No. _____

In the Supreme Court of the United States

LAURIE WEINLEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Criminal restitution is a court-ordered financial liability imposed upon a convicted offender to compensate victims of a crime for financial losses caused. Restitution is typically ordered as part of a criminal sentence, as it was in this case. It thus "implicates the prosecutorial powers of government" and "serves punitive purposes," in addition to remedial ones. *Paroline* v. *United States*, 572 U.S. 434, 456 (2014).

Restitution comprises two substantive elements: (1) the amount owed and (2) the period of time before which the liability expires. In this case, defendant Laurie Weinlein was ordered to pay around $2.185 million in restitution. Pursuant to the Victim and Witness Protection Act of 1982, which was in effect at the time of her offense conduct, Weinlein was liable to pay that sum during a period of 20 years from the date of final judgment in her criminal case. Congress later enacted the Mandatory Victims Restitution Act, which now provides that "[t]he liability to pay a [sum of restitution] shall terminate the later of 20 years from the entry of judgment or 20 years after the release from imprisonment." 18 U.S.C. § 3613(b). The government seeks to collect restitution from Weinlein under the MVRA's longer liability period.

The lower courts are intractably divided on whether a legislative extension of the expiration date for restitution liability may be applied retroactively, consistent with the Ex Post Facto Clause. The Second, Eighth, and Ninth Circuits and the highest courts of Washington, Kansas, and Michigan have held that it *may* be, although for differing reasons; the Third and Sixth Circuits and the West Virginia Supreme Court have disagreed.

The question presented is whether the retroactive enlargement of a restitution liability period violates the Ex Post Facto Clause.

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INTRODUCTION

This case presents an important and frequently recurring question of law that has divided the lower courts: Does the retroactive enlargement of a criminal restitution liability period violate the Ex Post Facto Clause?

In this case, petitioner Laurie Weinlein was convicted of a financial crime and ordered to pay restitution for acts committed in 1994 and 1995. At the time of Weinlein's offense conduct, the Victim and Witness Protection Act (VWPA) governed restitution liability. Under that law, Weinlein's restitution obligation terminated in 2020. But Congress later enacted the Mandatory Victims Restitution Act (MVRA), enlarging the enforcement period for restitution obligations. Under the revised provision, Weinlein still bears liability for restitution today.

The lower courts are deeply and openly divided over the question of whether it is a violation of the Ex Post Facto Clause to enlarge retroactively the period of time during which restitution is owed. For varying reasons, the federal courts of appeals for the Second, Eighth, and Ninth Circuit and the highest courts of Washington, Kansas, and Michigan have held that retroactive application of restitution laws do *not* violate the Ex Post Facto Clause. By contrast, the Third and Sixth Circuits and the West Virginia Supreme Court have held that they *do*.

Proper resolution of the question presented is a matter of tremendous practical importance. Federal and state legislatures frequently amend their criminal restitution laws, including in ways that may be understood to increase the punishment that restitution imposes. In just the past two years, state lawmakers have enacted 24 such amendments. And criminal defendants frequently challenge restitution orders made under the retroactive application of those amended laws.

This case presents a suitable vehicle for resolving this frequently recurring issue. The question presented was fully preserved at every stage of litigation below, and the Second Circuit's answer to the question is what drove the outcome. Moreover, a live controversy is certain to persist, given that the government will imminently foreclose on the only real property that Weinlein owns and already has caused her injury seeking restitution post-2020.

Finally, the Second Circuit's decision in this case is wrong. Restitution is penal in nature. And the length of time a defendant must pay restitution is a core component of the punishment imposed. When the district court below applied the MVRA's longer restitution liability limitation to Weinlein for conduct governed by the VWPA, it retroactively enlarged the punishment levied upon her. That's a straightforward Ex Post Facto Clause violation, and the Second Circuit was wrong to hold otherwise. Immediate review is therefore warranted.

OPINIONS BELOW

The Second Circuit's opinion (App., *infra*, 1a-27a) is published at 109 F.4th 91. The district court's memorandum decision and order (App., *infra*, 28a-36a) is not reported.

JURISDICTION

The Second Circuit entered its opinion and judgment on July 25, 2024. App., *infra*, 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 9, clause 3 of the United States Constitution provides that "No * * * ex post facto Law shall be passed."

In 1995, 18 U.S.C. § 3613(b) provided that "[a] lien becomes unenforceable and liability to pay a fine expires * * * twenty years after the entry of the judgment."

As since amended by the Mandatory Victims Restitution Act of 1996, that same code provision now provides that "The liability to pay restitution shall terminate on the date that is the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person ordered to pay restitution."

STATEMENT

A. Statutory background

The Victim and Witness Protection Act of 1982 (VWPA) governed restitution obligations for more than a decade. Under the Act, a defendant's liability for restitution terminated 20 years after the entry of judgment. See 18 U.S.C. § 3613(b)(1) (1995).

Congress enacted and President Clinton signed the Mandatory Victims Restitution Act (MVRA) in 1996. Under that statute, which remains in effect today, a defendant's liability for restitution now terminates 20 years after the later of entry of judgment *or* release from prison. See 18 U.S.C. § 3613(b). By its terms, the MVRA is made retroactively applicable to pre-enactment conduct "in cases in which the defendant is convicted on or after the date of [its] enactment," but only "to the extent constitutionally permissible." Pub. L. 104-132, title II, § 211 (Apr. 24, 1996), 110 Stat. 1241.

B. Factual background

Weinlein was convicted of bank fraud and embezzlement in October 1998 (after the MVRA's enactment) for offense conduct taking place between September 1994 and February 1995 (before the MVRA's enactment). See App., *infra*, 2a-4a.

In February 2000, Weinlein was sentenced to 63 months of imprisonment and five years of supervised release. App., *infra*, 4a. And in April 2000, she was ordered to pay $2.185 million in restitution. *Id.* at 4a.

Weinlein made nearly 50 payments while incarcerated. App., *infra*, 4a. Upon release from prison, she made 30 more. *Ibid*. But Weinlein struggled to keep up with her financial obligations, and between 2014 and 2021, the government made no effort to collect. *Id.* at 4a-5a.

On April 11, 2020—20 years after the entry of final judgment against her—Weinlein's restitution liability expired under the VWPA.

But one year and two days after that, the government renewed its collection efforts all the same. It ordered Weinlein to complete a financial statement describing, among other things, her monthly income, bank accounts, and real estate holdings. App., *infra*, 4a-5a. It later subpoenaed those financial records and Weinlein's testimony about them. *Ibid.*

Around two years after Weinlein's restitution liability expired under the VWPA, the government commenced foreclosure proceedings against Weinlein's real property in Corinth, Texas. In another recent case, the government has taken the position that a lien may be foreclosed even after the liability expiration date if the proceedings were commenced before that date. *See* Br. Appellee 9, *United States* v. *Norwood*, No. 20-3478 (3d Cir. Jan. 7, 2022).

C. Procedural background

1. In July 2021, the government issued a subpoena *duces tecum* for Weinlein's financial records and for her testimony in the criminal case in the Northern District of New York. App., *infra*, 5a.

Weinlein moved to quash the subpoenas and terminate her restitution obligation. *Ibid*. As relevant here, she argued that the Ex Post Facto Clause forbade application of the MVRA's extended liability period and that under the VWPA, her period of restitution liability expired on April 11, 2020.

The district court denied the motion to terminate her restitution liability. App., *infra*, 28a-36a. While the court acknowledged that restitution may be "punitive in nature," bringing it within the scope of the Ex Post Facto Clause, it held that the MVRA enacted a mere "procedural change" to the "length of time in which the Government may enforce a restitution order." App., *infra*, 32a. Expanding the duration of Weinlein's liability for restitution without changing the underlying amount levied therefore did not, in the court's view, amount to an increase in the "measure of punishment attached to [the] crime." *Ibid.*

2. The Second Circuit affirmed. App., *infra*, 1a-27a. The court of appeals correctly recognized that, under this Court's precedents, the Ex Post Facto Clause asks whether a change in law "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when [it was] committed." App., *infra*, 12a (quoting *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.)). But it held that retroactive extension of the expiration date for enforcement of a restitution order is merely procedural and does not inflict greater punishment.

On this front, the court analogized an extension of the expiration date for enforcement of a restitution order to an enlargement of the statute of limitations applicable to a crime whose original statute of limitations had not yet expired. Because the federal courts of appeals have held that "'Congress may retrospectively extend a still-open criminal statute of limitations without offending the Constitution,'" the courts held that "Congress may * * * extend the enforcement period of a restitution order, at least before the original enforcement period has expired, without violating the *Ex Post Facto* Clause." App., *infra*, 14a-15a (quoting *Miller* v. *United States*, 77 F.4th 1, 7 (1st Cir. 2023) (SOL case)).

In reaching that conclusion the lower court registered its disagreement with the Third Circuit's contrary holding on the same issue in *United States* v. *Norwood*, 49 F.4th 189 (3d Cir. 2022). App., *infra*, 15a-21a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether the retroactive enlargement of a restitution liability period violates the Ex Post Facto Clause. In conflict with the Third Circuit and the West Virginia Supreme Court, but in agreement with the Eighth and Ninth Circuits and the highest courts of Washington and Kansas, the Second Circuit held that it does not.

That decision should not stand. Aside from deepening a recognized conflict among the lower courts, the decision below is manifestly wrong. To extend the time during which an individual is subject to restitution liability and thus must make payments or face the risk of government seizure of property is plainly to enlarge the punishment imposed. To do so retroactively is thus a violation of the Ex Post Facto Clause. Given how frequently states amend their criminal restitution statutes, this issue arises—and will continue to arise—in a great many cases. And this is an ideal opportunity to resolve the conflict. Further review should be granted.

A. There is a deep and acknowledged conflict over the question presented.

Both federal and state courts are deeply divided over whether the retroactive application of a longer restitution liability period violates the Ex Post Facto Clause. Two circuits and state high courts hold that it does violate the clause because restitution is punitive, and a longer liability period thereby increases one's punishment. Several courts disagree but have arrived at their contrary conclusions via different reasoning—whereas four circuits and state high courts hold that a longer liability period does

not increase an individual's punishment, two circuits and state high courts have concluded that restitution is not punitive at all. The disarray on the question presented is intolerable. Only this Court can bring clarity on this important issue.

1. Two circuits and one state high court disagree with the decision below

Here, the Second Circuit held that retroactive application of the MVRA's longer liability period does not violate the Ex Post Facto Clause.

In square conflict with the Second Circuit, the **Third Circuit** held in *United States* v. *Norwood*, 49 F.4th 189 (2022), that retroactively applying the MVRA's longer restitution liability period violates the Ex Post Facto Clause. The court there began by explaining that "being subject to restitutionary liability is its own form of criminal punishment, independent of the amount a defendant owes, such that extending the duration of a defendant's liability period may itself violate the Ex Post Facto Clause." *Id.* at 218-219.

Because a restitution order "creates a lien * * * in favor of the Government and imposes on the defendant a punitive legal obligation," which "continues until the lien 'is satisfied, remitted, set aside, or is terminated,'" the *Norwood* court held that "any extension of the liability period is a *de facto* increase of a criminal punishment." *Id.* at 219 (citation omitted). The court also noted that the "collateral consequences" that attach to restitution liability, such as being denied the right to vote or own a firearm, the suspension of one's driver's license, and stricter conditions of supervised release, are punitive. *Ibid.*

Thus, the Third Circuit concluded, "retroactive application of the MVRA to Norwood would increase his punishment by subjecting him to additional decades of liability, supervision, and collateral consequences, even if

he ultimately never paid a cent more than he would have under the VWPA." *Id.* at 220.

As the Second Circuit expressly recognized (App., *infra*, 15a), that holding conflicts with the decision below and the decisions of other circuits.

The **West Virginia Supreme Court** reached a similar conclusion as the Third Circuit in *State* v. *Short*, 350 S.E.2d 1 (W. Va. 1986). That case involved West Virginia's Victim Crime Protection Act of 1984, which gave state authorities the power to enforce restitution orders past the expiration of the offender's probation, which previously had been the limit for enforcement of restitution orders in the state.

The court there explained that "[t]he question on this appeal is whether the retroactive application of the Victim Protection Act of 1984 would constitute an ex post facto law in violation of" the federal and state constitutions. *Id.* at 2. The Court held that it would: The new law "gives the State much broader powers, including the ability to enforce an order of restitution beyond the period of probation in the same manner as a civil judgment," which "represents a change in the law" adding an "extra penalty which could not have been imposed under the older law." *Ibid.* "The retroactive application of the Victim Crime Protection Act [thus] increased the punishment" of the offender "and is an ex post facto application of the law and is therefore void." *Ibid.* That is the opposite of the Second Circuit's holding in this case.

The **Sixth Circuit** has aligned with the Third Circuit and West Virginia court. In *United States* v. *Schulte*, 264 F.3d 656 (2001), the Sixth Circuit held that "restitution imposed under the VWPA is punishment for the purpose of the Ex Post Facto Clause." *Id.* at 662. Accordingly, the MVRA categorically may not be applied retroactively. That is, "where an act was committed prior to the effec-

tive date of the MVRA, the retroactive application of the MVRA to that act violates the Ex Post Facto Clause." *Ibid*. That is the exact proposition that the Second Circuit rejected in this case; it held instead that the MVRA may be applied retroactively to Weinlein's pre-enactment conduct. In any one of these courts—the Third or Sixth Circuits or the West Virginia Supreme Court—the outcome in this case would have been different.

2. Two circuits and three state high courts are aligned with the decision below on differing rationales

a. Three courts have aligned with the Second Circuit, reasoning that an enlargement of a restitution liability period does not augment the punishment imposed and thus does not implicate the Ex Post Facto Clause.

The **Ninth Circuit** upheld retroactive application of the MVRA's longer restitution liability period in *United States* v. *Blackwell*, 852 F.3d 1164 (2017). Drawing a distinction between procedural and substantive rights, the court there held that retroactively extending the MVRA's enforcement period is procedural only. *Id.* at 1166. Because the extension "merely increased the time period over which the government could collect" without enlarging the sum of money owed, it did not affect the defendant's "substantive rights." *Id.* Thus, in the Ninth Circuit's view, no Ex Post Facto Clause violation resulted.

The **Washington Supreme Court** employed the same reasoning in *State* v. *Schultz*, 980 P.2d 1265 (1999). There, a criminal defendant had challenged the application of a new sentencing law to his pre-enactment conduct. Like the Ninth Circuit, the Washington Supreme Court held that the amendments had no effect on the defendant's "quantum of punishment" because they did not make him liable for a larger sum of money. *Id.* at 1269. Because a criminal defendant "has no legal right to pay

less than he was ordered to pay" by passage of time, the Washington court reasoned that "his punishment is not increased by extending the length of time the [government] can collect on the restitution order." *Id.*

The **Kansas Supreme Court** followed a similar line of reasoning in *Tonge* v. *Werholtz*, 109 P.3d 1140 (2005). In *Tonge*, an inmate challenged the state's authority to collect an expired disciplinary restitution order. The state invoked a new regulation that permitted it to collect the unpaid disciplinary restitution of a discharged inmate if the inmate was readmitted following a subsequent conviction. *Id.* at 1142. The Kansas court described the regulation as effecting a "change in procedure" only, which had "no effect on the underlying disciplinary infractions or the amount of restitution ordered." *Id.* at 1145. The court held that retroactive application of the regulation was thus permitted under the Ex Post Facto Clause. See also *State* v. *Galligo*, 551 N.W.2d 303, 304 (S.D. 1996) (agreeing with procedure/substance distinction).

b. Two other courts have aligned with the judgment of the Second Circuit, but on the distinct reasoning that restitution is not punitive at all. But see *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005) (the MVRA imposes "criminal punishment"); *Paroline* v. *United States*, 572 U.S. 434, 457 (2014) (criminal restitution serves "penological purposes").

The **Eighth Circuit** held that restitution is not punitive in *United States* v. *Ellingburg*, 113 F.4th 839 (2024). That case, like this one, involved the retroactive application of the MVRA's longer liability period to pre-enactment conduct. Bound by an earlier decision characterizing restitution as "essentially a civil remedy," the Eighth Circuit held that retroactively extending the period of time in which a defendant has to pay restitution does not violate the Ex Post Facto Clause. *Id.* at 841-842.

The **Michigan Supreme Court** concluded the same in *People* v. *Neilly*, No. 165185, 2024 WL 3333179 (Mich. July 8, 2024) (regional reporter publication forthcoming). The court there squarely rejected the notion that restitution is punitive: "The fact that the imposition of restitution imposes some financial pain on defendants to effectuate this goal does not render restitution penal because the focus of the current restitution statutes remains 'on the victims' losses' rather than on further punishment of the defendants." *Id*. at *4. "Given this conclusion," the court held, "the trial court's application of the current restitution statutes on defendant during resentencing does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions because it does not constitute a retroactive increase in punishment." *Id*. at *9.

3. The split is producing troubling disparity in enforcement of the Ex Post Facto Clause

The courts of appeals and state high courts are thus deeply divided on the question presented, and the conflict cannot resolve itself. The results of the split are troubling. Similarly situated defendants in Detroit are being treated differently under the Ex Post Facto Clause depending on whether they are prosecuted in federal court (in the Sixth Circuit) or state court (in the Michigan courts). And similarly situated defendants in the New York City area are being treated differently under the Ex Post Facto Clause depending on whether they are prosecuted on the east bank of the Hudson River (in the Third Circuit) or the west bank (in the Second Circuit). This kind of stark variability in the interpretation and application of the federal Constitution is unseemly and unjust.

The problem is typified by *Mikhlov* v. *Festinger*, 102 N.Y.S.3d 170 (N.Y. App. Div. 2019), a case adjudicated in a New York state courthouse—just two miles from where the Second Circuit decided this case. Samuel

Festinger, like Laurie Weinlein, committed criminal acts in 1995 prior to the enactment of the MVRA. See *Mikhlov*, 102 N.Y.S.3d at 172 (noting Festinger's bank fraud scheme spanned from 1985 to 1995). And Festinger, like Weinlein, was ordered by a federal court to pay criminal restitution totaling around $2 million. *Ibid.* In 2016, one of Festinger's victim creditors, Ilya Mikhlov, attempted to enforce the restitution order in New York state court. *Ibid.* Mikhlov's standing to file suit in state court turned on whether the VWPA or the MVRA governed the restitution order. The state appellate court held the MVRA constitutionally could not apply:

> It is the VWPA rather than the MVRA that should be applied to the claim here. The criminal conduct qualifying for mandatory restitution * * * occurred in 1995, before the effective date of the MVRA * * *. Consequently, there was no conviction in relation to mandatory restitution after the effective date of the MVRA. Thus, the MVRA is not applicable. *Applying the MVRA instead of the VWPA would violate the Constitution's ex post facto prohibition.*

Id. at 173 (emphasis added).

Two defendants, two similar restitution orders, and two cases heard just two miles apart—but only one was allowed to claim the shelter of our nation's first and oldest individual right. Core constitutional rights should not hinge upon which courthouse door a defendant walks through. This Court's intervention is plainly warranted.

B. The question presented is important, and this is a suitable vehicle for review.

The question presented is a matter of tremendous practical importance. Criminal restitution statutes are ubiquitous and often subject to amendment at both the federal and state level. The question presented thus arises

frequently. This case is a clean and uncomplicated vehicle for resolving this critical constitutional issue.

1. The question presented arises with substantial frequency. Over the last 40 years, criminal restitution statutes have become a load-bearing pillar of the American criminal justice system. In what some have termed the "Restitution Revolution," all 50 states[1] enacted criminal

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[1] *See, e.g.*, Ala. Code §§ 15-18-65 to 15-18-78 (2024); Alaska Stat. § 12.55.045 (2024); Ariz. Rev. Stat. Ann. §§ 13-804, 13-806 (2024); Ark. Code Ann. § 5-4-205 (2024); Cal. Penal Code § 1202.4 (West 2024); Colo. Rev. Stat. §§ 18-1.3-601 to 18-1.3-603 (2024); Conn. Gen. Stat. § 53a-28(c) (2024); Del. Code Ann. tit. 11, §§ 4106(d)(2), 9014 (2024); Fla. Stat. § 775.089 (2024); Ga. Code Ann. § 17-14-2 (2024); Haw. Rev. Stat. § 706-646 (2024); Idaho Code § 19-5304 (2024); 730 Ill. Comp. Stat. § 5/5-5-6 (2024); Ind. Code § 35-50-5-3 (2024); Iowa Code § 910 (2024); Kan. Stat. Ann. § 21-6604 (2024); Ky. Rev. Stat. Ann. § 533.030 (West 2024); La. Code Crim. Proc. Ann. art. 883.2 (2024); Me. Stat. tit. 17, §§ 2001-2019 (2024); Md. Code Ann., Crim. Proc. §§ 11-601 to 11-620; Mass. Gen. Laws. ch. 258B, § 3; Mich. Comp. Laws § 769.1a (2024); Minn. Stat. § 611A.04 (2024); Miss. Code Ann. §§ 99-37-3 to 99-37-25 (2024); Mo. Rev. Stat. § 559.105; Mont. Code Ann. § 46-18-241 (2024); Neb. Rev. Stat. §§ 29-2280 to 29-2289 (2024); Nev. Rev. Stat. §§ 176A.430, 176.064 (2023); N.H. Rev. Stat. Ann. §§ 651:62 to 651:67 (2024); N.J. Stat. Ann. §§ 2C:43-3, 2C:44-2 (West 2024); N.M. Stat. Ann. § 31-17-1; N.Y. Penal Law § 60.27(1) (McKinney 2024); N.C. Gen. Stat. § 15A-1340.34 to 15A-1340.39 (2024); N.D. Cent. Code § 12.1-32-08 (2024); Ohio Rev. Code Ann. § 2929.18 (West 2024); Okla. Stat. tit. 22, § 991f (2024); Or. Rev. Stat. §§ 137.106 to 137.109 (2024); 42 Pa. Cons. Stat. § 9721, 18 Pa. Cons. Stat. § 1106 (2024); R.I. Gen. Laws §§ 12-19-32 to 12-19-34 (2024); S.C. Code Ann. §§ 17-25-322 to 17-25-325 (2024); S.D. Codified Laws §§ 23A-28-1 to 23A-28-15 (2024); Tenn. Code Ann. § 40-35-304 (2024); Tex. Code Crim. Pro. Ann. art. 42.037 (West 2024); Utah Code Ann. §§ 77-38b-101 to 77-38b-402 (West 2024); Vt. Stat. Ann. tit. 13, § 7043 (2024); Va. Code Ann. §§ 19.2-305 to 19.2-305.3 (2024); Wash. Rev. Code §§ 9.94A.750, 9.94A.753 (2024); W. Va. Code § 61-11A-4 (2024); Wis. Stat. § 973.20 (2024); Wyo. Stat. Ann. §§ 7-9-101 to 7-9-115 (2024).

restitution statutes. Cortney E. Lollar, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93, 99 (2014). And recent studies suggest that total criminal restitution obligations surpass $100 billion annually in the United States, affecting countless Americans for decades after their convictions.[2] Given the widespread reliance on criminal restitution as a punitive tool at sentencing, restitution statutes are a hotbed of legislative experimentation. For example, 24 states have amended their criminal restitution statutes over the last two years.[3] Over the last six years, 36 states

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[2] A Government Accountability Office report estimated that $110 billion in outstanding federal restitution obligations existed at the end of 2016. *Federal Criminal Restitution: Most Debt is Outstanding and Oversight of Collections Could be Improved*, Government Accountability Office 2 (2018), https://perma.cc/H7H4-D2MV. While comprehensive state data is difficult to obtain, studies commissioned by the Iowa and Minnesota state governments found, for example, that each state imposed approximately $25,000,000 of restitution obligations annually. Office of Justice Programs, *Minnesota Restitution Working Group: Report to the Legislature*, Minn. Dep't of Pub. Safety 16 (2015), https://perma.cc/WM5E-WNKK; Kile Beisner, *SFY 2010 – SFY 2017 Iowa Restitution Paid*, Iowa Dep't of Hum. Rts. 10 (2018), https://perma.cc/W37U-BGTR.

[3] See An Act Relating to Lien Fees, ch. 9, 2022 Ariz. Sess. Laws 57; Protect Arkansas Act, No. 659, 2023 Ark. Acts 3494; California Victims of Crime Act, 2024 Cal. Legis. Serv. Ch. 651 (West); An Act Concerning Enhancing Restitution Services for Victims, ch. 263, 2022 Colo. Sess. Laws; An Act…Relating to Fines, Fees, Costs, Assessments, and Restitution, ch. 441, 83 Del. Laws 1 (2022); An Act Relating to Public Safety, No. 278, 2022 Haw. Sess. Laws 765; An Act to Amend the Indiana Code Concerning State and Local Administration, P.L. 144-2024, 2024 Ind. Acts 2256; An Act Concerning Crimes, Punishment and Criminal Procedure, ch. 92, 2024 Kan. Sess. Laws 1797; An Act Relating to Crimes and Punishments, ch. 174, 2024 Ky. Rev. Stat. & R. Serv. (West); An Act to Require the Consideration of Restitution to Support a Child Whose Parent is Killed During the Commission of a Crime, ch. 277, 2023 Me. Laws 480; An Act Concerning Criminal Procedure—Restitution Orders—

have done so.[4]

Recording Fees, ch. 740, 2023 Md. Legis. Serv. (West); An Act Relating to State Government, ch. 52, 2023 Minn. Laws 810; An Act Requiring Interest to Be Levied on Criminal Restitution and Fines, ch. 509, 2023 Mont. Laws 1491; An Act Relating to the Administration of Justice, L.B. 50, 2023 Neb. Laws 1; An Act Relating to Criminal Justice, ch. 250, 2023 Nev. Legis. Serv. (West); An Act to Amend the Penal Law, ch. 61, 2023 N.Y. Laws 526; An Act Relating to Restitution, ch. 134, 2023 N.D. Laws 572; An Act to Make Changes Relative to the Rights of Crime Victims, H.B. 343, 2022 Ohio Laws 1; An Act Relating to Restitution, ch. 57, 2022 Or. Legis. Serv. (West); An Act to Update Certain Provisions Regarding the Department of Corrections and the Authority of the Secretary of Corrections, 2023 S.D. Sess. Laws ch. 82, 172; An Act to Amend Tennessee Code Annotated, Title 40, Chapter 35, Part 3, Relative to Restitution, ch. 811, 2024 Tenn. Legis. Serv. (West); An Act Authorizing Payment by the Texas Department of Criminal Justice of Certain Amounts Owed By an Inmate, ch. 368, 2023 Tex. Sess. Law Serv. (West); Restitution Revisions, ch. 330, 2024 Utah Legis. Serv. (West); An Act Relating to Legal Financial Obligations, ch. 260, 2022 Wash. Sess. Laws 1863.

[4] See An Act Relating to Restitution, 2018 Alaska Sess. Laws ch. 21; An Act Concerning Victim's Rights and Restitution, P.A. 18-128, 2018 Conn. Acts 756 (Reg. Sess.); An Act Relating to Restitution, ch. 2021-172, 2021 Fla. Laws 2054; An Act Concerning Fees, Fines, and Assessments, P.A. 100-987, 2018 Ill. Laws 6390; An Act Relating to Including Retroactive Applicability Provisions, Ch. 80, 2021 Iowa Acts 162; Sentence and Punishment—Jails—Reorganization, ch. 416, 2018 Miss. Laws 780; An Act Relating to Public Safety, S.B. 53 & 60, 2021 Mo. Laws 825; An Act to Make Base Budget Appropriations for Current Operations of States Agencies, Departments, and Institutions, and for Other Purposes, S.L. 2021-180, 2021 N.C. Sess. Laws 833; An Act Amending Titles 42 (Judiciary and Judicial Procedure) and 61 (Prisons and Parole), No. 115, 2019 Pa. Laws 776; An Act Relating to Miscellaneous Amendments to Alcoholic Beverage and Tobacco Laws, No. 73, 2019 Vt. Acts & Resolves 761; An Act to Amend…the Code of Virginia, Relating to Orders of Restitution; Enforcement, ch. 393, 2021 Va. Acts 1183; An Act Requiring Courts to Order Restitution to Victims of Crime Where It is Economically Practicable, ch. 72, 2019 W. Va. Acts 696.

Thus, unsurprisingly, in addition to the documented federal split over the MVRA specifically, the question presented arises often in state courts across the country, with similarly divergent results. As noted, the state supreme courts of West Virginia, Kansas, and Washington are split on the question presented. The supreme courts of Montana, Pennsylvania, and Hawaii also have confronted the question presented but disposed of the cases without deciding the constitutional question. *State* v. *Thaut*, 103 P.3d 1012 (Mont. 2004) (holding appellant lacked standing); *Buck* v. *Beard*, 879 A.2d 157 (Pa. 2005) (finding appellant failed to properly raise the issue on appeal); *State* v. *Feliciano*, 81 P.3d 1184 (Haw. 2003) (resolving the case on statutory grounds). At the state intermediate appellate court level, the issue recurs with even greater frequency: from Alaska to Arizona to California to Colorado to Hawaii to New York to Utah to Washington,[5] this is a national issue with no clear answer.

Such widespread disagreement on a matter so important as the Ex Post Facto Clause is concerning. The Clause holds a unique position in the Constitution, applying from the outset not only to the federal government, but also to the states. See U.S. Const. art. I, § 9, cl. 3 ("[No] ex post facto Law shall be passed."); U.S. Const. art. I, § 10, cl. 1 ("No State shall * * * pass any * * * ex post facto Law"). But as matters now stand, the Nation's

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[5] *Lapp* v. *State*, 220 P.3d 534 (Alaska Ct. App. 2009); *State* v. *Cota*, 319 P.3d 242 (Ariz. Ct. App. 2014); *State* v. *O'Connor*, 827 P.2d 480 (Ariz. Ct. App. 1992); *State* v. *Weinbrenner*, 795 P.2d 235 (Ariz. Ct. App. 1990); *People* v. *Kwolek*, 48 Cal. Rptr. 2d 325 (Cal. Ct. App. 1995); *People* v. *White*, 64 Cal. Rptr. 2d 245 (Cal. App. 1997); *People* v. *Lowe*, 60.P.3d 753 (Colo. App. 2002); *State* v. *Werner*, 1 P.3d 760 (Haw. Ct. App. 2000); *Mikhlov*, 102 N.Y.S.3d at 170; *State* v. *Dominguez*, 992 P.2d 995 (Utah Ct. App. 1999); *State* v. *Flygare* 356 P.3d 698 (Utah Ct. App. 2015); *State* v. *Serio*, 987 P.2d 133 (Wash. Ct. App. 1999).

citizens are not uniformly secure from ex post facto laws, a "favorite and most formidable instrument of tyranny." The Federalist No. 84 (Alexander Hamilton).

2. This case offers a particularly suitable vehicle for resolving this important constitutional issue.

First, the case allows for a complete presentation of the question as compared with other similar cases.[6] The Second Circuit expressly reached and clearly decided the constitutional issue, and none of the relevant facts are in dispute. Its decision stands in direct conflict with that of the Third Circuit with no relevant factual or legal variations differentiating the two decisions. And because the government has inflicted a range of concrete injuries in the time since the VWPA period expired (indeed, it is on the cusp of foreclosing on Weinlein's property in Texas) there are no concerns that the case will become moot.

Unlike many other similar cases, this case concerns only the extension of the enforcement period for a restitution order. By contrast, other cases (especially those arising based on state criminal restitution statutes) often are infused with related, but analytically distinct issues like the retroactive expansion of the *amount* of restitution owed. The decision below implicates none of these confounding circumstances. The constitutionality of the retroactive expansion of a defendant's restitution liability is presented independently. And to the extent that there is any lingering doubt that restitution constitutes a punitive measure, this case gives the Court an opportunity to authoritatively resolve the point.

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[6] Two other cases, *Ellingburg*, 113 F.4th 839 and *Neilly*, 2024 WL 3333179 at *4, present similar questions, and petitions are expected in each. But the courts in both *Ellingburg* and *Neilly* determined that restitution is a civil remedy rather than a punitive measure, and thus neither reached the question whether an extension of a restitution expiration date violates the Ex Post Facto Clause.

C. Retroactive application of the MVRA's later restitution expiration date violates the Ex Post Facto Clause

The clean presentation of an open circuit split on a constitutional question of great practical importance is reason enough for the Court to grant certiorari. Review is all the more warranted because the Second Circuit's decision is demonstrably wrong.

Application of the MVRA's extended restitutionary liability period to Weinlein, whose conduct of conviction predates the statute's enactment, violates the Ex Post Facto Clause. Since the Founding Era, it has been the rule that a change in the law may not be applied retroactively if it imposes "an additional punishment to that then prescribed" at the time of commission or if, "in relation to the offence or its consequences, [it otherwise] alters the situation of a party to his disadvantage." *Collins* v. *Youngblood*, 497 U.S. 37, 45-46 (1990) (quoting *Duncan* v. *Missouri*, 152 U.S. 377, 382-383 (1894), and discussing *Calder*, 3 U.S. at 390).

This describes retroactive application of the MVRA to Weinlein. Restitution imposed under the MVRA, and its predecessor the VWPA, is an aspect of the punishment imposed by the district court. And the length of time during which that liability extends is part of the punishment—lengthening the period increases the punishment or at least alters Weinlein's situation to her disadvantage. The analogy of the Second Circuit (and others) to statute of limitations periods is misplaced.

1. Both the plain meaning of the MVRA's text and this Court's precedent demonstrate that restitution imposed under § 3663A is penal. The MVRA states that "when sentencing a defendant * * * the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any *other penalty* authorized by law, that the

defendant make restitution." 18 U.S.C. § 3663A(a)(1) (emphasis added). This provision expressly denotes restitution a form of "penalty."

This Court's cases are in accord: Congress designed the MVRA "to mete out appropriate criminal punishment for [unlawful] conduct." *Pasquantino*, 544 U.S. at 365. And as the Court noted of restitution under a parallel statutory scheme, restitution is intended "to impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims." *Paroline*, 572 U.S. at 457. Restitution thus "serves punitive purposes," and "penological purposes" in addition to remedial ones. *Id.* at 456-457. Thus, nine circuits (including the court below) have held that restitution is a penalty.[7]

2. Because restitution is penal, neither the amount nor the duration of liability for restitution may be increased retroactively; to do so "inflicts a greater punishment." *Calder*, 3 U.S. at 390.

"[T]wo critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospec-

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[7] *United States* v. *Tull-Abreu*, 921 F.3d 294, 305 (1st Cir. 2019) ("Restitution is part of a criminal penalty."); *Gonzalez* v. *United States*, 792 F.3d 232, 236, 236 n.18 (2d Cir. 2015) ("Restitution is a serious component of criminal punishment"); *United States* v. *Leahy*, 438 F.3d 328, 335 (3d Cir. 2006); *United States* v. *Grant*, 715 F.3d 552, 554 (4th Cir. 2013); *United States* v. *Adams*, 363 F.3d 363, 365 (5th Cir. 2004) ("Restitution under the MVRA is a criminal penalty"); *United States* v. *Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005) ("restitution constitutes punishment"); *United States* v. *Lillard*, 935 F.3d 827, 835 (9th Cir. 2019) ("restitution is part of a defendant's punishment"); *United States* v. *Anthony*, 25 F.4th 792, 798 (10th Cir. 2022) ("restitution is intended to some degree to inflict criminal punishment"); *United States* v. *Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998) ("restitution is a criminal penalty carrying with it characteristics of criminal punishment"). See also *Ellingburg*, 113 F.4th at 842 (collecting cases but reaching opposite conclusion).

tive, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981). A statute violates the Ex Post Facto Clause "if it is both retrospective and more onerous than the law in effect on the date of the offense." *Id.* at 30-31.

Retroactive imposition of a longer restitution liability period plainly disadvantages the offender vis-à-vis her restitution obligation, falling afoul the Court's ex post facto cases. Under the VWPA, Weinlein no longer would bear any liability to pay restitution today. According to the Second Circuit, she continues to bear liability today because the government is applying the MVRA retroactively. That is a straightforward case of enlarging the punishment to which Weinlein is subject—of altering the situation to her disadvantage. *Collins*, 497 U.S. at 46.

3. The Second Circuit's analogy between restitution liability periods and statutes of limitations is not persuasive. According to the Second Circuit, "the effect on Weinlein of applying the MVRA to extend the enforcement period is analogous to the effect on a criminal defendant of retroactively extending the statute of limitations for a crime that is not yet time-barred." *United States* v. *Weinlein*, 109 F.4th 91, 99-100 (2d Cir. 2024). Since statutes of limitations can be extended retroactively, the court reasoned, restitution liability periods can as well. *Id.* at 100.

"But the MVRA's liability period is not a statute of limitations," and a restitution "liability period and a statute of limitations have very different legal effects." *Norwood*, 49 F.4th at 217. "A statute of limitations creates a [waivable] procedural bar to * * * prosecuting a crime but does not extinguish a plaintiff's underlying rights or the crime itself." *Ibid.* It merely creates an affirmative defense. A restitution liability period, in contrast, "express-

ly extinguishes a defendant's liability once the liability period has run," terminating it altogether. *Id.* at 218.

Moreover, a statute of limitations concerns only the time during which criminal charges can be brought for a crime. It does not change, alter, or augment punishment itself. Restitution, on the other hand, is a form of punishment in its own right, which the MVRA alters. While theoretically a statute of limitations might affect the circumstances under which punishment ultimately can be imposed, it is not itself penal. That is to say, it does not affect the punishment that the offender risks by committing a given crime. Not so of the liability period for a restitution order, which is an element of punishment itself. The analogy between these two concepts is faulty and should not guide ex post facto scrutiny of the MVRA.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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