violation was sufficient for the jury to return a guilty verdict. 42 U.S.C. § 6928(d).

At sentencing, the district court applied 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 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 the maximum daily fine of \$50,000 times 762, the total 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. Pet. App. 39a-48a. The government conceded that the jury was not asked to find, and did not find, a particular number or span of days of illegal storage and that therefore “the issue requires judicial fact-finding.” See United States’ Response to Defendant’s Memorandum Concerning the Maximum Possible Fine, at 2 (June 1, 2009) (Dkt. 136) (“[T]he dispute over whether Southern Union violated the statute during that entire period or for some lesser number of days cannot be resolved by reference to the verdict.”). The government also conceded that each day of violation increases the maximum fine under the statute: “Southern Union also is correct that such fact-finding would increase the statutory maximum fine authorized by [RCRA] by

\$50,000 increments for each day of violation found by the Court. Under that provision, the maximum fine is \$50,000 for a one-day violation, \$100,000 for a two-day violation, \$150,000 for a three-day violation, and so on. Each increment represents a higher statutory maximum,” *Id.*; see also Br. for the Appellee, United States of America at 36, *United States v. S. Union Co.*, No. 09-2403 (1st Cir. Apr. 7, 2010) (“U.S. First Cir. Br.”) (“[e]ach daily increment represents a higher statutory maximum”).

The government nonetheless argued that *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 that is the maximum that can be supported by the jury’s verdict) to \$38 million (corresponding to 762 days of violation).

District Court Decision and Sentencing. The district court initially concluded *sua sponte* that Southern Union had 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.” Pet. App. 44a. Applying the *Apprendi* principle, 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.” *Id.* at 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 the district court’s 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.* at 46a; 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 “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; see also J.A. 146 (“In this case, the length of the violation is 762 days, which yields a maximum fine, as we have discussed, of \$38.1 million.”). After a sentencing hearing, the district court imposed a \$6 million fine and a \$12 million “community service obligation.” Pet App. 24a.⁴ Southern Union appealed both the verdict and sentence.

⁴The district court specifically noted at the sentencing hearing that its sentence did not include restitution. J.A. 148.

First Circuit Decision. In addition to rejecting Southern Union’s challenges to the verdict, the First Circuit rejected Southern Union’s challenges to the 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 U.S. First Cir. Br. at 38 (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 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

(“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.”); see also J.A. 163 (judgment form listing the amount of restitution to be paid by Southern Union as \$0). The court specified that the \$12 million community service obligation would be paid to several local organizations and into an endowed fund to be managed by the Rhode Island Foundation for grants in the fields of environmental education, remediation, and conservation. J.A. 154-55. None of this community service obligation would be paid to the residents of the apartment complex, with whom Southern Union had reached a settlement.

finer,” Pet. App. 2a, relying on two aspects of this Court’s opinion in *Oregon v. Ice*, 555 U.S. 160 (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 concluded that this dictum 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-29a.

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. 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 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.” *Id.* at 33a; see U.S. First Cir. Br. at 38 (“[T]he 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. 34a. In short, the court of appeals concluded that “any error under *Apprendi* was not harmless.” *Id.* at 2a.

The First Circuit denied rehearing and rehearing en banc.

SUMMARY OF ARGUMENT

1. Nothing in this Court’s reasoning or language in *Apprendi*, or in its subsequent decisions, provides a basis upon which to distinguish fines from incarceration for Fifth and Sixth Amendment purposes. *Apprendi*’s core holding was based on an extensive historical analysis, which concluded that judges during the years surrounding our Nation’s founding did not make factual determinations that elevated sentences. In reaching this conclusion, the Court relied on historical evidence indicating that judges had very little sentencing discretion with respect to felonies because substantive criminal laws generally were “sanction-specific,” 530 U.S. at 479, but also relied on historical evidence indicating that sentencing for misdemeanors – which were commonly punished by fines – was “substantially more depen-

dent on judicial discretion,” *id.* at 480 n.7. Based on this evidence, the Court concluded that the notion of judicial fact-finding being used to expand a fine or other punishment range beyond what was explicitly set by a legislature would have been unknown to the Founders.

This Court’s historical analysis in *Apprendi* makes plain that the *Apprendi* principle applies to criminal fines. This Court specifically considered and relied upon historical sentencing practices concerning fines in deciding *Apprendi*. Because *Apprendi* was derived in part from historical evidence and practices concerning the extent of judicial discretion in setting fines, the principle naturally applies 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 with respect to incarceration because fines were one of the most common forms of criminal punishment at the time of the Founding, while incarceration was rare. Moreover, *Apprendi*’s discussion of historical sentencing practices concerning fines confirms that the fine imposed by the district court here violates the Constitution. The district court found facts in order to increase the statutorily set maximum penalty under a fine-per-day provision in a criminal law, rather than to calibrate a sentence under a discretionary regime – a form of judicial fact-finding that had no analog at common law and that usurps the jury’s function as defined by the Constitution and this Court in *Apprendi*.

The express language of *Apprendi* confirms that it applies to the imposition of criminal fines. That language does not speak only to incarceration; indeed, there would have been no principled basis or

historical evidence for doing so. Rather, this Court's formulation of its holding encompasses punishment and penalties broadly, without any qualification or limitation. This Court's restatement of these principles in *Apprendi*'s progeny further confirms that it applies to all forms of criminal punishment.

Moreover, this Court already has applied the *Apprendi* principle to criminal fines. In *United States v. Booker*, 543 U.S. 220 (2005), this Court extended its holding in *Apprendi* to a context that indisputably involved criminal fines: the Federal Sentencing Guidelines. Those Guidelines address the imposition of fines, and this Court's holding in *Booker* applies to the Guidelines *in toto* – not merely to the portions that address sentences of incarceration. The remedy that this Court imposed – rendering the Guidelines advisory rather than mandatory – applies across the board.

The clear conclusion that *Apprendi* applies to fines is further confirmed by the fact that until the decision below, federal courts of appeals, federal district courts, state supreme courts, and commentators uniformly held (or assumed) that the principle applies to fines. Indeed, the United States itself apparently concurred in this view for nearly a decade after *Apprendi* was decided.

The fine imposed here violated *Apprendi* because the district court made a factual determination that increased the available sentence beyond the single-day fine that was the most that could be supported by the jury's verdict. Indeed, the district court made an even more fundamental Fifth and Sixth Amendment error by effectively determining that Southern Union was *guilty* of violating RCRA for 762 days, when the jury verdict could only support a single day of violation. Southern Union's right to trial by jury

entitled it to have the jury determine for what days, if any, within the indictment period the government proved beyond a reasonable doubt all of the elements of the violation charged. The district court impermissibly displaced the jury by making that finding of guilt for 761 of the 762 days identified in the indictment.

2. The court of appeals erred in holding that this Court's reasoning in *Oregon v. Ice*, 555 U.S. 160 (2009), suggests that the plainly-stated *Apprendi* principle does not apply to the imposition of criminal fines. *Ice* did not involve a criminal fine and is properly understood as a narrow decision that merely declined to extend the *Apprendi* principle to the multiple offense context.

The court of appeals erred in relying on cursory dictum in *Ice* concerning fines. This dictum is not entitled to any weight because this Court is not bound by its prior, off-hand statement on a point that was not "fully debated," which is the case here. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007) (plurality opinion). Moreover, even if the dictum in *Ice* is considered at all, it cannot remotely qualify as controlling authority on the question presented because the meaning of this Court's fleeting reference to fines is at a minimum unclear and in all events appears to address very different situations that are not at issue here.

The court of appeals also erred in holding that this Court's reliance in *Ice* on historical sentencing practices was a new "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." Pet. App. 28a. Yet even if *Ice* did break new methodological ground, the First Circuit's conclusion that judges historically had unfettered

discretion to determine fines without input from the jury is incomplete, if not incorrect. Early American statutes, for example, demonstrate that (1) there was variation in the discretion accorded to judges with respect to fines, and (2) juries were sometimes authorized to set fines. This latter point squarely distinguishes this case from *Ice* because the sentencing practice at issue here (the imposition of fines) was *not* performed exclusively by judges.

Further, even if the First Circuit were also correct that judges historically determined fines and had unfettered discretion to do so, the court of appeals' conclusion that fines are outside the scope of the *Apprendi* principle does not follow. This Court's derivation of the *Apprendi* principle was in part based on its own historical conclusion that judges had considerable discretion with respect to fines. Here, by contrast, the statute does not give the court discretion to find the number of days of violation and thus the maximum available fine. Because the *Apprendi* rule was derived from historical sentencing practices concerning the extent of judicial discretion with respect to a variety of criminal punishments, including fines, there is no basis upon which to distinguish fines from incarceration for *Apprendi* purposes.

3. The court of appeals was wrong in holding that defendants subject to criminal fines do not merit the same constitutional protections as defendants subject to incarceration and other criminal penalties. Criminal defendants subject to fines are entitled to other fundamental constitutional safeguards under the Fifth and Sixth Amendments. In addition, the drafters of the Bill of Rights included a specific provision, the Excessive Fines Clause of the Eighth Amendment, to protect criminal defendants from

government abuse of power with respect to the imposition of fines. These protections dispel any notion that fines are a less significant form of criminal punishment that do not merit full constitutional safeguards.

Finally, a holding that the *Apprendi* principle does not apply to fines would have widespread impact and adverse practical consequences. Fines are a significant element of criminal sentencing, for both corporations and individuals. Elimination of Fifth and Sixth Amendment constitutional guarantees for fines would undermine the efficacy of the justice system by making innocent defendants more likely to plead guilty. In addition, eliminating fines from the scope of *Apprendi*'s protections would have thorny implications for application of the Federal Sentencing Guidelines because it would mean that there was no need for this Court in *Booker* to have made advisory the Guideline provisions that address fines.

ARGUMENT

I. THE SENTENCE VIOLATED SOUTHERN UNION'S FIFTH AND SIXTH AMENDMENT RIGHTS.

A. The *Apprendi* Principle Applies To Criminal Fines.

There is no basis upon which to distinguish fines from incarceration for Fifth and Sixth Amendment purposes. Nothing in the reasoning or language of *Apprendi* itself, or in the Court's subsequent decisions, supports such a radical retrenchment of the scope of the *Apprendi* principle.

1. The *Apprendi* Decision.

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. It later 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 v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original). *Apprendi*’s core holding was based on an extensive historical analysis. In particular, the Court rejected the notion that a factual determination that elevates a sentence can be labeled a mere “sentencing factor” because “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” *Apprendi*, 530 U.S. at 478 (footnote omitted).

In support of the historical conclusion that judges during this period did not make factual determinations that elevated sentences, *i.e.*, did not determine “sentencing factors” that were exempt from the jury trial and reasonable doubt requirements, the Court relied on historical evidence demonstrating that judges 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. In addition, with respect to sentencing for misdemeanors during this period, the Court explained that judges likewise did not determine facts that elevated a sentence above that permitted

by the jury's verdict because sentencing for misdemeanors – which were generally punishable by “fines or whippings” and only rarely by incarceration – was “substantially more dependent on judicial discretion.” *Id.* at 480 n.7. Indeed, the Court expressly noted that judges’ discretion when imposing fines was subject only to the limitations that the fines “be proportionate to the offense, and, by the 17th century, that [they] not be ‘cruel or unusual.’” *Id.* (quoting J.H. Baker, *Introduction to English Legal History* 584 (3d ed. 1990)). In other words, the Court concluded that there typically were no statutory constraints on judges in imposing fines during this period and, as a result, found that the notion of judicial fact-finding being used to expand a fine range set by a legislature would have been unknown to the Founders.⁵

The Court also derived the *Apprendi* principle from historical sentencing practices in the United States following the adoption of the Bill of Rights. Specifically, the Court 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 (emphasis added). While acknowledging that “judges in this country have long exercised discretion” in imposing criminal sentences, the Court emphasized that judges’ discretion has always been employed

⁵ This discussion echoed the Court’s prior conclusion in *Jones v. United States*, 526 U.S. 227 (1999), that it is “unsurprising” that there are no statutes of the pre-Founding period that exemplify “the distinction between elements and facts that elevate sentencing ranges,” given “the breadth of judicial discretion over fines and corporal punishment” in misdemeanor cases and “the norm of fixed sentences in cases of felony.” *Id.* at 244-45 (citing sources describing the practices in both England and the colonies).

“*within statutory limits* in the individual case.” *Id.* (emphasis in original) (citing *Williams v. New York*, 337 U.S. 241, 246 (1949)).

The Court concluded that *all* of this historic evidence pointed to “a single, consistent conclusion: The judge’s role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.” *Id.* at 483 n.10. That is, 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.” *Id.* at 482-83 (emphasis in original).

2. The Historical Underpinnings Of The *Apprendi* Principle Foreclose Any Argument That The Principle Does Not Apply To The Imposition Of Criminal Fines.

This Court’s extensive historical analysis in *Apprendi* makes plain that the *Apprendi* principle applies to criminal fines. As shown, this Court specifically considered and relied on historical sentencing practices concerning fines in deriving the *Apprendi* principle. See *Apprendi*, 530 U.S. at 480 n.7 (explaining that sentencing practices at the time of the Founding concerning fines and other punishments for misdemeanors provided evidence for the Court’s conclusion that the Sixth Amendment jury trial guarantee precludes judges from determining

facts that expose the defendant to a punishment that exceeds the maximum he would receive if punished pursuant to the facts reflected in the jury verdict alone). In *Jones*, the Court drew this same link between historical sentencing practices concerning the imposition of fines and the principle that it later adopted in *Apprendi*. 526 U.S. 227, 244 (1999).

Justice Thomas' concurring opinion in *Apprendi* further relied upon evidence concerning the imposition of fines in documenting the *Apprendi* principle's historic foundations. See, e.g., 530 U.S. at 514 (Thomas, J., concurring) (citing the court's reasoning and holding in *United States v. Woodruff*, 68 F. 536, 538 (Kan. 1895), which overturned a criminal fine); *id.* at 505 (citing *Ritchey v. State*, 7 Blackf. 168, 169 (Ind. 1844)), which held that an indictment for arson must allege the value of the property destroyed because the statute set the fine based on the property's value). Indeed, in explaining the "original understanding" of facts that are elements of a criminal offense, Justice Thomas employed an example involving a criminal fine, rather than incarceration, as the form of punishment: "if the legislature, rather than creating grades of crimes, has provided for setting the *punishment* of a crime based on some fact – such as a *fine* that is proportional to the value of stolen goods – that fact is also an element." *Id.* at 501 (emphasis added).

In sum, both the majority opinion in *Apprendi* and Justice Thomas' concurring opinion confirm that the historical practices from which the *Apprendi* principle is derived included practices involving the imposition of criminal fines. Because the *Apprendi* principle is derived in part from historical evidence and practices concerning the extent of judicial discretion in setting fines, the principle naturally

applies to fines. That is, there is no separate common law history concerning the imposition of fines – as distinct from the imposition of incarceration or other forms of punishment – that could lead to a different interpretation of the Fifth and Sixth Amendments as applied to fines.

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 with respect to incarceration (which was at issue in that case). Fines were one of the most common forms of criminal punishment at the time of our nation’s Founding, while incarceration was a much less prevalent form of punishment. 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 emerge as a common penological practice in the United States until the late eighteenth and the early nineteenth century.⁶ See also *Graham v. Florida*,

⁶ Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. Rev. 621, 641-42 (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, 350 (1982) (noting that fines were “overwhelmingly the most common of the non-capital punishments” in the colonies, and that “imprisonment, although provided for as a punishment in some colonies, was not a central feature of criminal punishment until a later time”); Judge Nancy Gertner, *Juries and Originalism: Giving “Intelligible Content” to the Right to a Jury Trial*, 71 Ohio State L.J. 935, 939 (2010) (“Scalable punishments, punishments involving a term of

130 S. Ct. 2011, 2045 (2010) (Thomas, J., dissenting) (noting that “crimes in the late 18th-century colonies generally were punished either by fines, whipping, or public ‘shaming,’ or by death, as intermediate sentencing options such as incarceration were not common”).

Thus, the *Apprendi* principle derives from sentencing practices at the time of the Founding, and those practices primarily involved the imposition of capital punishment, fines and various forms of corporal punishment. It therefore would be anomalous indeed for this Court to adopt a rule that the *Apprendi* principle applies to incarceration (a form of punishment with which the Founders had little familiarity), but does not apply to criminal fines (a form of punishment with which the Founders were intimately familiar).

Moreover, this Court’s discussion in *Apprendi* of historical sentencing practices concerning fines confirms that the fine imposed by the district court here violates the Constitution. As noted, this Court concluded that common law judges exercised nearly unfettered discretion to impose fines as punishment for misdemeanors, 530 U.S. at 480 n.7, and cited this practice as one that the Founders would have understood to be consistent with the Sixth Amendment jury trial guarantee because judges exercising such discretion did not usurp the jury’s role or exceed any statutory limits set by the legislature, *id.* at 482 (noting “the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided”). That historical practice, however, bears no resemblance to what the district court

years, were not common until the end of the eighteenth century with the growth of penitentiaries.”).

did here: find facts that the jury did not find, and then use those purported facts to impose a fine that exponentially exceeds the maximum statutory penalty authorized by the jury's verdict alone. In other words, the judicial fact-finding that the district court engaged in here – finding facts in order to increase the statutorily set maximum penalty under a fine-per-day provision in a criminal law, rather than to calibrate a sentence under a discretionary regime – had no analog at common law.

Unlike the imposition of a fine in the absence of a statutory constraint, the district court blatantly usurped the role of the jury to set the parameters of the available punishment. Using a preponderance of the evidence standard, the district court found facts that caused it to impose a fine greater than the maximum fine that could be levied under RCRA based on the facts that the jury found beyond a reasonable doubt. Thus, the district court's imposition of the fine against Southern Union transgressed this Court's fundamental holding in *Apprendi* that "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* at 483 n.10.

3. The Express Language Of *Apprendi* And Its Progeny Confirms That The *Apprendi* Principle Applies To The Imposition Of Criminal Fines.

This Court's language in *Apprendi* itself does not speak only to incarceration. This Court's formulation of its holding encompasses punishment and sentencing broadly, 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); *id.* at 482-83 (jury must determine any fact that “exposes the criminal defendant to a *penalty*” that exceeds the maximum he would otherwise receive) (emphasis added); *id.* at 494 (“the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a *greater punishment* than that authorized by the jury’s guilty verdict”) (emphasis added).

This Court’s restatement of the *Apprendi* principle in subsequent cases confirms that it applies to all forms of criminal punishment, without qualification. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (“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 the law makes essential to [a defendant’s] *punishment*”) (internal quotation marks omitted; emphasis added). As the court of appeals acknowledged, this Court’s decisions applying and construing *Apprendi* “do not distinguish among types of ‘penalties’ or ‘punishment,’ leaving the broad language unglossed.” Pet. App. 27a.

The plain language of *Apprendi* and its progeny therefore establishes that the *Apprendi* principle applies to the imposition of criminal fines. There can be no dispute that a fine imposed upon an individual or organization convicted of a crime is a form of criminal “punishment” or “penalty.” See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492

U.S. 257, 265 (1989) (“at the time of the drafting and ratification of the [Eighth] Amendment, the word ‘fine’ was understood to mean a payment to a sovereign as *punishment* for some offense”) (emphasis added). Indeed, this Court recognized in *Apprendi* that fines are one of the oldest forms of criminal punishment. 530 U.S. at 480 n.7. Moreover, in other Sixth Amendment contexts, this Court has expressly stated that “[i]n using the word ‘penalty,’ [the Court does] not refer solely to the maximum prison term authorized for a particular offense,” but also to “other penalties” such as “probation or a fine.” *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 542 (1989) (addressing whether a crime carried sufficient penalties to be subject to the jury trial guarantee). Accordingly, the *Apprendi* principle, by its express terms, applies to the imposition of criminal fines.

4. This Court’s Application Of The *Apprendi* Principle Confirms That It Applies To Fines.

This Court’s application of the *Apprendi* principle in subsequent cases further confirms that it applies to forms of criminal punishment other than incarceration. *Ring*, of course, held that *Apprendi*’s holding applies to the imposition of the death penalty. *Ring*, 536 U.S. at 589 (“Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment”).

In *Booker*, 543 U.S. 220 (2005), this Court extended its holdings in *Apprendi* and *Blakeley* to a context that indisputably involves criminal fines: the Federal Sentencing Guidelines. *Id.* at 226-27 (“We hold that . . . the Sixth Amendment as construed in *Blakeley* does apply to the Sentencing Guidelines”).

Specifically, this Court held that the imposition of an enhanced sentence under the Guidelines based on the sentencing judge's determination of a fact (other than the fact of a prior conviction) that was not found by the jury or admitted by the defendant violates the Sixth Amendment. *Id.* at 230-44 (opinion of the Court by Justice Stevens). In order to remedy this problem and allow the Guidelines to continue to operate in a manner consistent with Congressional intent, the Court then invalidated provisions of the Sentencing Reform Act that have the effect of making the Guidelines mandatory. *Id.* at 244-71 (opinion of the Court by Justice Breyer).

This holding and remedy confirm that *Apprendi*, *Booker* and their progeny apply to the imposition of criminal fines because the Federal Sentencing Guidelines address the imposition of criminal fines. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, §5E1.2.(a) – Fines for Individual Defendants (2010) (providing that “[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine” and establishing a range of minimum and maximum fines for various offense levels); *id.* §8C1.1-8C4.11 (numerous provisions that address fines for organizational defendants). The Court's holding in *Booker* applies to the Guidelines *in toto* – not merely to the portions that address sentences of incarceration. In addition, the remedy that the Court imposed – rendering the Guidelines advisory rather than mandatory – applies to the Guidelines across the board, *i.e.*, to the Guideline provisions that address fines as well as to those that address incarceration. In short, *Booker* applied the *Apprendi* principle to sentencing guidelines that address criminal fines. Accordingly, this

Court has already applied the principles established in *Apprendi* to the imposition of criminal fines.

5. Judicial Consensus Prior To The Decision Below, And The United States' Previous Position, Confirm That The *Apprendi* Principle Applies To Criminal Fines.

Given the unqualified language of *Apprendi* and its progeny, and this Court's reliance in *Apprendi* on historical evidence involving the imposition of fines, it is not surprising that until the decision below, federal courts of appeals, federal district courts, state supreme courts, and commentators uniformly held (or assumed) that the *Apprendi* principle applies to the imposition of criminal fines. See Pet. at 12-17 & nn. 7-9; see also Cert. Reply 3-4 (discussing *United States v. AU Optronics Corp.*, 2011 U.S. Dist. LEXIS 77494 (N.D. Cal. July 18, 2011)), which expressly rejected the holding and reasoning of the First Circuit in this case). In particular, three federal courts of appeals have held that the *Apprendi* principle applies to the imposition of criminal fines and have vacated criminal fines as a result. See *United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010) (per curiam) (vacating a \$6 million fine imposed pursuant to 18 U.S.C. § 3571(d)⁷ as plain error because the fine was "supported only by the district court's own pecuniary loss finding" and "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

⁷ Pursuant to 18 U.S.C. § 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 of twice the defendant's gross gain or twice the victim's gross loss.

district court may fine the defendant”), *cert. denied*, 131 S. Ct. 3059, 3060 (2011); *United States v. LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006) (vacating a \$1 million fine imposed pursuant to § 3571(d) because “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”); *United States v. Yang*, 144 F. App’x 521, 524 (6th Cir. 2005) (vacating and remanding a \$5 million fine as plain error under *Booker* because it was “based on judge-found facts under a mandatory guidelines system”).

Indeed, as far as petitioner has been able to determine, before this case the United States itself took the position that the *Apprendi* principle applies to the imposition of criminal fines. Notably, the United States confessed error in *LaGrou*. See Br. and App. of the United States at 33-34, *United States v. LaGrou*, No. 05-3361 (7th Cir. Dec. 20, 2005) (“*LaGrou Br.*”) (“conced[ing] that the [*Apprendi*] rule does apply to criminal fines because they are penalties for criminal offenses” and that the fine imposed in that case had to be vacated and remanded for resentencing); *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”).⁸

Moreover, in *Pfaff*, the United States did not argue that the *Apprendi* principle is inapplicable to criminal fines. Instead, the United States (unsuccessfully) argued that there was no *Apprendi*

⁸ The United States expressly noted in its brief that “[t]his concession was made in consultation with the Office of the Solicitor General.” *LaGrou Br.* at 33 n.12.

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 United States' 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. See Opp. 10 (conceding that the United States "did not raise [the *Ice*] argument or cite *Ice*" in *Pfaff*). In addition, the United States did not seek *certiorari* in *Pfaff* on the sentencing issue. See also 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 10 ("Chamber/NACDL Br.") (noting that the Antitrust Division of the Department of Justice conceded until recently that *Apprendi* and *Booker* apply to the imposition of criminal fines).

The near consensus among federal and state courts that fines are subject to the *Apprendi* principle, and the United States' apparent concurrence in this view for nearly a decade after *Apprendi* was decided, confirm that this is the clear import of the language and reasoning of *Apprendi* and its progeny.

B. The Fine Imposed By The District Court Violated The Constitution.

The fine provision in the statute that was the basis for Southern Union's conviction, 42 U.S.C. § 6928(d), applies on a per-day basis at a maximum of \$50,000 for each day the statute was violated. See *id.* (specifying "a fine of not more than \$50,000 for each day of violation"). As shown, the district court violated *Apprendi* by making a factual determination that increased the available sentence beyond the single-day fine supported by the jury's verdict. More-

over, the district court made an even more fundamental Fifth and Sixth Amendment error by effectively determining that Southern Union was *guilty* of violating RCRA for 761 days more than the single day supported by the jury's verdict. See *Apprendi*, 530 U.S. at 476-77 (acknowledging that a criminal defendant is indisputably entitled "to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'") (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

At trial, the district court instructed the jury that the law required the government to prove beyond a reasonable doubt each of the following elements that comprise the crime: (1) knowingly storing a waste; (2) that is hazardous; (3) without a permit; and (4) knowing that the waste had a substantial potential to be harmful to others or to the environment. J.A. 129-30. The jury instructions did not direct the jury to determine the number of days or the duration of any violation that it found, and instead 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); J.A. 135-36. Accordingly, the jury's general guilty verdict supports a conviction for only a single day's violation.

The district court nevertheless based the statutory maximum fine on a RCRA violation of 762 separate days. Pet. App. 46a. In making this finding, the court necessarily determined that all four elements of the crime were proven for each of the 761 days of the indictment period that were *not* covered by the jury's verdict. In other words, the district court acted as a

second jury by weighing the evidence, assessing credibility, deciding contested facts and applying the law to determine the number of days that RCRA was violated.⁹ It did this, moreover, by bypassing the jury's beyond-a-reasonable-doubt standard that the Constitution requires for findings of criminal guilt, and instead applying a preponderance of the evidence standard. This is precisely the sort of judicial encroachment on the historic jury function that the Fifth and Sixth Amendments were designed to prevent. See *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (an accused's right under the Sixth Amendment is "of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty'").

The United States conceded below that "if the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), extends to fines, the district court was barred from raising § 6928(d)'s fine maximum based on its own findings concerning the number of days that Southern Union violated the statute." U.S. First Cir. Br. at 36. It also conceded that "the jury was not asked to find a particular number or span of days of illegal storage" and that "[e]ach daily increment represents a higher statutory maximum." *Id.* at 36, 38. Accordingly, because (as shown) the *Apprendi* principle does apply to criminal fines and because the district court imposed a fine greater than § 6928(d)'s fine maximum based on its own – rather than the jury's – findings concerning the number of days of

⁹ In this regard, the district court's factual finding that RCRA was violated for 762 days might well conflict with the jury's views. See *United States v. O'Brien*, 130 S. Ct. 2169, 2177 (2010) (expressing concern that a judicial finding for sentencing purposes that the defendant used a machine gun might conflict with the jury's belief that he used another weapon).

Southern Union's RCRA violation, the fine imposed by the district court violated Southern Union's Fifth and Sixth Amendment rights.¹⁰

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THIS COURT'S REASONING IN *OREGON* v. *ICE* SUGGESTS THAT THE *APPRENDI* PRINCIPLE DOES NOT APPLY TO THE IMPOSITION OF CRIMINAL FINES.

The court of appeals held that the plainly-stated *Apprendi* principle does not apply to the imposition of criminal fines based on its view that *Oregon v. Ice*, 555 U.S. 160 (2009), "has effected a change in the application of the *Apprendi* rule to the issue in this

¹⁰ Even though the court of appeals stated three times in its opinion that any *Apprendi* error in this case could not have been harmless, see Pet. App. 2a, 32a-33a, 34a, the United States nevertheless asserted in its brief in opposition that the *Apprendi* error somehow was harmless. Opp. 16. It is not clear whether the United States will press this "harmless error" argument on the merits, but any such argument would be unavailing because, as petitioner demonstrated in its reply brief, the court of appeals' finding that the *Apprendi* violation was not harmless is fully supported by the record. Cert. Reply 6-8. In addition, the United States is foreclosed from asserting (*see* Opp. 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. Cert. Reply 5-6. In all events, this Court should not reach any harmless error claim asserted by the United States. Although this Court has the authority to make a harmless error determination, it "do[es] not ordinarily do so." *Carella v. California*, 491 U.S. 263, 266-67 (1989) (*per curiam*); *see also Ring*, 536 U.S. at 609 n.7 (declining to reach Arizona's assertion of harmless error and remanding the case). It would be particularly appropriate here for this Court not to rule on any harmless error claim because the United States' claim is case-specific and record-intensive.

case.” Pet. App. 31a. *Ice*, however, did not involve the imposition of a criminal fine, and the court of appeals’ view that it “alter[ed] any previous broad understanding of *Apprendi*,” *id.* at 28a, is fundamentally flawed and ignores *Ice*’s exceedingly narrow ruling.

A. The *Ice* Decision.

In *Ice*, this Court addressed the following question: “When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?” 555 U.S. at 163. Consistent with this formulation of the question presented, which limited the Court’s inquiry in *Ice* to defendants “tried and convicted of multiple offenses,” the Court repeatedly emphasized that the multiple offense context was critical to its analysis, and also presented a question of first impression. See, e.g., *id.* (“[t]hus far, the Court has not extended the *Apprendi* and *Blakely* line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions”); *id.* at 167 (observing that *Apprendi* and its progeny all “involved sentencing for a discrete crime, not – as here – for multiple offenses different in character or committed at different times”).

This Court held that the *Apprendi* principle does not “extend[]” to the “imposition of sentences for discrete crimes” based on its conclusion that “[t]he decision to impose sentences consecutively is not within the jury function that ‘extends down centuries into the common law.’” *Id.* at 168 (quoting *Apprendi*, 530 U.S. at 477). “In light of this history,” the Court explained, “legislative reforms regarding the imposition of multiple sentences do not implicate the core

concerns that prompted [the Court’s] decision in *Apprendi*.” *Id.* at 169; see also *id.* at 168 (*Apprendi*’s “animating principle is the preservation of the jury’s historic role as a bulwark between the State and the accused at the trial for *an alleged offense*”) (emphasis added); *id.* at 170 (noting that *Apprendi*’s core concerns are legislative attempts to “remove from the [province of the] jury’ the determination of facts that warrant punishment for *a specific statutory offense*”) (emphasis added; alteration in original) (quoting *Apprendi*, 530 U.S. at 490).

This Court’s holding in *Ice* was thus narrowly tailored to a multiple offense context that was presented in that case and is not presented here. *Ice* is properly understood as a decision that declined to extend *Apprendi* to the multiple offense context; not a decision that either narrowed the *Apprendi* principle as it applies in the single offense context or adopted a new methodology for resolving *Apprendi* issues.

B. The Court Of Appeals Erred By Relying On Dictum In *Ice* Concerning Fines.

This Court in passing observed in *Ice*:

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 sentence; required attendance at drug rehabilitation programs or terms of community service; and *the imposition of statutorily prescribed fines* and orders of restitution. See Brief for State of Indiana et al. as *Amici Curiae* 11. Intruding *Apprendi*’s rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings.

Id. at 171-72 (emphasis added).

Citing this single, oblique reference to fines in *Ice*, the court of appeals held that the *Apprendi* principle does not apply to the imposition of fines. See Pet. App. 28a-29a. This reliance was misguided. As an initial matter, as noted, *Ice* did not involve any issue concerning a criminal fine. See Opp. 13 (acknowledging that *Ice* “involved consecutive sentencing, not fines”). Accordingly, under this Court’s long-standing precedent, the off-hand statement in *Ice* concerning fines cannot be controlling here because this Court is “not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated.” *Parents Involved in Cmty. Sch.*, 551 U.S. at 737 (plurality opinion) (quoting *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006)); see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) (“this Court does not decide important questions of law by cursory dicta inserted in unrelated cases”). The question whether the *Apprendi* principle applies to fines was not presented or briefed in *Ice* – much less “fully debated” – and therefore, the *Ice* dictum is entitled to no weight.

Even if the “cursory dict[um]” in *Ice* is considered, it has no persuasive force. The Court’s meaning in the passage at issue is far from clear. As a result, the dictum does not remotely permit a court to use non-jury fact-finding to impose a fine that exceeds the maximum fine set by the legislature, which is what occurred in this case. In this regard, the district court correctly observed that “[t]he best that can be said about” the *Ice* dictum is that this Court was saying 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). This reading is supported by the Court’s reference to judicial fact-finding “about the nature of the offense or the character of the defendant” – classic inquiries (e.g., about the particular defendant’s ability to pay) that sentencing courts undertake to assess the amount of a fine *within a prescribed range*. *Ice* does not suggest that this Court was addressing the fundamentally different type of judicial fact-finding that occurred here: judicial fact-finding to determine whether a crime was committed on any of the days charged in the indictment, and if so, on which days.

It is also possible that the Court was addressing yet another type of judicial fact-finding that is not at issue in this case: judicial fact-finding that occurs in the context of determining whether to impose a fine or fee *in addition to* a term of incarceration. In the relevant passage in *Ice*, this Court cited an amicus brief filed by a group of States as raising the concerns it identified. This amicus brief addressed fines and other “aspects” of a sentence in the situation where they are “imposed *in addition to* an executed term in prison.” See Brief of Indiana, et al. as *Amici Curiae* in Support of Petitioner at 12, *Oregon v. Ice*, No. 07-901 (emphasis added); see also *id.* (discussing convicted persons who are “*both* incarcerated and ordered to pay a fine” as an “additional” punishment) (emphasis added). Whatever concerns the Court may have suggested about applying *Apprendi* to fines in that circumstance, *Ice* did not present that issue and neither does this case, where the fine was imposed pursuant to a maximum daily fine provision in a statute and was the primary form of punishment.

In this regard, in explaining why it was “unconvinced” by the First Circuit’s interpretation of

the *Ice* dictum, the district court in *AU Optronics* noted that this Court's apparent concerns in *Ice* about extending the *Apprendi* principle to "accoutrements" of criminal sentencing, 555 U.S. at 171-72, are a remarkably "poor fit" when applied to multi-million dollar fines that are "the primary form of punishment the government seeks," rather than "an ancillary form of punishment." 2011 U.S. Dist. LEXIS 77494, at *12; see also *id.* ("The magnitude and primacy of such punishment puts it in a separate class from an ordinary criminal fine imposed against a defendant who faces incarceration."). When substantial monetary penalties are at stake and judicial fact-finding would increase the statutory maximum fine, the core Fifth and Sixth Amendment principles that underlie the *Apprendi* rule are squarely implicated. Accordingly, application of that rule would hardly "cut the rule loose from its moorings." *Ice*, 555 U.S. at 171-72. To the contrary, creating an exception to *Apprendi* for all criminal fines would eviscerate constitutional protections that this Court has long recognized apply in the sentencing context.

In sum, whatever this Court meant in *Ice* by its fleeting reference to fines, this dictum cannot remotely qualify as controlling authority on the question presented in this case, and is better understood as not at all directed at this case.

C. The Court Of Appeals' Historical Analysis Based on *Ice* Is Fundamentally Flawed.

The court of appeals was also mistaken in its view that this Court's reliance in *Ice* on historical sentencing practices was a new "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." Pet. App. 28a. *Ice*'s analysis of historical sentencing practices was hardly a "new" metho-

dology. As shown in Section I, the *Apprendi* principle is derived from common law and historical sentencing practices, and the Court's opinion extensively canvassed those practices with respect to fines as well as other forms of punishment. Indeed, this Court expressly acknowledged in *Ice* that the *Apprendi* principle is "rooted in the historic jury function – determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." 555 U.S. at 163; see also *id.* at 167-68 (noting that the *Apprendi* principle is "rooted" in "longstanding common-law practice") (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007)); *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).

Further, the First Circuit's attempt at historical analysis is itself fundamentally flawed. The court of appeals rested its holding on its belief that "historically, judges assessed fines without input from the jury." Pet. App. 30a. According to the panel, "[j]udges 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.'" *Id.* (quoting Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982)).

Although there is evidence supporting this historical conclusion – and petitioner acknowledges that the Court itself suggested this conclusion in *Apprendi* – it appears to be based on evidence of

sentencing practices for fines that were not, as here, limited by statute. Moreover, the history in fact is more complex and, with respect to colonial practice at the time of the Founding, not entirely clear. It appears to be true that English judges generally had discretion to determine the amount of any fine imposed.¹¹ Colonial practice is less susceptible to generalization. To begin with, conclusions about colonial history are difficult to draw because records of colonial sentencing practices are “almost non-existent.” Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L.J. 951, 963 n.43 (2003); see also Preyer, *supra*, at 347 (noting that “incompleteness of records” with respect to colonial penal practices is “a caution which cannot be emphasized too often”); *id.* at 328 (“[A]nyone attempting a synthesis of the application of penal measures in the thirteen colonies is confronted instantly with a dearth of scholarship on this particular subject.”).

Nevertheless, colonial statutes are informative and suggest variation in the discretion accorded to judges with respect to fines. Some colonial statutes prescribed fines without specifying any particular sum. See, e.g., *Body of Liberties*, art. 22, in *The Colonial Laws of Massachusetts* 29, 38-39 (W. Whitmore ed. 1889) (1641) (empowering court to impose a “reasonable fine” on any resident guilty of bringing a “vexatious suit”); *The Laws and Liberties of Massachusetts* 23 (M. Farrand reprint ed. 1929)

¹¹ Again, this appears to be the case because fines generally were not statutorily fixed. See 4 William Blackstone, *Commentaries* *371-72 (“Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offense to be punished by fine, in general, without specifying the certain sum”); J.H. Baker, *An Introduction to English Legal History* 584 (3d ed. 1990).

(1648) (empowering judges to fine persons guilty of fornication in an amount “most agreeable to the word of God”); *id.* at 36 (setting punishment for “openly or willingly defam[ing] any Court of [J]ustice” as “Fine, Imprisonment, Disfranchisement, or Bannishment as the qualitie and measure of the offense shall deserve”) (emphasis omitted). Other colonial statutes set a maximum fine but gave judges discretion to choose a lower amount. See, e.g., Preyer, *supra*, at 333 (robbery, larceny, and burglary punishable in the Massachusetts Bay colony by “fines of up to £5”); *id.* at 344 (petit larceny punishable in Pennsylvania by a “maximum of 15 lashes, 20 shilling fine, and ‘if able,’ restitution”). Still others prescribed an exact sum. See, e.g., *id.* at 341 (penalty in Virginia for a particular crime by a servant was a “one-year extension of service or fine of 1,000 pounds of tobacco”); Lawrence Henry Gibson, *The Criminal Codes of Connecticut*, 6 J. Am. Inst. Crim. L. & Criminology 177, 181 (1915) (“[h]ouse-breaking” punishable in Connecticut by “[a] fine of ten pounds”) (emphasis omitted). Accordingly, it was *not* invariably the case that colonial judges’ power to impose fines was “without limit.”

Moreover, the First Circuit’s suggestion that *Apprendi* does not apply to criminal punishments that historically were subject to judicial discretion also ignores evidence indicating that, to the extent that incarceration was used in common law England, the prison sentences were in some circumstances discretionary. See Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1261 (1987) (“common-law crimes could result in imprisonment for an indefinite period of time,” although “statutory crimes generally resulted in imprisonment for a

definite period”); see also Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097, 1125 & n.206 (2001) (“The sentences of imprisonment for misdemeanors were not capped at one year, as they are in modern America. In theory, judges could order unlimited imprisonment, though in practice they appear not to have imposed sentences of longer than five years.”). Blackstone himself lauded the “discretionary length of imprisonment, which [English] courts are enabled to impose,” because such sentences took into account “the aggravations or otherwise of the offense, the quality and condition of the parties, and . . . innumerable other circumstances.” 4 Blackstone, *supra*, at *371. Accordingly, if (as the First Circuit suggests) *Apprendi* does not apply to criminal punishments that were historically subject to judicial discretion, then *Apprendi* would not apply to incarceration either – but it most certainly does.

Nor is it true that the assessment of fines was never a jury function. Statutes from both before and soon after the Founding¹² indicate that jurors in some States set fines.¹³ In Virginia, for example, “[o]ne of

¹² In *Ice*, this Court’s consideration of the historical record included practices in “the early American States.” 555 U.S. at 169 & n.9.

¹³ Jurors’ power in these States to determine fines harks back to medieval England, where monetary penalties for both civil and criminal misconduct were set by juries. Such monetary penalties were called “ameracements.” See Massey, *supra*, at 1259 (“The amercement was an all-purpose monetary sanction used to penalize both criminal and civil wrongdoing.”). Significantly, as stipulated by Magna Carta, jurors, not judges, determined the amount of an amercement. See Magna Carta § 14 (“[A]nd none of the aforesaid ameracements shall be assessed, but by the oath of honest and lawful men of the vicinage.”); 4 Blackstone, *supra*, at *373 (“[T]he great charter also directs,

the Commonwealth's first statutes declared that the crime of maintaining the authority of Great Britain will be punished 'with fine and imprisonment, to be ascertained by a jury.'" Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 Chi.-Kent L. Rev. 937, 943 n.27 (2003) (quoting Oct. 1776 Va. Laws 15). Indeed, it appears that the default rule in Virginia was that juries, not judges, set fines. See Oct. 1786 Va. Laws ch. 64 ("[I]n every . . . information or indictment, the amercement which ought to be according to the degree of the fault . . . shall be assessed by twelve honest and lawful men . . ."); King, *supra*, at 943 ("In general, juries fixed fines in their verdicts while judges fixed other sentences, including any period of incarceration in jail . . .") (emphasis omitted).¹⁴

Kentucky, too, empowered juries to set fines. See, e.g., 1801 Ky. Acts ch. 84, § 28 (vote selling); *id.* § 32 (rioting); *id.* § 33 ("[g]oing with force and arms before the court"); *id.* § 37 (altering brands); see also *Commonwealth v. Watkins*, 6 Ky. (3 Bibb) 21, 22

that the amercement . . . shall be set . . . or reduced to a certainty, by the oath of a jury."). Although amercements fell out of use in England during the seventeenth and eighteenth centuries, the term itself did not fall out of use, and at least two of the early American States that provided for jury-determined fines (Virginia and Kentucky) called such fines "amercements." See Oct. 1786 Va. Laws ch. 64; 1801 Ky. Acts ch. 84, §§ 28, 32.

¹⁴ See also Oct. 1786 Va. Laws ch. 52 (officer who accepts bribe shall be "amerced and imprisoned at the discretion of a jury"); *id.* ch. 54 (any person who disturbs or arrests a minister during a service shall be imprisoned and amerced "at the discretion of a jury"); *Commonwealth v. Chapman*, 3 Va. (1 Va. Cas.) 138 (1803) (reporting that jury convicted and fined defendant \$450 for attempted bribery); *Commonwealth v. Alexander*, 14 Va. (4 Hen. & M.) 522 (1808) (reporting that jury convicted and fined defendant \$50 for being intoxicated while performing official duties).

(1813) (“[I]n all cases where the penalty imposed shall exceed five pounds, or shall be uncertain, the trial shall be by jury, who shall find the amount of the penalty or forfeiture incurred.”); King, *supra*, at 984 (“It was the [Kentucky] county jury that selected a misdemeanor’s sentence when the penalty was not mandatory, both before and after the reform act of 1798.”) (emphasis omitted). Alabama did the same, as did Indiana and Mississippi. See King, *supra*, at 990 app. (noting that Alabama’s 1807 code “allow[ed] juries to set fines but not imprisonment”); *Wynn v. State*, 1 Blackf. 28, 29 (Ind. 1818) (describing Indiana statute that authorized jury to set fine in prosecution for riot); *State v. Blennerhassett*, 1 Miss. (Walker) 7, 17 (1818) (“It is the duty of the jury to assess the fine according to the nature and aggravation of the offence.”). In addition, cases from the mid-1800s show that juries in Missouri, Tennessee, and Texas also set fines. See *Barada v. State*, 13 Mo. 94 (1850) (gaming); *Gillespie v. State*, 25 Tenn. (6 Hum.) 164 (1845) (usury); *Holt v. State*, 2 Tex. 363 (1847) (affray). Accordingly, the historical record indicates that early American juries sometimes set fines.

This history distinguishes this case from *Ice*. In *Ice*, it was undisputed that the jury historically “played *no* role in the decision to impose sentences consecutively or concurrently.” 555 U.S. at 168 (emphasis added); see *id.* at 169 (“Ice ‘has no quarrel with [this account] of consecutive sentencing practices through the ages’”) (alteration in original) (citing Br. for Resp’t at 32). Here, by contrast, the historical record indicates that in the years both before and following Ratification, at least five States (including Virginia, home of several prominent Founders) empowered juries to set fines. Thus, the imposition of fines is not a sentencing practice that historically

has been performed exclusively by judges. Compare *Ice, id.* at 168 (“[T]he choice [whether to impose sentences consecutively or concurrently] rested exclusively with the judge.”).

Moreover, even if the First Circuit had more carefully analyzed the historical record and it was invariably true that judges determined fines and had unfettered discretion to do so, the court of appeals’ conclusion that fines are outside the scope of the *Apprendi* principle does not follow. The court of appeals asserted that the unfettered judicial discretion with respect to fines that it posited was “in direct contrast with the Supreme Court’s reasoning in the *Apprendi* context” that common law judges had little sentencing discretion. Pet. App. 30a. But this is flatly wrong. As shown, this Court’s reasoning in *Apprendi* was in part based on its own historical conclusion that judges had discretion with respect to fines. Indeed, the Court *relied on this sentencing practice in deriving the Apprendi principle*. As shown, this Court in *Apprendi* canvassed and examined a variety of historical sentencing practices in reaching its conclusion that judges cannot make factual determinations that elevate the available sentence above that supported by the jury’s verdict. The Court relied on the fact that common law judges had little sentencing discretion with respect to felonies because criminal statutes at that time generally set fixed sanctions (which meant that judges did not impose penalties that exceeded the maximum authorized by the jury’s verdict). 530 U.S. at 479. But it *also* relied on its conclusion that common law judges generally had wide discretion in imposing fines and other punishments for misdemeanors without statutory limits (which also meant that judges did not impose penalties that exceeded

the maximum authorized by the jury's verdict). See *id.* at 480 n.7; see also *Jones*, 526 U.S. at 244.

Accordingly, the First Circuit's conclusion that criminal fines are outside of *Apprendi*'s scope is fundamentally flawed because it is based on the very historical conclusion concerning fines that this Court relied on to demonstrate that the *Apprendi* principle is rooted in and confirmed by historical sentencing practices. No amount of mental gymnastics can support the First Circuit's view that fines have a separate common law history from incarceration for *Apprendi* purposes, when the *Apprendi* rule was derived from historical sentencing practices concerning a wide variety of criminal punishments, including fines.

III. THE COURT OF APPEALS' HOLDING THAT DEFENDANTS SUBJECT TO CRIMINAL FINES DO NOT MERIT THE SAME CONSTITUTIONAL PROTECTIONS AS DEFENDANTS SUBJECT TO INCARCERATION AND OTHER CRIMINAL PENALTIES IS UNSOUND AND CREATES ANOMALIES.

The foregoing discussion demonstrates that neither this Court's decisions in the *Apprendi* line of cases, nor the historical practices from which the *Apprendi* principle is derived, support the First Circuit's holding that criminal fines – alone among criminal punishments – are not eligible for *Apprendi*'s protections. This section provides additional support for the conclusion that criminal fines should stand on the same constitutional footing as other forms of criminal punishment for *Apprendi* purposes.

A. Criminal Defendants Subject To Fines Should Be Included In *Apprendi*'s Protections.

The First Circuit's exclusion of fines from *Apprendi*'s protections is inconsistent with this Court's holdings that criminal defendants who are subject to criminal fines are entitled to other constitutional protections. These protections confirm that criminal fines are a significant form of punishment that can only be imposed when fundamental constitutional safeguards are observed.

The Constitution itself protects criminal defendants from government abuse of power with respect to the imposition of fines by prohibiting fines that are "excessive." U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). As this Court has explained, the purpose of the Excessive Fines Clause is "to limit the government's power to punish," specifically, the power "to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (emphasis in original) (quoting *Browning-Ferris*, 492 U.S. at 265).¹⁵ In this regard, the Court noted in *Browning-Ferris* that "[t]he Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights" in England, which included the imposition by the King's Judges of "heavy fines on the King's enemies" during the reigns of the Stuarts. 492 U.S. at 267; see also *id.* (noting

¹⁵ Although this Court has held that *in rem* civil forfeitures are subject to the limitations of the Excessive Fines Clause, *Austin*, 509 U.S. 602, it has noted that its "cases long have understood [the provisions of the Eighth Amendment] to apply primarily" to "criminal prosecutions and punishments," *Browning-Ferris*, 492 U.S. at 262.

that “some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed”).

The fact that the drafters of the Bill of Rights included a specific provision to limit government authority to impose criminal fines should dispel any notion that fines are a less significant or less important form of criminal punishment that do not merit full constitutional safeguards. To the contrary, constitutional safeguards are particularly vital with respect to fines because as this Court has observed:

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue.

Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (plurality opinion). For this reason, the Court continued, “it makes sense to scrutinize governmental action more closely” with respect to criminal fines because “the State stands to benefit.” *Id.*; cf. *Tumey v. Ohio*, 273 U.S. 510, 531-35 (1927) (Fourteenth Amendment Due Process Clause violated by Ohio statutory scheme that permitted defendants charged with violating Ohio’s Prohibition Act to be tried by a village mayor who received a fee for his service only if he found the defendant guilty and who was authorized to impose “large” fines that were divided between the State and the village).

Moreover, criminal defendants subject to fines are entitled to other fundamental constitutional safeguards. The rights accorded by the Sixth Amendment – including the rights to a speedy trial, confront witnesses, and obtain compulsory process – apply

“[i]n all criminal prosecutions.” U.S. Const. amend. VI. In addition, the Fifth Amendment’s grand jury guarantee applies to anyone charged with an “infamous crime,” and its due process guarantee applies to deprivations of “property” as well as deprivations of “life” and “liberty.” *Id.* amend. V. See also *Jeffers v. United States*, 432 U.S. 137, 155 (1977) (plurality opinion) (“Fines, of course, are treated in the same way as prison sentences for purposes of double jeopardy and multiple-punishment analysis”) (citing *North Carolina v. Pearce*, 395 U.S. 711, 718 n.12 (1969)); *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 838 (1994) (the imposition of a “serious” criminal contempt fine – \$52 million – “could not be imposed absent a jury trial”).

In addition, the First Circuit’s holding that the *Apprendi* principle does not apply to the imposition of criminal fines would especially compromise the Sixth Amendment rights of corporations, since corporations cannot be incarcerated and are principally penalized upon conviction through the imposition of criminal fines. The elimination of corporations from *Apprendi*’s protections would be inconsistent with longstanding precedent affording corporations constitutional protections in criminal proceedings. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (a corporation possesses a Fourth Amendment right against unreasonable searches and seizures and “can only be proceeded against by due process of law”), *overruled in part on other grounds by Murphy v. Waterfront Comm’n*, 378 U.S. 52 (1964); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam) (corporation entitled to protection against double jeopardy); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 780 n.15 (1978) (“It has been settled for almost a century that corporations are persons within

the meaning of the Fourteenth Amendment.”). Corporations are not second-class citizens under the Constitution and should not be treated as such for *Apprendi* purposes.

B. A Holding That The *Apprendi* Principle Is Inapplicable To Fines Would Have Widespread Impact And Adverse Practical Consequences.

Affirming the decision below would have far-reaching and adverse practical consequences. Fines are as significant a component of criminal sentencing today as they were historically. This is true for both individuals and corporations, but particularly for corporations because they cannot be incarcerated and are facing 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. U.S. Sentencing Comm’n, *2010 Annual Report* 32 (chart), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/ar10toc.htm. For corporations and other organizational defendants, 77% of criminal sentences in the federal courts involved fines. *Id.* at 38. 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). *Id.* In total, federal courts imposed fines on more than 7700 offenders in 2010. U.S. Sentencing Comm’n, *2010 Sourcebook of Federal Sentencing Statistics*, tbl.15, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table15.pdf. See also Chamber/NACDL Br. at 2 (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); *AU Optronics Corp.*, 2011 U.S. Dist. LEXIS 77494, at *12 (noting that the fine that the United States seeks “could amount to as much as \$1 billion”).

Affirming the First Circuit would affect criminal sentencing, for both individuals and corporations, in wide-ranging contexts. As the United States conceded below, there are numerous sentencing provisions in the United States Code and in state codes that can give rise to *Apprendi* issues because they contain maximum fine-per-day provisions. See U.S. First Cir. Br. at 43 (citing numerous federal statutes). Some of these federal criminal penalty provisions include 12 U.S.C. § 1847(a) (banking); 15 U.S.C. § 2615(b) (toxic substances control); 30 U.S.C. § 1463(b) (mineral mining); 33 U.S.C. § 1319(c)(1) & (2) (water pollution); and 42 U.S.C. § 6992d(b) (solid waste disposal). The United States also identified multiple statutes from more than 40 States that contain similar maximum-fine-per-day provisions. U.S. First Cir. Br. at 43-46.

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. For example, 18 U.S.C. § 3571, the federal criminal code’s general fine provision, establishes maximum fines for individuals and organizations convicted of felonies and misdemeanors (where the law setting forth the offense does not specify an amount), but the alternative fine provision in § 3571(d) specifies that where the defendant “derives pecuniary gain from the offense” or “the offense results in pecuniary loss” to the victim, “the defendant may be fined not more than the greater of twice the gross gain or twice the

gross loss.” It was § 3571(d) that gave rise to the *Apprendi* issues in both *Pfaff* and *LaGrou*. Similarly, the statute that prohibits fraud against the United States provides for a maximum fine of \$1,000,000 for an offense, *id.* § 1031(a), but also provides that the fine may exceed this maximum if “the gross loss to the Government or the gross gain to a defendant is \$500,000 or greater.” *Id.* § 1031(b)(1). In addition, the penalty provision in the Racketeer Influenced and Corrupt Organizations Act (“RICO”) provides that “a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.” See *id.* § 1963(a).

Elimination of Fifth and Sixth Amendment constitutional guarantees for these numerous fine provisions would leave significant, even “bet the company,” factual findings to judicial discretion cabined only by a preponderance of the evidence standard. Defense counsel would be left without even the most basic leverage of insisting to the prosecutor that he or she must prove a particular fact or point to the jury. Thus, *amici* Chambers/NACDL observed that “exempting criminal fines from Sixth Amendment scrutiny will undermine the efficacy of the justice system by making innocent defendants more likely to plead guilty.” Chambers/NACDL Br. at 5. This is because “prosecutors regularly use criminal fines as bargaining chips in white-collar plea negotiations,” threatening that the government will seek a large fine in the event of a conviction, but promising a smaller fine if the defendant will plead guilty. *Id.* at 12. This “perverse incentive” is “stronger still for organizational defendants” because fines are their principal form of criminal punishment (since they cannot be incarcerated) and fines can have significant

adverse consequences to their shareholders and employees. *Id.* at 13-14.

In addition, eliminating fines from the scope of *Apprendi*'s protections would have thorny implications for the application of the Federal Sentencing Guidelines. As noted, this Court in *Booker* made all of the Guidelines (both Guidelines for incarceration and for fines) advisory based on its conclusion that mandatory guidelines violate the *Apprendi* principle. If the *Apprendi* principle is not applicable to fines, however, then there was no reason to invalidate the provision of the Sentencing Reform Act that has the effect of making the Guidelines mandatory as they apply to fines, and Congress would be free to re-adopt this aspect of the Act. This would result in a bifurcated regime in which federal courts might have to apply both mandatory and advisory Guidelines to the same defendant – a regime that would be difficult for judges to apply and certain to create anomalies such as high mandatory fines even for those defendants who receive downward variances as to periods of incarceration or probation.

* * * *

At the end of the day, this Court said what it meant and meant what it said in *Apprendi*, namely, any fact that increases the “penalty” for a crime, whether incarceration, fine or other punishment, must be submitted to the jury and must be proved beyond a reasonable doubt. Nothing in any subsequent decision of this Court applying the *Apprendi* principle has departed from that fundamental rule. Certainly, the Court’s holding in *Ice* does not justify a wholesale departure that would strip criminal defendants of their fundamental Fifth and Sixth Amendment jury trial rights in cases involving fines. In this case the findings of the jury can support only a \$50,000 fine

and anything beyond that amount violates the Constitution.

CONCLUSION

The judgment of the court of appeals should be reversed, the sentence vacated, and the case remanded for resentencing.

Respectfully submitted,

DANIEL R. BENSON	CARTER G. PHILLIPS*
ERIC D. HERSCHMANN	JEFFREY T. GREEN
DAVID E. ROSS	JACQUELINE G. COOPER
SETH B. DAVIS	SIDLEY AUSTIN LLP
KASOWITZ, BENSON,	1501 K Street, N.W.
TORRES & FRIEDMAN LLP	Washington, D.C. 20005
1633 Broadway	(202) 736-8000
New York, NY 10019	cphillips@sidley.com
(212) 506-1700	

Counsel for Petitioner

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* Counsel of Record