No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KARL KLUGE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2018, Congress enacted the Amy, Vicky, and Andy Child Pornography Victim Assistance Act, which established a mandatory minimum restitution amount of $3,000 per victim for certain child exploitation offenses. *See* 18 U.S.C. § 2259(b)(2)(B).

As this Court has repeatedly held, the Sixth Amendment guarantees a right to have a jury find all the facts necessary to criminal punishment. Thus, a jury must find any fact that increases the statutory maximum penalty, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as well as any fact that increases the mandatory minimum, *Alleyne v. United States*, 570 U.S. 99, 103 (2013). This bedrock constitutional rule applies "broadly" to all forms of criminal punishment, including monetary penalties like fines. *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012).

The question presented is: Does the Sixth Amendment require a jury to find the facts needed to justify a restitution order meeting or exceeding § 2259(b)(2)(B)'s $3,000 mandatory minimum?

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Kluge, Case No. 2:22-cr-23-SPC-NPM

United States Court of Appeals (11th Cir.)

United States v. Kluge, No. 23-10697

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PETITION FOR A WRIT OF CERTIORARI

Karl Kluge respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The Eleventh Circuit's opinion affirming Mr. Kluge's sentence is provided in Appendix A and is published at 147 F.4th 1291.

JURISDICTION

The Eleventh Circuit affirmed Mr. Kluge's sentence on July 31, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ." U.S. Const. amend. VI.

Section 2259 of Title 18 of the United States Code states in relevant part:

> **(a) In General.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.
>
> **(b) Scope and Nature of Order.—**
>
> . . . .
>
> **(2) Restitution for trafficking in child pornography.**—If the defendant was convicted of trafficking in child pornography, the court shall order restitution under this section in an amount to be determined by the court as follows:
>
> **(A)** Determining the full amount of a victim's losses.— The court shall determine the full amount of the victim's losses that were incurred or are reasonably projected to be incurred by the victim as a result of the trafficking in child pornography depicting the victim.
>
> **(B)** Determining a restitution amount.— After completing the determination required under subparagraph (A), the court shall order restitution in an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses, but which is no less than $3,000.
>
> **(C)** Termination of payment.— A victim's total aggregate recovery pursuant to this section shall not exceed the full amount of the victim's demonstrated losses. After the victim has received

restitution in the full amount of the victim's losses as measured by the greatest amount of such losses found in any case involving that victim that has resulted in a final restitution order under this section, the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim shall be terminated. The court may require the victim to provide information concerning the amount of restitution the victim has been paid in other cases for the same losses.

(3) Enforcement.— An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(4) Order mandatory.—

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definitions.—

. . . .

(2) Full amount of the victim's losses.—For purposes of this subsection, the term "full amount of the

victim's losses" includes any costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim, and in the case of trafficking in child pornography offenses, as a proximate result of all trafficking in child pornography offenses involving the same victim, including—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) reasonable attorneys' fees, as well as other costs incurred; and

(F) any other relevant losses incurred by the victim.

. . . .

(4) Victim.—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the crime victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

INTRODUCTION

Section 2259 of Title 18 of the United States Code creates a mandatory restitution scheme for child exploitation offenses. When a defendant is convicted of trafficking in child pornography, the court "shall order restitution" for any victim in an amount that is "no less than $3,000." 18 U.S.C. § 2259(b)(2)(B). That restitution order, however, does not flow automatically from the facts needed to convict the defendant.

Rather, the district court must find additional facts—not reflected in the jury verdict or admission of guilt—before it can order restitution. First, a victim or victims must be identified. *See id.* § 2259(b)(2)(A); *id.* § 2259(c)(4) (defining "victim"). Second, the full amount of the victim's losses caused by the trafficking must be determined. *Id.* § 2259(b)(2)(A); *see id.* § 2259(c)(2) (defining "full amount of the victim's losses"). Third, if there is an identified victim with losses, the restitution order must reflect the defendant's relative role in causing the losses. *Id.* § 2259(b)(2)(B). And regardless of a victim's losses or the defendant's causal role, the restitution order must be for no less than $3,000. *Id.*

This Court's precedent makes clear that relying on judicial factfinding to impose restitution under § 2259(b)(2)(B) violates the Sixth

Amendment. A jury must find the facts necessary to impose an increased mandatory minimum penalty. *Alleyne v. United States*, 570 U.S. 99 (2013); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that jury must find facts that increase statutory maximum). That principle applies not only to increased statutory ranges of imprisonment but also to any form of criminal punishment, including monetary penalties. *Southern Union Co. v. United States*, 567 U.S. 343 (2012). And this Court has recognized that criminal restitution is part of the criminal penalty. *See*, *e.g.*, *Paroline v. United States*, 572 U.S. 434, 456 (2014); *Kelly v. Robinson*, 479 U.S. 36, 49 n.10, 53 (1986).

Yet, in the decision below, the Eleventh Circuit exempted restitution from the Sixth Amendment right to a jury trial. Its reasoning contradicts this Court's precedent and is incompatible with the original understanding of the Sixth Amendment. Other courts of appeal that have considered whether a restitution order based on judge-found facts violates the Sixth Amendment have similarly misapplied this Court's precedent. At the same time, the imposition of onerous restitution awards is increasing nationwide. This Court's intervention is urgently needed to protect the fundamental right to a criminal jury trial.

STATEMENT OF THE CASE

1. Following a bench trial on stipulated facts, the district court found Karl Kluge guilty of one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and 2252(b)(2), and imposed a 97-month term of imprisonment followed by 15 years of supervised release. Doc. 70.[1] The district court deferred with respect to restitution and scheduled a separate hearing for a later date. *Id.* at 6.

Before the restitution hearing, Mr. Kluge moved the district court to "either empanel a jury to determine the amount of restitution or limit the restitution to the amount authorized by the facts found by the Court during Mr. Kluge's bench trial—here, nothing beyond his guilty of the offense." Doc. 84 at 1. He explained that *Apprendi* and *Alleyne* required a jury to determine each restitution-related fact beyond a reasonable doubt, noting that the restitution statute, 18 U.S.C. § 2259(b)(2), established a mandatory minimum of $3,000 per victim. *Id.* at 2–11.[2]

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[1] "Doc." references the district court docket entries in this case.

[2] Section 2259(b)(2) applies when a defendant is convicted of "trafficking in child pornography," a defined term that includes possession of child pornography under 18 U.S.C. § 2252(a)(4)(B). *See* 18 U.S.C. § 2259(c)(3).

The government opposed Mr. Kluge's motion and stated its intention to seek $39,000 in restitution, representing $3,000 each for 13 victims. Doc. 86 at 4.

The district court overruled Mr. Kluge's request to empanel a jury. Doc. 87. It determined that "[t]he Eleventh Circuit has already held that '*Apprendi* does not apply to a restitution order.'" *Id.* at 4 (quoting *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006)). So, the court concluded, "it is well-settled in this circuit that jury findings are not needed for a court's restitution order." *Id.*

At the ensuing restitution hearing, Mr. Kluge maintained his request that a jury be empaneled while the government maintained its request for $39,000 in restitution. Doc. 103 at 3–5. The district court found that the offense involved thirteen victims and therefore ordered Mr. Kluge to pay restitution in the amount of $39,000. *See id.* at 8.

2. On appeal, Mr. Kluge renewed his challenge to the restitution order, arguing that it violated his constitutional rights under *Apprendi* and *Alleyne*. The Eleventh Circuit rejected his argument, asserting that restitution is not a criminal penalty for purposes of the Sixth Amendment. *See* App. 16a–19a. The court explained that "*Alleyne*'s

protections 'only come into consideration if we first conclude restitution is a criminal penalty,'" but that a previous panel of the court had "explicitly 'declined to reach such a conclusion'" in *United States v. Gatlin*, 90 F.4th 1050 (11th Cir. 2024). App. 17a (quoting *Gatlin*, 90 F.4th at 1074). "Moreover," the court added, "in broadly holding that *Apprendi* does not apply to a restitution order" in *Dohrmann*, "*Dohrmann* adopted the view of our sister circuits that 'restitution is a civil penalty, not a criminal one.'" App. 17a (quoting *Dohrmann*, 442 F.3d at 1281).

The court distinguished its many precedents finding that restitution is a criminal penalty in other contexts. *Id.* 18a; *see*, *e.g.*, *United States v. Twitty*, 107 F.3d 1482, 1492 n.12 (11th Cir. 1997); *United States v. Johnson*, 983 F.2d 216, 220 (11th Cir. 1993); *United States v. Hairston*, 888 F.2d 1349, 1355 (11th Cir. 1989); *United States v. Satterfield*, 743 F.2d 827, 836 (11th Cir. 1984), *superseded by statute as stated in United States v. Edwards*, 728 F.3d 1286, 1292 n.2 (11th Cir. 2013). The reason: none of those cases specifically "consider[ed] whether restitution is the type of punishment that falls within 'the historical role of the jury at common law,' and thus, whether it is the type of penalty that triggers the Sixth Amendment right to a jury trial under *Apprendi*."

App. 18a (internal citation omitted). So in the Eleventh Circuit's eyes, *non-mandatory* restitution under the Victim and Witness Protection Act *is* a criminal penalty for purposes of claim preclusion, *Twitty*, 107 F.3d at 1493 n.12; *Hairston*, 888 F.2d at 1355, third-party standing, *Johnson*, 983 F.2d at 219–21, and the Seventh Amendment, *Satterfield*, 743 F.2d at 836–39, and restitution under the Mandatory Victims Restitution Act (MVRA) *is* a criminal penalty for purposes of the Ex Post Facto Clause, *United States v. Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998). But mandatory restitution under § 2259(b) *is not* a criminal penalty for purposes of the Sixth Amendment. App. 17a.

The court concluded it was bound by its holdings in *Gatlin* and *Dohrmann* that *Apprendi* does not apply to restitution, and it "extend[ed] that holding to restitution orders pursuant to § 2259(b)(2)(B)." *Id.* 19a. Thus, the court rejected Mr. Kluge's constitutional challenge under *Apprendi* and *Alleyne* and affirmed the restitution order. *Id.*

REASONS FOR GRANTING THE WRIT

I. The decision below contravenes this Court's Sixth Amendment precedent.

A. Under the Sixth Amendment, facts triggering a mandatory minimum restitution order must be proved to a jury beyond a reasonable doubt.

In *Apprendi*, this Court held that, except for the fact of a prior conviction, the Sixth Amendment requires that any fact that would increase the punishment for a crime beyond the prescribed statutory maximum must be presented to the factfinder and proven beyond a reasonable doubt. 530 U.S. at 490. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

The Court later extended *Apprendi's* rule to mandatory minimums. *Alleyne*, 570 U.S. at 103, 116. The Court clarified that although *Apprendi* had been limited to facts increasing the statutory maximum, *Apprendi*'s underlying principle carries the same weight when it comes to facts that elevate the mandatory minimum. *See id.* at 111–12. *Alleyne*'s reasoning was based on the recognition that a fact triggering a mandatory minimum alters the prescribed sentencing range for a criminal

defendant. *Id.* at 112. Because the legally prescribed range represents the penalty associated with the offense, it follows that a fact affecting either end of the range results in a new penalty and constitutes an essential element of the offense. *See id.*

In the years since, this Court "has not hesitated to strike down" sentencing procedures "that fail to respect the jury's supervisory function." *United States v. Haymond*, 139 S. Ct. 2369, 2377 (2019) (plurality opinion). Just last year, for example, the Court held that to impose an enhanced statutory range under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the statute's "different occasions" requirement must be proved to a unanimous jury beyond a reasonable doubt. *Erlinger v. United States*, 602 U.S. 821 (2024).

The Court has also explained that this bedrock constitutional rule is not limited to facts that increase terms of imprisonment—it applies "broadly" to "prohibit judicial factfinding that increases maximum criminal sentences, penalties, or punishments." *Southern Union*, 567 U.S. at 350 (cleaned up). Indeed, this Court "ha[s] never distinguished one form of punishment from another" for purposes of *Apprendi*. *Id.*

Thus, in *Southern Union*, the Court held that a jury must find the facts necessary to impose criminal fines. *Id.*

Like fines, restitution ordered in criminal cases is a monetary criminal penalty whose "purpose" is "to mete out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). And like the fine in *Southern Union*, restitution orders under 18 U.S.C. § 2259(b) require additional factfinding. *See supra* at 5. Because those facts increase the statutory minimum (and maximum) penalty a defendant faces, the Sixth Amendment demands that the government prove them to a jury.

This result is not only compelled by the Court's precedent, it is consistent with the "historical role of the jury at common law." *Southern Union*, 567 U.S. at 353 (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)). A review of the historical record supports that facts affecting the statutory maximum or minimum amount of restitution must be admitted by the defendant or submitted to a jury and proven beyond a reasonable doubt. *See* James Barta, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463 (2014).

Indeed, "as long ago as the time of Henry VIII, an English statute entitling victims to the restitution of stolen goods allowed courts to order the return only of those goods mentioned in the indictment and found stolen by a jury." *Hester v. United States*, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); *see Southern Union*, 567 U.S. at 354 (discussing authority suggesting English juries had to find value of property taken to authorize pecuniary punishment). "In America, too, courts held that in prosecutions for larceny, the jury usually had to find the value of the stolen property before restitution to the victim could be ordered." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). As two Justices of this Court opined, "it's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth . . . Amendment's adoption." *Id.*

In short, a historical understanding of the Sixth Amendment confirms what this Court's precedent compels: a jury must find the facts necessary to order restitution. This result is especially clear as applied to an order under § 2259(b)(2), where the factfinding triggers a $3,000 mandatory minimum restitution order.

B. The Eleventh Circuit's decision that a jury need not find the facts necessary to trigger § 2259(b)(2)(B)'s $3,000 mandatory minimum is wrong.

In holding that *Apprendi* and *Alleyne* do not apply to mandatory minimum restitution orders under § 2259(b)(2), the Eleventh Circuit relied on the faulty premise that restitution is not a criminal penalty and therefore does not implicate the right to a jury trial. App. 17a. Some other circuits have reached a similar conclusion. *See United States v. Wolfe*, 701 F.3d 1206, 1206 (7th Cir. 2012); *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006); *see also United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (holding that the rule of lenity does not apply to MVRA because restitution does not inflict criminal punishment).

That is wrong. The jury trial right applies "[i]n all criminal prosecutions." U.S. Const., amend. VI. And restitution is "imposed by the Government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime." *Paroline*, 572 U.S. at 456 (quoting *United States v. Bajakajian*, 524 U.S. 321, 328 (1998)); *see Manrique v. United States*, 581 U.S. 116, 118 (2017) ("Sentencing courts are required to impose restitution as part of the sentence for specified crimes.").

This Court has repeatedly recognized that restitution is a criminal penalty with "punitive purposes." *See*, *e.g.*, *Paroline,* 572 U.S. at 456; *Pasquantino*, 544 U.S. at 365 ("The purpose of awarding restitution" is "to mete out appropriate criminal punishment for that conduct."). As the Court observed in *Kelly*, restitution is an "effective rehabilitative penalty" that "[has] a more precise deterrent effect than a traditional fine." 479 U.S. at 49 n.10; *see id.* at 50–53.

The statutory scheme confirms that the restitution ordered in Mr. Kluge's case is a criminal penalty. Section 2259 classifies restitution as a "penalty" for the "offense" that is triggered when a defendant is "convicted" of certain crimes. 18 U.S.C. § 2259(a), (b)(2); *see Hester*, 139 S. Ct. at 511 (Gorsuch, J. joined by Sotomayor, J., dissenting from denial of certiorari) ("Federal statues, too, describe restitution as a penalty' imposed on the defendant as part of his criminal sentence . . . ."). That § 2259(b) imposes a $3,000 minimum—regardless of the victim's actual losses or the defendant's causal contribution to them—reflects the statute's penal goals. And because paying restitution is both a mandatory condition of supervised release, 18 U.S.C. § 3583(d), and enforceable like a fine, § 3664(m)(1)(A)(i), restitution can be enforced

through reimprisonment. Thus, the statutory scheme lays bare that restitution is part of the criminal penalty.

II. The question presented is important, recurring, and unlikely to be resolved without this Court's intervention.

"Restitution plays an increasing role in federal criminal sentencing today." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari). Before enactment of the MVRA in 1996, "restitution orders were comparatively rare." *Id.* But "between 1996 and 2016, the amount of unpaid federal criminal restitution rose from less than $6 billion to more than $110 billion." *Id.* And "from 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution." *Id.* Criminal restitution continues to shape our justice system. In 2024, federal courts ordered over 8,000 defendants to pay nearly $13.5 billion in restitution, with a mean award of more than $1.65 million. U.S. Sentencing Comm'n, 2024 Sourcebook of Federal Sentencing Statistics tbl. 17.

And when defendants do not comply with their restitution orders—a common occurrence, *see* Wayne LaFave, *Criminal Procedure* § 26.6(c) (2024)—they face severe consequences. "Failure or inability to pay

restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari); *see* 18 U.S.C. § 3664(m)(1)(A)(i) (providing that restitution may be enforced in same manner as fines). The consequences are particularly troubling for indigent defendants, as restitution is often imposed without regard for the individual's ability to pay. *See, e.g.*, 18 U.S.C. § 2259(b)(4)(B).

These penalties are not just onerous; under the Sixth Amendment, they are unconstitutional. As this Court recently explained, it's not "too much to ask the government to prove its case . . . with reliable evidence" before exposing criminal defendants to enhanced punishments, especially considering the "practical reality" that defendants face as a result. *Erlinger*, 602 U.S. at 835 n.1 (alteration adopted).

Despite that, the appellate courts that have considered whether the Sixth Amendment's jury trial right applies to restitution have answered "no." *See United States v. Milkiewicz*, 470 F.3d 390, 403–04 (1st Cir. 2006); *United States v. Bengis*, 783 F.3d 407, 412–13 (2d Cir. 2015); *United States v. Leahy*, 438 F.3d 328, 335–38 (3d Cir. 2006) (en banc); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *United States v.*

Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014); *United States v. Churn*, 800 F.3d 768, 782 (6th Cir. 2015); *Wolfe*, 701 F.3d at 1206 (7th Cir.); *Millot*, 433 F.3d at 1062 (8th Cir.); *United States v. Green*, 722 F.3d 1146, 1149–51 (9th Cir. 2013); *United States v. Burns*, 800 F.3d 1258, 1261–62 (10th Cir. 2015).[3] These courts have relied on one or more of three faulty reasons to conclude that using judicial factfinding to impose criminal restitution comports with the Sixth Amendment:

1. *First*, a minority of circuits have concluded, like the Eleventh Circuit, that restitution does not implicate the right to a jury trial because restitution is not a criminal penalty. App. 17a; *see Wolfe*, 701 F.3d at 1206 (7th Cir.); *Millot*, 433 F.3d at 1062 (8th Cir.); *see also Serawop*, 505 F.3d at 1122 (holding that the rule of lenity does not apply to the MVRA because restitution does not inflict criminal punishment).

This is wrong because it conflicts both with this Court's precedents and with the statutory scheme for restitution. *Supra* at 16–17.

[3] The Eleventh Circuit seems to be the only circuit to have addressed whether § 2259(b)(2)(B)'s $3,000 mandatory minimum violates *Alleyne*. The Fifth Circuit was recently presented with this specific issue but did not address it. *See United States v. Caudillo*, 110 F.4th 808, 811–12 (5th Cir. 2024).

2. *Second*, at least seven circuits have held that criminal restitution orders are exempt from *Apprendi* because restitution statutes prescribe no statutory maximum. *See, e.g.*, *Bengis*, 783 F.3d at 412–13 (2d Cir.); *Day*, 700 F.3d at 732 (4th Cir.); *Rosbottom*, 763 F.3d at 420 (5th Cir.); *Churn*, 800 F.3d at 782 (6th Cir.); *Millot*, 433 F.3d at 1062 (8th Cir.); *Green*, 722 F.3d at 1150 (9th Cir.); *Burns*, 800 F.3d at 1261–62 (10th Cir.).

This reasoning is wrong because it misunderstands the concept of a statutory maximum. "The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303–04. That is, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.*

Applying the correct understanding, the "statutory maximum" amount of restitution is zero because "a court can't award any restitution without finding additional facts about the victim's loss." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari); *see Milkiewicz*, 470 F.3d at 403 ("If the question is whether the verdict '*alone*' allows the judges to impose restitution with

no additional finding of fact, obviously it doesn't."). That § 2259 itself contains no "prescribed statutory maximum" is thus irrelevant for Sixth Amendment purposes; what matters is that imposing restitution under that statute requires a district court to find additional facts beyond those established by the conviction itself.

But even if those circuits were correct that restitution statutes like 18 U.S.C. § 3663 and § 3663A do not implicate *Apprendi* because they lack a statutory maximum—such that courts may find the facts necessary to impose restitution under those statutes—the Sixth Amendment would still prohibit judicial factfinding under the statute at issue here, § 2259(b)(2)(B).

That's because, regardless of whether § 2259(b)(2)(B) has a separate "statutory maximum," the statute has a separate mandatory *minimum*. *See* 18 U.S.C. § 2259(b)(2)(B) (setting $3,000 statutory minimum). And under *Alleyne*, the factfinding required to impose that mandatory minimum must be found by a jury. *See supra* at 5–6, 11–12.[4]

[4] Section 2259(b)(2)(C), which states that the liability of a defendant ordered to pay restitution shall be terminated after a victim's total aggregate recovery meets the full amount of her losses, doesn't change that constitutional command. That liability may later be "terminated" is

Indeed, the Fifth Circuit recognized the *Alleyne* distinction in *Caudillo*, 110 F.4th at 811–12. There, the government argued that circuit precedent finding *Apprendi* inapplicable to restitution statutes without a statutory maximum resolved that § 2259(b)(2)(B) did not implicate *Alleyne*. *Id.* The Fifth Circuit disagreed. Its earlier decisions concerned a different restitution statute with no mandatory minimum. *Id.* Thus, the court explained, its prior precedents did "not govern whether factual determinations that increase the statutory *minimum* amount of restitution [under § 2259(b)(2)(B)] must be admitted by a defendant or found beyond a reasonable doubt." *Id.* at 812.

The Fifth Circuit ultimately did not resolve the *Alleyne* issue because the defendant had waived his Sixth Amendment argument. *Id.* But its acknowledgment that § 2259(b)(2)(B)'s mandatory minimum raises distinct Sixth Amendment concerns is in tension with the decision below. And it highlights why this Court's intervention is needed to clarify

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distinct from the restitution order itself, which is a criminal penalty subject to the $3,000 mandatory minimum. And *Alleyne* requires a jury find all the facts to support a mandatory minimum penalty, even if that minimum can be broken through the application of other statutes, such as substantial assistance under 18 U.S.C. § 3553(e) or the safety valve under 18 U.S.C. § 3553(f).

the Sixth Amendment jury trial right for criminal restitution, especially for restitution orders under a statute like § 2259(b)(2), which implicates both a mandatory minimum and a statutory maximum.

3. *Third*, a couple of circuits have suggested that a restitution order based on judicial factfinding comports with the Sixth Amendment because a conviction automatically authorizes restitution for the full amount of loss. The Third Circuit reached this conclusion over a five-judge dissent. *Leahy*, 438 F.3d at 335–38; *see id.* at 339–48 (McKee, J., joined by four other judges, dissenting in part). The First Circuit also adopted this reasoning. *See Milkiewicz*, 470 F.3d at 404 ("[I]n *every* case in which such punishment is imposed, 'the jury's verdict automatically triggers restitution in the 'full amount of each victim's losses.'" (quoting *Leahy*, 438 F.3d at 338 n.11)). But their reasoning misapprehends the statutory scheme and this Court's Sixth Amendment precedent.

Imposing restitution under § 2259(b)(2)—even for the $3,000 mandatory minimum—requires additional factfinding beyond the facts needed to convict the defendant of a child pornography offense. One or more victims must be identified; the amount of the victim's losses caused by the trafficking must be determined; and, if there is an identified victim

with losses, the restitution order must reflect the defendant's relative role in causing the losses. *Supra* at 5.[5] The Sixth Amendment's command is clear: those facts must be admitted by the defendant or proven to a jury beyond a reasonable doubt. *See Alleyne*, 570 U.S. at 103; *see also Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 303–04; *Southern Union*, 567 U.S. at 350.

For the sake of comparison, consider the Resource Conservation and Recovery Act of 1976 ("RCRA"), the statute at issue in *Southern Union*. Violations of RCRA are subject to a fine of $50,000 per day. *Southern Union*, 567 U.S. at 347. This Court held that when a jury finds a defendant violated the RCRA but does not find the number of days the defendant engaged in a violation, judicial factfinding to determine the number of days enlarges the punishment beyond what the jury's verdict allowed, in violation of the Sixth Amendment. *Id.* at 352.

The Sixth Amendment compels the same result here. Just as a jury must find the number of days a defendant violated RCRA, the Sixth Amendment requires that a jury find the number and identity of the

[5] Ordering restitution under other statutes, like § 3663 or § 3663A, similarly requires additional factfinding.

victim(s), their total losses, and the portion of those losses attributable to the defendant before a court may impose restitution under § 2259(b).

To the extent the First and Third Circuits suggest that the $3,000 mandatory minimum is a legislative determination of the per se harm a child pornography victim suffers, it misses that imposing even the mandatory minimum requires an additional finding—not established by the fact of conviction—that a particular individual is a "victim" of the offense. *See* 18 U.S.C. § 2259(c)(4) (defining "victim"); *Paroline*, 572 U.S. at 445 ("[I]f the defendant's offense conduct did not cause harm to an individual, that individual is by definition not a 'victim' entitled to restitution under § 2259."). In Mr. Kluge's case, the district court found by a preponderance of the evidence that there were thirteen such "victim[s]." And based solely on that judicial factfinding, the district court ordered Mr. Kluge to pay $39,000 in restitution as part of the penalty for his crime.

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After years of percolation, the courts of appeals have held tight to their precedent, despite Justices of this Court and federal circuit judges highlighting inconsistencies between circuit precedent and this Court's

Sixth Amendment jurisprudence. *See, e.g.*, *Hester*, 139 S. Ct. at 509–11 (Gorsuch, J., and Sotomayor, J., dissenting from denial of certiorari); *Leahy*, 438 F.3d at 339–48 (McKee, J., dissenting, joined by four other judges) ("A finding of loss necessarily is a condition precedent to an order of restitution, and . . . it is the judge who makes the finding. As I have explained, the imposition of this additional criminal penalty based on a fact not found by a jury violates the Sixth Amendment."); *United States v. Carruth*, 418 F.3d 900, 904–06 (8th Cir. 2005) (Bye, J., dissenting) ("Once we recognize restitution as being a 'criminal penalty' the proverbial *Apprendi* dominoes begin to fall.").

In short, the courts of appeals are stuck. As the Ninth Circuit explained, "Our precedents are clear that *Apprendi* doesn't apply to restitution, but that doesn't mean our caselaw's well-harmonized with *Southern Union*. Had *Southern Union* come down before our cases, those cases might have come out differently. Nonetheless, our panel can't base its decision on what the law might have been." *Green*, 722 F.3d at 1146. What the courts of appeals can't or won't fix, this Court must.

III. This case is an excellent vehicle.

This case is an ideal vehicle to correct course and uphold the right to a jury trial. The issue is well preserved and has a material impact for Mr. Kluge, an indigent defendant now facing an onerous criminal penalty based solely on judicial factfinding.

Mr. Kluge raised his Sixth Amendment argument—including that relying on judicial factfinding to trigger § 2259(b)(2)(B)'s mandatory minimum violates *Alleyne*—in the district court, where he requested a jury trial or that the district court impose a restitution order supported by the facts from his bench trial: zero dollars. Doc. 84. The district court rejected his request, Doc. 87, and based the $39,000 restitution order (the $3,000 mandatory minimum for thirteen victims) on its own factfinding from exhibits tendered by the government, *see* Doc. 103 at 7–8. Mr. Kluge renewed the Sixth Amendment *Alleyne* issue before the Eleventh Circuit, where the panel rejected it.

This Court recently heard oral argument in *Ellinburg v. United States*, No. 24-482, where the issue is "[w]hether criminal restitution under the Mandatory Victims Restitution Act (MVRA) is penal for purposes of the Ex Post Facto Clause." This case presents the related but

distinct question of whether the Sixth Amendment's jury trial right applies to restitution under 18 U.S.C. § 2259(b) because restitution is part of the criminal penalty. The Eleventh Circuit has already signaled that the outcome in *Ellinburg* would not affect its resolution of the Sixth Amendment issue here. App. 19 a n.3. Thus, this Court should grant Mr. Kluge's petition, which is an ideal vehicle for resolving an issue *Ellinburg* will likely leave open: the Sixth Amendment's role in criminal restitution orders. At a minimum, however, this Court should hold Mr. Kluge's petition pending the disposition of *Ellinburg*.

CONCLUSION

The right to a trial by jury is "at the heart of our criminal justice system." *Erlinger*, 602 U.S. at 831. Yet judges continue to find for themselves the facts necessary to trigger criminal penalties in the form of restitution orders. This practice cannot be squared with the Court's precedent or a historical understanding of the Sixth Amendment. But until this Court clarifies that it meant what it said in *Southern Union*—that the Sixth Amendment prohibits judicial factfinding for all forms of criminal punishment—judges will continue to usurp the jury's critical role and impose punishment in the form of onerous restitution orders.

The Court should grant the petition for writ of certiorari. Alternatively, at a minimum, the Court should hold the petition pending its decision in *Ellinburg*, No. 24-482.

Respectfully submitted,

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October 29, 2025