

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 NACDL AND FAMM
AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

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INTERESTS OF *AMICI CURIAE*¹

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal-defense lawyers, and the justice system as a whole. NACDL has a particular interest in ensuring that defendants who are subject to the punishment of criminal restitution are afforded the protections due under the Ex Post Facto clause and other constitutional provisions.

FAMM (formerly Families Against Mandatory Minimums) is a national, nonpartisan, nonprofit organization whose primary mission is to promote fair

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

and rational sentencing policies, and to challenge mandatory sentencing laws and the ensuing inflexible and excessive penalties. Founded in 1991 as Families Against Mandatory Minimums, FAMM currently has 75,000 members nationwide. FAMM pursues a broad mission of creating a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing incarcerated persons and their families adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the public and through selected *amicus* filings in important cases. In recognition of the destructive toll that restitution exacts on FAMM's members, their loved ones, and their communities, FAMM submits this brief highlighting the troubling collateral consequences of criminal restitution under the Mandatory Victims Restitution Act (MVRA).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented is whether criminal restitution under the Mandatory Victims Restitution Act (MVRA) is penal for purposes of the Ex Post Facto Clause of the U.S. Constitution. As the majority of the courts of appeals to address the issue and the Department of Justice have recognized, it is. This brief further underscores the correctness of that conclusion by drawing attention to restitution’s significant collateral consequences that penalize individuals in ways that constitute criminal punishment—not mere civil compensation.

To start, this Court has recognized expressly that “[t]he purpose of awarding restitution” under the MVRA is “to mete out appropriate criminal punishment.” *Pasquantino v. United States*, 544 U.S. 349, 365 (2005); *see also Paroline v. United States*, 572 U.S. 434, 456 (2014) (recognizing that restitution from similar federal statute “serves punitive purposes”). And most courts of appeals to have addressed the issue have applied that principle to recognize that restitution orders under the MVRA or MVRA’s predecessor statute, the Victim and Witness Protection Act (VWPA), are penal for the purpose of the Ex Post Facto Clause. *See, e.g., United States v. Norwood*, 49 F.4th 189, 219 n.19 (3d Cir. 2022); *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. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001); *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998).

Courts have also recognized the penal nature of restitution orders by applying the “longstanding

principles of lenity” to the MVRA and VWPA. *Hughey v. United States*, 495 U.S. 411, 422 (1990). An interpretive tool, the rule of lenity applies only with respect to “ambiguities in criminal statutes,” *id.*, or civil statutes with “criminal applications,” *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18, 518 n.10 (1992) (plurality opinion).

For example, in *United States v. Lillard*, 935 F.3d 827, 835–36 (9th Cir. 2019), the Ninth Circuit applied the rule of lenity to resolve the meaning of the phrase “during a period of incarceration” in the defendant’s favor. The court held that the rule of lenity applied because restitution was part of the criminal sentence imposed and, moreover, a person who fails to pay restitution could be subject to resentencing and reincarceration. *Id.* at 835; *see also, e.g., United States v. Gibbens*, 25 F.3d 28 (1st Cir. 1994) (applying rule of lenity to narrowly construe the VWPA). By applying a rule of construction that only concerns statutes with criminal applications, these courts have necessarily concluded that federal restitution orders are punitive.

In addition to the textual and structural reasons for recognizing that MVRA restitution orders are criminal, courts have considered the significant and punitive collateral consequences that follow from them. As the Third Circuit observed, “[t]he punitive nature” of restitution under the MVRA is made “apparent from the collateral consequences that attach to criminal restitutionary liability.” *Norwood*, 49 F.4th at 219.

As described below, these punitive collateral consequences of restitution orders are devastating.

Restitution orders under the MVRA—which courts must fix without considering the defendant’s ability to pay—frequently impose crushing debt and set in motion a series of destabilizing events that further decrease individuals’ ability to pay restitution. Restitution orders, which are based on victims’ losses, often vastly exceed the particular defendant’s gains (if any) from the individual offense. Indigent and young defendants especially have difficulty finding work to pay off restitution orders, particularly where the amount balloons with interest over time.

Failure to pay restitution in turn can lead to reincarceration and forfeiture of a multitude of rights and benefits under both state and federal law. For example, failure to pay restitution can prevent an individual from being able to vote, hold public office, own a firearm, be eligible for federal assistance programs, or even have a driver’s license. Such collateral consequences are completely untethered to a remedial purpose and, in fact, make it *harder* for individuals to pay off restitution.

All these punitive consequences reinforce the same textual and structural conclusion that restitution under the MVRA is a criminal penalty.

ARGUMENT

I. Kateline Lavache: Real-World Case Study of the Punitive Consequences of MVRA Restitution Orders.

Amicus FAMM works with individuals who have experienced the punitive effects of restitution firsthand. Among them is Kateline Lavache, who

lives under a multimillion-dollar restitution order that she will never be able to pay. Her story illustrates how restitution orders result in a lifetime of punishment.

Ms. Lavache's early life was the very image of the self-made American dream. She grew up in a single-parent home in Haiti, immigrated to the United States at age 17, finished high school, and became an American citizen. She obtained both bachelor's and master's degrees in nursing and served in healthcare for decades, including as a trauma nurse in New York City and as a nurse and nurse practitioner in Florida.

In 2018, Ms. Lavache became wrapped up in a Medicare-fraud scheme run by Michael Nolan and Richard Epstein. Nolan and Epstein profited tremendously from their scheme: when they pled guilty in 2020, they admitted to gaining \$2.1 million and \$3 million, respectively. *See* Information at 21, *United States v. Nolan*, No. 8:20-cr-00195 (M.D. Fla. June 17, 2020), Dkt. No. 1; Information at 21, *United States v. Epstein*, No. 8:20-cr-00196 (M.D. Fla. June 17, 2020), Dkt. No. 1. Ms. Lavache, who signed off on physicians' orders in return for kickbacks, received \$123,180, a small fraction of Nolan's and Epstein's gains. *See* Sentencing Memorandum, *United States v. Lavache*, No. 8:22-cr-00184 (M.D. Fla. Mar. 24, 2023), Dkt. No. 59 ("Lavache Sentencing Mem."). Ms. Lavache was indicted and convicted as a co-conspirator. In 2023, a federal judge sentenced her to a year in prison, three years of supervised release, and \$4.26 million in restitution. *See* Judgment, *United States v. Lavache*, No. 8:22-cr-00184 (M.D. Fla. Mar. 29, 2023), Dkt. No. 62 ("Lavache J.").

The court took Ms. Lavache's restitution order to be a significant element of her criminal penalty and adjusted other elements of her sentence accordingly. The government initially requested a sentence of 51–63 months in prison, but Ms. Lavache's counsel asked for a shorter term, in part, to enable her to “pay down the restitution amount,” and the court sentenced her to one year in prison. Lavache Sentencing Mem. at 13–14; Motion for Downward Variance at 7, *United States v. Lavache*, No. 8:22-cr-00184 (M.D. Fla. Mar. 22, 2023), Dkt. No. 57; Lavache J. at 2. Further, even the government recommended waiving an additional criminal fine “given the large amount of restitution,” and the court agreed. Lavache Sentencing Mem. at 13; Lavache J. at 5.

Ms. Lavache has now served her entire prison term and is in the process of completing her supervised release. But she has no hope of ever paying the entirety of her millions in restitution debt. Because she is unable to renew her nursing license until she completes her restitution payments, she can no longer earn income to pay that restitution through the profession that she trained so hard to join. Instead, she has struggled to find employment upon leaving prison, earning at most \$250 per week working variable shifts at a call center. Given these harsh realities, Ms. Lavache will likely spend much of the rest of her life saddled with her restitution obligation.

Ms. Lavache's story is unfortunately not unique. Rather, her case illustrates the collateral consequences typical of restitution orders that many individuals face, further confirming restitution's punitive nature.

II. Restitution Imposes Punitive Financial Burdens That Interfere with Successful Reintegration and Rehabilitation.

Restitution can lead to an array of financial and other consequences beyond the restitution debt itself. These consequences loom over formerly incarcerated persons and prevent them from establishing stable lives. For many individuals, restitution becomes an enduring financial millstone preventing any closure on the punitive consequences of a past conviction.

A. Restitution Orders Often Exceed What Defendants Can Afford.

The MVRA directs courts to issue restitution orders that often exceed what defendants can afford. It does so in two ways.

First, the MVRA provides that courts shall order restitution in the amount of the “victim’s losses” rather than the defendant’s gain. 18 U.S.C. § 3664(f)(1)(A). Accordingly, courts applying the MVRA do not order defendants to simply disgorge money they took from the victim. Instead, they can order defendants to pay amounts far beyond any benefits they received. Ms. Lavache’s case is illustrative. Because of the astronomical amounts of Medicare expenditures attributable to the conspiracy as a whole, the “victim’s losses” (*i.e.*, losses to the government) were calculated at \$4.26 million dollars. Ms. Lavache’s personal gain was just 2.9 percent of that amount, and she immediately disgorged her entire gain by selling two homes that the court ordered her to forfeit separate and apart from the restitution order. *See* Final Order of Forfeiture for

Substitute Assets, *United States v. Lavache*, No. 8:22-cr-00184 (M.D. Fla. Mar. 13, 2023), Dkt. No. 56. The proceeds from selling her real property were insufficient to satisfy the forfeiture order, so she also drew from her 401(k) retirement account. Nor would satisfaction of the forfeiture itself serve to reduce the restitution obligation unless the Attorney General, in her discretion, opted to remit that sum to the victim. *See* 18 U.S.C. § 982(b)(1). Thus, at the time Ms. Lavache was sentenced, she had paid back her personal gains, had virtually no additional assets to speak of, and was still more than \$4 million in debt.

Second, the MVRA expressly directs courts to order restitution “without consideration of the economic circumstances of the defendant.” 18 U.S.C. § 3664(f)(1)(A). The economic circumstances of those convicted of criminal offenses are often bleak.

For most, poor economic conditions predate their conviction. A high percentage of federal defendants are indigent when charged, and even more by the time of conviction—by one recent study, more than three quarters of them. *See* Kelly Roberts Freeman et al., Urb. Inst., *Counsel Type in Federal Criminal Court Cases, 2015–18*, at 12–13 (2022). These indigency statistics are consistent with data about defendants’ employment and earnings before conviction. An economic study by The Brookings Institution found that less than half of incarcerated 18- to 54-year-old men were employed in the three years before their sentence. *See* Adam Looney & Nicholas Turner, Brookings Inst., *Work and Opportunity Before and After Incarceration* 1 (2018). Of those who were employed, median annual earnings were a meager

\$6,250, and only 13 percent made more than \$15,000. *Id.*

Criminal conviction and incarceration add their own host of financial burdens. Defendants who have jobs before their conviction may lose them due to being incarcerated. *See* Alicia Bannon et al., Brennan Ctr. For J., *Criminal Justice Debt: A Barrier to Reentry* 19 (2010) (“Even a short stint in jail can lead to harmful consequences such as job loss”). And while incarcerated people may be able to participate in prison work programs, the pay is minimal: the federal Bureau of Prisons (BOP) pays only \$0.12 to \$0.40 per hour. *See Work Programs*, Federal Bureau of Prisons, https://www.bop.gov/inmatescustody_and_care/work_programs.jsp (last visited June 26, 2025).

Further, money earned through prison employment is often directed to pay restitution. Such payment may be court-ordered, as it was for Ms. Lavache, who was ordered to pay, at a minimum, either (a) “\$25 quarterly” if she had a job outside of the BOP’s somewhat higher-paying UNICOR job-training program, or (b) half her monthly earnings if she had a UNICOR job while incarcerated. Lavache J. at 6. Payment may also be required through the BOP’s “Inmate Federal Responsibility Program” (IFRP). *See* 28 C.F.R. §§ 545.10, 545.11(a)(2). Although the IFRP is framed as a voluntary program, the consequences for not participating are severe. BOP regulations warn those who choose not to participate that it will withhold pay, furlough, and release gratuity; relegate them to “the lowest housing status”; restrict their commissary spending; not allow them to participate in the UNICOR job-training

program or other work details; not place them in a halfway house; not give them an incentive for participating in a residential drug-treatment program; and, for those subject to parole, report their “failure to participate” to the Parole Board. *Id.* § 545.11(d). Incarcerated persons who owe restitution face a choice between two unattractive options: make negligible payments toward restitution or incur a litany of other punitive consequences that will likely make it even more difficult to pay restitution in the future.

In most cases, individuals’ inability to make significant payments of restitution continues after they are released. People recently released from incarceration often have trouble finding and maintaining employment. About 94 percent of employers run a criminal-background check on job applicants, and a criminal record cuts an applicant’s chances of receiving a callback or job offer in half. See Caroline Cohn et al., Nat’l Consumer L. Ctr. & Collateral Consequences Res. Ctr., *The High Costs of a Fresh Start: A State-by-State Analysis of Court Debt as a Bar to Record Clearing* 2 (2022). As a result, as many as 60 percent of formerly incarcerated people are unemployed a year after their release. See 42 U.S.C. § 17501(b)(18) (Congress’ findings in connection with the Second Chance Act). Even for those who do have jobs, median annual earnings one year after incarceration are only about \$10,000, and only 20 percent make more than \$15,000. Looney & Turner at 1. The predictable result of the lack of employment opportunities is that “many defendants ... may never be able to pay off their restitution.” *Norwood*, 49 F.4th at 220. In a 2018 report, the

Government Accountability Office found that of \$110 billion in outstanding restitution, fully 91 percent is uncollectable because of individuals' inability to pay. *See* U.S. Gov't Accountability Off., GAO-18-203, *Federal Criminal Restitution: Most Debt is Outstanding and Oversight of Collections Could be Improved* 25 (2018).

Ms. Lavache is again an example of how restitution orders are often wildly out of proportion with defendants' ability to pay. Even though Ms. Lavache, unlike most federal criminal defendants, was gainfully employed before her conviction, she ultimately lost her license to work as a nurse practitioner, and with it, her entire livelihood. The minimal amount that she now earns when she is even able to secure work is a tiny fraction of her remaining restitution debt. Her \$4.26 million restitution order is thus far beyond what she can ever hope to pay. Indeed, it is multiple times what the median American earns in an entire lifetime. *See* U.S. Soc. Sec. Admin., *Education and Lifetime Earnings* (Nov. 2015), <https://www.ssa.gov/policy/docs/research-summaries/education-earnings.html>. When Ms. Lavache was sentenced in March 2023, she received one year of incarceration, three years of supervised release, and relinquished all her wrongful gains. But she was also condemned to decades of oppressive debt.

B. The Government May Seize Money and Property When an Individual Cannot Pay Restitution, Further Impeding Ability to Pay.

Additional financial penalties emerge when individuals cannot keep up with restitution payments. By operation of law, restitution orders under the MVRA place a lien on the defendant's assets. *See* 18 U.S.C. § 3613(c). Once in place, that restitution lien is broadly enforceable against “all property or rights to property of” the defendant, with minimal exceptions. *Id.* § 3613(a). This language is intentionally broad, echoing that of the Internal Revenue Code's provisions for collection of delinquent tax obligations. *Cf. United States v. Nat'l Bank of Com.*, 472 U.S. 713, 719–20 (1985) (interpreting identical language and stating that “[t]he statutory language ‘all property and rights to property,’ ... is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have” (internal citations omitted)). In other words, under an MVRA restitution order, “the government steps into the debtor's shoes and acquires whatever rights the debtor herself possesses.” *United States v. Chittenden*, 2025 WL 786043, at *2 (4th Cir. Mar. 12, 2025) (per curiam) (cleaned up) (quoting *United States v. Frank*, 8 F.4th 320, 331 (4th Cir. 2021)).

The MVRA authorizes the government to enforce that broad right to the property of the individual subject to a restitution order in multiple ways. Enforcement options include typical mechanisms for recovering criminal fines, including the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C.

§§ 3001–3308, as well as “all other available and reasonable means,” 18 U.S.C. § 3664(m)(1)(A). For example, the government can garnish wages. *See United States v. Elashi*, 789 F.3d 547, 549 (5th Cir. 2015); *United States v. Mays*, 430 F.3d 963, 966 (9th Cir. 2005). It can reach into retirement accounts. *See, e.g., United States v. Shkreli*, 47 F.4th 65, 68 (2d Cir. 2022); *Frank*, 8 F.4th at 325. It also can seize and sell physical assets. *See, e.g., United States v. Parker*, 927 F.3d 374, 380 (5th Cir. 2019). And to the extent that the Department of Justice is not aware of a defendant’s assets, it encourages the public to report “information about a defendant’s assets, income, and employment” to aid enforcement efforts. *Restitution Process*, Criminal Division, U.S. Dep’t of J., <https://www.justice.gov/criminal/criminal-vns/restitution-process> (last visited June 26, 2025).

The MVRA thus threatens individuals with punitive asset seizures long after the other elements of their sentence are complete. Such seizures—painful collateral penalties in their own right—also contribute to the cumulative destabilizing effect of restitution orders. As detailed above, many individuals recently released from incarceration already stand on tenuous financial ground. Government seizures of money and property further weaken that financial footing, preventing the financial security necessary to pay restitution and build a successful life after reentry. *See generally* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1780 (2010) (explaining how garnishing wages to pay restitution

and other court-ordered debt detracts from ability to build wealth).

Poverty is often already a driving force in an individual's original conviction. And after completing a term of imprisonment, the collateral consequences of restitution can further impede reintegration, by, for example, making it more difficult to find a job, secure stable housing, provide for basic life necessities, and build wealth. All these factors not only make paying restitution significantly more difficult but can also increase the likelihood that individuals reoffend. *See, e.g.,* Michael Ostermann et al., *Reframing the Debate on Legal Financial Obligations and Crime: How Accruing Monetary Sanctions Impacts Recidivism*, 62 CRIMINOLOGY 331, 358–59 (2024). Recidivism driven by economic pressures and reintegration challenges can lead to a cycle of poverty and incarceration, making it even more difficult for individuals to pay restitution orders and less likely that victims will ultimately be compensated.

C. Restitution Is Especially Punitive and Destabilizing for Young People and Defendants' Families.

Restitution can be particularly destabilizing for young defendants. Young people who are required to pay restitution often have even lower earning potential and less savings than older defendants. *See* Lindsey E. Smith et al., Juv. L. Ctr., *Reimagining Restitution: New Approaches to Support Youth and Communities* 13 (2022). To pay restitution, young people may have to forgo educational opportunities. *See, e.g.,* Harris et al. at 1780 (telling story of a young person who “describe[d] the tension between his

desire to further his education and the economic constraints his [court-ordered] payments represented”). In one study by the Juvenile Law Center, 76 percent of survey respondents stated that difficulty paying restitution led to problems for young people that included “risk of more court visits,” “deeper contact with the juvenile justice system,” and “family stress” and emotional “strain.” Jessica Feierman et al., Juv. L. Ctr, *Debtors’ Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* 21 (2016). Unfortunately, these consequences of restitution often make young people more likely to continue criminal activity in the future. *See id.*

Families of those who owe restitution also suffer, especially when funds necessary for food, shelter, medicine, and other needs are garnished to pay restitution orders. This too is true for Ms. Lavache. Her daughter, a member of the United States Navy, has paid the monthly court-ordered minimum restitution payments that her mother has struggled with due to her unstable—or non-existent—employment. Ms. Lavache has been permitted to travel to see her daughter only once since her release. Even then, Ms. Lavache was warned that, if she had the funds to travel, she needed to devote them to paying her restitution. These financial and psychological burdens on Ms. Lavache and her family from restitution debt will outlast her supervised release.

A study of Alabama residents burdened with various kinds of court-ordered debt further documents the pressures that families face when a family member owes restitution. It found that 82.9 percent

of respondents reported forgoing paying for rent, food, medical bills, car payments, and child support so they could keep up with criminal debt payments. *See* Ala. Appleseed Ctr. for L. & Just., *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama's Racial Wealth Divide* 4, 31 (2018); *see also* Harris et al. at 1778–79 (collecting stories of individuals who have had to forgo necessities to pay legal debt, including restitution).

This lack of stability can, in turn, further diminish the earning power necessary to pay restitution. “[P]erversely, because a record significantly impairs economic opportunity, having an open record makes it harder to pay off fines and fees,” as well as restitution. Cohn et al. at 1 (2018). In this way, the consequences of restitution can create a devastating downward spiral.

D. Unpaid Restitution Only Grows, Often Resulting in Insurmountable Debt.

Because the MVRA provides that defendants “shall pay interest on any fine or restitution of more than \$2,500,” unless expressly waived by the court at the time of sentencing, to be compounded daily beginning on the day restitution is ordered, at the rate of the weekly average 1-year constant maturity Treasury yield, the balance of unpaid restitution is an ever-growing financial burden. 18 U.S.C. § 3612(f). That rate is currently just under 4 percent. *See Selected Interest Rates (Daily) – H.15*, Board of Governors of the Federal Reserve System (June 26, 2025), <https://www.federalreserve.gov/releases/h15/>.

At that rate, restitution debt can quickly snowball to even more insurmountable sums.

That is what happened to Petitioner. When Mr. Ellingburg was sentenced under the VWPA in 1995, the district court ordered him to pay \$7,567.25 in restitution. Pet. App. 24a. During the twenty-five years that he was incarcerated, he made \$2,154.04 in restitution payments. D. Ct. Dkt. 12-3, at 4. But now—nearly thirty years after he was sentenced—the government claims that he owes \$13,476.01 in restitution, or almost double the original amount. *Id.* at 5. For a person like Mr. Ellingburg, who has struggled to pay off the initial amount for three decades, paying that amount plus interest is likely impossible.

* * *

For all the reasons above, many individuals with restitution orders struggle to pay them off. In light of these challenges, more than 90 percent of restitution goes unpaid. *See* U.S. Gov’t Accountability Off. at 25. That unpaid debt is an enduring burden for those ordered to pay it. But it also means that *victims* do not receive compensation. Indeed, restitution orders can create a second loss for victims by raising hopes of compensation that are dashed when the order goes unpaid. *See* Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1698 (2009). Thus, restitution orders often succeed only in punishing the defendant without compensating the victim—a result that makes it even more apparent that the driving purpose of restitution is to punish, not to compensate.

III. Failure to Pay Restitution Leads to the Loss of Fundamental Rights and Government Benefits Untethered from Making Victims Whole.

Individuals who fail to pay restitution ordered under the MVRA risk losing, among other things, physical liberty through reincarceration, the right to vote, and the right to self-defense through possession of a firearm. Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 124, 127, 129 (2014). These resultant penalties strip away the very same rights individuals lose upon conviction and are equivalent to penalties faced by those who fail to pay criminal fines. Indeed, state laws premised on failure to pay court-imposed financial liabilities often do not differentiate between restitution and other court debts. This dynamic further distinguishes criminal restitution from other forms of victim compensation, as an individual who owes a tort judgment would not face these same punitive consequences.

Moreover, the collateral loss of these benefits and rights serves no compensatory purpose for victims. Conditions on public benefits in particular are unlikely to facilitate the payment of restitution. *See infra* Section III.C. Losing benefits like federal food aid and driver's or occupational licenses, which enhance economic stability, only impedes successful reentry after incarceration and reduces the likelihood that restitution will be paid. The message of these collateral consequences is clear: the offender is subject to punishment, even though it hamstring the offender's ability to compensate victims.

A. Failing to Pay Restitution Can Lead to Reincarceration.

In the federal justice system, payment of outstanding restitution is a mandatory condition of probation and supervised release. 18 U.S.C. §§ 3563(a)(6)(A) (citing *id.* § 3664), 3583(d). Likewise, state justice systems often include restitution payments as a condition of sentences, probation, or parole. Violations of these conditions can lead to a range of consequences culminating in the most prototypical criminal penalty: incarceration.

If an individual cannot pay some or all of their restitution order, a federal court may consider all relevant circumstances, including willfulness and finances, *id.* § 3613A(a)(2), when choosing among a host of responsive consequences:

- revoking probation or a term of supervised release;
- modifying the terms or conditions of probation or a term of supervised release;
- resentencing a defendant;
- holding the defendant in contempt of court;
- entering a restraining order or injunction;
- ordering the sale of property of the defendant;
- entering or adjusting a payment schedule; or

- taking any other action necessary to obtain compliance.

Id. § 3613A(a)(1).

As particularly relevant to the question of whether restitution under the MVRA is penal, the menu of consequences from which a district court can choose includes several circumstances under which an individual can be ordered to return to prison. For example, the MVRA allows a court to reimpose a prison sentence on a defendant who “knowingly fails to pay” an overdue restitution order in the same manner as an overdue fine. *Id.* § 3614(a).² Because fines are a traditional criminal remedy, employing a similar enforcement mechanism for non-payment of restitution further underscores that restitution is penal in nature.

The MVRA also permits reincarceration through the revocation of supervised release. *Id.* § 3613A(a)(1). Although courts must determine that failure to pay was willful before revoking probation or supervised release, *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), studies and anecdotal evidence suggest that criminal defendants are increasingly facing these consequences for failure to pay, *see, e.g.*, Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prison*, 75 MD. L. REV. 486, 512–13 (2016); Lollar at 128–29. This increase may reflect courts’ significant discretion in determining what

² *Amici* do not concede the constitutionality of this provision under, *inter alia*, the Due Process and Double Jeopardy Clauses, but its existence is a strong indication of congressional intent.

constitutes a “willful” failure to pay. *See, e.g., United States v. Montgomery*, 532 F.3d 811, 814–15 (8th Cir. 2008) (finding failure to pay willful despite repeated attempts to obtain employment, partial restitution payments, and testimony regarding impact of defendant’s mental health issues on employability).

Even the threat that courts will reinstate prison time has harmful psychological and economic effects that perpetuate the punitive power of a criminal sentence. Matthew Charles—who is currently FAMM’s State Legislative Affairs Manager, and who was himself sentenced to incarceration and restitution for nonviolent drug offenses in 1996—has attested to those effects. *See United States v. Charles*, No. 3:96-cr-00051 (M.D. Tenn.). By 2016, Mr. Charles had completed all elements of his sentence: he had served twenty years in prison, completed nine months in a halfway house, and paid the entirety of his approximately \$1,050.00 restitution. But the court did not have a record of the payments Mr. Charles made. About a month after he had been released from the halfway house, his parole officer told him that if he did not finish paying his restitution, “she would have to write it up as a supervised release violation and reincarcerate [him].” Mr. Charles was shocked. He had worked hard to pay off his restitution while in custody and could not fathom returning to prison over restitution that he had already paid.

Luckily for Mr. Charles, his parole officer believed him. She investigated the matter and saw that he had, in fact, paid his restitution in full, but due to a BOP clerical mistake, the payment confirmations were never sent to the court. The mere threat of reincarceration was terrifying to Mr. Charles. He had

just completed a long term of incarceration and was already facing the many existing economic challenges that come with reentry and reintegration. *See supra* Section II. The threat of reincarceration, Mr. Charles explained, “made me feel like I was being set up to fail,” forcing him to choose between making restitution payments or paying for basic life necessities, like food, rent, and clothing.

B. Several States Condition the Restoration of Civil Rights on Payment of Restitution.

In addition to threatening to curtail individuals’ physical liberty, failure to pay restitution may also result in denial of freedoms and rights fundamental to American civic life. Lollar at 123; *see generally* Margaret Colgate Love, Jenny Roberts & Wayne A. Logan, *Collateral Consequences of Criminal Conviction: Law, Policy and Practice* (2021–22 ed.). Many states have enacted laws that effectively bar individuals who owe restitution from voting, running for public office, serving on a jury, and possessing a firearm, even though those individuals have completed all other terms of their sentences, including paying other legal financial obligations, such as fines. Such deprivations are quintessential punitive consequences of a conviction. *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955) (“[A] person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen”).

At least eleven states condition the restoration of civil rights, such as the right to vote, for those convicted of certain or all felonies on the payment of

restitution.³ Among these states is Florida. In November 2018, Florida voters overwhelmingly

³ **Alabama** requires payment of “all ... victim restitution ordered by the sentencing court” before a person may apply for restoration of voting rights. See Ala. Code § 15-22-36.1(3). **Alaska** law provides that “mak[ing] restitution or reparation to aggrieved parties” “may be required” while on probation, Alaska Stat. § 12.55.100(a)(2)(B), completion of which is required for restoration of the franchise, *id.* §§ 15.05.030(a), 12.55.185(18). **Arizona** automatically unsuspends voting rights for individuals who complete probation and “pay[] all victim restitution imposed.” Ariz. Rev. Stat. § 13-907; see *id.* § 13-904. The **Arkansas** Constitution “deem[s] eligible to vote” a person who has completed their felony sentence “and paid all applicable ... restitution.” Ark. Const. amend. 51 § 11(d)(2)(A), (D). **Florida** law defines the “complet[ion of] all terms of sentence” for purposes of restoration of rights to include “[f]ull payment of restitution ordered to a victim.” Fla. Stat. § 98.0751(2)(a)(5.a). **Idaho** requires judges in all “[a]ppropriate” cases, to order restitution during sentencing, Idaho Code § 19-5304(5), which must be satisfied for “final discharge” from punishment and restoration of all civil rights, *id.* § 18-310(2), (4). In 2020, the **Iowa** Governor signed an executive order restoring the right to vote for individuals who have “completed repayment of ... restitution.” Iowa Exec. Order No. 7 (Aug. 5, 2020); see also Voting Rights Restoration, Office of Governor Kim Reynolds, <https://governor.iowa.gov/services/voting-rights-restoration> (last visited June 26, 2025). **Louisiana** courts have interpreted the bar on enfranchisement for those “under an order of imprisonment for conviction of a felony,” La. Const. art. I, § 10(A) to include those on probation and parole, *Voice of Ex-Offender v. State*, No. 2017-1141, 249 So. 3d 857, 863 (La. App. 1 Cir. 4/13/18), *cert. denied*, No. 2018-0945, 255 So. 3d 575 (La. 10/29/18), for which restitution is a condition, La. Code Crim. Proc. art. 895.1(A)(1). In **Missouri**, a person becomes eligible to vote following discharge from parole or probation, Mo. Stat.

approved an amendment to the state constitution that provides: “any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.” Fla. Const. art. VI, § 4; *see* Frances Robles, *1.4 Million Floridians With Felonies Win Long-Denied Right to Vote*, N.Y. TIMES (Nov. 7, 2018). Following the amendment’s passage, however, the Florida Legislature enacted legislation defining “completion of all terms of sentence” to include “[f]ull payment of restitution ordered to a victim by the court as a part of the sentence.” Fla. Stat. § 98.0751(2)(a)(5.a). In holding the statutory restitution-payment requirement to be constitutional, the en banc Eleventh Circuit emphasized that “[m]onetary provisions of a sentence are no less a part of the penalty that society imposes for a crime than terms of imprisonment.” *Jones v. Governor of Fla.*, 975 F.3d 1016, 1031 (11th Cir. 2020) (en banc). As applied to Ms. Lavache, who was a registered and regular voter prior to her sentence, this law precludes the restoration of her voting rights until she pays her restitution in full. Given the sheer size

§ 115.133(2), for which courts may order restitution as a condition, *id.* § 559.021(2). **North Carolina** law “makes the payment of ... restitution a condition of probation, parole, and post-release supervision,” *Cnty. Success Initiative v. Moore*, 886 S.E.2d 16, 42 (2023) (citing N.C. Gen. Stat. §§ 15A-1343(b)(9), 15A-1374(b)(11a)–(11b), 15A-1368.4(e)(11)–(12)), unconditional discharge from which is required for rights restoration, N.C. Gen. Stat. § 13-1(1). And **Tennessee** prohibits restoring the “right of suffrage” to a person who has not “paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence.” Tenn. Code § 40-29-202(b)(1).

of her restitution order, it will be at least decades before she can vote again.

Arizona is a similar story. A felony conviction “suspends” an Arizonan’s “right to vote,” “right to hold public office of trust or profit,” “right to serve as a juror,” and “right to possess a firearm.” Ariz. Rev. Stat. § 13-904(A). As in Florida, these rights are only restored “if the person pays all victim restitution imposed.” *Id.* § 13-907. When the statute’s constitutionality was challenged, the Ninth Circuit “ha[d] little trouble concluding that Arizona has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders.” *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O’Connor, J., sitting by designation).

Similarly, individuals with outstanding restitution orders, regardless of willfulness, may be barred from serving on juries or running for public office. Ability to exercise these rights often rises and falls with the franchise. For example, Alaska prohibits those ineligible to vote from running for office, and separately bars those who have not completed their sentences from jury service. Alaska Stat. §§ 15.25.030(a)(10), 33.30.241(b). Alabama prohibits both by virtue of disenfranchisement. *See* Ala. Code §§ 36-2-1(a)(1), 12-16-60(a)(4).

The federal Gun Control Act prohibits people convicted of felonies or misdemeanor domestic-violence offenses under state or federal law from possessing firearms. *See* 18 U.S.C. § 922(g)(1), (9). But federal law excludes from this prohibition any conviction for which a person “has had civil rights

restored,” subject to certain exceptions. *Id.* § 921(a)(20). As a result, states can set predicate conditions—including payment of restitution—for restoration of the ability to exercise Second Amendment rights.

At least eight states have done so expressly. As noted above, Arizona and Idaho restore civil rights, including the right to possess a firearm, following satisfaction of victim restitution. Ariz. Rev. Stat. §§ 13-904(A)(5), 13-907; Idaho Code § 18-310(2), (4). Iowa and Florida do the same through executive clemency, with the added requirement of a five-year or eight-year waiting period, respectively, following full satisfaction of the sentence and restitution before restoration of firearms rights can be requested. *See* Fla. R. Exec. Clemency 5(D); Pardons & Commutations, Office of Governor Kim Reynolds, <https://governor.iowa.gov/services/pardons-commutations> (last visited June 26, 2025). In North Dakota, when restitution has been included as a condition of a person’s sentence, probation, or parole, that condition must be satisfied before they may petition a court for restoration of firearm rights. N.D. Cent. Code § 62.1-02-01.1(2). Michigan and Washington law require the same, plus a five-year waiting period. Mich. Comp. Laws § 28.424; Wash. Rev. Code § 9.41.041. And Utahns must pay in full all restitution before seeking expungement of a conviction that otherwise forbids them from possessing a firearm. Utah Code §§ 76-10-503, 77-40a-303.

That failure to pay restitution, regardless of their ability to do so, will cause some individuals to continue to be deprived of core civil rights, including

the right to vote, serve on a jury, hold public office, and carry a firearm further confirms the punitive nature of these orders.

**C. Federal Benefits Programs
Condition Eligibility on Payment of
Restitution.**

Failure to pay restitution can also lead to a loss of federal benefits. By law, many federal benefits accessible to those on parole or probation are, in effect, contingent on compliance with court-ordered restitution payments. *See* Bannon et al. at 28. Take the Supplemental Nutrition Assistance Program (SNAP), which is a federal benefit that provides low-income and no-income individuals and families food-purchasing assistance. *See* 7 U.S.C. § 2011. A “member of a household who is otherwise eligible” for SNAP is disqualified from the program for “any period during which the individual is ... violating a condition of probation or parole imposed under a Federal or State law.” *Id.* § 2015(k)(1). Because restitution is a part of a convicted person’s criminal sentence, and usually also a condition of probation or parole, failure to pay restitution as required may render an individual ineligible for SNAP benefits.

For those convicted of a crime that “has as an element the possession, use, or distribution of a controlled substance,” 21 U.S.C. § 862a(a), (d)(1), the penalty for a SNAP-eligible individual’s failure to pay restitution can cascade. In Texas, for example, a person convicted of a drug-related crime who fails to pay their restitution becomes ineligible for SNAP not just for the period during which they failed to pay, but

for two years following, too. Tex. Hum. Res. Code § 33.018(b).

Similar restrictions on access apply to other general-welfare programs. The statute authorizing Temporary Assistance for Needy Families (TANF)—a block-grant program that provides cash assistance to low-income families—prohibits states from “us[ing] any part of the grant to provide assistance to any individual who is ... violating a condition of probation or parole.” 42 U.S.C. § 608(a)(9)(A). Section 8 of the Housing Act of 1937, which authorizes housing vouchers for low-income households, likewise permits landlords to use a tenant’s “violati[on of] a condition of probation or parole” as cause to “terminat[e] the tenancy.” 42 U.S.C. § 1437f(d)(1)(B)(v); *see also id.* § 1437d(l)(9) (requiring state and local public-housing agencies to permit landlords to terminate leases on this basis). Elderly, blind, or disabled individuals otherwise eligible to be paid Social Security benefits are disqualified from receiving them “with respect to any month if during such month the person is ... violating a condition of probation or parole.” *Id.* § 1382(e)(4)(A)(ii).

D. Several States Condition Licensing on Payment of Restitution, Erecting Further Roadblocks to Repayment.

In addition to conditioning civil rights and federal benefits on restitution status, some states allow courts to bar those who fail to make restitution payments from keeping or obtaining driver’s licenses. *See, e.g.,* N.J. Stat. § 2C:46-2 (courts may suspend driver’s licenses for those who default on restitution); R.I. Gen. Laws § 12-21-33 (same). A debtor’s ability

to pay often goes unaccounted for in the license-suspension process. *See* Bannon et al. at 28.

As with the loss of benefits designed to ease the burdens of low-income individuals and households, discussed *supra*, loss of a driver's license makes it more difficult for formerly incarcerated people to successfully rejoin society. And the inability to drive to work or other obligations often complicates the ability of returning citizens to secure economic stability and thus pay restitution. *See, e.g., id.* (“[S]uspending driver's licenses for a failure to pay criminal justice debt can make it difficult for many people to search for and hold down jobs.”); Jessica Eaglin, *Driver's License Suspensions Perpetuate the Challenges of Criminal Justice Debt*, Brennan Ctr. for Just., <https://www.brennancenter.org/our-work/analysis-opinion/drivers-license-suspensions-perpetuate-challenges-criminal-justice-debt> (last visited June 26, 2025) (discussing Justice Department report that highlighted a woman facing a license suspension, who said “I am a hard working mother of two children and I cannot by any means take care of my family or work with my license being suspended and unable to drive.”) Already faced with the Herculean task of finding a job and fulfilling basic needs while paying a restitution order, individuals may risk additional penalties by driving without a license. *See* Colleen Chien et al., *Estimating the Earnings Loss Associated with a Criminal Record and Suspended Driver's License*, 64 ARIZ. L. REV. 675, 677–78 (2022) (discussing case study in which individual drove on suspended license to attend job after completing prison sentence in order to pay court debt

but was ultimately reincarcerated for driving on a suspended license).

Similar issues arise as to professional licensure. The Texas Department of Licensing and Regulation, for example, requires that individuals with criminal convictions who apply for an occupational license—for any of dozens of professions, ranging from personal trainer to barber to air-conditioning technician to midwife—“furnish proof” that they have “paid all outstanding ... restitution ordered in any criminal case in which the applicant has been convicted.” *Guidelines for License Applicants with Criminal Convictions*, Tex. Dep’t of Licensing & Regul., <https://www.tdlr.texas.gov/crimconvict.htm> (last visited June 26, 2025). Likewise, other states permit denial of specific professional licenses based on the failure or inability to pay restitution. *See, e.g.*, Miss. Admin. Code § 30-3103, Rule 1.1(3)(f) (a Mississippian applying for a license to operate as a physical therapist or physical therapist assistant is required to submit evidence to show “good moral character,” including “[w]hether restitution ordered by a court in a criminal conviction or civil judgement has been fully satisfied”); *Frequently Asked Questions For Real Estate Applicants*, Neb. Real Est. Comm’n, <https://nrec.nebraska.gov/additional-links/faqapplicants.html> (last visited June 26, 2025) (absent “extraordinary circumstances,” a Nebraskan applying for a real-estate license “will be denied if the applicant has not ... made restitution, if any was ordered.”). Denial of the ability to acquire a license to pursue gainful employment only makes paying restitution that much more difficult. It also serves as an additional, follow-on consequence of restitution.

As for Ms. Lavache, Florida law requires full satisfaction of her MVRA restitution order before she is eligible to apply for an exemption from the Florida Board of Nursing to restore her license. *See* Fla. Stat. § 435.07(1)(b) (“A person applying for an exemption who was ordered to pay any amount for ... restitution as part of the judgment and sentence for any disqualifying felony or misdemeanor must pay the court-ordered amount in full before he or she is eligible for the exemption.”). By effectively denying her the opportunity to work in her chosen profession, this law makes Ms. Lavache even less able to pay off a meaningful portion of her \$4 million restitution balance.

* * *

As detailed above, the collateral consequences of restitution demonstrate that it is a criminal penalty. The loss of fundamental rights and disqualification from state and federal benefits make all parties worse off. These punitive consequences hinder returning citizens from fully reentering society. Consequently, victims to whom restitution is owed are rarely, if ever, made whole.

CONCLUSION

For these reasons, this Court should vacate the judgment of the United States Court of Appeals for the Eighth Circuit.

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