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 THE CATO INSTITUTE AND FINES AND FEES JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Fines and Fees Justice Center ("FFJC") is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC's mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably. As a national hub for information, resources, and technical assistance on fines and fees, FFJC works with impacted communities, researchers, advocates, legislators, justice system stakeholders, and media across the nation. FFJC also provides *amicus curiae* assistance at the state and federal level in cases where

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

issues of economic justice intersect with state and constitutional law.

This case concerns *amici* because the decision below mischaracterizes a criminal punishment as a civil remedy removed from the protection of the Ex Post Facto Clause.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1995, when Petitioner Holsey Ellingburg, Jr., robbed a bank, federal criminal restitution was governed by the Victim and Witness Protection Act (VWPA).[2] The VWPA provided that a defendant's liability to pay restitution ended twenty years after the entry of judgment.[3] Then, in 1996, Congress enacted the Mandatory Victim Restitution Act (MVRA), which extended the liability period to twenty years after a defendant's release from imprisonment and required that restitution include interest.[4] The MVRA's drafters apparently anticipated the possibility that its retroactive application might violate the Ex Post Facto Clause: Congress explicitly made the Act retroactive only "to the extent constitutionally permissible."[5]

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[2] Cert. Pet. at 5; 18 U.S.C. § 3663 (1994).

[3] 18 U.S.C. § 3613(b) (1994).

[4] Cert. Pet. at 4; 18 U.S.C. §§ 3613(b) (2018), 3663A.

[5] *United States v. Norwood*, 49 F.4th 189, 196 (3d. Cir. 2022) (quoting 18 U.S.C. § 2248 (statutory notes)).

The issue in this case is whether that concern was correct. Mr. Ellingburg's sentence included just shy of 27 years' imprisonment and $7567.25 in restitution.[6] He paid $2054.04 toward this during the twenty-year period authorized by the VWPA.[7] In the past three years, he has returned to society, living with his fiancée and trying to make ends meet.[8] However, his probation officer maintains that he still has to make $100 monthly restitution payments and the Government says he now owes $13,476.01 total—almost twice as much as his sentence originally imposed and far more than he owed at the close of the VWPA restitution period.[9]

Mr. Ellingburg seeks judicial relief. The district court held that the MVRA's extension of the restitution period did not increase his punishment.[10] The Eighth Circuit instead applied its own precedent

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[6] Cert. Pet. at 5.

[7] *Id.* Federal prisoners are paid for work at hourly rates of just 12 to 40 cents. *Work Programs*, BUREAU OF PRISONS, https://tinyurl.com/yvcdeh5r (last visited June 4, 2025).

[8] Cert. Pet. at 5–6.

[9] *Id.* at 6; *cf. Norwood*, 49 F.4th at 216–17 ("For a defendant . . . who from the start owed more in restitution than he would likely ever be able to pay, [the VWPA's twenty-year limit] was significant; it meant that he could reasonably expect that the Government would only be able to collect on whatever funds he acquired over the course of twenty years while incarcerated, likely much less than the amount listed in his restitution order.").

[10] Cert. Pet. App'x 15a.

holding that criminal restitution is not subject to the Ex Post Facto Clause at all because it is a civil remedy rather than a criminal punishment.[11] Two of the three panel members wrote a concurring opinion criticizing this precedent, but the Eighth Circuit denied rehearing en banc.[12]

After this Court granted Mr. Ellingburg's cert petition, the Government decided not to defend the Eighth Circuit's decision and to instead file a brief in support of Mr. Ellingburg. *Amici* are pleased to join the parties in asking this Court to vacate the decision below. Criminal restitution is punishment under this Court's modern precedent. Historical authorities support this conclusion, too. While those are adequate reasons to rule in Mr. Ellingburg's favor, this Court should also revive a broader understanding of what qualifies as criminal punishment.

ARGUMENT

I. CRIMINAL RESTITUTION IS PUNISHMENT UNDER MODERN PRECEDENT.

Criminal restitution is routinely treated as "penal"—as criminal punishment—under modern precedent. The MVRA itself refers to criminal restitution as a "penalty." 18 U.S.C. § 3663A(a)(1). That statute is codified in Title 18 alongside other federal criminal laws. Criminal restitution has

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[11] *Id.* 5a–7a (per curiam).

[12] *Id.* 1a7a–8a (Melloy, J., concurring).

commonly recognized hallmarks of criminal punishment. *Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from denial of cert.). It is imposed using the government's prosecutorial powers. *Paroline v. United States*, 572 U.S. 434, 456 (2014); *see also Pasquantino v. United States*, 544 U.S. 349, 364 (2005). It is imposed at the close of a criminal proceeding, requires the defendant to be convicted, and "cannot be imposed upon an innocent [person]." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (holding that criminal asset forfeiture "constitutes punishment"); *see also Kansas v. Hendricks*, 521 U.S. 346, 362 (1997) (holding that a law was not criminal punishment because it did not "affix culpability for prior criminal conduct"); *Dept. of Rev. of Mont. v. Kurth Ranch*, 511 U.S. 767, 781–82 (1994) ("[T]his so-called tax is conditioned on the commission of a crime. That condition is significant of penal and prohibitory intent . . . .") (citation and quotation marks omitted).

Criminal restitution is limited to the amount of loss caused by the offense of criminal conviction. *Hughey v. United States*, 495 U.S. 411, 420 (1990). It is imposed *in personam*—a classification that in the asset forfeiture context has "historically been treated as punitive." *Bajakajian*, 524 U.S. at 332; *see also Alexander v. United States*, 509 U.S. 544, 558 (1993). It is inseparable from criminal sentences, supervised release, and probation. *Manrique v. United States*, 581

U.S. 116, 118 (2017).[13] Failure to pay it is punished through criminal justice measures and collateral consequences, such as incarceration; supervision; loss of the rights to vote, have firearms, and serve on juries; and drivers-license revocation.[14]

As with other criminal punishments, criminal restitution is imposed in part for penological reasons. *Paroline*, 572 U.S. at 470 (Roberts, C.J., dissenting).[15] It is imposed to advance retributive as well as "rehabilitative and deterrent goals." *Kelly v. Robinson*, 479 U.S. 36, 49 (1986). It thus "serves purposes that differ from (though they overlap with) the purposes of tort law." *Paroline*, 572 U.S. at 453 (majority op.). It is meant "to mete out appropriate criminal punishment" even as it also benefits victims. *Pasquantino*, 544 U.S. at 365; *see also Hendricks*, 521 U.S. at 361–62; *United States v. Zukerman*, 897 F.3d 423, 433 (2d Cir. 2018)

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[13] *See also United States v. Edwards*, 162 F.3d 87, 91 (3d Cir. 1998); *United States v. Bruchey*, 810 F.2d 456, 461 (4th Cir. 1987) ("[B]ecause [criminal restitution] is part of the sentencing process it is fundamentally 'penal' in nature."); *United States v. Sleight*, 808 F.2d 1012, 1020 (3d Cir. 1987) ("[R]estitution . . . is imposed as a part of sentencing and remains inherently a criminal penalty.").

[14] 18 U.S.C. §§ 3614(a)–(b); *Hester*, 586 U.S. at 1106 (Gorsuch, J., dissenting from denial of cert.); *Norwood*, 49 F.4th at 219.

[15] *See also United States v. Ritchie*, 858 F.3d 201, 214 (4th Cir. 2017); *cf. United States v. Keith*, 754 F.2d 1388, 1391 (9th Cir. 1985) ("Congress intended restitution . . . to be a criminal penalty carrying the stigma associated with other authorized criminal sanctions.").

(approving of how criminal restitution "personally punished" the defendant). "As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter." *Kelly*, 479 U.S. at 46 (citation and quotation marks omitted).

> Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.

Id. at 49 n.10.[16] Criminal restitution also has general-deterrence aims like other forms of criminal

[16] *See also United States v. Carrara*, 49 F.3d 105, 108 (3d Cir. 1995) ("[R]estitution is rehabilitative because it permits or indeed requires that offenders personally face what they have done and, at least partially, atone for their legal transgressions by direct action in the form of a positive personal performance."); *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984) ("Restitution undoubtedly serves traditional purposes of punishment. The prospect of having to make restitution adds to the deterrent effect of imprisonment and fines, penalties that might seem to some offenders less likely to be imposed than restitution. Restoring the

punishment. *Bajakajian*, 524 U.S. at 329; *see also Hendricks*, 521 U.S. at 361–62; *id.* at 373 (Kennedy, J., concurring) ("[R]etribution and general deterrence are reserved for the criminal system alone."); *United States v. Anthony*, 25 F.4th 792, 798 (10th Cir. 2022) (Tymkovich, J.). Failure to pay criminal restitution can be punished with incarceration under the MVRA only based on the penologically relevant finding that "in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence." 18 U.S.C. § 3614(b)(2).

Criminal restitution is assessed with reference to "special reason[s]" not applicable to civil law. *Paroline*, 572 U.S. at 453. Civil law rules "cannot be imported into criminal restitution and applied to their utmost limits without due consideration of these differences." *Id.* at 454. Criminal restitution can be imposed only subject to criminal due process. *Id.* at 471 (Roberts, C.J., dissenting). It is apportioned *not* to make the victim whole as soon as possible, but in light of penological considerations, including defendants'

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victim's property also serves the legitimate penal purpose of vindicating society's interest in peaceful retribution. Finally, restitution can be a useful step toward rehabilitation, a consequence specifically emphasized by Congress. These penal purposes have long been promoted through the imposition of fines payable to the Treasury; their achievement is not lessened because the immediate beneficiary of a restitution order is the crime victim.") (internal citation omitted).

"respective causal roles and their own circumstances so that more are made aware, through the concrete mechanism of restitution, of the impact of [criminal offenses] on victims." *Id.* at 462 (majority op.).

There are "manifest procedural differences between criminal sentencing and civil tort lawsuits." *Id.* at 453. Criminal restitution is collected by the Attorney General.[17] Victims have "no control over the amount of restitution awarded or over the decision to award restitution." *Kelly*, 479 U.S. at 52.[18] Criminal restitution cannot be waived through civil settlements.[19] Criminal restitution does not preclude separate civil relief (albeit with the possibility of an

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[17] 18 U.S.C. §§ 3612(b)–(c).

[18] *See also United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006) ("This is because . . . restitution ordered as part of a criminal sentence is a criminal penalty, not a civil remedy."); *Brown*, 744 F.2d at 910 ("[U]nlike a civil suit, the victim . . . . cannot control the presentation of evidence during either the criminal trial or the sentencing hearing and is not even guaranteed the right to testify about the extent of his losses. Neither can he appeal a determination he deems inadequate.").

[19] *United States v. Bearden*, 274 F.3d 1031, 1041 (6th Cir. 2001); *United States v. Sheinbaum*, 136 F.3d 443, 448 (5th Cir. 1998); *United States v. Savoie*, 985 F.2d 612 (1st Cir. 1993) (Selya, J.) ("[Criminal restitution] is a criminal penalty meant to have deterrent and rehabilitative effects. Private parties cannot simply agree to waive the application of a criminal statute.") (internal citation omitted).

offset).[20] It "does not create . . . a debtor-creditor relationship" between a defendant and a victim. *Kelly*, 479 U.S. at 46 (citation and quotation marks omitted). It cannot be discharged in bankruptcy proceedings—a holding this Court reached partly by analogy to criminal "fines and penalties." *Id.* at 48 (citation omitted).

The MVRA, then, does not merely insert a civil remedy into criminal proceedings.[21] Criminal restitution is penal under modern precedent, and as such, it is properly subject to the Ex Post Facto Clause.

II. CRIMINAL RESTITUTION IS PUNISHMENT UNDER HISTORICAL AUTHORITIES.

Modern precedent reflects historical understandings of criminal restitution, and the original meaning of the Ex Post Facto Clause supports extending its reach to criminal restitution. Criminal restitution is older than fines and imprisonment, "and in the earliest penal codes, it was always awarded to the victim of a property crime—usually in addition to punishment."[22] By the reign of King Henry VIII, English law restricted restitution to those stolen goods identified in a criminal indictment and found by a jury

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[20] *Creel v. CIR*, 419 F.3d 1135, 1140 (11th Cir. 2005); *Edwards*, 162 F.3d at 91.

[21] *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (reaching the same holding as the decision below).

[22] *Carrara*, 49 F.3d at 108; *see also id.* n.3 (discussing restitution in the 4000-year-old Code of Hammurabi).

to be stolen. *Hester*, 586 U.S. at 1107 (Gorsuch, J., dissenting from denial of cert.). Nineteenth-century American juries were similarly tasked with finding the value of stolen property before restitution could be imposed. *Id.* (collecting cases). Criminal restitution was integral to criminal proceedings.

Originally understood, the Ex Post Facto Clause limits the retroactivity of criminal punishments like criminal restitution. Ex post facto laws were roundly condemned at the time of the Founding. Oliver Ellsworth thought "there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves."[23] James Wilson thought explicitly prohibiting them could imply "that we are ignorant of the first principles of Legislation."[24]

John Dickinson reported to the Constitutional Convention that he consulted William Blackstone's *Commentaries* and found that the term "ex post facto" applied only to criminal laws.[25] Blackstone lends support to the characterization of criminal restitution as criminal punishment. Like modern authorities, he thought criminal punishment addressed harm done to the public rather than a private person and was

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[23] 2 RECORDS OF THE FEDERAL CONVENTION 375 (Madison, Aug. 22, 1787) *in* PHILIP B. KURLAND & RALPH LERNER, 3 THE FOUNDERS' CONSTITUTION (web ed., 1986), *available at* https://press-pubs.uchicago.edu/founders/.

[24] *Id.*

[25] *Id.* at 448 (Madison, Aug. 29).

prosecutable only by the government.[26] He identified robbery—Mr. Ellingburg's offense—as a central example of a criminal wrong.[27]

Blackstone also wrote about criminal restitution (which was unavailable for robbery in his time because it was a capital offense punished by forfeiture of life and estate).[28] He said victims could receive civil remedies for crimes injuring them.[29] Additionally, a defendant who created an injurious public nuisance could "be compelled to make ample satisfaction, as well for the private injury, as for the public wrong."[30] The law took

> a double view: viz. not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent . . . but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to

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[26] 4 WILLIAM BLACKSTONE, COMMENTARIES *2, *5.

[27] *Id.*

[28] *Id.* at *6.

[29] *Id.*

[30] *Id.* at *6–7.

> establish, for the government and tranquility of the whole.[31]

Though Blackstone described restitution as at least partly civil, he also considered retribution and deterrence to be the law's responses to crimes.

Criminal laws were the Ex Post Facto Clause's original concern. James Iredell praised the Clause as "one of the most valuable parts of the new constitution."[32] He named ex post facto laws "the instrument of some of the grossest acts of tyranny that were ever exercised."[33] The prohibition on them was "worth ten thousand declarations of rights"—and the foundation of every American's "pride in his security" that his actions today "cannot be tortured into guilt and danger tomorrow."[34]

Iredell's reference to "guilt and danger" aligns with later authorities. In 1798's *Calder v. Bull*, Justice Chase wrote that the Clause was meant to prevent measures that "inflicted greater punishment, than the law annexed to the offense." 3 U.S. 386, 389 (1798) (Chase, J., seriatim). It protected Americans from "injury, or punishment." *Id.* at 390. Any law that

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[31] *Id.* at *7.

[32] KURLAND & LERNER, *supra*, doc. 10, James Iredell, Marcus, *Answers to Mr. Mason's Objections to the New Constitution*, 1788 PAMPHLETS 368.

[33] *Id.*

[34] *Id.*

"changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" was "manifestly unjust and oppressive." *Id.* at 390–91.[35] In the same case, Justice Paterson agreed that the Clause applied to "crimes, pains, and penalties." *Id.* at 396 (Paterson, J.) (seriatim). Iredell, by then a justice of the Court, confirmed that Congress could not "increase the degree of punishment previously denounced for any specific offence." *Id.* at 400 (Iredell, J.) (seriatim).

According to Joseph Story's 1833 evaluation, too, the Clause covered measures that "inflict penalties on the person."[36] Fifty years later, this Court held that the Clause "protect[s] the individual rights of life and liberty against hostile retrospective legislation." *Krieg v. Missouri*, 107 U.S. 221, 229 (1883).

The harm the Clause aimed to prevent was criminal punishment, which this Court historically defined in a way that covers criminal restitution. In 1922, the Court held that "punishment for infraction of the law" that is "primarily designed to define and

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[35] *Cf. Norwood*, 49 F.4th at 215 (holding that the Ex Post Facto Clause "ensures that individuals have fair warning . . . and that defendants know the range of punishments that are possible during the adjudication of their case, so that they can plea bargain and strategize effectively") (citations and internal quotation marks omitted).

[36] KURLAND & LERNER, *supra*, doc. 15, JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION: §§ 1338–39 (1833).

suppress crime" qualifies as criminal in nature. *Lipke v. Lederer*, 259 U.S. 557, 561–62 (1922).

Criminal punishment has long been understood as that which inflicts retribution for public wrongs and seeks to generally deter them. Criminal restitution does this, so it fits neatly within the original reach of the Ex Post Facto Clause.

III. THIS COURT SHOULD REVIVE A BROADER UNDERSTANDING OF WHAT QUALIFIES AS CRIMINAL PUNISHMENT.

Modern and historical understandings of criminal restitution as criminal punishment are reason enough to vacate the judgment below. However, this case also presents this Court with an opportunity to revisit doctrinal overcomplications. Criminal punishment is defined differently for different constitutional provisions—and sometimes, much too narrowly.

Ex Post Facto Clause doctrine is sometimes put simply: a law is unconstitutional if it is retrospective and disadvantageous to an offender. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). At other times, though, the line between criminal punishments and civil measures has been described nebulously. In *Smith v. Doe*, 538 U.S. 84, 92–93 (2003), the Court endorsed "statutory construction" featuring "considerable deference" to legislative intent.[37] Taken to its extreme, this theory "peddles a modern version"

[37] *See also United States v. Ward*, 448 U.S. 242, 248 (1980).

of the abuses that inspired the Ex Post Facto Clause. *United States v. Rahimi*, 602 U.S. 680, 776 (2024) (Thomas, J., dissenting). It lets "majoritarian interests" decide the Clause's reach. *Id.* The Court should "remain wary of any theory . . . that would exchange" constitutional limits "for vague (and dubious) principles with contours defined by whoever happens to be in power." *Id.* at 777.

Even a tamer reading of *Smith* is troubling. That case held that "registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions"—and enforced through "mandatory conditions," including the threat of incarceration—are not criminal punishment. *Id.* at 102 (majority op.); *id.* at 113 (Stevens, J., dissenting in part and concurring in the judgment in part); *contrast Hendricks*, 521 U.S. at 362 (describing a law as "not retributive because it does not affix culpability for prior criminal conduct."). This result reflects "the problems that arise when judges create atextual legal rules and frameworks." *Ames v. Ohio Dept. of Youth Servs.*, 221 L. Ed. 2d 929, 939 (2025) (Thomas, J., concurring).[38] Justice Stevens's *Smith* dissent criticized manipulable "multifactor tests" and would have held that criminal punishment "(1) is imposed on everyone who commits a criminal offense, (2) is not

[38] *See also id.* ("Judge-made doctrines have a tendency to distort the underlying statutory text, impose unnecessary burdens on litigants, and cause confusion for courts.").

imposed on anyone else, and (3) severely impairs a person's liberty." *Smith*, 538 U.S. at 113 (Stevens, J., dissenting in part and concurring in the judgment in part). This simpler approach squares neatly with historical and modern understandings of criminal punishment.

In lieu of this, the Court has held that if a legislature intends a statute to be civil, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997). This approach is misdirected. The question should be whether a measure is criminal punishment within the meaning of the Constitution. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures . . . think that scope too broad." *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008). Litigants do not bring forward "proof" to "transform" legislative enactments into constitutional subject matter. *Cf. Elder v. Holloway*, 510 U.S. 510, 516 (1994) (holding that "a question of law" should not be distorted into "legal facts" a plaintiff must plead). The Constitution requires analysis, not alchemy.

The analysis only goes further astray as the Court demands "proof" that something is a criminal punishment in keeping with seven (apparently non-exhaustive) "guideposts" set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963):

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[39]

To be sure, many of these factors undisputedly support treating criminal restitution as criminal punishment. As detailed above, criminal restitution has historically been treated as a punishment, it is imposed only after a finding of culpability, it is imposed for the sake of retribution and deterrence, and it is imposed following the entry of a criminal conviction. But despite this, in the Double Jeopardy Clause context, this Court has sometimes held that parties challenging monetary penalties cannot perform the magic necessary for these to count as criminal punishment—even if they are motivated by

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[39] *Hudson*, 522 U.S. at 99–100 (internal quotation marks and brackets omitted).

penological purposes and "punitive."[40] A two-step, seven-plus-factor test inquiring into how things "appear" to judges, one that sometimes excludes penological punitive measures from the meaning of criminal punishment, is the result of this Court substituting strong legislative deference for clear constitutional analysis. *Cf. N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 22–24 (2022) (criticizing "judge-empowering" doctrinal tests in favor of constitutional text, history, and tradition) (citation omitted).

Another area of doctrinal disorder is *in rem* asset forfeiture, which has many of the same hallmarks of punishment as criminal restitution. It overlaps with criminal proceedings.[41] It is exacted only against contraband "or in its broadest reach, to proceeds traceable to unlawful activity."[42] It depends on "the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence."[43] Nevertheless, the

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[40] *Id.* at 102, 104; *Kurth Ranch*, 511 U.S. at 779–80.

[41] *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984).

[42] *Alexander*, 509 U.S. at 563 (Kennedy, J., dissenting).

[43] *Austin v. United States*, 509 U.S. 602, 615 (1993); *see also id.* at 625 (Scalia, J., concurring in part and concurring in the judgment) ("Punishment is being imposed . . . ."); *United States v. Ursery*, 518 U.S. 267, 315 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part) ("There is simply no rational basis for characterizing the seizure of this respondent's

Court has maintained that *in rem* asset forfeitures are merely civil for constitutional purposes.[44]

This case does not require the Court to reconsider any of its precedent, but confirming that criminal punishment has a plain meaning would be salutary.

CONCLUSION

Criminal restitution was imposed on Mr. Ellingburg partly for reasons of retribution and general deterrence, and the MVRA has now subjected him to years of additional "liability, supervision, and collateral consequences."[45] Criminal restitution is criminal punishment. This Court should accept the parties' invitation to vacate the decision below.

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home as anything other than punishment for his crime."); *cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 82 (1993) (Thomas, J., concurring in part and dissenting in part) (doubting that traditional property-focused rationales can justify the immense scope of modern *in rem* asset forfeitures).

[44] *Ursery*, 518 U.S. at 321 (Stevens, J., concurring in the judgment in part and dissenting in part) ("Consider how drastic the remedy would have been if Congress in 1931 had authorized the forfeiture of every home in which alcoholic beverages were consumed. Under the Court's reasoning, I fear that the label 'civil,' or perhaps '*in rem*,' would have been sufficient to avoid characterizing such forfeitures as 'punitive' . . . ."); *One Assortment of 89 Firearms*, 465 U.S. at 363–64.

[45] *Norwood*, 49 F.4th at 220.

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