

No. 24-____

IN THE
Supreme Court of the United States

WILLIAM EDWARD NEILLY,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

**On Petition for a Writ of Certiorari
to the Michigan Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether restitution ordered as part of a criminal sentence is punishment for purposes of the Ex Post Facto Clause.

PARTIES TO THE PROCEEDING

Petitioner is William Neilly. Respondent is the State of Michigan. There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

Circuit Court of Michigan, Kalamazoo County:

People v. Neilly, No. 1993-000756-FC (Apr. 21, 2021) (entering restitution order at resentencing)

Court of Appeals of Michigan:

People v. Neilly, No. 358043 (Nov. 10, 2022) (affirming restitution order)

Supreme Court of Michigan:

People v. Neilly, No. 165185 (July 8, 2024) (affirming the Court of Appeals' judgment)

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INTRODUCTION

In 1993, Petitioner William Neilly was sentenced to life without parole for a crime he committed as a juvenile. His sentence did not include a restitution order, consistent with the discretionary restitution scheme in place at the time of his offense. Two decades later, following this Court’s decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), Neilly was resentenced to a lesser term of imprisonment. But the resentencing court also ordered Neilly to pay nearly \$15,000 in restitution pursuant to a mandatory restitution scheme enacted after Neilly’s offense.

The Michigan Supreme Court held that retroactive application of the new restitution provisions did not violate the Ex Post Facto Clause, because restitution is not punishment. In so holding, it deepened a widely acknowledged split among state high courts and federal courts of appeals. At least five state high courts and nine federal courts of appeals recognize that restitution ordered at a criminal sentencing is punishment for purposes of the Ex Post Clause. *See, e.g., Spielman v. State*, 471 A.2d 730, 734 (Md. 1984) (“restitution constitutes a form of punishment”). In those jurisdictions, criminal restitution statutes *cannot* be applied retroactively. The Michigan Supreme Court and two federal courts of appeals hold the opposite. *See, e.g., Pet.App.33a* (“restitution is not punishment”). In those jurisdictions, criminal restitution statutes *can* be applied retroactively.

That division of authority really matters, both in principle and in practice. The basic principle enshrined in the Ex Post Facto Clause—that individuals can be punished only pursuant to laws in

place at the time of their offense—is fundamental to our constitutional order. And the obligation to pay restitution can pose a significant barrier to reentry for individuals like Neilly, who are just beginning to rebuild their lives after decades in prison.

The majority rule is the right one. Michigan’s criminal restitution scheme—like others across the country—appears in a criminal procedure code, uses “penalty” language, provides for the imposition of restitution during sentencing, and imposes serious consequences for the violation of restitution orders. Those are strong textual indicators that criminal restitution orders are intended to punish. Criminal restitution has also been understood as punishment throughout history. And it bears the other hallmarks of punishment this Court has previously identified.

This case is an ideal vehicle for resolving this longstanding split and clarifying the status of criminal restitution orders under the Ex Post Facto Clause. Certiorari should be granted.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (Pet.App.1a–33a) will be reported at --- N.W.3d --- and is available at 2024 WL 3333179. The opinion of the Michigan Court of Appeals (Pet.App.34a–41a) is unreported but is available at 2022 WL 16858012. The relevant order of the Michigan Circuit Court (Pet.App.42a–47a) is unreported.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on July 8, 2024. Pet.App.10a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State Ex Post Facto Clause of the U.S. Constitution provides that “No State shall ... pass any ex post facto Law.” U.S. Const. art. I, § 10, cl. 1.

The Michigan restitution statutes involved, MCL 780.766 and MCL 769.1a, are reproduced in full at Pet.App.51a–68a.

STATEMENT

A. Legal Framework

1. The Ex Post Facto Clause applicable to the States provides that “No State shall ... pass any ex post facto Law.” U.S. Const., Art. I, § 10, cl. 1. The same prohibition applies to Congress. *See* U.S. Const., Art. I, § 9, cl. 3 (“No ... ex post facto Law shall be passed.”). Although the Latin phrase “ex post facto” literally encompasses any law passed “after the fact,” the phrase “ex post facto Law” was “a term of art with an established meaning at the time of the framing of the Constitution.” *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). Consistent with that established meaning, this Court has always interpreted the Clause as applying to “penal statutes which disadvantage the offender affected by them.” *Id.*

The Constitution prohibits these ex post facto laws because the Framers considered them to be “contrary to the first principles of the social compact and to every principle of sound legislation.” The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison); *cf.* The Federalist No. 84, p. 512 (C. Rossiter ed. 1961) (A. Hamilton) (“The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which,

when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.”). The Clause serves “a fundamental fairness interest ... in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.” *Carmell v. Texas*, 529 U.S. 513, 533 (2000). It “ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action.” *Peugh v. United States*, 569 U.S. 530, 544 (2013). And it serves important separation of powers functions “by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law.” *Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981).

This Court has consistently applied the Ex Post Facto Clause to prohibit statutes that retroactively change “the quantum of punishment” to an individual’s detriment. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977); *see also Calder v. Bull*, 3 Dall. 386, 390 (1798) (Chase, J.) (explaining that the Clause encompasses “[e]very law that ... inflicts a *greater punishment* ... than the law annexed to the crime, when committed”). In *Weaver*, 450 U.S. 24, for example, this Court held that a Florida statute reducing “good time” credits for incarcerated people violated the Ex Post Facto Clause when applied retroactively because it “substantially alter[ed] the consequences attached to a crime already completed.” *Id.* at 33, 36. Similarly, in *Peugh*, 569 U.S. 530, this Court held that amended sentencing guidelines that increased the recommended sentence violated the Ex

Post Facto Clause when applied retroactively because they “create[d] a sufficient risk of a higher sentence.” *Id.* at 544.

2. This Court has often applied a two-part test for determining whether a sanction is civil or criminal for purposes of the Ex Post Facto Clause.

At the first step, the Court “consider[s] the statute’s text and its structure to determine the legislative objective.” *Smith v. Doe*, 538 U.S. 84, 92 (2003); *see also Hudson v. United States*, 522 U.S. 93, 99 (1997) (explaining that the intent inquiry is “a matter of statutory construction”). If the text reveals that “the intention of the legislature was to impose punishment, that ends the inquiry.” The Ex Post Facto Clause applies. *Smith*, 538 U.S. at 92.

If, however, the text reflects that the intention of the legislature was “to enact a regulatory scheme that is civil and nonpunitive,” the Court moves to the second step and asks whether the statutory scheme is nevertheless “so punitive either in purpose or effect as to negate the State’s intention to deem it ‘civil.’” *Id.* (cleaned up). That inquiry is guided by seven “factors, which migrated into our ex post facto case law from double jeopardy jurisprudence.” *Id.* at 97. They are:

- (1) “Whether the sanction involves an affirmative disability or restraint”;
- (2) “whether it has historically been regarded as a punishment”;
- (3) “whether it comes into play only on a finding of scienter”;

(4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”;

(5) “whether the behavior to which it applies is already a crime”;

(6) “whether an alternative purpose to which it may rationally be connected is assignable for it”;
and

(7) “whether it appears excessive in relation to the alternative purpose assigned.”

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963). These factors—sometimes called the *Mendoza-Martinez* or *Hudson* factors—are “neither exhaustive nor dispositive,” but serve as “useful guideposts” in determining whether a sanction is punitive in nature. *Smith*, 538 U.S. at 97 (internal quotation marks omitted).

B. Factual Background

1. In 1993, William Neilly was one of several co-defendants convicted of felony murder, conspiracy, and firearms charges in connection with an armed robbery that resulted in the death of a 17-year-old. Pet.App.11a. He received a mandatory sentence of life without parole, even though—unlike three of his four codefendants—he was a juvenile at the time of the offense. Pet.App.11a, 48a–50a. Neither Neilly nor his co-defendants were ordered to pay restitution. Pet.App.12a n.1, 48a–50a.

Nearly two decades later, this Court held in *Miller* that mandatory life-without-parole sentences are unconstitutional for juveniles. *Miller*, 567 U.S. at 489; *Montgomery*, 577 U.S. at 212 (holding that *Miller*

applies retroactively). As a result, Neilly was resentenced in 2021. Pet.App.12a. In lieu of life without parole, he received a term-of-years sentence of 35-to-60 years' imprisonment. Pet.App.12a, 42a–47a. He was released from prison on parole in January 2024.

Over Neilly's objection, however, the resentencing court also imposed a new restitution penalty in the amount of \$14,895.78 to cover funeral expenses that had been incurred by the victim's family in 1993. Pet.App.12a, 44a–45a.

2. “There are two main statutes that govern restitution in Michigan: MCL 780.766 (part of the [Crime Victim's Rights Act]) and MCL 769.1a (the general restitution statute).” *People v. Garrison*, 852 N.W.2d 45, 47 (Mich. 2014). Both provisions appear in the State's Code of Criminal Procedure. When Neilly was originally sentenced, both MCL 780.766 and MCL 769.1a stated that courts “may order” restitution at sentencing. *See* MCL 780.766(2) (1993); MCL 769.1a(1) (1993). Before doing so, courts were required to consider “the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate.” MCL 780.767(1) (1993). Neither the prosecutor nor the victim's family requested restitution during Neilly's original sentencing proceedings. *See* Appellant's Supp. Br. 38–39, *People v. Neilly*, No. 165185 (Mich. Oct. 26, 2023) (Mich. S.Ct. Br.). No restitution was ordered. Pet.App.11a, 48a–50a.

By the time of his resentencing, however, criminal restitution had become mandatory in Michigan—without regard to a defendant's ability to pay. Both

statutes now provide that a court “shall order ... full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction.” MCL 780.766(2); MCL 769.1a(2) (same). In setting the amount of restitution, courts are directed to consider only “the amount of the loss sustained by any victim as a result of the offense.” MCL 780.767(1).

The resentencing court relied on this new, mandatory restitution scheme in ordering Neilly to pay \$14,895.78 in restitution to the victim’s family. See Pet.App.35a, 42a–48a; Appellant’s App. 29, *People v. Neilly*, No. 165185 (Mich. Oct. 26, 2023) (Mich. S.Ct. App.). In theory, Neilly’s liability is “joint and several with co-defendants.” Pet.App.12a, 42a–48a. But none of Neilly’s co-defendants were resentenced. (Three were adults, and the only other juvenile cooperated in exchange for a reduced sentence. Pet.App.12a n.1; see also Mich. S.Ct. Br. 37 n.9.) So Neilly bears sole responsibility for the full \$14,895.78 amount. Pet.App.12a n.1.

If Neilly cannot or does not pay, he faces serious consequences. The restitution order can be enforced via garnishment of wages or a lien on property. See MCL 769.1a(13); MCL 780.766(13), (18). And because payment of restitution is a condition of parole, Neilly can be reimprisoned if he fails to pay during his parole term. See MCL 780.766(11); MCL 769.1a(11).

3. On appeal, Neilly argued that applying the new restitution scheme to his detriment violated the Ex Post Facto Clause of the U.S. and Michigan Constitutions. Pet.App.35a. The Michigan Court of Appeals applied this Court’s “two-step analysis for determining whether a law is a ‘punishment,’” concluded that restitution is not punishment, and

rejected Neilly’s claims. Pet.App.37a–41a. At the first step, the court “conclude[d] that the Legislature did not intend for the restitution statutes to be a criminal punishment.” Pet.App.40a. At the second step, the court acknowledged that “[s]ome of the *Mendoza-Martinez* factors suggest that restitution is a penalty.” Pet.App.40a. But it found that “several other *Mendoza-Martinez* factors” cut the other way. Pet.App.41a. It ultimately concluded that “restitution is not a penalty” for purposes of the Ex Post Facto Clause. Pet.App.41a.

The Michigan Supreme Court affirmed. Like the Court of Appeals, it held that retroactive application of the amended restitution statutes to Neilly’s detriment did “not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions”—which the court “interpret[ed] ... coextensively,” Pet.App.16a n.5—because “the imposition of restitution is not punishment.” Pet.App.33a.

At the first step, the court concluded that restitution was intended to be a civil remedy, not a criminal punishment. Pet.App.24a. “Neither MCL 769.1a nor MCL 780.766,” the court recognized, “expressly characterizes restitution as a criminal punishment or a civil remedy.” Pet.App.18a. But in the court’s view, “the purpose of restitution is ‘to enable victims to be compensated fairly for their suffering at the hands of convicted offenders,’ rather than to impose additional punishment on offenders.” Pet.App.18a (quoting *People v. Peters*, 537 N.W.2d 160, 165 (Mich. 1995)) (citing, *inter alia*, *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998); *United States v. Arutunoff*, 1 F.3d 1112 (10th Cir. 1993)).

At the second step, the court applied the *Mendoza-Martinez* factors and concluded that “the aggregate punitive effects of the restitution statutes do not negate the state’s intention to deem it a civil remedy.” Pet.App.32a. In so doing, the court acknowledged that restitution involves some “affirmative disability or restraint.” Pet.App.26. It also recognized that restitution serves the traditional aims of punishment: retribution and deterrence. Pet.App.28. But in the court’s view, the “[m]ost significant” factor was that restitution has “a rational connection to a nonpunitive purpose”—*i.e.*, compensating victims. Pet.App.30a (alteration in original). In light of restitution’s rational connection to that nonpunitive purpose, the court held that it is not punishment for purposes of the Ex Post Facto Clause.

REASONS FOR GRANTING THE PETITION

I. STATE AND FEDERAL COURTS ARE DEEPLY DIVIDED.

A significant majority of state and federal courts have held that restitution imposed as part of a criminal sentence is punishment for purposes of the Ex Post Facto Clause. A distinct minority, however, have held the opposite. That split is well-developed, acknowledged, and entrenched. Only this Court can resolve it.

A. Most Courts Recognize That Restitution Imposed at Sentencing Is Punishment Under the Ex Post Facto Clause.

At least five state high courts, several state intermediate appellate courts, and nine federal courts of appeals have held that restitution ordered at a

criminal sentencing is punishment for purposes of the Ex Post Facto Clause.

1. The highest courts of Iowa, Maryland, Nebraska, West Virginia, and Arkansas—plus intermediate appellate courts in several other states—have held that restitution schemes substantively indistinguishable from Michigan’s are punitive for purposes of the Ex Post Facto Clause.

In *State v. Corwin*, 616 N.W.2d 600 (Iowa 2000), the Iowa Supreme Court held that retroactive application of a mandatory criminal restitution statute would violate the Ex Post Facto Clause. *Id.* at 602. Restitution, the court reasoned, “serves not only a remedial purpose but accomplishes the goals of retribution and deterrence normally associated with punishment.” *Id.* Accordingly, “the State was not at liberty to seek enforcement of the statute’s penalty in connection with a crime that predated its enactment.” *Id.*

In *Spielman*, 471 A.2d 730, the Maryland Court of Appeals reached the same conclusion with respect to a restitution statute that had been amended to require restitution to insurers. *See id.* at 611. The statute’s characterization of restitution as a “penalty,” the court reasoned, is a “clear indication ... that restitution constitutes a form of punishment.” *Id.* at 734. “It hardly can be contended,” the court continued, “that one who has been ordered to pay restitution, as a condition of probation, and is subject to revocation of that probation for failure to make payment, has not received punishment.” *Id.* at 735.

The Nebraska Supreme Court followed suit in *State v. Duran*, 401 N.W.2d 482 (Neb. 1987) (per curiam).

Because restitution is meted out by a “sentencing court” as part of a criminal “sentence,” the court held that it “is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty.” *Id.* at 484. It thus “cannot be given retroactive effect to crimes committed prior to its effective date.” *Id.*

The West Virginia Supreme Court came out the same way in *State v. Short*, 350 S.E.2d 1 (W. Va. 1986). A restitution order imposed as a condition of parole, the court reasoned, is “undeniably part of [the defendant’s] punishment.” *Id.* at 2. Restitution statutes thus cannot be applied retroactively to an individual’s detriment without violating the Ex Post Facto Clause. *See id.*

Finally, in *Eichelberger v. State*, 916 S.W.2d 109 (Ark. 1996), the Arkansas Supreme Court held that a restitution scheme applicable to juveniles was punitive for purposes of the Ex Post Facto Clause. *Id.* at 112. Even though the provision in question—unlike the one at issue in this case—appeared in the State’s family law code, the court still held that it is punitive in nature because “it allows for revocation of probation if restitution is not paid.” *Id.*

Intermediate appellate courts in many other states have also held that restitution is punishment for purposes of the Ex Post Facto Clause. *See, e.g., Ortiz v. State*, 173 P.3d 430, 432 (Alaska Ct. App. 2007); *Matter of Appeal in Maricopa Cnty. Juv. Action No. J-92130*, 677 P.2d 943, 947 (Ariz. Ct. App. 1984); *People v. Callejas*, 85 Cal. App. 4th 667, 670 (2000); *State v. French*, 400 N.W.2d 111, 114 (Minn. Ct. App. 1987); *Bellamy v. State*, 525 S.W.3d 166, 170 (Mo. Ct. App. 2017).

2. The Courts of Appeals for the First, Second, Third, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits agree that restitution ordered at sentencing is punishment for purposes of the Ex Post Facto Clause. These cases all concern a pair of sequential amendments to the Victim Witness Protection Act (“VWPA”), 18 U.S.C. §§ 3663–64, which governs restitution for purposes of federal criminal sentencing. First, in the Crime Control Act of 1990, Congress broadened the VWPA’s definition of “victim” to encompass “any person directly harmed by the defendant’s criminal conduct.” Pub. L. No. 101-647, § 2509, 104 Stat. 4789, 4863, 4931; *see United States v. Gilberg*, 75 F.3d 15, 20 (1st Cir. 1996). Second, in the Mandatory Victims Restoration Act of 1996 (“MVRA”), Congress made full restitution mandatory regardless of the defendant’s financial and personal circumstances. Pub. L. No. 104-321, §§ 202–11, 110 Stat. 1214, 1227–41; *see United States v. Baggett*, 125 F.3d 1319, 1321–22 (9th Cir. 1997). Because both changes “increase[ed] the amount of restitution [defendants] would have to pay,” federal courts were called upon to “determine whether applying” the amended provisions to “criminal activity that took place” before their effective dates “violate[s] the Ex Post Facto Clause of the United States Constitution.” *Id.* (MVRA); *see Gilberg*, 75 F.3d at 21 (Crime Control Act). Most have held that it does.

The First Circuit so held in *United States v. Gilberg*, 75 F.3d 15, 21 (1st Cir. 1996). “[A]n order of restitution is part of the criminal sentence,” the court reasoned. *Id.* Because “[r]etroactive application of” the Crime Control Act’s expanded definition of “victim” “would make more burdensome the

punishment for [a defendant's] crimes, after their commission," the sentencing court's reliance on the amended version of the statute violated the Ex Post Facto Clause. *Id.* at 21 (cleaned up); *cf. United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006) ("[R]estitution ordered as part of a criminal sentence is a criminal penalty, not a civil remedy.").

The Second Circuit reached the same result shortly after the MVRA's adoption. *See United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997) ("concur[ring] in" the "view" that "application of the new amendments to this case would be barred by the *ex post facto* clause of the United States Constitution"). Its subsequent decisions confirm that it views "[r]estitution [as] a serious component of criminal punishment." *Gonzalez v. United States*, 792 F.3d 232, 236 (2d Cir. 2015).

After surveying the developing circuit split on this issue, the Third Circuit concluded that the majority had the "better view." *United States v. Edwards*, 162 F.3d 87, 91 (3d Cir. 1998). Restitution, the court recognized, "is imposed as an integral and necessary part of sentencing, supervised release, and probation for the crimes it implicates." *Id.* The compensatory aspects of restitution do not "detract from [its] status as a form of criminal penalty when imposed as an integral part of sentencing." *Id.* at 92; *see also United States v. Leahy*, 438 F.3d 328, 335 (3d Cir. 2006) (en banc) ("[W]e ... reaffirm our view, consistent with the view of the majority of the Circuits to have addressed this issue, that restitution ordered as part of a criminal sentence is criminal rather than civil in nature.").

The Fifth Circuit has endorsed the same rule. See *United States v. Pleitez*, 876 F.3d 150, 158 (5th Cir. 2017) (“[M]andatory restitution is a criminal penalty and part of a criminal sentence.”); *United States v. Richards*, 204 F.3d 177, 213 (5th Cir. 2000) (acknowledging split and concluding that “[r]etroactive application of the MVRA ... would violate the Ex Post Facto Clause”).

The same is true of the Sixth Circuit. See *United States v. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001) (finding “no basis for following the minority approach” and holding that restitution is “punishment for the purpose of the Ex Post Facto Clause”); *United States v. Streebing*, 987 F.2d 368, 376 (6th Cir. 1993) (“retroactive application” of expanded definition of “victim” would “violate the constitutional prohibition of *ex post facto* laws”). The Ninth Circuit. See *Baggett*, 125 F.3d at 1321–22 (“applying the amended version of the VWPA would violate the *Ex Post Facto* Clause of the United States Constitution”); cf. *United States v. Dubose*, 146 F.3d 1141, 1145 (9th Cir. 1998) (“restitution has historically been understood as punishment”). The Eleventh Circuit. See *United States v. Siegel*, 153 F.3d 1256, 1259–60 (11th Cir. 1998) (endorsing “the analysis adopted in the majority of the circuits on this issue” and “hold[ing] that the MVRA cannot be applied” retroactively consistent with the Ex Post Facto Clause). And the D.C. Circuit. See *United States v. Rezaq*, 134 F.3d 1121, 1141 n.13 (D.C. Cir. 1998) (“the Ex Post Facto Clause prohibits the application of this amendment” retroactively); cf. *United States v. Monzel*, 641 F.3d 528, 541 (D.C. Cir. 2011) (“[a] restitution award ... is part of [a defendant’s] sentence”).

As for the Tenth Circuit, it initially adopted the minority view, holding that restitution is a civil remedy that could be imposed retroactively consistent with the Ex Post Facto Clause. *See, e.g., United States v. Nichols*, 169 F.3d 1255, 1278–80 (10th Cir. 1999) (citing *Arutunoff*, 1 F.3d 1112); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005). But after this Court “explained in *Paroline* [*v. United States*, 572 U.S. 434 (2014)] that restitution ‘serves punitive purposes,’” the Tenth Circuit appears to have joined those courts that “view restitution as penal and part of the criminal sentence.” *United States v. Anthony*, 25 F.4th 792, 798–99 nn.5–6 (10th Cir. 2022) (quoting *United States v. Ferdman*, 779 F.3d 1129, 1132 & n.1 (10th Cir. 2015)); *see United States v. Ellingburg*, 113 F.4th 839, 842 (8th Cir. 2024) (“the Tenth Circuit changed course” and “joined the majority of circuits in finding that MVRA restitution is a criminal penalty”).¹

B. A Few Courts Hold That Restitution Imposed at Sentencing Is *Not* Punishment Under the Ex Post Facto Clause.

On the other side of the split, the Michigan Supreme Court, one state intermediate appellate court, and the Seventh and Eighth Circuits have held

¹ Although the Fourth Circuit has not addressed the status of restitution for purposes of the Ex Post Facto Clause, it has repeatedly held in other contexts that restitution is “part of the criminal defendant’s sentence.” *United States v. Cohen*, 459 F.3d 490, 495 (4th Cir. 2006); *accord United States v. Grant*, 715 F.3d 552, 554 (4th Cir. 2013); *United States v. McLeod*, 972 F.3d 637, 640 (4th Cir. 2020).

that restitution imposed at sentencing is a civil remedy for purposes of the Ex Post Facto Clause.

1. In the decision below, the Michigan Supreme Court squarely held that the “imposition of restitution is not punishment” for purposes of the Ex Post Facto Clause. Pet.App.33a; *see supra* 9–10. Michigan’s restitution scheme is substantively indistinguishable from—and, indeed, typical of—the state and federal statutes addressed by courts endorsing the majority view. All of these statutes, save Arkansas’ and Arizona’s, are located in a criminal procedure code.² All of these statutes (this time including Arkansas’ and Arizona’s) provide for the imposition of restitution at sentencing by a sentencing court.³ All of these statutes (again including Arkansas’ and Arizona’s) provide that criminal restitution orders carry collateral consequences.⁴ And the amendments at

² *See* MCL 780.766, 769.1a; 18 U.S.C. § 3663A; Iowa Code § 910.3B (1999); Md. Code Ann., art. 27, § 640 (1982); Neb. Rev. Stat. § 29-2280 (1987); W. Va. Code § 61-11A-4(h) (1984); Alaska Stat. § 12.55.045 (2004); Cal. Penal Code § 1202.45 (1995); Minn. Stat. § 609.10 (1984); Mo. Rev. Stat. § 559.105.1 (2014).

³ *See* MCL 780.766(2), 769.1a(2); 18 U.S.C. § 3663A(a)(1); Iowa Code § 910.2 (1999); Md. Code Ann., art. 27, § 640(b) (1982); Neb. Rev. Stat. § 29-2280 (1986); W. Va. Code § 61-11A-4(a) (1984); Ark. Code Ann. § 9–27–339(a) (1995); Alaska Stat. § 12.55.045(a) (2004); Ariz. Rev. Stat. Ann. § 8-241(C) (1984); Cal. Penal Code § 1202.45(a) (1995); Minn. Stat. § 609.10 (1984); Mo. Rev. Stat. § 559.105.1 (2014).

⁴ *See, e.g.*, MCL 780.766(11), 769.1a(11); 18 U.S.C. § 3613A(a)(1); Iowa Code § 910.4(1) (1999); Md. Code Ann., art. 27, § 640(c) (1982); Neb. Rev. Stat. § 29-2284 (1986); W. Va. Code § 61-11A-4(g) (1984); Ark. Code Ann. § 9–27–339(f) (1995); Alaska Stat. § 12.55.051(a) (2004); Ariz. Rev. Stat. Ann. § 8-241(H) (1984); Cal. Penal Code § 1202.45(b) (1995); Minn. Stat. § 611A.045 (1985); Mo. Rev. Stat. § 559.105.2 (2014).

issue in the decision below—just like Alaska’s amendment to its restitution statute and the MVRA’s amendment to the VWPA—transformed a discretionary scheme that required consideration of financial resources into a mandatory scheme that requires full restitution regardless of an individual’s ability to pay.⁵

A Pennsylvania intermediate appellate court has also held that restitution imposed at sentencing—pursuant to a provision of the criminal code that carries collateral consequences, 18 Pa.C.S. § 1106—“is not punishment under the ex post facto clause.” *Commonwealth v. Kline*, 695 A.2d 872, 877 (Pa. Super. Ct. 1997), *appeal denied*, 716 A.2d 1248 (Pa. 1998). Although the court acknowledged that restitution has a “deterrent and penal effect,” it concluded that “its primary purposes are completely remedial: compensation to the victim for loss occasioned by the crime and rehabilitation of the defendant.” *Id.*⁶

⁵ See Pet.App.15a (“[T]he former restitution statutes provided that the imposition of restitution was discretionary, rather than mandatory. Further, while current MCL 780.767(1) provides only that the court shall consider the amount of loss sustained by a victim in determining whether to award restitution, former MCL 780.767(1) ... required the trial court to also consider ‘the financial resources ... of the defendant[.]’”); *Baggett*, 125 F.3d at 1322 (explaining that “the amended version of the VWPA requires the court to impose ‘full’ restitution without considering the defendant’s economic circumstances”); *Ortiz*, 173 P.3d at 431 (explaining that the prior Alaska statute “gave a sentencing judge discretion as to whether to order restitution,” but the amended statute “requires the judge to order restitution unless the victim expressly waives restitution”).

⁶ Although the Montana Supreme Court has not addressed the status of restitution for purposes of the Ex Post Facto Clause,

2. Two federal courts of appeals have also held that criminal restitution is not punishment for purposes of the Ex Post Facto Clause.

The Seventh Circuit first reached that result in *Newman*. “Restitution,” the court reasoned, “has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions.” 144 F.3d at 538. The court also found that the other *Mendoza-Martinez* factors suggested that restitution is civil in nature. *See id.* at 540–42. It therefore held that “the restitution authorized by the VWPA (and mandatorily imposed under the MVRA) is not a criminal punishment for the purposes of the Ex Post Facto Clause.” *Id.* at 542. The Seventh Circuit has held fast in its minority position ever since. *See, e.g., United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (“Ours is a minority view ... but we think it is correct.”); *United States v. Dawson*, 250 F.3d 1048, 1052 (7th Cir. 2001) (refusing to “revisit the holding of *Newman* and its progeny” in light of the circuit split); *cf. United States v. LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 593 (7th Cir. 2006) (finding “no reason to reconsider our well-settled Circuit precedent”).

The Eighth Circuit arrived at the same place—albeit via a more circuitous route. After initially treating restitution as punishment for the purposes of Ex Post Facto Clause, *see United States v. Williams*,

it has held that restitution is “not punishment” for purposes of the Excessive Fines Clause. *State v. Johnson*, 430 P.3d 494, 501 (Mont. 2018) (“This Court holds that the primary purpose of criminal restitution in Montana is remediation, not punishment.”).

128 F.3d 1239, 1241 (8th Cir. 1997) (“We conclude an order of restitution under the MVRA is punishment for Ex Post Facto Clause purposes[.]”), the Eighth Circuit later disavowed that ruling as dicta. See *United States v. Carruth*, 418 F.3d 900, 903–04 (8th Cir. 2005); *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015). It recently reaffirmed its view that “retroactive application of the MVRA ... does not violate the Ex Post Facto Clause.” *Ellingburg*, 113 F.4th at 842; see also *Ellingburg*, 2024 WL 4349610 (8th Cir. Sept. 30, 2024) (denying rehearing and rehearing en banc).

C. The Split Is Well-Developed, Widely Acknowledged, and Deeply Entrenched.

This split could hardly be more well-developed. At least fourteen state high courts and federal courts of appeals have held that restitution imposed as part of a criminal sentence is punishment subject to the Ex Post Facto Clause. At least one state high court and two federal courts of appeals have concluded it is not. And state intermediate appellate courts have weighed in on both sides.

This split is also widely acknowledged. Federal and state courts have recognized it time and time again. See, e.g., *Bellamy*, 525 S.W.3d at 170 (noting split on the character of restitution among “[f]ederal courts and other state courts”); *Ellingburg*, 113 F.4th at 842 (identifying split among the courts of appeals). Commentators have too. See, e.g., Penny J. White, 1 CONSTITUTIONAL RIGHTS OF THE ACCUSED 3d § 1:19 (3d ed. 2023) (“[c]ourts are split on the question whether victim restitution is punishment for purposes of the ex post facto clause”); Irene J. Chase, *Making*

the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996, 68 U. CHI. L. REV. 463, 473 (2001) (noting that a circuit split has existed since 1998).

And this split will persist unless and until this Court intervenes. Courts holding the minority view have refused to reconsider their positions. *See, e.g., Dawson*, 250 F.3d at 1052 (refusing to “revisit the holding of *Newman* and its progeny” in light of the circuit split); *Bach*, 172 F.3d at 523 (“Ours is a minority view ... but we think it is correct.”); *Ellingburg*, 113 F.4th at 842 (cases holding that restitution is not punishment remain “binding precedent in the Eighth Circuit”); *Ellingburg*, 2024 WL 4349610 (declining to reconsider that ruling en banc). So only this Court can restore uniformity. *See, e.g., Cortney E. Lollar, What Is Criminal Restitution?* 100 IOWA L. REV. 93, 148 (2014) (“Leadership from the Supreme Court on this issue is necessary”); Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2715 (2005) (“The granting of a petition of certiorari by the Supreme Court on an appropriate case to decide the character of restitution ... would go a long way towards resolving this tension and creating uniformity in this facet of the sentencing of criminal defendants.”).

II. THE QUESTION PRESENTED IS IMPORTANT.

The status of criminal restitution under the Ex Post Facto Clause is important both in principle and in practice. It is an issue that arises frequently in courts

across the country. And it has potential implications for other constitutional rights.

1. The Ex Post Facto Clause’s prohibition of retroactive punishment is a “fundamental principle” of our legal system. *Calder*, 3 U.S. at 388 (Chase, J.). The Framers considered retroactive punishment contrary both to the basic “social compact” and to the rule of law. The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison); *see supra* at 3–4. That is why the Ex Post Facto Clause appears two different times in the Constitution, binding not only the federal government but also the states. U.S. Const., Art. I, § 9, cl. 3; U.S. Const., Art. I, § 10, cl. 1. It is also why this Court has frequently granted certiorari where the lower courts have failed to enforce the Clause’s guarantee that individuals will be punished only on the basis of laws in effect at the time of their offense. *See, e.g., Peugh*, 569 U.S. 530, *Stogner v. California*, 539 U.S. 607 (2003), *Carmell*, 529 U.S. 513.

Whether that guarantee extends to restitution has profound consequences for individuals convicted of crimes. A criminal record can make it more difficult to find a job, obtain safe housing, and access government benefits. *See, e.g.,* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 302 (2015); U.S. Comm’n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment Redemption, and the Effects on Communities* 1 (2019). For many, the obligation to pay restitution can spell the difference between making rent and being out on the street. *See* Lollar, *supra*, at 125–26; Alicia Bannon, et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 27 (2010). Moreover, failure to pay restitution

can result in “suspension of the right to vote, continued court supervision, or even reincarceration.” *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); see Lollar, *supra*, at 123–29. Restitution liability can even pass to an individual’s estate. See *Peters*, 537 N.W.2d at 164 (upholding \$400,000 restitution order against estate of deceased offender).

It is one thing to require an individual convicted of a crime to bear these burdens pursuant to laws in place at the time of his offense. But it is quite another to allow legislatures to impose new restitution obligations retroactively. The retroactive application of new restitution statutes subjects individuals to potentially crippling liability without warning. See *Weaver*, 450 U.S. at 28–29 (describing fair notice principles behind the Ex Post Facto Clause). It also unfairly penalizes individuals who receive unlawful sentences at their original sentencings—and so must be resentenced pursuant to harsher statutes. Indeed, treating restitution as punishment creates a potential disincentive for individuals to challenge unlawful sentences in the first place.

This case proves those points. Neilly could not have anticipated mandatory restitution liability at the time of his offense. Neither the prosecutor nor the victim’s family requested restitution during Neilly’s original sentencing proceedings. See Mich. S.Ct. App. 107, 109; Mich. S.Ct. Br. 38–39. And neither Neilly nor his codefendants were ordered to pay restitution as part of their original sentences. See Pet.App.12a n.1, 48a–50a. But because Neilly alone received an unconstitutional prison sentence, he alone was

resentenced pursuant to the new mandatory regime. *See supra* 8. As a result, he alone now bears the burden of a nearly \$15,000 restitution order.

2. The Question Presented also arises frequently—and will continue to do so in the future. Every state and territory has a restitution statute, as does the federal government. *See* Report, Juvenile Law Center, *Reimagining Restitution: New Approaches to Support Youth and Communities* 7 (2022), <https://tinyurl.com/4mcfbkxe>. Those statutes are often amended in ways that increase the amount of restitution that can be awarded, the number of persons to whom it must be paid, and the likelihood it will be ordered. *See supra* Section I.A.1 (citing cases addressing amendments to ten state restitution statutes); Section I.B.1 (citing cases addressing amendments to two state restitution statutes); Sections I.A.2 & I.B.2 (citing cases addressing two separate amendments to the federal restitution statute). And in many jurisdictions, restitution for crime victims is now mandatory in every criminal case. *See, e.g.*, MCL 780.766(2); MCL 769.1a(2); 18 U.S.C. § 3663A; 18 Pa.C.S.A. § 1106; Alaska Stat. § 12.55.045.

Every time a restitution statute is amended in a way that expands liability, courts must decide whether the amended version applies to individuals whose offenses occurred before the amendment. Because the criminal process takes time, that question arises in *every sentencing* that occurs in the weeks and months following the effective date of an amendment. *See, e.g., Duran*, 401 N.W.2d at 483 (offense occurred July 7, 1986, amendment became effective July 17, 1986, and sentencing occurred

September 4, 1986). It also arises, as in Neilly’s case, when a restitution statute is amended between when an individual is initially sentenced and when resentencing occurs. *See* Pet.App.11a.

There is every indication that the trend toward broader restitution will continue—and with it, new applications of the Ex Post Facto Clause to new restitution schemes. At the federal level, for example, President Biden recently signed into law the Victims’ VOICES Act, which extends mandatory restitution under the MVRA to cover “expenses incurred by the person who has assumed the victim’s rights.” Pub. L. No. 118-77, 138 Stat. 1510, 1510 (July 30, 2024); *see Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (recognizing that “[r]estitution plays an increasing role in federal criminal sentencing today”). States also continue to expand the range of losses for which individuals convicted of crimes can be held financially responsible. *See, e.g.*, Tex. Code Crim. Proc. Ann. art. 42.0375 (2023) (requiring mandatory restitution payments for the support of a child whose parent or guardian is a victim of intoxication manslaughter); Kan. Stat. Ann. § 21-6604(b)(1)(C) (2024) (requiring mandatory restitution to law enforcement agencies for costs associated with harming police animals).

3. The classification of restitution as punishment also has implications for other important constitutional rights.

Take the Double Jeopardy Clause. Many courts have held that the Double Jeopardy Clause applies to restitution because restitution is “punishment.” *See, e.g., Harris v. State*, 413 S.E.2d 439, 441 (Ga. 1992) (citing *Bearden v. Georgia*, 461 U.S. 660, 673 n.12

(1983)); *State v. Gonzales*, 226 P.3d 131 (Wash. 2010) (citing *United States v. DiFrancesco*, 449 U.S. 117 (2010)). For good reason: If restitution is not punishment, can an individual face duplicative restitution orders for the same offense?

Or take the Sixth Amendment. Some courts have held that a defendant has the right to counsel in connection with restitution proceedings because “[r]estitution is a criminal sentence.” *Pleitez*, 876 F.3d at 160 (citing *United States v. Cronin*, 466 U.S. 648, 659 (1984)). Were it otherwise, would an individual have to face a criminal restitution hearing without the assistance of counsel?

Finally, take the Eighth Amendment’s prohibition of excessive fines. In *Paroline*, this Court suggested that the “punitive purposes” of restitution “may be ‘sufficient to bring [it] within the purview of the Excessive Fines Clause.’” *Paroline*, 572 U.S. at 456 (citing *United States v. Bajakajian*, 524 U.S. 321, 328 (1998)). But at least one state high court has held to the contrary on the ground that “the primary purpose of criminal restitution [] is remediation, not punishment.” *State v. Johnson*, 430 P.3d 494, 501 (Mont. 2018). If restitution is not punishment, is there no constitutional limit on the amount of restitution that can be ordered?

There may be reasons why some of these provisions would sweep more narrowly than the Ex Post Facto Clause. But it would be anomalous to extend other constitutional protections to individuals facing criminal restitution orders but not the “first principle[]” among them. *See* Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison).

III. THE DECISION BELOW IS WRONG.

The majority's answer to the Question Presented is correct: Criminal restitution is punishment for purposes of the Ex Post Facto Clause. That conclusion follows first from statutory text. It also follows from the *Mendoza-Martinez* factors, which require consideration of history and tradition as well as statutory purpose.

1. Traditional tools of statutory construction make clear that criminal restitution statutes like Michigan's are intended to inflict punishment. *Smith*, 538 U.S. at 92 ("Whether a statutory scheme is civil or criminal is first of all a question of statutory construction." (cleaned up)).

Start with plain text. MCL 780.766 and MCL 769.1a both label restitution as a "penalty." See MCL 780.766(2) ("the court shall order, in addition to or in lieu of any *other penalty* authorized by law or in addition to any *other penalty* required by law, that the defendant make full restitution" (emphases added)); MCL 769.1a(2) (same). Both also require that it be imposed on "defendants" at criminal "sentencing." MCL 780.766(2) ("when sentencing a defendant convicted of a crime, the court shall order ... that the defendant make full restitution"); MCL 769.1a (similar). The word "penalty" conveys punishment. See, e.g., *Random House Webster's College Dictionary* (1995) (defining "penalty" as "a punishment imposed or incurred for a violation of law or rule"); *Merriam Webster's Collegiate Dictionary* (10th ed. 1994) (defining "penalty" as "the suffering in persons, rights, or property that is annexed by law or judicial decisions to the commission of a crime or public offense"); *Kokesh v. SEC*, 581 U.S. 455, 461 (2017) ("A 'penalty'

is a ‘punishment[.]’ (citation omitted); *Williams*, 128 F.3d at 1241 (the “plain meaning” of the word “penalty” supports treating restitution as punishment). The use of other criminal law language and the invocation of criminal procedure does, too. *See Duran*, 401 N.W.2d at 484 (noting “[t]he use of the words ‘sentencing court’ and ‘sentence’ compels the conclusion that restitution ... is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty”).

Next consider structure. Though “not dispositive,” “formal attributes of a legislative enactment, such as the manner of its codification ... , are probative of the legislature’s intent.” *Smith*, 538 U.S. at 94. Both MCL 769.1a and 780.766 appear in the State’s criminal procedure codes, with MCL 769.1a even appearing under the chapter titled “Judgment and Sentence.” Mich. Act 175 of 1927, Chapter IX; MCL 769.1a. And as this Court recognized in *Smith*, “codification] in the State’s criminal procedure code” suggests that a provision is punitive in nature. 538 U.S. at 94; *cf. Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (“Kansas’ objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, instead of the criminal code[.]”).

Finally, consider context. Criminal restitution orders in Michigan—as in other jurisdictions—carry criminal consequences, including the revocation of parole and reincarceration. *See* MCL 780.766(11); MCL 769.1a(11); *see generally* Lollar, *supra*, at 123–129 (2014) (describing the consequences of failing to pay restitution). In that respect, a criminal restitution order resembles a criminal fine (which is considered punishment under the *Ex Post Facto*

Clause)⁷ and is distinguishable from a civil judgment (which is not).⁸

2. Because the text of criminal restitution statutes like Michigan’s makes clear “that the legislature intended to punish,” no “further inquiry” is required. *Smith*, 538 U.S. at 92-93. Nevertheless, criminal restitution also bears the hallmarks of punishment this Court identified in *Mendoza-Martinez*.

History. Restitution ordered as part of a criminal sentence “has historically been regarded as a punishment.” *Martinez-Martinez*, 372 U.S. at 168; *see Dubose*, 146 F.3d at 1145 (“restitution has historically been understood as punishment”); *United States v. Carrara*, 49 F.3d 105, 108 (3d Cir. 1995) (similar). “[R]estitution has been employed as a punitive sanction throughout history”—dating back to ancient societies that would “require an offender to reimburse the victim or his family for any loss caused by the offense.” Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 933 (1984); *see Kleinhaus, supra*, at 2717 (“The Code of Hammurabi and the Bible ... imply that the

⁷ *See, e.g.*, MCL 771.3(b) (listing payment of fines as a condition of probation); *Sheppard v. State of La. Bd. of Parole*, 873 F.2d 761, 764 (5th Cir. 1989) (“the ex post facto clause applies not only to sentence length, but to any punishment, [including] a monetary payment [or] a fine”); *State v. Izzolena*, 609 N.W.2d 541, 549 (Iowa 2000) (“restitution and fines share a common history as sanctions in a criminal case”).

⁸ *See Roman Cath. Bishop of Oakland v. Super. Ct.*, 128 Cal. App. 4th 1155, 1165 (2005) (“No reported decision of any federal or state court has ever held that punitive damages awarded pursuant to a common law tort claim might constitute criminal punishment under the ex post facto clause. Our courts and others have held just the opposite.”).

purpose of restitution was ... also to punish the offender”); *United States v. Fountain*, 768 F.2d 790, 800 (7th Cir. 1985) (“Before there is organized government, criminal misconduct is punished by forcing the criminal to compensate the victim or the victim’s family.”). This practice carried through medieval and common-law English practice into early American law, where restitution was a traditional punishment for larceny and other property crimes. See Kleinhaus, *supra*, at 2717–18 (“In medieval England, a person found guilty of an offense paid monetary compensation both to the injured person and to the feudal lord.”); *Fountain*, 768 F.2d at 800 (noting “an English statute of 1529 that empowered the court, upon finding someone guilty of robbery, to issue a ‘writ of restitution’”) (citing 21 Hen. 8, ch. 11 (1529)); 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, 472–76 (2014) (describing restitution practices in common law England); Lollar, *supra*, at 96–97 & n.5 (explaining that “[r]estitution has long been an available criminal remedy in the United States” and collecting authority).

Scienter. Restitution orders imposed at criminal sentencing necessarily “come[] into play only on a finding of scienter.” *Mendoza-Martinez*, 372 U.S. at 168; see Pet.App.28a (acknowledging that this factor is present).

Underlying Crime. Criminal restitution orders, by definition, apply only to “behavior” that “is already a crime.” *Mendoza-Martinez*, 372 U.S. at 168; see Pet.App.28a (acknowledging that “restitution may

only be ordered after a defendant has been convicted of a criminal offense”).

Disability or Restraint. As even the Michigan Supreme Court recognized, restitution imposes an “affirmative disability or restraint.” *Martinez-Martinez*, 372 U.S. at 168; *see* Pet.App.26a. Failure to adhere to a restitution order (in Michigan and other jurisdictions) can result in criminal penalties, up to and including imprisonment. *See* Pet.App.26a (“[A] defendant may be imprisoned as a result of his failure to comply with the restitution order[.]”); *see also supra* 8, 28–29. And “imprisonment ... is the paradigmatic affirmative disability or restraint.” *Smith*, 538 U.S. at 100.

Traditional Aims of Punishment. Restitution “promote[s] the traditional aims of punishment—retribution and deterrence.” *Mendoza-Martinez*, 372 U.S. at 168. This Court has repeatedly recognized restitution’s retributive goals. *See, e.g., Kelly v. Robinson*, 479 U.S. 36, 49 n.10 & 53 (1986) (restitution “forces the defendant to confront, in concrete terms, the harm his actions have caused,” and allows courts to “impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims”); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005) (a “purpose of awarding restitution” is to “mete out appropriate criminal punishment”); *Paroline*, 572 U.S. at 456 (2014) (restitution “serves punitive purposes”). And “[l]ike a fine, restitution can ... be an effective deterrent.” HARV. L. REV., *supra*, at 939; *see* Pet.App.28a (“imposing restitution on defendants may deter future crimes as an additional negative consequence of conviction”); *Kelly*, 479 U.S. at 49 n.10 (“the direct

relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine”).

Nonpunitive Purpose. To be sure, restitution can be “rationally ... connected” to an “alternative purpose,” *Mendoza-Martinez*, 372 U.S. at 168: compensating victims. In that limited sense, the “alternative purpose” factor—and that factor alone—cuts against treating restitution as punitive. But as this Court observed in a different context, “restitution” in “criminal proceedings” “focus[es] on the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation.” *Kelly*, 479 U.S. at 53. So “restitution orders imposed in such proceedings operate ‘for the benefit of’ the State,” not the benefit of the victim. *Id.* As a result, in the criminal context, restitution’s nonpunitive purpose always takes a backseat to punitive ones. And in many cases victims are never compensated at all, leaving punitive purposes only. *See* Lollar, *supra*, at 142; Dep’t of Justice, Criminal Division, *Restitution Process*, <https://tinyurl.com/3m8pe4a4> (acknowledging that “it is rare” that criminal restitution is fully paid, and “the chance of full recovery is very low”).

Excess in Relation to Alternative Purpose. Finally, restitution orders often “appear[] excessive in relation to th[at] alternative purpose.” *Mendoza-Martinez*, 372 U.S. at 169. Case in point: Michigan’s restitution scheme authorizes courts to order “up to 3 times the amount of restitution otherwise allowed” in some contexts. MCL 780.766(5). Other restitution statutes have similar provisions. *See, e.g.*, Okla. Stat. tit. 22, § 991f(A)(1) (similar); Kan. Stat. Ann. § 22-

3424(d)(1)(A) (similar); Wash. Rev. Code Ann. § 9.94A.750(3) (capping restitution at “double the amount of the offender’s gain or the victim’s loss from the commission of the offense”). Restitution can also be paid to third parties like a state victim’s fund, insurance companies, or even the government. *See, e.g.*, MCL 769.1a(1) (including “governmental entity” within the definition of “victim” eligible for restitution); MCL 780.766(1) (same); MCL 780.766(21) (requiring payment of restitution into the “crime victim’s rights fund” when victim cannot be located); MCL 780.766(8) (providing for payment to insurers). Penalties that *exceed* the amount of the victim’s loss or are paid to third parties are plainly excessive in relation to the goal of compensating victims. *See* Lollar, *supra*, at 138–41 (noting that “the only rational reason to require a defendant to pay restitution to a third party is as a form of punishment”).

Taken together, the *Mendoza-Martinez* factors confirm that criminal restitution is punishment for purposes of the Ex Post Facto Clause.

IV. THIS CASE IS AN IDEAL VEHICLE.

This case is an ideal vehicle for resolving restitution’s status under the Ex Post Facto Clause once and for all. The other “two critical elements” of an Ex Post Facto Clause challenge are clearly present: (1) the amended restitution provisions were applied “to events occurring before [their] enactment,” and (2) the intervening change in law worked to Neilly’s “disadvantage.” *Weaver*, 450 U.S. at 29; *see* Pet.App.15a (“These current restitution statutes are less favorable to defendants than previous versions

that were in effect at the time of defendant’s crimes.”). The decision below hinged on the question “whether restitution is punishment” for Ex Post Facto Clause purposes. Pet.App.17a. And nearly \$15,000—a crippling debt for most people, and especially for Neilly, who is just beginning to rebuild his life after decades in prison—turns on the answer.

The Michigan restitution scheme is also typical of state and federal restitution schemes. Like the MVRA and most state restitution statutes, MCL 780.766 and 769.1a appear in a criminal procedure code, label restitution as a “penalty,” and attach collateral consequences to failure to pay a restitution order. *See supra* at 8, 28–29. And nothing in the Michigan Supreme Court’s ruling turned on any idiosyncrasy of Michigan law. To the contrary, the court relied exclusively on features of MCL 780.766 and 769.1a that are common to the statutes at issue in the cases on both sides of the split. *See* Pet.App.18a–33a. It also invoked federal decisions endorsing the minority rule. Pet.App.18a–19a (citing *Newman*, 144 F.3d at 538; *Arutunoff*, 1 F.3d at 1121).

CONCLUSION

The petition for a writ of certiorari should be granted.

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