No. 11-94

In the Supreme Court of the United States

SOUTHERN UNION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner was convicted under a statute that authorizes "a fine of not more than $50,000 for each day of violation." 42 U.S.C. 6928(d). The question presented is whether the Sixth Amendment, as interpreted in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), required that the jury rather than the trial court determine the number of "day[s] of violation" before the court could impose a fine greater than $50,000 pursuant to Section 6928(d).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 630 F.3d 17. The preliminary sentencing memorandum of the district court (Pet. App. 39a-48a) is reported at 2009 WL 2032097. A subsequent opinion of the district court, denying petitioner's motion for a judgment of acquittal or for a new trial, is reported at 643 F. Supp. 2d 201.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2010. A petition for rehearing was denied on February 17, 2011 (Pet. App. 49a-50a). On April 12, 2011, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including June 17, 2011. On June 9, 2011, Justice Breyer further

extended the time to July 17, 2011, and the petition for a writ of certiorari was filed on July 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the District of Rhode Island, petitioner was convicted of illegally storing a hazardous waste (mercury) without a permit, in violation of 42 U.S.C. 6928(d)(2)(A). The district court imposed a fine of $6 million and a term of probation. The court of appeals affirmed. Pet. App. 1a-38a.

1. Under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, it is a felony to knowingly store a "hazardous waste" without a permit. 42 U.S.C. 6928(d)(2)(A). Violation of that provision is punishable by "a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed * * * five years." 42 U.S.C. 6928(d). If the defendant is an organization and the offense is a felony, the court may impose a fine of "not more than $500,000," if that amount is greater than "the amount specified in the law setting forth the offense." 18 U.S.C. 3571(c).

RCRA defines "hazardous waste" as any "solid waste" that threatens substantial danger to human life or health or to the environment. 42 U.S.C. 6903(5). "Solid waste," in turn, includes "discarded material." 42 U.S.C. 6903(27). A material is considered discarded if it is stored or accumulated before, or in lieu of, disposal. 40 C.F.R. 261.2(b)(3). Discarded material also includes "spent materials," even if they are "recycled—or accumulated, stored, or treated before recycling—as specified" in the applicable regulations. 40 C.F.R. 261.2(a)(2)(i)(B) and (c) & tbl.1; see also *Howmet Corp.* v. *EPA*, 614 F.3d 544, 547-548 (D.C. Cir. 2010). A spent

material is "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. 261.1(c)(1). In sum, any hazardous waste (including certain spent materials and materials stored before, or in lieu of, disposal) requires a storage permit under RCRA.

Mercury is a highly toxic heavy metal that can poison and kill those exposed to it. Pet. App. 2a. When mercury is discarded or intended to be discarded, it is a hazardous waste under RCRA. See 40 C.F.R. 261.33(f) tbl.

2. In June 2001, petitioner, a natural-gas distribution company, began removing outdated mercury-sealed gas regulators from customers' homes and replacing them with mercury-free regulators. Pet. App. 3a. Petitioner at first hired an environmental firm to remove the mercury from the regulators and ship it to a recycling facility. Petitioner later discontinued that arrangement but nevertheless continued collecting malfunctioning, mercury-filled regulators and any loose liquid mercury that its employees found. *Id.* at 3a-4a. In 2001, a company official described the accumulated material as "spent" mercury and discussed keeping it in a "HAZWaste storage area." C.A. App. 1510, 1517, 2834-2835. As admitted by several company officials, "[petitioner] had no use for any of the mercury it accumulated." Pet. App. 4a; C.A. App. 903, 966, 1519. Petitioner's employees were thus instructed that whenever they found mercury, they were to "get rid of it." C.A. App. 1047, 1071, 2085.

Petitioner brought the mercury-filled regulators and liquid mercury to a brick building that it owned in Pawtucket, Rhode Island. Pet. App. 3a. Company officials admitted that the building was used for "[s]torage

of junk," and the evidence showed that the building contained broken tools and furniture, discarded equipment, and empty cans and drums. C.A. App. 569; see *id.* at 445-450, 574-575, 1520, 2805-2807, 2812, 2827. The company stored the mercury-filled regulators in kiddie pools on the floor of the building and the liquid mercury "in various containers inside a wooden cabinet, including a milk jug, a paint can, glass jars, and plastic containers." Pet. App. 4a. By July 2004, the brick building held 165 regulators and 1.25 gallons, or more than 140 pounds, of liquid mercury. *Ibid.*

Petitioner posted no signs warning of hazardous substances. Even though the brick building had suffered break-in attempts and petitioner knew that the property was frequently vandalized and occupied by homeless people, petitioner removed the only security guard from the property in 2004. Pet. App. 3a-4a; *United States* v. *Southern Union Co.*, 643 F. Supp. 2d 201, 206 (D.R.I. 2009), aff'd, 630 F.3d 17 (1st Cir. 2010); Gov't C.A. Br. 5. Petitioner's environmental services manager repeatedly asked the company to dispose of the "waste" in 2002, 2003, and 2004, but the company took no action. Pet. App. 4a-5a.

In September 2004, local youths broke into the brick building, found the liquid mercury, and spilled it in and around the building and back at their apartment complex. Other residents of the complex inadvertently tracked it into their residences. Petitioner did not discover the release until weeks later, on October 19, 2004. All five buildings in the apartment complex had to be evacuated, and the residents were displaced for two months during cleanup. Pet. App. 5a-6a.

3. A grand jury in the District of Rhode Island returned an indictment charging petitioner with illegally

storing mercury without a permit "[f]rom on or about September 19, 2002 until on or about October 19, 2004," a period of 762 days. Pet. App. 41a.

The district court instructed the jury that the "proof need not establish with certainty the exact date of the alleged offense," but rather that the "offense was committed on a date reasonably near the date alleged." C.A. App. 2652. The verdict form returned by the jury read as follows:

> As to Count 1 of the indictment, on or about September 19, 2002 to October 19, 2004, knowingly storing a hazardous waste, liquid mercury, without a permit, we the jury find the Defendant, Southern Union Company GUILTY.

Pet. App. 42a.

The presentence report (PSR) concluded that the maximum fine was $38.1 million, or $50,000 per day multiplied by 762 days. Pet. App. 39a. Petitioner objected to the PSR based on this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Pet. App. 40a. In *Apprendi*, this Court held that a sentence of imprisonment had been imposed in violation of the Constitution because the court, not the jury, had made the factual finding that was necessary to impose a sentence above the statutory maximum that would apply without the factual finding. Petitioner argued that *Apprendi*'s holding should be extended to criminal fines and that, because the jury did not find the specific dates on which its violation occurred, the maximum fine therefore was $50,000—the maximum for one day of violation.

The district court agreed that the Sixth Amendment, as interpreted in *Apprendi*, requires the jury to find any fact necessary to increase the statutory maximum fine.

Pet. App. 44a-45a. The court concluded, however, that the jury *had* found that petitioner violated RCRA for the full 762-day period alleged in the indictment. *Id.* at 46a-47a. From the indictment, the jury instructions, and the verdict form, the court discerned "clear and essentially irrefutable" evidence that the mercury was stored as early as September 19, 2002. *Id.* at 47a. The district court thus concluded that the maximum fine was $38.1 million. *Id.* at 48a.

The district court imposed a fine of $6 million. Separately, as a special condition of probation, the court required petitioner to perform "community service" by paying a total of $1 million to various community organizations and $11 million to endow a fund for issuing environmental grants. Pet. App. 34a & n.18.

4. The court of appeals affirmed. Pet. App. 1a-38a.

a. As relevant here, the court of appeals held that the Sixth Amendment permits a trial court, rather than the jury, to make the findings necessary to impose a criminal fine. The court reached that conclusion based on the "reasoning and logic" of this Court's decision in *Oregon* v. *Ice*, 555 U.S. 160 (2009). Pet. App. 30a.

In *Ice*, this Court held that the *Apprendi* rule does not govern certain factual findings by trial courts that increase the length of a defendant's incarceration. Ice was convicted of multiple offenses in a State that required by statute that the sentences be served concurrently, *unless* the trial court made a particular finding, in which case the sentences could be served consecutively. Ice contended that, under *Apprendi*, such a finding increased his punishment and must be made by the jury. This Court rejected that contention and held that the "decision to impose sentences consecutively is not within the jury function that 'extends down centuries

into the common law.'" *Ice*, 555 U.S. at 168 (quoting *Apprendi*, 530 U.S. at 477). Rather, that decision had consistently been made by courts, and the Court rejected any interpretation of the Sixth Amendment that would strip courts of that traditional function. *Ibid.*

Furthermore, the Court warned against "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries." *Ice*, 555 U.S. at 172 (citation omitted). The Court noted that the interpretation of the Sixth Amendment that Ice advanced would threaten to invalidate many other judicial sentencing determinations, such as "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." *Id.* at 171. "Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements," the Court stated, "surely would cut the rule loose from its moorings." *Id.* at 171-172.

In this case, the court of appeals followed this Court's analysis in *Ice*. The court of appeals first gave weight to the Court's "express statement in *Ice*, albeit in dicta, that it is inappropriate to extend *Apprendi* to criminal fines." Pet. App. 28a. The court then applied the "method of reasoning" that the Court used in *Ice*, *id.* at 29a, and found it "highly relevant that, historically, judges assessed fines without input from the jury." *Id.* at 30a. At the time of the Founding, the court observed, judges enjoyed considerably greater discretion to select the amount of a fine than they did in other aspects of sentencing. *Ibid.* The court concluded that in this case, as in *Ice*, the form of judicial factfinding at issue does not usurp any traditional jury function. The court of

appeals also pointed out that the dissenters in *Ice* advanced a broader reading of *Apprendi*, one that a majority of this Court rejected. *Id.* at 31a-32a. The court of appeals thus held that here, as the Court stated in *Ice*, "'[i]ntruding *Apprendi*'s rule into' decisions such as 'the imposition of statutorily prescribed fines . . . surely would cut the rule loose from its moorings.'" *Id.* at 32a (alteration in original) (quoting *Ice*, 555 U.S. at 171-172).

b. The court decided "[i]n the interest of judicial economy" to address whether, if a fine may violate the Sixth Amendment under *Apprendi*, any such error was harmless in this case. Pet. App. 32a. The court of appeals concluded that, if error occurred, the error was not harmless. *Id.* at 33a. According to the court, the government had not shown beyond a reasonable doubt "the facts necessary 'to justify the statutory maximum'" that the district court had calculated, *i.e.*, that petitioner treated the mercury as waste "throughout the period in the indictment." *Id.* at 34a (quoting *United States* v. *Soto-Beníquez*, 356 F.3d 1, 46 (1st Cir.), cert. denied, 541 U.S. 1074 (2004)).

The court of appeals noted that two matters would remain open if remand were required: whether petitioner could be fined up to $500,000 under 18 U.S.C. 3571(c), see p. 2, *supra*, and whether the $12 million "community service obligation" was properly considered not to be a fine at all, but restitution (which, under the court of appeals' precedent, is a civil remedy that does not implicate *Apprendi*). Pet. App. 34a-35a.

ARGUMENT

Petitioner contends (Pet. 11-17) that the Court should grant review to address a circuit conflict on whether *Apprendi* applies to criminal fines. The court

of appeals correctly applied *Ice*'s analysis in rejecting the extension of *Apprendi* to fines, and no other court of appeals has considered that question in light of this Court's decision in *Ice*. This case therefore does not present any circuit conflict that warrants this Court's review at this time. In addition, this case is a poor vehicle for addressing the question presented, because under a correct harmless-error analysis, any *Apprendi* error was harmless beyond a reasonable doubt. Further review is not warranted.

1. a. In *Ice*, this Court explained that, to establish a Sixth Amendment right to a jury determination, the defendant must do more than merely show that the applicable statutory law creates an "'entitlement' to predicate findings." 555 U.S. at 170. The holding of the *Apprendi* cases cannot be "wooden[ly]" applied to matters beyond "the central sphere of [those cases'] concern," namely, the historic function of the jury. *Id.* at 172 (citation omitted). The Court thus looked to historical practice and to the nature of modern sentencing legislation before concluding that some "statutory protections" that benefit the defendant by constraining judicial discretion do not invade the jury's constitutional role and, accordingly, do not warrant the application of *Apprendi*. *Id.* at 169; see *id.* at 168-172.

In this case, petitioner similarly seeks to expand the Sixth Amendment requirement of jury factfinding into a new context. This Court has never taken up "the question of whether the imposition of a fine falls under the *Apprendi* rule." Pet. App. 27a. The court of appeals in this case is the first appellate decision to apply the *Ice* analysis to answer that question. No other federal court

of appeals has done so; nor has any state supreme court.[1]

Of the cases that petitioner cites, only one postdates *Ice*. See *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010) (per curiam), cert. denied, 131 S. Ct. 3059, and 131 S. Ct. 3060 (2011). That decision did not apply the analysis in *Ice*; the government's brief in *Pfaff* did not raise that argument or cite *Ice*. See *id.* at 174-175; Gov't C.A. Br. at 208-211, *Pfaff*, *supra* (No. 09-1702). The relevance of *Ice* should therefore be regarded as an open question in the Second Circuit. Furthermore, answering that question should lead to a different outcome. The *Pfaff* panel conducted no historical inquiry; rather, it reasoned only that because the applicable statute required a factual finding (pecuniary loss) before the court could fine the defendant a particular amount, that finding must be made by the jury. 619 F.3d at 174-175. *Ice*, however, squarely rejected the notion that *every* statutory "'entitlement' to predicate findings" gives rise to a constitutional entitlement to have the jury make those findings. 555 U.S. at 170.

Petitioner's other two cases—only one of which set circuit precedent—were decided before *Ice*. See *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006); *United States* v. *Yang*, 144 Fed. Appx.

[1] In fact, as petitioner's amici concede (at 9-10), some state supreme courts have concluded (in distinct contexts) that this Court's decision in *Ice* sets out the analysis to follow in resolving questions concerning extensions of *Apprendi*. See *State* v. *Andrews*, 329 S.W.3d 369, 373-374 (Mo. 2010) (en banc), cert. denied, 131 S. Ct. 3070 (2011); *State* v. *Rudy B.*, 243 P.3d 726, 734 (N.M. 2010), cert. denied, 131 S. Ct. 2098 (2011); *People* v. *Nguyen*, 209 P.3d 946, 959 (Cal. 2009), cert. denied, 130 S. Ct. 2091 (2010). No court of appeals or state supreme court has read *Ice* as petitioner (Pet. 19-20) and its amici (Br. 8) do, *i.e.*, as confined to the context of multiple-count sentencing.

521, 524 (6th Cir. 2005) (reversing a fine based on *Apprendi* error without analyzing whether *Apprendi* applies to criminal fines). The Seventh Circuit's decision in *LaGrou*, which the Second Circuit cited in *Pfaff* (see 619 F.3d at 175), is inconsistent with *Ice* for the same reason that *Pfaff* is: it rested on the notion that because the applicable statute required a factual finding (pecuniary loss) before the court could fine the defendant a particular amount, that finding must necessarily be made by the jury.[2] Because *Ice* is intervening authority, the Seventh Circuit is likely to address the question afresh and to apply *Ice*'s holding and analysis rather than to view the matter as foreclosed by *LaGrou*. Cf., *e.g.*, *United States* v. *Nance*, 236 F.3d 820, 822 n.1 (7th Cir. 2000), cert. denied, 534 U.S. 832 (2001).

Thus, contrary to petitioner's contention (Pet. 17), petitioner would not have faced "a fundamentally different legal regime for the imposition of criminal fines" in other circuits. Rather, this Court refined the *Apprendi* analysis in *Ice*, and both federal and state courts have only begun to apply that refinement in the context of criminal fines. At present, this Court's review is not warranted.

b. Petitioner suggests (Pet. 26-28) that the question presented is sufficiently important that this Court should review it even before a genuine conflict develops in the federal and state courts where this question may arise. Petitioner's contentions lack merit.

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[2] Although the government conceded that point in *LaGrou*, that concession came well before this Court's decision in *Ice*. Gov't C.A. Br. at 33-34, *LaGrou*, *supra* (No. 05-3361). See also Chamber Amici Br. 10 (noting that the government conceded the point in other settings before *Ice*).

Citing statistics about the total number of defendants sentenced to pay fines, petitioner suggests (Pet. 26-27) that the question presented would affect a significant number of cases. Petitioner's statistics do not bear out that assertion. Because the Sixth Amendment permits sentences to be enhanced based on facts the defendant admits in a guilty plea colloquy, see, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004), the judge-versus-jury question presented here has, at most, limited relevance in guilty-plea cases. And many cases that result in fines involve guilty pleas. Indeed, petitioner emphasizes (Pet. 26-27) that most convictions of organizational defendants result in a fine. But the same statistics show that nearly all organizational defendants (93.8%) are convicted pursuant to a guilty plea. See U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* tbl.53 (2011), http://www.ussc.gov/Data_and_Statistics/Annual_Report_and_Sourcebooks/2010/Table53.pdf. Only six corporate defendants (4.1%) were convicted and fined after a trial in 2010. *Ibid.* Petitioner's principal example—a case involving a fine greater than $1 billion—likewise involves a guilty-plea conviction.[3] See also Pet. App. 38a n.20 (four out of five cases that petitioner identified as similar to this one for sentencing purposes "were resolved by plea agreements").

As petitioner notes (Pet. 27), a substantial number of federal and state statutes do calibrate criminal fines based on factual findings, such as the days-of-violation finding here. But since this Court decided *Apprendi*,

[3] See Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Announces Largest Health Care Fraud Settlement in Its History* (Sept. 2, 2009), http://www.justice.gov/opa/pr/2009/September/09-civ-900.html.

relatively few cases have arisen in the lower federal or state courts in which the parties disputed the applicability of *Apprendi*'s holding to fines, and even fewer cases have required the courts to resolve such a dispute. See, *e.g.*, *People* v. *Kozlowski*, 898 N.E.2d 891, 908-909 (N.Y. 2008) (reserving the question because any *Apprendi* violation was harmless), cert. denied, 129 S. Ct. 2775 (2009). And as discussed above, the court below is the first federal appellate or state supreme court to confront the issue since *Ice*. The question presented does not recur with sufficient frequency to justify plenary review in the absence of a conflict.

2. The court of appeals correctly heeded this Court's admonition against "expanding the *Apprendi* doctrine far beyond its necessary boundaries." *Ice*, 555 U.S. at 172 (citation omitted). As this Court observed in *Ice*:

> States currently permit judges to make a variety of sentencing determinations other than the length of incarceration. Trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, * * * *the imposition of statutorily prescribed fines* and orders of restitution. Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings.

Id. at 171-172 (citation omitted; emphasis added).

Ice, of course, involved consecutive sentencing, not fines, but its reasoning is nonetheless critical here. First, *Ice* establishes that the statutory "'entitlement' to predicate findings," such as those used in calculating a fine under RCRA, does not create a constitutional entitlement to have the jury make those findings. 555 U.S. at 170. Second, a historical analysis is necessary before

extending *Apprendi*. The Sixth Amendment is concerned with "legislative encroachment on the jury's traditional domain." *Id.* at 168 (citing *Apprendi*, 530 U.S. at 497). Accordingly, in determining whether the jury must find a particular fact, the Court considers "whether the finding of [that] fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" *Ibid.* (quoting *Harris* v. *United States*, 536 U.S. 545, 557 (2002) (plurality opinion)); see *id.* at 168-170.

At common law, the jury did not find facts governing the imposition of criminal fines, which were regularly imposed in misdemeanor cases. Instead, common-law judges had unfettered discretion to set the amount of criminal fines, subject only to the limitations that they "be proportionate to the offense, and, by the 17th century, that [they] not be 'cruel or unusual.'" *Apprendi*, 530 U.S. at 480 n.7 (citing J.H. Baker, *Introduction to English Legal History* 584 (3d ed. 1990)); see Pet. App. 30a-31a; see also John Jervis, *Archibold's Pleading, Evidence & Practice in Criminal Cases* 246 (26th ed. 1922) ("There is no general statutory limit to the amount of such fine, except the provisions of Magna Charta, and the Bill of Rights, against excessive and unreasonable fines and assessments.") (citation omitted). Likewise, in colonial America, the range of a criminal fine "was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid." Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982). Thus, just as there was "no encroachment * * * by the judge upon facts historically found by the jury" in *Ice*, 555 U.S. at 169, there is no encroachment, and thus no *Apprendi* violation, where a judge finds

facts necessary to set the amount of a criminal fine. Petitioner contends (Pet. 23-24) that the jury-trial right applies here even though the jury played no part in setting the amount of criminal fines at common law. This Court, however, considered and rejected indistinguishable arguments in *Ice*. See 555 U.S. at 170.

Furthermore, extending *Apprendi*'s rule to criminal fines would run counter to *Ice*'s approval of legislatively developed rules that benefit the defendant by constraining judicial discretion. "[S]tatutory protections" limiting judicial discretion in this way "serve[] the 'salutary objectives' of promoting sentences proportionate to 'the gravity of the offense,' and of reducing disparities in sentence[s]." *Ice*, 555 U.S. at 169, 171 (citations omitted). Numerous States have adopted such protections, including requirements to make days-of-violation findings (although, as noted above, the question presented has been litigated only rarely since *Apprendi*).

Petitioner argues that a fine that turns on the duration of an offense does not implicate the "classic" sentencing concerns "about the nature of the offense or the character of the defendant" that the Court had in mind in *Ice*. Pet. 20 (citation omitted). But, as the court of appeals explained, "this argument misses * * * the flow of the logic used by the *Ice* majority." Pet. App. 31a. "[H]istoric practice * * * at common law [was that] judges' discretion in imposing fines was largely unfettered." *Ibid.*

The court of appeals properly recognized that, in *Ice*, this Court "specifically cautioned that it would be senseless to use *Apprendi* to nullify sentencing schemes in which legislatures have curtailed the discretion judges had at common law." Pet. App. 31a. The decision of the court of appeals, therefore, correctly applied the twin

considerations that this Court identified in *Ice* in considering whether to extend the *Apprendi* rule to a new context. Further review is not warranted.

3. The court of appeals held that if any *Apprendi* error occurred, it was not harmless beyond a reasonable doubt. Pet. App. 34a. The court of appeals, however, applied an incorrect harmless-error standard, and the district court's judgment may be affirmed on the alternative ground that any Sixth Amendment violation was harmless. No jury could have reasonably concluded that Southern Union illegally stored the mercury for less than 120 days (approximately four months), the period necessary to support the $6 million fine that the district court actually imposed.[4] The indictment charged and the evidence overwhelmingly proved that petitioner illegally stored the mercury for more than two years. Because petitioner would not be entitled to reversal even if it were to prevail on the question presented, this case does not warrant plenary review.

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[4] The district court also imposed a $12 million "community service obligation" as a special condition of probation, but did not expressly state whether it considered that payment to be in the nature of restitution or a fine. Pet. App. 34a-35a. The court of appeals did not resolve how that payment should be characterized, but stated that the issue would be open in the event of any remand. According to the district court, the purpose of the grantmaking fund was to "pay forward * * * the damage that's been done to the community and to benefit people in the State of Rhode Island in a manner that relates to this crime in perpetuity." C.A. App. 2780. The community-service obligation therefore is not part of the fine, but resembles restitution. The courts of appeals unanimously agree that restitution is a civil remedy not subject to the holding of *Apprendi*. See, *e.g.*, *United States* v. *Milkiewicz*, 470 F.3d 390, 402-404 (1st Cir. 2006). Petitioner expressly does not challenge that consensus. Pet. 17 n.10.

a. "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error," and such an error thus does not require reversal if it is harmless. *Washington* v. *Recuenco*, 548 U.S. 212, 222 (2006); see also *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (failure to submit an element of the offense to the jury may be harmless error).

In the *Apprendi* context, the proper focus of harmless-error analysis is on the sentence that the district court actually imposed. If the sentence actually imposed does not exceed the statutory maximum supported by the jury verdict or defendant's admissions, no Sixth Amendment violation occurs at all. See, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 267 (2005) (respondent Fanfan's sentence, which was based only on the jury verdict, "d[id] not violate the Sixth Amendment," whereas respondent Booker's sentence violated the Sixth Amendment because the district court "*imposed* a sentence higher than the maximum authorized solely by the jury's verdict") (emphasis added); accord, *e.g.*, *United States* v. *Kelly*, 519 F.3d 355, 363 (7th Cir. 2008); *United States* v. *Eirby*, 262 F.3d 31, 39 (1st Cir. 2001) ("[M]ere exposure to a higher potential sentence does not violate *Apprendi*, [because] * * * the *Apprendi* doctrine [i]s concerned with *actual* sentences as opposed to *potential* sentences."). Any *Apprendi* error here, therefore, could only have been in *imposing* a $6 million fine, not in *considering* a maximum fine of $38.1 million.

The court of appeals, therefore, erred in requiring the government to prove "that the mercury was treated as waste *throughout* the period in the indictment," *i.e.*, for 762 days. Pet. App. 34a (emphasis added); see also *ibid.* (stating that an *Apprendi* error is harmless if the

evidence overwhelmingly establishes "the statutory maximum under which the defendants were sentenced") (citation omitted). That would be correct if the district court had imposed a $38.1 million fine. Because the district court imposed a $6 million fine, however, any *Apprendi* error is harmless so long as the evidence clearly establishes that petitioner violated RCRA for 120 days—about four months. See 42 U.S.C. 6928(d) (authorizing fine of $50,000 per day of violation).

b. The indictment charged petitioner with illegally storing mercury without a permit "[f]rom on or about September 19, 2002 until on or about October 19, 2004." Pet. App. 41a. Petitioner does not dispute that it stored the mercury without a permit beginning and ending on the dates alleged in the indictment. As the district court found, there was "clear and essentially irrefutable" evidence that the mercury was stored as early as September 19, 2002. *Id.* at 47a.

Rather, petitioner argues that the jury may have credited its defense that the mercury was a "commercial chemical product that the company intended to recycle" and thus required no permit. Pet. 4-5; Pet. App. 7a. The court of appeals thought that argument sufficient to rebut the government's harmless-error showing. But the court of appeals failed to recognize that RCRA required a permit to store spent mercury *regardless* of petitioner's purported intent to recycle the material (intent that was not credible in any event).

The evidence overwhelmingly established that the mercury was "spent material," and thus required a permit even if "accumulated, stored, or treated before" reclamation, *i.e.*, recycling as specified in the regulations. 40 C.F.R. 261.2(a)(2)(i)(B) and (c) & tbl. 1; see also 40 C.F.R. 261.6(c)(1); *Howmet Corp.*, 614 F.3d at 547; p. 2,

supra. A spent material is "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. § 261.1(c)(1). The evidence showed that the mercury at issue was used and contaminated and that it had little or no commercial value until it was purified by a four-stage distillation process. C.A. App. 1631-1637, 1710-1740, 1852-1854, 1881-1882, 1922, 1931-1933, 2238-2242, 2251-2265, 2269-2270, 3137-3151, 3156-3169.

The court of appeals thought it significant that "as late as the summer of 2004, [petitioner's] employees discussed a potential mercury recycling project." Pet. App. 33a. But whether or not company officials contemplated recycling the mercury, they had long since recognized that the mercury was useless without further processing and that it was waste. As early as 2001, a company official described the accumulated materials as "spent HG [mercury]" and discussed keeping them in a "HAZWaste storage area." C.A. App. 1517, 2834-2835. At trial, that official conceded that "spent" is "equivalent to waste." *Id.* at 1510. As several employees admitted, "[petitioner] had no use for any of the mercury it accumulated." Pet. App. 4a; C.A. App. 903, 966, 1519. Accordingly, despite petitioner's alleged intent to reclaim the mercury, a RCRA waste-storage permit was required.

Moreover, even if an intent to recycle spent material could be enough to defeat RCRA liability, petitioner's alleged intent to recycle was refuted by its own internal statements and by the deplorable conditions under which it stored the mercury. Company employees and documents repeatedly referred to the mercury as "waste" that the company wanted to "get rid of" and that required "disposal." Pet. App. 5a; C.A. App. 997,

1009-1010, 1047, 1071, 2085, 3131-3134, 3137-3169. The company stored the mercury in kiddie pools, a milk jug, a paint can, glass jars, and plastic containers inside an unsecured, dilapidated brick building that company officials admitted was used to store "junk." Pet. App. 3a-4a; C.A. App. 445-450, 569, 574-575, 1520, 2805-2807, 2812, 2827. In short, petitioner treated the mercury as a waste, not as a valuable commodity that it intended to recycle.

In light of the overwhelming evidence, no rational jury could have concluded that Southern Union illegally stored the mercury for less than the two years alleged in the indictment, let alone less than the four months necessary to support the fine imposed by the district court. Because any *Apprendi* error was harmless beyond a reasonable doubt, the fine imposed by the district court should be affirmed whether or not fines are subject to *Apprendi* analysis. Accordingly, this case is a poor vehicle for considering the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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