No. __

In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
ATTICUS W. DEPROSPO
BRETT V. RIES
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

QUESTION PRESENTED

Whether criminal restitution under the Mandatory Victim Restitution Act (MVRA) is penal for purposes of the Ex Post Facto Clause.

PARTIES TO THE PROCEEDING

Petitioner, Holsey Ellingburg, Jr., was the defendant in the Western District of Missouri and the appellant in the Eighth Circuit.

Respondent, United States of America, was the plaintiff in the Western District of Missouri and appellee in the Eighth Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Holsey Ellingburg, Jr.*, No. 23-3129 (8th Cir. Sept. 30, 2024) (denying petition for rehearing en banc).
- *United States v. Holsey Ellingburg, Jr.*, No. 23-3129 (8th Cir. Aug. 23, 2024) (affirming district court's judgment).
- *United States v. Holsey Ellingburg, Jr.*, No. 4:22-cr-00173-RK (W.D. Mo. May 4, 2024) (denying defendant's motion to show cause).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of the Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Cases, cont'd:

Page(s)

Cases, cont'd:

Page(s)

Constitution and statutes:

Page(s)

Other authorities:

Page(s)

Other authorities, cont'd:

In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Holsey Ellingburg, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is available at 113 F.4th 839 (8th Cir. 2024). Pet.App.2a-9a. The court of appeals' order denying rehearing en banc is unreported but available at 2024 WL 4349610. Pet.App.1a. The opinion of the district court is unreported. Pet.App.12a-16a.

JURISDICTION

The court of appeals entered judgment on August 23, 2024, and denied rehearing en banc on September 30, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause of the U.S. Constitution provides in relevant part: "No . . . ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3.

Relevant provisions of the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663 (1994), and the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A(a)(1) (2018), are in the Petition Appendix. Pet.App.32a-41a.

STATEMENT

This case presents an ideal vehicle to resolve a deeply entrenched circuit split on an important constitutional issue regarding criminal law that requires this Court's resolution: whether criminal restitution ordered as part of a defendant's sentence under the MVRA is penal for purposes of the Ex Post Facto Clause.

The government violates the Ex Post Facto Clause if (1) it applies a *penal* law retroactively, and (2) retroactive application of the law disadvantages the affected offender by altering the definition of criminal conduct or increasing the punishment for the crime. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). This case involves the first, threshold step of this test—whether a law is penal. Four circuits—the Third, Fifth, Sixth, and Eleventh Circuits—have held that restitution under the MVRA is penal and that retroactive application of the MVRA thus violates the Ex Post

Facto Clause if it increases a defendant's punishment. More broadly, five additional circuits have determined restitution under the MVRA is penal in other contexts. By contrast, two circuits, the Seventh Circuit and the Eighth Circuit below, hold the opposite. In those circuits, which hold that the MVRA provides only a civil remedy, courts never proceed to the second step of the ex post facto analysis.

The split in authority is entrenched and recognized. Commentators and courts, including the Eighth Circuit below, have highlighted the clear split. The Eighth Circuit's denial of rehearing en banc—even though panel members below suggested that en banc review might be warranted—demonstrates that only this Court can resolve this deeply entrenched split. *See* Pet.App.1a, 7a-8a.

Whether criminal restitution under the MVRA is penal or civil for Ex Post Facto Clause purposes is a question of national importance impacting countless defendants with restitution orders. This case illustrates the pernicious consequences of the split in authority. Petitioner committed the underlying offense in 1995, when the VWPA was in effect. The sentencing court entered a restitution order. Under the VWPA, petitioner was required to make restitution payments for twenty years following his judgment. Under the VWPA, then, petitioner's restitution liability ended in 2016, twenty years from entry of judgment.

But after that twenty-year period expired, the government continues to demand and collect restitution from petitioner, on the theory that the MVRA requires payment of restitution for twenty years from release from imprisonment. And because the MVRA requires application of interest to restitution orders, on the government's view,

petitioner remarkably now owes even more than he did in 2016.

Whether a defendant is protected by the Ex Post Facto Clause should not depend on geography. This Court should grant certiorari now to resolve this unjust conflict.

A. Statutory Background

The VWPA "ensure[s] that the Federal Government does all that is possible within limits of available resources to assist victims . . . without infringing on the constitutional rights of the defendant." VWPA, Pub. L. No. 97-291, § 2(b)(2), 96 Stat. 1248, 1249 (1982). The VWPA permitted, but did not require, courts to order restitution as part of a defendant's criminal sentence and authorized the government to enforce such orders. 18 U.S.C. § 3663(a), (h)(1) (1994). Under the VWPA, a defendant's restitution liability period completely expired twenty years after entry of judgment, regardless of the amount remaining at that time. 18 U.S.C. § 3613(b) (1994).

On April 24, 1996, Congress enacted the MVRA, which amended the VWPA and made restitution mandatory. *See* MVRA, Pub. L. No. 104-132, §§ 201-11, 110 Stat. 1214, 1227-41 (1996); 18 U.S.C. § 3663A(a)(1). Additionally, the MVRA extended a defendant's restitution liability period: whereas the VWPA extinguished a defendant's restitution liability after twenty years from entry of judgment, the MVRA extinguishes a defendant's liability after twenty years from entry of judgment or release from imprisonment, whichever is later. *Compare* 18 U.S.C. § 3613(b) (1994), *with* 18 U.S.C. § 3613(b) (2018). The MVRA also requires collection of interest on restitution. 18 U.S.C. § 3612(f)(1) (2018).

The VWPA and MVRA place criminal restitution in the criminal code along with criminal fines, and restitution is part of a defendant's sentence. *See* 18 U.S.C. §§ 3612 (title), 3663A(c)(1). Criminal restitution can influence the amount of other criminal punishments and can even replace a criminal fine altogether. *See* 18 U.S.C. §§ 3572(b), 3663A(a)(1). Payment of outstanding restitution orders is also a mandatory condition of probation and supervised release. 18 U.S.C. §§ 3563(a)(6)(A) (citing 18 U.S.C. § 3664), 3583(d).

B. Factual and Procedural Background

1. On December 4, 1995, while the relevant provisions of the VWPA were in effect, petitioner Holsey Ellingburg Jr. committed a bank robbery in Georgia. *See* Pet.App.13a. A federal jury convicted petitioner, and, on November 20, 1996, the district court sentenced petitioner to 322 months' imprisonment with 5 years of supervised release. Pet.App.13a. Additionally, the court ordered a $100.00 mandatory assessment and $7,567.25 in restitution. Pet.App.24a. Petitioner started his prison sentence on November 20, 1996, the day of sentencing. *See* Pet.App.19a. While incarcerated, petitioner made thirty-six payments totaling $2,054.04 toward his restitution amount from July 24, 2000, to April 19, 2016, before his twenty-year restitution liability period expired. *See* D. Ct. Dkt. 12-3.

November 20, 2016, marked twenty years after the entry of judgment in petitioner's case—meaning he could no longer be liable for the restitution he owed pursuant to the VWPA. *See* 18 U.S.C. § 3613(b) (1994). Yet the government continued to withdraw money from petitioner's Bureau of Prisons account after this date. *See* Pet.App.3a. Petitioner was released from prison in June 2022 and has tried to resume a normal life in Missouri with his fiancée.

See Pet.App.3a; D. Ct. Dkt. 6. Like many individuals who have recently been released from prison and are trying to reintegrate into society, petitioner has had to put most of his wages toward his monthly bills. D. Ct. Dkt. 6.

The government is still trying to enforce payment on petitioner's restitution order and to charge interest, even though it has been eight years since his restitution liability expired under the VWPA. D. Ct. Dkts. 12, 12-2, 12-3. In January and February 2023, petitioner received text messages from his probation officer stating that he would need to make a $100.00 restitution payment by February 23, 2023, and at the end of every month thereafter, citing the MVRA. C.A. Appellant's Add.20. The government now claims that petitioner still owes $13,476.01 in restitution—almost double the amount of restitution he was originally ordered to pay and well more than double the amount outstanding when the twenty-year liability period expired in 2016. *See* D. Ct. Dkts. 12, 12-2, 12-3.

2. On March 2, 2023, petitioner moved to show cause in the U.S. District Court for the Western District of Missouri why he should have to pay restitution, arguing that his restitution liability expired in November 2016 under the VWPA and that applying the MVRA's extended liability period would violate the Ex Post Facto Clause. Pet.App.12a. Again, an Ex Post Facto Clause violation occurs if (1) a penal law is applied retroactively, and (2) retroactive application of the law disadvantages the affected offender by, as relevant here, increasing the punishment for the crime. *Weaver*, 450 U.S. at 29. The district court denied petitioner's motion, agreeing with some federal circuit courts that have held at the second step of this test that retroactively applying the MVRA's extended liability period does not increase a defendant's punishment. Pet.App.15a. Petitioner appealed.

3. The Eighth Circuit affirmed, but on the ground that the MVRA is not penal at the first step of the test. The court held it was bound by prior Eighth Circuit precedent holding that criminal restitution is a civil remedy. Pet.App.6a-7a. Therefore, it held, retroactively applying the MVRA does not implicate the Ex Post Facto Clause at all. Pet.App.7a. The court, however, recognized that its holding conflicts with the view of a super-majority of other circuits. Pet.App.6a. Further, a two-judge concurrence noted that the Eighth Circuit's current position conflicts with this Court's decision in *Paroline v. United States*, 572 U.S. 434 (2014). Pet.App.7a.

In *Paroline* this Court analyzed the causal nexus between a defendant's offense conduct and a victim's harm required to impose restitution under 18 U.S.C § 2259. In rejecting the government's argument for a "less restrictive causation standard," the Court distinguished criminal restitution from civil tort law. *Paroline*, 572 U.S. at 451, 452-57. The Court explained that restitution "serves punitive purposes," "implicates the prosecutorial powers of government," and "is imposed by the Government at the culmination of a criminal proceeding and requires conviction of an underlying crime." *Id.* at 456-57 (citations and quotation marks omitted).

But because the court of appeals determined it was bound by a post-*Paroline* Eighth Circuit decision, those judges explained that "only the en banc court [could] overturn such [circuit] precedent." Pet.App.6a-7a.

The Eighth Circuit denied rehearing en banc. Pet.App.1a.

REASONS FOR GRANTING THE PETITION

This petition is the ideal vehicle for resolving an intolerable circuit split over whether criminal restitution ordered as a part of a defendant's sentence under the MVRA is penal for Ex Post Facto Clause purposes. Again, an Ex Post Facto Clause violation occurs if (1) a penal law is applied retroactively, and (2) it disadvantages the affected offender. Under the first prong, four circuits have held that criminal restitution under the MVRA, or its predecessor, the VWPA, is a criminal punishment for Ex Post Facto Clause purposes. By contrast, two circuits—the Seventh and Eighth—have held that criminal restitution is a civil remedy in the context of the Ex Post Facto Clause. Only this Court can resolve this clear split on a recurring issue of critical importance that has long been recognized by courts and commentators.

I. The Circuits Are Squarely Divided Over Whether Criminal Restitution Under the MVRA Is Penal for Ex Post Facto Purposes

Four circuits have held that criminal restitution under the MVRA, or the VWPA, its predecessor, is a criminal punishment and part of a defendant's criminal sentence for Ex Post Facto Clause purposes. And five additional circuits have described MVRA restitution as a criminal penalty in other contexts. In direct conflict, two circuits hold that criminal restitution is a civil remedy intended to compensate victims for Ex Post Facto Clause purposes.

1. The Third, Fifth, Sixth, and Eleventh Circuits hold that criminal restitution under the MVRA or the VWPA is penal for Ex Post Facto Clause purposes.

The Third Circuit has explained that restitution, including under the MVRA and the VWPA, is a "criminal penalty" in the Ex Post Facto Clause context. *United States v. Norwood*, 49 F.4th 189, 215-16 (3d. Cir. 2022) (citing *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)); *accord United States v. Edwards*, 162 F.3d 87, 89 (3d Cir. 1998) ("[R]estitution imposed as part of a defendant's sentence is criminal punishment, not a civil sanction . . . .").

The Fifth Circuit also holds that "restitution imposed under the VWPA is punishment for the purpose of the Ex Post Facto Clause." *United States v. Richards,* 204 F.3d 177, 213 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton,* 535 U.S. 625 (2002). "Restitution . . . is a criminal penalty and a component of the defendant's sentence." *United States v. Chaney*, 964 F.2d 437, 451 (5th Cir. 1992); *see also United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004).

The Sixth Circuit likewise holds that "restitution imposed under the VWPA is punishment for the purpose of the Ex Post Facto Clause" and "that this is also true under the MVRA." *United States v. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001) (citing *United States v. Streebing*, 987 F.2d 368, 376 (6th Cir. 1993)). That court has acknowledged the circuit split and expressly rejected "the minority approach" that "restitution orders [under the MVRA] are not punishment for the purpose of Ex Post Facto Clause analysis." *Id.*

The Eleventh Circuit too holds "restitution under the MVRA is a penalty" for purposes of the Ex Post Facto Clause. *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998); *accord United States v. Puentes*, 803 F.3d 597,

609 (11th Cir. 2015) ("To be sure, restitution is penal, rather than compensatory." (internal quotation marks omitted)). Again, the court rejected the minority position because it "is inconsistent with [that] court's position" that "restitution is a criminal penalty carrying with it characteristics of criminal punishment." *Siegel*, 153 F.3d at 1260.[1]

2. Relatedly, as the Eighth Circuit noted, multiple other circuits have recognized that criminal restitution under the MVRA is criminal punishment in other contexts. Pet.App.6a.

The First Circuit determined that restitution ordered under the MVRA is a criminal penalty when holding that the government has standing to enforce a defendant's restitution order. *United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006) (citing *Kelly v. Robinson*, 479 U.S. 36, 52 (1986)).

---

[1] The Second and D.C. Circuits also have signaled that criminal restitution under the MVRA is criminal punishment for Ex Post Facto Clause purposes. *See United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997) (stating that "even if the MVRA was in effect when [the defendant] was convicted, application of the [MVRA's] new amendments . . . would be barred by the *ex post facto* clause of the United States Constitution"); *see also* Pet.App.6a (categorizing the Second Circuit as holding the majority view); *United States v. Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997) (citing *Thompson*, 113 F.3d at 15 n.1) (stating that applying the MVRA retroactively would raise "*ex post facto* concerns"); *United States v. Rezaq*, 134 F.3d 1121, 1141 n.13 (D.C. Cir. 1998) (same); *see also Schulte*, 264 F.3d at 661-62 (categorizing the D.C. Circuit as holding the majority view).

The Second Circuit also recognized that restitution under the MVRA is "a serious component of criminal punishment" when determining that the one-year limitations period for filing a § 2255 motion begins to run upon the entry of the revised restitution order on remand. *See Gonzalez v. United States*, 792 F.3d 232, 236, 236 n.18, 239 (2d Cir. 2015) (citing *Pasquantino*, 544 U.S. at 365).

The Fourth Circuit similarly described the MVRA's goals as "both compensatory and penal" in rejecting an argument that the victim bank's losses were limited to the amount it paid to purchase the at-issue mortgage. *United States v. Ritchie*, 858 F.3d 201, 214 (4th Cir. 2017) (citing *Paroline*, 572 U.S. at 456).

The Ninth Circuit concluded that "restitution is part of a defendant's punishment under the MVRA" in holding that the rule of lenity applies when construing the MVRA. *United States v. Lillard*, 935 F.3d 827, 835 (9th Cir. 2019).

Finally, the Tenth Circuit held that criminal restitution under the MVRA "serves punitive purposes" and is a "part of the criminal sentence" when determining that the one-year limitations period for filing a § 2255 motion begins to run upon the entry of the judgment and deferred restitution order. *United States v. Anthony*, 25 F.4th 792, 797-99, 798 n.5 (10th Cir. 2022) (quoting *Paroline*, 572 U.S. at 456).

3. In direct and stark conflict, the Seventh and Eighth Circuits hold that for ex post facto purposes criminal restitution is a *civil* remedy designed to make victims whole. As discussed, the Eighth Circuit below held that restitution under the MVRA is not a criminal punishment in the ex post facto context, relying on prior Eighth Circuit cases

deciding whether restitution awards require jury factfinding under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet.App.5a-7a (citing *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015), and *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005)). According to the Eighth Circuit, restitution "is designed to make victims whole, not to punish perpetrators, . . . [and] it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality." Pet.App.5a (quoting *Carruth*, 418 F.3d at 904). And the Eighth Circuit denied rehearing en banc below, even though two panel members flagged that the Eighth Circuit's position likely conflicts with this Court's precedent. Pet.App.1a, 7a.

Likewise, the Seventh Circuit holds that a defendant's "ex post facto claim falters" because restitution under the MVRA does not "qualif[y] as a criminal punishment." *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998). As a result, defendants in the Seventh and Eighth Circuits are categorically barred from presenting ex post facto challenges to their criminal restitution orders.

4. Courts and commentators recognize the circuit split on this issue. The Eighth Circuit below acknowledged that a "majority of circuits" have determined that "restitution is a criminal penalty." Pet.App.6a. In 2022, the Tenth Circuit, previously in the minority, switched to the majority view and recognized that "[n]early all the other circuits also view restitution as penal and part of the criminal sentence." *Anthony*, 25 F.4th at 798 n.6 (collecting cases). The Third, Sixth, and Eleventh Circuits have highlighted the split as well and expressly confronted and rejected the minority view. *See Edwards*, 162 F.3d at 89-

92; *Siegel*, 153 F.3d at 1260; *Schulte*, 264 F.3d at 661-62. Nearly every other circuit has recognized the split too.[2]

Academic commentators likewise recognize that the Seventh Circuit (and now the Eighth Circuit) is the "only [] circuit court" where criminal restitution falls on the "civil side of the ledger." Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 111-12, 112 n.67 (2014) (citing *Newman*, 144 F.3d at 540, and *Edwards*, 162 F.3d at 90 n.5).[3] Other commentators continue to note the opposing views on this issue. *See, e.g.*, 24 Francis C. Amendola et al., *C.J.S. Criminal Procedure & Rights of Accused* § 2503 (May 2024 update); 1 John K. Villa, *Banking Crimes: Fraud, Money Laundering & Embezzlement* § 8:29 (2024-2025 ed. Sept. 2024 update).

This Court's intervention is patently necessary to resolve this split in authority.

---

[2] *See United States v. Karam*, 201 F.3d 320, 330 n.13 (4th Cir. 2000); *United States v. Richards*, 204 F.3d 177, 213 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Dawson*, 250 F.3d 1048, 1052 (7th Cir. 2001).

[3] *See also* Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After* Southern Union v. United States*?*, 64 Ala. L. Rev. 803, 832 n.178 (2013); Brian Kleinhaus, Note, *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, 2739-44 (2005); Adam S. Zimmerman, *Restitution*, 87 Geo. L.J. 1750, 1756 & n.2360 (1999); Irene J. Chase, Note, *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, 470-75 (2001).

II. This Case Is an Ideal Vehicle To Decide This Exceptionally Important Question

1. Whether criminal restitution under the MVRA is penal or civil for Ex Post Facto Clause purposes is a question of national importance impacting countless defendants with restitution orders.

Because "[r]estitution is an effective rehabilitative penalty," *Kelly*, 479 U.S. at 49 n.10, criminal restitution "plays an increasing role in federal criminal sentencing today." *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting). "[F]rom 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution." *Id.* (citing GAO, G. Goodwin, Federal Criminal Restitution 16 (GAO-18-203, 2018)). The MVRA particularly places a heavy burden on formerly incarcerated individuals who are trying to reintegrate into society by subjecting them to restitution obligations for a longer period of time, mandatory compounding interest, the looming threat of default, and the collateral consequences that attach to potentially ongoing criminal liability, including re-incarceration. *See Norwood*, 49 F.4th at 196.

These collateral consequences can be "profound." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting). As a practical matter, "an unpaid restitution obligation instantly becomes an added condition of parole or supervised release [under both the VWPA and MVRA]." *Norwood*, 49 F.4th at 219 (citation omitted). Accordingly, unpaid restitution can result in further incarceration or supervised release. *Id.*; *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting). Further, unpaid restitution orders can result in the denial of "the right to vote, to serve on a jury, or to run

for office, along with suspension of one's driver's license, or the right to own a firearm." *Norwood*, 49 F.4th at 219 (citations omitted). As such, the collateral consequences extend beyond just financial impacts—they include the potential loss of liberty and civil rights. *See id.* Criminal restitution thus saddles defendants like petitioner with insurmountable burdens as they seek to reintegrate into society.

In 2016, $100 billion (ninety-one percent) of the $110 billion in outstanding federal restitution debt was uncollectible because offenders had "little ability to pay." GAO, G. Goodwin, Federal Criminal Restitution 25 (GAO-18-203, 2018). This is unsurprising given that federal prisoners are paid only 12 to 40 cents per hour. *Work Programs*, Fed. Bureau of Prisons, https://tinyurl.com/yvcdeh5r. Plus, federal courts are required to determine the amount of restitution "without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A). In reality, then, very few federal defendants can pay off their restitution debt—meaning it is almost certain they will be subject to the "profound" consequences of unpaid restitution debt until their restitution liability expires. *See Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting).

Whether the MVRA may be applied retroactively to individuals whose offense conduct occurred before its enactment has life-changing ramifications. In petitioner's case, for example, the government claims that petitioner now owes more than double the amount of restitution he was initially ordered to pay, nearly 30 years after his offense. And the government claims that petitioner remains on the hook to pay this amount until 2042, exposing him to

the associated collateral consequences of a failure to pay for many years to come.

The MVRA's application should not depend on geography. After his release from incarceration, petitioner settled in Missouri. As a result of the decision below, the courthouse door is closed to any ex post facto challenge by petitioner or any other resident of the Eighth Circuit to retroactive application of any aspect of the MVRA to their restitution orders. By contrast, at least four circuits (and likely more) would entertain those challenges. Indeed, the Third Circuit has ruled for an identically situated defendant, holding that retroactively applying the MVRA's extended liability period violates the Ex Post Facto Clause. *Norwood*, 49 F.4th at 196. If petitioner had settled in the Third Circuit, he would owe nothing in restitution.[4]

2. This case is the perfect vehicle to resolve the split. The case squarely presented the Eighth Circuit with the

---

[4] The circuits are split on the second prong of the Ex Post Facto Clause test on the facts of this case. *See* Pet.App.15a. A pending certiorari petition presents that question. *See* Pet. for a Writ of Certiorari, *Weinlein v. United States*, No. 24-458 (filed Oct. 21, 2024). The Second, Ninth, Tenth, and Eleventh Circuits have held that retroactively applying the MVRA's extended liability period does not violate the Ex Post Facto Clause. *United States v. Weinlein*, 109 F.4th 91, 103-04 (2d Cir. 2024); *United States v. Blackwell*, 852 F.3d 1164, 1166 (9th Cir. 2017) (per curiam); *United States v. McGuire*, 636 F. App'x 445, 447 (10th Cir. 2016); *United States v. Rosello*, 737 F. App'x 907, 909 (11th Cir. 2018) (per curiam). The Third Circuit came to the opposite conclusion. *Norwood*, 49 F.4th at 217-20. In *Weinlein*, the Second Circuit "assume[d] . . . —without deciding—that the MVRA imposes a criminal punishment" before deciding the second step of the ex post facto question. 109 F.4th at 98. This petition presents the threshold question that the Second Circuit merely assumed in *Weinlein*.

question whether criminal restitution under the MVRA is punitive for Ex Post Facto Clause purposes. Despite the recognition of two panel members that the Eighth Circuit is in the minority—and that its current view likely contradicts this Court's precedent—the Eighth Circuit adhered to its precedent and denied rehearing en banc. Pet.App.1a, 6a-7a.

Moreover, the question presented is the only issue on which the Eighth Circuit ruled. The Eighth Circuit did not, and could not, rule on the second step of petitioner's ex post facto challenge—i.e., whether the MVRA increased his punishment—because it viewed criminal restitution as a civil remedy. A favorable ruling on this threshold question would allow petitioner's ex post facto claim to continue on remand.

Not only is this case an ideal vehicle, this is also the right time for this Court to resolve this issue. Nearly all circuits have voiced an opinion on whether restitution under the MVRA is criminal punishment, and the minority view of the Seventh and Eighth Circuits is entrenched. The Seventh Circuit has refused to reconsider its position at least five times, adhering to its position as recently as 2022.[5] By denying rehearing en banc in this case, the Eighth Circuit has definitively signaled an unwillingness

[5] *See, e.g.*, *Lee v. Carr*, 2022 WL 519890, at *2 (7th Cir. Feb. 22, 2022); *United States v. Baldwin*, 414 F.3d 791, 800 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007); *Dawson*, 250 F.3d at 1052; *United States v. Lopez*, 222 F.3d 428, 440 (7th Cir. 2000); *United States v. Bach*, 172 F.3d 520, 522-23 (7th Cir. 1999); *United States v. Szarwark*, 168 F.3d 993, 998 (7th Cir. 1999).

to change its position. Pet.App.1a. Now is the time, and this is the case.

III. The Decision Below Is Wrong

The court of appeals' conclusion below that criminal restitution is a civil remedy, not criminal punishment, flouts the MVRA's text and structure and this Court's precedent.

1. At step one of the Ex Post Facto Clause analysis, *see Weaver*, 450 U.S. at 29, a court asks "whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly *or* impliedly a preference'" for a criminal or civil label. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citation omitted) (emphasis added). This is a question of "statutory construction," *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (citation omitted), one that "consider[s] the statute's text *and* its structure to determine the legislative objective," *Smith v. Doe*, 538 U.S. 84, 92 (2003) (emphasis added). If the text and structure reveal that Congress intended—either expressly or impliedly—to create a criminal punishment, the inquiry is done, and a court need not proceed to consider the factors set out in *Hudson*'s second step. *Smith*, 538 U.S. at 92-93.

The MVRA's text and structure demonstrate that Congress intended criminal restitution to be penal when it passed the MVRA. Most telling, criminal restitution under the MVRA is placed in the criminal code along with criminal fines, is part of a defendant's sentence, is tied to the underlying criminal offenses, and is collected by the Attorney General. *See* 18 U.S.C. §§ 3612 (title), (b)-(c), 3663A(c)(1). Not only does criminal restitution influence

the amount of other criminal punishments, it can actually *replace* a criminal fine altogether. 18 U.S.C. §§ 3572(b), 3663A(a)(1). And restitution is a mandatory condition of probation and supervised release. 18 U.S.C. §§ 3563(a)(6)(A), 3583(d). The determination of the restitution amount, if any, is governed by the Federal Rules of Criminal Procedure and federal criminal law governing sentencing and post-sentence administration. 18 U.S.C. § 3664(c). Put simply, there is nothing "civil" about the administration of criminal restitution under the MVRA.

The MVRA's scheme contains several other indicia that criminal restitution is penal and not purely compensatory. First, the statute states that "[a]n order of restitution . . . does not create any right of action against the United States by the person to whom restitution is ordered to be paid." 18 U.S.C. § 3612(c). Further, both the court and the Attorney General can waive interest on criminal restitution. 18 U.S.C. § 3612(f)(3), (h). The court can even waive restitution entirely in some instances or direct the defendant to make only "nominal periodic payments." 18 U.S.C. §§ 3663A(c)(3), 3664(f)(3)(B).

2. Since 1986, this Court has viewed "[r]estitution [a]s an effective rehabilitative penalty." *Kelly*, 479 U.S. at 49 n.10. As recently as 2014, this Court exhaustively distinguished criminal restitution from civil tort liability. *See Paroline*, 572 U.S. at 453-56. As this Court explained, "despite the differences between restitution and a traditional fine, restitution still implicates 'the prosecutorial powers of government,'" *id.* at 456, and is thus a "criminal punishment," *Pasquantino*, 544 U.S. at 365. Viewing restitution

as a criminal penalty "better effects the need to impress upon defendants that their acts are not irrelevant or victimless." *Paroline*, 572 U.S. at 461. This "direct relation between the harm and the punishment" gives criminal restitution an even stronger deterrent effect "than a traditional fine." *Kelly*, 479 U.S. at 49 n.10. That deterrent effect has long been seen as one of the "traditional aims of punishment." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

Justices of this Court have recently reiterated that federal statutes and this Court's cases both "describe restitution as a 'penalty' imposed on the defendant as part of his criminal sentence." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting). A majority of circuits have similarly understood this Court to hold that restitution is a punishment. *See, e.g.*, *Norwood*, 49 F.4th at 215-16; *United States v. Zukerman*, 897 F.3d 423, 432-33 (2d Cir. 2018); *Anthony*, 25 F.4th at 797-98.

3. The contrary reasoning of the Seventh and Eighth Circuits is incorrect.

The Seventh Circuit incorrectly arrived at its position using the factors this Court enumerated in *Hudson*. *Newman*, 144 F.3d at 540-42. But those factors inform the second step of the *Hudson* analysis. As discussed above, step one of the *Hudson* test requires a court first to analyze the text and structure of a statute to determine whether Congress expressly or impliedly intended to create a criminal punishment. *Supra* p. 18. At that first step, the Seventh Circuit summarily concluded that there was no "express language" in the MVRA that indicated whether criminal

restitution was criminal or civil. *Newman*, 144 F.3d at 540. That analysis overlooked the plethora of textual and structural indicia discussed above indicating that Congress intended to create a criminal penalty.

The Eighth Circuit has summarily reasoned, in cases involving the application of *Apprendi* to restitution orders, that "[r]estitution is designed to make victims whole, not to punish perpetrators; it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality." *Carruth*, 418 F.3d at 904; *Thunderhawk*, 799 F.3d at 1209. It too has overlooked the indicia of congressional intent discussed above. In the decision below, the court simply deemed itself bound to those prior decisions. Pet.App.6a-7a.

* * *

This Court should grant certiorari, hold that criminal restitution under the MVRA is a criminal punishment for Ex Post Facto Clause purposes, and restore uniform ex post facto protections for criminal defendants.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
ATTICUS W. DEPROSPO
BRETT V. RIES
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

OCTOBER 25, 2024