No. 24-482

In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

The government concedes that the courts of appeals are squarely divided 5-3 regarding whether criminal restitution under the MVRA is penal for purposes of the Ex Post Facto Clause. The split is "longstanding," in the government's own words (at 8), and entrenched. The Court should grant the petition to establish uniformity on this critically important question.

Remarkably, the government in its brief in opposition does not defend the merits of the minority position holding that criminal restitution is not penal, even though that was the sole basis for the Eighth Circuit's decision below.

Instead, the government spends half of its argument discussing the separate question, at the second step of the ex post facto analysis, of whether the MVRA's enlarged liability period increases a defendant's punishment. The Eighth Circuit did not reach that second question because of its incorrect conclusion at the first step that restitution under the MVRA is not penal. The Court should grant certiorari to decide this important threshold question and, as is its practice, remand the case to the Eighth Circuit to decide the second question in the first instance. In any event, a circuit split also exists at the second step (*see* Pet.16 n.4), and if the Court wishes to resolve that second split, it should grant both this petition and the pending petition in *United States v. Weinlein*, No. 24-458 (filed Oct. 21, 2024), and set both for argument.

The government's claim that the question presented is of decreasing importance lacks any support. Under the MVRA, defendants must continue to pay restitution for *twenty years after release from imprisonment*. Many defendants who committed their offenses before the MVRA took effect in 1996 were released from prison less than twenty years ago. The question presented is enormously consequential to all such individuals with restitution orders, for whom restitution obligations carrying mandatory compounding interest impede their ability to reintegrate into society and expose them to serious collateral consequences, including potential re-incarceration.

The Court should not delay resolution of the question presented any longer. The Court should grant the petition.

I. The Government Concedes the Circuits Are Split

The government (at 7-8) admits that petitioner is "correct" that the courts of appeals are split on the question presented and that this split is "longstanding." The

government acknowledges that five courts of appeals (the Third, Fifth, Sixth, Ninth, and Eleventh Circuits) treat "the MVRA [a]s criminal punishment subject to the Ex Post Facto Clause," and that the Seventh and Eighth Circuits do not. The government also counts the Tenth Circuit as holding the minority position, even though that court has observed that recent Supreme Court precedent "calls into question" that court's prior precedent holding that MVRA restitution is not penal. *United States v. Anthony*, 25 F.4th 792, 798 n.5 (10th Cir. 2022). But even on the government's view the split is 5-3. That split warrants this Court's review.[1]

This "longstanding" split is unlikely to disappear on its own. The government does not dispute that the Seventh and Eighth Circuits have declined to reconsider their minority approach, including in the decision below. Pet. 17-18. Only this Court can resolve the conflict.

Despite the government's concession that a split exists, it nevertheless (at 8) asserts that the Court should deny the petition because it denied four petitions presenting this question nearly twenty-five years ago, in the wake of the MVRA's enactment. That is not a serious argument. The question presented has been percolating for twenty years since those petitions, the question continues to arise, and the split has not resolved itself, even after this Court's more recent guidance in *Paroline v. United States*, 572 U.S. 434 (2014). *See* Pet.App.7a (Melloy., J., concurring) (concluding that *Paroline* abrogates the Eighth Circuit's prior authority holding that restitution is not penal).

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[1] The government also does not dispute that at least four other courts of appeals (the First, Second, Fourth, and Tenth Circuits) have recognized that criminal restitution under the MVRA is criminal punishment in other contexts. *See* Pet. 10-11.

The government has not even tried to demonstrate that any of these cases were clean vehicles to decide the split. In one case, no ex post facto issue was discussed in the decision below. *See United States v. Stoecker*, 215 F.3d 788, 792 (7th Cir. 2000). In another, the defendant "did not object to the order of restitution." *United States v. Smith*, 156 F.3d 1046, 1057 (10th Cir. 1998); *see also United States v. Smith*, 188 F.3d 520 (10th Cir. 1999) (unpublished). In another, the government argued in opposing the petition that the question presented was not case-dispositive because the "district court explicitly found that petitioner 'has the ability to make restitution' in the amount awarded by the court." BIO at 6, *Bach v. United States*, 528 U.S. 950 (1999) (No. 99-127). The government provides no reason to think the Court's denials of certiorari in those cases in any way reflect the Court's view of the importance of the question.

II. This Case Is an Ideal Vehicle To Resolve This Exceptionally Important Question

1. The government does not dispute that the question presented was the *only* issue that the Eighth Circuit addressed in denying petitioner's ex post facto challenge. This case is thus the ideal vehicle to resolve the split on the question presented.

The government does not defend the merits of the minority position on the question presented. It says not one word in its brief in opposition about why criminal restitution under the MVRA is not penal for purposes of the Ex Post Facto Clause. Instead, the government (at 7-11) defends the merits of other courts of appeals' rulings on a different question. According to the government (at 8-9), even if restitution under the MVRA is penal, "applying the MVRA's extended period for paying an outstanding restitution amount does not increase the defendant's punishment."

The Eighth Circuit below did not reach this second step of the ex post facto analysis given its erroneous conclusion at the first step of the analysis. Therefore, this Court should grant the petition, and, if it agrees with petitioner that criminal restitution under the MVRA is punishment for purposes of the Ex Post Facto Clause, remand for the Eighth Circuit to consider the second step of the analysis in the first instance.[2]

In any event, as the government concedes (at 9), a circuit split exists on the question whether enlarging the period during which an offender must pay restitution increases his punishment. Although the government (at 9) cites five relevant decisions, two are unpublished. In published decisions, the circuits have split 2-1 on whether applying the MVRA's enlarged liability period constitutes an increase in punishment. *Compare United States v. Weinlein*, 109 F.4th 91, 103-04 (2d Cir. 2024), *petition for cert. pending*, No. 24-458 (2d Cir. 2024); *United States v. Blackwell*, 852 F.3d 1164, 1166 (9th Cir. 2017), *with United States v. Norwood*, 49 F.4th 189, 218 (3d Cir. 2022).

The Third Circuit's position is correct. As that court explained, the MVRA's enlarged liability period increases defendants' punishments because, among other reasons, it subjects defendants to punishment and the collateral consequences of restitution liability for a longer period of time, akin to increasing a term of imprisonment, and it literally increases the amount they have to pay, as interest compounds during the extended period. *See Norwood*, 49 F.4th at 218-20. The government's analogy to criminal

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[2] The government overlooks that petitioner also argued below that the MVRA's mandatory interest provision independently increases his punishment. *See* Pet.App.7a n.2. The government identifies no court of appeals that has addressed that question, which would be a question for the Eighth Circuit to decide in the first instance on remand.

statutes of limitations (at 10-11) is thus misplaced, as extending the time during which the government may *commence* a prosecution does not increase a defendant's punishment.

The Court should grant the petition and, if it reverses, remand the case to the Eighth Circuit to resolve the second step of the ex post facto analysis. If the Court wishes to resolve now the circuit split over whether enlarging the MVRA's liability period increases a defendant's punishment for ex post facto purposes, then it should grant the petitions in this case and in *Weinlein v. United States*, No. 24-458 (filed Oct. 21, 2024), and set both for argument. *Weinlein* does not allow the Court to decide the question presented in this case because the Second Circuit merely "assume[d] … – without deciding – that the MVRA imposes a criminal punishment." 109 F.4th at 98. To resolve both steps of the ex post facto analysis, the Court would need to grant both petitions and set both for argument.

2. None of the government's remaining arguments undermine the significance of the question presented. The government (at 12) claims, without evidence, that the question presented is of "diminishing significance" because the "number of individuals potentially affected" is "limited." That is incorrect.

The government (at 12) identifies several factors defining the group of affected individuals, but gives the Court no reason to conclude those factors significantly restrict the number of affected individuals. First, the government notes that affected individuals must have committed their underlying offenses before April 24, 1996, when the MVRA took effect, and must have been sentenced after that date. That group may well exceed more than a hundred thousand individuals; federal courts

sentenced more than 50,000 individuals annually at the time of the MVRA's enactment.[3]

Next, the government notes that affected individuals must have failed to pay their outstanding restitution amounts during the twenty years after their judgments. But many, if not most, individuals with restitution orders struggle to satisfy them; as noted in the petition (at 15), 91% of outstanding restitution debt is uncollectible due to offenders' inability to pay.

Finally, the government notes that, to be affected by the question presented, the individual must have been released from prison within the last twenty years, such that that they are still subject to the MVRA's extended liability period. The MVRA took effect only twenty-nine years ago. Thus, anyone who served approximately nine years or more—which is hardly an unusually long sentence—remains on the hook for restitution under the MVRA.

It is thus unsurprising that the question arises frequently. Indeed, two petitions involving ex post facto challenges to the MVRA's enlarged liability period are currently pending before the Court: this one and the petition in *Weinlein*, discussed above. And the Third Circuit just recently resolved such a challenge in the defendant's favor in *Norwood*, discussed above.

The government (at 12 n.3) also tries to downplay the significance of the question presented for state restitution statutes. To be sure, the question whether a provision is

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[3] *See* Compendium of Federal Justice Statistics for 1996, U.S. Dep't of Justice 51 (Nov. 1998), https://bjs.ojp.gov/library/publications/compendium-federal-justice-statistics-1996 (53,076 defendants sentenced); Compendium of Federal Justice Statistics for 1997, U.S. Dep't of Justice 49 (Oct. 1999), https://bjs.ojp.gov/library/publications/compendium-federal-justice-statistics-1997 (56,570 defendants sentenced).

penal for purposes of the Ex Post Facto Clause is one of "statutory construction." BIO 12 n.3 (citation omitted). That is why petitioner's question presented is "[w]hether criminal restitution under the Mandatory Victim Restitution Act (MVRA) is penal for purposes of the Ex Post Facto Clause." Pet. (I). But, of course, the reasoning the Court employs in deciding that question may well inform state courts' analyses of that same question as to state restitution statutes.

As the government acknowledges (at 12 n.3), another pending petition presents the question whether restitution under the Michigan constitution and statutory law is penal for purposes of the Ex Post Facto Clause. *See Neilly v. Michigan*, No. 24-395 (filed Oct. 7, 2024). The Court should decide this question in the context of the MVRA—a statute applying nationwide in all federal courts—rather than in the context of a particular state statute. State restitution statutes differ from each other and from the MVRA; for example, the Michigan statute permits restitution in an amount "three times" the victim's loss in some circumstances, MCL 780.766(5), whereas the MVRA does not authorize such enhanced restitution, 18 U.S.C. § 3663A(b). The Court thus should grant this petition to resolve the conceded circuit split involving the MVRA, and hold the *Neilly* petition to allow the Michigan courts to reconsider that case with the benefit of the Court's guidance in this case. *See* Reply Br. 11 n.2, *Neilly v. Michigan*, No. 24-395 (filed Feb. 5, 2025).

Finally, in an attempt to diminish the devastating consequences of unpaid restitution orders, the government (at 12-13) points to what it calls "safeguards" in the MVRA. None of those supposed safeguards mitigates the fact that Mr. Ellingburg's restitution liability should have ended nine years ago, in 2016. Under the government's

view, due to mandatory compounding interest, Mr. Ellingburg now owes nearly double the amount of his original restitution order. Pet. 3-4.

The collateral consequences of a restitution order are "profound." *Hester v. United States*, 586 U.S. 1104, 1106 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting). "[A]n unpaid restitution obligation instantly becomes an added condition of parole or supervised release [under both the VWPA and MVRA]." *Norwood*, 49 F.4th at 219 (citation omitted). Unpaid restitution can even result in further incarceration. *Id.* Whether restitution under the MVRA is penal for purposes of the Ex Post Facto Clause is a tremendously important question that deserves this Court's review.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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