No. 11-94

In the Supreme Court of the United States

SOUTHERN UNION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Petitioner was convicted of a felony for knowingly storing hazardous waste without a permit 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 Constitution, 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 under Section 6928(d).

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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, 2010, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including June 17, 2010. On June 9, 2010, Justice Breyer further

extended the time to and including July 17, 2010, and the petition was filed on July 15, 2011, and was granted on November 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

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

1. Following numerous instances where companies discharged hazardous industrial wastes directly into the environment, H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3, 16-23 (1976) (*House Report*), Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, to address the serious problems posed by the mismanagement of hazardous wastes. See 42 U.S.C. 6901 (congressional findings).

As relevant here, Congress made it a felony to knowingly store or dispose of a hazardous waste without a permit. 42 U.S.C. 6928(d)(2)(A); see also *House Report* 30 (explaining that criminal penalties are appropriate in the case of knowing violations that pose serious threats to human health). "[U]pon conviction," the defendant is liable to be punished 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).

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). "[S]olid waste," in turn, includes any "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"—used materials that have become contaminated and require further processing before reuse—even if they are intended to be reclaimed. See 40 C.F.R. 261.1(c)(1), .2(a)(2)(i)(B) and (c) & Tbl. 1; see also 40 C.F.R. 261.1(c)(4) and (7) (reclamation is a specific type of recycling where a hazardous material is processed to recover a usable product). In sum, hazardous waste (including discarded and spent materials) generally requires a storage permit under RCRA.

Mercury is a highly toxic liquid metal that can poison and kill those exposed to it. Pet. App. 2a; see C.A. App. 645-646, 1186-1187, 1855. 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. Petitioner is a large, publicly traded company engaged in the transportation and distribution of natural gas throughout the nation. It is headquartered in Texas and operated a division serving customers in, among other places, Rhode Island. See J.A. 98, 146-147; C.A. App. 2749-2751.

In June 2001, petitioner began removing outdated mercury-containing gas regulators from customers' homes in Rhode Island and Massachusetts 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. *Id.* at 3a-4a. But petitioner discontinued that arrangement after five months. *Ibid.*

For the next two and one-half years, petitioner continued to collect malfunctioning mercury-filled regulators and any loose liquid mercury that its employees found, without any plan to reclaim the mercury or store it safely. Pet. App. 4a. Petitioner had "no intended use [for] the mercury" it accumulated. C.A. App. 903, 966, 1519. Company employees were instructed that whenever they found mercury, they were to "get rid of it." *Id.* at 1047.

Company officials decided to bring the mercury-filled regulators and "loose" liquid mercury to a brick building on a property petitioner owned in Pawtucket, Rhode Island. Pet. App. 3a-4a. The property "was not well maintained and had fallen into disrepair": the "perimeter fence was rusted," with several unrepaired gaps, and "[t]here were no security cameras." *Id.* at 3a. The building where the mercury was stored likewise "was in poor condition"; it had "many broken windows" and its walls "were covered in graffiti." *Id.* at 4a. The building had been used for "[s]torage of junk"; it contained broken tools and furniture, discarded equipment, and empty cans and drums. C.A. App. 569; see *id.* at 445-450, 574-575, 1520; see also *id.* at 2805-2807, 2812, 2827 (photos).

Petitioner stored the mercury-filled regulators in plastic kiddie pools on the floor of the building and the liquid mercury "in various containers in which it arrived, 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 (more than 140 pounds) of liquid mercury. *Ibid.* 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. *Id.* at 4a-5a. Even though petitioner "was well aware that the mercury was piling up and that it was kept in unsafe conditions," it did not "arrange for recycling," "secure the building," or "secure a storage permit," and it had "removed the single part-time security guard from the site." *Id.* at 3a-4a. Petitioner also did not post any signs inside or outside the building warning that it contained hazardous substances—even though petitioner "was aware that homeless people were staying * * * on the property" and that the property was "frequently vandalized." *Ibid.*

In September 2004, local youths broke into the brick building, found the liquid mercury, and spilled it in and around the building. Pet. App. 5a-6a. They also took some of the mercury back to their apartment complex, "where they spilled more on the ground, dipped cigarettes in it, and tossed some in the air." *Id.* at 6a; see C.A. App. 855-862. Other residents of the complex inadvertently tracked the mercury into their residences. Pet. App. 6a. Petitioner did not discover the release until weeks later, when an employee "found pancake-sized puddles of mercury around the brick building." *Ibid.* Rather than immediately contact state or local fire department officials (the designated points of contact for a mercury spill), petitioner immediately began shipping the mercury offsite. *Ibid.* Petitioner eventually did contact the authorities, and all five buildings in the apartment complex had to be evacuated. *Ibid.* The residents were displaced for two months during cleanup and had to undergo testing for mercury poisoning. *Ibid.*

3. A grand jury in the District of Rhode Island returned an indictment charging petitioner with knowingly storing mercury without a permit, in violation of

42 U.S.C. 6982(d)(2)(A), "[f]rom on or about September 19, 2002 until on or about October 19, 2004," a period of 762 days. J.A. 104-105. At trial, petitioner did not contest that it stored the mercury without a permit for the entire period alleged in the indictment. C.A. App. 410-429, 1045-1047, 1102-1104, 1226-1230, 1292-1295, 1520, 2589-2633; J.A. 142-144; see also Pet. App. 41a-42a. Instead, it contended that it intended to reclaim the mercury, and so a permit was not required. Pet. App. 7a.

In instructing the jury, the district court stated that the government "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." J.A. 128.[1] The jury returned a guilty verdict, which read:

> 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.

J.A. 141.

The presentence investigation report (PSR) concluded that the maximum fine available was $38.1 million, or $50,000 per day multiplied by 762 days of illegal storage. Pet. App. 39a; PSR ¶ 25; see 42 U.S.C. 6928(d). Petitioner objected to the PSR based on *Apprendi* v.

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[1] Petitioner cites (Br. 5, 8, 30) a different jury instruction that it says allowed the jury to convict if petitioner stored the mercury illegally "at *some point* in time." The cited instruction did not address the alleged dates of the violation; rather, it was part of the court's explanation about how to determine whether petitioner intended to reclaim the mercury "in the future," or instead "at some point in time" had abandoned it. J.A. 135-136.

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 prison term above the statutory maximum that would apply without the factual finding. 530 U.S. at 490. Petitioner argued that *Apprendi* should be extended to criminal fines and that, because the jury did not find the specific dates of violation, the maximum fine was $50,000—the maximum for one day of violation. Pet. App. 40a; C.A. App. 3729.

The district court agreed that the Constitution, 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 period alleged in the indictment. *Id.* at 46a-47a. The court relied on the indictment, the jury instructions, the verdict form, and the "clear and essentially irrefutable evidence" at trial about the length of the violation. *Id.* at 47a. The district court concluded it could impose a fine up to $38.1 million. *Id.* at 48a; C.A. App. 3734 (adopting PSR).

The district court imposed a $6 million fine. J.A. 154, 163. 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. J.A. 154-155, 162-163.

4. The court of appeals affirmed. Pet. App. 1a-38a. As relevant here, the court held that *Apprendi* permits a trial court, rather than the jury, to make factual findings necessary to impose a criminal fine. The court re-

lied on the "reasoning and logic" of *Oregon* v. *Ice*, 555 U.S. 160 (2009). Pet. App. 30a.

In *Ice*, this Court held that *Apprendi* does not extend to factual findings by trial courts that increase the length of a defendant's incarceration by permitting consecutive, rather than concurrent, sentences. 555 U.S. at 168, 172. *Ice* relied on the historical record showing that the consecutive-versus-concurrent sentence determination had consistently been made by courts, and the Court rejected any interpretation of the Sixth Amendment that would strip courts of that "traditional" function and overturn "legislative innovations * * * that seek to rein in the discretion that judges possessed at common law." *Id*. at 168, 171.

Ice warned against "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries." 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 the Court's analysis in *Ice*. The court first gave weight to the "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, finding 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.*; see *id.* at 31a ("[A]t common law, judges' discretion in imposing fines was largely unfettered."). The court concluded that in this case, as in *Ice*, the form of judicial factfinding at issue does not usurp any traditional jury function. *Id.* at 30a-31a.

The court of appeals rejected petitioner's broader reading of *Apprendi*, explaining that a majority of this Court already rejected it in *Ice*. Pet. App. 31a-32a. The court thus held that here, as in *Ice*, extending *Apprendi*'s rule to the imposition of statutorily prescribed fines "would cut the rule loose from its moorings." *Id.* at 32a (quoting *Ice*, 555 U.S. at 172).[2]

SUMMARY OF ARGUMENT

The constitutional rule announced in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), should not be extended to criminal fines.

A. In *Apprendi*, this Court concluded that a jury must find any fact (other than a prior conviction) that increases a sentence of imprisonment beyond the otherwise-applicable statutory maximum. The Court

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[2] The court determined that, if *Apprendi* applies to fines, the case would need to be remanded because any *Apprendi* error was not harmless. Pet. App. 33a-34a. The court also noted that two other matters would remain open on remand: whether petitioner could be fined up to $500,000 under 18 U.S.C. 3571(c) and whether the $12 million "community service obligation" should be characterized as a fine or a condition of probation. Pet. App. 29a n.14, 34a-35a.

explained that permitting a judge to find a fact that results in an increased maximum sentence of imprisonment essentially punishes the defendant for a greater offense than the offense of conviction, thereby circumventing the constitutional rule that the jury must find guilt on every element of a crime beyond a reasonable doubt. The Court has applied that rule in the context of increased terms of imprisonment and eligibility for the death penalty, explaining that the rule is necessary because factfinding increases the defendant's exposure to the loss of liberty or life.

The Court has not applied the *Apprendi* rule to criminal fines, and in *Oregon* v. *Ice*, 555 U.S. 160 (2009), the Court counseled hesitation before expanding the rule's scope. In holding that the *Apprendi* rule should not be extended to facts that authorize consecutive sentences, the Court rejected the view that any fact increasing the "quantum of punishment" must be found by the jury, *id.* at 166 (citation omitted); instead, it advised that extension of *Apprendi* depends on consideration of the doctrine's core purposes, the historical role of the jury, and the potential effect on the administration of justice.

B. Criminal fines do not implicate the core concerns underlying *Apprendi*. This Court has long recognized that criminal fines, even significant ones, raise fundamentally different concerns from terms of incarceration or the death penalty, because the former involve a deprivation of property, the latter a deprivation of liberty or life. The Court has defined both the jury-trial right and the right to counsel primarily based on whether the defendant faces a term of imprisonment, and it has recognized that those rights sometimes do not apply at all when the only possible punishment is a fine. Because fines do not implicate the same life and liberty concerns

as terms of incarceration or death, the *Apprendi* rule should not be extended to them.

Moreover, the factual findings that influence fine amounts do not raise the concern in *Apprendi* about adding an element that essentially defines a greater offense. Here, as in other instances involving fines, the sentencing judge's role is to establish the appropriate punishment for the defendant's course of conduct once the jury already has found that the defendant committed the statutory violation charged. Judicial factfinding in that setting does not result in punishment for a greater crime than that stated in the indictment.

C. The historical record confirms that fines lie outside the jury's traditional domain. As this Court recognized in *Apprendi*, English common-law judges had substantially more discretion with respect to fines than they did in imposing terms of imprisonment or death, and that tradition continued in the early United States. In common-law England, judges had nearly unfettered discretion in setting fine amounts, and the same was true in many American Colonies and early States. Although some early American statutes set maximum fine amounts, determining the amount of a criminal fine remained a judicial function.

A few English and American statutes of this period set fine amounts based on particular facts. The practice under these statutes was that judges found the facts that influenced the fine amount. That practice was confirmed by *United States* v. *Tyler*, 11 U.S. 285 (1812), where this Court considered an early federal statute prohibiting putting goods on a carriage for foreign transport. The statute set the penalty for the crime at a fine of four times the value of the goods; the Court held that "no valuation by the jury was necessary" be-

cause the court was responsible for imposing the fine. *Id.* at 285-286.

Petitioner cites a smattering of state statutes authorizing juries to impose fines, but these reflected a few States' experimentation with jury sentencing, not an understanding of the common-law role of the jury. Those statutes characteristically did not place factfinding responsibility on juries, but instead transferred sentencing discretion to them wholesale—which is quite different from the extension of *Apprendi* that petitioner seeks. Petitioner also identifies a few state decisions where juries found the value of goods in larceny cases, but these also do not demonstrate a consensus in common-law practice. The prevailing practice in England and the United States was that judges, not juries, would find facts to set fine amounts.

D. Applying the *Apprendi* rule to criminal fines would significantly undercut state and federal legislative reforms to guide judges' sentencing discretion. Many state and federal statutes allow courts to set fines based either on the number of days of a violation or the gain or loss resulting from the violation. These provisions were adopted in order to proportion fines to the harm the defendant's offense caused and to treat similarly situated defendants alike.

Requiring juries to find these facts would not only undo state and federal legislative determinations, it would create significant complications and risks of unfairness. For example, the full extent of the gain from the offense or loss to the victims may not be known at the time of the indictment, particularly when calculating gain or loss is complex. And proving gain or loss to the jury may require the introduction of evidence that is prejudicial to the defense or confusing to the jury. Bi-

furcated trials may become necessary. The Constitution has never been understood to require those results before a court imposes fines.

ARGUMENT

THE CONSTITUTION PERMITS A JUDGE TO DETERMINE THE NUMBER OF DAYS OF A CONVICTED DEFENDANT'S VIOLATION IN ORDER TO SET THE AMOUNT OF A CRIMINAL FINE UNDER 42 U.S.C. 6928(d)

A. *Oregon* v. *Ice* Makes Clear That Any Expansion Of *Apprendi* Requires Careful Consideration Of The Doctrine's Purposes, Historical Practice, And Impact On The Administration Of Justice

1. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court considered whether the Constitution requires that the jury find facts that increase a sentence of imprisonment beyond the statutory maximum that would apply without the finding. Apprendi had pleaded guilty to violating a New Jersey firearm-possession statute with a ten-year statutory maximum term of imprisonment. *Id.* at 469-470. The State sought, and the judge applied, a sentencing enhancement on the ground that Apprendi committed the firearm offense with a racially biased purpose; the enhancement raised the maximum sentence from 10 to 20 years of imprisonment, and Apprendi received a 12-year term. *Id.* at 470-471.

This Court held the sentence unconstitutional. *Apprendi*, 530 U.S. at 476, 491-492. The Court observed that the due process and jury-trial rights, taken together, require a jury to find every element of a crime beyond a reasonable doubt before a defendant is deprived of his liberty. *Id.* at 476-477. In Apprendi's case, the Court explained, the biased-purpose requirement should be treated like an element because it substan-

tially increased the maximum prison sentence available, essentially making firearm possession with a biased purpose a greater offense than simple firearm possession. *Id.* at 476, 494 n.19, 495-496. The Court held, in the context of an offense punished by imprisonment, that "any fact" other than the fact of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

Two years later, the Court applied *Apprendi* in *Ring* v. *Arizona*, 536 U.S. 584 (2002), which held Arizona's death-penalty statute unconstitutional insofar as it allowed the sentencing judge, rather than the jury, to find aggravating circumstances that made a defendant eligible for the death penalty. *Id.* at 609. The Court explained that, as in *Apprendi*, the state statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense'" and therefore must be found by a jury. *Ibid.* (quoting *Apprendi*, 530 U.S. at 494 n.19).

The Court then extended *Apprendi* in a series of cases challenging judicial factfinding in establishing the range of imprisonment. See *Blakely* v. *Washington*, 542 U.S. 296, 303-305 (2004) (factfinding permitting a sentence in excess of the standard range in a state guidelines sentencing scheme); *United States* v. *Booker*, 543 U.S. 220, 230-244 (2005) (factfinding resulting in an increased sentencing range under mandatory federal Sentencing Guidelines); *Cunningham* v. *California*, 549 U.S. 270, 288-289 (2007) (finding of aggravated circumstances permitting imposition of upper-term sentence under state determinate-sentencing scheme).

Significantly, each of these cases involved judicial factfinding that increased the maximum possible sen-

tence of imprisonment for a particular offense and resulted in a longer term. See *Blakely*, 542 U.S. at 299-300 (finding of deliberate cruelty increased the maximum possible sentence for kidnaping from 53 to 90 months of imprisonment); *Booker*, 543 U.S. at 227-228 (Booker: drug-quantity finding increased maximum sentence available for drug possession with intent to distribute from 262 months to life imprisonment; Fanfan: drug-quantity finding increased maximum sentence available for drug possession with intent to distribute from 78 to 235 months of imprisonment); *Cunningham*, 549 U.S. at 275-276 (finding of six aggravating factors increased maximum sentence available for child sexual abuse from 12 to 16 years of imprisonment). This Court, then, has applied *Apprendi* only in cases involving imprisonment or the death penalty, where a fact makes the defendant eligible for a sentence of imprisonment or death beyond the otherwise-applicable statutory maximum and the defendant received the enhanced sentence.

2. In *Oregon* v. *Ice*, 555 U.S. 160 (2009), the Court clarified that *Apprendi* should not be extended beyond those circumstances without careful consideration of the rule's purposes, historical origin, and practical effect. The particular question in *Ice* was whether, once a defendant has been tried and convicted for multiple offenses, a jury must determine a fact necessary to impose consecutive sentences. *Id*. at 163.

Ice was sentenced under an Oregon law that allows a judge to impose consecutive sentences for two offenses arising out of the same course of conduct only if the second offense showed the defendant's willingness to commit multiple crimes or caused greater or different harm. 555 U.S. at 165. This Court held that the Sixth Amend-

ment allowed the judge to make that determination. *Id*. at 168, 172.

The Court explained that, to establish a constitutional 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. Instead, he must show that the proposed extension implicates the "core [Sixth Amendment] concerns" underlying *Apprendi*, is supported by "historical practice," and would not hamper the "administration of [the States'] criminal justice systems." *Id*. at 163-164, 169. The Court counseled caution "extend[ing] the *Apprendi* * * * line of decisions," because state legislatures' attempts to guide judges' sentencing discretion should be respected "absent [a] genuine affront to *Apprendi*'s instruction." *Id*. at 163, 172.

The Court determined that imposition of consecutive sentences does not implicate the key concern identified in *Apprendi*, which is that a jury must find the elements of each distinct offense beyond a reasonable doubt; to the contrary, historically the jury "played no role in the decision to impose sentences consecutively or concurrently." 555 U.S. at 168-170. The Court also recognized that extending *Apprendi* to consecutive-sentence determinations would intrude on States' efforts to guide judges' sentencing discretion to promote proportional and fair sentencing. *Id*. at 171. Such an expansion would be "difficult for States to administer," because requiring juries to find the predicate facts for consecutive sentencing could prejudice the defense or require "bifurcated or trifurcated" trials. *Id*. at 172. Accordingly, the Court rejected the view that all facts that increase the "quantum of punishment" must be found by a jury, *id.* at 166 (citation omitted), and it held that the

Sixth Amendment does not require that a jury find the facts that permit the imposition of consecutive sentences, *id.* at 163, 172.

3. Contrary to petitioner's contention (Br. 23-27), this Court has never applied *Apprendi* to criminal fines. The Court recognized as much in *Ice* when it suggested that *Apprendi* should not apply to fines. The Court stated that "[t]rial judges often find facts about the nature of the offense or the character of the defendant" in "the imposition of statutorily prescribed fines," and it suggested that "[i]ntruding *Apprendi*'s rule into" such a decision "would cut the rule loose from its moorings." *Ice*, 555 U.S. at 171-172. Indeed, in *Apprendi* itself the Court suggested that fines should be treated differently from terms of imprisonment or death because English common-law judges had vast sentencing discretion when it came to fines. *Apprendi*, 530 U.S. at 480 n.7; see *Jones* v. *United States*, 526 U.S. 227, 244-245 (1999); see also pp. 28-29, *infra*.

Petitioner asserts (Br. 23) that "express language" in *Apprendi* and its progeny makes clear that the *Apprendi* rule applies to fines. But *Ice* specifically rejected the argument petitioner now makes—that any fact that increases the "quantum of punishment" must be found by the jury. 555 U.S. at 166 (citation omitted). And the Court did so while acknowledging the seemingly broad language in *Apprendi* itself. See *id.* at 167 (quoting *Apprendi* language referencing "any fact" that "increases the penalty for a crime" beyond the statutory maximum, 530 U.S. at 490). As the court of appeals correctly explained, "[t]o the extent that excluding criminal fines from *Apprendi* requires a more restrained" reading of the language in *Apprendi*, "it is the Supreme

Court in *Ice* that has imposed that restraint." Pet. App. 32a.

Petitioner also contends (Br. 25-26) that *Booker* establishes that the *Apprendi* principle extends to fines, because *Booker* applied *Apprendi* to the mandatory federal Sentencing Guidelines, which include provisions addressing fines for organizations. But neither sentence the Court reviewed in *Booker* included a criminal fine, see *Booker*, 543 U.S. at 227-228, and the Sixth Amendment question the Court addressed was whether factual determinations that increased the defendants' Guidelines ranges of imprisonment should be treated the same as factual determinations that increase a sentence beyond a statutory maximum, *id.* at 228-230, 233-237. The Court did not mention the fine provisions of the Guidelines, much less hold that juries must make factual findings that influence fine amounts. *Id.* at 230-237, 245-265. Moreover, the Court's remedial holding acknowledged that the mandatory application of some portions of the Guidelines may be constitutional, but it made the Guidelines advisory on a wholesale basis in order to avoid "administrative complexities." *Id.* at 266-267. In any event, petitioner's reading of *Booker* cannot be correct, because *Ice* clarified that the application of *Apprendi* to fines is an open issue. 555 U.S. at 171-172.

4. What petitioner seeks in this case is to expand *Apprendi* to a new context. Whether to do so depends not on "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries," *Ice*, 555 U.S. at 172 (quoting *Cunningham*, 549 U.S. at 295 (Kennedy, J., dissenting)), but on a careful analysis of whether the expansion is warranted in light of the doctrine's core concerns, historical practice, and the potential impact on the administration of criminal

justice, *id.* at 163-164. In this case, all three of those factors counsel against applying *Apprendi* to criminal fines.

B. Fines Do Not Implicate The Core Concerns Underlying *Apprendi*

1. The holding in *Apprendi* is grounded in the principle that the jury must find the facts that result in a term of imprisonment beyond the statutory maximum because of the significant liberty interests involved. *Apprendi* observed that if "a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances," "the loss of liberty and the stigma attaching to the offense are heightened," and so the defendant must be afforded a jury determination of the circumstances supporting the increased term of imprisonment. 530 U.S. at 483-484; see *In re Winship,* 397 U.S. 358, 364 (1970) (explaining that the requirement of proof beyond a reasonable doubt is necessary because a defendant facing a loss of liberty has "an interest of transcending value" at stake). The Court explained that the "procedural protection[]" of a jury determination of any fact increasing the defendant's sentence of imprisonment "reduce[s] the risk of imposing such deprivations erroneously." *Apprendi*, 530 U.S. at 484.

In later decisions, the Court explained the constitutional justification for requiring jury determinations of sentence-enhancing facts by pointing to the heightened concerns raised by depriving a person of life or liberty. "The Framers would not have thought it too much to demand," the Court stated in *Blakely*, "that, before depriving a man of three more years of his liberty," the government should have to submit the additional fact to

a jury. *Blakely*, 542 U.S. at 313-314. In *Ring*, the Court made the same point with respect to the death penalty: "[the] dispositive question * * * 'is not one of form, but of effect,'" and a fact necessary to deprive a defendant of his life therefore must be found by a jury. 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 494). In each decision, the Court justified applying *Apprendi* to enhanced imprisonment or death by the seriousness of those consequences. Accord *Cunningham*, 549 U.S. at 292; *Booker*, 543 U.S. at 231-232.

2. This Court long has recognized that "imprisonment and fines are intrinsically different." *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975). Fines "cannot approximate in severity the loss of liberty that a prison term entails." *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 541-542 (1989) (citation omitted). Because fines involve a lesser and fundamentally different type of deprivation than incarceration or death, the Court has found only limited Sixth Amendment rights with respect to fines. The same distinctions counsel against extending *Apprendi* to fines.

a. This Court has defined the scope of the Sixth Amendment jury trial right based on the length of the prison term faced by the defendant. A defendant has a right to a jury trial for "serious" offenses, but not "petty" offenses, and the severity of the maximum authorized penalty determines whether an offense is serious or petty. *Blanton*, 489 U.S. at 541; see *Duncan* v. *Louisiana*, 391 U.S. 145, 159-162 (1968). This holding recognizes that "[s]o-called petty offenses were tried without juries both in England and in the Colonies." *Id.* at 160. In defining what offenses are "petty," the Court has focused on the degree of deprivation of liberty, holding that "no offense can be deemed 'petty' * * * where

imprisonment for more than six months is authorized," *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970) (plurality opinion), and that offenses punishable by less than six months of imprisonment are presumed petty, *Blanton*, 489 U.S. at 543. "Primary emphasis," the Court has said, "must be placed on the maximum authorized period of incarceration" because a significant loss of liberty is "the most powerful indication whether an offense is 'serious.'" *Id.* at 542.

When confronted with the question whether a defendant facing a fine-only sentence was entitled to a jury trial, the Court distinguished between the severe loss of liberty resulting from incarceration and the lesser property deprivation occasioned by a fine. See *Muniz*, 422 U.S. at 475-477. "From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation," the Court observed, fines and imprisonment are "intrinsically different": "It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that * * * a jury is required where any fine greater than $500 is contemplated." *Id.* at 477. Accordingly, the Court held in *Muniz* that a labor union facing a fine-only sentence of up to $10,000 for criminal contempt had no right to a jury trial. *Ibid.* The Court has repeated the critical distinction between fines and imprisonment for jury-trial purposes on numerous occasions.[3]

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[3] See, *e.g.*, *Lewis* v. *United States*, 518 U.S. 322, 326 (1996) (the Court "place[s] primary emphasis on the maximum prison term authorized" because "the deprivation of liberty imposed by imprisonment" makes it the "best indicator" of a crime's seriousness); *United States* v. *Nachtigal*, 507 U.S. 1, 5 (1993) (a "monetary penalty" such as a fine is "far

That is not to say that the jury-trial right is wholly inapplicable to fine-only sentences. Indeed, petitioner received a jury trial here. Although the Court "has not specified what magnitude of [a] fine" makes a crime serious enough to warrant a jury trial, it has held that a $54 million fine imposed on a labor union for criminal contempt is sufficient. *International Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 837 & n.5 (1994). But even when a jury trial is required on the underlying crime, the Court has not held that a jury finding is required as to all facts authorizing the amount of the fine.

b. The Court likewise has defined the Sixth Amendment right to counsel by distinguishing liberty deprivations from the lesser penalty of monetary fines. An indigent defendant has a right to appointed counsel in a felony case, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963), but for a misdemeanor, counsel is required only when the defendant actually is sentenced to imprisonment, *e.g.*, *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). The "central premise" of that rule is that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment" because it deprives the defendant of liberty. *Scott* v. *Illinois*, 440 U.S. 367, 373 (1979); see *Gideon*, 372 U.S. at 343 (right to counsel for felonies necessary to "[e]nsure [the] fundamental human rights of life and liberty" (citation omitted)). Focusing on whether the "accused is deprived of his liberty," the Court recognized that "imprisonment for however short a time" generally has much more severe con-

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less intrusive than incarceration"); *Baldwin*, 399 U.S. at 70 (plurality opinion) (key question is whether the punishment at issue "involve[s] the deprivation of the liberty of the citizen" (quoting *Callan* v. *Wilson*, 127 U.S. 540, 549 (1888)).

sequences than a punishment "where the loss of liberty is not involved." *Argersinger*, 407 U.S. at 32, 37 (citation omitted).

For that reason, the Court held in *Scott* v. *Illinois*, *supra*, that a defendant who had been convicted of shoplifting and sentenced only to a $50 fine was not entitled to appointed counsel. 440 U.S. at 368, 373-374. The Court contrasted the "severe" sanction of incarceration with punishment by a fine, and it concluded that "actual imprisonment" is "the line defining the constitutional right to appointment of counsel." *Id.* at 372-373. The distinction between fines and imprisonment, the Court remarked, "is eminently sound." *Id.* at 373. The Court has reaffirmed that Sixth Amendment distinction between imprisonment and fines in other cases.[4] Accordingly, the constitutional "line [has] be[en] drawn between criminal proceedings that resulted in imprisonment, and those that did not." *Nichols* v. *United States*, 511 U.S. 738, 746 (1994).

3. *Apprendi* should not be extended to criminal fines because fines do not implicate the same significant interests as incarceration and the death penalty. The Court has recognized that fines and imprisonment are fundamentally different for Sixth Amendment jury-trial purposes, and that recognition is significant here, because the *Apprendi* doctrine is premised on the jury-trial right. See *Apprendi*, 530 U.S. at 476-477; see also, *e.g.*, *Blakely*, 542 U.S. at 305 (*Apprendi* reflects "the need to give intelligible content to the right of jury trial").

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[4] See *Alabama* v. *Shelton*, 535 U.S. 654, 661 (2002); *Nichols* v. *United States*, 511 U.S. 738, 743 (1994); *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 26 (1981) (civil context); see also, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 203 (2001) ("[A]ny amount of actual jail time has Sixth Amendment significance.").

The right to a jury trial, first and foremost, protects a defendant against arbitrary or unjustified imprisonment or death. The "principle [that] lies at the heart of the Sixth Amendment" is that "[w]hen a defendant's liberty is put at great risk, he is entitled to have the trial conducted to a jury." *Lewis*, 518 U.S. at 339 (Kennedy, J., concurring in the judgment). *Apprendi* required juries to determine facts that increase a defendant's sentence beyond the otherwise-applicable maximum because of the greater "loss of liberty" and associated "stigma." 530 U.S. at 484; see *id.* at 495. Similarly, in *Ring*, the factfinding exposed the defendant to potential loss of life, the most severe deprivation the government may impose. 536 U.S. at 602-604.

Concerns about arbitrary or erroneous deprivations of life and liberty, which animate the jury-trial guarantee, are not present here. Financial penalties alone are at stake—in this case, for a felony hazardous-waste violation that the jury has already found to be proved beyond a reasonable doubt. The stigma of conviction flows from the jury's verdict. The judge's factfinding solely determines the violation's duration and thus sets the boundaries for the judge's discretion to impose a fine. It would be anomalous for the Court to extend *Apprendi* to such fine-related determinations when the doctrine does not apply to every case involving an increased sentence of *imprisonment*. See *Ice*, 555 U.S. at 172. Factual determinations that bear on fines, rather than incarceration, present a far weaker case for jury determination than *Ice*, because the primary concerns motivat-

ing *Apprendi*—and this Court's jury-trial jurisprudence more generally—are missing.[5]

Petitioner does not acknowledge the Court's repeated distinction between fines and sentences of imprisonment or death in the Sixth Amendment context. Instead, it focuses largely on the Excessive Fines Clause of the Eighth Amendment, arguing that fines are punishment. Pet. Br. 46-47. But the Eighth Amendment's substantive protection against the imposition of excessive fines reinforces the lack of need to extend *Apprendi*'s procedural right to a jury trial in setting the outer boundaries of a fine. The Framers provided an explicit proportionality safeguard against undue fines; *Apprendi* is not necessary to avoid arbitrariness. Because the heightened concerns about erroneous deprivations of life and liberty in *Apprendi* and its progeny are absent in the case of fines, and because the Eighth Amendment affords substantive protection against excessive fines, applying the *Apprendi* jury-trial rule to fines "would cut the rule loose from its moorings." *Ice*, 555 U.S. at 172.

4. Applying *Apprendi* to fines also is unwarranted because the judicially found facts typically involve only quantifying the harm caused by the defendant's offense, as opposed to defining a separate set of acts for punishment.

In *Apprendi*, the Court was concerned that New Jersey had "singled out" two different acts for punishment,

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[5] Indeed, in some criminal cases involving fine-only sentences, a defendant has no jury trial right at all. See, *e.g.*, *Muniz*, 422 U.S. at 475-477. *Apprendi* could not apply in those circumstances: if the defendant has no right to a jury determination on the essential elements of the offense, it likewise has no right to a jury determination of facts affecting its fine.

but only required the procedural safeguard of proof beyond a reasonable doubt to a jury for the lesser offense. 530 U.S. at 476. Because of the increased sentence available for firearm possession with a biased purpose, versus simple firearm possession, the Court viewed the biased-purpose fact like an element that would require a jury finding of guilt beyond a reasonable doubt. *Id.* at 476, 494 n.19, 495-496. The Court concluded that the biased-purpose fact was "the functional equivalent of an element of a greater offense than the one covered by the jury's verdict." *Id*. at 494 n.19; see *Ring*, 536 U.S. at 609.

The factual determination at issue here, by contrast, does not make petitioner's offense different or greater than the offense found by the jury. The statute at issue prohibits "knowingly * * * stor[ing] or dispos[ing] of any hazardous waste * * * without a permit." 42 U.S.C. 6928(d)(2)(A). The jury found petitioner guilty of "knowingly storing a hazardous waste, liquid mercury, without a permit." J.A. 140. The district court then imposed sentence, and in doing so, it determined that petitioner had committed this violation for 762 days. Pet. App. 46a-47a; see 42 U.S.C. 6928(d). The court's factual finding only concerned how long petitioner committed the offense found by the jury; the court did not add any fact about how petitioner committed the offense that even arguably transformed the offense into a greater one. This type of judicial fact-finding to assess the harm is typical in statutes where a judge-found fact increases the maximum fine available. See pp. 46-47, *infra*.

Although the Court has made clear that the relevant question is one not of form, but of effect, *Apprendi*, 530 U.S. at 494, the effect of the factual finding here was not

to deny the "requirement[] of trying to a jury all facts necessary to constitute a statutory offense," *id.* at 483. The jury found the offense—thus branding petitioner as a felon and exposing it to criminal punishment. The court's finding of the length of the violation did not transform the crime into a greater offense.[6]

Nor did petitioner lack notice of the acts for which it was fined. *Apprendi* expressed concern that the defendant would not be able to predict the judgment "from the face of the felony indictment" because in that case "[n]one of the counts referred to the hate crime statute" or "alleged that Apprendi acted with a racially biased purpose." 530 U.S. at 469, 478. Here, petitioner could "predict from the face of the indictment" what its sentence could be. *Harris* v. *United States*, 536 U.S. 545, 562 (2002). The indictment charged petitioner with "knowingly stor[ing], and caus[ing] to be stored, hazardous wastes, namely, waste liquid mercury, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, without a permit issued pursuant to RCRA," "[f]rom on

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[6] Petitioner contends (Br. 31 n.9) that the jury may have disagreed with the district court's finding that petitioner stored hazardous waste illegally for the entire time period alleged in the indictment. That is extremely unlikely, because petitioner never contested that it stored mercury on the site for the entire time period; instead, it contended that it did not need a permit to store the mercury because it intended to reclaim the mercury. See Pet. App. 7a. But even if petitioner intended to reclaim the material, it still needed a permit because the material was "spent." See p. 3, *supra*; see J.A. 123-124; C.A. App. 1631-1637, 1921-1922, 1931-1933, 2238-2242, 2251-2265, 2269-2270. In any event, petitioner's assertion of an intention to reclaim the mercury is refuted by its own internal statements referring to the mercury as "waste" that the company wanted to "get rid of," *id.* at 1047; see Pet. App. 5a, and the deplorable conditions under which it stored the mercury, see *id.* at 3a-4a.

or about September 19, 2002 until on or about October 19, 2004." J.A. 104-105. That language informed petitioner of the nature of the violation and the time period that the government alleged the violation endured. The statute completed petitioner's notice that "upon conviction," it faced a fine for "each day of violation." 42 U.S.C. 6928(d).

Petitioner correctly observes (Br. 30-31) that the district court's finding of fact increased its potential and actual punishment—the fine it received. But this Court in *Ice* expressly rejected the view that *Apprendi* requires a jury to find any facts that "increased the quantum of punishment imposed." *Ice*, 555 U.S. at 166 (internal quotation marks and citation omitted). The question is whether the judicial factfinding at issue "implicates *Apprendi*'s core concern[s]." *Id.* at 170. Because fines involve fundamentally different and lesser degrees of punishment, and because judicial factfinding in setting fines typically involves only assessing the scope of or harm from a violation found by the jury, the Sixth Amendment does not forbid judges from engaging in factfinding to determine the amount of a fine.

C. Criminal Fines Lie Outside The Jury's Traditional Domain

1. As *Ice* reaffirmed, the historical role of the jury bears heavily on the scope of *Apprendi*. 555 U.S. at 168. And this Court has recognized a significant difference in historical practice between judges assessing fines and judges imposing terms of imprisonment or death. For felonies, English judges "had very little explicit discretion in sentencing" because the substantive law "prescribed a particular sentence for each offense." *Apprendi,* 530 U.S. at 479 (quoting John H. Langbein, *The Eng-*

lish Criminal Trial Jury on the Eve of the French Revolution, in *The Trial Jury in England, France, Germany 1700-1900*, at 13, 36-37 (Antonio P. Schioppa ed., 1987)). This "invariable linkage of punishment with crime" allowed the defendant "to predict with certainty the judgment from the face of the felony indictment." *Id.* at 478 (citing 4 William Blackstone, *Commentaries on the Laws of England* 369-370 (1769)).

By contrast, judges had "substantially more * * * discretion" in imposing "sentences of fines or whippings" in misdemeanor cases. *Apprendi*, 530 U.S. at 480 n.7 (internal quotation marks omitted). These sentences were entirely within the judge's discretion, subject only to the limitations that they "be proportionate to the offense, and, by the 17th century, that [they] not be 'cruel or unusual.'" *Ibid.* (citing J.H. Baker, *An Introduction to English Legal History* 584 (3d ed. 1990) (*English Legal History 3d*)); see also *Jones*, 526 U.S. at 244-245 (noting the "the breadth of judicial discretion over fines" in misdemeanor cases, as opposed to the "norm of fixed sentences in cases of felony"). A historical review explains this tradition of nearly unfettered discretion in setting fines.

a. Before criminal fines came amercements—an "'all-purpose' royal penalty" paid to the King or to feudal lords for a wide variety of civil and criminal offenses. *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 269-270 (1989); see 2 Frederick Pollock & Frederick W. Maitland, *The History of English Law Before the Time of Edward I* 513-515 (2d ed. 1898). Originating in the eleventh century, William S. McKechnie, *Magna Carta: A Commentary on The Great Charter of King John* 285 (2d ed. 1914), by the thirteenth century, amercements were "the most common criminal

sanction[s]" in England, *Solem* v. *Helm*, 463 U.S. 277, 284 n.8 (1983). "[M]ost men in England must have expected to be amerced at least once a year." Pollock & Maitland 513. As a result, popular opposition to amercements grew, and "Magna Carta included several provisions placing limits on the circumstances under which a person could be amerced, and the amount of the amercement." *Browning-Ferris*, 492 U.S. at 270.

Magna Carta required that the amount of the amercement be fixed by the person's peers. See Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 5 (Ruffhead ed.) ("[N]one of the [s]aid amerciaments [s]hall be a[ss]e[ss]ed, but by the oath of hone[s]t and lawful men of the vicinage."). This requirement was not equivalent to a jury trial. Setting the amount of the amercement was a two-step process: a judge would set the maximum amount of the amercement, and then the affeerors (peers of the offender) would "liquidat[e] the amercement to a precise sum" based on the circumstances of the offense and the offender's ability to pay. 4 Blackstone 373; McKechnie 288; Pollock & Maitland 513. The affeerors were "appointed to [the] Office [of affeeror]" to "declare what goods the offender has" and to ensure that he would be able to pay the fine. J. Cowel, *A Law Dictionary: Or the Interpreter of Words and Terms* (1708) (definition of "affeerers"); see 3 Giles Jacob & T.E. Tomlins, *The Law-Dictionary* 73 (1811). Only one or two men served as affeerors in a case, unlike the 12 or 24 men that made up a criminal jury. See Max Radin, *Radin Law Dictionary* 12 (Lawrence G. Greene ed., 1955) (one, two, or four affeerors); Pollock & Maitland 513 ("two [affeerors] seem[ed] to be enough"). Affeerors therefore were different from a jury tasked with deciding guilt or innocence for an indi-

vidual case. See Pollock & Maitland 513; 4 Blackstone 373.

b. Criminal fines differed from amercements. They "originated in the 13th century as voluntary sums paid to the Crown to avoid an indefinite prison sentence" for a crime. *Browning-Ferris*, 492 U.S. at 289 (O'Connor, J., concurring). By the thirteenth century, judges had begun sentencing offenders to imprisonment for their crimes. Pollock & Maitland 517-518. For common-law crimes, judges had broad sentencing discretion, and they often imposed indefinite periods of imprisonment, but then commuted the sentence if the offender paid a fine. *Ibid.*; Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233, 1261 (1987). Judges did not actually impose fines as punishment; instead, they "pronounce[d] a sentence of imprisonment and then allowed the culprit to 'make fine'" to avoid imprisonment. Pollock & Maitland 517; see Jacob & Tomlins 72. The amount of the fine was committed to the judge's discretion. Pollock & Maitland 517-518.

By the seventeenth century, criminal fines had been recast as penalties for crimes that could be set only by the courts. Fines had "lost their original character of bargain" and had "replaced amercements as the preferred penal sanction." *Browning-Ferris*, 492 U.S. at 290 (O'Connor, J., concurring); Massey 1253, 1264. A fine had become "a pecuniary punishment for a [criminal] offense" that did not depend upon a term of imprisonment. 1 Edward Coke, *The Institutes of the Laws of England* § 194, at *126(b) (16th ed. rev. 1809) (explaining that "it is called *finis*, because it is an end for that offense"). Although Magna Carta "contained protections against excessive financial punishments imposed

by juries," it had no similar "prohibitions against excessive financial punishments imposed by judges." Massey 1252 (citing 2 Coke *27).[7] Some English judges "took advantage of their newly acquired power and imposed ruinous fines on wrongdoers and critics of the Crown," leading to the prohibition on "excessive Fines" in the 1689 English Bill of Rights. *Browning-Ferris*, 492 U.S. at 290-291 (O'Connor, J., concurring) (citation omitted); see Massey 1263.

c. Thus, by the eighteenth century, a clear difference had emerged in a judge's role in imposing imprisonment or death for felonies and imposing fines and other punishments for misdemeanors. For felonies or treason, statutes set the sentence for the offense (typically death). J.H. Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in *Crime in England 1550-1800*, at 15, 42-43 (J.S. Cockburn ed., 1977) (*Crime in England*). For misdemeanors, "punishment was at the discretion of the justices, provided that it did not touch life or limb, and was not disproportionate to the offence." J.H. Baker, *An Introduction to English Legal History* 512 (4th ed. 2002). "Fines and whippings" were the most common penalties for misdemeanors, *ibid.;* "[a]ctual sentences of imprisonment for such offenses * * * were rare" because "the idea of prison as a punishment would have seemed an absurd expense." *Apprendi*, 530 U.S. at 480 n.7 (quoting *Crime in England* 43).

Although fines originated as penalties for common-law offenses, by the eighteenth century some statutes

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[7] By the seventeenth century, it had been settled that "[s]tatutes of the Magna Charta * * * extend[ed] to amercements, and not to fines." *Griesley's Case*, 77 Eng. Rep. 530, 532-533 (C.P. 1588).

specified fines as possible punishments.[8] But in those instances as well, judges retained wide discretion in setting the amount of the fines. William Blackstone explained:

> Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine, in general, without specifying the certain sum: which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but it[s] discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted.

4 Blackstone 372 (footnote omitted). Blackstone explained that the legislature generally specified the form of the punishment, but not the amount, and that was acceptable because "[t]he *quantum*, in particular, of pecuniary fines neither can nor ought to be ascertained by an invariable law" because "what is ruin to one man's fortune may be a matter of indifference to another's." 4 Blackstone 371. Thus, "[a]t common law the court may impose" a fine "as part or the whole of a sentence for [a] misdemeanor," and "[t]here [wa]s no general statutory limit to the amount of such fine, except the provisions of

[8] See, *e.g.*, 4 Blackstone 101 (various "inferior embezzlements and misdemeanours * * * are punished, by statute * * * with fine and imprisonment"); 121 (misprison of a felony punishable by imprisonment and "fine and ransom at the king's pleasure"); 132-133 (receipt of stolen goods was "punished by fine and imprisonment"); 136 (conspiracy to indict an innocent man "punishable by statute * * * , at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation").

Magna Charta, and the Bill of Rights, against excessive and unreasonable fines and assessments." John Jervis, *Archibold's Pleading, Evidence & Practice in Criminal Cases* 246 (Henry Delacombe Roome & Robert Cracit Ross eds., 26th ed. 1922) (citations omitted).

d. The jury was not responsible for setting the amount of criminal fines in seventeenth- and eighteenth-century England. Crimes were generally divided into felonies, misdemeanors, and summary offenses. Langbein 16-17. Fines were often imposed as punishments for both misdemeanors and summary offenses. *Ibid.* For summary offenses—also known as "petty offenses"—the jury trial right did not apply at all. See *Callan* v. *Wilson*, 127 U.S. 540, 557 (1888); see also *Duncan*, 391 U.S. at 160. When misdemeanor cases were tried before juries, judges retained the power to set the amounts of fines. Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. Rev. 621, 631-632 (2004); see *id.* at 635 ("The trial jury's main power was deciding guilt," not determining punishments.).

Petitioner has not identified any historical evidence suggesting that English juries found facts relevant to the amounts of criminal fines, except to point out (Br. 41 n.13) that private citizens, and not judges, set the amounts of amercements. But affeerors were not jurors, and by the seventeenth century, it was clear that *courts*, and not individual citizens, set the amount of criminal fines. See pp. 31-32, *supra*. Accordingly, no evidence indicates that finding facts to establish fine amounts was any part of the "historic jury function" in England. *Ice*, 555 U.S. at 163. Instead, setting fines was "a sentencing function in which the jury traditionally played no role." *Ibid.*

2. a. The English norm of broad judicial discretion in setting fines carried over to the early United States. In the Colonies, fines and corporal punishments were the most common non-capital criminal penalties. See Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. of Legal Hist. 326, 333-335, 343 (1982) (discussing experience in the Colonies from 1607 until 1775). Because of the "absence of adequate prisons" and the fact that "incarceration would have withdrawn servant labor," fines were "overwhelmingly the most common" punishment. *Id.* at 344-345, 350. In colonial times, juries seldom played a role—let alone an exclusive role—in meting out criminal fines. Rather, "colonial judges, like their English brethren, possessed a great deal of discretion" in setting fines; "the judge could set the amount or even elect between [a fine or whipping], depending on the nature of the defendant and the crime." Lillquist 640-641.

The amount of a criminal fine usually was "within the discretion of the judge": "the precise amount of the fine was established by him and [was] tailored individually to the particular case." Preyer 350. "Fines ranged widely in amount," and the amount "was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid." Preyer 344, 350. For example, in North Carolina, the "most common punishment imposed" was a fine, and although some early statutes set specific fines for certain crimes, "[North] Carolina judges were, like their English counterparts, allowed by law a large measure of discretion in sentencing," particularly in assessing fines. Donna J. Spindel, *Crimes and Society in North Carolina, 1663-1776*, at 118-124, 126 (1989). Similarly, in Pennsylvania sometimes fine amounts were set by statute, but when

they were not, "the courts fixed whatever fine they felt was fitting." Herbert W.K. Fitzroy, *The Punishment of Crime in Provincial Pennsylvania*, in 2 *Crime and Justice in American History: Courts and Criminal Procedure* 69, 88-90 (Erik K. Monkkonen ed., 1991). See Mark D. Cahn, *Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts*, 33 Am. J. Legal Hist. 107, 127, 132-133 (1989); Edwin Powers, *Crime and Punishment in Early Massachusetts 1620-1692: A Documentary History* 204-206, 415-416 (1966).

b. Judges retained broad discretion in setting fines at the time of the Founding. Early state statutes often provided broad ranges for fines or did not limit the judge's discretion at all.[9] The same was true for federal crimes; "federal judges were entrusted with wide sentencing discretion" and they could "impose * * * any fine up to the statutory maximum." Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9 (1998) (quoted in *Apprendi*, 530 U.S. at 482 n.9). In the Crimes Act of 1790, for example, most crimes were punishable by imprisonment, fines, or both; the statute set maximum terms of imprisonment and maximum fines, but otherwise left the sentence to the court's discretion. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.[10] In the Framing era, Congress often speci-

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[9] See, *e.g.*, 1830 Conn. Pub. Acts 253 (§§ 17-18, 21, 54, 57, 63-68, 70-73, 80-81, 83-84, 87, 92, 115) (establishing ranges for fines); June 1785 R.I. Acts & Resolves 5 (counterfeiting coins punishable by "[s]uch Fines or corporeal Puni[s]hment as the [s]aid Superior Court [s]hall think his, her or their Offences merit, not extending to Life or Limb").

[10] In the Crimes Act of 1790, the maximum fines for larceny and receipt of stolen property depended on judicial factfinding. See p. 43, *infra*.

fied that judges could impose fines up to a specified amount, with the exact amount to be set by the judge,[11] or stated that the fine amount was entirely within the judge's discretion.[12] When federal law specified a maximum fine, it was clear that courts, and not juries, were to set an appropriate amount. See *United States* v. *Mundell*, 27 F. Cas. 23, 24 (C.C. Va. 1795) (No. 15,834)

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[11] See, *e.g.*, Act of Mar. 3, 1791, ch. 15, § 39, 1 Stat. 208 (a supervisor or officer of inspection convicted of oppression or extortion "shall be fined not exceeding five hundred dollars, or imprisoned not exceeding six months, or both, at the discretion of the court"); Process Act, ch. 36, § 7, 1 Stat. 278 (an officer of the court who demands an unlawful fee "shall on conviction thereof in any court of the United States, forfeit and pay a fine not exceeding five hundred dollars, or be imprisoned not exceeding six months, at the discretion of the court"); Act of Mar. 3, 1795, ch. 44, § 17, 1 Stat. 432 (every person who entices a soldier to desert "shall, upon legal conviction, be fined at the discretion of the court, in any sum not exceeding three hundred dollars, or be imprisoned for any term not exceeding one year"); Act of May 7, 1800, ch. 46, § 2, 2 Stat. 62 (any person who entices any artificer or workman employed in an arsenal or armory to desert "shall, upon conviction, be fined at the discretion of the court not exceeding fifty dollars"); Act of Feb. 28, 1803, ch. 9, § 7, 2 Stat. 205 (any consul who gives a false certificate shall "forfeit and pay a fine not exceeding ten thousand dollars, at the discretion of the court").

[12] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83 (contempt of court punishable "by fine or imprisonment, at the discretion of said courts"); Crimes Act of 1790 § 21, 1 Stat. 117 (any person who bribes a judge "on conviction thereof shall be fined and imprisoned at the discretion of the court"); *id*. § 26, 1 Stat. 118 (any persons who prosecute a writ of process against a foreign minister, "being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court"); *id*. § 28, 1 Stat. 118 (any person who does violence to an ambassador or public minister, "on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court").

(Iredell, Circuit Justice) (explaining that "[t]he common law practice * * * must be adhered to; that is to say, the jury are to find whether the prisoner be guilty, and if unfortunately that should prove to be the case, the court must assess the fine"). And by the mid-nineteenth century, the "amount of a fine [was] usually regulated, in the judge's discretion, by the aggravating or mitigating circumstances of the case." Francis Hilliard, *The Elements of the Law; Being a Comprehensive Summary of American Jurisprudence* 424 (1848).

3. Petitioner acknowledges (Br. 38) that the historical record shows that judges had nearly unfettered discretion at common law to set fines. Petitioner instead relies on a few jurisdictions that varied from the common law. But those instances do not shed light on the relevant question: whether the jury-trial right "at common law" included finding facts that increased the amount of criminal fines. *Ice*, 555 U.S. at 170. The answer is no.

First, petitioner points out (Br. 38-40) that some statutes in the Colonies and early States limited judges' sentencing discretion: while some statutes gave judges complete discretion over the amount of a fine, other statutes specified a maximum fine amount or a particular fine for a crime. That is true, but unenlightening. That legislatures sometimes limited judicial discretion does not say anything about the jury's role. The pertinent point is that the general common-law rule in England made fines "discretionary with the court to award"; that rule was carried over to the United States; and when States varied from that practice, they were varying from the common law. J.A.G. Davis, *A Treatise on Criminal Law, with an Exposition of the Office and*

Authority of Justices of the Peace in Virginia 471 (1838).

Second, it is true, as petitioner (Br. 41-43) and his amici (Crim. Proc. Scholars Br. 21-23) note, that some States experimented with jury sentencing, as opposed to judicial sentencing. Virginia, for example, was an early experimenter with jury sentencing, and juries often set fine amounts as well as other sentences. See, *e.g.*, Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 Chi.-Kent L. Rev. 937, 937, 960-961 (2003) (*Origins*). During the nineteenth century, several other States, including Kentucky, Georgia, Tennessee, and Alabama, also experimented with jury sentencing. See *id.* at 937, 990-993. But it is well-recognized that this practice of juries setting fines was a deviation from the common law. Davis 471; James M. Matthews, *Digest of the Laws of Virginia, of a Criminal Nature* 85 n.16 (1871); see *Origins* 938 (Virginia's experiment with jury sentencing "was then, and remains today, an unusual delegation of sentencing authority."); 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 632, at 647 (2d ed. 1858) (noting that "the jury does not at common law determine the sentence to be imposed" but that several States chose to deviate from that practice). And nothing suggests that these juries routinely were entrusted with finding particular facts in order to assess particular fines. Rather, these statutes seem to have characteristically transferred sentencing discretion to the jury wholesale. See, *e.g.*, *Holt* v. *State*, 2 Tex. 363, 363-364 (Dec. Term 1847) (explaining that the Texas jury-sentencing statute, 1846 Tex. Gen. Laws 161, "merely substitutes the opinion of the jury for that of the judge") (cited in Pet. Br. 43).

The fact that States sometimes allowed juries to set fines in the eighteenth and nineteenth centuries, therefore, does not demonstrate a consensus about the essential components of the jury-trial right. Indeed, this Court has recognized on numerous occasions that although jury sentencing is permissible, it is not required by the Sixth Amendment. See, *e.g.*, *Libretti* v. *United States*, 516 U.S. 29, 49 (1995) ("Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed."); see also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 93 (1986); *Cabana* v. *Bullock*, 474 U.S. 376, 385 (1986); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984); *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). At the end of the day, although the historical record in the United States is at times "complex" and "not entirely clear," Pet. Br. 39, the common-law practice of affording judges broad discretion in setting fines is clear, and neither petitioner nor his amici have demonstrated any consensus in England or the United States that the right of trial by jury included the right to have a jury find facts that influence a fine amount.

4. Of course, a history of broad judicial sentencing discretion is not dispositive if common-law juries routinely found certain facts to increase the fine beyond the otherwise-applicable maximum. See *Apprendi*, 530 U.S. at 481-482. But they did not. Although juries sometimes found facts relevant to criminal fines, those sporadic instances do not demonstrate any common understanding that the right to jury trial historically encompassed finding facts that set fines.

a. In England at common law, judges enjoyed nearly unfettered discretion in setting fines, and stat-

utes rarely specified that the amount of a fine depended on a particular finding of fact. As Blackstone explained, the "statute law" rarely "ascertained the quantity of fines," and the "common law" "[n]ever" did, leaving the amount of the fine entirely up to the judge. 4 Blackstone 372. Petitioner has not identified any English statute setting a fine amount based on a finding of fact. The government is aware of a few such statutes. For example, one statute stated that any person convicted of making cables for Her Majesty's ships using "olde and overworn" material would be fined four times the value of each cable,[13] another provided that any person convicted of cheating at gambling would be fined "Five Times the Value of the Sum or Sums of Money or other thing so won,"[14] and a third provided that persons who obtain money or goods by false pretenses be fined "not le[s]s than double the amount or value" of the money or goods.[15] The government has not found any English decisions stating that juries must value the cables, gambling winnings, or goods at issue. That is not surprising, because the general rule was that value did not need to be alleged in the indictment or found by the jury "provided the value [was] sufficient to constitute the offence at law." John Jervis, *Archbold's Summary of the Law*

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[13] *An Acte againste deceitfull making of Cordage,* 35 Eliz. ch. 8 (1592-1593).

[14] *An Act for the better preventing of excessive and deceitful Gaming*, 9 Anne ch. 19 (1710).

[15] *An Act for the more effectual puni[s]hment of per[s]ons who [s]hall attain, or attempt to attain, po[ss]e[ss]ion of goods or money, by fal[s]e or untrue pretences*, 30 Geo. II. ch. 24, pt. II (1757). See also *id*. pt. VI (providing that a person convicted of knowingly buying linens or apparel entrusted to others to wash "[s]hall forfeit double the [s]um given for or lent on the [s]ame").

Relating to Pleading and Evidence in Criminal Cases 51 (W.N. Welsby ed., 11th ed. 1849) (Archbold).

b. In the United States, a few early federal statutes made the amount of a criminal fine depend upon a particular fact. An 1809 federal statute that prohibited putting goods on any ship, vessel, or carriage to transport them outside of the United States provided that the offender would be "fined a sum, by the court before which the conviction is had, equal to four times the value of such specie, goods, wares and merchandise." Enforcement Act (Embargo), ch. 5, § 1, 2 Stat. 506.[16]

This Court considered that statute and confirmed what the text suggests: courts were responsible for valuing the goods in question. See *United States* v. *Tyler*, 11 U.S. 285 (1812). The particular question in *Tyler* was whether, when a defendant was indicted for "loading on carriages * * * nineteen barrels of *pearl-ashes*" and the jury returned a verdict finding the defendant "guilty of the charge alleged against him in [the] indictment" and stating that "the said *pot-ashes* were worth two hundred and eighty dollars," "the verdict was not sufficiently certain as to the value of the property charged in the indictment." *Id.* at 285. This Court held, consistent with the statutory language, that "no valuation by the jury was necessary to enable the Circuit Court to impose the proper fine" and therefore the "part of the verdict" addressing the type of ashes and value "is surplusage, and cannot deprive the United States of the judgment to which they became entitled" upon the jury's finding of guilt. *Id.* at 285-286. See also *United States* v. *Mann*, 26 F. Cas. 1153, 1153 (C.C.N.H. 1812) (No.

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[16] See also Non-Intercourse Act (Foreign Relations), ch. 24, § 13, 2 Stat. 531 (same); Act of Dec. 17, 1813, ch. 1, § 2, 3 Stat. 88 (same).

15,717) (decision under same statute post-*Tyler* stating that "[t]he fine is to be assessed by the court; not found as a penalty by a jury"). The Court's holding is consistent with the general rule that "[i]n the federal courts, the judges fix the fine." 5 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 380 n.12 (1803).

The same was true with respect to federal larceny offenses. The Crimes Act of 1790 provided that larceny and receipt of stolen property were punishable by a fine up to four times the amount of the stolen property. See Crimes Act of 1790, §§ 16-17, 1 Stat. 116. This Court considered that provision in *United States* v. *Murphy*, 41 U.S. 203 (1842), and it remarked that under that statute, "the fine is, as to its amount, purely in the discretion of the court." *Id.* at 209. Some decisions considering this statute stated that the value of stolen goods was charged in the indictment, *e.g.*, *Pye* v. *United States*, 20 F. Cas. 99, 99 (C.C.D.C. 1842) (No. 11,488), and in one instance a district court instructed the jury to find the value of the goods, see *United States* v. *Holland*, 26 F. Cas. 343, 345 (C.C.S.D.N.Y. 1843) (No. 15,378). But those decisions—issued well after the framing of the Sixth Amendment and not purporting to apply common law—do not suggest that the jury was required to find value as a constitutional matter. Particularly in light of the Court's statement in *Murphy*, the likelihood is that federal courts generally adhered to the background federal rule that judges set fines in larceny cases.

c. Petitioner relies on (Br. 20) state larceny cases cited in Justice Thomas's concurring opinion in *Apprendi*, in which the fine depended on the value of the

goods stolen and the jury determined that value. See *Hope* v. *Commonwealth*, 50 Mass. (9 Met.) 134, 136-137 (1845); *Commonwealth* v. *Smith*, 1 Mass. (1 Will.) 245, 246-247 (Nov. 1804 Term); see also *Ritchey* v. *State*, 7 Blackf. 168, 169 (Ind. 1844) (arson case relying on reasoning in *Smith*). But these decisions do not show a consensus view supporting the application of *Apprendi* to fines. First, none of these decisions states that juries, and not judges, must find the value of goods because such findings were historically understood to be an essential component of the right of trial by jury. To the extent that States required juries to find such value, they were deviating from the general common-law rule. Particularly because several States experimented with jury sentencing, little weight should be placed on these decisions.

Second, and in any event, larceny was a special case because of the common-law distinction between grand and petit larceny. Grand larceny and petit larceny were different offenses at common law, and the division between the two depended on the value of the goods stolen. See 4 Blackstone 238-239. "So long as the distinction between grand and petit larceny existed, it was necessary, in order to convict the defendant, to prove that the articles * * * exceeded" a certain value. Archbold 194; *English Legal History 3d* 591; see also pp. 13-14, *supra* (noting *Apprendi*'s concern about a defendant being punished for a greater offense than the jury found). But after England abolished that distinction, it became "immaterial whether the goods be proved to be the value laid in the indictment or not." Archbold 193-194; 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 237-238 (1847). Some States apparently still required the jury to "find, in special words, what is the

value of the property stolen, in cases * * * where the sentence depends on the value," but this doctrine was "very exceptional," 2 Joel P. Bishop, *Commentaries on the Law of Criminal Procedure* § 719, at 419-420 (1866), and it apparently was based on adherence to the common-law practice of finding value to distinguish between the two different larceny offenses, see *Hope*, 50 Mass. at 136-137. The relevant question here is whether juries were required to determine a fact when the only effect was to set the fine amount for an offense, not to transform it into a different offense. Although exceptions existed, the "prevailing practice" (*Ice*, 555 U.S. at 169) at common law in both England and early America was that judges determined the facts necessary to impose statutory fines. Petitioner therefore has not demonstrated any longstanding common-law tradition understanding that "the scope of the constitutional right to jury trial" (*id.* at 170) included finding facts relevant to the amount of a criminal fine.[17]

D. Extending *Apprendi* To Criminal Fines Would Interfere With Legislative Prerogatives And The Administration Of Justice

1. *Ice* noted that before "expanding the *Apprendi* doctrine far beyond its necessary boundaries," the Court would consider the effect of such an expansion on the administration of criminal justice. 555 U.S. at 172 (citation omitted). Here, as in *Ice*, numerous federal and state statutes would be affected by petitioner's proposed

[17] Petitioner also relies (Br. 20) on Justice Thomas's citation in his *Apprendi* concurrence to *United States* v. *Woodruff*, 68 F. 536, 538 (D. Kan. 1895). That decision, rendered more than a century after the Sixth Amendment was ratified and citing no authority for its holding, is too frail a reed to support an extension of *Apprendi*.

rule. These statutes typically allow judges to set fines based on the number of days of the violation, or the gain or loss resulting from the offense.

a. The statute at issue, 42 U.S.C. 6928(d), permits a judge to impose a fine up to $50,000 per day based on the number of days the defendant has illegally stored hazardous waste. Many other federal statutes have similar maximum-fine-per-day-of-violation provisions. See App., *infra*, at 6a-7a.[18] The language and structure of these statutes reveal that judges are to find the number of days as part of sentencing. See, *e.g.*, *United States* v. *Chemetco, Inc.*, 274 F.3d 1154, 1159 (7th Cir. 2001) (concluding that a similar provision in the Clean Water Act, 33 U.S.C. 1319(c)(2), made "the number of days that the violation occurred * * * a factor to be determined after a 'violation' has been established"). Petitioner does not argue otherwise. See Pet. Br. 50-51.

Many state statutes also allow judges to set fine amounts based on the duration of the crime. These statutes have slightly different formulations: some say that upon "conviction" or a "guilty" verdict, the defendant shall be fined up to a certain dollar amount per day of the violation, App., *infra*, at 9a-11a; others allow a per-day penalty when the statute is "violate[d]," *id.* at 12a; and others permit a fine for each day the violation "continues," "exists," or "occurs," or until the violation "ceases," *id.* at 13a. But all of these formulations assume that judges, not juries, will determine the fine amounts, because they separate the facts necessary to

[18] Federal statutes occasionally set a criminal fine based on the number of days of violation but state that "each day * * * constitute[s] a separate violation," *e.g.*, 42 U.S.C. 4910(b); in such instances, the government acknowledges that the jury would need to find the number of days of the violation.

find guilt from the facts relevant to setting the amount of the fine. Again, petitioner has not disagreed.

b. Federal and state statutes often allow judges to set criminal fines based on the gain or loss resulting from the offense. The primary federal gain-or-loss statute is 18 U.S.C. 3571(d), which authorizes a fine of up to "the greater of twice the gross gain or twice the gross loss" when "any person derives pecuniary gain from the offense" or "the offense results in pecuniary loss to a person other than the defendant." This provision is used in a wide range of criminal cases, including cases involving fraud against the government, securities fraud, and antitrust violations.[19]

Several state laws likewise allow judges to set criminal fines based on the defendant's gain or the victims' losses. These statutes—some of which are general sentencing statutes and some of which are offense-specific—typically state that the "court" shall make the finding of gain or loss and expressly grant the court the authority to conduct a separate hearing if necessary to find these facts. See App., *infra*, 14a-17a. That language makes plain the States' view that judges should make the factual findings of gain or loss in order to set fines during sentencing proceedings, rather than having juries find these facts as part of the criminal trial.

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[19] A few other federal statutes set fines based on a judicial factfinding, such as the federal statutes that base the fines for embezzlement and bribery on the amount embezzled or the value of the bribe. See 18 U.S.C. 645 (embezzlement by court officers); 18 U.S.C. 201(b) (bribery of public officials and witnesses); see also *United States* v. *Rasco*, 853 F.2d 501, 504 (7th Cir.) (explaining that the "penalty provision does not alter or amend the statutory definition of the offense" and the government therefore "was not required to establish the exact value of the bribe"), cert. denied, 488 U.S. 959 (1988).

2. States and the federal government have sound reasons for structuring sentencing decisions in this way. Judges typically have had broad discretion in setting criminal fines, but in the context of certain types of crimes, such as environmental crimes, the state and federal legislatures decided to "rein in th[at] discretion" by conditioning the amount of the fine on facts that quantify the harm caused by the offense. *Ice*, 555 U.S. at 171; see Pet. App. 31a.

For example, setting the fine based on the number of days a defendant committed an environmental crime "promot[es] sentences proportionate to 'the gravity of the offense,'" *Ice*, 555 U.S. at 171 (quoting *Blakely*, 542 U.S. 308), because the harm caused by environmental pollution often depends on the length of time hazardous materials are exposed. Similarly, fines set as a multiple of the gain or loss allow defendants to be punished according to the magnitude of the harms they cause, thereby reducing unjustified disparities in sentences. See *ibid.*; see also 18 U.S.C. 3553(a)(6) (directing federal judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" in sentencing).

These discretion-guiding sentencing provisions represent legislative innovations that would be undone by the rule petitioner advocates. For example, the adoption of fines based on the gain or the loss from the offense reflected a concerted federal and state effort to ensure that corporate criminal penalties were proportional to the gravity of the offense. Before legislatures adopted these sentencing provisions, courts had imposed very modest penalties on corporations convicted of seri-

ous crimes.[20] The Model Penal Code was revised to address this concern, adding a provision stating that, as an alternative to maximum fines specified for certain offenses, the court could impose an alternative fine of "any higher amount equal to double the pecuniary gain derived from the offense by the offender." Model Penal Code § 6.03(5), 10A U.L.A. 259 (2001) (adopted 1962). New York was the first jurisdiction to adopt such a provision, and numerous other States and the federal government followed suit. See N.Y. Penal Law § 80.10(2)(b) (McKinney 2009) (enacted 1965); Criminal Fine Improvement Act of 1987, Pub. L. No. 100-185, § 6, 101 Stat. 1279, 1280 (18 U.S.C. 3571(d)). These provisions were designed to "ensure that the wrongdoer does not profit" by "bas[ing] the fine upon the pecuniary gain of the defendant." H.R. Rep. No. 906, 98th Cong., 2d Sess. 17 (1984).

Petitioner suggests (Br. 36) that a fine that turns on the duration of an offense does not implicate "classic" sentencing concerns "about the nature of the offense or the character of the defendant." That suggestion is inaccurate: length of a violation can underscore the degree of harm inflicted by a violation as well as reveal the

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[20] See Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 Ariz. L. Rev. 407, 408 (1994) (noting that between 1984 and 1987, the average corporate criminal fine was only $48,164 and "the implicit sentencing message was that corporate crime paid"); Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 Wash. U. L.Q. 205, 215 (1993) (citing an empirical study by the United States Sentencing Commission that "found that the median fine courts imposed on organizations convicted of criminal offenses was substantially *less than* the actual dollar loss caused by the offense").

character of the person who committed it. And under current state and federal practice, "[t]rial judges often find facts" (*Ice*, 555 U.S. at 171) about the harm caused by the defendant in order to set a criminal fine. In the absence of any common-law practice requiring juries to make those findings, the Court should not "hem in [the] States" (*ibid.*) and the federal government by taking the function from the courts.

3. Forbidding judges from finding facts necessary to set criminal fines would hamper the administration of criminal justice. As in *Ice*, the "predicate facts" (555 U.S. at 172) for setting the fine may not be known at the time of the indictment. For example, statutes basing the fine amount on the loss caused by the defendant's offense are often used in environmental crimes cases. The exact dollar figure of clean-up costs may not be known at the time of the indictment. See, *e.g.*, Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 Wash. U. L.Q. 205, 254-259 (1993). One principal reason the Sentencing Guidelines exclude environmental crimes from their fine provisions is "the potential difficulty in many environmental cases of defining and computing loss." *Id.* at 256; see Sentencing Guidelines § 8C2.1 and comment. (n.2).

Further, documenting the extent of environmental harm caused by the defendant could greatly prejudice the defense at trial. In a case like this one, the government might have to show how much money the defendant saved by not properly disposing of the hazardous waste and by avoiding the required permitting process. Establishing clean-up costs could require the introduction of evidence on the effects and persistence of the

hazardous material on the environment and the particular effects on persons exposed to the hazardous material or displaced by a spill. And evidence of a defendant's wealth may come in as a byproduct of establishing gain or loss. Contrary to petitioner's (Br. 51) and his amici's contention (Chamber Br. 5-7), it is difficult to believe that a corporate defendant would prefer that juries hear this type of evidence. See J.A. 15 (petitioner moved to exclude evidence relating to the apartment complex's contamination as unduly prejudicial).

Aside from a risk of jury prejudice, a rule requiring juries to find gain or loss could result in substantial juror confusion, because such calculations are often complex and involve the introduction of expert testimony that is irrelevant to guilt or innocence. For example, to show a defendant's gain from not obtaining a hazardous waste permit, the government may need to put on testimony from industry experts about how the permits are obtained and how much the process costs, as well as testimony from financial experts, or even business competitors, to testify about the money saved, and competitive advantage gained, from not complying with the law.

Problems of jury prejudice and confusion could perhaps be avoided by "bifurcated or trifurcated trials." *Ice*, 555 U.S. at 172. But as this Court has explained, that type of administrative burden should not be imposed absent a "genuine affront to *Apprendi*'s instruction." *Ibid.* No such affront exists here. The jury has already found petitioner guilty of a serious felony, and the sentencing phase simply "rein[s] in" (*id.* at 171) the judge's historically broad discretion in imposing fines.

Accordingly, the Court has good reason not to extend *Apprendi* to undo state and federal legislative efforts to guide judges' discretion in setting fines. Nothing in the

history or purposes of the Sixth Amendment prohibits judges from deciding facts that set a fine amount above the otherwise-applicable statutory maximum, and such a rule would "cut the [*Apprendi*] rule loose from its moorings." *Ice*, 555 U.S. at 172.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2012

APPENDIX A

Statutory Appendix

1. Amendment V of the United States Constitution provides, in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

2. Amendment VI of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *

3. 42 U.S.C. 6903 provides, in pertinent part:

Definitions

As used in this chapter:

* * * * *

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

* * * * *

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

4. 42 U.S.C. 6928 provides, in pertinent part:

Federal enforcement

* * * * *

(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 under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]

* * * * *

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. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

5. 40 C.F.R. 261.1 provides in pertinent part:

Purpose and scope.

(c) For the purposes of §§ 261.2 and 261.6:

(1) 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;

* * * * *

(4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. * * *

* * * * *

(7) A material is "recycled" if it is used, reused, or reclaimed.

* * * * *

6. 40 C.F.R. 261.2 provides in pertinent part:

Definition of solid waste.

(a)(1) A *solid waste* is any discarded material that is not excluded under §261.4(a) or that is not excluded by a variance granted under §§260.30 and 260.31 or that is not excluded by a nonwaste determination under §§ 260.30 and 260.34.

(2)(i) A *discarded material* is any material which is:

(A) Abandoned, as explained in paragraph (b) of this section; or

(B) Recycled, as explained in paragraph (c) of this section; or

* * * * *

(b) Materials are solid waste if they are *abandoned* by being:

* * * * *

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(c) Materials are solid wastes if they are *recycled*—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (4) of this section.

* * * * *

(3) *Reclaimed.* Materials noted with a "—" in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an "*" in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§ 261.2(a)(2)(ii), or 261.4(a)(17), or 261.4(a)(23), or 261.4(a)(24) or 261.4(a)(25).

* * * * *

Table 1

	Use constituting disposal (§ 261.2(c)(1))	Energy recovery/ fuel (§ 261.2(c)(2))	Reclamation (261.2 (c)(3)), except as provided in §§ 261.2 (a)(2)(ii), 261.4(a)(17), 261.4(a)(23), 261.4(a)(24), or 261.4(a)(25)	Speculative accumulation (§ 261.2 (c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
. . . . .				
* * *	* * *	* * *	* * *	* * *

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APPENDIX B

Selected Federal Statutes With Fine Per Day Of Violation

12 U.S.C. 1467a(i)(1)(A)-(B) (prohibition on violating laws regulating savings and loans)

12 U.S.C. 1785(d)(3) (prohibiting anyone who has been convicted of a criminal offense involving dishonesty or a breach of trust from participating in the affairs of an insured credit union)

12 U.S.C. 1829(b) (prohibiting anyone who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from participating in the affairs of an insured depository institution)

12 U.S.C. 1847(a)(1)-(2) (prohibition on knowingly violating regulations of bank holding companies)

12 U.S.C. 3111 (prohibition on violating laws regulating foreign bank participation in domestic markets)

14 U.S.C. 85 (prohibition on violating maritime regulations)

15 U.S.C. 717t(b) (prohibition on willfully and knowingly violating regulations of natural gas companies)

16 U.S.C. 825o(b) (prohibition on violating regulations made under the Federal Power Act)

30 U.S.C. 1463(b) (prohibition on violating laws and regulations pertaining to deep seabed hard mineral resources)

33 U.S.C. 411 (prohibition on wrongful deposit of refuse, use of or injury to harbor improvements, and obstruction of navigable waters)

33 U.S.C. 1319(c)(1)-(2), (4) (prohibition on violating laws or permit conditions made under the Clean Water Act)

42 U.S.C. 2273(b) (prohibition on violating laws regulating atomic energy licenses by persons responsible for constructing a utilization facility)

42 U.S.C. 6992d(b) (prohibition on violating laws regulating disposal, storage, and treatment of medical waste)

42 U.S.C. 9152(d) (prohibition on violating laws regulating ocean thermal energy conversion)

47 U.S.C. 502 (prohibition on violating rules and regulations pertaining to wire and radio communications)

APPENDIX C

Selected Federal Statute With Fine Based On Gain Or Loss

18 U.S.C. 3571(d) ("If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.")

APPENDIX D

Selected State Statutes With Fine Per Day Of Violation

Statutes providing for fine upon "conviction" or "guilty" verdict

Ark. Code Ann. § 12-79-106 (2003)

Cal. Health & Safety Code §§ 1248.8(a) (West 2008), 25515(a) (West Supp. 2012), 25541 (West Supp. 2012), 25541.3 (West 2010), 100895(a) & (b) (West Supp. 2012), 115215(b), (c) & (e) (West Supp. 2012), 116730(a) & (b) (West Supp. 2012), 121710 (West 2006), 131130(a) & (b) (West Supp. 2012)

Colo. Rev. Stat. §§ 25-7-122.1(1)(b) & (c), (3)(a) & (d), 25-15-310(2) & (3) (2011)

Del. Code Ann. tit. 7, § 7714(c) (2011)

D.C. Code §§ 6-506(1) (2008), 7-2108(g) (2008), 8-231.16(a) (2008)

Fla. Stat. Ann. § 403.727(3)(b) (West 2008)

Haw. Rev. Stat. Ann. §§ 179D-8(b) (Michie 2008), 340E-8(b) (Michie 2008), 342D-35 (Michie 2008)

415 Ill. Comp. Stat. Ann. 5/44(b)(2), (c)(2), (d)(2), (f)(2), (g)(2), (h)(7), (j)(2), (j)(3), (j)(5), (k)(2) & (p)(2) (West 2011); 430 Ill. Comp. Stat. Ann. 100/18(b) (West 2004)

Ind. Code Ann. §§ 13-29-1-14 (Michie 2011), 13-30-10-5(c)(1) & (2) (Michie 2011)

Iowa Code Ann. §§ 455B.146A (West 2004), 716B.2, 716B.3, 716B.4 (West 2003)

La. Rev. Stat. Ann. §§ 30:2076.2(A)(3) & (B)(3) (2000), 30:2117(C) (West Supp. 2012), 30:2183(G)(1) & (2) (West Supp. 2012), 32:1514(A) & (B) (2002), 37:2160(C)(1) (West Supp. 2012)

Me. Rev. Stat. Ann. tit. 38, § 1319-T(1) & (2) (2001)

Md. Code Ann., Bus. Reg. § 11-1001(b) (2010); Md. Code Ann., Envir. § 2-609.1 (2007)

Mich. Comp. Laws §§ 324.3115(2) (West 2007), 324.20139(3) (West Supp. 2011), 325.1021(1) (West Supp. 2011)

Miss. Code Ann. §§ 17-17-67(1) (West Supp. 2011), 21-27-217(3) (West 1999), 49-17-43(5) (West 2011)

Mo. Ann. Stat. §§ 260.425(3)(6) (West 2001), 643.250(2) (West Supp. 2012), 644.076(3) (West 2006)

Mont. Code Ann. §§ 75-5-632 (2009), 82-11-148 (2009)

Nev. Rev. Stat. §§ 445A.705(1) (Michie 2009), 459.600 (Michie 2009)

N.J. Stat. Ann. §§ 13:1E-99.89(f) (West Supp. 2011), 13:1F-10(f) (West Supp. 2011), 13:9A-9(f) (West Supp. 2011), 13:9B-21(f) (West Supp. 2011), 13:19-18(f) (West Supp. 2011), 58:1A-16(f) (West Supp. 2011), 58:4-6(f) (West Supp. 2011), 58:10A-10(f)(1)(a), (2) & (3) (West 2006), 58:16A-63(f) (West Supp. 2011)

N.M. Stat. Ann. § 69-36-18(A) (1997)

N.Y. Envir. Conserv. Law Ann. §§ 71-1933(1) (McKinney Supp. 2012), 71-2113(2) (McKinney Supp. 2012), 71-2705(2) (McKinney Supp. 2012), 71-4303(2) (McKinney 1997), 71-4402(2) (McKinney 1997)

N.C. Gen. Stat. §§ 14-284.2(a) (2011), 75A-10(e) (2011), 76-40(a1)(2) (2011), 130A-26.1(f), (g) & (i)(1) (2011), 143-214.2A(c)(2) (2011), 143-215.6B(f)-(h) (2011), 143-215.88B(e)-(h) (2011), 143-215.94X(a)-(c) (2011), 143-215.104Q(a)-(c) (2011), 143-215.114B(f)-(h) (2011)

Okla. Stat. Ann., tit. 27A , §§ 2-5-116(A) (West 2011), 2-6-206(G)(1)-(4) (West 2011)

S.D. Codified Laws § 34A-2-75 (West Supp. 2011)

Tex. Nat. Res. Code Ann. § 91.604(b) (Vernon 2011)

Utah Code Ann. §§ 19-2-115(3)-(4) & (7)-(8) (2010), 19-5-115(3)-(4) (2010), 19-6-113(4) (2010)

W. Va. Code §§ 16-27-4 (Michie 2011), 22-15-15(b)(3)-(4) (Michie 2009), 22-18-16(a) & (c) (Michie 2009), 29-1H-8 (Michie 2008)

Wyo. Stat. §§ 24-1-133(c), 36-1-119(c), 40-14-604(g), 40-19-118(f) (LexisNexis 2011)

Statutes providing for a per-day penalty when the statute is "violate[d]"

Ala. Code §§ 22-22-14(a), 22-36-9(a) (Michie 2006)

Alaska Stat. §§ 02.40.010(e) (Michie 2010), 31.05.150(e) (Michie 2010)

Conn. Gen. Stat. Ann. §§ 22a-131a(a), (b) & (c) (West 2006), 22a-175(a) (West 2006), 22a-226a (West 2006), 22a-628 (West 2006)

Del. Code Ann. tit. 7, § 6013(a) (2011)

D.C. Code § 44-509(a) (West Supp. 2011)

Haw. Rev. Stat. Ann. §§ 342B-49 (Michie 2008), 342D-32 (Michie 2008), 342D-33 (Michie 2008), 342P-22 (Michie 2008), 342P-23 (Michie 2008)

La. Rev. Stat. §§ 30:4.1(G) (West Supp. 2012), 30:18(A)(4) (West 2007)

Me. Rev. Stat. Ann. tit. 38, § 349(1) & (6) (West Supp. 2011)

Mass. Ann. Laws ch. 21, § 34C (LexisNexis 2007), ch. 21L, § 2(c) (Lexis-Nexis 2007)

N.Y. Exec. Law Ann. § 382(2) (McKinney 2005)

N.D. Cent. Code Ann. § 23-20.3-09(3)-(4) (2002)

Tex. Nat. Res. Code Ann. § 141.102(b) (West 2011)

Utah Code Ann. § 19-5-115(2)-(4) (2010)

Wis. Stat. Ann. § 283.91(3) (West 2010)

Statutes providing for fine for each day violation "continues," "exists," or "occurs," or until the violation "ceases"

Ark. Rev. Stat. Ann. § 23-3-304(a) & (b) (Michie Supp. 2011)

D.C. Code §§ 6-703.06 (2008), 6-1110(a) (Supp. 2011), 32-414(a) (2010), 44-212(e) (Supp. 2011)

La. Rev. Stat. §§ 6:950.4(D), 6:1338(B), 30:2025(F)(1)(a) & 2(a) (2005)

Md. Code Ann., Envir. § 9-413(b) (2007), Md. Code Ann., Pub. Util. Cos. § 11-101(g) (2010)

Mass. Ann. Laws ch. 21, § 42 (LexisNexis 2007), ch. 21A, §§ 13, 14 (LexisNexis 2007), ch. 91, §§ 23, 55 (LexisNexis 2005), ch. 111, §§ 160, 160A, 162 (LexisNexis 2004), ch. 111F, § 3(b) (LexisNexis 2004)

Mont. Code Ann. § 80-15-414(1) (2009)

Okla. Stat. Ann., tit. 17, §§ 158.59, 191.11 (West Supp. 2012); tit. 18, § 381.73(I) (West 1998); tit. 82, § 1324.50(A) & (B) (West Supp. 2012)

APPENDIX E

Selected State Statutes With Fine Based On Gain Or Loss

General criminal sentencing provisions

Ala. Code § 13A-5-11(c) (Michie Supp. 2011) ("The court may conduct a hearing upon the issue of defendant's gain or the victim's loss * * * ")

Conn. Gen. Stat. Ann. § 53a-44 (West 2007) ("the court * * * may sentence the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the offense"; "the court shall make a finding as to the amount of the defendant's gain," and "if the record does not contain sufficient evidence to support such a finding, the court may conduct a hearing upon the issue")

Fla. Stat. § 775.083(1)(f) (West 2008) (authorizing fine of an "amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim")

Me. Rev. Stat. Ann. tit. 17-A, § 1301(2) (West Supp. 2011) ("When the court imposes a fine based on the amount of gain, the court shall make a finding as to the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding, the court may conduct * * * a hearing on this issue.")

Mo. Ann. Stat. § 560.011(2) (West 1999) ("When the court imposes a fine based on gain the court shall make a finding as to the amount of the offender's gain from the crime. If the record does not contain sufficient evi-

dence to support such a finding, the court may conduct a hearing upon the issue.")

N.J. Stat. Ann. § 2C:43-3(e) (West 2005) ("the court shall make a finding as to the amount of the gain or loss, and if the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue")

N.Y. Penal Law § 80.00(3) (McKinney 2009) ("the court shall make a finding as to the amount of the defendant's gain from the crime"; "the court may conduct a hearing upon such issues")

Or. Rev. Stat. § 161.625(5) (2011) ("When the court imposes a fine for a felony the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding the court may conduct a hearing upon the issue.")

Offense-specific "gain or loss" provisions

Colo. Rev. Stat. Ann. § 18-17-105(2), (3) (2011) (penalties for organized crime; "[t]he court shall hold a hearing to determine the amount of the fine")

Del. Code. Ann. tit. 11, § 939(e) (Michie Supp. 2010) (penalties for computer-related offenses; "the court shall make a finding as to the amount of the defendant's gain from the offense" and "may conduct a hearing upon the issue")

Fla. Stat. Ann. § 812.032 (West 2006) (theft, robbery, and related crimes; "[t]he court shall hold a hearing to

determine the amount of the fine to be imposed under this section")

Fla. Stat. Ann. § 895.04(2), (3) (West 2000) (racketeering; "[t]he court shall hold a hearing to determine the amount of the fine")

La. Rev. Stat. Ann. § 15:1354(B), (C) (West Supp. 2012) (racketeering; "[t]he court shall hold a hearing to determine the amount of the fine")

Minn. Stat. Ann. § 609.904 (West 2009) (racketeering; "[t]he district court shall hold a hearing to determine the amount of the fine" and shall consider various additional factors, such as "the seriousness of the conduct, whether the amount of the fine is disproportionate to the conduct in which the person engaged, its impact on victims and any legitimate enterprise involved in that conduct, as well as the economic circumstances of the convicted person")

Miss. Code Ann. § 97-43-7(2), (3) (West 2011) (racketeering; "[t]he court shall hold a hearing to determine the amount of the fine")

N.H. Rev. Stat. Ann. § 638:18(IV) (LexisNexis Supp. 2011) (computer-related offenses; fine is "fixed by the court" and "the court shall make a finding as to the amount of the defendant's gain from the offense")

Ohio Rev. Code Ann. § 2923.32(B)(2)(c) (LexisNexis 2010) (corruption; "[t]he court shall hold a hearing to determine the amount of fine")

Okla. Stat. tit. 22 § 1404(B) (West Supp. 2012) (racketeering; "[t]he district court shall hold a separate hearing to determine the amount of the fine")

Tex. Parks & Wildlife Code § 12.410(c) (West 2002) (violation of fish and wildlife laws; "if a court finds that the corporation or association gained money or property or caused personal injury, property damage, or other loss through the [violation] * * * , the court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed double the amount gained or caused by the corporation to be lost, whichever is greater")

Wis. Stat. Ann. § 946.84(2), (3) (West 2005) (racketeering; "[t]he court shall hold a hearing to determine the amount of the fine")