No. 24-482

IN THE
# Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent.*

*On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution's protections of personal liberty, including its prohibition of ex post facto laws, are fully enforced and therefore has an interest in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In August 1996, a federal jury convicted Holsey Ellingburg of robbing a bank. Pet. App. 2a-3a. In addition to sentencing Mr. Ellingburg to nearly 27 years in prison, the judge ordered him to pay $7,567.25 in restitution. Pet. 5. Even though Mr. Ellingburg made multiple payments on his restitution while in prison, by the time he was released, he owed $13,476.01—almost double the original restitution amount, due to the accumulation of interest. *Id.* at 6. Under the terms of the law in effect at the time of the bank robbery, the restitution order should have expired 20 years after his sentencing, 18 U.S.C. § 3613(b) (1994), but the government continues to attempt to collect payments from him, nearly 30 years after his trial concluded. Pet. 6.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

According to the Government, it can enforce the restitution order for 17 more years—until 2042—because Congress changed the law to extend the term of liability for restitution payments *after* Mr. Ellingburg's crime occurred. BIO 3. The Ex Post Facto Clause of the Constitution plainly prohibits the retroactive application of this new law to Mr. Ellingburg.

As relevant here, the Ex Post Facto Clause provides that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. In prohibiting Congress from passing "ex post facto Law[s]," the Constitution was "incorporat[ing] 'a term of art with an established meaning at the time of the framing of the Constitution.'" *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)). Under that established meaning, an ex post facto law was one that retroactively made an action a crime, made the punishment for a crime more severe, or deprived a criminal defendant of defenses available at the time of their alleged offense. 3 Joseph Story, *Commentaries on the Constitution of the United States* 212 (Boston, Hilliard, Gray & Co. 1833) ("[T]he prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done; or whereby the act, if a crime, is aggravated in enormity, or punishment."); *Calder v. Bull*, 3 U.S. 386, 390-91 (1798) ("Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed[,] . . . [is] manifestly unjust and oppressive.").

According to the court below, this fundamental constitutional protection does not apply here because, in its view, the new restitution law that Congress passed after the offense at issue—the Mandatory Victim Restitution Act (MVRA)—is not criminal, making

the Ex Post Facto Clause inapplicable. Pet. App. 6a-7a. This was wrong.

To determine whether a law is criminal, or penal, and therefore subject to the Ex Post Facto Clause, this Court focuses on "whether the legislature . . . 'indicated either expressly or impliedly a preference for one label or the other.'" *Hudson v. United States*, 522 U.S. 93, 99 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)); *see id.* (determining the applicability of the Clause is, "at least initially, a matter of statutory construction"). And courts may override Congress's intent in only one situation: when the "clearest proof" indicates that although Congress intended to create a civil penalty, the "purpose or effect" of the law is so punitive that the Ex Post Facto Clause nonetheless applies. *Ward*, 448 U.S. at 251 (quotation marks omitted). In other words, congressional intent is generally dispositive: if Congress intended to make a law criminal, the law is subject to the Ex Post Facto Clause. Here, the MVRA is plainly a criminal law, as its text and history make clear.

To start, in passing the MVRA, Congress expressly drew on a long history of restitution being used to sanction criminal conduct. For millennia, restitution has been used as a form of criminal punishment. The first legal codes, from Hammurabi's Code to Saxon laws predating the Norman invasion of England, used restitution to prevent and punish crime and to deter violators from future wrongdoing. Criminal restitution survived the English political upheaval of 1066 and was joined by new punishments—such as fines, banishment, and the death penalty. *See* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 934 (1984). At the time, there was no crisp distinction between criminal

and civil law; most offenses were seen as wrongs against both the victim and society. Clarence Ray Jeffery, *The Development of Crime in Early English Society*, 47 J. Crim. L. Criminology & Police Sci. 647, 655 (1957). After criminal and civil law began to diverge in the 1500s, Henry VIII reaffirmed restitution's availability as an important criminal sanction in 1529. James Barta, Note, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 473 (2014).

Building on this history, the American colonies also used restitution as a criminal punishment. For instance, in Massachusetts, the penalty for theft was either restitution (if the thief could afford it) or public whipping (if they could not). *See, e.g.*, The General Laws and Liberties of Massachusetts Bay, ch. XVII, § 2 (1634), *reprinted in The Charters and General Laws of the Colony and Province of Massachusetts Bay* 41, 57 (Boston, T.B. Wait & Co. 1814) [hereinafter Mass. L. ch. XVII]. Georgia sanctioned illegal gamblers with a combination of restitution and corporal punishment. An Act to Suppress Lotteries, and Prevent Other Excessive and Deceitful Gaming, § 5 (Ga. 1764), *in* Robert Watkins & George Watkins, *1764 Digest of the Laws of Georgia* 95 (1800).

During the Republic's early years, the states and the new federal government continued to use restitution to punish certain crimes, and state courts treated such restitutive sanctions as criminal punishments subject to the Constitution's special guardrails for criminal prosecutions. *See Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from denial of certiorari) (identifying cases in which the Sixth Amendment's protections were held to apply to

restitution orders). That tradition continued into the nineteenth and then twentieth centuries, with criminal restitution littering the states' penal codes.

When, in the 1980s, Congress passed the federal government's first comprehensive criminal restitution law, the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 [hereinafter VWPA] it drew on restitution's history as a penological tool for deterrence and rehabilitation. *See* S. Rep. No. 97-532, at 30 (1982) (restitution has been "an integral part of virtually every formal system of criminal justice, of every culture and every time"). And in 1996, Congress returned to those goals when it passed the MVRA, which made restitution mandatory for many federal crimes and made additional tools available to enforce federal criminal restitution orders. Pub. L. No. 104-132, 110 Stat. 1227. Although the MVRA sought to support crime victims, it also sought to "ensure that the offender realizes the damage caused by the offense," which Congress saw as a "penalogical [sic] benefit[]" of restitution. S. Rep. No. 104-179, at 12, 18 (1995).

The MVRA's text reflects Congress's intent to use restitution to punish and rehabilitate defendants and deter future potential offenders—in other words, to use it as a criminal penalty. The law refers repeatedly to restitution as a "penalty," imposes restitution as an alternative or addition to other criminal punishments, applies the same procedures to "restitution" as to criminal fines, and makes the Federal Rules of *Criminal* Procedure "the only rules applicable" in restitution proceedings, 18 U.S.C. § 3664(c). Similarly, the MVRA's structure treats restitution as a criminal punishment: restitution is located in the criminal code; failure to pay it can lead to incarceration; and the law

prioritizes punishing the wrongdoer over compensating the victim at every turn. Thus, the MVRA, like the restitution laws that preceded it, reflected Congress's effort not to create a civil remedy for crime victims, but instead to "restore restitution to its proper place in criminal law." S. Rep. No. 97-532, at 30.

In sum, the MVRA's text, structure, and history all point to the same conclusion: restitution ordered under the law is "a part of the criminal sentence." S. Rep. No. 104-179, at 20. When the government uses restitution as a punishment for crimes, applying that punishment or its terms retroactively does precisely what the Ex Post Facto Clause prohibits: it increases the punishment for a crime after the crime has already been committed. The judgment of the court below was wrong, and this Court should vacate it.

## ARGUMENT

### I. Restitution Has Been Used as a Criminal Punishment for Millennia.

For at least as long as there have been written legal codes, governments have imposed restitution as a consequence for criminal conduct. Joe Hudson & Bert Galaway, *Restitution and the Justice Model*, *in Justice as Fairness* 52-53 (David Fogel & Joe Hudson eds., 1981). Hammurabi's Code, one of the world's oldest legal codes, featured restitution extensively. Created in approximately 1780 B.C.E., the Code outlined wrongs that constituted crimes, procedures that could lead to a "conviction," and the consequences of such a conviction. For many offenses, the Code ordered restitution. *Hammurabi's Code* § 107 (L.W. King trans., 1915) (c. 1780 B.C.E.) [hereinafter *Hammurabi's Code*] (after a merchant is "convict[ed] . . . before God and the judges" for cheating an agent, he "shall pay six times

the sum to the agent"). And the restitutive provisions of the Code went beyond disgorgement, requiring restitution even when the defendant gained nothing from the crime. *See, e.g.*, *id.* § 114 (requiring a payment to the victim for making an unjustified demand for goods, even if the defendant did not successfully obtain any goods). Indeed, the amount of restitution ranged from compensation for the loss suffered by the victim, *id.* § 113, to multiple times the actual damages, *id.* § 107 (requiring six-times damages). The restitution was thus designed to be both deterrent and punitive, rather than just remunerative.

Over two thousand years later, restitution pervaded the earliest codes of our Anglo-American legal tradition as well. In 893 C.E., King Alfred of England compiled existing English law into the Dooms of Alfred, the first surviving codification of English law. Like the laws of societies that preceded it, English law required restitution as a punishment for various crimes. *See, e.g.*, *Dooms of Alfred* § 9 (Frederick Attenborough trans., 1922) (c. 893 C.E.) [hereinafter *Dooms of Alfred*] (requiring restitution for killing pregnant women and for stealing livestock); *see also* Dorothy Whitelock, *The Beginnings of English Society* 145 (1952) ("By far the commonest penalty was the payment of compensation and fines, the former to the injured party, the latter normally to the king . . . ."). Although English law at the time did not include a crisp distinction between criminal and civil law, *see* Jeffery, *supra*, at 656, "wergeld," the restitution owed to the victim or deceased victim's family, often served as an addition or alternative to other unambiguously penal sanctions such as mutilation, *e.g.*, *Dooms of Alfred* § 6(1) (loss of a hand *or* restitution), or a fine paid to the Crown, *e.g.*, *id.* § 19(1) (fine *and* restitution). And

some provisions of the Dooms required a finding of criminal intent before restitution could be imposed. *E.g.*, *id.* ("If he wishes to clear himself [from paying restitution], [by swearing] he was cognisant of no criminal intention when he made the loan [that was used to fund a crime], he may do so."). Thus, once again, restitution was not only compensatory, but also played a penal role.

After the Norman invasion of England in 1066 and the subsequent development of the common law, restitution took a back seat to fines payable to the Crown, at least for a time. Barta, *supra*, at 472-74. But even then, restitution remained an important criminal sanction as separate civil and criminal bodies of law evolved. The divergence of criminal and civil law began with actions, called appeals of felony, that were "initiated and maintained by an individual," but "had a punitive orientation." *Id.* at 472. Although the primary punishments for a successful conviction included hanging, imprisonment, fines, and seizure of land by the Crown, the victim-prosecutors could seek restitution as punishment in specific cases, such as those for maiming and larceny, if they followed the proper procedures to allege losses. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. Rev. 59, 67-68 (1996) ("Even though courts awarded damages, appeals of mayhem remained prosecutions for felony . . . ."). English courts at the time expressly rejected the argument that the losses sought in those cases were civil damages. *E.g.*, YB 18 Edw. 3, fol. RS 131, Pasch., pl. 31 (1344) (Eng.) (allowing recovery of damages in criminal case over defendant's objection that they should be allowed only in civil cases).

Then, in 1529, King Henry VIII reformed a different type of legal proceeding called the indictment of felony to allow restitution as a punishment. Barta, *supra*, at 473; 21 Hen. VIII c. 11 (Eng.). The indictment of felony resembled, in many ways, a modern prosecution. Although the indictment would initially be brought by the victim, a local prosecutor would take over after that and pursue the case on behalf of the government. Barta, *supra*, at 472. After the 1529 reform, restitution was a common form of punishment for these criminal larceny cases, eventually becoming a default outcome even if the restitution was not correctly pleaded under the increasingly outdated writ system. *Id.* at 473 (citing 3 William Blackstone, *Commentaries* *362-63 ("On a conviction of larceny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII cl. 11. . . . [I]t is now usual for the court, upon conviction of a felon, to order, without any writ, immediate restitution . . . ."). And even outside the formalized restitution provisions available in indictments of felony, restitution would "easily slide over into areas of business which in formal law might be thought of as criminal in nature." Peter King, *Crime and Law in England, 1750-1840*, at 28 (2006) [hereinafter King, *Crime and Law*].[2]

The colonies imported much of the English legal tradition, and restitution was used as a criminal

[2] Not until 1828, well after the Anglo-Saxon legal tradition had been imported to America and 50 years after the American Revolution, did the British Parliament pass the Offenses Against the Person Act, which moved most restitution into the civil tort system. King, *Crime and Law*, *supra*, at 28. The United Kingdom has since reintroduced criminal restitution. Powers of Criminal Courts (Sentencing) Act 2000, c. 6 (UK).

punishment in America both before and immediately after the Founding. For instance, colonial Massachusetts ordered restitution as a punishment for theft and viewed it as interchangeable with other punishments that were unambiguously criminal; offenders who could not pay would instead be sentenced to the stocks or to whipping. Mass. L. ch. XVII, § 2. Similarly, colonial Georgia required both corporal punishment and restitution upon a conviction for fraudulent gambling. An Act to Suppress Lotteries, and Prevent Other Excessive and Deceitful Gaming, *supra*, § 5. These laws remained in force after the American Revolution and even after the ratification of the Constitution in 1789. *Cf.* Nancy King, *The Origins of Felony Jury Sentencing in the United States*, 78 Chi.-Kent L. Rev. 937, 962 n.126 (2003) (multiple Virginia laws carried over from colonial times that impose restitution for crimes such as rape and maiming).

After the ratification of the Constitution, states continued to pass laws that used restitution as a punishment—and that therefore were subject to the constraints on criminal laws imposed by the newly minted Constitution. For example, in 1797, Georgia passed a law that extracted both a fine and restitution from law enforcement officers who used their position for extortion. An Act to Revise and Amend the Judiciary of This State, § 56 (Ga. 1764), *in* Watkins & Watkins, *supra*, 635. In compliance with the procedural requirements outlined in the U.S. Constitution, a "bill of indictment" specifying the accused's wrongdoing was required before a conviction could be entered. *Id.* And although prosecutions for these crimes like these were at times initiated by the victim, the actions were brought in the name of the state. Barta, *supra*, at 474

& n.122 (citing *Salisbury v. State*, 6 Conn. 101, 101 (1826) ("public prosecution" seeking restitution)).

The fledgling federal government also considered restitution to be in its toolbox of criminal punishments. For thefts on federal lands or the high seas, the offender would, "on conviction, be fined not exceeding the four-fold value of the property so stolen, . . . the one moiety to be paid to the owner of the goods, . . . and the other moiety to the informer and prosecutor, and be publicly whipped." Crimes Act of 1790, ch. 9, § 16, 1 Stat. 112, 116. Like ancient criminal codes, these laws used restitution as an alternative or addition to other criminal punishments.

Early courts identified these restitution provisions to be imposing criminal punishments and accordingly required the government to comply with the Constitution's special protections for criminal defendants. For instance, the Massachusetts Supreme Court cautioned that trial courts "could not give judgment for treble damages for any part of the articles stolen [in a criminal larceny prosecution], excepting for [items], the value of which [had been] averred" in an indictment and found by the jury. *Commonwealth v. Smith*, 1 Mass. 245, 246-47 (1804); *see also Apprendi v. New Jersey*, 530 U.S. 466, 502 (2000) (Thomas, J., concurring) (citing *Smith*, 1 Mass. at 245, and other cases as evidence that the value on which restitution is based must be found by a jury).

Similarly, in *Schoonover v. State*, a grand larceny case that came before the Supreme Court of Ohio, the prosecution readily conceded that in cases involving petit larceny, "[t]he jury is required to *return* the value of the property . . . because . . . [t]he statute punishing petit larceny requires restitution." 17 Ohio St. 294,

295 (1867) (statement of counsel). The Supreme Court of Alabama similarly found it uncontroversial that a jury finding of the value of stolen goods would be "important as it relates to the restitution of the property stolen." *Jones v. State*, 13 Ala. 153, 157 (1848); *see also Hester*, 586 U.S. at 1107 (Gorsuch, J., dissenting from denial of certiorari) (citing these and other cases from Alabama, Maine, Massachusetts, and Ohio).

Thus, in the early Republic, restitution pervaded criminal codes and was regarded no differently than other criminal punishments. Indeed, a New York court recognized in 1839 that, at least since Henry VIII's reform of English restitution law 300 years prior, "court[s] might, on the conviction of the felon, award restitution; and the courts are now in the habit of doing so." *Hoffman v. Carow*, 22 Wend. 285, 297 (N.Y. Ct. of Corr. of Errors 1839) (opinion of Sen. Furman).

States have continued to employ restitution as a criminal punishment throughout the intervening two centuries, although its popularity and breadth has waxed and waned in various jurisdictions. Many state laws resemble the English indictment of felony in that they combine restitution, a fine, and some other punishment such as imprisonment. Although many states initially imposed restitution primarily for larceny and similar crimes, *see* Note, *Restitution and the Criminal Law*, 39 Colum. L. Rev. 1185, 1195 n.53 (1939) (collecting state laws from the 1920s and 1930s), restitutive legislation exploded in the 1980s and broadened the scope of restitution. For instance, in 1982, California adopted a state constitutional right to criminal restitution, Proposition 8 (Cal. 1982) (codified at Cal. Const. art. I, § 28), and since 1983 has required courts to impose, "in addition to any other penalty provided

or imposed under the law," both a "restitution fine" (paid to the government) and restitution to the victim for *any* crime of which a person is convicted for which there is an identifiable victim. Cal. Penal Code § 1202.4(a)(3) (West 2025). Similarly, Minnesota passed a law in 1983 that allows victims to request restitution as "part of the disposition of a criminal charge." H.F. No. 218, ch. 262, § 4, 1983 Minn. Laws 1125, 1127. Such an award does not "bar . . . any civil action by the victim or by the state . . . against the offender," *id.*, indicating that it is not merely a civil remedy grafted onto the criminal proceedings, but rather an additional measure intended to punish the defendant.

Thus, in a near-continuous line from the earliest penal codes through modern state laws, restitution has played a role in this country's criminal punishment. Congress drew on that history in passing the MVRA, as the next Section discusses.

## II. The Text, Structure, and History of the MVRA All Indicate that Congress Intended Restitution Under the MVRA to Be Penal.

The MVRA shares characteristics with historic punitive restitution sanctions and represents the culmination of Congress's efforts to ensure that restitution is used as a tool for the punishment for federal crimes. As this Court has recognized, restitution has "penological purposes" that affect how Congress designed the law and how courts apply it. *Paroline v. United States*, 572 U.S. 434, 457 (2014) (discussing the Violent Crime Control and Law Enforcement Act of 1994, a predecessor of the MVRA, which applied a similar restitution scheme to a narrower set of crimes).

**A.** The MVRA's history reveals no ambiguity in Congress's preference for a "criminal" label on the restitution it authorizes: restitution would be "part of the criminal sentence" without which "justice cannot be considered served." S. Rep. No. 104-179, at 20.

The MVRA sits on the shoulders of multiple previous congressional efforts to create a comprehensive federal restitution scheme, beginning with the Victim and Witness Protection Act of 1982. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-70 (1963) (relying on a statute's predecessors to conclude that its "primary function is to serve as an additional penalty" because "[a] study of the history of the predecessor . . . is worth a volume of logic" (quotation marks omitted)). When enacting the VWPA, Congress observed that "[t]he principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time." S. Rep. No. 97-532, at 30. It sought to "*restore* restitution to its proper place in criminal law" as a default punishment for most crimes, rather than as a special punishment for only narrow classes of crimes. *Id.* (emphasis added). The law accordingly "made restitution a separate criminal punishment," 130 Cong. Rec. 31681 (1984) (statement of Sen. Rodino), applicable to broad swaths of the federal criminal code, *see* VWPA, sec. 5, § 3579(a)(1), 96 Stat. at 1253 (providing that, in certain circumstances, the sentencing court "may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense").

The MVRA advanced the aims of these predecessor statutes by demanding that "restitution must be considered a part of the criminal sentence" and that "justice []not be considered served until full restitution is made." S. Rep. No. 104-179, at 20. "[W]hatever *else*

the sanctioning power of society does to punish its wrongdoers," Congress concluded, "it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." *Id.* at 12-13 (emphasis added) (quoting S. Rep. No. 97-532, at 30).

While restitution could help ensure that victims were compensated for their losses, that was not its only purpose: Congress intended restitution to work in concert with other punitive measures to rehabilitate defendants and "ensure that the offender realizes the damage caused by the offense," *id.* at 12, by "impress[ing] upon [them] that their conduct produces concrete and devastating harms for real, identifiable victims," *Paroline*, 572 U.S. at 457. Indeed, Congress acknowledged that "85 percent of all Federal defendants are indigent at the time of sentencing[] and thus are unlikely to be able to pay restitution," but nonetheless decided that the "penalogical [sic] benefits" of even nominal restitution still made passage of the MVRA appropriate. S. Rep. No. 104-179, at 18. In other words, even though "mandatory victim restitution would not lead to any appreciable increase in compensation to victims of crime" and would involve "costs to the justice system," Congress prioritized the perceived punitive effects of restitution and passed the MVRA. *Id.* (quotation marks omitted).

Predictions about the effect of mandatory restitution proved correct. The government spends, on average, far more enforcing restitution orders than the actual amount of restitution collected. Lula Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. 469, 507-08 (2024). If the government aimed only to compensate victims for their losses, it could pay the victims directly for less than it spends to enforce

restitution orders. *See* U.S. Gov't Accountability Off., GAO-18-203, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved* 23 (2018), https://www.gao.gov/products/gao-18-203 (between 2014 and 2016, "DOJ collected at least some of the debt for one-third of debts and did not collect any restitution on the remaining two-thirds").

**B.** The text of the MVRA also "expressly" and "impliedly" reflects Congress's "preference" that restitution be treated as a criminal punishment. *Hudson*, 522 U.S. at 99 (quotation marks omitted). First, the MVRA repeatedly refers to restitution as a "penalty." *See* 18 U.S.C. § 3663A(a)(1) (restitution required "in addition to . . . or in lieu of[] any *other* penalty (emphasis added)); *see also id.* § 3572(d)(1) ("a fine or other monetary penalty, including restitution").

Second, as did innumerable historic laws stretching back to antiquity, the MVRA requires restitution "in addition to . . . or [in the case of a misdemeanor] in lieu of[] any other penalty authorized by law." *Id.* § 3663A(a)(1). While the United States may not today punish crimes by chopping off the hands of thieves, *see Dooms of Alfred* § 6(1), it employs precisely the same structure as criminal codes that did, treating restitution as both fungible with, and complementary to, other punishments.

Third, the MVRA amended existing law to make many provisions governing criminal fines applicable to criminal restitution. MVRA § 207, 110 Stat. at 1237. Thus, the collection procedures, delinquency and default rules, and methods of interest calculation are identical for criminal fines and criminal restitution orders, which are governed by the same sections of the

U.S. Code. *See* 18 U.S.C. § 3612(c), (d), (e), (f). By placing restitution in the same provision and same grammatical position as criminal fines, the MVRA treats restitution as an additional criminal punishment.

Fourth, Congress was explicit that restitution should be treated by the courts, too, as a criminal punishment, not as a civil penalty. Rather than allowing courts and litigants, such as crime victims, to hammer out MVRA restitution orders through Rule 69 of the Federal Rules of Civil Procedure, which governs the procedures for enforcing civil money judgments, Congress required that "the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings" to determine and enforce restitution orders, under the same procedures applicable to fines. *Id.* § 3664(c).

**C.** The MVRA's structure also treats restitution as a criminal penalty.

First, the MVRA sits in the criminal code of the United States, *see* 18 U.S.C. (title), specifically within the Miscellaneous Sentencing Provisions subchapter, *see* 18 U.S.C. ch. 232, pt. II (title). Consequences tied to a criminal conviction and placed inside the criminal code in the list of criminal sentences are, presumably, themselves criminal sentences.

Second, although the MVRA allows the United States government to enforce restitution orders through a civil process, 18 U.S.C. § 3613, even that process can terminate in criminal consequences, such as revocation of probation or even resentencing, *id.* § 3613A(a)(1). Civil debts, by contrast, generally cannot be enforced with imprisonment. Fed. R. Civ. P. 69; *see also* Jonathan Sheldon, Carolyn Carter & Chi Chi Wu, *Collection Actions: Defending Consumers and*

*their Assets* § 17.3.1 (2015) ("Imprisonment for debt is prohibited in all or nearly all the states and the District of Columbia."); 28 U.S.C. § 2007(a) (extending state bans on imprisonment for debt to federal courts).

Third, several MVRA features go beyond compensating the victim, prioritizing punishing the offender instead. That belies the conclusion of the court below that "the primary purpose of [the MVRA] is remedial or compensatory." Pet. App. 6a (quotation marks omitted). For instance, MVRA penalties persist even if the victim has been fully compensated for their loss by another party, such as an insurer. 18 U.S.C. § 3664(f)(1)(B); Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 138 (2014).

The MVRA even allows restitution in some cases in which there are no identifiable victims. For instance, in Controlled Substances Act cases, the MVRA allows restitution "based on the amount of public harm" to be paid to state and federal agencies. 18 U.S.C. § 3663(c)(2)(A). And in some other cases, courts have awarded restitution to entities such as the governments of other countries, *see, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 365 (2005) (restitution to Canadian government permissible under MVRA to "mete out appropriate criminal punishment"), or to state and federal agencies, *see* Cortney E. Lollar, *Punishment Through Restitution*, 34 Fed. Sent. R. 98, 99 & n.36 (2021) (citing *United States v. de la Fuente*, 353 F.3d 766, 768-69, 772-74 (9th Cir. 2003)), which upheld an award of restitution to the United States Postal Service).

When there is an identifiable victim, the MVRA enforces restitution even when doing so provides *no* benefit to that victim. For instance, courts may direct

the defendant to make nominal payments, 18 U.S.C. § 3664(f)(3)(B), which are of little use to the victim, but which Congress nonetheless ordered because of their supposed "penalogical [sic] benefits," S. Rep. No. 104-179, at 18; Hagos, *supra*, at 509. Restitution is mandatory even if the victim disavows any claim to it; the MVRA specifically designates a process for victims to assign their restitution rights away. 18 U.S.C. § 3664(g)(2). In other words, even when the victims have no need or desire to be made whole, the MVRA persists: the defendants must pay, because the purpose of the restitution regime is to punish them for their crimes.

* * *

The question whether the Ex Post Facto Clause applies is, at least initially, a question of "statutory construction," *Hudson*, 522 U.S. at 99, and here the answer to that question is straightforward: Congress passed the MVRA to impose a criminal punishment. The history of the MVRA is replete with evidence that Congress drew on restitution's role as "an integral part of virtually every formal system of criminal justice, of every culture and every time." S. Rep. No. 97-532, at 30. And the text and structure of the MVRA both reflect that history. The MVRA is a criminal law, and therefore the Constitution's Ex Post Facto Clause applies.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated.

Respectfully submitted,

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