

In The
Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

**BRIEF OF *AMICUS CURIAE*
MOTHERS AGAINST DRUNK DRIVING
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICUS*¹

Mothers Against Drunk Driving (“MADD”) is a national grassroots organization founded by the mother of a 13-year-old girl whose life was senselessly claimed by a drunk driver. In the more than 35 years since its founding, MADD staff and volunteers have fought for the rights of tens of thousands of families affected by the criminal acts of others.

While the emotional turmoil crime victims suffer is well chronicled, the staggering financial costs they bear is largely hidden from public view. Victims of drunk and impaired driving often incur lost wages, loss of support, funeral expenses, and expenses relating to past and future medical care.

Historically, courts have been reticent to impose these costs upon convicted offenders, electing instead to force innocent victims to bear the brunt of the costs resulting from criminal acts.

The federal restitution statutes at issue here represent much needed reform designed to shift the costs of crime back to responsible offenders. MADD and its members have fought hard for laws to strengthen restitution at the state and federal levels and the restitution statutes at issue are among the strongest.

¹ This brief was not authored in whole or in part by counsel for any party. No party to the case or counsel for any party or any other person made a monetary contribution intended to fund the preparation or submission of the brief. The parties have filed blanket consents to the filing of *amicus* briefs.

Petitioner's broad attack on the federal restitution law threatens to undermine that progress and result in financial catastrophe for many thousands of victims and their families.

Like the many other dedicated organizations supporting Respondent, MADD recognizes the historical significance of this case – the first Supreme Court challenge ever to be initiated by a victim of crime whose rights were violated. This case therefore falls squarely within MADD's core mission of defending the rights of the victims it serves.



SUMMARY OF THE ARGUMENT

Restitution is an ancient precept long applied by civilizations across centuries and continents to force offenders to repay victims for the financial losses resulting from criminal acts. In addition to the statutory issues that are well covered in other briefs, Petitioner broadly attacks the restitution statute at issue as fundamentally and constitutionally unfair.

Restitution is neither a fine nor a windfall. Petitioner's suggestion that imposing restitution in this case is "unfair" turns that concept on its head. Restitution has long been about compensating innocent victims for financial losses caused by criminal acts. The large body of law underlying restitution is all about shifting a small portion of the staggering financial costs of crime from victims to criminal offenders.

Because restitution is aimed at compensating victims rather than punishing offenders, restitution orders simply are not subject to the limitations of the Eighth Amendment's Excessive Fines Clause. Moreover, even if that clause applied, restitution orders could not violate the clause under any circumstances because the orders are inherently proportional to the harm caused by a crime.

Lower federal courts and state courts alike have wrestled with whether the Eighth Amendment applies to restitution at all and, if so, what standard should govern. The *amicus curiae* urges the Court to clarify this issue by adopting the common sense notion, grounded in history as well as statutory and common law, that the Eighth Amendment's Excessive Fines Clause simply does not apply to restitution orders. In the alternative, to the extent the Court finds the clause applicable, MADD urges the Court to adopt the "grossly disproportionate" standard of review.



ARGUMENT

I. Restitution is About Compensating Victims – Not Punishing Offenders

The concept of restitution as a restorative remedy is found in ancient Arab, Greek, and Roman civilizations.² Throughout history, the concept of restitution has

² Douglas J. Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471, 495-96 (2003).

been based on the notion that crime victims are entitled to compensation for the injuries they suffer.³ Similarly, this Court has long recognized the purpose of restitution as “restoring someone to a position [she] occupied before a particular event” and that the primary consideration in awarding restitution is “the amount of loss sustained by the victim. . . .” *Hughey v. United States*, 495 U.S. 411, 416, 419 (1990).

The “amount” of financial loss sustained by crime victims is astounding. The United States Justice Department estimates that personal crime results in \$105 billion annually in “tangible” losses (medical care, lost wages, etc.) and another \$450 billion annually in intangible losses (pain and suffering, reduced quality of life, etc.).⁴ The vast majority of these costs are not covered by insurance.⁵

In recent years, federal law has trended toward shifting more of the tangible costs of crime from innocent victims to the criminal offenders who caused the losses. Congress first introduced restitution for victims of federal crime in the 1925 Federal Probation Act, which permitted district courts to impose restitution

³ *Id.* at 500.

⁴ Ted R. Miller, Mark A. Cohen, Brian Wiersma, *Victim Costs and Consequences: A New Look*, NAT. INSTI. JUST. RES. REP. 2 (1996).

⁵ *The Economic Impact of Motor Vehicle Crashes 2000*, U.S. Dept. Transp. 7 (May 2002).

only as a condition of probation.⁶ Congress passed the Victim Witness Protection Act (“VWPA”) in 1982 rendering restitution as a separate component of sentencing.⁷ In 1994, Congress passed 18 U.S.C. § 2259, giving child sex victims the right to mandatory restitution. Two years later, the Mandatory Victim Restitution Act (“MVRA”) of 1996 was enacted; it required district courts to award restitution to a wide array of victims.⁸ The key distinction between the MVRA and the VWPA is that the MVRA eliminated consideration of a defendant’s ability to pay in determining the amount of restitution. *See United States v. Siegel*, 153 F.3d 1256, 1258 (11th Cir. 1998). The express purpose of the mandatory restitution statutes is “to restore a victim, to the extent money can do so, to the position [the victim] occupied before sustaining injury.”⁹

II. Restitution Orders Cannot Constitute Excessive Fines under the Eighth Amendment

Petitioner urges the Court to adopt the position that awarding restitution to victims of child exploitation, such as Amy, constitutes a violation of the Eighth

⁶ Federal Probation Act of 1925, ch. 521, 43 Stat. 1259, 1259-60.

⁷ Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, sec. 5(a), §§ 3579-80, 96 Stat. 1248, 1253-56.

⁸ Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, §§ 204-05, 110 Stat. 1227, 1227-32.

⁹ *United States v. Fair*, 699 F.3d 508, 512 (D.C. Cir. 2012).

Amendment's protection against excessive fines (the "Excessive Fines Clause"). The Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Applying the Eighth Amendment as Petitioner suggests flies in the face of this Court's jurisprudence, which limits the Excessive Fines Clause of the Eighth Amendment to "only those fines directly imposed by, and payable to, the government." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989). As the Court has clarified, the Excessive Fines Clause "limits *the government's* power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 509-10 (1993) (emphasis supplied). Accordingly, the Excessive Fines Clause cannot apply to a restitution award unless the restitution order *both* constitutes a payment to the government *and* a punishment.

A. Restitution Orders Are Not Fines Because they are Payable to the Victim – Not the Government

Restitution cannot constitute an excessive fine because restitution orders are not "payable to" the government. Under the plain language of Section 2259, "the victim" is the beneficiary of the restitution

order.¹⁰ This Court has repeatedly held that an award of damages in favor of a non-governmental person cannot constitute an excessive fine as a matter of law.¹¹

B. Restitution Orders are Not Punishment within the Ambit of the Eighth Amendment

Even if Petitioner somehow establishes restitution orders as payments to the government (which he cannot), restitution simply cannot constitute a “punishment” as that term has been applied by the Court. *See Austin*, 509 U.S. at 610. That a restitution order is awarded in a criminal proceeding is not dispositive of whether it is a punishment. *See Austin*, 509 U.S. at 610 (“It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.”) Moreover, any punitive effects a restitution order has are simply byproducts of its financial impact on the defendant, rather than a goal of the order itself. *See*

¹⁰ *See generally* 18 U.S.C. § 2259.

¹¹ *See, e.g., Browning-Ferris*, 492 U.S. at 266 (holding punitive damages award in favor of private party cannot constitute an excessive fine because “the primary focus of the Eighth Amendment was the potential for governmental abuse of its ‘prosecutorial’ power, not concern with the extent or purposes of civil damages.”); *Austin*, 509 U.S. at 622 (distinguishing forfeiture proceedings involving “payment to a sovereign” from other proceedings involving private persons).

Hudson v. United States, 522 U.S. 93, 101 (1997) (“[A]ll civil penalties have some deterrent effect.”).

Despite their criminal context, restitution orders are significantly more remedial than punitive in nature. This is because restitution orders serve to compensate victims for the harms they suffer as the result of criminal wrongdoing; their goal is to restore victims to their original positions. *See Hughey*, 495 U.S. at 415; *see also Dolan v. United States*, 560 U.S. 605, 130 S. Ct. 2533, 2539 (2010) (“[T]he [Mandatory Victim Restitution Act] seeks primarily to assure that victims of a crime receive full restitution.”). The compensatory goals of restitution are thus distinguishable from the traditional goals of criminal punishment: retribution and deterrence. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (setting forth the factors typically considered in determining whether a statute is “penal or regulatory in character”).

While the Court has never addressed the issue, the courts of appeals disagree over whether restitution orders are punishments subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. For example, the Ninth Circuit has held that “restitution under the MVRA is punishment” that implicates the Excessive Fines Clause. *United States v. Dubose*, 146 F.3d 1141, 1145 (9th Cir. 1998); *see also United States v. Bollin*, 264 F.3d 391, 419 (4th Cir. 2001) (applying the Eighth Amendment excessiveness analysis to a restitution award). Alternatively, the Fifth Circuit has held that it is “not persuaded that

restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. *In re Amy Unknown*, 701 F.3d 749, 771 (5th Cir. 2012); see also *Necula v. Conroy*, 13 Fed. App'x 24, 26 (2d Cir. 2001) (“[T]he monies owed were in the nature of restitution, not a fine. Therefore, the Eighth Amendment was not implicated.”). To provide guidance and clarity to the courts of appeals, *amicus curiae* urges the Court to adopt the position that, based on great weight of evidence demonstrating restitution’s restorative purpose, the Excessive Fines Clause simply cannot be implicated by a restitution order.

III. Restitution Orders Could Never be Found to Violate the Excessive Fines Clause Even if it Applied

Even if this Court applies the Excessive Fines Clause to restitution orders, the orders, by their very nature, could never meet the high standard required to constitute a cruel and unusual punishment under the Eighth Amendment. To violate the Excessive Fines Clause, a restitution order would have to be found to be grossly disproportionate to the crime itself. See, e.g., *Dubose*, 146 F.3d at 1145 (“Thus, we must determine whether the restitution orders imposed . . . are grossly disproportional to the crime committed.”); *In re Amy Unknown*, 701 F.3d at 772 (explaining that the court’s conclusion concerning proximate causation “does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment”).

The gross disproportionality standard sets a very high bar. In *United States v. Bajakajian*, the Court explained that the “touchstone of the constitutional inquiry under the excessive fines clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” 524 U.S. 321, 334 (1998). In determining the appropriate excessiveness standard, the Court found two considerations particularly relevant: first, that “judgments about the appropriate punishment for an offense belong in the first instance to the legislature,” and second, that “any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.” *Bajakajian*, 524 U.S. at 336 (citing *Solem v. Helm*, 463 U.S. 277, 290, 288 (1993)).

Because of the context in which restitution is imposed, restitution orders can never constitute “grossly disproportionate” fines. As discussed in Parts I and II.B, *supra*, the goal of restitution is to compensate crime victims and restore them to their original positions. Even though this Court has not considered the Eighth Amendment implications of restitution orders, both the restitution statutes themselves and this Court’s interpretation of those statutes impose limits on the precise losses that may be awarded. See *Hughey*, 495 U.S. at 418-19 (construing the restitution provisions of the Victim and Witness Protection Act of 1982, the predecessor of the Mandatory Victim Restitution Act).

In light of these limitations, it is not surprising that, even among the courts of appeals that analyzed

restitution under the Excessive Fines Clause, *none* has found a restitution order unconstitutionally disproportional to the offense.¹² Rather, many of the courts of appeals have noted that because restitution orders are causally related to a victim's losses, they are inherently proportional. *See, e.g., Dubose*, 146 F.3d at 1145 ("Proportionality is inherent in a MVRA restitution order."); *Newell*, 658 F.3d at 35 ("[R]estitution is inherently proportional, insofar as the point of restitution is to restore the victim to the status *quo ante*"). Even in the context of conspiracies, the courts of appeals have upheld restitution orders that render a single co-conspirator jointly and severally liable for a victim's entire losses, even if that co-conspirator is responsible for only a discrete portion of those losses and even if restitution has not been ordered against all co-conspirators. *See, e.g., United States v. Arledge*, 553 F.3d 881, 899-900 (5th Cir. 2008); *see also United States v. Garcia-Castillo*, 127 Fed. App'x 385 (10th Cir. 2005) (upholding a restitution

¹² *See United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011); *United States v. Lessner*, 498 F.3d 185, 205-06 (3d Cir. 2011); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003); *United States v. Bollin*, 264 F.3d 391, 417-19 (4th Cir. 2001); *United States v. Arledge*, 553 F.3d 881, 899-900 (5th Cir. 2008); *United States v. Dighlawi*, 452 Fed. App'x 758, 760 (9th Cir. 2011); *Wright v. Riveland*, 219 F.3d 905, 915-19 (9th Cir. 2000); *United States v. Dubose*, 146 F.3d 1141, 1144-46 (9th Cir. 1998); *but see United States v. Boring*, 557 F.3d 707, 713-14 (6th Cir. 2009) (remanding for recalculation a restitution award that included payments to which the defendant was legitimately entitled because they did not constitute losses to the victim and were not properly the subject of restitution).

order applied jointly and severally to members of a conspiracy in the context of a Sixth Amendment challenge). Accordingly, as long as the statute authorizing restitution orders mandates that those orders are causally tied to a victim's losses, a restitution order can never be unconstitutional.

IV. A Supreme Court Decision on Whether Restitution Implicates the Eighth Amendment Will Have Far-Reaching Consequences.

This Court's decision here will have broad implications for victims of crime in every jurisdiction in this country. Each of the 50 states has its own statutory scheme for imposing criminal restitution.¹³

¹³ Ala. Code § 15-18-67 (2013); Alaska Stat. Ann. § 12.55.045 (West 2013); Ariz. Rev. Stat. Ann. §§ 13-804, 13-603 (2013); Ark. Code Ann. § 5-4-205 (West 2013); Cal. Penal Code § 1202.4 (West 2013); Colo. Rev. Stat. Ann. § 18-1.3-603 (West 2013); Conn. Gen. Stat. Ann. § 53a-28 (West 2013); Del. Code Ann. tit. 11 § 4106 (West 2013); Fla. Stat. Ann. § 775.089 (West 2013); Ga. Code Ann. § 17-14-3 (West 2013); Haw. Rev. Stat. § 706-646 (West 2013); Idaho Code Ann. §§ 19-5302, 19-5304 (West 2013); 730 Ill. Comp. Stat. Ann. 5/5-5-6 (West 2013); Ind. Code Ann. § 35-50-5-3 (West 2013); Iowa Code Ann. § 910.2 (West 2013); Kan. Stat. Ann. § 21-6604 (West 2013); Ky. Rev. Stat. Ann. § 532.032 (West 2013); La. Code Crim. Proc. Ann. Art. 833.2 (2013); Me. Rev. Stat. tit. 17-A § 1323 (2013); Md. Code Ann., Crim. Proc. § 11-603 (West 2013); Mass. Gen. Laws Ann. ch. 258B § 3 (West 2013); Mich. Comp. Laws Ann. § 780.766 (West 2013); Minn. Stat. Ann. § 611A.04 (West 2013); Miss. Code Ann. § 99-37-3 (West 2013); Mo. Ann. Stat. § 595.020 (West 2013); Mont. Code Ann. § 46-18-241 (West 2013); Neb. Rev. Stat. Ann. § 29-2281 (West 2013);

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The Excessive Fines Clause of the Eighth Amendment remains one of the only provisions of the Bill of Rights that has not been explicitly incorporated to the states by virtue of the Fourteenth Amendment Due Process Clause. *See McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3035 n.13 (2010). However, many state courts have assumed Eighth Amendment incorporation and have considered the Court's Eighth Amendment holdings controlling for purposes of construing similarly worded state constitutional provisions.¹⁴ Thus, even though the Excessive

Nev. Rev. Stat. Ann. § 176.033 (West 2013); N.H. Rev. Stat. Ann. § 651:63 (2013); N.J. Stat. Ann. § 2C:43-3 (West 2013); N.M. Stat. Ann. § 31-17-1 (West 2013); N.Y. Penal Law § 60.27 (West 2013); N.C. Gen. Stat. Ann. § 15a-1340.34 (West 2013); N.D. Cent. Code Ann. § 54-23-4 (West 2013); Ohio Rev. Code Ann. §§ 2929.18, 2929.28 (West 2013); Okla. Stat. Ann. tit. 22 § 991f (West 2013); Or. Rev. Stat. Ann. § 137.106 (West 2013); 18 Pa. Cons. Stat. Ann. § 1106 (West 2013); R.I. Gen. Laws Ann. § 12-19-32 (West 2013); S.C. Code Ann. § 17-25-322 (2013); S.D. Codified Laws § 23A-28 (2013); Tenn. Code Ann. § 40-35-304 (West 2013); Tex. Code Crim. Proc. Ann. art. 42.037 (West 2013); Utah Code Ann. §§ 77-38a-301, 77-38a-302 (West 2013); Vt. Stat. Ann. tit. 13 § 7043 (West 2013); Va. Code Ann. § 19.2-305.1 (West 2013); Wash. Rev. Code Ann. § 9A.20.030 (West 2013); W. Va. Code Ann. § 61-11A-4 (West 2013); Wis. Stat. Ann. § 973.20 (West 2013); Wyo. Stat. Ann. § 7-9-102 (West 2013).

¹⁴ *See, e.g., City of Milwaukee v. Arrieh*, 565 N.W.2d 291, 294 (Wis. App. 1997) (“Although the Supreme Court has never held that the Excessive Fines Clause applies to the States through the Fourteenth Amendment, we assume that it does . . . Moreover, imposition of ‘excessive fines’ is prohibited by Article I, § 6 of the Wisconsin Constitution.”) (citations omitted); *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094, 1099 (Colo. App. 1996) (“Nevertheless, since the Supreme Court has assumed, without
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Fines Clause has not been explicitly incorporated, any ruling on its applicability to restitution orders stands to impact virtually every crime victim across the country.

Like the United States courts of appeals, state courts are divided on whether restitution orders implicate the Excessive Fines Clause. For example, the New Jersey Superior Court has held that “[a] fine for Eighth Amendment purposes is ‘payment to a sovereign as punishment for some offense.’ Restitution is paid to the victim, not the State. Also, restitution is not meant to punish but rather to rehabilitate the criminal.” *State v. DeAngelis*, 747 A.2d 289, 295-96 (N.J. Super. Ct. App. Div. 2000) (quoting *Browning-Ferris*, 492 U.S. at 265, and *State v. Harris*, 362 A.2d 32, 35 (1976)); see also *Benton v. State*, 711 A.2d 792, 799 (Del. 1998) (holding that because restitution was “not a punitive fine at all” it could not be imposed in violation of the Eighth Amendment); *People v. Stafford*, 93 P.3d 572, 574 (Colo. Ct. App. 2004) (“[F]or purposes of Eighth Amendment Analysis, restitution

deciding, that the excessive fines clause applies to the states, we also assume its applicability here.”); *State v. Good*, 100 P.3d 644, 649 (Mont. 2004) (“Given that we interpret the wording of our state’s Excessive Fines Clause in the same manner as the Excessive Fines Clause of the Eighth Amendment, however, we need not assume that the federal version has been incorporated, and therefore only address Good’s state claim.”); *State v. Izzolena*, 609 N.W.2d 541, 547 (Iowa 2000) (“The similarity between the two clauses permits us to look to the interpretations by the United States Supreme Court for guidance in interpreting our own clause.”) (citation omitted).

is not the equivalent of a fine.”). Alternatively, the Iowa Supreme Court has held that a restitution award “does not only serve a remedial purpose but also serves other purposes normally associated with punishment such as retribution and deterrence. The award is a ‘fine’ within the Eighth Amendment of the United States Constitution and article I section 17 of the Iowa Constitution.” *Izzolena*, 609 N.W.2d at 549; *see also Good*, 100 P.3d at 649 (holding that restitution implicates the Excessive Fines Clause because it is “punitive in part”).¹⁵ In light of the influence of this Court’s Excessive Fines Clause jurisprudence over state courts’ analyses of restitution orders, even in the absence of a ruling on incorporation, a holding by the Court concerning whether the Excessive Fines Clause is implicated by a restitution order will help to eliminate this division. *Amicus curiae* urges the Court to reach the issue and definitely rule that restitution orders do not implicate the protections of the Eighth Amendment.

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CONCLUSION

Discussions on federal restitution law often devolve into arcane and abstract analyses of technical

¹⁵ Like the federal courts of appeals discussed in Section III *supra*, state courts that have analyzed restitution orders under the Excessive Fines Clause have consistently held that restitution orders are not unconstitutional based upon their inherent proportionality. *See, e.g., Good*, 100 P.3d at 650 (citing *Dubose*, 146 F.3d at 1145).

points of law. To MADD, and countless organizations like it, restitution comes down to a grieving mother seeking funds to bury her 13-year-old daughter from the now-convicted impaired driver who claimed the child's life. Nothing could be less abstract, less clear, or less ambiguous than that.

The changes to federal law that gave rise to this case are as hard-fought as they are carefully considered. More than anything else, this *amicus curiae* urges the Court to rule in a manner that preserves and protects those changes and applies long-standing principles of fairness and justice to clarify the manner in which those provisions should be applied to the countless human tragedies that will be directly impacted by this ruling.

Respectfully submitted,

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