No. 24-395

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The State's Brief in Opposition makes the case for this Court's review even clearer. The State acknowledges that the lower courts are split on whether criminal restitution is punishment for purposes of the Ex Post Facto Clause. It does not dispute that the answer to that question is profoundly important. It does little more on the merits than regurgitate the Michigan Supreme Court's flawed reasoning. And it identifies no vehicle problems.

The State's arguments for nonetheless denying certiorari are meritless. The State points out that restitution statutes differ in some respects. But each restitution statute implicated by the split—including the Michigan statutes at issue here—shares the same key elements: presence in a criminal procedure code, provision for restitution during criminal sentencing, and enforcement through criminal sanctions including reincarceration. The State tries to write-off the split as outdated. But that ignores the many recent decisions on this issue, including two in 2024 alone. And the State insists that the word "penalty" does not suggest punishment. But it recognizes that many courts have held exactly that, and it has no answer to the many other indicia of punishment the petition identified.

The lower courts are deeply divided; this issue is important; the decision below is wrong; and this case is a good vehicle. The Court should grant certiorari and clarify the status of criminal restitution under the Ex Post Facto Clause.

ARGUMENT

I. THE STATE ACKNOWLEDGES THE SPLIT.

As the State repeatedly recognizes, this petition implicates a long- and widely acknowledged split among state high courts and federal courts of appeals on whether restitution ordered at a criminal sentencing is punishment for purposes of the Ex Post Clause. *See* Pet. 12–13, 20–21; BIO 9 ("there is indeed a split in both state and federal courts on the question presented"); *id.* at 9–10 ("one can find cases at the state and federal level that have characterized restitution as 'punishment' for purposes of the Ex Post Facto Clause, and others that have determined that it is 'remedial' or 'compensatory' in nature"); *id.* at 10 (acknowledging "differing opinions from one state to another" and "even within the [same] state"); *id.* at 12 (acknowledging "split in authority" and cases "on both sides of the divide"). The State's attempts to downplay the split fall flat.

1. The State first suggests the split is "somewhat attributable" to differences among the underlying restitution schemes. BIO 9. It fails to distinguish even a single case on that basis.

For starters, the State makes no attempt to distinguish the decisions of the Maryland, Nebraska, West Virginia, and Arkansas high courts, or four of the five state intermediate courts. Each of those courts reached the opposite conclusion as the Michigan Supreme Court with respect to a substantively indistinguishable statute. *See* Pet. 11–12. The State also all but ignores the eleven federal courts of appeals that have reached different conclusions with respect to the same federal statute—nine of which

conflict with the decision below. Pet. 13–16. The split is thus clear (and plenty deep), even excluding the two cases with which the State quibbles.

Those quibbles amount to nothing in any event. The State points out that Iowa's restitution statute (unlike Michigan's) includes a mandatory minimum amount of restitution. *See* BIO 8–9. But the Iowa Supreme Court's decision in no way turned on that aspect of the statute. *See State v. Corwin*, 616 N.W.2d 600 (Iowa 2000). And Iowa's statute closely resembles Michigan's in every other relevant respect. *See* Pet. 17–18. As for California, the State relies on a Double Jeopardy Clause case addressing the "victim restitution" part of California's bifurcated restitution scheme. BIO 7 (citing *People v. Harvest*, 84 Cal. App. 4th 641, 647 (2000)). But it concedes that California courts have found the "restitution fines" part of that scheme—which closely resembles Michigan's—to be punishment for purposes of the Ex Post Facto Clause. *See* BIO 7; Pet. 12; *People v. Callejas*, 85 Cal. App. 4th 667, 670 (2000).

2. The State next contends that the analysis in some of the decisions on the long side of the split is "incomplete or poor." BIO 9. In particular, the State complains that "many" courts "relied solely on the use of the word 'penalty'" in concluding that restitution constitutes punishment. BIO 11–12. Far from undermining the existence of the split, that argument underscores it: Michigan's restitution scheme also describes restitution as a "penalty," yet the decision below reasoned that the word "penalty" carried no "exclusive allegiance" to the concept of punishment. Pet.App.22a–24a; *see* Pet. 27. The same is true of other cases on the split's short side. *See, e.g.*, *United*

States v. Newman, 144 F.3d 531, 540 & n.9 (7th Cir. 1998) (rejecting the view that "the use of the word 'penalty' can be dispositive of the issue").

The State also faults the West Virginia Supreme Court for "simply assum[ing]" that criminal restitution is punishment. BIO 11 (citing *State v. Short*, 350 S.E.2d 1 (W. Va. 1986)). But *Short* squarely held that restitution is "part of [the defendant's] punishment" when imposed as a "condition of probation." 350 S.E.2d at 2. It just found no need to tarry on that question because it thought that conclusion "undeniabl[e]." *Id.*

3. Unable to distinguish the split away, the State tries to paint it as stale. It isn't. The State is of course right that some courts answered the Question Presented in "the mid-1980s and the 1990s," BIO 12, in the wake of significant amendments to the federal restitution statutes. *See* Pet. 13 (describing this history). But those early cases—which reached conflicting results—provided no definitive answer. And that seed of division has only continued to grow in the decades since, yielding several new decisions in the last few years and two in 2024 alone. *See* Pet. 11–20 (citing five state and federal cases, including the decision below, decided between 2017 to 2024).

There is every reason to expect that growth to continue. "Restitution plays an increasing role in federal criminal sentencing today." *Hester v. United States*, 586 U.S. 1104, 1105 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). And federal and state legislatures continue to expand restitution schemes in ways that raise retroactivity concerns. *See* Pet. 24–26 (citing recent state and federal statutes). Moreover, as this case illustrates,

retroactivity issues can arise long after a new restitution provision is adopted. Pet. 7–8. The need for this Court's guidance remains as pressing as ever.

4. The State next attempts to attribute the split to "landmark" ex post facto and restitution rulings that postdate some of the early decisions on this issue. BIO 10. But the State fails to explain how any of these purportedly "seminal" rulings would have altered the outcome in any case. BIO 12. Nor could it. Many of the State's cases were not even cited in the decision below and have no discernable bearing on the Question Presented. *See, e.g.*, *Nelson v. Colorado*, 581 U.S. 128 (2017) (addressing procedural due process protections for monetary exactions tied to vacated convictions). Courts have reached conflicting results both before and after those decisions. *Compare, e.g.*, Pet.App.15a (Mich. 2024) ("restitution is not punishment"); *United States v. Ellingburg*, 113 F.4th 839, 842 (8th Cir. 2024) (per curiam) (same), *petition for cert. filed*, No. 24-482 (U.S. Oct. 25, 2024), *with Bellamy v.* State, 525 S.W.3d 166, 170 (Mo. Ct. App. 2017) (restitution is punishment); *United States v. Pleitez*, 876 F.3d 150, 158 (5th Cir. 2017) (same), and *Spielman v. State*, 471 A.2d 730, 734 (Md. 1984) (same). The Michigan Supreme Court resolved this case under the same ex post facto "framework" that has been "well established" since before the split developed. *Smith v. Doe*, 538 U.S. 84, 92–106 (2003) (describing the "well established" framework); *see* Pet.App.16a–17a (applying this "two-step inquiry" "adopted from the United States Supreme Court") (citing, *e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). And, if anything, this Court's precedents

have trended *toward* recognizing restitution as punishment. *See* Pet. 31 (citing cases).

5. Finally, the State complains that the split is too shallow because "*only* six state high courts" have weighed in. BIO 13 (emphasis added). That argument conveniently ignores six intermediate state appellate courts and eleven federal courts of appeals. Pet. 12–16, 18–20. In any event, "six state high courts" hardly merits an "only." *See, e.g.*, *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (1-1 split); *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (finding "reasonable probability" of a cert grant where a state court decision conflicted with decisions from two federal circuit courts and one state supreme court).

II. THE STATE DOES NOT DISPUTE THAT THE QUESTION PRESENTED IS IMPORTANT.

The State offers no response to Mr. Neilly's argument that the Question Presented is exceptionally important. Pet. 21–26. Perhaps that is because the fair notice principles undergirding the Ex Post Facto Clause are central to our constitutional system. *See* Pet. 22. And their applicability to criminal restitution is profoundly important for individuals convicted of crimes. *See* Pet. 22–23. The unexpected financial obligation can be ruinous, and failure to meet it can result in life-altering consequences like "suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 586 U.S. at 1106 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

Mr. Neilly's is a case in point. The decision below imposes nearly $15,000 in *new* criminal restitution

liability on a man who is just beginning to rebuild his life after spending decades in prison under a juvenile sentencing scheme that has since been deemed unconstitutional. *See* Pet.App.35a. That is exactly the kind of result the Ex Post Facto Clause was designed to prevent.

III. THE DECISION BELOW IS WRONG.

On the merits, the State largely rehashes the reasoning of the "*unanimous*[]" decision below. BIO 14–15 (emphasis, of course, in the original). If anything, the court's unanimity makes its decision to join the short side of the split more troubling, not less. And in trying to defend the court's reasoning the State's brief only highlights its flimsiness.

1. Starting with "traditional tools of statutory construction," *Smith*, 538 U.S. at 92, the petition explained that text, structure, and context all demonstrate that Michigan's criminal restitution scheme is punitive. The statutes speak the language of criminal law, reside in the criminal procedure code, provide for restitution to be imposed at sentencing as part of a criminal judgment, and impose criminal consequences up to and including reincarceration. Pet. 27–29.

The State does not even attempt to mount its own textual argument. And it responds to Mr. Neilly's only by dismissing as "without merit" the notion that the word "penalty" suggests punishment. BIO 15–16. This Court, however, has said exactly that. *See, e.g.*, *Kokesh v. SEC*, 581 U.S. 455, 461 (2017) ("A 'penalty' is a 'punishment[.]'" (citation omitted)). And many lower courts have treated "penalty" language as evidence of criminal restitution's punitive nature.

See, e.g., *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998) (reasoning that "expressly describ[ing] restitution as a penalty" supports treating restitution as punishment). Notably, moreover, the State has nothing at all to say about Mr. Neilly's *other* text, structure, and context points. *See* Pet. 28–29.[1]

2. The State also fails to defend the decision below under the *Mendoza-Martinez* framework. It acknowledges that restitution "serves punitive purposes" and "may promote the traditional aims of punishment." BIO 17. It concedes that restitution can be imposed only after a criminal conviction and that failure to pay "may result in a defendant's probation or parole being revoked—and thus, incarceration." BIO 18. It makes no attempt to grapple with restitution's long history as a punitive sanction. *See* Pet. 29–30. And it admits that restitution promotes deterrence, which it dismisses with the truism that "all civil penalties have some deterrent effect." BIO 17–18 (quoting *Hudson v. United States*, 522 U.S. 93, 102 (1997)).

Despite all these markers of punishment, the State insists that criminal restitution should be treated as a civil sanction because restitution *also* serves to compensate victims. BIO 16–17. But the presence of some non-punitive purpose is just one factor of seven. *See* Pet. 5–6. Standing alone, it cannot transform a

[1] The State objects that Mr. Neilly "neglected" to cite a restitution provision in the Michigan Constitution and referred to the "William Van Regenmorter Crime Victim's Rights Act" as just the "Crime Victim's Rights Act." BIO 2; *see* Pet. 7. But it makes no argument that the constitutional provision or the name of the statute's sponsor alters the analysis in any way.

otherwise punitive sanction into a civil one—particularly because criminal restitution orders often exceed any conceivable compensatory purpose. *See* Pet. 32–33.

The State also contends that certain "protections" and "accommodations" for individuals who are unable to pay "minimize" a restitution order's "punitive effect." BIO 18–20. These provisions, however, mirror protections that this Court has required for *criminal* penalties but that are unnecessary for purely civil remedies. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (holding that, before revoking probation for failure to pay criminal fines, the Fourteenth Amendment requires courts to consider "alternate measures of punishment" and inquire into defendant's ability to pay). They thus only underscore the scheme's punitive nature.

IV. THIS IS AN IDEAL VEHICLE.

Finally, this case is an ideal vehicle for resolving restitution's status under the Ex Post Facto Clause. Pet. 33–34.

The State's suggestion that state restitution schemes vary too much for meaningful review is meritless. *See* BIO 7–10, 13. The State identifies no feature of Michigan's restitution scheme that renders it atypical in any relevant respect. *See* Pet. 17–18. Moreover, the State's argument, if taken seriously, would preclude review of virtually any state law raising federal constitutional questions. *But see* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.12 (11th ed. 2019) (collecting cases and noting that decisions holding "state statute[s] valid or invalid under the federal Constitution" are certworthy when

they call into question "the validity of similar statutes in other states"). It is particularly baseless in the ex post facto context, where this Court has repeatedly granted certiorari in cases challenging state statutes that vary in some respects. *See, e.g.*, *Smith*, 538 U.S. at 90, 92 (ex post facto challenge to Alaska's sex offender registration statute where there was "some variation" among state laws on the topic). While the minutiae of restitution schemes may vary, this case cleanly presents the core constitutional question whether restitution imposed as part of a criminal sentence constitutes punishment under the Ex Post Facto Clause. The Court need not give a "one-size-fits-all" answer (*contra* BIO 9) to provide essential guidance on this important and recurring issue.

Contrary to the State's suggestion (BIO 9), a federal case would be a worse vehicle, not a better one. The petition in *United States v. Ellingburg*, No. 24-482 (filed Oct. 25, 2024), does not even purport to address the constitutional status of criminal restitution more broadly. *Ellingburg* Pet. i (presenting the question "[w]hether criminal restitution *under the [MVRA]* is penal for purposes of the Ex Post Facto Clause" (emphasis added)). Moreover, whereas the Eighth Circuit never decided whether applying the MVRA would actually increase the defendant's punishment, *id.* at 17—an unresolved question that implicates another circuit split, *id.* at 16 n.4—the Michigan Supreme Court squarely held (and the State does not dispute) that Michigan's new restitution statutes "are less favorable to defendants than previous versions that were in effect at the time of defendant's crimes." Pet.App.15a; *see* Pet. 33–34. Addressing the broader question in this case will have a greater impact across

the criminal justice system than resolving just one of two splits on one federal statute. *See* Pet. 11–12 (citing thirteen state cases implicating an even larger number of statutes).[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

[2] If the Court grants review in *Ellingburg*, it should also grant review in this case, or else hold this case pending its decision in that one. *See* Shapiro et al., *supra*, at §§ 4.16, 5.9.

February 5, 2025 Respectfully submitted,

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