No. 25-6010

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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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The question is whether the Sixth Amendment requires a jury, rather than a judge, to find the facts that increase a criminal defendant's exposure to restitution. The Eleventh Circuit said "no" because restitution, it claimed, is not a criminal penalty. Pet. App. 17a.

This term, however, the Court held that restitution under the Mandatory Victims Restitution Act (MVRA) "is plainly criminal punishment for purposes of the Ex Post Facto Clause." *Ellingburg v. United States*, 146 S. Ct. 564, 567 (2026). Unless restitution is a criminal penalty under the Ex Post Facto Clause but not the Sixth Amendment, this Court's review is imperative to restore the jury trial right on a matter of significant criminal punishment.

The government doesn't dispute that this Sixth Amendment issue is important and recurring. *See* Brief in Opposition ("BIO"), *generally*. It doesn't argue that Mr. Kluge failed to preserve the issue. *Id.*, 10. And it barely tries to defend the Eleventh Circuit's claim that restitution is not a criminal penalty. Rather, it urges the Court to deny review for other reasons: it contends 18 U.S.C. § 2259 does not prescribe a maximum or impose a "true" mandatory minimum, and therefore doesn't implicate

Apprendi v. New Jersey, 530 U.S. 466 (2000), or *Alleyne v. United States*, 570 U.S. 99 (2013). BIO 6-8. Mr. Kluge anticipated some of these flawed arguments in his Petition at pages 20-25, and further addresses them below. *Infra*, 7-13.

The government also urges this Court to deny review because it denied review in *Stroud v. United States*, No. 24-7486, 2026 WL 79762 (Jan. 12, 2026), among others. BIO 5-6 & n.2. But *Stroud*, like several other petitions the government cites, was on plain-error review. Br. in Opp. at 13-15, *Stroud*, No. 24-7486. And every petition the government cites was turned away before the Court decided *Ellingburg*.

The Eleventh Circuit has shown *Ellingburg* will not sway it. Pet. App. 19a n.3. The other circuits are dug in, despite several judges recognizing the dissonance between circuit precedent and this Court's Sixth Amendment decisions. Pet. 25-26. The time is right to restore the jury's role in finding the facts necessary to increase the amount of restitution imposed in a criminal judgment. Mr. Kluge's case is an excellent vehicle, and the government's suggestion otherwise holds no water. *Infra*, 14-15.

I. The lower courts' use of judicial factfinding for restitution violates the Sixth Amendment.

A. *Ellingburg* confirms restitution is a criminal penalty.

Under the Sixth Amendment, any fact that increases the maximum or minimum penalty for a crime (other than the fact of a prior conviction) must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 111-12. That's true no matter whether the penalty is carceral or monetary. *See Southern Union Co. v. United States*, 567 U.S. 343, 349 (2012).

The sole reason the Eleventh Circuit gave for holding that the Sixth Amendment doesn't require a jury to find facts that increase a defendant's minimum restitution is that restitution is not a criminal penalty. Pet. App. 17a. Other circuits, too, say restitution isn't criminal punishment, *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012); *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006), despite this Court characterizing restitution as punitive, *see Paroline v. United States*, 572 U.S. 434, 456 (2014).

Ellingburg should quell any doubt whether restitution is a criminal penalty. There, the Court addressed whether imposing mandatory

restitution on a defendant who committed his crime before enactment of the MVRA violated the Ex Post Facto Clause. 146 S. Ct. at 566. The answer to that question "turn[ed] in part on … whether restitution under the MVRA is criminal punishment." *Id.* A unanimous Court held that "[r]estitution under the MVRA is plainly criminal punishment for purposes of the Ex Post Facto Clause." *Id.* at 567 (footnote omitted). The Court cited several features of the MVRA that supported that conclusion: the MVRA labels restitution a "penalty" for a criminal "offense"; a court may order restitution only as to a criminal "defendant" after his conviction for a qualifying crime; restitution is imposed during sentencing alongside other criminal penalties like fines or imprisonment; the government is the adverse party in restitution proceedings; if a defendant doesn't make the required restitution payments, the court may modify the terms of supervised release or probation or even reimprison him; and the MVRA is codified under Title 18, titled "Crimes and Criminal Procedure." *Id.*

Not all of these features "are necessary to constitute criminal punishment," the Court said, "but they are sufficient." *Id.* Nor did it matter that parts of the MVRA reflected the "nonpunitive goal" of

compensating victims. *Id.* at 568. "[S]o long as the text and structure of the Act demonstrate that Congress intended at least 'to impose punishment,' that 'ends the inquiry.'" *Id.* (citation omitted).

The same features that make restitution under the MVRA a criminal penalty apply to restitution under § 2259. Section 2259 labels restitution a "penalty" for an "offense" under Chapter 110 of Title 18. 18 U.S.C. § 2259(a)(1). A court may order restitution only against a "defendant" who stands "convicted of trafficking in child pornography." § 2259(b)(2). As with the MVRA, restitution is imposed at sentencing for the offense alongside other criminal punishments, like imprisonment or fines. *See* § 2259(b)(3) ("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."). The government—not the victim—is the party adverse to the defendant in restitution proceedings. If a defendant fails to make restitution payments, the district court may modify his term of supervised release or even reimprison him. *See* § 2259(b)(3); *see also* 18 U.S.C. §§ 3664(m)(1)(A)(i), 3613A(a)(1), 3614(b)(2). And like the MVRA, restitution under § 2259 is codified in Title 18 of the United States Code. These features are "sufficient" to show

that a restitution order under § 2259 is a criminal penalty. *See Ellingburg*, 146 S. Ct. at 567.

Of course, this case is about the right to a jury trial whereas *Ellingburg* held that restitution is a criminal penalty under the Ex Post Facto Clause. To be sure, the Sixth Amendment and Ex Post Facto Clause analyses are different: the Court's Sixth Amendment cases have focused on when a factfinding is needed to trigger a more severe penalty, while its "*ex post facto* cases … have focused on whether a change in law creates a 'significant risk' of a higher sentence." *Peugh v. United States*, 569 U.S. 530, 549-50 (2013). But both protections are about checking the government's power to impose *punishment* for offenses. *See id.* In that regard, there's no reason why restitution should be considered criminal punishment under the Ex Post Facto Clause but not the Sixth Amendment.

The government has little to say about *Ellingburg*. Instead, it invites the Court to accept a double standard in which restitution is a criminal penalty under the Ex Post Facto Clause but not under *Apprendi* and *Alleyne*. BIO 9. Offering no defense of that rule, the government's invitation should be rejected.

B. The lower courts' reliance on judicial factfinding violates *Apprendi* because the maximum penalty authorized by a conviction alone does not include any restitution.

Perhaps sensing that the Eleventh Circuit's reasoning is untenable, the government turns to a fallback argument. The government says judges may find facts that increase a defendant's restitution because § 2259 establishes an "indeterminate" framework "with no fixed maximum." BIO 6-7. If there is no "fixed maximum," the government reasons, a judge cannot violate *Apprendi* by imposing additional punishment based on his own factfinding. *Id.*, 7.

Besides not addressing the *Alleyne* issue, *infra*, this theory suffers two flaws: it misunderstands the meaning of a "statutory maximum" and it ignores the history of the jury trial right.

1. The government misconceives the statutory maximum.

Start with the government's misconception that because § 2259 itself contains no numeric limit on restitution, there is no "statutory maximum" for *Apprendi* purposes. This argument ignores that because restitution corresponds to a victim's loss, it *can't* be predicted and capped in advance. Regardless, the government's argument conflicts with how this Court defines the statutory maximum.

The Court's "precedents make clear" that "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 v. Washington*, 542 U.S. 296, 303 (2004) (collecting cases). "In that sense, the statutory maximum for restitution is usually *zero,* because a court can't award *any* restitution without finding additional facts about the victim's loss." *Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

Such is the case with § 2259. A court cannot award *any* restitution without finding additional facts extrinsic to the conviction. A court ordering restitution under § 2259 must find (1) the identity of one or more victims; (2) the amount of the victim's losses caused by the trafficking of their images; and (3) the defendant's relative role in causing each victim's losses. Pet. 5. None of those facts are established by a plea or guilty verdict for a child pornography offense. *See* 18 U.S.C. § 2259(c)(3) (defining "Trafficking in child pornography"). And none of those extra facts were alleged in Mr. Kluge's indictment or admitted during his bench trial. *See* D. Ct. Docs. 1, 94. Instead, over his objection, the district court

engaged in its own factfinding and ordered him to pay $3,000 each to thirteen victims, totaling $39,000. Pet. 7-8.

The government apparently has no answer for this because its Brief never acknowledges *Blakely* or the meaning of a "statutory maximum." *See* BIO, *generally*.

2. The jury trial right historically applied within "indeterminate" sentencing frameworks where the punishment corresponded to the victim's loss.

The government's claim that a jury has no role because restitution is imposed within an "indeterminate framework" also ignores the history of the jury trial right.

In England and in early America, larceny statutes often pegged the amount of a fine, restitution, or other penalty to the value of damaged or stolen goods. *See Southern Union*, 567 U.S. at 354-55 (collecting cases); *Apprendi*, 530 U.S. at 502 (Thomas, J. concurring) (discussing *Commonwealth v. Smith*, 1 Mass. 245, 1804 WL 709 (1804)); *Hester*, 586 U.S. at 1107 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citing early American cases). Under such frameworks, the punishment was indeterminate in that it was based on whatever the value of the damaged or stolen property was. *See*, *e.g.*, *Clark v. Illinois*,

2 Ill. 117, 120-21 (1833) (arson statute imposing fine equal to the value of the property burned); *Smith*, 1 Mass. at 247 (larceny statute awarding treble damages for the value of stolen items). Despite this indeterminacy, English and early American courts required that the value of the damaged or stolen goods be alleged in the indictment and proven to a jury. *See* T. Starkie, A Treatise on Criminal Pleading 187-88 (1814) (In cases "where the offence, or its defined measure of punishment, depends upon" property's specific value, the value "must be proved precisely as it is laid [in the indictment], and any variance will be fatal"); *Hester*, 586 U.S. at 1107 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) ("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." (collecting cases)).

These early frameworks were just as "indeterminate" as restitution under § 2259. Yet history reflects that if a fine, restitution, or other penalty corresponded to the victim's loss, the value of the property had to be charged and proven to a jury. This history is critical because "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Oregon v. Ice*, 555 U.S. 160, 170 (2009).

"And 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 and Seventh Amendments' adoption." *Hester*, 586 U.S. at 1107 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

C. The lower courts' reliance on judicial factfinding also violates *Alleyne*.

Apart from violating *Apprendi*, judicial factfinding under § 2259 violates *Alleyne* because "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 570 U.S. at 103.

Section 2259(b) requires that a district court order no less than $3,000 in restitution per victim, but only after finding additional facts extrinsic to the conviction. Pet. 5. The district court found there were thirteen victims, transforming the $3,000-per-victim minimum into a $39,000 restitution order. But the number and identity of victims was not alleged in Mr. Kluge's indictment, admitted by Mr. Kluge, nor proven to a jury. By finding additional facts that multiplied Mr. Kluge's mandatory minimum restitution, the district court violated *Alleyne*.

The government responds that § 2259 doesn't impose a "true" mandatory minimum because "any restitution obligation end[s] once [the victim] has received th[e] amount [of her losses] from one or more defendants." BIO 8 (citing 18 U.S.C. § 2259(b)(2)(C) (2018)).

Section 2259(b)(2)(C) doesn't negate the $3,000 mandatory minimum in § 2259(b)(2)(B). Subsection (b)(2)(C) merely "operates to prevent more than one full recovery." *United States v. Sandstrom*, No. 24-30309, 2025 WL 692342, at *2 (5th Cir. Mar. 4, 2025). That the liability may later be "terminated" is distinct from the restitution order itself, which is part of the criminal penalty and subject to the $3,000 minimum. Indeed, the appeals courts that have considered § 2259(b) in the Sixth Amendment context uniformly recognize that the statute imposes a mandatory minimum. Pet. App. 4a; *see also United States v. Sotelo*, 130 F.4th 1229, 1246-48 (11th Cir. 2025); *United States v. Caudillo*, 110 F.4th 808, 812 (5th Cir. 2024).

Even if § 2259(b)(2)(C) could be construed to occasionally prevent application of the $3,000 minimum, it would be immaterial for Sixth Amendment purposes. Other statutes also provide relief from mandatory minimums. *See*, *e.g.*, 18 U.S.C. § 3553(e) (substantial assistance);

§ 3553(f) (safety valve); USSG § 5G1.3(b) (crediting toward the federal sentence time served on an undischarged term of imprisonment for related conduct). But none of them mean that a judge may find, for example, the drug quantity that triggers a minimum penalty.

II. The question is important and recurring.

The government doesn't dispute that the issue presented is important and recurring. Federal courts impose billions of dollars in restitution on thousands of defendants each year—all without the protections of a jury trial or regard to their economic circumstances. Pet. 17-18. Two Justices have expressed that this issue demands the Court's attention. *Hester*, 586 U.S. at 1105 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

As Justice Gorsuch observed, "[t]he effects of restitution orders … can be profound. Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Id.* at 1106. Add to the mix that district courts retain jurisdiction indefinitely to enforce restitution orders. *United States v. Mims*, 167 F.4th 1340, 1345-46 (11th Cir. 2026). The upshot: any unpaid restitution debt can jeopardize a person's liberty even long after he has

completed supervised release. And the greater the restitution debt, the less likely it is the defendant will ever fully repay it, so the longer he must live under threat of reincarceration. Yet he is denied the Sixth Amendment right to a jury trial when it comes to facts that increase his restitution liability.

III. This case is an excellent vehicle.

At every stage, Mr. Kluge has objected that relying on judicial factfinding to impose restitution under § 2259(b) violates the Sixth Amendment.

Contrary to the government's suggestion on page 10 of its Brief, the fact that Mr. Kluge opted for a stipulated-facts bench trial *on the underlying offense* is irrelevant. He never waived his right to a jury trial as to restitution-related factfinding. Mr. Kluge no more waived his right to a jury trial on sentence-related factfinding than did the defendants in *Apprendi*, *Blakely*, and *Erlinger*, all of whom waived their right to a trial on the underlying offense(s) by pleading guilty. *Apprendi*, 530 U.S. at 469-70; *Blakely*, 542 U.S. at 298-99; *Erlinger v. United States*, 602 U.S. 821, 826 (2024). Yet in each case, the defendant preserved his Sixth Amendment objection to the use of judge-found facts to enhance his

statutory penalties. In the same vein, the government's claim that Mr. Kluge "identifies no authority that would allow him to selectively waive his Sixth Amendment right," BIO 10, is utterly untrue. *Apprendi*, *Blakely*, and *Erlinger* support that very premise.

Finally, the government's claim that evidence of the victims' losses was "uncontested" because Mr. Kluge didn't also object to the admission of exhibits *after* the district court denied his request for a jury trial, *see* BIO 10, is as Kafkaesque as irrelevant. Mr. Kluge asked for and was denied the means to effectively test the evidence against him. Like tying a boxer's arm behind his back and faulting him for not parrying his opponent's blows, the government faults Mr. Kluge for not doing more. Besides, harmlessness can be addressed on remand, as this Court has often explained. Not to be forgotten, faced with his constitutional objection, the government never claimed it could prove to a jury beyond a reasonable doubt the number of victims and the losses proximately caused by Mr. Kluge.

CONCLUSION

The lower courts continue infringing upon the Sixth Amendment by taking from juries the factfinding necessary to impose substantial restitution sentences. It won't stop without the Court's intervention. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 1, 2026