No. 11–94

IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The 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]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber 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, the Chamber regularly files *amicus curiae* briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

The National Association of Criminal Defense Lawyers ("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 crimes or misconduct. NACDL has over 11,000 members and over 40,000 affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL regularly files *amicus curiae* briefs in this Court in cases that implicate the rights of criminal defendants.

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[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 other person other than *amici*, their counsel, and their members made a monetary contribution intended to fund this brief's preparation or submission.

Amici believe this Court's review is critical to ensuring uniform nationwide enforcement of the Sixth Amendment right to have "any fact (other than prior conviction) 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). Specifically, *amici* are concerned that, in the First Circuit, the Sixth Amendment no longer applies to "fact[s] (other than prior conviction) that increase[] the maximum penalty for a crime" by increasing the maximum fine.

A fine is an important part of "the … penalty for a crime." In white-collar prosecutions in particular, fines represent a significant component of the penalties faced by individuals, including those represented by NACDL's members. And because a corporation cannot be incarcerated, fines represent the central component of the penalties faced by organizations, like members of the Chamber. The decision below, however, permits the sentencing judge to increase the maximum fine based upon facts found by a mere preponderance of the evidence. Accordingly, *amici* respectfully urge this Court to grant review.

INTRODUCTION

The Resource Conservation and Recovery Act ("RCRA") makes it a crime to store mercury without a permit. 42 U.S.C. § 6928(d)(2)(A). This offense is punishable by a prison term of up to two years and a fine of up to $50,000 for each day of unlawful storage. *Id.* § 6928(d). That is, the maximum penalty for storing mercury without a permit is a two-year prison term plus a $50,000 fine if the storage lasted

one day, a two-year prison term plus a $100,000 fine if the storage lasted two days, and so on.

This Court has made clear that the Sixth Amendment requires that "any fact (other than prior conviction) that increases the maximum penalty for a crime … be … submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476; *see Cunningham v. California*, 549 U.S. 270, 281–82 (2007); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Ring v. Arizona*, 536 U.S. 584, 600 (2002). And this Court has confirmed that this rule applies to facts that "increase[] the maximum penalty for a crime" by increasing the maximum fine. *See Booker*, 543 U.S. at 244, 245.

In the context of a RCRA violation, the duration of unlawful mercury storage is a fact that "increases the maximum penalty." Namely, the longer the duration, the larger the maximum fine. 42 U.S.C. § 6928(d). The import of this Court's Sixth Amendment jury-trial cases, then, seems clear: Duration of unlawful storage must be proved to the jury beyond a reasonable doubt. Indeed, the Second, Sixth, and Seventh Circuits have held precisely that. Pet. 12–16 (discussing cases).

Not so, however, according to the First Circuit. Pet. App. 25a. That court upheld a sentencing judge's decision to subject Petitioner Southern Union Company to a maximum RCRA fine of $38.1 million—corresponding to 762 days of unlawful mercury storage—even though the jury found the company guilty of storing mercury unlawfully only for one day. *Id.* The panel found no error, because a preponderance of the evidence supported the longer period. *See*

id. Proof beyond a reasonable doubt was not required; in the panel's view the Sixth Amendment does not apply to criminal fines. *Id.*

The First Circuit recognized that a fine indisputably is a component of "the penalty" for a RCRA violation. *See id.* at 26a. And it acknowledged that this Court has held time and again that increasing "the penalty" for a crime beyond the statutory maximum requires jury factfinding. *Id.* at 26a–27a (citing *Cunningham*, 549 U.S. 270; *Booker*, 543 U.S. 220; *Blakely*, 542 U.S. 296; *Ring*, 536 U.S. 584; *Apprendi*, 530 U.S. 476). Nevertheless, the panel determined that this express, repeated directive must yield to the "logic and method" of this Court's recent decision in *Oregon v. Ice*, 555 U.S. 160 (2009), which in the panel's view cut the other way. Pet. App. 28a.

In *Ice*, the Court held that the Sixth Amendment does not govern factfinding necessary to enable the penalties for two separate crimes to run consecutively rather than concurrently. 555 U.S. at 163. As the First Circuit read *Ice*, this was because, as a historical matter, the judge, and not the jury, made this determination. Pet. App. 28a. Judges historically set the amounts of criminal fines, as well, according to the panel. *Id.* at 30a–31a. Therefore, the panel reasoned, *Ice* compels the conclusion that the Sixth Amendment does not govern factfinding necessary to authorize a particular fine amount. *Id.* at 31a.

This Court should grant the petition for a writ of certiorari for at least three reasons. *First*, the decision below conflicts with this Court's decision in *Booker*, which held that a sentencing scheme permitting and sometimes requiring judges to impose a fine greater than the maximum fine authorized by the

jury verdict alone violates the Sixth Amendment. Properly read, *Ice* does not suggest otherwise. Yet, in the short time since *Ice* was decided, the decision has been misread so drastically that this Court should step in *now* to eliminate the potential for further confusion.

Second, exempting criminal fines from Sixth Amendment scrutiny will undermine the efficacy of the justice system by making innocent defendants more likely to plead guilty. This is particularly true in white-collar and corporate prosecutions, where fines are a significant and often predominant part of the entire penalty. By refusing to require that facts determining the maximum amount of a criminal fine be proved to the jury beyond a reasonable doubt, the decision below makes those criteria harder to contest, and a large fine upon conviction thus harder to avoid. Therefore, even innocent defendants will be more likely to relinquish their jury-trial rights and plead guilty to avoid the possibility of a large fine upon conviction.

Third, subjecting criminal fines to Sixth Amendment scrutiny will not force prosecutors to compromise their law-enforcement efforts. The Antitrust Division of the Department of Justice, as well as multiple U.S. Attorneys' Offices, have been operating as if the Sixth Amendment *does* apply to criminal fines, and their experiences suggest that proceeding in this way does not make a prosecutor's office any less able to fight crime.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with this Court's decision in *Booker*.

A. *Amici* agree with Petitioner (Pet. 18–25) that the decision below conflicts with *Apprendi*. *Amici* submit that it also conflicts with *Booker*, which, at least in part, dealt concretely with criminal fines. *See United States v. Yang*, 144 F. App'x 521, 524 (6th Cir. 2005) (holding that enhancing the maximum fine using facts found by a preponderance of the evidence violates *Booker*).

For each defendant convicted of a federal crime, the U.S. Sentencing Guidelines (the "Guidelines") recommend a particular penalty range, *i.e.*, a minimum and maximum prison term and a minimum and maximum fine, based upon criteria determinable by reference to the jury's verdict. But the Guidelines also recommend "enhancing" that range—increasing the minimum and maximum penalty—if a preponderance of the evidence supports various additional offender- and offense-specific findings. *See* U.S. Sentencing Guidelines Manual ch. 1, pt. A (2010).

Congress's sentencing statute made these "recommendations" mandatory: A court *had* to impose a sentence within the "enhanced" Guidelines range (the range determined by reference *both* to the facts found by the jury beyond a reasonable doubt *and* to the facts found by the court by a preponderance). 18 U.S.C. § 3553(b)(1) (2000). As a result, courts in certain situations were permitted or even compelled to impose a sentence—including a fine—greater than the maximum the Guidelines would have authorized

based solely on the jury's verdict. *See generally Booker*, 543 U.S. at 233–37.

In *Booker*, the Court held that this sentencing scheme violated the Sixth Amendment. *Id.* at 244. This was because the scheme in certain situations permitted or required judges to impose sentences greater than the maximum sentence authorized by the jury's verdict alone. *Id.* But the Court did not simply condemn this scheme to the extent it related to factfinding that increased an offender's maximum prison term. The Court condemned it *in toto*, including factfinding that increased an offender's maximum fine. *See id.*; *see also id.* at 245.

Thus, *Booker* makes clear that using preponderance factfinding to increase the fine beyond the maximum authorized by the jury's verdict alone violates the Sixth Amendment. Yet that is exactly what the First Circuit did below.

B. The panel concluded that even if its ruling could be said to conflict with *Apprendi* and *Booker*, *Ice* "effected a change in the application of the *Apprendi* rule to the issue in this case" that rendered moot any conflict with prior precedent. Pet. App. 31a. The panel recognized that *Ice* itself had nothing to do with the subject of *Apprendi*, namely factfinding that increases *the* maximum penalty for *a* crime. *See id.* at 27a. Rather, *Ice* concerned factfinding that resulted in the penalties for two separate crimes—each penalty already having been determined consistently with the Sixth Amendment—being imposed consecutively rather than concurrently. *Id.* Nevertheless, the panel concluded that the "logic and method" of *Ice*

indicates that the Sixth Amendment does not apply to factfinding that increases a maximum fine. *Id.* at 28a.

The panel observed that the *Ice* Court (1) noted that, as a historical matter, the consecutive-versus-concurrent decision was made by judges, not juries, and (2) held that the decision to impose penalties consecutively rather than concurrently does not trigger Sixth Amendment scrutiny. *Id.* at 27a–28a. From these two data points, the panel determined that *Ice* stands for the proposition that the Sixth Amendment applies only to forms of punishment that historically were entrusted to juries. *Id.* at 28a. The panel concluded that judges always had set the amounts of criminal fines, so the Sixth Amendment does not apply to them. *Id.*

The panel read *Ice* incorrectly. *First*, as an initial matter, *Ice* explains that it does not purport to call into question "[a]ll of the[] decisions involv[ing] sentencing for a discrete crime," which hold without deviation that any fact (other than prior conviction) that increases a crime's maximum penalty—like duration of unlawful mercury storage under RCRA—must be proved to the jury. 555 U.S. at 167. Thus, *Ice* simply has nothing to say about the type of factfinding used to enhance Petitioner's fine in this case.

Second, the proper historical inquiry is not whether the judge set the amount of a criminal fine. Rather, as *Ice* makes clear, the question is whether the judge when doing so was bound by any pre-set statutory limit determinable by reference only to the jury's verdict. *See id.* at 163, 168–70. On this score,

as the *Apprendi* Court noted, fines and prison terms stand on precisely the same footing: "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion … to impose any term of imprisonment and any fine *up to the statutory maximum*." 530 U.S. at 482 n.9 (quoting Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1988)) (emphasis added in *Apprendi*); *see United States v. Woodruff*, 68 F. 536, 538 (D. Kan. 1895) (holding that an embezzlement statute providing for a fine equal to the amount embezzled "contemplates that there should be an ascertainment of the exact sum for which a fine may be imposed," and "[o]n such an issue the defendant is entitled to his constitutional right of trial by jury"). The discretion of state judges was similarly limited. *See, e.g.*, *Illinois v. Clark*, 2 Ill. 117, 1833 WL 2696, at *4 (Ill. 1833) (holding that an indictment for violating a statute providing for fine equal to the value of the property destroyed "should have charged the value of the property destroyed, otherwise it could not properly have been inquired into by the jury").

Properly understood, then, *Ice* does not change the Sixth Amendment landscape. Indeed, when the Second Circuit in *United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010) held that the Sixth Amendment applies to criminal fines, it did not even see the need to discuss *Ice*. Yet, in the short time since *Ice* has been decided, other courts, like the First Circuit below, have misread *Ice* as having sparked a sea change. Pet. App. 31a ("Our view [is] that *Ice* has effected a change in the application of the *Apprendi* rule …."); *Missouri v. Andrews*, 329 S.W.3d 369, 374

n.3 (Mo. 2010) ("Justice Ginsburg's majority opinion in *Ice* signals a change in the Court's Sixth Amendment right-to-jury-trial analysis ...."); *New Mexico v. Rudy B.*, 243 P.3d 726, 732 (N.M. 2010) ("*Ice* signals change. ... The opinion does appear to represent a pivotal turning point in the Court's Sixth Amendment analysis ....").

The Antitrust Division of the Department of Justice has made this same error. In the wake of *Booker*, the Antitrust Division expressly conceded that the Sixth Amendment required it to prove to a jury beyond a reasonable doubt each fact necessary to obtain a fine above the maximum authorized by a Sherman Act conviction. *Criminal Remedies: Hearings Before the Antitrust Modernization Comm'n* 38 (2005) [hereinafter *Criminal Remedies*] (testimony of Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement). Yet, following *Ice*, the Antitrust Division did an about-face: It disavowed that earlier concession and began advocating precisely the opposite position, *i.e.*, that the Sixth Amendment does not apply to criminal fines. Its explanation: *Ice* changed everything, and its earlier position had been formulated "without the benefit of the Supreme Court's subsequent guidance in ... *Ice*." United States' Reply in Support of Motion for Order Regarding Fact Finding for Sentencing under 18 U.S.C. § 3571(d) at 10 n.4, Hammond Aff. at 1, *United States v. Au Optronics Corp.*, No. 09-cr-00110 (N.D. Cal. July 11, 2011), ECF No. 350.

Confusion over *Ice*'s place in this Court's Sixth Amendment jurisprudence already has infected federal and state courts, as well as at least one

division of the Department of Justice. This Court should grant review immediately to prevent that confusion from spreading further.

II. Exempting criminal fines from Sixth Amendment scrutiny undermines the efficacy of the justice system, especially in white-collar cases.

A. Fines are an important part of the criminal justice system. And in white-collar prosecutions, where allegations of large financial gains and losses are commonplace, fines represent a particularly significant part of "the penalty for a crime." This is because, in the federal system and in many states, statutes authorize fines of double the offender's gain or the victim's loss no matter the substantive offense of conviction.[2] And other statutes, like the federal Racketeer Influenced and Corrupt Organizations ("RICO") statute and its state analogs, provide for gain- and loss-based fines in specific instances.[3]

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[2] *See, e.g.*, 18 U.S.C. § 3751(d) (double the gain or loss); Fla. Stat. Ann. § 775.083(1)(f) (same); N.J. Stat. Ann. § 2C:43-3(e) (same); Haw. Rev. Stat. § 706-640(1)(f) (double the gain); Ky. Rev. Stat. § 534.030(1) (same); N.Y. Penal L. § 80.00(1)(b) (same); Pa. Cons. Stat. § 1101(8) (same).

[3] *See, e.g.*, 18 U.S.C. § 1963(a) (double the RICO profits); Colo. Rev. Stat. § 18-17-105(2) (triple the RICO gain or loss); *see also, e.g.*, 18 U.S.C. §§ 201(b) (bribery of a public official subject to a fine of up to triple the value of the bribe); 653 (embezzlement by public official subject to a fine of up to the amount embezzled); 1956(a)(1) (money laundering subject to a fine of up to double the value of the money laundered).

Accordingly, prosecutors regularly use criminal fines as bargaining chips in white-collar plea negotiations. Specifically, the prosecutor threatens to seek a large fine in the event that the Government obtains a conviction, and then promises to seek a smaller fine if the defendant will plead guilty and save the Government the cost of a trial. *See* Symposium, *Law and the Continuing Enterprise: Perspectives on RICO*, 65 Notre Dame L. Rev. 1073, 1089 (1990) (remarks of Professor John C. Coffee, Jr.) (observing that prosecutors use RICO's twice-the-gain fine in precisely this way). Ideally, an innocent defendant would reject this offer. But, by making the large fine so easy to obtain—by holding that the facts necessary to authorize it need only be proved by a preponderance of the evidence—the decision below increases the likelihood that an innocent defendant will take the deal. *See Blakely*, 542 U.S. at 311; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006); Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 Stan. L. Rev. 295, 296, 306 (2001).

When a prosecutor offers to agree to a smaller fine if the defendant will plead guilty, the defendant will consider his ability to contest the criteria on which the maximum amount of the fine is based. The stronger his ability to meaningfully dispute those factors, the more likely he will be to opt for a trial: If he can negate those facts, then the risks of an unsuccessful bid for acquittal are not as severe. Conversely, the weaker the defendant's ability to meaningfully dispute the fine criteria, the more likely he will be to take the deal: If he cannot disprove them, then even a small risk of conviction could be too

much given the high likelihood of a large fine if convicted. *See Blakely*, 542 U.S. at 311; King & Klein, 54 Stan. L. Rev. at 296, 306; *cf.* Barkow, 58 Stan. L. Rev. at 1034.

By permitting maximum-fine criteria to be found by a judge by a mere preponderance, rather than demanding that they be proved to a jury beyond a reasonable doubt as the Sixth Amendment requires, the decision below makes those findings significantly harder to contest. It turns the fine into the "tail which wags the dog of the substantive offense" charged, *Apprendi*, 530 U.S. at 495, because it makes even innocent defendants more likely to plead guilty simply to avoid the risk of a large fine should they be convicted at trial.

B. This perverse incentive is stronger still for organizational defendants. Corporations, unlike individuals, cannot be incarcerated. Thus, fines not only are *an* important part of the potential penalty, they are the *most* important part. *See* Jed S. Rakoff & Jonathan S. Sack, Federal Corporate Sentencing: Compliance and Mitigation § 1.06[6] (2011) (discussing U.S. Sentencing Commission data on organizational sentencing). Thus, unlike an individual defendant, a corporation cannot rest assured that, even if fines may be determined based upon preponderance factfinding, at least one significant component of the sentence (incarceration) will be subject to the rigors of the Sixth Amendment. Rather, in the corporate context, the Sixth Amendment simply does not apply to sentencing. Thus, the "tail" will "wag[] the dog" even more strongly.

Not only is the perverse incentive for an innocent defendant to plead guilty stronger for corporations, but its effects—the consequences of that guilty plea—arguably are more harmful in the corporate context, as well. For one thing, unlike individual defendants, corporations have shareholders. These shareholders depend on the corporation; to the extent they have made an investment, the corporation's wealth is their wealth. A criminal conviction, especially one accompanied by a large fine, can decrease that wealth immensely. For another, unlike most individual defendants, corporations have employees. A guilty plea followed by a steep corporate fine may cause these employees to lose their jobs and their retirement security. *See* John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1329, 1341 & n.44 (2009).

The decision below makes the criminal justice system more likely to malfunction. This Court should grant review to help prevent that from happening.

III. Subjecting criminal fines to Sixth Amendment scrutiny will not compromise law enforcement.

The experiences of the Antitrust Division of the Department of Justice and multiple U.S. Attorneys' Offices demonstrate that applying the Sixth Amendment to criminal fines will not prevent prosecutors from effectively fighting crime.

A. The Antitrust Division relies heavily upon criminal fines in enforcing the Sherman Act and promoting commercial competition. But, because the

maximum penalties authorized by a Sherman Act conviction ($1 million for individual offenders and $100 million for organizational offenders) 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 general federal double-the-gain-or-loss fine statute, 18 U.S.C. § 3571(d). *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, 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 *Booker*, the Antitrust Division became concerned that proving gain by a preponderance of the evidence and using that proof to seek a fine in excess of the Sherman Act maximum no longer would pass Sixth Amendment muster. So, it began alleging gain and loss figures in its indictments and preparing to prove them beyond a reasonable doubt to the jury in the event of trial. *Criminal Remedies* 38 (Hammond testimony). Yet, the evidence indicates that this has not hampered the Antitrust Division's ability to use § 3571(d) to obtain fines well above the Sherman Act maximum.[4] Indeed, four of the top five § 3571(d)

[4] Accordingly, even though the Antitrust Division now takes the view that, as a matter of law, the Sixth Amendment does not apply to criminal fines (*see* Part I.B, *supra*), it does *not* argue that, as a matter of practicality, applying the Sixth Amendment to criminal fines prevents it from doing its job effectively.

antitrust fines imposed upon corporations in the past quarter-century have been obtained after the Antitrust Division began treating the Sixth Amendment 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 most noteworthy white-collar prosecutions. Yet, following the Seventh Circuit's decision in *United States v. LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 597 (7th Cir. 2006), which held that the Sixth Amendment 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]

C. The U.S. Attorney's Office for the Southern District of New York brings some of the most important financial prosecutions not only in the Second Circuit but in the entire country. While the Second Circuit only recently held that the Sixth Amendment applies to criminal fines, *see Pfaff*, 619 F.3d at 175, prosecutors in the Southern District do not appear skittish about preparing to prove gain or loss beyond

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[5] *See* Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More* (July 12, 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.

a reasonable doubt in order to seek high fines using 18 U.S.C. § 3571(d), even where such gain or loss could soar into the hundreds of millions of dollars.[7]

All of this is to say that subjecting criminal fines to Sixth Amendment scrutiny will not cause law enforcement to grind to a halt. There simply is no compelling reason to subvert this Court's unbroken line of Sixth Amendment jurisprudence squarely holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be … submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476; *see Cunningham*, 549 U.S. at 281–82; *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 301; *Ring*, 536 U.S. at 600.

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[7] *See, e.g.*, 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) (stating that the maximum fine will be twice the value of the gross gain or loss caused by the alleged conspiracy to avoid paying taxes on more than $215 million), available at http://www.justice.gov/usao/nys/pressreleases/August11/gislergianindictmentpr.pdf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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