No. 24-482

IN THE
SUPREME COURT OF THE UNITED STATES

HOLSEY ELLINGBURG, JR.,

Petitioner,

v.

UNITED STATES,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF PROFESSOR BETH A. COLGAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BETH A. COLGAN
UCLA School of Law
385 Charles E. Young Dr. East
Los Angeles, CA 90095
(310) 825-6996
colgan@law.ucla.edu

June 30, 2025

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Beth A. Colgan is Professor of Law at UCLA School of Law. She is one of the country's leading experts on constitutional and policy issues related to the use of monetary sanctions as punishment.

SUMMARY OF ARGUMENT

The Ex Post Facto Clause prohibits the imposition of "additional punishment to that then prescribed" at the time the offence was committed. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1866); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1789) ("Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed . . . [is] manifestly unjust and oppressive."). The post-offense application of the Mandatory Victim Restitution Act (MVRA)—which imposes restitution for a variety of public offenses—is a clear violation of the Clause. 18 U.S.C. §§ 3663A-3664. The Eighth Circuit's decision below to the contrary not only misapprehends the MVRA, it is also out of accord with both the Clause's original meaning and with America's centuries-long history and tradition of imposing restitution as a form of punishment.

The Clause's earliest jurisprudence makes plain that *ex post facto* laws may be criminal *or* penal in nature. *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 110 (1834). The Eighth Circuit appears to have understood these terms to be merely synonymous. *Compare* Pet. 4a (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981)) ("[t]he

---

[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to this brief's preparation or submission.

Ex Post Facto Clause applies only to criminal penalties, and thus the dispute before us is whether MVRA restitution is a criminal or civil penalty"), *with Weaver*, 450 U.S. at 29 (stating that a "criminal or penal law [may] be *ex post facto*").

Historically, the terms "criminal" and "penal" held distinct meanings—the former requiring full criminal process and the latter allowing for civil or summary adjudication in some instances—though both involved the imposition of punishment for offenses against the public. Therefore, even if the MVRA constituted a civil proceeding (which it does not), it would still be subject to the Ex Post Facto Clause so long as it imposes restitution in response to public offenses (which it does).

In addition to misapprehending that the Ex Post Facto Clause's scope encompassed all public offenses regardless of the form of adjudication, the Eighth Circuit further erred in its assumption that because restitution compensates victims for their losses, it is necessarily non-punitive in nature and thus beyond the Clause's reach. *See* Pet. 5a-7a (quoting *United States v. Carruth*, 418 F.3d 900, 903-04 (8th Cir. 2005) (declining to overturn a prior opinion in which it held that "because restitution under the MVRA 'is designed to make victims whole, not to punish perpetrators, … it is essentially a civil remedy").

That holding is belied by a long history and tradition in the United States, dating back to the colonial era, of using restitution as a form of punishment for public offenses. Restitution was often imposed in distinctly criminal matters, made plain by the placement of the statutes authorizing its use in criminal codes and for offenses designated as felonies or misdemeanors, or pursuant to statutes mandating the use of

criminal procedures. Restitution was also often imposed in response to both criminal and penal offenses, as evident through its use in conjunction with other recognized forms of punishment as a component of sentencing.

The MVRA shares the same characteristics that demonstrated the punitive nature of early sentences to pay restitution. It is embedded in a federal criminal code, it mandates the imposition of restitution in felony and misdemeanor cases, it requires the sole use of the Rules of Federal Criminal Procedure in the adjudication of and sentencing for public offenses, and it intertwines restitution at sentencing with other forms of punishment, including terms of imprisonment, fines, criminal forfeitures, probation, and community supervision. Therefore, in keeping with the original understanding of the Ex Post Facto Clause as applicable to all forms of punishment imposed for public offenses, and the longstanding use of restitution for exactly that purpose, the Court should hold that the Clause is applicable to the MVRA.

ARGUMENT

As detailed below, both the original meaning of the Ex Post Facto Clause as applicable to all public offenses and the centuries-long history and tradition of punishing public offenses with restitution support the conclusion that the MVRA—which mandates the imposition of restitution for public offenses—is subject to the Clause's restrictions.

I. The Ex Post Facto Clause Applies to Pecuniary Punishments Imposed in Response to All Public Offenses

In holding that the Ex Post Facto Clause did not apply to the MVRA, the Eighth Circuit erred in its understanding of the Clause as limited to only punishment imposed in technically criminal matters. That idea—that whether a penalty constitutes "punishment" depends on whether it is processed criminally or civilly—is a modern invention that would have been unrecognizable in seventeenth, eighteenth, and nineteenth century America. Therefore, even if the Eighth Circuit were correct that restitution is not a technically criminal punishment, the Ex Post Facto Clause would still apply to the MVRA.

That the Ex Post Facto Clause extends beyond punishments imposed in technically criminal matters is evident on the face of the Court's early jurisprudence interpreting the Clause.[2] In one of the Court's earliest opinions, and the first interpreting the Ex Post Facto Clause, the Court declined to apply the Clause to a Connecticut statute regarding the probate of wills, reasoning that the statute affected only "private rights, of either property or contracts" litigated civilly. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). This did not, however, render all civil proceedings outside the Clause's ambit. As the Court soon made clear, the Clause applied to both "penal and criminal" statutes, the former of which addressed public offenses that might be processed through civil or summary proceedings. *See Watson v. Mercer*, 33 U.S. (8 Pet.) 88,

---

[2] For a detailed historical account of the Clause, see Wayne A. Logan, *The Ex Post Facto Clause: Its History and Role in a Punitive Society*, 1-49 (Oxford Univ. Press 2023).

110 (1834) ("ex post facto laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights"); *see also Burgess v. Salmon*, 97 U.S. 381, 382, 385 (1878) (referring to a statute that would result in a defendant being "punished…civilly" and explaining that "the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal"); Timothy Farrar, *Manual of the Constitution of the United States of America*, § 477 (Boston, Little, Brown, & Co. 1867) (regarding the application of the Clause to "criminal and penal matters": "Civil and criminal relate rather to the form in which the act is dealt with, than to the nature and character of the act itself.").

That the early Court drew the relevant line for the Clause's scope between punishments imposed in response to public offenses whether prosecuted criminally or civilly on the one hand, and purely private disputes on the other, is unremarkable given the broader understanding of punishment dating back to the colonial era.

Colonial statutes, and those passed by the federal government and American states in the eighteenth and nineteenth century, allowed certain offenses for which fines and forfeitures were the typical form of punishment to be adjudicated in proceedings referred to as either "civil" or "summary" in nature. Such proceedings were distinguishable from private disputes litigated civilly given the public nature of the underlying offense.

The distinction between public offenses and private disputes, and in turn the ability to adjudicate certain public offenses civilly, was borrowed from the English common law. *See Huntington v. Attrill*, 146

U.S. 657, 668 (1892) (citing Blackstone for the premise that "[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual"). As Blackstone explained, private actions involved "an infringement or privation of the civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries.'" 3 Blackstone, *Commentaries on the Laws of England* 2 (1794). In contrast, public wrongs "are a breach and violation of public rights and duties, which affect the whole community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'" *Id.* Some of the latter category of public offenses, in turn, could be proceeded against without full criminal process, often before justices of the peace. *Id.* at 271, 281-83. *See also* 2 Benjamin Vaugh Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 620 (Boston, Little, Brown, & Co. 1879) (defining "summary conviction" as "authorized by the statutes of many of the states … chiefly for the lesser offenses").

Following the English tradition, offenses were understood to necessitate full criminal process if the punishments that could be imposed included death, periods of incarceration, and corporal punishment, at times along with pecuniary penalties. *E.g.*, *Slaughter v. People*, 2 Doug. 334, 335-39 (Mich. 1842) (holding a statute making "keeping a bawdy-house, or house of ill-fame … punishable by fine or imprisonment" unconstitutional because it did not require indictment by a grand jury).

Lawmakers also at times choose to authorize civil or summary proceedings for certain public offenses for which the primary form of punishment was pecuniary.

See, e.g., *Spaulding v. People ex rel. Backus*, 7 Hill 301, 302-04 (N.Y. Ct. Corr. Errors 1843) (holding that a fine imposed in a "summary proceeding" remained penal in nature).

Despite the distinction in procedural form, pecuniary penalties imposed in response to public offenses were widely understood to constitute punishment. As the Court explained:

> The real nature of the case is not affected by forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of [the state], the prosecution must be by indictment or by action; … In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end,—compelling the offender to pay a pecuniary fine by way of punishment for the offense.

Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 299-300 (1888) (holding that the rule precluding one jurisdiction from enforcing the penal laws of another extended to penal laws processed civilly), *limited on other grounds Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273-74 (1935); *see also Adams v. Woods*, 6 U.S. (2 Cranch) 336, 340-41 (1805) (holding that a statute of limitations on cases in which a person is "prosecuted" "appl[ied] not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence," including the civil action at issue); *United States v. Mann*, 26 F. Cas. 1153, 1154-57 (C.C.D. N.H. 1812) (No. 15,718) (Story, Circuit Justice) ("without question all infractions of public laws are offences; and it is the mode of prosecution and not the nature of the prohibitions, which ordinar-

ily distinguish penal statutes from criminal statutes"); *People v. Stevens*, 13 Wend. 341, 342 (Mass. 1835) (emphasis in original) (describing both a fine imposed civilly and fines and imprisonment imposed criminally: "they both constituted *the* punishment which the law inflicts upon the offense").

In other words, what mattered for discerning whether a pecuniary award was punishment was the substance of the law—its imposition in response to a public offense—rather than its procedural form. Therefore, the distinction between criminal and civil proceedings employed by the Eighth Circuit below to ascertain the scope of the Ex Post Facto Clause would have been ineffectual historically, as the Clause applied to penal statutes punishing public offenses that may have been processed civilly.[3]

The relevant question for whether the MVRA imposes punishment is, therefore, whether the restitution it mandates is imposed in response to a public offense. The historical use of restitution for that exact purpose—in both criminal and penal matters—is discussed next.

II. The United States Has a Long History and Tradition of Employing Restitution as a Punishment for Public Offenses

In holding that the Ex Post Facto Clause did not apply to the MVRA, the Eighth Circuit further erred

---

[3] Not only is the Eighth Circuit's approach ineffectual as a historical matter, it remains so today. If one were to commit a minor traffic offense at a time the offense was to be punished by a $25 fine, and the government were to then amend the statute and impose a fine of $1,000,000 dollars, it would be nonsensical to treat that fine as non-punitive simply because the offense was processed civilly.

in its assumption that because restitution compensates victims for their losses, it is necessarily non-punitive in nature and thus beyond the Clause's scope. *See* Pet. 5a-7a.

That assumption is belied by the long history and tradition of employing restitution as a form of punishment in response to public offenses. That restitution was imposed as punishment for offenses that were public in nature, rather than as compensation for purely private injuries, was evident in both obviously criminal statutes and in penal statutes. First, restitution was employed for offenses explicitly designated as criminal, as felonies and misdemeanors, and as necessitating the use of criminal procedures. Second, lawmakers authorized and courts imposed restitution in both criminal and penal matters in conjunction with other recognized forms of punishment as a component of the overall sentence.

A. That Restitution Constituted Punishment Was Evident by the Description of Such Offenses as Criminal, as Felonies and Misdemeanors, or as Necessitating Criminal Procedures

One way that the public nature of offenses authorizing the imposition of restitution was made plain was through explicit descriptions of such offenses as criminal, as felonies or misdemeanors, or as necessitating criminal process.

Some of the myriad statutes pursuant to which lawmakers authorized restitution were located within criminal codes or statutes designated as criminal. For example, in 1790, Congress passed An Act for the Punishment of Certain Crimes Against the United States. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. What came to

be known as the Federal Crimes Act included a prohibition on larceny on federal land or upon the high seas, a conviction for which authorized whipping and that "the person or persons so offending … be fined not exceeding four-fold value of the property so stolen …; the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor."[4] *Id.* 1 Stat. 116, § 16.[5] Years later when Congress recodified the federal law into a single code in the late 1870s, it included within it a title on "Crimes," which in turn included a set of "Crimes Against the Elective Franchise and Civil Rights of Citizens." *See Revised Statutes of the United States, Passed at the First Session of the Forty-Third Congress*, 1873-74, tit. 70, ch. 9 (2d ed. 1878) (*Revised Statutes*). Among the offenses listed in the statute, was the refusal by a marshal or deputy marshal to receive or execute a lawful process related to voting, the punishment for which was "a fine in the sum of one thousand dollars, for the benefit of the

---

[4] The terms "informer" or "*qui tam*" prosecutor, refer to private citizens who investigated, reported, and prosecuted public offenses on behalf of the government. *See Marvin v. Trout*, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer … have been in existence for hundreds of years in England, and in this country ever since the foundation of our government.").

[5] This statute is currently codified in the same primary federal criminal code as the MVRA. *See* 18 U.S.C. § 661 (prohibiting stealing within "the special maritime and territorial jurisdiction of the United States"). So long as there is an identifiable victim, restitution would be available under the MVRA for an offense against this statute. 18 U.S.C. § 3663A(c)(1)(B).

party aggrieved thereby." *Id.* § 5517[6]; *see also id.* tit. 70, ch. 6, §§ 5488-5492[7] (regarding the embezzlement of public funds, the sentence for which was a term of imprisonment, fines, or both, with fines—which would be payable to the United States—assessed in relation to the amount embezzled from the United States).

The states similarly included restitution as a form of punishment in statutes designated as criminal. For example, in the years before and shortly after the ratification of the Constitution (and thus, the Ex Post Facto Clause), the New Hampshire Legislature passed a series of code provisions explicitly labeled as criminal; those provisions included restitution among the authorized punishments dating back at least to 1696. *E.g.*, 1785-1791 (1791) N.H. Laws 252-57 ("An Act for the punishment of certain crimes not capital": for theft, the offender is sentenced to a fine or whipping, "and shall be further sentenced to pay treble the value of the goods or other articles stolen, to the owner thereof"); 1701 N.H. Laws 14-16 ("An Act for the Punishing of Criminal Offenders": for perjury, sentencing to imprisonment and a fine and to either "answer all damages, that any person or persons may sustain by reason of any such offense" or stand in the pillory with ears nailed thereto); 1697 N.H. Laws 15-23, § 17

---

[6] The original statute is: Act of May 31, 1870, ch. 114, 16 Stat. 140-141, § 3. It is currently codified at 42 U.S.C. § 1990 (requiring a marshal to obey all precepts or "be liable to a fine in the sum of $1,000, for the benefit of the party aggrieved thereby").

[7] The original statutes recodified in these sections are: Act of June 14, 1866, ch. 122, 14 Stat. 64-65, § 2; Act of Mar. 3, 1857, ch. 114, 11 Stat. 249 §§ 2-3; Act of Aug. 6, 1846, ch. 90, 9 Stat. 63, § 16. The current codifications of these sections continue to measure fines by reference to the amounts embezzled. *See* 18 U.S.C. §§ 648, 650, 653.

("Criminal Laws": for willful burning of a fence: "He shall make good the damage to the party wronged, and be amerced forty shillings, and bound to Good Behaviour"); 1696-1701 N.H. Laws 14-16 (1696) ("An Act for the Punishing Criminal Offenders": for theft, sentencing to a fine or whipping, and to "forfeit, treble the value of the Money, Goods or Chattels so Stolen or Purloined unto the Owner"). Other jurisdictions followed suit. *E.g.*, 1732-1746 (1744) Md. Laws 7-8 ("An Act to prevent cutting up Tobacco Plants … and for ascertaining the Punishment of Criminals guilty of the said Offences": "forfeit and pay unto the Party grieved, One Hundred Pounds Sterling" in addition to a prison term); 1700-1769 (1719) Del. Laws 64-77, ch. 22, §§ 4, 26 (setting out punishment for "crimes" including suborning perjury, for which "such offender shall forfeit the sum of Forty Pounds, one half thereof to the Governor, for the support of this government, and the other half to the party grieved" or a six month term of imprisonment).

Another indication of the punitive nature of restitution was its imposition in response to offenses denominated as felonies or misdemeanors. For example, federal revenue officers and agents found to have engaged in fraudulent activities were to "be held to be guilty of a misdemeanor," fined and subject to imprisonment, and that "[t]he court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured." *Revised Statutes*, *supra*, tit. 35, ch. 1, § 3169.[8] *See*

---

[8] The original statute is: Act of July 20, 1868, ch. 186, 15 Stat. 165, § 98. The current codification of this statute is at 26 U.S.C. § 7214 (regarding "Offenses by officers and employees of the

also, e.g., 1697 N.H. Laws 15-23, § 6 (setting the punishment for felony stealing: "[h]e shal be punished by restoring threefold to the party wronged; & a fine, or corporal punishment"); 1694-1726 (1696) S.C. Acts 2, § 1 (setting punishment for "felony" stealing of boats and canoes at corporal punishment or a fine, "and make good to the person or person injured all damages that may accrue thereby").

The use of restitution as a punishment for felonies and misdemeanors is also evident in early American court records. *E.g.*, *Post v. President of the Bank of Utica*, 7 Hill 391, 397-98 (N.Y. 1844) (applying the rule of lenity to a usury statute because it "creates not only a forfeiture of the money lent, but renders the party violating its provisions guilty of a misdemeanor, and punishable by fine and imprisonment"); *Court Records of Kent County, Delaware 1680-1705* 271 (Leon de Valinger, ed., Washington D.C., Am. Historical Ass'n 1959) (*Delaware Court Records*) (sentencing a person to be whipped and "to Pay to Isak Freeland from whome the said gelding was feloniously taken … The sum of ten pounds being fourefold the value of the said [gelding]"); *Records of the Particular Court of Connecticut, 1639-1663* 213 (Hartford, Conn. Historical Soc'y 1928) (*Particular Court of Connecticut*) ("John Packer is fined for his misdemeanor in Strikeing Edwrd Leake 20^{s} to be paid unto y^{e} said Leake."); 1 *Records of the Suffolk County Court 1671-1680* 82-83 (Boston, Colonial Soc'y of Mass. 1933) (sentencing defendant for "several shameful notorious

---

United States"). It retains the language requiring courts to impose restitution. *Id.* § 7214(a) (mandating a fine, imprisonment, or both, and requiring the court to "render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured").

crimes & high misdemeanors… to restore" multiple victims, and to be imprisoned, whipped, and to stand in the gallows with a rope around her neck for one hour).

Yet another indication that restitution was imposed in response to an offense against the public was statutory language mandating the use of, and courts employing, criminal procedures to secure a restitution award. For example, in 1791 lawmakers in South Carolina included in its statute outlawing gaming or swindling that "on conviction[9] thereof in any court of this state, exercising criminal jurisdiction, by trial by jury, be deemed guilty … [he] shall forfeit a sum at the discretion of the court and jury, besides refunding to the party aggrieved, double the sum he was so defrauded of." 1791 S.C. Acts 41 (Feb. Session). *See also, e.g.*, 1732-1746 (1737) Md. Laws 8-10 (authorizing either restitution or a term of imprisonment after a conviction "upon an Indictment or Information"); Hon. Samuel W. Pennypacker, *Pennsylvania Colonial Cases* 32-35 (Philadelphia, Rees Welsh & Co. 1892) (*Proprietor v. Pickering*: sentencing three co-defendants for counterfeiting coins upon indictment prosecuted by the Attorney General, and sentencing one to "make Satisfaction in good and Currant pay to Every Person that shall, within ye Space of one month, bring

---

[9] The terms "convict" or "conviction" in a statute may refer to both criminal or penal proceedings, and so the examples here are limited to only those cases in which explicit reference is made to criminal procedures. *See* 1 Abbott, *supra*, at 285-86 (defining "conviction" as "the act or proceeding pronouncing a person guilty of an offense and punishable therefor" and as including "summary proceedings"). Examples of statutes not explicitly referencing criminal procedures, but referencing conviction and combining restitution with other forms of punishment are included below.

in any of this false Base and Counterfitt Coyne, according to their respective portions").

In sum, lawmakers authorized and courts imposed restitution as a punishment in explicitly criminal matters, dating back to the late seventeenth century. Additional evidence of its widespread use in both criminal and penal matters follows.

B. That Restitution Constituted Punishment Was Evident Through Its Imposition in Conjunction with Other Recognized Forms of Punishment as a Component of Sentencing

Even without the statutory structures or language noted above, the punitive nature of the restitution authorized under both criminal and penal statutes was frequently evident because it was clustered with other readily recognized forms of punishment—such as incarceration or corporal punishment—or issued through a distribution of fines and forfeitures imposed at sentencing.

For example, in 1783 Delaware lawmakers felt it "necessary to take effectual Measures for preventing and punishing Frauds and Cheats which may be put upon the President, Directors and Company of the Bank of *North-America*." 1783 Del. Laws. 2-3, ch. 2 (Jan. Adjourned Session). The legislature passed a bill setting the punishment for forgery and counterfeiting of bank bills or notes requiring that those convicted of the offense "be whipped … set in the Pillory for one Hour, and have the soft Parts of his or her Ears cut off, and shall also restore to the Party defrauded … double the Amount of such Bill or Note." *Id.*; *see also, e.g.*, 1700-1769 (1741) Del. Laws 235-38, ch. 90, § 9

(setting the punishment upon being "legally convicted" of receiving or buying stolen property to include whipping, branding, and "mak[ing] fourfold satisfaction to the party injured, with costs of prosecution").

Addressing a very different potential offense against the public, Georgia's legislature declared in 1787 that "nothing more forceably marks the barbarity and the ignorance of a country, than the savage custom of biting and gouging, and which is moreover too frequently attended with the loss or disfiguration of some one of the members of the body." 1787 Ga. Laws 21-22. In an effort to prevent the same, lawmakers required a person who maimed or disfigured another to "forfeit the sum of one hundred pounds, and stand in the pillory not exceeding two hours: One half of which fine to go to the party injured, the other half to the state." *Id.*

As in Delaware and Georgia, the imposition of restitution in conjunction with other forms of punishments was, in fact, common place and longstanding. *E.g.*, 1786 Va. Acts 35, ch. 52 (requiring that a person convicted of bribery or extortion be sentenced to a fine, imprisonment, and to "pay unto the party grieved, the treble value of that he hath received"); 1776-1777 (1777) Pa. Laws 54-56, ch. 18, § 3 (requiring a person "legally convicted" of producing counterfeit lottery tickets to "be sentenced to the pillory, and be publicly whipped … and the offender shall pay to the party aggrieved double the value of damages thereby sustained"); 1702-1745 (1702) N.H. Laws 281 (to address the risk "of being Assaulted or Robbed by Ill-minded Ruffians," the person convicted "shall be punished with Burning in the Fore-head or Hand, suffer Six Months Imprisonment, and render treble damages to

the party Robbed"); 1715-1755 (1715) N.C. Sess. Laws 23, ch. 55, § 5 ("That whatever white man shall defaud or take from any of the Indians his goods, or shall beat, abuse, or injure his person, each and every person so offending, shall make full satisfaction to the party injured, and shall suffer such other punishment as he should or ought to have done, had the offence been committed to an Englishman."); 1710-1711 (1711) Mass. Acts 270 ("That every Person or Persons, that shall be convicted of Assaulting and Robbing … shall be punished with burning in the Forehead or Hand, suffer Six Months Imprisonment, and render Treble Damages to the party robbed[.]"); 1672-1714 (1702) Conn. Pub. Acts 11 (punishing theft by a forfeiture of "treble the value of the Money, Goods or Chattels, so stollen or purloined, unto the owner or owners thereof: and be further punished by fine, or whipping").

Early court records also exhibit the treatment of restitution as a component of sentencing. *E.g.*, *Burlington Court Book, A Record of Quaker Jurisprudence in West New Jersey 1680-1709* 338 (H. Clay Reed & George J. Miller, eds., Washington, D.C., Am. Historical Ass'n 1944) (sentencing for the theft of a shirt to whipping, branding, and to "make restitution to the party Injured"); *Court Records of Prince Georges County, Maryland, 1696-1699* 494, 523 (Joseph H. Smith & Philip A. Crowl eds., Washington, D.C., Am. Historical Ass'n 1964) (sentencing for the theft of onions and cabbage to "pay unto [the victim] two hundred pounds of Tobacco" and to be whipped, later referred to as "Punishment for that offence"); John Noble, *Criminal Trials in the Court of Assistants and Superiour Court of Judicature 1630-1700* 9 (Cambridge, John Wilson & Son 1897) (reporting the sentence of a person in Massachusetts convicted of various offenses

including stealing: to "make double restitution, to bee branded, & bee severely whipped"); *Delaware Court Records*, *supra*, at 147 (sentencing a person for theft to "pay foure fold" the value of stolen goods to the victim plus costs and to "weare a romane T upon the out side of his left arme for the space of Six months … upon paine of banishment and further that he … immediately receive three Lashes on his beare back well Laid on"); *Particular Court of Connecticut*, *supra*, at 29 ("for his thefte is adjudged to restore fower-fold for what shall be proved … and to be brand[ed] in the hand"); *id.* at 112 ("for Robbing an orchyard the Courte orders that hee Shall pay Treble damages and Charge of Courte and prosecution, or be whipped"); 2 *Records of the Court of Assistants of the Colony of Massachusetts Bay 1630-1692* 81 (John Noble ed., Boston, County of Suffolk 1901, 1904) (*Court of Assistants*) ("Thomas Boyse haveing attempted a rape wth Sarah Jusall was censured to give the mayde 5^{l}, to bee whiped & imprisoned a time").

Restitution was not merely employed as an addition to other forms of punishment; in some cases, fines and forfeitures were the mechanism by which lawmakers and courts afforded victims compensation, particularly in cases involving penal statutes allowing civil or summary process. In the seventeenth, eighteenth, and nineteenth century, fines and forfeitures were a quintessential form of punishment. *E.g.*, Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 302-08 (2014) (collecting statutes and explaining that the terms "forfeit" and "forfeit and pay" were often used interchangeably with the term "fine" in colonial and early American criminal and penal statutes); 1 Alexander Burrill, *A New Law Dictionary and Glossary: Terms of the Common and Civil Law* 491, 506-07 (John S. Voorhies, ed., New York

1850) (defining "fine" as a sum of money paid by an offender as satisfaction for his offence," and as a "punishment," and defining "to forfeit" as "[t]o lose what belongs to one by some fault, misconduct, or crime," further noting that "[p]enal statutes frequently provide that a party found guilty of violating their provisions shall forfeit a sum of money, or an article of property").

The fact that restitution was drawn directly from a widely recognized form of punishment made its punitive nature plain. *Compare, e.g.*, *Brady v. Daly*, 175 U.S. 148, 153-55 (1899) (interpreting a copyright statute as creating a private right of action in part because it did not contain any "word of forfeiture or penalty"), *with Backus v. Gould*, 48 U.S. (7 How.) 798, 811-12 (1849) (applying the rule of lenity when interpreting a copyright statute requiring a person found in violation to "forfeit" all copies of the book in his possession to the copyright holder and to "forfeit and pay fifty cents for every such sheet found in his possession," the latter of which was divided between the copyright holder and the United States).

For example, New Hampshire lawmakers, recognizing that street lamps were "very advantageous to those that pass and repass in and thro' the same in the night time on their lawful Business," made it an offense to tamper with street lamps, imposing a "Fine" up to five pounds for a first offense and ten pounds for subsequent offences. 1745-1774 (1754) N.H. Laws 72-73, ch. 6. The statute further explained that "all such Fines shall be Applied in this manner namely, out of the same the owner or owners of such Lamp or Lamps shall be payed the damages he she or they have sustained." *Id. See also e.g.*, 1788 N.Y. Laws 627-29 ("every such offender shall for [the offence of perjury],

being thereof lawfully convicted or attainted, lose and forfeit the sum of one hundred pounds … one moiety of the said forfeiture shall be to the use of the people of this State and the other moiety to such person or persons as shall be grieved, hindered or molested by reason of any of the offence or offences aforesaid"); 1785 S.C. Acts 16-17 (imposing a "fine" for taking more toll than allowed at a grist mill, with the fine distributed "one-half to the prosecutor, and the other half to the person aggrieved"); 1784 N.C. Sess. Laws 360-63, ch. 27, § 14 ("shall on conviction [of failing to aid a vessel in distress] forfeit and pay the sum of twenty-pounds … the one half to the informer, and the other half to the master of such vessel"); 1745-1774 (1772) N.H. Laws 569, ch. 4 (requiring that "all fines and forfeitures" related to the failure to obtain licenses to sell "Spiritous Liquors" be distributed to the county treasury, but including within the exceptions "where any fine or forfeiture is given to any party Injured by the Offence"); 1701-1718 (1705) Va. Acts 152-54, ch. 15, § 8 (describing the punishment for stealing a boat or canoe—payment to the owner of "Five Hundred Pounds of Tobacco, over and above the Damage the said Boat, or Canoe, shall sustain, and over and above the Charge of regaining and bringing her back again"—as a "Fine").

Early trial records frequently exhibit this use of fines and forfeitures to compensate victims. Several examples of this practice can be found in a series of entries for convictions of unintentional homicide, in which the courts of the Massachusetts Bay Colony sentenced defendants to be "fined" to both the government and the victim's family. *E.g.*, 1 *Court of Assistants*, *supra*, at 60 (sentencing for "driving … a Cart over Abigaile King [so] that the child died … to pay the fine of five pounds to the Country & five pounds

mony to Its fathe^{r}"); *id.* at 186 (sentencing to "pay as a fine to y^{e} Country tenn pounds & as a fine to yo^{r} Aunt the widow… the sume of twenty pounds"); *id.* at 188 (sentencing for the manslaughter of "Jn^{o} Anattawants Indian by shooting him with swan shott … [to] pay unto the widow of the said Indian" six pounds); *see also Particular Court of Connecticut*, *supra*, at 25 (regarding a case of death by misadventure: "The said John Ewe is ffyned to pay the five pownd to the Country and ten pownd to the wyddowe Scotte."). The practice of imposing fines to be distributed in whole or in part to victims extended well beyond unintentional homicide to a wide variety of public offenses. *See, e.g.*, 2 *Court of Assistants*, *supra*, at 81 ("Rich'd Ibrooke for tempting 2 or more maydes to uncleanness was fined 5^{l} to the country, & 20^{s} a peece to the 2 maydes"); *id.* at 115 ("for striking M$^{r.}$ Constable was committed, & fined to give M$^{r.}$ Constable, 10^{lb}"); *Particular Court of Connecticut*, *supra*, at 190 ("This Court findes cause to fine John Bartlet of Windsor for his abusive carriage towards Nich: Wilton … one half to y^{e} Countrey and the other half to Nich: Wilton).

* * *

In other words, the Eighth Circuit's assumption that the fact that restitution has the remedial quality of affording compensation to a victim renders it nonpunitive is directly at odds with the longstanding use of restitution to both compensate and punish. *See Spaulding*, 7 Hill at 304 ("in cases confessedly criminal and indictable, the penalties for which would ordinarily go for the benefit of the people, the courts are authorized to impose a fine with a view to the indemnity of the party aggrieved"); *see also Paroline v. United States*, 572 U.S. 434, 455-56 (2014) (internal citations omitted) (explaining that "while restitution

… is paid to a victim, it is imposed by the Government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime" and that while "[t]he primary goal of restitution is remedial or compensatory, … it also serves punitive purposes).

III. The MVRA, Which Applies Exclusively to Public Offenses, Has the Same Characteristics that Rendered Restitution Punitive Historically

Restitution mandated by the MVRA carries the same hallmarks of criminal punishment evident throughout early American history. Like its historical predecessors, the MVRA is incorporated into one of the primary federal criminal codes. Crimes and Criminal Procedure, 18 U.S.C. §§ 1-6005. By its terms, it applies to a wide variety of criminal offenses, which, like many colonial and early American statutes, are felonies or misdemeanors for which restitution was imposed. 18 U.S.C. § 3663A(a)(1) (noting the MVRA's applicability to all criminal convictions, including misdemeanors); *id.* § 3663A(c)(1) (mandating restitution in crimes of violence, offenses against property, drug laws, tampering with consumer products or theft of medical products, or any offense "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss"). And like the imposition of restitution in early criminal statutes, the MVRA mandates the use of criminal processes in order to impose a sentence of restitution. 18 U.S.C. 3664(c) (mandating that the Federal Rules of Criminal Procedure "shall be the only rules applicable to proceedings under this section"). The Federal Rules of Criminal Procedure are intended "to provide for the just determination of every criminal proceeding," Fed. R. Crim Pro. 2. The Rules address all aspects of criminal matters from preliminary

proceedings through post-conviction proceedings including the sentencing of a defendant to pay restitution. *Id.* R. 32(c)(1)(B) (requiring the probation department to "conduct an investigation and submit a report that contains sufficient information for the court to order restitution").

But even if the MVRA were not so closely intertwined with federal criminal law and sentencing, it would still share qualities common among penal statutes that authorized restitution as a punishment for public offenses historically. Restitution under the MVRA is imposed in conjunction with other punishments as a component of sentencing. *E.g.*, 18 U.S.C. § 3663A(a)(1) ("when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense…"). Those additional penalties include terms of incarceration, fines, and criminal forfeitures of money or property. *E.g.*, 18 U.S.C. §§ 670, 3571 (terms of imprisonment up to thirty years, fines up to $500,000, and additional civil penalties trebling economic loss or set at $1,000,000); 18 U.S.C. §§ 1365(a), 3571 (up to a life term of imprisonment and fines up to $500,000); 21 § U.S.C. 856(b) (terms of imprisonment of up to twenty years, fines up to $2,000,000); 21 U.S.C. § 2403(1)-(2) (terms of imprisonment of up to ten years, fines up to $1,000,000, and criminal forfeiture of property used as an instrumentality of an offense and of crime proceeds). In the case of bank robbery, for example, the punishment to be imposed in conjunction with restitution would be a term of up to twenty-five years in prison, fines of up to $500,000, or both. 18 U.S.C. §§ 2113(a), (d), 3571. Restitution under the MVRA is part and parcel of the

broader criminal sentence for these offenses. *See Kelly v. Robinson*, 479 U.S. 36, 49 (1986) (warning against a statutory interpretation that "would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems").

And while the MVRA does not impose a "fine" and then distribute monies therefrom directly to victims, like the relationship between fines and restitution in many early penal actions, modern fines and restitution under the MVRA are inextricably linked. First and foremost, for any conviction for which a sentence of restitution is imposed, the court may only impose a fine if doing so "will not impair the ability of the defendant to make restitution." 18 U.S.C. § 3572(b). Further, for any person sentenced to a term of probation or community supervision, payment of a sentence of restitution is a mandatory condition. 18 U.S.C. §§ 3563(a)(6)(A), 3583(d). Further still, fines and restitution are treated identically for purposes of collection, the application of interest, and the modification of amounts imposed. 18 U.S.C. § 3612(b)-(h).

In short, as the Court has plainly stated: "The purpose of awarding restitution [under the MVRA] is … to mete out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). In passing the MVRA for that purpose, Congress followed a history and tradition in America, dating back to the seventeenth century, of using restitution as a form of punishment for criminal and penal offenses.

CONCLUSION

The Court has long understood the Ex Post Facto Clause to apply to "additional punishment to that then prescribed" at the time an offence was committed. *Cummings*, 71 U.S. (4 Wall.) at 325-26. The Clause's prohibition applies to all public offenses, whether criminal or penal, and thus whether processed criminally or civilly. *See supra* Part I. Further, punishment for public offenses has included restitution in both criminal and penal matters throughout early American history. *See supra* Part II. The MVRA, which mandates restitution be imposed upon conviction of a criminal offense, shares the same characteristics that rendered restitution punitive historically. *See supra* Part III. The Court should, therefore, hold that restitution imposed under the MVRA is punishment, subject to the protections afforded by the Ex Post Facto Clause.

Respectfully submitted,

BETH A. COLGAN
UCLA SCHOOL OF LAW
385 CHARLES E. YOUNG DR. EAST
LOS ANGELES, CA 90095

June 30, 2025