No. 24-482

IN THE
Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF PROFESSOR WAYNE A. LOGAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PROFESSOR WAYNE LOGAN
WAKE FOREST UNIVERSITY SCHOOL OF LAW
1834 Wake Forest Rd
Winston-Salem, NC 27109

KRYSTAL B. SWENDSBOE
Counsel of Record
LEAH C. DESKINS
GRACE O. MOORE
WILEY REIN LLP
2050 M St. NW
Washington, D.C. 20036
kswendsboe@wiley.law
(202) 719-4197

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Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Wayne A. Logan is a University Research Professor at Wake Forest University School of Law and the nation's foremost Ex Post Facto Clause scholar. Professor Logan has taught criminal procedure, criminal law, sentencing, and capital punishment classes for almost three decades, including at Wake Forest, Florida State University College of Law, University of California Law San Francisco, William & Mary Law School, and William Mitchell College of Law.

A primary focus of Professor Logan's life's work has been to explore and draw attention to the proper scope and application of the Ex Post Facto Clause (the "Clause"). His most recent book, *The Ex Post Facto Clause: Its History and Role in a Punitive Society* (2022), provides the only comprehensive critical examination of the history of the Clause and the Supreme Court's Ex Post Facto jurisprudence. Professor Logan has also authored or co-authored several other books focusing on the sentencing of criminal offenders, including *Sentencing Law, Policy, and Practice* (2022) and *Collateral Consequences of Criminal Conviction: Law, Policy, and Practice* (4th ed., 2021).

Professor Logan's shorter scholarly works have appeared in the nation's premier legal publications, including *Michigan Law Review*, *Notre Dame Law*

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

Review, *Pennsylvania Law Review*, *Texas Law Review*, and *Vanderbilt Law Review*. His scholarship has been cited in well over one hundred state and federal court decisions, including by this Court in *United States v. Kebodeaux*, 570 U.S. 387 (2013). He has filed several amicus briefs, including with this Court (*Gundy v. United States*, 583 U.S. 1166 (2018) and *Carr v. United States*, 560 U.S. 438 (2010)).

Professor Logan's perspective on legal matters has been solicited by many media outlets, including *The New York Times*, *The Wall Street Journal*, *National Public Radio*, *Fox News*, and *Radio Free Europe*. He has been a member of the American Law Institute for the past twenty-five years and previously served as the chair and secretary of the Criminal Justice Section of the Association of American Law Schools.

As the nation's foremost authority on the Ex Post Facto Clause, Professor Logan has an interest in advising the Court on the purpose and scope of the Clause, which are at odds with the Eighth Circuit's decision. This case raises critically important constitutional issues regarding the widespread practice of imposing restitution as a sentencing condition in criminal cases. It is essential that the historical background and enduring purpose of the Ex Post Facto Clause figure centrally in assessing the constitutionality of the federal law challenged in this case.

SUMMARY OF ARGUMENT

The Ex Post Facto Clause plays a critically important role in the nation's constitutional infrastructure. By preventing the legislative branch

from passing burdensome retroactive laws, the Clause ensures that the government acts fairly, abiding by the rules it sets; provides fair notice to individuals; and preserves the separation of powers by requiring legislatures to enact only laws having prospective—not retrospective—effect.

The Eighth Circuit's decision below upholding application of the Mandatory Victim Restitution Act ("MVRA"), Pub. L. No. 104-132, tit. II, subtit. A, 110 Stat. 1214 (1996), violates these core principles. By retroactively increasing the restitution that Petitioner owes—a punishment—Congress violated the Ex Post Facto Clause. The Court should vacate the Eighth Circuit's contrary finding.

The Eighth Circuit's decision is problematic for two fundamental reasons. First, it failed to recognize that restitution is a criminal sanction. In so doing, it ignored (1) the majority view of federal circuit courts of appeal; (2) the historical record clearly showing that restitution is a component of criminal punishment; (3) statements of members of this Court recognizing the punitive nature of restitution; and (4) features of restitution under the MVRA that clearly demonstrate its nature as a criminal sanction.

Second, the Eighth Circuit incorrectly presumed that the Clause prohibits only retroactive criminal penalties. In doing so it ignored substantial historical support, dating back to the nation's founding, showing that the Clause was intended to prohibit burdensome retroactive laws of both a civil and criminal nature. Moreover, the legal authority on which the Eighth

Circuit relied—the Court's decision in *Calder v. Bull*—is subject to extensive criticism.

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION FLOUTS THE CENTRAL PURPOSES OF THE EX POST FACTO CLAUSE.

Ex post facto laws were of major concern to the Framers of the U.S. Constitution.[2] Indeed, their concern was such that they included two ex post facto prohibitions in Article I—one barring Congress (Section 9), and another barring state legislatures (Section 10)[3]—one of the few civil liberty protections enshrined in a document otherwise mainly dedicated to defining the structure and operation of the federal government.[4]

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[2] For fuller discussion of the Framing Era history of the Clause and its intended purposes see Wayne A. Logan, *The Ex Post Facto Clause: Its History and Purpose In a Punitive Society* Chs. 1–2 (2022).

[3] U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); U.S. Const. art I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law.").

[4] As the Supreme Judicial Court of Maine recognized over two centuries later:

> [t]he framers' decision to include the ex post facto clause in the body of the Constitution adopted in 1787, and not to defer consideration to the amendment process that would follow, is evidence that the framers viewed the federal ban on ex post facto laws as fundamental to the protection of individual liberty.

State v. Letalien, 985 A.2d 4, 13 (Me. 2009).

Although scholarly debate persists regarding many provisions of the U.S. Constitution, there is no question that the ex post facto prohibitions were motivated by the recognized propensity of legislatures to enact burdensome retroactive laws. Alexander Hamilton spoke to this concern in the *Federalist Papers* when he singled out the Clause as a primary reason favoring state ratification of the Constitution (which contained no Bill of Rights). He wrote that ex post facto laws "have been, in all ages, the favorite and most formidable instruments of tyranny."[5] To Hamilton, the "prohibition of ex post facto laws" was among the greatest "securities to liberty and republicanism [the Constitution] contains."[6]

Fellow *Federalist Papers* contributor James Madison described ex post facto laws as "contrary to the first principles of the social compact and to every principle of sound legislation," and considered the Clause a key part of the Constitution's "bulwark in favor of personal security and private rights."[7] Early justices on the Court were equally aware of the need to constrain Congress and state legislatures. Justice Samuel Chase, in *Calder v. Bull*, one of the Court's first decisions, recognized that "the advocates of [ex post facto] laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and

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[5] *The Federalist* No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[6] *Id.* at 511.

[7] *Id.*, No. 44, at 282 (James Madison).

injustice . . . the Federal and State Legislatures, were prohibited from passing any . . . ex post facto law."[8]

Shortly thereafter, in *Fletcher v. Peck*, Chief Justice John Marshall echoed this view. He recognized that "the Framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment" and that the Clause embodied among Americans "a determination to shield themselves . . . from the effects of those sudden and strong passions to which men are exposed."[9] Protection was needed, the Chief Justice wrote, to preclude legislatures from enacting burdensome retroactive laws targeting particular individuals when they were caught up in the "feelings of the moment" and subject to "sudden and strong passions."[10]

Over time, a veritable "who's who" of disfavored Americans have invoked the Clause as a shield, including: in the late 1860s, Confederate sympathizers; at the turn of the twentieth century, immigrants and prostitutes; and in the 1950s, former members of the Communist Party. In one of the two Confederate sympathizer cases, *Cummings v. Missouri*,[11] the Court invalidated on ex post facto grounds the conviction of a Roman Catholic priest who

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[8] 3 U.S. (3 Dallas) 386, 389 (1798).

[9] 10 U.S. (6 Cranch) 87, 137–38 (1810).

[10] *Id.* at 138*; see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (recognizing that a legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals").

[11] 71 U.S. (4 Wall.) 277 (1867).

was prohibited from preaching for failure to satisfy the state's required "oath of loyalty."[12] The Court concluded that the law's retroactive prohibition of a vocation (the ministry) constituted a retroactively imposed punishment and was a product of "the excited action of the State[] . . . [against which] the Framers of the Federal Constitution intended to guard."[13] The Ex Post Facto Clause, the Court stated, "[was] intended to secure the liberty of the citizen" and "cannot be evaded by the form in which the power of the State is exerted."[14]

A. The Ex Post Facto Clause Has Several Critically Important Purposes in Protecting Civil Liberty.

The Ex Post Facto Clause has several critically important structural purposes in protecting civil liberty in the nation's constitutional democracy.

Perhaps foremost, the Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation" and guards against legislative abuses.[15] As the Court noted in *Carmell v. Texas*,[16] "[t]here is plainly a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances

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[12] *Id*. at 280, 322.

[13] *Id.* at 322.

[14] *Id.* at 329; *see also Weaver v. Graham*, 450 U.S. 24, 31 (1981) ("it is the effect, not the form, of the law that determines whether it is ex post facto").

[15] *Weaver*, 450 U.S. at 29.

[16] 529 U.S. 513, 533 (2000).

under which it can deprive a person of his or her liberty or life."[17] The Clause, the Court recognized three years later in *Stogner v. California*,[18] precludes the ability of "legislatures to pick and choose when to act retroactively," which "risks both 'arbitrary and potentially vindictive legislation.'"[19] It ensures, in short, that the government "play[s] by its own rules."[20]

The Clause does not prohibit burdensome, arbitrary, or vindictive laws generally. Rather, it only prohibits those that have retroactive effect, with good reason. Retroactive laws are problematic because with them legislators can single out already disfavored parties (who cannot change their past actions), confident in the knowledge that the electorate will back them. As Justice Gorsuch recently noted, ensuring that laws apply prospectively "prevents majoritarian legislatures from condemning disfavored minorities for past conduct they are powerless to change."[21]

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[17] *Id.* at 514.

[18] 539 U.S. 607 (2003).

[19] *Id*. at 611 (citation omitted).

[20] *Id.*; *see also Lynce v. Mathis*, 519 U.S. 433, 440 (1997) ("the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects"). This same concern prompted Justice Hugo Black, who authored several decisions invoking the Clause, to insist that "the Government should turn square corners in dealing with the people." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting).

[21] *Sveen v. Melin*, 584 U.S. 811, 827 (2018) (Gorsuch, J., dissenting); *see also James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part)

A second chief purpose of the Clause is to ensure fair notice.[22] The principle of *nulla poena sine lege* is a fundamental feature of the rule of law that constrains every civilized system of government, including ours. Legislatures can, and regularly do, enact laws creating new criminal prohibitions and increasing punishment for already codified offenses. However, such provisions must apply prospectively, giving fair notice to any would-be violators as to the consequence of their actions. Indeed, the Court has recognized a "central concern[]" of the Clause is preventing "the lack of fair notice" that can occur "when [a] legislature increases punishment beyond what was prescribed when the crime was consummated."[23]

("[T]he policy of the prohibition against ex post facto legislation . . . rest[s] on the apprehension that the legislature, in imposing penalties upon past conduct . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons."); *cf. E. Enters. v. Apfel*, 524 U.S. 498, 548 (1988) (Kennedy, J., concurring in part and dissenting in part) (noting that the Court's cases "reflect our recognition that retroactive lawmaking is a particular concern for the courts because of the legislative 'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals'" (citation omitted)).

[22] *See Weaver*, 450 U.S. at 28–29 ("[T]he Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning . . . ."); *see also Marks v. United States*, 430 U.S. 188, 191 (1977) (noting "the principle on which the Clause is based [is] the notion that persons have a right to fair warning").

[23] *See Lynce*, 519 U.S. at 896 (quoting *Weaver*, 450 U.S. at 30); *cf. Landgraf,* 511 U.S. at 266 (explaining that "retroactive statutes

A third and final purpose of the Ex Post Facto Clause is to preserve separation of powers. The Clause does so by requiring that Congress and state legislatures enact burdensome laws only "with prospective effect," "leav[ing] the application of existing penal law" to the judicial and executive branches.[24] Ex post facto laws, as the *Stogner* Court noted, prevent the "erosion of the separation of powers."[25]

B. The Eighth Circuit's Decision Transgresses the Central Purposes of the Ex Post Facto Clause.

The Court has emphasized that the reach of a constitutional provision should turn on the "reasons" it was included in the Constitution and the "evils it was designed to eliminate."[26] Viewed in this light, the Eighth Circuit's decision to permit retroactive application of the MVRA to Petitioner is undeserving of support and should be vacated because it violates the core structural constitutional purposes served by the Ex Post Facto Clause, identified above.

First, retroactive application to Petitioner of the MVRA epitomizes the kind of abusive legislation that

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raise particular concerns," including "the interests in fair notice and repose that may be compromised by retroactive legislation").

[24] *United States v. Norwood*, 49 F.4th 189, 215 (3d Cir. 2022) (citation omitted).

[25] *Stogner*, 539 U.S. at 611 (citing *Weaver*, 450 U.S. at 29, n.10).

[26] *United States v. Brown*, 381 U.S. 437, 442 (1965); *see also, e.g.*, *Dufresne v. Baer*, 744 F.2d 1543, 1546 (11th Cir. 1984) ("When subjecting a law to ex post facto scrutiny, courts should bear in mind the related aims of the ex post facto clause . . . .").

the Framers intended the Ex Post Facto Clause to prohibit. The law's mandated, increased duration period of restitution, and attendant associated interest penalties, apply only to individuals convicted of crimes, a readily identifiable and disdained population. Although Petitioner has already spent nearly twenty years in prison and paying restitution, the MVRA *increases* the amount of restitution he is required to pay—almost doubles it—and *extends* that obligation.[27]

Retroactive application of the MVRA also betrays the second chief purpose of the Clause—that individuals receive fair notice of being subject to burdensome laws. Whatever hope Petitioner had of being able to dedicate the little money he earned to satisfy post-prison demands, such as family care, food, and rent—already very difficult for any former inmate—is made more remote, if not impossible, by the retroactive application of the MVRA. Worse yet, if considered a civil sanction, as the Eighth Circuit has held in Petitioner's case, the payment obligation persists post-mortem,[28] likely saddling Petitioner's

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[27] *See* Dana A. Waterman, Note, *A Defendant's Ability to Pay: The Key to Unlocking the Door of Restitution Debt*, 106 Iowa L. Rev. 455, 456 (2020) (noting that from 2014–2016 only approximately nine percent of restitution was collected from federal defendants). That failure to satisfy a restitution requirement is only a possibility, not a certainty, is of no moment. *See Garner v. Jones*, 529 U.S. 244, 250 (2000) (noting that a defendant need only show "a sufficient risk of increasing the measure of punishment attached to the covered crimes" (citation omitted)).

[28] *See United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001).

family with long-term debt payment obligations (and continued compounding interest).

Furthermore, failure to satisfy restitution requirements can short-circuit reintegration into society altogether. This is because Petitioner can be returned to prison if he cannot satisfy its payment demands.[29] The fact that the MVRA mandates restitution to the fullest extent possible, without regard for an individual's ability to pay[30] (unlike the law in effect at the time of Petitioner's offense, the Victim and Witness Protection Act ("VWPA"), Pub. L. No. 97-291, 96 Stat. 1248 (1982))[31] makes this outcome all the more likely.

Finally, permitting retroactive application of the MVRA allows Congress to transgress the bedrock principle of separation of powers, by retroactively "increas[ing] the punishment" for a crime after the fact.[32] Congress overstepped the Court's ability to evaluate the facts and law and to impose an appropriate penalty (which may include restitution). It therefore contravenes the goal of "leav[ing] the application of existing penal law" to the judicial and executive branches.[33]

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[29] *See Norwood*, 49 F.4th at 219.

[30] 18 U.S.C. § 3664(f)(1)(A).

[31] *See United States v. Edwards*, 162 F.3d 87, 88–89 (3d Cir. 1998) (noting that under the VWPA courts were required to consider ability to pay, meaning that the defendant "would, in all likelihood, not be held accountable for the full amount" but for retroactive application of the MVRA).

[32] *Garner*, 529 U.S. at 249.

[33] *Norwood*, 49 F.4th at 215 (citation omitted).

II. THE EIGHTH CIRCUIT ERRED IN CHARACTERIZING RESTITUTION AS A NON-PUNITIVE SANCTION.

As the parties' briefing acknowledges, a majority of circuit courts conclude that restitution under the MVRA is a component of a criminal sentence, and that therefore its retroactive imposition is subject to Ex Post Facto Clause prohibition.[34] The majority view, *contra* that adopted by the Eighth Circuit Court of Appeals in proceedings below, is manifestly correct for several reasons.

Requiring that restitution be paid to the victim of a crime dates back to antiquity.[35] As the Eleventh Circuit has recognized, "history is replete with references to restitution as part of the criminal sentence."[36] In America, dating back to colonial times, restitution was regularly accorded crime victims and regarded as part of a punishment imposed.[37]

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[34] *See, e.g.*, Pet'r's Pet. Cert. at 8–11; Br. U.S. Supp. Vacatur at 14, 25–26.

[35] *See, e.g.*, Robert F. Harper, *The Code of Hammurabi King of Babylon About 2250 B.C.* 13 (1904) ("If a man steal[s] ox or sheep, . . . or boat—if it be from a god (temple) or a palace, he shall restore thirtyfold; if it be from a freeman, he shall render tenfold. If the thief have nothing wherewith to pay he shall be put to death."). *See also generally* William Tallack, *Reparation to the Injured; and the Rights of the Victims of Crime to Compensation* 6–7 (1900); Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. Rich. L. Rev. 71 (1970).

[36] *United States v. Satterfield*, 743 F.2d 827, 837 (11th Cir. 1984).

[37] *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Calif. L. Rev. 277, 303–16 (2014); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal

Members of this Court have stated their view that restitution is punitive in nature. As Justice Gorsuch (joined by Justice Sotomayor) recently put it, "restitution is imposed as part of a defendant's criminal conviction."[38] In *Paroline v. United States*,[39] which concerned payment of restitution to child pornography victims, the Court observed that "despite the differences between restitution and a traditional fine, restitution still implicates 'the prosecutorial powers of government.'"[40] The "primary goal of restitution is remedial or compensatory, but it also serves punitive purposes,"[41] and "is imposed by the government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime."[42] Restitution serves "the [punitive] need to impress upon defendants that their acts are not

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Hist. 326, 343, 351 (1982); Nathaniel Amann, Note, *Restitution and the Excessive Fines Clause*, 58 Am. Crim. L. Rev. 205, 217–18 (2021); Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 Fordham L. Rev. 2711, 2718–19 (2005).

John Locke, who had enormous influence on Framing Era thought, was unequivocal in his view that restitution was a primary purpose and part of punishment. *See* Alex Tuckness, *Retribution and Restitution in Locke's Theory of Punishment*, 72 J. Pol. 720, 721–31 (2010).

[38] *Hester v. United States*, 586 U.S. 1104, 1105 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citation omitted).

[39] 572 U.S. 434 (2014).

[40] *Id*. at 456 (citation omitted).

[41] *Id*. (citation omitted).

[42] *Id*. (citation omitted).

irrelevant or victimless."[43] Similar recognition of the punitive nature of restitution appears in *Pasquantino v. United States*[44] and *Kelly v. Robinson*.[45]

Restitution, in short, is not a tort-based remedy ensconced within criminal punishment, but is itself a punishment. The goal is not to make the crime victim whole, like in a tort claim,[46] contrary to the Eighth Circuit's ruling below.[47] As the Court stated in *Kelly v. Robinson*, restitution serves "the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation."[48] "The victim has no control over the amount of restitution awarded or over the decision to award restitution."[49]

Six other distinctive features make clear that restitution is part of the corpus of punishment

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[43] *Id*. at 461; *see also Hester*, 586 U.S. at 1105 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) ("Restitution plays an increasing role in federal criminal sentencing today.").

[44] 544 U.S. 349, 365 (2005) (stating that the purpose of restitution is to "mete out appropriate criminal punishment"); *see* Pet'r's Br. at 22.

[45] 479 U.S. 36, 37 (1986) (explaining how restitution serves "the penal goals of the State"); *id*. at 49 n.10 (discussing how restitution serves various goals of punishment); *see* Pet'r's Br. at 23.

[46] As the Senate Report in favor of adopting the MVRA noted, restitution proceedings are not to "become fora for the determination of facts and issues better suited to civil [actions]." S. Rep. No. 104-179, at 18 (1995).

[47] *United States v. Ellingburg*, 113 F.4th 839, 841–42 (8th Cir. 2024).

[48] 479 U.S. at 53.

[49] *Id.* at 52.

imposed on an individual, rather than being merely a civil adjunct of a sentence:

1) Restitution cannot be modified by private settlement.[50]

2) Unlike a civil debt, restitution is not dischargeable in bankruptcy.[51]

3) Like a criminal fine, restitution is levied with no regard for a defendant's ability to pay,[52] and the restitution amount can influence imposition of other punishments and substitute for a fine.[53]

4) Restitution is a condition of probation, parole, and supervised release,[54] as it is in Petitioner's

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[50] *See United States v. Hankins*, 858 F.3d 1273, 1277 (9th Cir. 2017) (joining the Second, Fifth, Sixth, and Eighth circuits in upholding the authority of a district court to enter an order redirecting payments, reasoning that "restitution is a criminal sentence" and as "private individuals should not be allowed to thwart the penal goals of the criminal justice system by entering into releases or settlements with wrongdoers," rejecting contrary position of Seventh and Tenth Circuits (citation omitted)); *see also United States v. Sanjar*, 876 F.3d 725, 751 (5th Cir. 2017) ("both restitution and criminal forfeiture are mandatory features of criminal sentencing that a district court does not have authority to offset").

[51] *Kelly*, 479 U.S. at 52.

[52] 18 U.S.C. § 3664(f)(1)(A).

[53] 18 U.S.C. §§ 3572(b), 3663A(a)(1).

[54] *See Restitution Process*, U.S. Dep't of Just., https://www.justice.gov/criminal-vns/restitution-process (last updated Oct. 10, 2023) ("Compliance with the Order of Restitution automatically becomes a condition of the offender's probation or supervised release.").

case, all forms of community supervision acknowledged as being punitive in nature.[55]

5) Failure to pay restitution results in incarceration,[56] a coercive power of government alone that no individual can exercise.

6) Failure to pay restitution can result in preventing a convicted individual from having their conviction sealed or expunged.[57]

In sum, history, the views of members of this Court, and the distinctive features of restitution make clear that the Eighth Circuit erred in concluding that restitution is a civil sanction.

III. THE EIGHTH CIRCUIT WRONGLY CONCLUDED THAT THE EX POST FACTO CLAUSE PROHIBITS ONLY RETROACTIVE CRIMINAL LAWS.

The Eighth Circuit further erred by drawing a strict distinction between the application of the Clause to criminal versus civil penalties. The application of the Ex Post Facto Clause to retroactive criminal laws—but ignoring it entirely for civil ones—

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[55] *Smith v. Doe*, 538 U.S. 84, 101 (2003).

[56] *Norwood*, 49 F.4th at 219; *see also Hester*, 586 U.S. at 1106 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) ("The effects of restitution orders, too, can be profound. Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration.").

[57] Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 123 n.109 (2014).

lacks historical support and is yet another reason to vacate the Eighth Circuit's decision below.

The primary source for the modern belief that the Ex Post Facto Clause does not apply to civil penalties is *Calder v. Bull*,[58] one of the Court's first decisions, and one that has been subject to major legal and historical criticism. *Calder* involved a challenge against a "resolution or law" of the Connecticut Legislature, when it was exercising its appellate judicial jurisdiction (not uncommon at the time), which set aside a probate court's decree and granted a new trial. The Court unanimously rejected the ex post facto challenge advanced, with Justice Chase authoring what is now regarded as the principal opinion in the case, including its central holding that the Clause prohibits only criminal, not also civil, retroactive laws.[59]

Justice Chase offered several reasons in support of the limit. First, he wrote that "private rights, of either property, or contracts"[60] were already regulated by other prohibitions in Article I, Section 10 (such as

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[58] 3 U.S. (3 Dall.) 386 (1798).

[59] The other principal holding of *Calder* was that the ex post facto prohibition only extended to four categories of laws identified by Justice Chase in his opinion. The validity of this holding is also subject to serious question. *See* Logan, *supra* note 2, at 156–58. However, the four-category limit is not material here because retroactive application of the restitution provisions of the MVRA increased the punishment experienced by the Petitioner, violating the third prohibition. *See Calder*, 3 U.S. at 390 ("3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.").

[60] *Calder*, 3 U.S. at 390.

concerning the impairment of contracts). Second, "[t]he expressions 'ex post facto laws,' are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by Legislators, Lawyers, and Authors."[61] The "technical" meaning, Justice Chase wrote, was reflected in the work of William Blackstone and Richard Wooddeson, and "the author of the Federalist [presumably James Madison in Number 44], who I esteem superior to both, for his extensive and accurate knowledge of the true principles of Government."[62] Finally, Justice Chase pointed to what he regarded as the criminal-centric definitions of ex post facto laws in several state constitutions.[63]

As subsequent understanding of the Framing Era historical record has shown, Justice Chase's analysis in *Calder* was questionable, at best.

A. Questioning *Calder*: Early Judicial Doubts.

Not long after *Calder* was decided, members of the Court questioned the accuracy of the criminal-centric view it advanced. In *Satterlee v. Matthewson*,[64] Justice William Johnson, who was not on the Supreme

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[61] *Id.* at 391.

[62] *Id.*

[63] *Id.* Two fellow justices concurred with Justice Chase's view. *See id.* at. 397 (Paterson, J.); *id.* at 399–400 (Iredell, J.). Justice Cushing, who also concurred in the result, did not expressly opine on the matter. *Id.* at 400–01 (Cushing, J.). The two other members of the Court at the time, Chief Justice Oliver Ellsworth and Justice James Wilson, did not participate. *See* Logan, *supra* note 2, at 214 n.18.

[64] 27 U.S. (2 Pet.) 380 (1829).

Court when *Calder* was decided, provided the first explicit critique. *Satterlee* involved a challenge to a Pennsylvania statute that effectively made a once-void land deed valid, which petitioners alleged violated the Contracts Clause in Article I, Section 10. The Court resolved the question on procedural grounds, avoiding the Contracts Clause issue, with Justice Johnson concurring in the result.

In a highly unusual "Note" appended to his concurrence, however, Johnson, who intimated the same view two years before in another case (*Ogden v. Saunders*[65]), took the opportunity to address what he called the "unhappy idea, that the phrase 'ex post facto,' in the constitution of the United States, was confined to criminal cases exclusively; a decision which leaves a large class of arbitrary legislative acts without the prohibitions of the constitution."[66]

After expressing his disagreement with *Calder*'s criminal-centric view, Justice Johnson noted that the holding itself was in fact dictum because, as the justices in *Calder* themselves stated, the government action challenged in the case was judicial not legislative in nature.[67] Justice Johnson then provided a point-by-point refutation of the evidence advanced by Justice Chase.

With respect to the argument that the Clause targeted only criminal laws because other prohibitions in Article I, Section 10 already addressed civil laws, Justice Johnson reasoned that "by placing

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[65] 25 U.S. (12 Wheat.) 213, 286 (1827).

[66] *Satterlee*, 27 U.S. at 416 (Johnson, J.).

[67] *Id*. at 416 n.a.

'*ex post facto* laws' between bills of attainder, which are exclusively criminal, and laws violating the obligation of contracts which are exclusively civil, it would rather seem that *ex post facto* laws partook of both characters, was common to both purposes."[68] The view that the ex post facto prohibition would be superfluous if given a broader reach, Justice Johnson maintained, resulted from a disregard for the many retroactive laws that can adversely affect individuals, beyond contracts:

> the learned judges could not then have foreseen the great variety of forms in which the violations of private right have since been presented to this court. . . . This court has had more than once to toil up hill, in order to bring within the restriction on the states to pass laws violating the obligation of contracts, the most obvious cases to which the constitution was intended, to extend its protection; a difficulty, which it is obvious, might often be avoided, by giving to the phrase *ex post facto* its original and natural application.[69]

Furthermore, Justice Johnson noted that Justice Chase's reliance on Blackstone and Wooddeson was misplaced, because the passages cited stood only for the proposition that retroactive criminal laws are

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[68] *Id*.

[69] *Id*. Justice Chase's inference is also problematic because Article I, Section 9 contains no parallel limits on Congress. Under his reading, states can pass retroactive civil laws, but Congress cannot.

especially problematic, not that they are the only kind of prohibited ex post facto law.[70] Justice Chase's invocation of an unnamed contributor to the *Federalist Papers*, who Justice Chase presumed to be James Madison, was poor authority, because:

> the writer has made no attempt at giving a distinct exposition of the phrase, as used in the constitution. Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are all considered together; and regarded, as they really are, as forming together "a bulwark, in favor of personal security and private rights;" but on the separate office of each, in the work of defence, he makes no remark, and attempts no definition or distribution.[71]

Justice Johnson wrote that Justice Chase was also wrong to cite state constitutions in support of his conclusion. The Massachusetts and Delaware constitutions that Justice Chase invoked, Justice Johnson observed, did not contain the phrase "ex post facto," and only North Carolina and Maryland "would seem to have applied the phrase in the restricted sense."[72] Of Maryland, which was "copied" by North Carolina, Justice Johnson wrote that the restrictive view of Justice Chase was likely influenced by the fact

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[70] *Id.*

[71] *Id.*

[72] *Id.*

that Justice Chase was a delegate to the Maryland Constitutional Convention.[73]

Other early era justices also expressed doubt about the soundness of the *Calder* criminal-centric limit. Although not citing *Calder*, one of the earliest and most important Marshall Court decisions, *Fletcher v. Peck*,[74] is one such example. *Fletcher* concerned a law enacted by the Georgia legislature that retroactively revoked land grants to purchasers without notice and was challenged on Contracts Clause grounds. The Court, with Chief Justice Marshall writing, backed the challenge, marking the first time the Court invalidated a state law on constitutional grounds. In the opinion, the Chief Justice signaled his broad understanding of the ex post facto prohibition, stating that "[a]n ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. *Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury.*"[75]

Similarly, Justice Joseph Story wrote in his *Commentaries on the Constitution* that "ex post facto laws, in a comprehensive sense, embrace all retrospective laws, whether they are of a civil, or a criminal nature."[76] Justice Story further explained that if the question of the applicable scope of the Clause were assessed in a case of first impression, before *Calder*, Justice Johnson's analysis and

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[73] *Id.*

[74] 10 U.S. at 87.

[75] *Id.* at 138 (emphasis added).

[76] 3 Joseph Story, *Commentaries on the Constitution* § 1339 (1833).

conclusions in *Satterlee* "would be entitled to grave consideration."[77] Earlier, in 1814 when riding circuit as a justice, Justice Story stated that "[o]n principle, every statute[] which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."[78] Thomas Jefferson, while not directly involved in drafting the Constitution or its approval (in Virginia, his home state), but nonetheless a key player in the nation's early history, took a similarly expansive view.[79]

The views of participants in state ratifying conventions—which James Madison later in life believed key to understanding the Constitution[80]—likewise support a broader understanding of the scope of the Ex Post Facto Clause. In North Carolina,

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[77] *Id.*

[78] *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 Fed. Cas. 756, 767 (C.C. N.H. 1814); *see also Stoddart v. Smith*, 5 Binn. 355, 370 (Pa. 1812) (Brackenridge, J.) ("I take notice of the language of the Court of the United States, as confining *ex post facto* to a criminal case. . . . [The view] is incorrect. *Ex post facto* law . . . embraces civil contracts as well as criminal acts. . . . Our constitutions use the phrase *ex post facto* law, or law impairing contracts. They mean no more than to specify under the idea of impairing contracts, a kind of *ex post facto* law, which was embraced under the general term *ex post facto*.").

[79] *See* 13 Thomas Jefferson, *The Writings of Thomas Jefferson* 326–27 (1903) ("every man should be protected in his lawful acts, and be certain that no *ex post facto* law shall punish or endamage him for them . . . [T]hey are equally unjust in civil as in criminal cases").

[80] 5 Annals of Cong. 775 (1796) (remarks of James Madison).

Justice Iredell (who later concurred in *Calder*) viewed the ex post facto prohibition as encompassing both retroactive civil and criminal laws.[81] In Virginia, four of five delegates addressing the ex post facto prohibition took the same position.[82] Patrick Henry[83] and George Mason[84] were especially adamant that retroactive civil laws came within the prohibition. And in New York's fractious convention, an amendment was proposed that would specifically

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[81] Iredell, a staunch Federalist, resisted Anti-Federalist arguments that the provision in Article I, Section 10 restraining states from issuing paper money would discredit state paper currency then in circulation. The limit, he argued, prohibited future paper money circulation, and the Clause would protect money already in circulation, making clear his view of its civil application. *See* Willis P. Whichard, *Justice James Iredell* 132 (2000). Fellow delegate Stephen Cabarrus expressed a similar view. *See* 4 *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* 184 (Jonathan Elliot ed., 1836) [hereinafter Elliot's Debates].

Iredell also published an anonymous essay evidencing his broader understanding, stating: "The people are expressly secured . . . against *ex post facto* laws, so that the tenure of any property at any time held under the principles of the common law, cannot be altered by any act of the future general legislature." James Iredell, Marcus I, Norfolk & Portsmouth J., Feb. 20, 1788, *in* 16 *The Documentary History of the Ratification of the Constitution* 164 (John Kaminsi et al., eds., 1986).

[82] Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 Wis. L. Rev. 727, 746. George Mason, a delegate to both the federal and Virginia ratifying conventions, identified his failed effort to limit the ex post facto prohibition to criminal laws in his refusal to support the federal constitution in Philadelphia. 2 *The Records of the Federal Convention of 1787* 636 (Max Farrand ed., 1911).

[83] Elliot's Debates, *supra* note 81, at 425, 473–76.

[84] *Id*. at 472–73, 479.

limit the ex post facto prohibition to criminal laws but failed.[85]

B. Questioning *Calder*: Framing Era History.

The vast majority of scholars, dating back to at least 1900,[86] are of the view that during the Framing Era ex post facto laws were understood by both the lay public and those using a "technical" or "professional" understanding to encompass both retroactive civil and criminal laws.[87] In 1922, Professor Oliver Field noted that James Madison, a key participant at the Philadelphia Convention, and a main chronicler of events there, believed that the ex post facto prohibition encompassed both civil and criminal laws. Professor Field pointed to Madison's question on August 28 at the Convention, in response to a motion to include a provision barring state interference with contracts: "Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void?"[88] Of this, Field reasoned that Madison was

> evidently of the impression that *ex post facto* applies to civil as well as to criminal matters. It is odd that no member of the Convention took the trouble to inform

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[85] *Id.* at 407.

[86] *See* Brainerd T. DeWitt, *Are Our Legal-Tender Laws Ex Post Facto?*, 15 Pol. Sci. Q. 96 (1900).

[87] *See* Logan, *supra* note 2, at 218 n.73 (citing multiple journal articles).

[88] Oliver P. Field, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315, 319 (1922).

> him that he was laboring under a serious misapprehension. It is hardly credible that such a slip should be permitted without some member calling it to his attention. Madison does not record any answer given to his query.[89]

Professor Field also observed that use of "ex post facto" in the *Official Journal* and Madison's corresponding use of the term "retrospective" in his *Notes* demonstrated that the terms "were used synonymously. It is improbable that Madison alone understood the terms to have the meaning he attaches to them. . . . During the entire debate recorded in this connection there is a notable absence of anything pertaining to criminal affairs."[90] Furthermore, as noted above, central players in the Virginia ratifying convention clearly regarded the prohibition to encompass civil and criminal matters.[91]

More recently, in 2019, Professor John Mikhail wrote that "[t]here is, in fact, a mountain of evidence indicating that ex post facto laws were commonly understood at the founding to include both civil and criminal laws" and that Justice Chase and his fellow justices were "aware of this fact."[92] Professor Mikhail notes that "[a]ll told . . . there appear to be approximately three dozen founding era cases which contradict the claim made by Justices Chase, Iredell,

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[89] *Id*.

[90] *Id*. at 320.

[91] *Id*. at 324–25.

[92] John Mikhail, *James Wilson, Early American Land Companies, and the Original Meaning of "Ex Post Facto*," 17 Geo. J. L. & Pub. Pol'y 79, 82 (2019).

and Paterson in *Calder v. Bull* that the phrase 'ex post facto law' was understood at the time to be a technical term limited to retroactive criminal laws."[93] Professor Evan Zoldan, in a 2015 article analyzing an even more extensive array of historical sources, concluded that not only did the technical/professional understanding of ex post facto encompass civil and criminal laws, but the general public/lay understanding did as well.[94]

Summarizing the modern understanding of Framing Era history, Professor Leonard Levy characterized *Calder*'s narrow view of the ex post facto prohibition as being "more innovative than . . . an accurate reflection of the opinions of the Framers and ratifiers. . . . [T]he history of the framing and ratification of the ex post facto clauses simply do not bear out the opinions in *Calder*. The Court in that case reinvented the law on the subject."[95]

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[93] *Id*. at 86 n.41.

[94] Zoldan, *supra* note 82, at 768–71.

[95] Leonard W. Levy, *Original Intent and the Framers' Constitution* 74 (1988); *see also id*. at 65–74 (providing extensive critique of *Calder*'s criminal-centric view).

It is also important to note that *Calder* was decided in 1798, without the benefit of any record of the discussions and debates taking place at the Philadelphia Constitutional Convention. The proceedings were held in secret and none of the justices were present and even the skeletal record provided in the *Official Journal* was not available until 1819. Madison's piecemeal *Notes* were published even later, in 1840. The *Calder* justices also lacked access to records from the state ratifying conventions, which were not available until 1827 (with the publication of *Elliot's Debates*).

C. *Calder*'s Limited Legacy.

As discussed, *Calder*, despite its landmark status, has long been criticized. Regarding the criminal-centric limit especially, strong reason exists to doubt Justice Chase's assertion that there was "a necessity to give a construction, or explanation of the words 'ex post facto laws,' because they have not any certain meaning attached to them."[96] On the contrary, when the Constitution originated both the "technical" and ordinary lay understandings of the ex post facto prohibition covered both civil and criminal laws. *Calder*'s limitation to criminal laws persists as an unfortunate early example of poorly executed law office history.

Overruling an aged precedent such as *Calder* would be a notable event. However, as Professor Michael Stokes Paulsen has written, "*stare decisis*, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism."[97] Justice Thomas, echoing the view of Justice Black voiced over three decades before,[98] has signaled his desire to reconsider the criminal-centric coverage mandated by *Calder*,[99] and more generally expressed his willingness to overrule "demonstrably

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[96] *Calder*, 3 U.S. at 395.

[97] Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 Const. Comment. 289, 289 (2005).

[98] *See Lehmann v. United States*, 353 U.S. 685, 690 (1957) (Black, J., concurring) (expressing view that limiting the ex post facto prohibition to criminal laws "confines the clause too narrowly").

[99] *E. Enters.*, 524 U.S. at 539 (Thomas, J., concurring).

erroneous precedent,"[100] adding that "[t]his view of *stare decisis* follows directly from the Constitution's supremacy over other sources of law—including our own precedents."[101] Justice Gorsuch has also emphasized that *stare decisis* "isn't supposed to be the art of methodically ignoring what everyone knows to be true."[102]

Stare decisis, the Court has also made clear, plays a diminished role regarding constitutional questions[103] and that it is "at its nadir in cases" implicating "fundamental constitutional protections,"[104] such as the Ex Post Facto Clause. Moreover, it bears mention that deference to *Calder*'s holding is less warranted for two additional reasons. One is that, as noted, the *Calder* Court's pronouncement constituted dictum because the Court was addressing a judicial act, not a legislative "law." Another concerns the in seriatim nature of the opinions issued by the *Calder* justices. As the Eighth Circuit itself recently observed, "it is instructive to note that Justice Chase's opinion in *Calder* was written in the period in which each Justice gave his opinion *seriatim*. Thus, it is not a Supreme Court holding that would be included in the definition of 'clearly established Federal law.'"[105]

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[100] *Gamble v. United States*, 587 U.S. 678, 711–12 (2019) (Thomas, J., concurring).

[101] *Id.* at 718.

[102] *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020).

[103] *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

[104] *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013).

[105] *Palmer v. Clarke*, 408 F.3d 423, 432 (8th Cir. 2005).

Finally, from an institutional perspective, overruling *Calder*'s limit will provide substantial practical benefits concerning the doctrine's "workability," another *stare decisis* consideration.[106] First, broadening ex post facto protection will obviate the judicial need to decide whether a provision is civil or criminal in nature, an arduous time-consuming test evaluating multiple indeterminate manipulable factors that are redundant and selectively relied upon by courts.[107] Second, it will free state legislatures and Congress from the felt need to camouflage sanctions with meaningless labels and "civil" window dressing in order to rebuff ex post facto challenges.[108]

Third, and perhaps most important, doing away with *Calder*'s cramped view will align with broader shifts in governance since *Calder*, particularly the advent of sanctions that make line-drawing problematic. As Justice William Johnson noted in 1829, in *Satterlee v. Mathewson*,[109] the holding in *Calder* "leaves a large class of arbitrary legislative acts without the prohibitions of the constitution,"[110] which "the learned judges [in *Calder*] could not then have foreseen."[111]

What was true in 1829 is much more so today, as the scope of legislative activity has expanded exponentially over time with governments frequently

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[106] *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).

[107] *See* Logan, *supra* note 2, at 122–32 (noting longstanding critiques in this regard).

[108] *See id*. at 120–22.

[109] 27 U.S. at 380.

[110] *Id*. at 416 (Johnson, J., concurring).

[111] *Id*. at 416 n.a.

enacting retroactive sanctions that betray simple binary categorization. As Justice Gorsuch recently said of this hybridization:

> today's civil laws regularly impose penalties far more severe than those found in many criminal statutes . . . Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.[112]

CONCLUSION

For the reasons provided above, the Court should vacate the holding of the Eighth Circuit Court of Appeals in the proceedings below.

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[112] *Sessions v. Dimaya*, 584 U.S. 148, 184 (2018) (Gorsuch, J., concurring).

Respectfully submitted,

PROFESSOR WAYNE LOGAN
WAKE FOREST
UNIVERSITY SCHOOL OF
LAW
1834 Wake Forest Rd
Winston-Salem, NC
27109

KRYSTAL B. SWENDSBOE
Counsel of Record
LEAH C. DESKINS
GRACE O. MOORE
WILEY REIN LLP
2050 M St. NW
Washington, D.C. 20036
(202) 719-4197
kswendsboe@wiley.law

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Counsel for Amicus Curiae