

No. 11–94

IN THE
Supreme Court of the United States

SOUTHERN UNION COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent.

**On Writ Of Certiorari
To The U.S. Court Of Appeals
For The First Circuit**

**BRIEF FOR THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AND
THE NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are the Chamber of Commerce of the United States of America (the “Chamber”) and the National Association of Criminal Defense Lawyers (“NACDL”). The Chamber is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, it regularly files *amicus* briefs in cases raising issues of vital concern to the Nation’s business community.

NACDL is a nonprofit, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of criminal wrongdoing. It has over 11,000 members and over 40,000 affiliate members, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL regularly files *amicus* briefs in cases implicating the rights of criminal defendants.

¹ Each party has consented to the filing of this brief. No party’s counsel authored this brief in whole or in part. And no party, party’s counsel, or person other than *amici*, their counsel, or their members made a monetary contribution intended to fund this brief’s preparation or submission.

Amici share an interest in ensuring that the constitutional right to have “any fact ... that increases the maximum penalty for a crime ... be ... submitted to a jury, and proven beyond a reasonable doubt,” *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), applies to criminal fines. The First Circuit, however, held that *Apprendi* does not apply to criminal fines. In its view, facts that increase the maximum fine need only be proven to a sentencing judge by a mere preponderance of the evidence. Because this decision denies defendants their constitutional rights and creates perverse incentives for innocent defendants to plead guilty, *amici* respectfully urge this Court to reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Apprendi*, this Court clearly held that, under the Fifth and Sixth Amendments, defendants have the right to have “any fact ... that increases the maximum penalty for a crime ... be ... submitted to a jury, and proven beyond a reasonable doubt.” 530 U.S. at 476. The rationale was straightforward: Criminal punishment is the most serious sanction the law allows, so the government should have to establish any facts that increase the defendant’s maximum criminal penalty according to the most demanding standard known to the law.

While *Apprendi* dealt with incarceration and not fines, fines are a very significant aspect of the criminal justice system that should be entitled to just as much constitutional scrutiny. In many criminal prosecutions, the most significant part of the penalty is the fine. Moreover, in cases where the defendant is

a corporation, because a corporation cannot be incarcerated, the fine is not merely the most significant part of the penalty; it *is* the penalty.

Some criminal statutes provide for fines of up to twice the amount of gain or loss, no matter the size.² And many regulatory statutes authorize criminal fines of up to tens or hundreds of thousands of dollars—sometimes even \$1 million—*per day* of non-compliance, no matter how long the duration.³ Prosecutors use these provisions regularly. For example, the federal twice-the-gain-or-loss provision, 18 U.S.C. § 3571(d), has been used to obtain fines of hundreds of millions of dollars for price fixing in violation of the Sherman Act, for which conviction alone authorizes a fine of no more than \$100 million (and, until 2004, no more than \$10 million). *See, e.g.*, Judgment at 1–2, *United States v. LG Display Co.*,

² The federal system and many states have general statutes making *any* financial crime punishable by up to twice the gain or loss. *See, e.g.*, 18 U.S.C. § 3571(d); Fla. Stat. Ann. § 775.083(1)(f); N.J. Stat. Ann. § 2C:43-3(e); Haw. Rev. Stat. § 706-640(1)(f); Ky. Rev. Stat. § 534.030(1); N.Y. Penal Law § 80.00(1)(b); Pa. Cons. Stat. § 1101(8).

³ *See, e.g.*, 12 U.S.C. § 1467a(h)(i)(1)(B) (\$1 million per day of certain Holding Company Act violations); *id.* § 1847(a)(2) (\$1 million per day of certain Federal Deposit Insurance Act violations); *id.* § 3111 (\$1 million per day of certain International Banking Act violations); 33 U.S.C. § 1319(c)(2) (\$100,000 per day of certain Clean Water Act violations); 42 U.S.C. § 4910(a)(1) (\$50,000 per day of certain Noise Control Act violation); *id.* § 6928(d) (\$50,000 per day of certain Resource Conservation and Recovery Act violations).

Ltd., No. 08-CR-803-SI (N.D. Cal. Dec. 23, 2008) (\$400 million fine for one Sherman Act violation); Judgment at 1–2, *United States v. F. Hoffmann-La Roche Ltd.*, No. 99-CR-184-R (N.D. Tex. May 20, 1999) (\$500 million fine for one Sherman Act violation). Section 3571(d) also has been used to extract hundred-million-dollar fines for failing to follow proper accounting procedures in violation of the Foreign Corrupt Practices Act (“FCPA”), a violation normally punishable by a fine of no more than \$25 million. *See, e.g.*, Judgment at 1–2, 5, *United States v. Siemens Aktiengesellschaft*, No. 08-CR-367-RJL (D.D.C. Jan. 6, 2009) (\$448.5 million fine for two FCPA violations). The same provision has been used to obtain a fine exceeding \$1 billion for violation of the Food, Drug & Cosmetic Act, for which conviction alone authorizes a fine of no more than \$500,000. *See* David Sell, *U.S. Attorney in Philadelphia Tackles Health-Care Fraud*, Philadelphia Inquirer, May 14, 2011, at A11.

The First Circuit held that *Apprendi* does not apply to criminal fines. Under the decision below, prosecutors need only prove facts that increase the maximum fine to a sentencing judge by a preponderance of the evidence. For many defendants, such as corporations, the import of the First Circuit’s decision is that they lack the constitutional rights confirmed in *Apprendi*.

Amici agree with Petitioner that, as a matter of law, the First Circuit’s decision is wrong and must be reversed. Neither the text of the Fifth and Sixth Amendments nor this Court’s decisions interpreting that text support the First Circuit’s interpretation limiting *Apprendi* to incarceration. *Amici* submit this

brief (a) to explain the practical effects that removing *Apprendi*'s protections from criminal fines will have on innocent defendants, and (b) to show how applying *Apprendi* to criminal fines will not hamper law enforcement from obtaining sentences of fines against guilty defendants.

First, exempting criminal fines from *Apprendi* makes innocent defendants more likely to plead guilty. When faced with the prospect of a potentially astronomical fine that the government need only prove by a preponderance of the evidence, some innocent defendants will prefer to plead guilty rather than rolling the dice at trial.

Second, subjecting criminal fines to *Apprendi* will not impair prosecutors' ability to enforce the law against defendants that actually are guilty. Prosecutors have previously operated as if *Apprendi* does apply to criminal fines, and their experience suggests that doing so has not undercut their ability to fight crime.

ARGUMENT

I. Exempting criminal fines from *Apprendi* makes innocent defendants more likely to plead guilty.

A. The mere existence of twice-the-gain-or-loss and duration-of-offense fines already provides a powerful incentive for even innocent defendants to plead guilty. Consider a hypothetical innocent defendant charged with defrauding his alleged victims of \$5 million. And suppose the jurisdiction has a twice-the-loss provision similar to 18 U.S.C. § 3571(d). The prosecutor tells the defendant that, if

he pleads guilty and saves the government the cost of a trial, the prosecutor will recommend a fine of \$1 million; otherwise, the prosecutor will push for something larger. The mere prospect that the prosecutor could convince a judge to award a \$10 million fine if the jury finds him guilty may render the plea an offer he cannot refuse.

The First Circuit's decision compounds this existing dynamic because it makes it dramatically easier for prosecutors to prove the predicate facts that trigger twice-the-gain-or-loss and duration-of-offense fines. This is true for two primary reasons. *First*, and most obviously, the decision below dramatically lowers the prosecution's burden of proof. *Apprendi* requires proof beyond a reasonable doubt, the highest standard known to the law. The decision below, however, permits the prosecution to prove the predicate facts by a mere preponderance of the evidence. Evidence that is barely stronger than equivocal will pass muster. *Second*, the decision deprives the defendant of the opportunity to make his case to a tribunal composed of his peers. *See Blakely v. Washington*, 542 U.S. 296, 306 (2004) (explaining that the Framers intended the jury to "function as circuit-breaker in the State's machinery of justice").

B. The perverse incentive to plead guilty created by the decision below is even stronger when the defendant is a corporation. Because corporations cannot be incarcerated, criminal fines are the only potential penalty. Under the First Circuit's rule, a corporation facing criminal penalties would be entirely deprived of *Apprendi*'s constitutional protection.

The potential effects of undeserved guilty pleas by corporations cannot be brushed aside. A guilty plea by a corporation will not only result in payment of financial penalties, but could result in the loss of a license, *see, e.g.*, 7 U.S.C. § 12a(2)(D) (commodities dealers); 12 U.S.C. § 1818(e)(1)(A)(i)(I) (federal banks); 15 U.S.C. § 77t(b) (securities dealers), debarment in the case of a government contractor, *see* 48 C.F.R. § 9.406-2, and significant reputational harm. These effects are felt not only by the corporation itself, but by the corporation's individual shareholders and by the corporation's employees, who may face loss of employment and retirement benefits. *See* Ellen S. Podgor, *White-Collar Innocence: Irrelevant in the High-Stakes Risk Game*, 85 Chi.-Kent L. Rev. 77, 78–79 (2010) (describing fallout from wrongful conviction of Arthur Andersen LLP); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1329, 1341 & n.44 (2009).

II. Subjecting criminal fines to *Apprendi* will not prevent prosecutors from enforcing the law.

As the experience of several federal prosecutors' offices shows, subjecting criminal fines to *Apprendi* will not prevent law enforcement from pursuing defendants that actually are guilty.

A. The Antitrust Division uses the Sherman Act to combat price fixing and promote commercial competition. But, because the maximum penalties authorized by a Sherman Act conviction (\$1 million for individuals and \$100 million for corporations) often amount to significantly less than the damage

done by the most harmful anticompetitive behavior, the Division in these most critical cases turns to the federal twice-the-gain-or-loss fine provision, 18 U.S.C. § 3571(d). *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Department of Justice, Antitrust Division, *Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants*, Remarks Before the American Bar Association Section of Antitrust Law (Mar. 30, 2005).

After *United States v. Booker*, 543 U.S. 220 (2005), the Antitrust Division recognized that proving gain or loss by a preponderance of the evidence to seek a fine in excess of the Sherman Act maximum no longer would pass *Apprendi* muster. So, it began alleging gain and loss figures in its indictments and preparing to prove them beyond a reasonable doubt to the jury. *Criminal Remedies: Hearings Before the Antitrust Modernization Commission* 38 (2005) (testimony of Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Department of Justice, Antitrust Division).

The evidence indicates, however, that this has not hampered the Antitrust Division's ability to use Section 3571(d) to obtain fines well above the Sherman Act maximum.⁴ Specifically, four of the top five

⁴ Accordingly, even though the Antitrust Division now takes the view that, as a matter of law, *Apprendi* does not apply to criminal fines, *see* United States' Reply in Support of Motion for Order Regarding Fact Finding for Sentencing under 18 U.S.C. § 3571(d), *United States v. AU Optronics Corp.*, NO. 09-CR-110 (continued...)

Section 3571(d) antitrust fines imposed upon corporations in the past quarter-century—fines between three and four times the Sherman Act maximum—have been obtained *after* the Antitrust Division began treating *Apprendi* as applicable to criminal fines.⁵

B. The Northern District of Illinois is the busiest district in the Seventh Circuit, and its U.S. Attorney's Office brings some of the Circuit's most sophisticated and noteworthy prosecutions. Yet, following the Seventh Circuit's holding in *United States v. LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 597 (7th Cir. 2006), that *Apprendi* applies to criminal fines, that Office does not appear to have experienced a downturn in its fine collection. In fact, in that district, the average median fine-plus-restitution award since *LaGrou* is more than triple what it was before.⁶

(N.D. Cal. July 11, 2011), it does *not* argue that, as a matter of practicality, subjecting criminal fines to *Apprendi* prevents it from enforcing the Sherman Act effectively.

⁵ See U.S. Department of Justice, Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More* (Dec. 20, 2011), available at <http://www.justice.gov/atr/public/criminal/sherman10.pdf>.

⁶ See U.S. Sentencing Comm'n Fiscal Year By-District Data, found in the Commission's Sourcebooks, available at http://www.ussc.gov/Data_and_Statistics/archives.cfm.

C. The U.S. Attorney's Office for the Southern District of New York brings some of the most important financial prosecutions in the country. While the Second Circuit only recently held that *Appendi* applies to criminal fines, *see United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010), prosecutors in the Southern District do not appear skittish about preparing to prove gain or loss beyond a reasonable doubt in order to seek high fines using Section 3571(d), even when such gain or loss could soar into the hundreds of millions of dollars, or higher. For example, the Office has announced that it is prepared to seek a twice-the-gain-or-loss fine against three Swiss bankers who allegedly conspired to hide more than \$1.2 billion from the IRS.⁷

⁷ U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Charges Three Swiss Bankers with Conspiring to Hide More than \$1.2 Billion in U.S. Taxpayer Accounts from the IRS (Jan. 3, 2012), available at <http://www.justice.gov/usao/nys/pressreleases/January12/berlinkafreiandkellerindictmentpr.pdf>; *see also* U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Charges Two Swiss Bankers with Conspiring to Hide More than \$600 Million in U.S. Taxpayer Accounts from the IRS (Oct. 11, 2011) (preparing to seek twice-the-gain-or-loss fine), available at <http://www.justice.gov/usao/nys/pressreleases/October11/casadeifrazzettointdictmentpr.pdf>; U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Charges Former UBS Banker and Financial Adviser with Conspiring to Hide More than \$215 Million in Swiss Bank Accounts (Aug. 4, 2011) (same), available at <http://www.justice.gov/usao/nys/pressreleases/August11/gislergianindictmentpr.pdf>.

Subjecting criminal fines to *Apprendi* will not cause law enforcement to grind to a halt. The decision below, then, cannot be justified even on pragmatic grounds.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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