No. 12-8561

In the Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES and AMY UNKNOWN,

Respondents.

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

BRIEF OF "VICKY" AND "ANDY" AS AMICI CURIAE IN SUPPORT OF RESPONDENT AMY UNKNOWN

HEIDI NESTEL
Utah Crime Victims
Legal Clinic
3335 S. 900 East, Ste. 200
Salt Lake City, UT 84406

CAROL HEPBURN
2722 Eastlake Ave. E
Suite 200
Seattle, WA 98102

STUART BANNER
Counsel of Record
UCLA Supreme Court Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

"Vicky" and "Andy" are victims of child pornography. Like respondent Amy Unknown, they are seeking restitution from defendants convicted of possessing videos and photographs depicting them being raped and sodomized as young children.[1]

1. Vicky's father began raping her, with his video camera running, when she was ten years old. He circulated these video clips widely among fellow pedophiles. Often he took "orders" for scripted videos of rape, sodomy, and bondage. He intimidated Vicky into not telling anyone. It was not until Vicky was sixteen that she was finally able to tell her mother. By then, the videos of Vicky's father raping her were famous among consumers of child pornography. They still are.

Vicky was seventeen when she learned that the videos are widely available on the Internet. She is now in her mid-twenties. She still suffers serious psychological trauma. She has nightmares about the abuse. She often has panic attacks and is unable to sleep. She still requires regular counseling. Sometimes she is stalked by collectors of the videos her father made. Despite repeated efforts, thus far she has been unable to work in any job that involves contact with strangers.

---

[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. "Vicky" and "Andy" are not amici's real names.

As Vicky has explained,

> I am living every day with the horrible knowledge that someone somewhere is watching the most terrifying moments of my life and taking grotesque pleasure in them. I am a victim of the worst kind of exploitation: child porn. Unlike other forms of exploitation, this one is never ending. Everyday people are trading and sharing videos of me as a little girl being raped in the most sadistic ways. They don't know me, but they have seen every part of me. They are being entertained by my shame and pain.
>
> I had no idea the "Vicky" series, the child porn series taken of me, had been circulated at all, until I was 17. My world came crashing down that day. These past years have only shown me the enormity of the circulation of these images and added to my grief and pain. This knowledge has given me a paranoia. I wonder if the people I know have seen these images. I wonder if the men I pass in the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers and traded around, I feel out of control. They are trading my trauma around like treats at a party, but it is far from innocent. It feels like I am being raped by each and every one of them. What are they doing when they watch these videos anyway? They are gaining sexual gratification from me at ages 10 and 11. It sickens me to the core and terrifies me. Just thinking about it now, I

> feel myself stiffen and I want to cry. So many nights I have cried myself to sleep thinking of a stranger somewhere staring at their computer with images of a naked me on the screen. I have nightmares about it.
>
> My paranoia is not without just cause. Some of these perverts have tried to contact me. Every time they are downloaded, I am exploited again, my privacy is breached, and my life feels less and less safe. I will never be able to have control over who sees me raped as a child. It's all out there for the world to see and it can never be removed from the internet.

2. Andy was sexually abused for three years, beginning when he was eight or nine years old. His abuser was a man named Antonio Cardenas, who gained access to Andy while a volunteer at Big Brothers Big Sisters of Utah, an organization that pairs children with adult mentors. Cardenas made many videos of himself abusing Andy, which he traded with other collectors of child pornography. These videos have now circulated widely on the Internet, where they are well known as the "SpongeBob" series, because the first of the videos features Andy on a blanket bearing the image of the SpongeBob cartoon character.

Andy is now a teenager in high school. Cardenas was convicted in 2012, but his videos of Andy are still easily found on the Internet. Andy has already received more than five hundred notifications of defendants being prosecuted in federal court for pos-

sessing "SpongeBob" videos, and that number increases all the time. Andy suffers from many of the known effects of child sexual victimization, including problems with anger and fighting triggered by comments about homosexuality.

SUMMARY OF ARGUMENT

I. Petitioner contends that unless the Court accepts his interpretation of 18 U.S.C. § 2259, restitution awards under the statute might violate the Eighth Amendment. But this contention is incorrect. The Eighth Amendment prohibits "excessive fines" and "cruel and unusual punishments," but restitution under the statute is neither a fine nor a punishment. It is a civil remedy intended to compensate the victim. The Court can thus interpret the text of the statute straightforwardly, without having to worry about avoiding constitutional difficulties.

Restitution under § 2259 is not a fine, because the award is payable to the victim rather than to the government. The Excessive Fines Clause applies only to payments to the government.

Restitution under § 2259 is not a punishment, because its purpose is not to punish the defendant but rather to make the victim whole by compensating her for her losses. While restitution may also serve indirectly to deter wrongdoing, the same is true of all compensatory damage awards.

If a victim of child pornography recovered compensatory damages in stand-alone proceedings, the

judgment would clearly be a civil damage award, not a fine or a punishment. The only circumstance that even gives rise to a colorable argument that a restitution award under § 2259 is a form of punishment is that it is awarded at the end of a criminal prosecution. But restitution awards have been tacked on to criminal prosecutions for centuries, in England and in the United States. They have never been understood as punishments.

II. Petitioner also contends that if § 2259 is ambiguous, the rule of lenity should apply. But this contention is also incorrect, for the same reason. The rule of lenity applies to *criminal* statutes, but § 2259 is not a criminal statute, because it prescribes neither a crime nor a punishment. Section 2259 is a remedial statute, so if it is ambiguous, the appropriate canon of construction is the one that states that remedial statutes should be liberally construed.

ARGUMENT

Petitioner contends that unless the Court accepts his interpretation of 18 U.S.C. § 2259, restitution awards under the statute might violate the Eighth Amendment. Pet. Br. at 58-66. But this contention is incorrect. Restitution under the statute is not subject to the Eighth Amendment, because it is neither a fine nor a punishment, but is rather a civil remedy intended to compensate the victim. The Court can thus interpret the text of the statute straightforwardly, without having to worry about avoiding constitutional difficulties.

Petitioner also contends that if § 2259 is ambiguous, the rule of lenity should apply. Pet. Br. at 39-43. But this contention is also incorrect, for the same reason. The rule of lenity applies to *criminal* statutes, but § 2259 is not a criminal statute, because it prescribes neither a crime nor a punishment. Section 2259 is a remedial statute, so if it is ambiguous, the appropriate canon of construction is the one that states that remedial statutes should be liberally construed.

I. Restitution under 18 U.S.C. § 2259 is not subject to the Eighth Amendment, because the restitution award required by § 2259 is neither a fine nor a punishment, but is rather a civil remedy intended to compensate the victim.

The Eighth Amendment prohibits "excessive fines" and "cruel and unusual punishments." It does not apply to the restitution required by 18 U.S.C. § 2259, which is neither a fine nor a punishment. Restitution under § 2259 is not a fine because the award goes to the victim, not to the government. It is not a punishment, because it is a civil remedy intended to compensate the victim rather than to punish the defendant. While restitution is awarded at the conclusion of a criminal prosecution, that does not transform restitution into either a fine or a punishment.

A. Restitution under § 2259 is not a fine, because the award is payable to the victim, not to the government.

A restitution order under § 2259 must "direct the defendant to pay the victim." 18 U.S.C. § 2259(b)(1). No money goes to the government. Restitution is thus sharply distinguishable from fines and from forfeitures, which both require defendants to pay money to the government rather than to the victim.

Because the restitution award is payable to the victim rather than to the government, the Excessive Fines Clause does not apply. "The Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989). In *Browning-Ferris*, the Court thoroughly reviewed the eighteenth-century sources and concluded that "at the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a

sovereign." *Id.* at 265. The Excessive Fines Clause thus limits *in personam* forfeitures as well as fines, because such forfeitures, like fines, are payable to the government. *United States v. Bajakajian*, 524 U.S. 321, 328-32 (1998); *Austin v. United States*, 509 U.S. 602, 607-10 (1993). But restitution is very different, because restitution, like any other civil judgment, is payable to the victim.

A harder case would be presented by a statute that authorized the government to seek an award of restitution to itself, to compensate the government for its own damages. In such a case, restitution would be "a payment to a sovereign," *Browning-Ferris*, 492 U.S. at 265, just like a fine or a forfeiture. There might be good reason to treat restitution to the government differently from restitution to a private victim. *Cf. Pasquantino v. United States*, 544 U.S. 349, 365 (2005) (in dictum, describing restitution to a sovereign as a form of criminal punishment). But that question is not presented here, because § 2259 authorizes restitution only to "the individual harmed as a result of a crime under this chapter," not to the government. 18 U.S.C. § 2259(c).

B. Restitution under § 2259 is not punishment, because it is a civil remedy intended to compensate the victim rather than to punish the offender.

Restitution under § 2259 is compensatory, not punitive. It is measured by what the victim has lost. 18 U.S.C. § 2259 (b)(1). As Judge Posner has observed of a similar statute, § 2259 is "[f]unctionally .

. . a tort statute," one that "enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution." *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (discussing 18 U.S.C. § 3663, which likewise authorizes restitution in the amount of the victim's losses), cert. denied, 528 U.S. 950 (1999). *See also United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) ("it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality"). Professor Laycock, the leading American authority on restitution, characterizes it the same way. As the term *restitution* is used "in the statutes requiring criminals to make restitution to their victims," he concludes, restitution "is simply compensatory damages." Douglas Laycock, "The Scope and Significance of Restitution," 67 *Tex. L. Rev.* 1277, 1282 (1989).

The purpose of restitution is to make the victim whole by compensating her for her losses. *Hughey v. United States*, 495 U.S. 411, 416 (1990) ("restitution as authorized by the statute is intended to compensate victims"); *Dolan v. United States*, 130 S. Ct. 2533, 2539-40 (2010). For this reason, the level of compensation under § 2259 does not vary with the culpability of the defendant. If guiltier defendants had to pay more, then the payment might properly be termed a criminal penalty. But an award authorized by § 2259, like any award of compensatory tort damages, is intended to be compensation, not punishment.

This distinction between compensation and punishment underlies *Kelly v. Robinson*, 479 U.S. 36 (1986), in which the Court had to decide whether a restitution award was nondischargeable in bankruptcy as a criminal penalty. The particular Connecticut restitution program at issue in *Kelly* was very different from § 2259, because Connecticut's version of restitution did "not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant." *Id.* at 52. For that reason, the Court classified Connecticut's restitution program as penal in nature, on the ground that the state's restitution orders "operate for the benefit of the State" and "are not assessed for compensation of the victim." *Id.* at 53 (internal quotation marks and ellipsis omitted).

Restitution under § 2259 is precisely the opposite: it *is* assessed to compensate the victim, and it operates for the benefit of the victim rather than the state. It is a summary tort remedy, tacked on to the end of a criminal prosecution. Unlike the Connecticut program in *Kelly*, it is a civil remedy rather than a criminal punishment.

To be sure, while restitution under § 2259 is primarily intended to compensate victims, it may also serve indirectly to deter wrongdoing, if potential possessors of child pornography are aware that they will have to compensate their victims. But that does not convert restitution into a criminal penalty. Virtually all law serves some deterrent purpose. Compensatory damage awards may deter wrongdoing like criminal penalties do, but that does not mean compensatory damage awards are criminal punish-

ments; it merely indicates that "deterrence may serve civil as well as criminal goals." *Hudson v. United States*, 522 U.S. 93, 105 (1997) (internal quotation marks omitted); *United States v. Ursery*, 518 U.S. 267, 292 (1996). To call restitution under § 2259 a punishment, on the ground that it serves in part as a deterrent, would be to collapse the entire civil/criminal distinction.[2]

C. Restitution under § 2259 is awarded at the end of a criminal prosecution, but that does not make it a criminal punishment.

If a victim of child pornography recovered compensatory restitution damages in stand-alone proceedings, the judgment would clearly be a civil damage award, not a criminal punishment. The only circumstance that even gives rise to a colorable argument that a restitution award under § 2259 is a fine or a punishment is that it is awarded at the end of a criminal prosecution. But that does not turn restitution into criminal punishment.

Restitution awards to compensate the victims of crime have been tacked on to criminal prosecutions for centuries. They were common in England before

---

[2] In urging the Court to find that restitution is punishment, petitioner relies primarily on *United States v. Halper*, 490 U.S. 435 (1989), and *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994). Pet. Br. at 61-62. But these cases were overruled by *Hudson*, to the extent they held that a deterrent purpose is enough to convert a civil judgment into a criminal punishment. *Hudson*, 522 U.S. at 101-03.

the American Revolution. William Blackstone, 4 *Commentaries on the Laws of England* 356 (1769) ("if any person be convicted of larciny [sic] by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels; or the value of them out of the offender's goods"); Matthew Hale, 1 *The History of the Pleas of the Crown* 538 (1736) ("Upon an appeal of robbery or larciny [sic], if the party were convict thereupon, restitution of the goods contained in the appeal was to be made to the appellant").

Restitution awards were also widely used in the early United States, as adjuncts to criminal prosecutions, for the purpose of compensating crime victims. *See, e.g.*, Francis Wharton, *A Treatise on the Criminal Law of the United States* 352, 368 (1846) (describing the use of restitution in Pennsylvania); J.A.G. Davis, *A Treatise on Criminal Law* 458, 474 (1838) (same for Virginia); Thomas G. Waterman, *The Justice's Manual* 130 (1825) (New York); Daniel Davis, *A Practical Treatise Upon the Authority and Duty of Justices of the Peace* 48 (1824) (Massachusetts); Harry Toulmin and James Blair, *A Review of the Criminal Law of the Commonwealth of Kentucky* 303 (1804) (Kentucky).

These summary restitution proceedings served, and indeed still serve, two purposes. First, they spare crime victims from having to waste time and money bringing a parallel and duplicative civil suit for damages. When the defendant's guilt has already been proven beyond a reasonable doubt, there is no reason to require the victim to prove it all over again in a second proceeding. Second, they spare crime vic-

tims from having to relive the crime unnecessarily, in the form of testimony and pretrial discovery. This is particularly important with a crime like child pornography, where having to tell one's story over and over again can be an excruciating experience for the victim.

There is thus a long Anglo-American tradition of restitution at the end of a criminal prosecution. But there is no evidence that such restitution was ever understood as a criminal punishment in its own right. Rather, as one of the leading nineteenth-century treatises put it, restitution is "a matter of civil jurisprudence, arising in a criminal case." Joel Prentiss Bishop, 2 *Commentaries on the Criminal Law* 275 (1858).

Perhaps the surest sign that restitution was not understood as a criminal punishment is that, to our knowledge, no one before the late twentieth century even thought to challenge a restitution award under the Eighth Amendment or its state constitutional analogues. Indeed, if restitution had been understood as a criminal punishment, there should also have been challenges to awards on the ground that they were decreed by judges rather than juries, and yet there do not appear to have been any such challenges until recently.

In light of this long history, the seven factors enumerated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), all point in the direction of finding that restitution under § 2259 is not a punishment. First, restitution does not "involve[] an affirmative disability or restraint," *id.* at 168, but

merely an obligation to compensate the victim for her losses. Second, restitution has not "historically been regarded as a punishment," *id.*, but rather as compensation. Third, while restitution does "come[] into play only on a finding of *scienter*," *id.*, that is because scienter is an element of the crime of possessing child pornography, which is punished separately by a term in prison. Restitution is not itself the punishment. Fourth, restitution does not promote the aim of "retribution," and only indirectly promotes "deterrence," *id.*; its primary purpose is compensating the victim. Fifth, restitution only applies to behavior that "is already a crime," *id.* Sixth, there is "an alternative purpose to which it may be rationally connected" that "is assignable for it," *id.* at 168-69, namely that of compensation. Finally, the amount of restitution is not "excessive in relation to" the purpose of compensation, *id.* at 169; indeed it is precisely tailored to that purpose.

Because restitution under § 2259 is a civil remedy intended to compensate the victim, not a fine or a punishment, it is not subject to the Eighth Amendment. The Court can therefore interpret the text of the statute straightforwardly, without having to worry about avoiding constitutional difficulties.[3]

[3] If restitution under § 2259 were subject to the Eighth Amendment, we would agree with the United States that no award under the statute could be constitutionally excessive, because the statute limits the award to the amount of the victim's losses. U.S. Br. at 47 n.18.

II. Because 18 U.S.C. § 2259 is not a criminal statute, the rule of lenity does not apply to it.

Petitioner suggests that if § 2259 is ambiguous, the rule of lenity should apply. Pet. Br. at 39-43. But the rule of lenity is an aid only in the interpretation of "*criminal* statutes." *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (emphasis added). The rule is, and always has been, that "*penal* laws are to be construed strictly." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (emphasis added). There is no rule of lenity for statutes that merely authorize compensatory damage awards.

As explained above, § 2259 is not a criminal statute. It does not set forth a crime or impose a punishment. Rather, it establishes a civil remedy to compensate the victims of child pornography. The rule of lenity thus does not apply.

The only conceivable argument for using the rule of lenity to interpret § 2259 rests on a single sentence in *Hughey v. United States*, 495 U.S. 411, 422 (1990), where the Court suggested that "longstanding principles of lenity" might aid in interpreting an ambiguous restitution statute. But this sentence is dictum. In *Hughey*, the Court had already found that the text of the statute was *not* ambiguous and that there was accordingly no need to invoke the rule of lenity. *Id.* at 415-20. The Court thus had no occasion in *Hughey* to consider whether restitution is a form of punishment, or whether the restitution statute at issue in the case was a criminal statute, or whether the rule of lenity applies to statutes authorizing

compensatory restitution awards. This sentence of dictum in *Hughey* cannot be understood to overturn the settled principle that the rule of lenity applies only to statutes setting forth crimes or imposing punishments.

Section 2259 is a remedial statute. It affords the remedy of compensatory damages to victims of child pornography. If the statute is ambiguous, therefore, the appropriate canon of construction is the one that states that remedial statutes should be liberally construed. *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Stewart v. Kahn*, 78 U.S. 493, 504 (1870). Where a criminal statute is ambiguous, it makes sense to resolve the ambiguity in favor of the individual who is up against the full power of the government. But where a *remedial* statute is ambiguous, the case pits one individual against another individual. It makes sense to resolve the ambiguity in favor of the person the statute was intended to help. In interpreting § 2259, a tie should go to child pornography's victims, not its perpetrators.

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

HEIDI NESTEL
Utah Crime Victims
Legal Clinic
3335 S. 900 East, Ste. 200
Salt Lake City, UT 84406

CAROL HEPBURN
2722 Eastlake Ave. E
Suite 200
Seattle, WA 98102

STUART BANNER
Counsel of Record
UCLA Supreme Court Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu