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IN THE SUPREME COURT OF THE UNITED STATES

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SOUTHERN UNION COMPANY, :

Petitioner : No. 11-94

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Monday, March 19, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; for
Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for
Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 11-94, Southern Union Company v. The United States.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS
ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

In its landmark decision in Apprendi, this Court announced as a fundamental principle of Fifth and Sixth Amendment jurisprudence that every fact necessary to increase the punishment beyond that which is otherwise maximally provided for must be presented to the jury and must be decided by the jury beyond a reasonable doubt.

In this particular case, the defendant was fined a total of an \$18 million penalty in the context of a jury finding that there was a single day of violation under the RCRA provision. Congress is quite explicit that the maximum fine for a single day's violation is \$50,000.

JUSTICE SCALIA: Was that jury trial constitutionally required?

1 MR. PHILLIPS: Yes, I believe the jury trial
2 was constitutionally required, Justice Scalia. The
3 cutoff between what's a petty offense not subject to
4 jury trial and what's beyond that -- I think you could
5 -- you could get there two ways. This is a crime that
6 Congress attaches a 5-year penalty to if it's against an
7 individual, which suggests that it is a very serious
8 crime. And the maximum fine under the district judge's
9 interpretation of this would have been \$38 million, even
10 though the judge chose only to impose an \$18 million
11 penalty under these circumstances. So, either way, it
12 seems to me clearly a serious offense.

13 JUSTICE KENNEDY: What have we said is the
14 standard for fines?

15 MR. PHILLIPS: I'm sorry.

16 JUSTICE KENNEDY: What have we said with
17 reference to a jury trial when fines are involved? Does
18 it have to be a substantial fine or do we have a word
19 that we use?

20 MR. PHILLIPS: Well, you haven't used a word
21 -- I mean, the distinction is between a serious offense
22 and a petty offense, and the places where the -- you
23 know, you've drawn the line to conclude that a fine was
24 too small to be worried about was -- was \$10,000 in the
25 Muniz case. You recognized in Bagwell that 52 million

1 was way beyond what would be appropriate under those
2 circumstances.

3 But I think the Court benefits most if it
4 just focuses on the potential penalties that Congress
5 has adopted and use that as the guidepost, because if
6 Congress has said that this is something for which
7 someone could be punished --

8 JUSTICE SCALIA: Well, you have to do that
9 because you have to know whether -- whether to impanel a
10 jury before the -- before the jury comes in or before
11 the jury comes in with a penalty, right?

12 MR. PHILLIPS: Right, absolutely. And we
13 asserted our right to a jury trial. The government
14 didn't contest our right to a jury trial. And I don't
15 actually read their brief --

16 JUSTICE ALITO: Do we assume for purposes of
17 this case that your client, a corporation, has a Sixth
18 Amendment right to a jury trial?

19 MR. PHILLIPS: I think the language of the
20 Sixth Amendment couldn't be clearer, that it says in all
21 criminal prosecutions, the -- the accused is entitled to
22 a jury trial, and all -- and you know, Article III,
23 section 2, says in all jury trial -- in all criminal
24 prosecutions, there's a jury trial. So, there is no
25 effort whatsoever to limit the -- the individual, or in

1 any way to -- the person or persons or entities that are
2 entitled to those rights.

3 JUSTICE ALITO: What are the peers of the
4 Southern Union Company that would sit on the jury?
5 Other railroads?

6 MR. PHILLIPS: Well, that would have been --
7 we'd probably have had a different outcome if that had
8 been the case. But, no, Your Honor, obviously "peers"
9 in that context is -- is derived from the citizenry in
10 the State or the district in which the prosecution is
11 brought. I mean, obviously, we don't get corporate
12 peers in that sense, but -- but no one has ever doubted
13 that an ordinary jury would be a suitable jury of peers
14 for corporations, and, candidly, corporations are tried
15 all of the time, and no one has doubted it. And I don't
16 think it -- you know, first of all, it seems clear,
17 under the language of the Sixth Amendment and Article
18 III, that corporations are entitled to a jury and that
19 no one is -- in anything that's a serious offense, and
20 that clearly is what we have here.

21 And so, what we've got is a decision by the
22 jury that there was at a -- at a single point in time a
23 violation of RCRA.

24 JUSTICE GINSBURG: But it's not -- the jury
25 didn't say that the defendant was in violation only 1

1 day. It said it was in violation within this span of
2 many months, and it didn't say how many days. It didn't
3 say whether it was every day or 1 day or 10 days. It
4 just didn't focus on the number of days. But it didn't
5 find they were in violation only 1 day, which is what
6 your opening statement was.

7 MR. PHILLIPS: Right. But what the -- what
8 the First Circuit said, Justice Ginsburg, is that the --
9 the most you could read the jury to have found, because
10 it was not asked the question, the most you could read
11 out of it, was that there was a single day of a
12 violation, and that that then sets the maximum.

13 JUSTICE SCALIA: The most -- the most you
14 must read out of it.

15 MR. PHILLIPS: The most you must read out of
16 it.

17 JUSTICE SCALIA: Yes. You could -- you
18 could say it could have meant -- they could have thought
19 that they violated every day.

20 MR. PHILLIPS: Right. They could have.

21 JUSTICE SCALIA: You can't say that for
22 sure. But one thing you can say for sure is that they
23 found that it violated it 1 day.

24 MR. PHILLIPS: Right. That's correct,
25 Justice Scalia, and that, therefore, if you apply the

1 core Apprendi doctrine in a principled way, as
2 Justice Kennedy suggested in a separate concurrence, if
3 you applied it in a principled way, you determine what
4 -- what facts are supported by the jury's findings and
5 how far does the penalty take it, and it goes to
6 \$50,000, and anything beyond the \$50,000, if it's found
7 by the judge, doesn't satisfy the Sixth or Fifth
8 Amendment under those circumstances.

9 That should be in my judgment the end of the
10 inquiry. The First Circuit rejected that argument by
11 turning to Oregon v. Ice and suggesting that there was a
12 fundamental shift in how the Court applies the Apprendi
13 doctrine. And I -- I would suggest to you that,
14 although you're clearly better positioned to determine
15 what you thought you meant by Ice than I am, my
16 interpretation of Ice is that it deals with the very
17 different situation of multiple offenses and the very
18 different problem of trying to extend the Apprendi
19 doctrine to the context of multiple convictions and then
20 adopted a methodology for applying it in those
21 circumstances that focus significantly on a particular
22 history of consecutive versus concurrent sentences --

23 JUSTICE BREYER: I didn't think --

24 MR. PHILLIPS: -- in that context.

25 JUSTICE BREYER: I mean, I was -- I tend to

1 be in dissent in these cases; so, I don't have the
2 authoritative view. But the --

3 MR. PHILLIPS: More so than I do, Your
4 Honor.

5 JUSTICE BREYER: What?

6 MR. PHILLIPS: More so than I do.

7 JUSTICE BREYER: Well, but no. But the
8 impression I have is that -- that I had thought there
9 were what I'd call the elements of the offense, and then
10 there were sentencing facts. And sentencing facts have
11 been traditionally facts found by the judge when
12 imposing a sentence.

13 Now, the majority of the Court in Apprendi
14 went back into the history and said there is no
15 significant old tradition, old enough, of -- of
16 sentencing facts. So, really, when you raise the
17 sentence, that's like an element, and you should have a
18 jury trial.

19 Now, the argument here, one of them, that the
20 government stresses -- and Ice is the same -- is that
21 there is no -- the tradition's different where fines and
22 where multiple and concurrent sentences were at issue.

23 If you go back to the 18th century or
24 earlier, what you'll discover is that the judge has
25 always had a much greater role in deciding what the

1 amount of a fine should be. And, therefore, insofar as
2 that amount rested upon some view of the facts as to the
3 manner in which the crime occurred -- and it always
4 does -- it was the judge who traditionally found it, not
5 the jury. So, those facts are not like elements of the
6 crime.

7 That's what I thought was essentially the
8 argument. Ice and fines are on one side of that line,
9 and Apprendi is on the other.

10 MR. PHILLIPS: I think the -- the problem
11 with that analysis, Justice Breyer, is I don't think the
12 history, first of all, is anywhere near as clear in this
13 context as it was, for instance, in Ice in terms of who
14 decided what. It is -- there is no history that
15 suggests that judges had the authority to impose fines
16 beyond whatever the maximum statutory limit that was
17 provided for by the legislature involved. And if you --
18 and if you go through --

19 JUSTICE BREYER: No, no. They're not doing
20 that here. What they're deciding is a fact of
21 sentencing is how often this crime was committed. No
22 one can go against the statutory limit, but rather it --
23 it allows a higher sentence when certain facts occur.

24 Now, I thought in Apprendi that the history
25 is just what I'm saying it was in -- in the fine case,

1 but the majority says to the contrary. And so, here it
2 seems, even if I was wrong in Apprendi, that at least
3 there's enough discretion here to say, look, this is
4 traditionally up to the judge. Now, why do you think
5 that isn't so?

6 MR. PHILLIPS: Because it never was
7 traditionally up to the judge to go beyond whatever the
8 maximum sentence provided was. Justice Thomas's
9 concurrence in Apprendi spends a significant amount of
10 time with that history. He several times references
11 jury -- I mean fines and jury determinations and
12 consistently finds that the same rule applies in the
13 fine context as applies in the -- in the incarceration
14 context.

15 JUSTICE KAGAN: Mr. Phillips, do you think
16 that you could say that there was no going above the
17 statutory maximum here? In other words, you know, if
18 the judge had said, well, it's \$500 a day, I'm going to
19 find some facts and fine you \$600 a day, that would be
20 going above a statutory maximum.

21 But I'm wondering whether this is different
22 because here the judge was sticking to the \$500 a day
23 that was set out in the statute, and then the question
24 is more, you know, of an -- is it an element or is it a
25 -- is it a sentencing fact as to how many days the

1 violation occurred?

2 MR. PHILLIPS: Well, Justice Kagan, I would
3 have thought, if anything, our case would be a much
4 easier one, because what you -- what you basically are
5 saying is that the district judge on the basis of a
6 non-reasonable doubt standard and without a jury is
7 making a determination that there have been 761
8 violations of Federal law and, on that basis, imposing a
9 sentence.

10 It would seem to me that, whatever else you
11 might want to say Apprendi should limit, it would be the
12 whole idea that the judge gets to determine every aspect
13 of all elements of the crime and the punishment that
14 attaches to it.

15 JUSTICE GINSBURG: Was there an objection at
16 trial to the charge on the ground that it didn't
17 instruct the jury to find the number of days of
18 violation?

19 MR. PHILLIPS: The United States didn't
20 object to that. No, Your Honor. Actually, we didn't
21 object to it either, and it wasn't an instruction that
22 was offered by either of the parties. The judge
23 actually was the one who divined the instruction with
24 respect to a single --

25 JUSTICE SOTOMAYOR: You have no inducement

1 to --

2 JUSTICE KENNEDY: But this was in the
3 context where the entire defense of the corporation was
4 consistent with what the indictment said. It was
5 between the dates on or about, and there -- it would be
6 very strange under this evidence to think that it was
7 only there for 1 day, when it was spilled and they came
8 back. And so, that just doesn't make any sense.

9 MR. PHILLIPS: Well, Justice Kennedy --

10 JUSTICE KENNEDY: I think there's -- that's
11 just more a sense of background. I do think we have to
12 reach the issue you -- you present as if it were just --
13 as if there were no evidence.

14 MR. PHILLIPS: Right.

15 JUSTICE KENNEDY: But I -- like Justice
16 Ginsburg, I was very surprised the government didn't
17 allege -- didn't stress waiver here. You didn't submit
18 an instruction?

19 MR. PHILLIPS: Well, the -- yes, we didn't
20 submit an instruction. On the other hand, neither side
21 submitted the particular instruction that the judge
22 adopted in this particular case. But what I think is
23 important is to put it in the context of the -- of the
24 evidence at trial and the way it was analyzed by the
25 First Circuit under the -- on the harmless error

1 standard. Remember that the issue here is not that they
2 simply have mercury in a particular location without a
3 permit. The question was, did they -- were they holding
4 it with an intent to recycle it at some point and to
5 make it a usable product?

6 And there were three different points in
7 time when evidence clearly demonstrated an intent to
8 obtain an RFP to handle the product in precisely that
9 way, even up to the summer of 2004, and the indictment
10 only runs to October of 2004.

11 So, the notion that it could be a -- a
12 significantly shorter period, maybe not -- maybe not
13 just a day, ultimately, but clearly you can't -- we just
14 don't know because no one asked under those
15 circumstances. The First Circuit said this could not be
16 viewed as harmless error, and I think that's not
17 challenged by the United States at this stage in the
18 litigation.

19 And so, it seems to me, as you say,
20 Justice Kennedy, you have to evaluate the pure issue
21 of -- you have 1 day of violation, that's the
22 determination, and when -- and to take the Apprendi
23 doctrine. As it -- as it's stated, it's quite plain.

24 JUSTICE SOTOMAYOR: Mr. Phillips, can you
25 deal with one policy argument that your adversary raised

1 that gives me some pause? And that is, the number of
2 days is certainly something that the jury here could --
3 relatively easily decided upon. It could have looked at
4 the evidence and figured that out --

5 MR. PHILLIPS: Right.

6 JUSTICE SOTOMAYOR: -- okay? But in fraud
7 cases, in securities cases, sometimes the identity of
8 victims is not determined for months, till months after
9 the conviction, and the amount of fine and/or
10 restitution is set at sentencing.

11 What's going to happen to all of those
12 statutes --

13 MR. PHILLIPS: Well --

14 JUSTICE SOTOMAYOR: -- because -- or all of
15 those procedures that have been set up by Congress to
16 sort of set the amount of loss and repayment? Are all
17 of those subject to the Apprendi rule?

18 MR. PHILLIPS: I dont -- I don't think so.
19 I mean, the lower courts have been pretty consistent on
20 the question of restitution, that restitution is, one,
21 not a punishment within the meaning of Apprendi; and,
22 two, it's indeterminate. And as a consequence of that,
23 the jury doesn't have to make that determination.

24 JUSTICE SOTOMAYOR: Well, isn't -- aren't
25 fines indeterminate here by definition, going back to

1 Justice Kagan's question? There's no upper limit to how
2 much the fine could be here. It's set -- the upper
3 limit is set by the number of days, but why is it
4 different?

5 MR. PHILLIPS: Well, because it is set by
6 the --

7 JUSTICE SOTOMAYOR: Why is restitution --

8 MR. PHILLIPS: Because it is set by the
9 number of days --

10 JUSTICE SOTOMAYOR: Well, so -- so --

11 MR. PHILLIPS: -- which requires a predicate
12 finding of how many days.

13 JUSTICE SOTOMAYOR: So, how about when a
14 fine is set by the value of the loss?

15 MR. PHILLIPS: Well --

16 JUSTICE SOTOMAYOR: That's no different than
17 restitution.

18 MR. PHILLIPS: And the government will have
19 to figure out what it -- what it -- its best take as to
20 the value of the loss, and it's going to have to prove
21 that if that's going to be the basis on which to fine.

22 JUSTICE BREYER: My goodness, I think
23 there's lots of statutes that say something like this:
24 That within limits, if there's a particular --

25 MR. PHILLIPS: Well, if it's within limits,

1 that's fundamentally different.

2 JUSTICE BREYER: Yes, leave that out
3 because we assume -- right.

4 MR. PHILLIPS: Right.

5 JUSTICE BREYER: It says, the fine, the
6 maximum fine is going to be "not more than the greater
7 of twice the gross gain or twice the gross loss."

8 MR. PHILLIPS: Right.

9 JUSTICE BREYER: Now, you're going to send
10 that to the jury. Let me read you the next phase --
11 phrase: "unless imposition of a fine under this
12 subsection would unduly complicate or prolong the
13 sentencing process."

14 I point to that next phrase to show you that
15 Congress understands, in an antitrust case, in a RICO
16 case, in a corruption case of different kinds, in an
17 environmental case, it is so complicated figuring out
18 that kinds of things that they excuse even the judge
19 who's experienced in this from dealing with that. And
20 under your theory, as you just point out, if Apprendi
21 applies here, we're suddenly telling juries to -- they
22 have to under the Constitution administer that section
23 18 U.S.C. 3571, which I just read to you.

24 MR. PHILLIPS: Right. Well, Justice Breyer,
25 I mean, my first line of defense would be the comment by

1 this Court consistently that the jury trial right
2 doesn't necessarily make for the most efficient criminal
3 proceeding.

4 JUSTICE BREYER: No, I understand you could
5 say that's what the Constitution provides, and if you
6 jury can't handle it, well, too bad. Okay. But I think
7 we're still in the business of trying to decide whether
8 the Constitution does provide that in the case of fines.

9 MR. PHILLIPS: Right, but I -- I would hope
10 that the Court wouldn't -- wouldn't let the tail wag the
11 dog in that particular context.

12 JUSTICE BREYER: Is that a tail? Is that a
13 tail that the jury proceeding is itself so
14 unadministrable that even Congress says we recognize
15 even a judge couldn't do it? All right?

16 MR. PHILLIPS: My --

17 JUSTICE BREYER: Now, is that --

18 MR. PHILLIPS: Well, recognizing --

19 JUSTICE BREYER: Is that an irrelevant
20 consideration when you are trying to figure out whether
21 an ambiguous history requires the jury trial?

22 MR. PHILLIPS: Well, the ambiguous -- the
23 part of the history that is unambiguous is the
24 importance of the jury as a bulwark against the Federal
25 Government and against the judge.

1 JUSTICE ALITO: Well, in 1790, in fact in
2 the first Judiciary Act and in the Crimes Act of 1790,
3 Congress enacted statutes, criminal statutes, that
4 authorized a fine and left it entirely to the discretion
5 of the court. Were those unconstitutional?

6 MR. PHILLIPS: If it -- up to the maximum.

7 JUSTICE ALITO: There was no maximum.

8 MR. PHILLIPS: Well, then there -- then it's
9 an indeterminate sentence, and, of course, they're not
10 unconstitutional. The core of Apprendi --

11 JUSTICE SOTOMAYOR: Congress permitted --

12 JUSTICE ALITO: And what's -- what --

13 JUSTICE SOTOMAYOR: -- in 1790 indeterminate
14 sentences as well, with no statutory maximum for jail.

15 MR. PHILLIPS: Right. I think that's what
16 Justice Scalia -- or Alito was saying.

17 JUSTICE SOTOMAYOR: So, they did both --

18 MR. PHILLIPS: Right.

19 JUSTICE SOTOMAYOR: -- with respect to
20 fines and --

21 MR. PHILLIPS: Right. They had both, but
22 the one thing they didn't have is a situation where,
23 whatever the statutory maximum was, the judge was
24 permitted to go beyond the maximum based on findings
25 that the judge offered up on his part without the

1 benefit of a --

2 JUSTICE ALITO: So, if the judge can -- if
3 it's totally up to the discretion of the judge, that's
4 fine; but if Congress enacts a statute that structures
5 the fine -- and says, if this is the case, then so much;
6 if that's the case, then so much more -- then you have
7 to have a jury trial?

8 MR. PHILLIPS: Absolutely. If --

9 JUSTICE ALITO: What sense does that make?

10 MR. PHILLIPS: Because you can take --

11 JUSTICE SCALIA: Isn't that precisely what
12 Apprendi said? Is --

13 MR. PHILLIPS: Well, that was the easy
14 answer.

15 JUSTICE SCALIA: Yes.

16 (Laughter.)

17 MR. PHILLIPS: But, more fundamentally, and
18 it's -- and it's demonstrated in a case just like this
19 one --

20 JUSTICE ALITO: That may be what Apprendi
21 said, but is it consistent with the original meaning of
22 the jury trial right in the Sixth Amendment? These
23 statutes give me pause on that score.

24 MR. PHILLIPS: Well, because -- but these
25 statutes don't speak to what Apprendi was talking about,

1 which is a situation where you set a maximum above which
2 the judge is permitted to go. None of the statutes that
3 are out there exist that demonstrate that. All -- and
4 all the language and all of the discussion in Justice
5 Thomas's concurrence talks about up to the -- you know,
6 you have broad discretion up to the maximum. Once you
7 go beyond the maximum, at that point the jury trial
8 right has to kick in.

9 And let me say it in this context. Here's a
10 situation where the government proves up its case in the
11 context of a \$50,000 fine; and that's what the jury is
12 asked to decide, and it decides that; and then the judge
13 gets to say: Okay, \$38 million is now the right number.
14 If that's not the tail wagging the dog within the
15 meaning of even the cases that preceded Apprendi, it
16 seems to me there's a fundamental flaw in that
17 particular scheme.

18 The history between fines and incarceration
19 are essentially the same. What the Court said in
20 Apprendi should be followed exactly under these
21 circumstances. Ice should be distinguished on the
22 recognition that multiple offenses are fundamentally
23 different from a single offense. And on that basis the
24 judgment of the court of appeals should be reversed.

25 JUSTICE GINSBURG: What do you make of this

1 old case that the Government cites, U.S. v. Tyler? And
2 it was the question of -- the penalty was four times the
3 value of the goods, and this Court said the judge, not
4 the jury, is responsible for imposing the fine and,
5 therefore, also for determining the value of the goods.

6 MR. PHILLIPS: Yes. Tyler is in -- in many
7 ways kind of imponderable. The one thing that's clear,
8 it's not a Sixth Amendment decision. It wasn't actually
9 argued. All it says is that under this law -- and the
10 problem, obviously, in this case was they found -- you
11 know, it was -- the pounds weren't -- weren't the
12 problem. The problem was obviously they had identified
13 one substance in the indictment, and the jury found
14 another substance in its verdict; and so, there was the
15 disconnect there, and the Court basically said we're not
16 going to worry about that trifling under these
17 circumstances.

18 What it doesn't say remotely is that the
19 Sixth -- is that -- you know, that the Sixth Amendment
20 would permit the judge to make that finding under those
21 circumstances.

22 JUSTICE KENNEDY: If you were to prevail, I
23 -- I think it would be a rather simple matter for the
24 parties to frame an instruction: We find the defendant
25 guilty and that the pollutant was retained for X days,

1 much of what they do in a drug case. That's one way to
2 do it. Could the government do it by the indictment?
3 Could it indict alternatively, indict on count 1 for 10
4 days, count 2 for 50 days, or something like that?

5 MR. PHILLIPS: They could do it that way
6 or --

7 JUSTICE KENNEDY: Maybe -- is that the way
8 it often works or --

9 MR. PHILLIPS: Well, I would have thought
10 actually the indictment in this case was probably
11 adequate for these purposes because it said: During the
12 entirety of the period from September 2002 to
13 October 2004.

14 JUSTICE KENNEDY: Well, that's why I am
15 surprised the government waived it, and I thought that's
16 what the evidence showed anyway. But that's not before
17 us. That's not the way the case is presented here.

18 MR. PHILLIPS: Right, Your Honor. That's
19 correct, Your Honor.

20 JUSTICE BREYER: How, in general -- I mean,
21 in the individual case, very often a trial doesn't come
22 up because 90 percent or more of the time it's just a
23 question of a plea bargain; and, therefore, the
24 defendant doesn't -- this is an added weapon for him,
25 Apprendi. But in your -- with your clients and the others,

1 there might be quite a lot of trials.

2 So, how in a trial does your client or
3 others in that position defend on the ground of we
4 didn't do this at all; but by the way, in case you
5 decide to the contrary, jury, we want to tell you we
6 only did it Monday, Wednesday, and Friday?

7 (Laughter.)

8 JUSTICE BREYER: How is that supposed to
9 work? Do you have two juries?

10 MR. PHILLIPS: No. Well, I mean, look, if
11 we think we're going to be prejudiced as a consequence
12 of trying this in a particular way, it will be our call
13 whether or not to waive the jury trial right under those
14 circumstances. But, more fundamentally, at least in
15 this particular case, obviously our position was we
16 didn't form the intent at any point in time and -- but,
17 you know, if ultimately the -- the jury had found that
18 there was some other point in time, then, you know,
19 we'll deal with that issue as we deal with it.

20 But it wouldn't have been -- I don't think
21 the trial in this case would have been significantly
22 different. The only thing that would have been
23 different is that the jury would have been properly
24 instructed and our jury trial right would have been
25 preserved. As it is here, our jury trial right has been

1 savagely undermined.

2 If there are no further questions, I reserve
3 the balance of my time, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Phillips.

6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE RESPONDENT

9 MR. DREEBEN: Mr. Chief Justice, and may it
10 please the Court:

11 This case, like Oregon v. Ice, involves the
12 kind of finding that the common law never entrusted to
13 the jury. There is, therefore, no erosion or
14 encroachment on the jury function by assigning the
15 function of determining the days of violation to the
16 court for the purpose of determining the criminal fine.

17 CHIEF JUSTICE ROBERTS: You agree, don't
18 you, that the statement in Oregon v. Ice was pure dicta?

19 MR. DREEBEN: The Court's statement in Ice
20 -- that if a purely algebraic application of Apprendi
21 were followed, it would sweep in things such as fines
22 and restitution -- was not necessary to the judgment,
23 Mr. Chief Justice, but it was part of the Court's
24 rationale in adopting a different take on the meaning of
25 the Apprendi line of cases than had previously been

1 espoused. Up until --

2 JUSTICE GINSBURG: Mr. Dreeben, I think the
3 reference -- it was a fleeting reference to fines, and
4 it could have meant that the judge has discretion to set
5 the fine up to the maximum in the statute. That's one
6 possible meaning.

7 MR. DREEBEN: That is true, Justice
8 Ginsburg. But I think that the author of the opinion in
9 Ice was citing to an amicus brief filed by States, which
10 supplied illustrations of fine statutes that it believed
11 would be imperiled by a purely programmatic rule-based
12 application of Apprendi.

13 And two of the State statutes that were
14 cited in that amicus brief, that of New Jersey and
15 Alaska, involved the kind of gain or loss statute that
16 has been discussed this morning, in which the judge,
17 following the rendition of a guilty verdict, determined
18 the amount of gain or loss and then applied either a
19 double or triple amount as the maximum fine.

20 JUSTICE SCALIA: This was -- you're not
21 arguing that this rule will apply only to fines against
22 corporations? It would also apply to individuals,
23 right?

24 MR. DREEBEN: Correct, Justice Scalia.

25 JUSTICE SCALIA: It's up to the judge to

1 decide how many days or what the value was and so forth.
2 Right?

3 MR. DREEBEN: Yes, Justice Scalia.

4 JUSTICE SCALIA: So, the right to trial by
5 jury to have that very important fact found does not
6 exist, even for individuals?

7 MR. DREEBEN: Justice Scalia, the tradition
8 with respect to monetary fines is different than the
9 tradition that the Court analyzed in Apprendi. With
10 respect to fines, restitution, and forfeiture, the jury
11 was never given a substantive role at common law. And
12 the law today is with respect to forfeiture --

13 JUSTICE SOTOMAYOR: I'm not sure how you can
14 fully make that argument, because I thought the history
15 was set forth fairly clearly in Apprendi that the early
16 history was that nothing was given to the jury with
17 respect to imprisonment or fines because most if not all
18 sentences were indeterminate. It's only when States
19 began, and the Federal government, to experiment with
20 determinate sentences that the Apprendi issue then
21 became live.

22 MR. DREEBEN: Justice Sotomayor, I think
23 what Apprendi relied on primarily was the linkage
24 between charge and penalty in English law, which was,
25 for felonies, death. The Court distinguished in a

1 footnote the tradition with respect to misdemeanors,
2 which it acknowledged was judicial discretion with
3 respect to fines and whippings, and it did not rely on
4 that history in fashioning the Apprendi rule.

5 What it relied on were two things: First,
6 the traditional linkage between charge and authorized
7 penalty in English common law; and, second, the
8 tradition in America that when the legislature had put a
9 cap on the amount of the penalty, the judge had
10 discretion within it not to go above it.

11 But neither of those aspects of Apprendi
12 addressed the issue that's before the Court today, which
13 is whether it would be an expansion beyond the domain
14 that was covered in Apprendi to apply it to monetary
15 penalties in --

16 JUSTICE SOTOMAYOR: So, explain to me, other
17 than your reliance on Ice, some sort of tradition,
18 which, you know, we can debate whether you can draw any
19 conclusion from tradition in any of these areas, whether
20 it's imprisonment or fines.

21 Tell me on the logic of Apprendi, not using
22 Ice, why fines are different, without relying on
23 history, which to me is -- I view it as ambiguous.
24 Okay?

25 MR. DREEBEN: It's difficult to do that,

1 Justice Sotomayor, because the Court fashioned the
2 Apprendi rule from history, and it limited it based on
3 history in Ice. It doesn't operate as an algorithm that
4 simply applies automatic --

5 JUSTICE SOTOMAYOR: I thought it was a fairly
6 simple algorithm. It says if the statutory penalty --
7 if a judge's factfinding can increase the statutory
8 penalty, then that's a violation of the Sixth Amendment.
9 A jury has to find any fact that increases the statutory
10 maximum.

11 MR. DREEBEN: Yes, and that -- that was the
12 argument of the Ice dissenters, that Apprendi states a
13 rule that knows no exceptions for history or the impact
14 on the States. And Ice does represent I think a --
15 shows where the high-water mark of Apprendi was. The
16 high-water mark was with respect to the penalty of
17 imprisonment.

18 JUSTICE SOTOMAYOR: So, outside of a -- a --
19 imprisonment, there is no other penalty that Congress
20 could fashion because it has no history that wouldn't be
21 within the purview of the judge?

22 MR. DREEBEN: Well, of course, the death
23 penalty in Ring v. Arizona. The Court held that facts
24 that expose a defendant to the death penalty must be
25 found by the jury. So, the Court has extended Apprendi

1 to those core liberty areas. But even with respect to
2 the implications for the length of imprisonment, the
3 quantum of punishment that a defendant faces when he's
4 convicted of multiple offenses, this Court in *Ice* looked
5 to history and the impact on the administration of
6 justice before being willing to extend *Apprendi* outside
7 of its core domain. And I think it's highly relevant --

8 JUSTICE KAGAN: But, Mr. Dreeben, wasn't the
9 core domain defined by whether it related to a specific
10 statutory offense? So, *Ice* says the core concern is "a
11 legislative attempt to remove from the province of the
12 jury the determination of facts that warrant a
13 punishment for a specific statutory offense." How is
14 that not relevant precisely in this context?

15 MR. DREEBEN: Well, it is, of course,
16 relevant, Justice Kagan, but --

17 JUSTICE KAGAN: How does it not determine
18 this context? I mean, those --

19 MR. DREEBEN: Because the Court went on
20 several paragraphs later in its opinion to describe what
21 it would mean to adopt a formulaic application of
22 *Apprendi*, treating it just as a rule divorced from
23 history. And one of the consequences that the Court
24 considered was the impact it would have on sentencing
25 accoutrements, two of which are directly related to this

1 case because they are financial penalties, fines and
2 restitution.

3 Now, I've talked about how the amicus brief
4 that prompted that paragraph, the concern about the
5 implications of expanding Apprendi, referred to fine
6 statutes that operate on a gain or loss basis, which
7 necessarily requires judicial factfinding after the
8 guilty verdict comes in.

9 But if the Court isn't satisfied with those,
10 restitution which is explicitly mentioned in Apprendi --
11 excuse me -- in Ice, classically operates based on
12 findings about victim loss that occur after the guilty
13 verdict has come in. This Court is well familiar that
14 oftentimes courts have to postpone sentencing in order
15 to allow the victim to gather evidence and to present
16 it.

17 Now, the Court could, I suppose, do as the
18 lower courts have done and say restitution is different
19 because it's designed simply to compensate for loss;
20 and, therefore, it's in one sense remedial. But that
21 will have to deal with the fact that in cases like
22 Pasquantino v. United States and Pennsylvania v.
23 Davenport, the Court has described restitution as a
24 criminal penalty.

25 Now, the other way in which lower courts

1 have said that restitution isn't swept up by Apprendi is
2 to say it's a rule that has no maximum. Whatever the
3 amount of harm to the victim is, that can be compensated
4 through restitution.

5 But, again, if one is applying an algebraic
6 understanding of the relevant statutory maximum from the
7 Blakely decision, restitution would be hard to justify
8 because the jury verdict does not contain findings about
9 harm to victims. The jury verdict finds guilt.
10 Afterwards, the judge finds an additional fact, namely
11 the amount of harm, and imposes restitution. And --

12 CHIEF JUSTICE ROBERTS: It's kind of odd,
13 though, isn't it? I mean, to some extent, this is a
14 little easier case for you, because it does involve a
15 corporation. But there are statutes where the amount of
16 imprisonment and the amount of a fine can both increase
17 based on a particular fact.

18 MR. DREEBEN: Yes.

19 CHIEF JUSTICE ROBERTS: And under your
20 submission, if you have -- you know, say a defendant who
21 is subject to 1 year, and that if a particular fact is
22 found, he's subject to 2 years, a fine of 20 but then
23 40, the judge would be constitutionally prohibited from
24 increasing the prison sentence but would be perfectly
25 free to increase the fine --

1 MR. DREEBEN: Probably --

2 CHIEF JUSTICE ROBERTS: -- including in a
3 situation where the fine might be a lot more serious
4 than the -- the time in prison.

5 MR. DREEBEN: Well, probably,
6 Mr. Chief Justice, such a statute would be construed to
7 make that fact one for the jury, since it dictates
8 imprisonment increases as well as fine increases. And
9 so, the constitutional question is unlikely to arise.
10 Congress would have been deemed to have intended that
11 that kind of a fact go to the jury.

12 That's not what -- the case in this statute.
13 This statute provides a 5-year maximum penalty, and then
14 it provides a fine amount that's graduated to the days
15 of the violation. The violation in this case was one
16 single violation. The judge did not find that there
17 were multiple violations; the judge simply looked at the
18 record, and his task is to decide how long did that
19 violation --

20 CHIEF JUSTICE ROBERTS: Sure, he operated --
21 he operated in a reasonable way. But we give juries the
22 discretion to be unreasonable. It would not -- juries
23 often compromise. So, if the instructions and the
24 verdict told the jury you can find the defendant, you
25 know, guilty for 1 day or whatever it is -- the 30

1 million; 50,000 or 30 million -- it would not be at all
2 unusual for the jury to debate and say, well, let's find
3 him guilty for 10 million.

4 MR. DREEBEN: We do presume --

5 CHIEF JUSTICE ROBERTS: And return that
6 verdict. The judge is constrained by reason in a way
7 that the jury is not, and that's sort of -- that's part
8 of the protection the Sixth Amendment provided.

9 MR. DREEBEN: This Court has never
10 recognized jury nullification as a constitutionally
11 protected right. We presume a rational jury. We
12 presume that if the jury is confronted with the evidence
13 and the law as given to it by the court, it will apply
14 that law in a rational manner. And the question here is
15 whether that is something that the jury is
16 constitutionally entitled to do.

17 Now, coming back to the historical
18 foundations of the Apprendi rule and the extension
19 that's requested here, with all due respect to
20 Petitioner, I think United States v. Tyler is much more
21 significant than Petitioner gives it credit for.

22 This is a case decided in 1812 on a Court
23 that had on it Chief Justice Marshall and Justice Story.
24 These were people who were well steeped in common law
25 traditions and well familiar with how judges would find

1 facts at the time of the founding. And in Tyler, there
2 was a charge that the defendant had unlawfully exported,
3 in violation of an embargo law, an amount of pearl ashes
4 that were worth \$600. And the jury came back with a
5 verdict that said we find that the defendant unlawfully
6 exported pot ashes worth \$280. And the question is:
7 Could a verdict be imposed on this, and could the judge
8 set the fine?

9 The two judges on the circuit court
10 disagreed, and so it was certified to the Supreme Court.
11 And this Court held unanimously that finding a valuation
12 was a judge function, not a jury function. No valuation
13 was necessary in order for the court to impose the
14 proper fine.

15 And it's difficult to understand how this
16 Court could have said that, if there were such a
17 well-settled constitutionally protected entitlement to a
18 jury verdict on facts that dictated a fine, if indeed
19 this statute assigned the role to the judge and the
20 Court was fully comfortable with that role being carried
21 out.

22 And Tyler is a decision of this Court.
23 There is no decision of this Court with respect to
24 imprisonment that is anything like Tyler. The
25 traditions with respect to imprisonment would surely be

1 understood in a different manner than with respect to
2 fines. And when one looks at fines, restitution, and
3 forfeiture as a package of possible financial penalties
4 and asks the question, did the Framers envision that
5 these matters would be within the jury's domain as
6 opposed to the judge's in imposing the appropriate
7 sentence after a jury verdict, I think that the answer
8 is they would not have viewed it as a matter protected
9 by the Sixth Amendment, because there was no factual
10 predicate in the common Law that would have led them to
11 believe the jury's function would be eroded if those
12 matters were not.

13 CHIEF JUSTICE ROBERTS: A very -- very
14 simple matter for the government to ask for jury
15 findings on the questions at issue in this case, right?

16 MR. DREEBEN: We could have done it here,
17 Mr. Chief Justice. The broader concern is cases that
18 involve gain or loss, in which the question of how much
19 loss may have been suffered by hundreds or even
20 thousands of victims of fraud is typically not
21 undertaken -- the process of quantifying them isn't done
22 until the guilty verdict is in because it's an
23 enormously difficult and complicated task. As
24 Justice Breyer pointed out, the judge isn't even
25 required to do it at sentencing if it proves to be too

1 complicated.

2 And for jury trials to do it, there may well
3 be a need for bifurcation. And this Court in
4 Oregon v. Ice declined to impose on the States the need
5 to bifurcate trials to determine whether a sentence
6 should be run consecutively or concurrently, because
7 that would intrude upon a valuable reform that was
8 designed to provide some restraints on judicial
9 discretion.

10 The same kind of thing would operate here if
11 this Court adopts an across-the-board rule that fines
12 have to be proved to a jury. If it extended it to
13 restitution and to forfeiture, that would involve
14 overruling the Court's decision in Libretti v. United
15 States, which held that forfeiture is a sentencing
16 function. But upon a strict application of Apprendi, a
17 mathematically, geometrically accurate application of
18 the rule stated in Apprendi, it's difficult to see why
19 forfeiture is not something that has to be --

20 JUSTICE SCALIA: Mr. Dreeben, let's talk
21 about Tyler. Tyler was not argued before this Court.

22 MR. DREEBEN: Correct.

23 JUSTICE SCALIA: It's a one-page opinion.
24 It's later described quite accurately as focusing not
25 upon the amount of the fine, but rather upon a

1 misdescription of pot ashes as pearl ashes, right?

2 MR. DREEBEN: Well, I don't agree with --
3 that it's later been characterized that way. It was
4 characterized in a decision that was written by Justice
5 Story --

6 JUSTICE SCALIA: That's right.

7 MR. DREEBEN: -- in the same year. Justice
8 Story was on Tyler. He wrote -- he sat on circuit in a
9 case called United States v. Mann.

10 JUSTICE SCALIA: Quite so.

11 MR. DREEBEN: And this is in our brief. And
12 he -- he interpreted Tyler and said the court would not
13 have given the direction that it did, that a judgment
14 could be entered based on the fine amount, unless they
15 were satisfied that an indictment lay and that the fine
16 was to be imposed by the court and not found by the jury
17 as a penalty.

18 JUSTICE SCALIA: The jury did find it in
19 Tyler, though, didn't it? The question was submitted to
20 the jury, wasn't it?

21 MR. DREEBEN: The jury --

22 JUSTICE SCALIA: Why doesn't -- why doesn't
23 that indicate what the historical practice was?

24 MR. DREEBEN: Because the Court stated that
25 the part of the verdict which is subject -- which we're

1 discussing right now is to be regarded as surplusage.
2 In other words, this -- Tyler explains that although it
3 was submitted to the jury, it wasn't necessary to be
4 submitted to the jury. The charge had asked for \$600 of
5 value which would then be subject to the fine. The jury
6 found only \$280.

7 And as I interpret the Court's decision and
8 I think as Justice Story interpreted it sitting on
9 circuit in Mann, it said this isn't a jury function.

10 JUSTICE SCALIA: Did it -- as a matter of
11 statutory construction, right?

12 MR. DREEBEN: Well, the -- again, I would
13 readily concede, Justice Scalia, that the Sixth
14 Amendment does not appear --

15 JUSTICE SCALIA: Right.

16 MR. DREEBEN: -- in the Court's decision in
17 Tyler, but it's difficult for me to understand that a
18 Court that included Chief Justice Marshall, Justice
19 Story, and other members who were well familiar with how
20 common law operated would have adopted an interpretation
21 of a statute that was facially unconstitutional.

22 I -- I don't submit that this decision
23 grapples with what we now know to be the Apprendi
24 doctrine. I simply submit it as evidence that this
25 Court --

1 JUSTICE SCALIA: You -- you don't think they
2 believed in the Apprendi doctrine, either, right?

3 MR. DREEBEN: No. I -- they didn't have the
4 benefit of having read Apprendi in order to render their
5 decision. They -- they were deciding the question that
6 was certified up to them.

7 My submission is that they wouldn't have
8 decided the case that way if they thought, based on
9 their familiarity with the common law, that fines were
10 the kind of thing that had to go to a jury.

11 JUSTICE SCALIA: Might have helped if they
12 had argument, right?

13 MR. DREEBEN: I think they felt they did not
14 need it, because the matter was sufficiently obvious
15 that all members of the Court could agree on it.

16 JUSTICE SCALIA: What about all of the
17 19th-century cases cited by Justice Thomas's concurrence
18 in Apprendi? Fine cases.

19 MR. DREEBEN: There are three of them.

20 JUSTICE SCALIA: In which course -- in which
21 courts did indeed require the amount of the fines to be
22 found by the jury.

23 MR. DREEBEN: There are three of them. The
24 earliest one is Commonwealth v. Smith. It's a
25 Massachusetts case.

1 JUSTICE SCALIA: Massachusetts, right.

2 MR. DREEBEN: And the Court in that case --
3 its analysis I think is even briefer than the analysis
4 we've just discussed in Tyler.

5 JUSTICE SCALIA: Was it an argued case, at
6 least?

7 MR. DREEBEN: Justice Scalia, I'd have to go
8 back and look at the opinion to tell you whether it was
9 an argued case. There's no citation of any
10 constitutional law in -- in that decision.

11 JUSTICE SOTOMAYOR: What makes acceptable
12 common law? Let's assume there weren't 50 States back
13 then, but whatever the number was, 20 States, and 15 of
14 them submitted it to the jury and 5 didn't. Does that
15 mean there was no common law that this was generally
16 submitted to the jury? If you can point to one case,
17 that's enough to defeat the existence of a common law
18 view?

19 MR. DREEBEN: I doubt that I would say that,
20 Justice Sotomayor. The -- the jurisprudence of the
21 former colonies/new States is not uniform. I -- the --
22 there is something I think of mythology in speaking
23 about the common law as one indivisible body of law.

24 JUSTICE SOTOMAYOR: That -- you see, that's
25 my problem.

1 MR. DREEBEN: And I don't disagree with you
2 on that point, Justice Sotomayor; but I think that there
3 is one fact that truly stands out about fines, and that
4 is they were historically at common law products of
5 judicial discretion.

6 JUSTICE SOTOMAYOR: But so was imprisonment.

7 MR. DREEBEN: Imprisonment was rare.
8 Imprisonment was hardly ever imposed in the early
9 colonies and in England, because --

10 JUSTICE SOTOMAYOR: Well, how many statutes
11 had anything but indeterminate fine structures?

12 MR. DREEBEN: I -- I'm sorry.

13 JUSTICE SOTOMAYOR: How many statutes in the
14 early common law had anything but indeterminate fine
15 statutes?

16 MR. DREEBEN: A few did. And I've attempted
17 to read up on the law of North Carolina, the law of
18 Pennsylvania, the law of Massachusetts, the law of New
19 York. It's all varied and complicated, but there were a
20 few of them there.

21 JUSTICE SCALIA: If it's varied and
22 complicated, why should we -- assuming that it's
23 ambiguous, why should we adopt the strange rule that the
24 jury has to find the fact if you go to jail for 2 weeks,
25 but doesn't have to find the fact if the amount of fines

1 multiplied by number of days or by anything else will --
2 will make a pauper of you? Why would we adopt such a
3 strange rule?

4 MR. DREEBEN: Well, the fact that there
5 were --

6 JUSTICE SCALIA: Unless compelled to do --
7 to do so by a clear common law history?

8 MR. DREEBEN: Well, none of those statutes
9 assigned the role of finding fines to juries. There may
10 be an example or two that one could find if you dig
11 through the mass of colonial records, but the dominant
12 trend, and it was acknowledged by Blackstone, was that
13 the common law never assigned the responsibility of
14 fines to the jury, and statutes did so rarely.
15 Imprisonment simply doesn't help very much in this area,
16 because the resources required to imprison just didn't
17 exist, and imprisonment really is a product that
18 developed in the late --

19 JUSTICE BREYER: What about the other two?
20 I just -- I was very interested in your colloquy here.
21 You said, well, there were three cases in the 19th
22 century where they did say the jury --

23 MR. DREEBEN: Yes.

24 JUSTICE BREYER: And one of them was a very
25 brief opinion from Massachusetts.

1 MR. DREEBEN: Yes.

2 JUSTICE BREYER: Well, Massachusetts counts
3 in its favor, but perhaps the brief opinion doesn't.
4 The --

5 (Laughter.)

6 JUSTICE BREYER: What about the other two?

7 MR. DREEBEN: Another one of them is
8 Massachusetts.

9 JUSTICE BREYER: Both Massachusetts. Well,
10 it's getting stronger.

11 MR. DREEBEN: Yes. We have Hope -- Hope in
12 1845, which cites back to Smith and relied on it, and
13 then there is an -- an arson case called Ritchey from
14 Indiana in which the court did seem to think that in
15 order to sustain a proper prosecution where the fine
16 amount varied based on the destruction of the property,
17 the jury had to find the amount of the property
18 valuation.

19 But this is 1845. It's not something that
20 would have been present to the mind of the Framers. It
21 doesn't indicate clearly what the source of law is,
22 whether it's a common law tradition, whether it's
23 following something like Smith. Smith itself I think is
24 also best understood as a larceny case, and there was
25 more of an established tradition that in larceny cases,

1 the value of the property taken was relevant to the
2 jury's findings because it made the difference between a
3 capital offense -- a capital offense that could be given
4 with benefit of clergy, which was basically a way for
5 the English judges to mitigate a death-eligible crime to
6 a non-death penalty, or petty larceny, which was
7 punished by fines and whipping. So, it graded the
8 offense in a way that, for example, the fine penalty at
9 issue in this case does not.

10 Petitioner is guilty of a felony by virtue
11 of the jury verdict. That imposes the stigma of being a
12 felon on Petitioner. The judge's role is then to decide
13 what was charged in the indictment and what was the
14 length of that violation, not to find Petitioner guilty
15 of numerous additional violations.

16 JUSTICE SCALIA: What if the judge disagreed
17 with the jury about whether there was even a violation?

18 MR. DREEBEN: The jury's acquittal would end
19 the criminal case.

20 JUSTICE SCALIA: No, no, no, no. The jury
21 finds a violation, but the judge thinks the jury got it
22 wrong.

23 MR. DREEBEN: Well, in that case --

24 JUSTICE SCALIA: How does -- how does he
25 pick the -- the number of days? He flips a coin?

1 MR. DREEBEN: Unless the -- the judge finds
2 that the evidence is insufficient under Jackson v.
3 Virginia, he's bound by the jury.

4 JUSTICE SCALIA: No, he finds, you know,
5 they could have come out that way, but -- but they were
6 wrong.

7 MR. DREEBEN: Then I think that he would be
8 bound by the day of violation, \$50,000 limit, subject to
9 another provision of Federal law, 3573(c), which
10 provides in the case of an organization that a felony
11 exposes the defendant to a \$500,000 fine. So, there --
12 there would be other limits applicable in Federal law
13 that would explain what the judge is supposed to do in
14 that situation.

15 The judge, of course, is operating in a
16 different way than the jury. The jury is finding guilt
17 beyond a reasonable doubt. The judge is applying a
18 preponderance of the evidence standard. This Court in
19 United States v. Watts has recognized that judges can
20 find facts that the jury may have rejected under the
21 higher standard.

22 JUSTICE SCALIA: That's the whole problem.
23 That is indeed the whole problem.

24 MR. DREEBEN: It's only the whole problem,
25 Justice --

1 JUSTICE SCALIA: The judge doesn't have to
2 find that this defendant beyond a reasonable doubt
3 committed the violation on so many days. The jury
4 would.

5 MR. DREEBEN: The only --

6 JUSTICE SCALIA: The judge can simply say,
7 well, you know, all in all, probably they did it --
8 probably. More likely than not they did it so many
9 days. It's a big difference.

10 MR. DREEBEN: It's only a problem,
11 Justice Scalia, if the Sixth Amendment protects a
12 defendant's right to it. And the question that was --
13 as framed in *Ice*, is whether the legislative innovation,
14 the reform aimed to structure the discretion of a court
15 which at the Founding era might have been impose
16 whatever fine you like with no limits whatsoever, except
17 the Excessive Fines Clause of the Eighth Amendment --
18 Congress has come along, as have the State legislatures,
19 and sought to structure the deliberations with respect
20 to financial penalties.

21 Fines, restitution, and forfeiture are now
22 structured in a way that basically sends the decision to
23 the judge or lowers the standard of proof to a
24 preponderance in the case of forfeiture amounts that --
25 that are decided by a Federal jury without the

1 constraints of the Apprendi rule.

2 And that distinction between financial
3 penalties and infringements on life or liberty is
4 consistent with a Sixth Amendment theme. Deprivations
5 of life or liberty attract a greater degree of
6 protection than fine amounts or other financial
7 penalties. There is substantive constitutional
8 protection in the Eighth Amendment --

9 JUSTICE KAGAN: What other rules do you
10 think are different? I mean, is there a jury trial in
11 the one case but not in the other? Is there a right to
12 counsel in the one case but not in the other? What else
13 turns on this fine/incarceration distinction?

14 MR. DREEBEN: In the right to counsel area,
15 the Court has held that for misdemeanors, if the
16 defendant goes to prison, he's entitled to counsel; if
17 the defendant does not, he is not entitled to counsel.
18 With respect to jury trials, a petty offense which is
19 generally one punishable by less than 6 months in
20 prison, there is no jury trial right. A penalty of
21 greater than 6 months in prison indicates a more serious
22 offense.

23 JUSTICE SCALIA: What if you call it a
24 misdemeanor but -- but impose a very heavy fine? It's
25 still a misdemeanor?

1 MR. DREEBEN: It is still a misdemeanor
2 because the primary indication --

3 JUSTICE SCALIA: And you don't have right to
4 counsel. Right?

5 MR. DREEBEN: That is -- that is this
6 Court's jurisprudence. This Court in Scott and
7 Argersinger drew the line at actual imprisonment,
8 recognizing that deprivations of liberty have a more
9 serious criminal implication than financial penalties.
10 And --

11 JUSTICE KENNEDY: And that makes it clear to
12 you that there's no overlap between property and
13 liberty, so that no matter how much of your property are
14 taken and what circumstances, it's just property;
15 there's no liberty involved?

16 MR. DREEBEN: There is, of course, an
17 important constitutional value in deprivations of
18 property. It's protected by due process, and the
19 Excessive Fines Clause explicitly addresses the
20 possibility that the judge may impose an unjustified
21 penalty. There are also nonconstitutional sources of
22 protection such as reasonableness review, which
23 Petitioner got in this case, and the First Circuit
24 upheld the amount of the fine as reasonable.

25 The only question here is whether, despite

1 the lack of a historical pedigree and despite this
2 Court's decision in Tyler and despite the adverse effect
3 on the administration of justice, the Apprendi rule
4 needs to be expanded where it has never been applied
5 previously to encompass fines. And I --

6 JUSTICE KENNEDY: But you want -- want us to
7 write as part of that decision that no matter how great
8 the fine, liberty is not involved?

9 MR. DREEBEN: Well, liberty in the sense of
10 imprisonment is not involved. Corporations I don't
11 think can be deprived of --

12 JUSTICE KENNEDY: Liberty in the sense of
13 what the Fifth Amendment and the Fourteenth amendment
14 say.

15 MR. DREEBEN: I don't think a corporation
16 can be deprived of liberty within the meaning of the
17 Fifth Amendment. It can't be put in prison; it can't be
18 restricted from, you know, activities that are
19 comprehended --

20 CHIEF JUSTICE ROBERTS: Well, your --

21 JUSTICE SCALIA: So --

22 CHIEF JUSTICE ROBERTS: I'm sorry.

23 JUSTICE SCALIA: Yes. I guess you don't
24 need counsel on any suits against corporations, right?

25 MR. DREEBEN: Well, I don't think

1 corporations can appear in court except through counsel.
2 They don't have a sort of distinct --

3 CHIEF JUSTICE ROBERTS: Your argument isn't
4 limited to corporations, though.

5 MR. DREEBEN: No, this -- this is a rule
6 that is responsive to the history with respect to
7 financial punishments.

8 JUSTICE BREYER: So, do you need any more
9 than that? I mean, do we have to get into this? Isn't
10 it just a question of whether there is a tradition in
11 the law that juries, rather than judges, would determine
12 what used to be called sentencing facts; facts related
13 not to the crime, but to the imposition of the
14 punishment where that's a fine?

15 MR. DREEBEN: May I answer?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. DREEBEN: Justice Breyer, we're not
18 asking the Court to reconsider its Apprendi line of
19 cases. We're asking it to apply the analysis that
20 limited Apprendi in Oregon v. Ice.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Phillips, you have 7 minutes remaining.

24 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

25 ON BEHALF OF THE PETITIONER

1 MR. PHILLIPS: Thank you, Mr. Chief Justice,
2 and may it please the Court:

3 Hopefully, I'll be able to give you back a
4 couple of those minutes.

5 I'd like to -- I'd like to start with what
6 seems to me ultimately the fundamental notion of the
7 United States' position, which is that there is a vast
8 gulf somehow between fines and imprisonment. And it
9 seems to me very difficult within the constitutional
10 structure to embrace that approach when, obviously,
11 property interests are protected in the Fifth Amendment;
12 they're protected in the Eighth Amendment. And if you
13 go back to Blackstone, where he talks about inflicting
14 corporal punishment or a stated imprisonment of a term,
15 which is better than an excessive fine, for that amounts
16 to imprisonment for life, there's the recognition
17 historically that fines have an enormous impact on
18 individuals and, of course, are entitled to fundamental
19 constitutional protections. It seems to me that the
20 Government's approach there to saying fines are off the
21 table and it's completely open season on defendants
22 under those circumstances is unjustifiable.

23 With respect to restitution, I already
24 suggested to the Court all lower courts have concluded
25 that restitution is not within the Apprendi doctrine. I

1 don't think that's going to be a problem under these
2 circumstances.

3 And -- and I don't think ultimately that the
4 issue in this case is sort of what is or is not the
5 common law tradition. Because I -- if I go back and I
6 think -- I read Justice Thomas's concurrence and the
7 history there, he doesn't even mention Tyler as part
8 of -- as part of that analysis and, yet, concludes with
9 what I think is a very powerful assessment, that juries
10 would be available for fines up to, you know, within --
11 if it were going to go beyond some kind of a maximum.
12 But within the maximum, obviously in that context, the
13 judge would have complete discretion on -- on how to
14 approach it.

15 JUSTICE GINSBURG: What about the amount of
16 loss issue that Justice Breyer raised, was very
17 complicated to determine what the amount of the loss is?

18 MR. PHILLIPS: Right.

19 Justice Ginsburg, I think it's worth
20 considering two facts in this case in dealing with what
21 I think is purely a policy argument that shouldn't
22 override the Constitution. But the first one is that --
23 the notion that Apprendi applies to fines has been well
24 accepted in 99 percent of the country for more than a
25 decade. And the Antitrust Division operates and makes

1 these kinds of decisions all the time. Fraud
2 prosecutions are going forward.

3 The amicus brief that was filed by the
4 Chamber of Commerce demonstrates categorically they --
5 this -- this gets done every day, and it gets done
6 effectively. So, whatever the problem of Apprendi, it
7 has not surfaced. And -- and you'll look in the
8 Government's brief for any specific evidence of the
9 complaint that it makes other than the hypothetical
10 possibility that their parade of horrors would play
11 out.

12 JUSTICE GINSBURG: If we --

13 MR. PHILLIPS: This Court has rejected that
14 parade of horrors in every other Apprendi context.

15 JUSTICE GINSBURG: If -- on the question of
16 the value of goods or the amount of the loss, what would
17 the standard be? Would the jury have to find beyond a
18 reasonable doubt that it was -- that the value was such
19 and such?

20 MR. PHILLIPS: Yes, I think that's precisely
21 what the jury would be asked to find. And juries are
22 asked to find that all the time, and they make that kind
23 of a determination.

24 And I guess the last point that I think as a
25 practical matter that ought -- the Court ought to take

1 notice of is that no State filed an amicus brief in this
2 case, that Apprendi has not been the problem in the
3 fines context that would even warrant anybody to come in
4 here and complain about it.

5 It seems to me the right answer is to apply
6 the core doctrine, the core principle of Apprendi, which
7 even the Government concedes, if you just take the
8 language, it talks about any fact that increases the
9 penalty, that algorithm takes you to the conclusion the
10 judgment below should be reversed.

11 JUSTICE SOTOMAYOR: I may have just
12 forgotten, but does your brief go through the status of
13 what lower courts have decided with respect to fines and
14 how they're dealing with them? I just don't remember it
15 as being part of your brief, the statement you just
16 made to Justice Kennedy.

17 MR. PHILLIPS: Well, we do -- I mean, we do
18 make the -- we demonstrated two things: one, that the
19 lower courts pretty consistently have rejected the First
20 Circuit's approach --

21 JUSTICE SOTOMAYOR: Okay.

22 MR. PHILLIPS: -- and then, two, that the --
23 in the amicus brief then focused more in terms of fines
24 being used on a regular basis in that period of time in
25 those jurisdictions.

1 If there are no further questions, I'll cede
2 back my rest of my time. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel,
4 counsel.

5 The case is submitted.

6 (Whereupon, at 12:02 p.m., the case in the
7 above-entitled matter was submitted.)

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