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 FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*

By order dated May 15, 2025, this Court invited John F. Bash to brief and argue this case, as *amicus curiae*, in support of the judgment below.

INTRODUCTION

The Court invited *amicus* to defend the judgment below because the United States has taken the position that "restitution under the Mandatory Victims Restitution Act of 1996 [MVRA], Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, is a criminal punishment for purposes of the Ex Post Facto Clause." U.S. Br. I, 12; *see* Pet. I. The nature of restitution under the MVRA, however, is not implicated by this case because petitioner's order of restitution was issued under a different statute. The Court should therefore dismiss the petition as improvidently granted.

Title 18 of the United States Code contains two distinct restitution regimes relevant here. The first, enacted in 1982 and codified primarily at Section 3663, is the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248. Under the VWPA, restitution is discretionary. A district court may decline to order any restitution at all, and, as originally enacted, the statute permitted awards of partial restitution. In deciding whether to impose VWPA restitution, a court is free to take into account any relevant considerations, such as the defendant's culpability, the nature of the offense, and ordinary penological objectives like deterrence and just punishment. 18 U.S.C. § 3663(a)(1)(B).

The second restitution regime, enacted in 1996 and codified primarily at Section 3663A, is the MVRA.

The MVRA applies to violent crimes and property crimes, and it generally requires courts to impose full restitution without regard to considerations like culpability, appropriate punishment, or a defendant's ability to pay. Its nearly exclusive focus is making victims whole.

Although the question presented pertains only to restitution awarded under the MVRA, petitioner's restitution order was issued under the discretionary VWPA. The district court so found below, Pet.App.14a n.2, and in the court of appeals, petitioner repeatedly acknowledged that the sentencing court had entered the order under the version of the VWPA in effect before the MVRA's enactment. This case therefore does not implicate the question presented.

Should the Court nevertheless reach that question, it should hold that MVRA restitution is not criminal punishment. To determine whether a sanction qualifies as punishment for Ex Post Facto Clause purposes, this Court asks whether there is conclusive evidence that Congress intended to impose punishment and, if not, whether the statute is so punitive in form and effect that it must be deemed punishment. The MVRA does not come close to meeting those high standards.

Congress did not describe MVRA restitution as "criminal," and the term "restitution" is drawn from the sphere of civil litigation. The MVRA's mandatory-restitution regime is designed to provide full victim compensation—no more, no less—and the statute withholds from judges the power to consider whether mandatory restitution would advance penological goals. Victims enjoy notice rights and remedies to enforce restitution orders, and they may reopen

proceedings to seek compensation for additional losses. The legislative record shows that Congress sought to address a staggering amount of uncompensated property damage and hospitalizations caused by criminal offenses.

It is thus unsurprising that in this Court's only substantial analysis of the MVRA, the Court held that the statute's "substantive purpose" is "to ensure that victims of a crime receive full restitution"—a holding that the government ignores and petitioner buries in an "*accord*" citation. *Dolan v. United States*, 560 U.S. 605, 612 (2010). The MVRA is a compensatory regime, not a punitive one.

Petitioner and the government largely focus on certain procedural features of the MVRA scheme that are in essence just one feature: Congress integrated the MVRA's compensatory remedy into the sentencing process. But it is well established that not every obligation imposed during sentencing is criminal punishment. Legislatures have long integrated matters like sex-offender registration, drug testing, and DNA testing into the sentencing process without a punitive intent. And it was entirely sensible for Congress to choose the efficient approach of awarding victims restitution when a convicted defendant is sentenced. The alternative—forcing people who have been brutalized or defrauded to hire lawyers to sue their victimizers—would leave victims far worse off. That salutary policy choice does not transform an overtly compensatory regime into punishment.

JURISDICTION

This Court has statutory jurisdiction under 28 U.S.C. § 1254(1), but answering the question

presented would yield an advisory opinion in excess of the Court's Article III jurisdiction.

STATUTORY PROVISIONS INVOLVED

A full version of the MVRA as enacted in 1996 is reproduced in the attached appendix.

STATEMENT

A. Statutory Background

In 1982, Congress enacted and President Reagan signed the VWPA "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims * * * without infringing on the constitutional rights of the defendant." § 2(b)(2), 96 Stat. 1249. In signing the bill, President Reagan lamented that crime victims had historically been "either ignored or simply used as tools to identify and punish offenders," leaving them "to suffer physical, psychological, or financial hardship, while the criminal justice system remains unresponsive to the victim's real needs." Ronald Reagan, Remarks on Signing the Missing Children Act and the Victim and Witness Protection Act of 1982, Pub. Pap. of the Pres. 1982 (Oct. 12, 1982), https://tinyurl.com/2hj44ze3.

Later codified at Sections 3663 and 3664 of Title 18, the VWPA authorized, but did not require, courts to order defendants convicted of offenses under Title 18 or other specified offenses to "make restitution to any victim" for losses caused by the offenses. 18 U.S.C. §§ 3663(a)(1) and (b), 3664(a) (1994). In exercising that discretion, courts considered the loss sustained by the victims, as well as the financial resources, financial needs, and earning ability of the

defendant, in addition to any other relevant factors. *Id.* § 3664(a) (1994). The VWPA generally tied the maximum amount of restitution to the loss or injury of the victim, with set-offs for compensation received from other sources or damages recovered in civil litigation, and it permitted courts to award partial restitution. *Id.* §§ 3663(b) and (e) (1994).

A 1988 amendment provided that a defendant's VWPA restitution obligation expired 20 years from the entry of judgment. *See* Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. B, § 7042, 102 Stat. 4181, 4399-4400 (18 U.S.C. § 3663(h)(1) (1994)); 18 U.S.C. § 3613(b) (1994).

Fourteen years after the passage of the VWPA, in April 1996, Congress enacted and President Clinton signed the MVRA as part of the Antiterrorism and Effective Death Penalty Act. Pub. L. 104-132, Tit. II, Subtit. A, 110 Stat. 1227. In enacting the law, Members of Congress considered data showing that in 1991 alone "crime against people and households resulted in an estimated $19.1 billion in losses" and that "[c]rime-related injuries typically amount for more than 700,000 days of hospitalization annually." H.R. Rep. No. 104-16, at 4 (1995). The House report expressed concern that current "law does not * * * provide for a means to make victims whole" and explained that the bill "strives to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses resulting from crime." *Id.* at 4-5.

The MVRA contains several provisions of particular relevance here.

First, the MVRA created a new regime of mandatory restitution for specified offenses, including crimes of violence and property offenses, and removed them from the ambit of the VWPA. *See* § 204(a), 110 Stat. 1227-29. Under that new system, codified at Section 3663A of Title 18, district courts must impose restitution to compensate victims for specified categories of losses, including lost income, property damage, and medical expenses, and it must order the return of stolen property. 18 U.S.C. § 3663A(a)(1) and (b). Because all the covered offenses are excluded from the VWPA, the "MVRA and VWPA do not overlap." *United States v. Battista*, 575 F.3d 226, 231 n.3 (2d Cir. 2009). The only exception to Section 3663A's mandatory regime is found in Subsection (c)(3), which provides that "[t]his section shall not apply" to certain covered non-violent offenses when the number of victims renders restitution "impracticable" or when calculating restitution is so "complex" that it would unduly "complicate or prolong the sentencing process."

Second, the MVRA replaced Section 3664 with a new section governing the procedures for imposing and enforcing restitution orders under both the VWPA and the MVRA. § 206(a), 110 Stat. 1232-36. Among other features, the revised Section 3664 maintains the preexisting set-off for victim compensation obtained through civil litigation but does not include a set-off for compensation obtained elsewhere. 18 U.S.C. § 3664(j)(2). It also empowers victims to enforce restitution orders by placing civil liens on defendants' property. *Id.* § 3664(m)(1)(B). And it enables victims, upon discovery of "further losses"

after sentencing, to request an amended order of restitution. *Id.* § 3664(d)(5).

The revised Section 3664 provides that any order of restitution must cover "the full amount of each victim's losses * * * without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A). But the MVRA left in place the requirement that courts consider a defendant's financial circumstances and other relevant factors in deciding whether to order VWPA restitution at all, without extending that provision to the new scheme of mandatory restitution. *Id.* § 3663(a)(1)(B)(i)(II).

Third, the MVRA made a handful of amendments to the provision governing VWPA restitution (Section 3663). § 205(a), 110 Stat. 1229-31. The majority of these were for minor clean-up or consistency, such as specifying that the VWPA does not apply to offenses now covered by the MVRA's mandatory-restitution regime and relocating certain procedural provisions. §§ 205(a)(1)(C), (a)(1)(E), and (a)(2), 206, 110 Stat. 1229-30, 1232-36. The MVRA's only meaningful expansion of VWPA restitution was to add a new Subsection (c) providing that for certain drug offenses without an identifiable victim, courts could impose restitution in the amount of the "public harm" caused by an offense. 18 U.S.C. § 3663(c)(1)-(2). That restitution must be ratably distributed to state-government entities that "administer crime victim assistance" (65%) and receive federal grants to prevent substance abuse (35%). *Id.* § 3663(c)(3).

Fourth, the MVRA provided that "liability" for both discretionary and mandatory restitution awards "shall terminate the later of 20 years from the entry

of judgment" (the original VWPA period) "or 20 years after a [defendant's] release from imprisonment." § 207(c)(3), 110 Stat. 1238 (18 U.S.C. § 3613(b)).

Fifth, the MVRA required the accrual of interest for restitution awards exceeding $2,500 unless the defendant lacks the ability to pay interest. § 207(c)(2)(F), 110 Stat. 1238 (18 U.S.C. § 3612(f)(1)).

Finally, the MVRA stated that "to the extent constitutionally permissible," the statute would apply to "sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment." § 211, 110 Stat. 1241 (18 U.S.C. § 2248 note).

B. Factual Background

In 1995, petitioner and an accomplice robbed a Georgia bank with a sawed-off shotgun, seizing $15,134.50. Pet.App.13a, 27a-28a. In August 1996, after the MVRA had been in effect for four months, a federal jury in the Southern District of Georgia convicted petitioner of bank robbery and using a firearm during a crime of violence, 18 U.S.C. §§ 924(c), 2113(a) and (d) (1994). Pet.App.13a, 17a.

The district court sentenced petitioner to 322 months in prison. Pet.App.19a. In determining petitioner's restitution obligation, the court applied the version of the VWPA in effect before the enactment of the MVRA. *See* Pet.App.14a n.2; pp. 14-15, *infra*. Exercising its discretion under that statute, the court required petitioner to pay $7,567.25 to the bank—half of what petitioner and his accomplice had stolen. Pet.App.24a-28a; U.S. Br. 9.

In 2022, petitioner completed his term of imprisonment after having satisfied only a quarter of his

restitution obligation. *See* Pet.App.3a. His probation officer continued to seek restitution payments with interest, citing the MVRA's liability cutoff, 18 U.S.C. § 3613(b), which does not relieve petitioner of his obligation until 2042. Pet. Br. 7.

C. Proceedings Below

Petitioner filed a pro se motion in the Western District of Missouri (where the sentencing court had transferred his supervised release) to challenge the continued enforcement of his restitution obligation under the Constitution's federal Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3. *See* Pet.App.12a. Under that clause and its counterpart for state laws, U.S. Const. art. I, § 10, cl. 1, "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). Petitioner argued that the MVRA's liability cutoff, which extended the end of his restitution liability from 2016 to 2042, had retroactively increased his punishment because the MVRA did not exist when he robbed the bank in 1995.

The district court denied his motion. Pet.App.16a. After examining the documents from petitioner's sentencing, the court concluded that "rather than applying the MVRA in ordering restitution, the sentencing court instead applied the Victim and Witness Protection Act of 1982." Pet.App.14a n.2. The court then held that extending the period of liability for a preexisting restitution obligation does not qualify as an increase in punishment for purposes of the Ex Post Facto Clause. Pet.App.15a.

Petitioner appealed. Now represented by counsel, he acknowledged that the sentencing court had

imposed his restitution obligation under the version of the VWPA in effect before the MVRA's enactment. *See* Pet. C.A. Op. Br. 8-9; C.A. Oral Arg. 0:50-0:58; 6:50-6:58, https://tinyurl.com/e64x859r. He nevertheless focused his constitutional argument on the MVRA's mandatory-restitution provision, Section 3663A. *See* Pet. C.A. Op. Br. 17-30 (discussing Eighth Circuit cases addressing Section 3663A); Pet. C.A. Reply Br. 3-15 (citing only Section 3663A). He also raised a new argument that applying the MVRA's interest provision to his restitution obligation violated the Ex Post Facto Clause as well. Pet. C.A. Op. Br. 49-55; *see* U.S. C.A. Br. 4.

The Eighth Circuit affirmed on the ground that, under circuit precedent, MVRA restitution is not criminal punishment and therefore is not subject to the Ex Post Facto Clause. Pet.App.4a-7a. Following petitioner's framing of the issue, the court discussed only MVRA restitution, noting its prior holding that the "primary purpose" of MVRA restitution is "remedial or compensatory," not punitive. Pet.App.4a-6a (quoting *Paroline v. United States*, 572 U.S. 434, 456 (2014)). In a footnote, the court rejected petitioner's new argument about mandatory interest on the same ground. Pet.App.7a n.2.

Petitioner filed a petition for a writ of certiorari. The petition did not disclose that the sentencing court had imposed his restitution obligation under the VWPA. Instead, the petition presented the question whether "criminal restitution under the [MVRA] is penal," extensively discussed Section 3663A, and highlighted conflicting appellate decisions about whether MVRA restitution qualifies as criminal punishment. Pet. I, 8-21.

After the Court granted certiorari, the government joined petitioner on the question presented. The Court appointed *amicus* to defend the Eighth Circuit's judgment.

SUMMARY OF ARGUMENT

I. The Court should dismiss the petition as improvidently granted. The question presented asks whether "restitution under the [MVRA] is penal for purposes of the Ex Post Facto Clause." Pet. I. But the sentencing court here imposed restitution under the pre-MVRA version of the VWPA. Answering a question about the nature of MVRA restitution would thus be purely advisory.

II. Should the Court reach the merits, it should hold that the MVRA restitution is not criminal punishment and therefore affirm the judgment of the Eighth Circuit.

A. Under the two-step framework of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court first asks whether there is "conclusive evidence of congressional intent as to the penal nature of a statute." *Id.* at 169. No such conclusive evidence exists here. Congress did not use the label "criminal," instead employing a term, "restitution," that ordinarily signifies a civil remedy. The mandatory regime codified at Section 3663A is designed exclusively to compensate victims for the full amount of specified categories of loss. The restitution award is capped at the victim's loss and must be offset by civil judgments; a sentencing court has no discretion to award less than the victim's loss; the court may not take into account the ordinary penological objectives of criminal sentencing; and victims can both enforce restitution orders through civil

liens and seek increased awards as they discover new losses. This Court has accordingly described the MVRA's "substantive purpose" as "primarily to ensure that victims of a crime receive full restitution." *Dolan*, 560 U.S. at 612. That conclusion is fortified by the constitutional-avoidance canon and the MVRA's legislative record.

The parties' contrary arguments largely flow from Congress's choice to integrate restitution into the sentencing process rather than require victims to file separate civil suits. But under this Court's precedent, that procedural efficiency—itself critical to ensuring full victim compensation—does not establish that Congress intended MVRA restitution to operate as criminal punishment.

B. At the second step of the *Mendoza-Martinez* framework, the Court asks whether the remedy at issue is "so punitive in form and effect as to render [it] criminal." *United States v. Ursery*, 518 U.S. 267, 290 (1996). MVRA restitution is not. It directly advances the non-punitive purpose of victim compensation; it is proportional in relation to that purpose; it is purely monetary; and there is no relevant historical tradition of treating victim compensation as punitive. The Constitution thus does not demand that MVRA restitution be classified as a form of punishment.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

This Court granted certiorari to decide "[w]hether criminal restitution under the Mandatory Victim[s] Restitution Act (MVRA) is penal for purposes of the

Ex Post Facto Clause." Pet. I. That question, however, is not presented by this case because petitioner's order of restitution was issued under the preexisting discretionary regime of the VWPA, not under the MVRA. The Court should accordingly dismiss the petition as improvidently granted.

A. "The Constitution gives federal courts the power to adjudicate only genuine 'Cases' and 'Controversies.'" *California v. Texas*, 593 U.S. 659, 668 (2021) (citation omitted). A corollary of that constraint on the judicial power is that "federal courts do not issue advisory opinions." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021). In other words, courts do not declare "principles or rules of law which cannot affect the result as to the thing in issue in the case before" them. *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893). For that reason, if it becomes apparent that the question presented is "without legal significance" to the "rights of the parties," *Coffman v. Breeze Corp.*, 323 U.S. 316, 324 (1945), the case should be "dismissed as improvidently granted," *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977).

Answering the question presented here would yield an advisory opinion. Petitioner asks this Court to decide the nature of "criminal restitution under the [MVRA]," Pet. I, but the sentencing court did not apply the MVRA in imposing restitution even though the statute was in effect at that time. In the proceedings below, the district court determined that "rather than applying the MVRA in ordering restitution, the sentencing court instead applied the Victim and Witness Protection Act of 1982." Pet.App.14a n.2. For support, the court cited the (now-sealed) 1996 presentence investigation report and 1996 judgment stating

that under "18 U.S.C. § 3663, restitution *may* be ordered in this case." Pet.App.14a n.2 (emphasis added and quotation omitted).

On appeal, petitioner's opening brief agreed that "the district court judge appears to have sentenced petitioner under the VWPA, the statute in effect at the time of the offense conduct." Pet. C.A. Op. Br. 8; *see id.* at 50; Pet. C.A. Reply 29-30 (similar). Petitioner enumerated "several indicators" supporting that conclusion and showing that he was in fact sentenced under the pre-MVRA version of the VWPA's Section 3663:

> First, page seven of the judgment references 18 U.S.C. § 3663(d), which empowered the judge to deny restitution in certain situations. That provision was part of the VWPA, *see* 18 U.S.C. § 3663(d) (1994), but was struck by the MVRA, *see* MVRA, Pub. L. No. 104-132, § 205(a)(2), 110 Stat. 1214, 1229 (1996).
>
> Second, the judgment form indicates that the form had last been revised in March 1995 ("Rev 3/95"), which was over a year before the MVRA was enacted.
>
> Finally, the fine section on page five of the judgment form references 18 U.S.C. § 3612(f) (1994), requiring interest on certain fines, but the restitution section on the same page is silent on interest. Unlike Mr. Ellingburg's judgment form, post-MVRA judgment forms now reference the requirement of interest for certain restitution orders, as required by the MVRA. *See* 18 U.S.C. § 3612(f) (2018).

Pet. C.A. Op. Br. 8-9 (some citations omitted). At oral argument, petitioner's counsel confirmed that petitioner's "restitution order was entered pursuant to the Victims [sic] Witness Protection Act." C.A. Oral Arg. 0:50-0:58; *see id.* at 6:50-6:58 (same).

Petitioner himself identifies the likely reason that the sentencing court applied the pre-MVRA version of the VWPA: "Soon after the MVRA's enactment, the Solicitor General directed United States Attorney's offices nationwide not to apply the MVRA retroactively," *i.e.*, "to offenses occurring before the enactment of the Act." Pet. Br. 30 (quotation omitted). Prosecutors were instead told "to apply the VWPA to cases involving offense conduct which occurred prior to April 24, 1996, regardless of the actual date of conviction." U.S. Br. 6, *United States v. Edwards*, 162 F.3d 87 (3d Cir. 1998) (No. 98-1055), 1998 WL 34084073, at *6. That is what appears to have happened here. Although it is unclear whether the Solicitor General issued formal guidance before petitioner's sentencing, the Solicitor General's Office and the Criminal Appellate Section often provide informal advice to U.S. Attorney's Offices before issuing a nationwide memorandum.

Petitioner was therefore never subject to "restitution under the [MVRA]," Pet. I, and the question presented is not implicated by this case.

B. The fact that petitioner has challenged the wrong statute alone justifies dismissing the petition. But it is worth noting that the two statutes differ in ways that may bear on this Court's analysis of the constitutional question—a question that depends on whether Congress clearly intended restitution to

operate as punishment and, if not, whether restitution is so punitive that it must be classified as punishment. *See* p. 20, *infra*.

In particular, under the VWPA, in deciding whether to impose restitution, a sentencing court can consider "factors" beyond the victim's loss "as the court deems appropriate," 18 U.S.C. § 3663(a)(1)(B)(i)(II), such as the defendant's characteristics, the circumstances of the offense, and ordinary penological objectives—*i.e.*, the considerations that typically inform a criminal sentence. *See United States v. Bruchey*, 810 F.2d 456, 458 (4th Cir. 1987); *United States v. Anglian*, 784 F.2d 765, 768 (6th Cir. 1986), *cert. denied*, 479 U.S. 841 (1986). And under the version of the VWPA applied in this case, a court could adjust the amount of restitution in light of such concerns. *See* 18 U.S.C. § 3664(a) (1994). By contrast, under the MVRA's mandatory-restitution regime, 18 U.S.C. § 3663A, a restitution award must cover all cognizable victim losses without regard to any consideration other than (for non-violent offenses) impracticability or burden on the court. *See* 18 U.S.C. § 3663A(a)(1) and (c)(3). In addition, the legislative history of the two laws naturally differs, with the MVRA's record more explicitly describing Congress's laser focus on making victims whole. *See* pp. 35-36, *infra*.

For at least those reasons, the two laws pose two different constitutional questions. The parties, in fact, recognize that the two statutes are distinct, with petitioner referring to the VWPA as the MVRA's "predecessor" or "progenitor." Pet. Br. 11, 28; *see* U.S. Br. 6. Resolving a question about one scheme in a case

involving the other would be a paradigmatic advisory opinion.

C. The parties have not acknowledged (or disputed) that petitioner's restitution obligation was imposed under the pre-MVRA version of the VWPA, much less explained why they believe petitioner could benefit from a holding that "restitution under the [MVRA] is penal," Pet. I. They may raise either of the following arguments, but they each lack merit.

First, the parties may argue that because the MVRA contains the challenged provisions extending the expiration date of petitioner's restitution obligation and mandating the payment of interest, a ruling that MVRA restitution is criminal punishment would entitle petitioner to continue to pursue his Ex Post Facto Clause claim. That is wrong. A retroactive extension of petitioner's restitution term would implicate the Ex Post Facto Clause only if his restitution obligations imposed *under the VWPA* qualify as criminal punishment. The nature of MVRA restitution is irrelevant. For example, if the MVRA had retroactively extended the Lanham Act's statute of limitations, the assertedly punitive character of MVRA restitution would not transform a Lanham Act claim into criminal punishment. In short, although application of the MVRA's liability cutoff tees up the Ex Post Facto Clause question in this case, answering that question requires assessing the nature of restitution under the VWPA—not the MVRA.

The same analysis applies to the MVRA's interest requirement. The punitive or compensatory character of an interest payment necessarily turns on the character of the underlying obligation, as the Eighth

Circuit indicated. Pet.App.7a n.2; *cf. Kansas v. Colorado*, 533 U.S. 1, 10 (2001) ("[A] monetary award does not fully compensate for an injury unless it includes an interest component."). Here, moreover, petitioner has not argued that an interest requirement applicable to both civil and criminal financial obligations would be classified as criminal punishment even in the civil applications. Indeed, petitioner has not substantively addressed the interest provision in his merits brief, and he failed to raise it in the district court.

Second, the parties may argue that because the MVRA amended the provision conferring authority on district courts to impose restitution under the VWPA, 18 U.S.C. § 3556, and made certain, largely technical changes to the VWPA's preexisting discretionary regime, restitution under the VWPA is now entirely subsumed within the MVRA and so falls within the question presented. The short and conclusive answer to that argument is that petitioner conceded his order was entered under the *pre-MVRA* version of the VWPA, so those amendments could not possibly be relevant. *See* pp. 14-15, *supra*.

But even if petitioner had been subject to the amended version of the VWPA, that would not matter. The question presented asks about a specific law passed by a specific Congress—in a legal context in which congressional intent is an overriding consideration—and petitioner is bound by that question. S. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Petitioner does not claim that the sentencing court applied any of the changes that the MVRA made to the VWPA in imposing his restitution award. And the amendment to the authority-conferring provision merely added a reference to

Section 3663A, *see* § 202, 110 Stat. 1227, leaving the preexisting reference to Section 3663 materially unchanged.

At any rate, assuming the question presented could, as a semantic matter, encompass the issue of whether VWPA restitution is criminal punishment, petitioner has forfeited that argument. In the court of appeals, despite recognizing that his restitution order was issued under the pre-MVRA version of the VWPA, petitioner relied primarily on precedents concerning the MVRA and Section 3663A. *E.g.*, Pet. C.A. Op. Br. 17-30; *see id.* at 17 ("A. The MVRA Is a Penal Statute."). Then, in seeking this Court's review, petitioner pointed to a circuit conflict over the character of MVRA restitution. Pet. 8. Petitioner's merits brief focuses on the MVRA's mandatory-restitution scheme and its drug-offense amendment to the VWPA, discussing the intent behind the VWPA only briefly on the ground that it was "the MVRA's progenitor." Br. 28. Petitioner thus has not remotely preserved an argument about the nature of VWPA restitution.

Even putting all that aside, at best this case would implicate the question of whether VWPA restitution is criminal punishment and would afford no basis to opine on the nature of MVRA restitution. But there is no circuit conflict on VWPA restitution. *See* U.S. Br. 22-23. A question about the nature of VWPA restitution therefore does not warrant this Court's review—especially in a case where it has not been adequately briefed or decided below and where petitioner is unlikely to obtain ultimate relief no matter how the Court resolves the question, *see* U.S. Br. 29-31.

* * *

When this Court has been "unwittingly * * * placed in the unfortunate posture of addressing a situation that does not exist," it has not hesitated to dismiss a petition as improvidently granted. *Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969). The Court should follow that course here.

II. RESTITUTION UNDER THE MVRA IS NOT CRIMINAL PUNISHMENT

To assess whether a law imposes criminal punishment for purposes the Ex Post Facto Clause and certain other constitutional provisions, this Court applies the two-step *Mendoza-Martinez* framework. *Smith v. Doe*, 538 U.S. 84, 92-97 (2003). First, the Court asks whether Congress "conclusively" intended to impose criminal punishment. *Mendoza-Martinez*, 372 U.S. at 169. If not, the Court evaluates whether the remedy at issue is "so punitive in form and effect as to render [it] criminal." *Ursery*, 518 U.S. at 290. Under that framework, MVRA restitution is not a species of criminal punishment.

A. Congress Did Not Clearly Intend For The MVRA To Impose Criminal Punishment

1. This Court's Precedent Requires Conclusive Evidence Of Punitive Intent

Step one of the *Mendoza-Martinez* test asks whether there is "*conclusive* evidence of congressional intent as to the penal nature of a statute." 372 U.S. at 169 (emphasis added). The Court looks for "unmistakable penal intent" and "overwhelming indications of punitive purpose." *Id.* at 170 n.30. To "end[] the inquiry" at step one, *Smith*, 538 U.S. at 92, the Court

must find that "the objective manifestations of congressional purpose indicate *conclusively* that the provisions in question can only be interpreted as punitive," *Mendoza-Martinez*, 372 U.S. at 169 (emphasis added).

That clear-statement requirement is grounded in the separation of powers. When a challenger has raised a substantial argument that a law, if deemed criminal punishment, would violate the Constitution, attributing punitive intent to Congress is tantamount to finding that Congress intended to test constitutional limits. But this Court ordinarily strives to do just the opposite: When "serious doubt is raised about the constitutionality of an Act of Congress," it looks for a "plausible" interpretation to "avoid[]" the question. *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) (quotation omitted). Only when Congress has provided a "clear statement," *Bond v. United States*, 572 U.S. 844, 860 (2014), or "clear indication" of its intent, *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001), will this Court embrace an interpretation that could invalidate a statute.

There is particularly good reason to apply that cautious approach in the legal context here, where a law's constitutionality depends on Congress's intent, independent of the law's practical operation or effect. This Court, after all, will ordinarily construe a federal statute to apply more narrowly than its text indicates (assuming such a construction is plausible) to avoid a serious constitutional question—for example, construing the honest-services-fraud statute as limited to bribes and kickbacks to avoid due-process concerns. *Skilling v. United States*, 561 U.S. 358, 404-09 (2010). It follows that when the Court can avoid the

constitutional issue merely by attributing a particular intent to Congress, without affecting the law's scope, it should do so absent an exceptionally clear statement that Congress intended to impose criminal punishment.

That approach accords with this Court's longstanding precedent. For instance, in *Murphy v. United States*, 272 U.S. 630 (1926), the defendants raised a double-jeopardy challenge that turned on whether Congress intended a statutorily authorized injunction to be criminal punishment. *Id.* at 631-32. In rejecting that characterization of the law for a unanimous Court, Justice Holmes cited "the unreasonableness of interpreting [the statute] as intended to accomplish a plainly unconstitutional result." *Id.* at 632.

Similarly, in *Flemming v. Nestor*, 363 U.S. 603 (1960), the Court rejected the claim that terminating welfare benefits amounted to criminal punishment in violation of the Sixth Amendment and the Ex Post Facto Clause, explaining that "the presumption of constitutionality * * * forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it." *Id.* at 617. The challenged law contained no "unmistakable evidence of punitive intent which * * * is required before a Congressional enactment of this kind may be struck down." *Id.* at 619.

To be sure, this Court has sometimes characterized the step-one inquiry as whether the legislature "indicated either expressly or impliedly a preference for one label or the other." *Smith*, 538 U.S. at 93. But the possibility of finding implied intent does not

conflict with *Mendoza-Martinez*'s clear-statement requirement. Rather, as the Court has held in the sovereign-immunity context, a clear statement need not contain "magic words," *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 48 (2024) (quotation omitted), or be phrased "in any particular way," *FAA v. Cooper*, 566 U.S. 284, 291 (2012). The standard "is simply whether, upon applying traditional tools of statutory interpretation, Congress's" intent "is clearly discernable from the statute itself." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023) (quotation omitted).

2. Congress Did Not Clearly Intend MVRA Restitution To Function As Criminal Punishment

Congress did not clearly intend for MVRA restitution to be criminal punishment. To the contrary, Congress designed the MVRA to serve "civil and remedial" ends, *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984), by compensating crime victims, *see Dolan*, 560 U.S. at 612.

Text. The most obvious indicator of a legislature's intent is the label that it attaches to a particular imposition. *See, e.g.*, *Hudson v. United States*, 522 U.S. 93, 103 (1997); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Ursery*, 518 U.S. at 288; *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 637-38 (1988); *Allen v. Illinois*, 478 U.S. 364, 368 (1986). The MVRA does not use the term "criminal restitution" or otherwise state that an award of restitution is a criminal sanction. In contrast, Congress did use the label "criminal" for

another post-conviction remedy that is not inherently punitive—forfeiture. *See* 18 U.S.C. §§ 982, 3554.

The term "restitution" itself, moreover, reflects the statute's compensatory purpose. Although "restitution" originally connoted "the return or restoration of some specific thing or condition * * * 20th-century usage has extended the sense of the word to include * * * compensation, reimbursement, indemnification, or reparation for benefits derived from—or loss caused to—another." Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 765 (2d ed. 1995); *see also* BLACK'S LAW DICTIONARY (12th ed. 2024) (4th def.: "[c]ompensation for loss" in criminal proceedings); OXFORD ENGLISH DICTIONARY (3d ed. 2010 rev.) (1.a def.: "making reparation to a person for loss or injury previously inflicted"). Consistent with that compensatory meaning, this Court has explained that when the "chief purpose of [a] statute[]" is to "provide for restitution," the statute is not "criminal" but "remedial and impose[s] a civil sanction." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549, 551-52 (1943). And the MVRA's central statutory requirement to "make restitution to the victim" underscores that "restitution" is used in its compensatory sense, not to connote some freestanding form of punishment. 18 U.S.C. § 3663A(a)(1).

The parties cite Congress's implicit description of restitution as a type of "penalty." Pet. Br. 25; U.S. Br. 24. But this Court has held that "both criminal and civil sanctions may be labeled 'penalties.'" *Smith*, 538 U.S. at 95 (quoting *89 Firearms*, 465 U.S. at 364-65 & n.6); *see Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (explaining that removal is a "severe penalty" but not a "criminal sanction" (quotation omitted)).

When Congress intends to refer to a penalty that is criminal in nature, it often calls it a "criminal penalty"—as it has done well over 200 times in the U.S. Code and numerous times in Title 18 alone. *See, e.g.*, 18 U.S.C. §§ 175c(c), 229A(a), 670(c), 1350(c), 1716E(e), 2332g(c), 2332h(c), 3600A(f). And Congress has used the unmodified term "penalty" to refer to civil exactions throughout the U.S. Code. *E.g.*, 12 U.S.C. § 86; 26 U.S.C. § 6707A; 47 U.S.C. § 205. That the term "penalty" is often used in connection with criminal penalties in Title 18 (Pet. Br. 26) is little surprise given the subject matter of that title. Even there, however, that usage is not universal, as petitioner admits. *See, e.g.*, 18 U.S.C. § 218 ("penalty * * * in a contract").

The government notes (Br. 18) that another provision of Title 18 refers to MVRA restitution as a "sanction." 18 U.S.C. § 3551. But as with "penalty," this Court has long held that "sanctions may * * * be either criminal or civil." *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *see, e.g.*, *Hudson*, 522 U.S. at 103. And the cited provision actually confirms that the restitution is different from criminal punishment, because it describes restitution as a "sanction" but imprisonment or a fine as a "sentence."

Petitioner points (Br. 31) to a 2010 amendment to the Internal Revenue Code that includes the term "criminal restitution" in its title and three of its section headings and that cross-references the provision giving courts authority to impose MVRA restitution, 18 U.S.C. § 3556. Firearm Excise Tax Improvement Act of 2010, Pub. L. No. 111-237, § 3, 124 Stat. 2497. But petitioner overlooks the Internal Revenue Code's rules of construction, which state that no "descriptive

matter relating to the contents of this title [shall] be given any legal effect." 26 U.S.C. § 7806(b); *Moxon Corp. v. Comm'r*, 2025 WL 1825507, at *5 n.6 (T.C. July 2, 2025) (applying provision to headings). At any rate, a different Congress's use of "criminal restitution" as shorthand in the non-operative text of a tax provision enacted 14 years after the MVRA is not conclusive evidence of congressional intent in enacting the MVRA.

Structure. The structure of the MVRA's mandatory-restitution scheme confirms that its principal aim is to "reimburse" victims for "the loss resulting from" the defendant's offense—a purpose this Court has long deemed non-punitive. *Helvering*, 303 U.S. at 401.

Restitution under Section 3663A is generally mandatory, depriving courts of the case-specific discretion ordinarily involved in criminal sentencing. When Section 3663A applies, a court must award full restitution—and no more—for the types of victim loss identified in the statute. 18 U.S.C. § 3663A(a) and (b). The court is not permitted to consider the defendant's culpability or economic circumstances, the nature of the offense, or basic penological goals like deterrence and just punishment. *Id.* § 3664(f)(1)(A). The court's only job is to accurately calculate what the victims lost.

Unlike criminal fines, MVRA restitution goes directly to the victim in most cases, and it is never paid to the federal government as the prosecuting sovereign. *See* 18 U.S.C. § 3663A(a). When the United States is also a victim, other victims get paid first. *Id.* § 3664(i). Victims can obtain a civil lien on the

property of the defendant for the restitution amount. *Id.* § 3664(m)(1)(B). If, after a restitution order is imposed, a victim discovers "further losses," the victim can petition the court for an amended order, *id.* § 3664(d)(5), with "no time limit on the victim's subsequent discovery of losses," *Dolan*, 560 U.S. at 613. At the same time, if a victim later obtains compensation for the same loss through a civil judgment, the court must reduce the restitution order by that amount. 18 U.S.C. § 3664(j)(2).

Ignoring or discounting those victim-centric features of the MVRA, the parties emphasize that victims do not play as much of a role in MVRA restitution proceedings as they would as tort plaintiffs. Pet. Br. 33-34; U.S. Br. 28-29. But that does not suggest a punitive purpose. Regardless of the procedures, restitution under Section 3663A is overwhelmingly focused on compensating victim loss, not inflicting punishment on offenders.

At any rate, victims play a much larger role than the parties suggest. At the outset, the "attorney for the Government" must "consult[], to the extent practicable, with all identified victims." 18 U.S.C. § 3664(d)(1). The probation officer must give a detailed notice to each victim and provide an opportunity to submit information about losses. *Id.* § 3664(d)(2). If victims "subsequently discover[] further losses," they may petition the court for an amended order. *Id.* § 3664(d)(5). And in practice, victims often actively participate in the proceedings. *See, e.g.*, *United States v. Rivera-Solís*, 733 F. Supp. 3d 46, 51-57 (D.P.R. 2024).

That system is supremely victim-centric—Sections 3663A and 3664 use the word "victim" 70 times—even if victims are not the first movers. Few victims would prefer to initiate civil litigation on their own to obtain compensation for medical expenses and property damage from the criminals who harmed them. And contrary to petitioner's suggestion (Br. 34), the fact that victims are not *required* to participate in the process yet can still receive compensation, 18 U.S.C. § 3664(g)(1), is a benefit to victims, not a drawback, and does not diminish MVRA restitution's fundamentally compensatory character.

Petitioner argues (Br. 33) that victims have no control over whether a defendant pleads to a non-MVRA offense. But the same would be true for a civil cause of action, where victims would have to prove the injurious conduct in the absence of a pertinent criminal conviction. And the option for victims to donate restitution to the Crime Victims Fund if they do not want it, 18 U.S.C. 3664(g)(2) (*see* Pet. Br. 33), does not detract from the scheme's compensatory focus. Unwanted compensation is still compensation.

Petitioner also points (Br. 34) to the one type of MVRA restitution that does not go directly to victims—restitution for certain drug offenses under the MVRA's amendment to the VWPA, 18 U.S.C. § 3663(c). But even that provision reflects an intent to compensate, not punish. Recognizing that drug crimes are not "victimless" but often injure victims who are hard to identify, *see Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in the judgment), the provision gives a district court discretion to impose an award "based on the amount of public harm caused by the

offense" and earmarks the payments for victim-assistance and substance-abuse prevention programs. 18 U.S.C. § 3663(c)(2)(A) and (3). That reflects the same nonpunitive intent as the MVRA's other provisions. And even if it did not, deeming restitution under that amendment to the discretionary regime of Section 3663 to be criminal punishment would not mean that Section 3663A's mandatory system of restitution to identifiable victims is also punitive.

The government emphasizes (Br. 29) that courts can withhold MVRA restitution for certain nonviolent offenses if calculating the loss would be impracticable given the number of victims or too burdensome on the sentencing process. 18 U.S.C. § 3663A(c)(3)(B). Congress's recognition that computing a restitution award sometimes is not worth the candle, however, does not convert restitution into criminal punishment.

The government points (U.S. Br. 27-28) to other features of the statutory scheme, but they are irrelevant. For example, the government cites a provision allowing a defendant to *agree* to pay restitution to someone other than a "victim"—*e.g.*, a person impacted by the offense but not "directly and proximately harmed." 18 U.S.C. § 3663A(a)(2) and (3). But a payment obligation voluntarily assumed does not fit any definition of "punishment." And although "nominal" payment is allowed when the defendant cannot pay "any amount of a restitution order," 18 U.S.C. § 3664(f)(3)(B) (*see* U.S. Br. 28), that leaves victims no worse off than if they had obtained an ordinary civil judgment against a judgment-proof individual. As further protection, moreover, victims must be notified

when the defendant's ability to pay changes. 18 U.S.C.§ 3664(k).

In short, the primary purpose of the MVRA's mandatory-restitution regime is to provide an efficient way for crime victims to obtain compensation for loss, without respect to whether a restitution award constitutes a just punishment, promotes deterrence, or advances other goals of the criminal-justice system.

Constitutional Avoidance. In two respects specific to the MVRA, the canon of constitutional avoidance counsels against construing the statute as punitive.

First, Congress provided that the MVRA would apply to offenses committed before its enactment. § 211, 110 Stat. 1241. It is unlikely Congress would have done so if it considered MVRA restitution criminal punishment subject to the Ex Post Facto Clause. Petitioner draws (Br. 24-25) a different inference from the retroactivity provision: that because Congress was cognizant of a potential constitutional objection, it *intended* to violate the Constitution by enacting a retroactive punitive measure. That is not how constitutional avoidance works. The section's proviso—"to the extent constitutionally permissible"—presumably accounted for the possibility that a court would deem MVRA restitution to be criminal punishment at *Mendoza-Martinez* step two.

Second, under the *Apprendi* line of cases, the "Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence." *S. Union Co. v. United States*, 567 U.S. 343, 346 (2012). The Court has applied that

rule "to criminal fines," and thus juries must "find beyond a reasonable doubt facts that determine [a] fine's maximum amount." *Id.* at 346, 350. If MVRA restitution were also deemed criminal punishment, the same rule would presumably apply. And because the MVRA requires judges to find by a preponderance of the evidence facts that increase the maximum amount of restitution, 18 U.S.C. § 3664(e), MVRA restitution would violate the Sixth Amendment were it criminal punishment—a serious problem with the government's position in this case that it brushes off in a footnote (Br. 26 & 27 n.3). *See Hester v. United States*, 586 U.S. 1104, 1105-07 (2019) (Gorsuch, J., dissenting from the denial of certiorari).

To be sure, even if MVRA restitution is not criminal punishment, it may implicate the Seventh Amendment right to a civil jury trial. But that would depend on the novel question of whether a restitution proceeding during criminal sentencing is a "Suit[] at common law," U.S. Const. amend. VII, and at least certain categories of MVRA restitution may qualify as equitable remedies not subject to the Seventh Amendment, *e.g.*, 18 U.S.C. § 3663A(b)(1). *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999). By contrast, construing restitution to be criminal punishment would clearly threaten to invalidate the entire scheme under the Sixth Amendment.

Precedent. In *Dolan*, *supra*, this Court's only sustained analysis of the purposes of the MVRA, the question was whether a court's violation of the statute's 90-day deadline for a "final determination of the victim's losses," 18 U.S.C. § 3664(d)(5), foreclosed a restitution order. 560 U.S. at 607-08. In holding that it did not, the Court relied on the MVRA's

"substantive purpose, namely, that the statute seeks primarily to ensure that victims of a crime receive full restitution." *Id.* at 612; *see id.* at 613. To "deny[] the victim restitution in order to remedy a missed hearing deadline," the Court held, "would defeat the basic purpose of the [MVRA]." *Id.* at 615. Even the dissent agreed that compensating crime victims "was a purpose Congress sought to promote" but merely concluded that the purpose was limited by the 90-day deadline. *Id.* at 625 (Roberts, C.J., dissenting).

Under *Dolan*'s interpretation of the statute, MVRA restitution is not clearly criminal punishment because its primary purpose is to compensate victims. As this Court explained in holding that a forfeiture provision was not criminal punishment, where a provision's purpose is "plainly more remedial than punitive," it is likely that Congress intended the provision to be "a remedial civil sanction rather than a criminal punishment." *89 Firearms*, 466 U.S. at 364.

The parties rely heavily on this Court's decisions in *Paroline*, *supra*, and *Pasquantino v. United States*, 544 U.S. 349 (2005), but that reliance is misplaced.

In *Paroline*, the Court considered the standard of causation under a different mandatory-restitution statute governing child-pornography offenses, 18 U.S.C. § 2259. 572 U.S. at 439. The Court explained, consistent with *Dolan*, that the "primary goal of restitution is remedial or compensatory." *Id.* at 456; *see also id.* at 481 (Sotomayor, J., dissenting) ("Section 2259 functions as a tort statute ...."). But the Court declined to import certain tort-law legal fictions into Section 2259 because "restitution serves purposes that differ from (though they overlap with) the

purposes of tort law." *Id.* at 453 (majority op.). In particular, the Court believed that Section 2259 "serve[s] the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses"—*i.e.*, compensation—"and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims." *Id.* at 459.

It is doubtful that the MVRA, which for the most part applies to crimes with obvious victims, shares the latter goal with Section 2259. But even if it did, the fact that a compensation scheme also "impress[es] upon offenders that their conduct produces concrete and devasting harms for real, identifiable victims," *Paroline*, 572 U.S. at 457, would not conclusively establish that Congress intended it to function as criminal punishment. Any form of civil monetary liability would do the same.

Pasquantino held that prosecuting defendants under the federal wire-fraud statute for a scheme to deprive Canada of tax revenue did not transgress the common-law prohibition on enforcing a foreign tax law. 544 U.S. at 352-53. In its analysis, the Court rejected the argument that mandatory restitution under the MVRA would amount to collecting the Canadian tax. *Id.* at 365. The Court explained that the "purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment" for "fraudulent domestic criminal conduct." *Ibid.* Read in context, the reference to "criminal punishment" simply conveyed that foreign tax assessment is not among the MVRA's animating purposes—purposes that *Dolan* has since clarified to be primarily compensatory. The characterization was dicta in any event because the Court went on to hold

that the nature of MVRA restitution was irrelevant to its holding. *See id.* at 365.

Petitioner also relies (Br. 23, 27) on the pre-MVRA decision in *Kelly v. Robinson*, 479 U.S. 36 (1986), which held that a state-law restitution obligation was not dischargeable in bankruptcy. *Kelly*, however, concerned a discretionary Connecticut statute that was far less victim-oriented than the MVRA. That statute did "not require imposition of restitution in the amount of the harm caused" but instead "provide[d] for a flexible remedy tailored to the defendant's situation." *Id.* at 53. The Court therefore concluded that the restitution awards were "not assessed for . . . compensation of the victim" and instead advanced "the penal and rehabilitative interests of the State." *Ibid.* (quotation omitted).

Congress rejected precisely that approach in the MVRA, making restitution in the amount of the victim's loss mandatory in most cases. And although *Kelly* briefly cited circuit decisions construing VWPA restitution as punishment, 479 U.S. at 53 n.14, the discretionary and flexible VWPA regime differs materially from the MVRA. *See* pp. 4-8, 16, *supra.*

Legislative Record. The MVRA's legislative record confirms that the statute's purpose is to compensate victims. *See Dolan*, 560 U.S. at 613 (citing S. Rep. No. 104-179, at 20 (1995)). Academic reviews of the record have concluded that the "few assertions" of penological benefits are "vastly outnumbered by assertions of the MVRA's remedial civil benefits." Matthew Spohn, Note, *A Statutory Chameleon: The Mandatory Victim Restitution Act's Challenge to the Civil/Criminal Divide*, 86 IOWA L. REV. 1013, 1031-36 (2001)

(collecting materials); *see* Comment, Heidi M. Grogan, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079, 1101 (2005) ("Congress's discussion focused, almost exclusively, on redressing victim's harms.").

Reports from both houses of Congress reflected the intent to compensate, not punish. The Senate report stated that the MVRA was needed "to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due." S. Rep. No. 104-179, at 12. The House report, citing startling statistics on uncompensated financial losses and hospitalizations, explained that the MVRA would address the failure of existing law to make "victims whole." H.R. Rep. No. 104-16, at 4 (1995). The purpose of the statute was to "provide those who suffer the consequences of crime with some means of recouping the personal and financial losses resulting from crime." *Id.* at 5.

Individual Members expressed similar views. Representative Hyde, then Chair of the Judiciary Committee, asked his colleagues to think "of the victims and think of the victims first." 142 Cong. Rec. H3606 (daily ed. Apr. 18, 1996). Senator Grassley expressed his concern that "crime victims actually receive the restitution they are entitled to." 141 Cong. Rec. S16827 (daily ed. Nov. 8, 1995). And Senator Feinstein asserted that if "somebody has been hurt by a criminal, they should be made whole." 141 Cong. Rec. S19280 (daily ed. Dec. 22, 1995).

Even for jurists skeptical that reports and floor statements shed light on the intent of a multi-member

body, these materials at least show that any possible punitive intent was far from universal. The parties' handful of quotations from the legislative record (Pet. Br. 29; U.S. Br. 21) largely just acknowledge that MVRA restitution would be imposed during sentencing or speculate about "potential pen[o]logical benefits" that might accompany "the benefits that even nominal restitution payments have for the victim of crime." S. Rep. No. 104-179, at 18.

3. Congress May Reasonably Integrate A Civil Remedy Into Criminal Sentencing

Much of what the parties present as several different features of the MVRA demonstrating a punitive purpose are really just one feature: Congress chose to integrate victim compensation into the sentencing process. That is why restitution is imposed only after a criminal conviction; why the MVRA is codified in Title 18 and amended the Sentencing Guidelines and Federal Rules of Criminal Procedure; why the statute distinguishes the restitution process from a "civil proceeding"; why the sentencing judge issues the award; and why prosecutors and probation officers play important roles. *See* Pet. Br. 15-20, 24-25, 31-33; U.S. Br. 16-21, 27.

But that feature alone is not enough to establish that Congress intended restitution to operate as criminal punishment. In *Smith*, *supra*, the Alaskan statutory scheme at issue required that defendants be notified of sex-offender-registration requirements during their criminal prosecutions, but that did not convert the registration scheme into punishment. 538 U.S. at 95-96. The Court explained that such "[t]imely" notice was "effective" at "appris[ing]

individuals of their responsibilities" and "ensur[ing] compliance with the regulatory scheme." *Id.* at 96. That provided a reasonable basis for its integration into criminal proceedings that had nothing to do with punishment. As the Court put it, merely invoking "the criminal process * * * does not render the statutory scheme itself punitive." *Ibid.*

Following *Smith*, courts of appeals have held that federal sex-registration requirements—imposed as a condition of supervised release at sentencing—are not punishment. *See, e.g.*, *United States v. W.B.H.*, 664 F.3d 848, 852-60 (11th Cir. 2011), *cert. denied*, 568 U.S. 978 (2012). They have reached the same conclusion as to other supervised-released conditions. *See, e.g.*, *United States v. Jackson*, 189 F.3d 820, 822-24 (9th Cir. 1999) (drug testing); *United States v. Coccia*, 598 F.3d 293, 296-99 (6th Cir. 2010) (DNA testing); *United States v. Winston*, 850 F.3d 377, 381-82 (8th Cir. 2017) (searches). That Congress incorporated an otherwise non-punitive obligation into the sentencing process thus does not demonstrate that Congress intended to impose criminal punishment.

Here, whether or not other practicable "methods" of securing compensation for crime victims were "available" to Congress, it is uniquely "effective" to simultaneously impose criminal penalties and restitution obligations since they both arise out of the same conviction. *Smith*, 538 U.S. at 96. Congress could in theory have provided for a "separate, noncriminal proceeding" (Pet. Br. 15), forcing injured or defrauded victims to hire attorneys to file lawsuits where they could invoke the collateral-estoppel effect of criminal judgments, 18 U.S.C. § 3664(*l*). But its choice to streamline procedures for the benefit of victims does not

mean that Congress clearly intended an overtly compensatory system to be punitive.

In a similar vein, petitioner relies heavily (Br. 15-17, 32-33) on the argument that Congress must have intended MVRA restitution to be punishment because it is a consequence of a criminal conviction. But this Court has long held that "[t]he mere fact that [an obligation] is imposed in consequence of a crime is not conclusive." *Murphy*, 272 U.S. at 632. Indeed, at *Mendoza-Martinez* step two, this Court has given that consideration "little weight" where the existence of a criminal conviction is necessary to serve a nonpunitive purpose (*e.g.*, crime-victim compensation), *Smith*, 538 U.S. at 105, so it would be incongruous if that feature of the MVRA could drive the step-one analysis. Under current law, moreover, a range of civil consequences follows from a criminal conviction, such as the loss of voting and firearm rights and changes to immigration status, so there is nothing anomalous about linking civil compensation to a criminal judgment. *Padilla*, 559 U.S. at 376 (Alito, J., concurring); *Hopkins v. Watson*, 108 F.4th 371, 382-89 (5th Cir. 2024) (en banc), *cert. denied*, 145 S. Ct. 1138 (2025) (voting); *Hinds v. Lynch*, 790 F.3d 259, 263-68 (1st Cir. 2015) (removal); *United States v. O'Neal*, 180 F.3d 115, 125 (4th Cir. 1999), *cert. denied*, 528 U.S. 980 (1999) (firearms).

The parties note (Pet. Br. 11; U.S. Br. 17-18) the MVRA's placement in Title 18. But this Court has "rejected the argument that the placement [of a provision in the Criminal Code] demonstrated Congress' 'intention to create an additional criminal sanction,'" *Smith*, 538 U.S. at 94-95 (quoting *89 Firearms*, 465

U.S. at 364 n.6), and Title 18 contains civil causes of action, *e.g.*, 18 U.S.C. §§ 2333(a), 2707(a).

Moreover, the specific placement of the MVRA cuts against the view that it is criminal punishment. Section 3663A is not housed in the "Sentences" chapter of Title 18 (Chapter 227), which addresses imprisonment, fines, and probation, but rather in a chapter entitled "Miscellaneous Sentencing Provisions" (Chapter 232). That chapter addresses a variety of matters that are not criminal punishments, such as the storage of records of criminal proceedings, 18 U.S.C. § 3662; the disposal of firearms found on certain arrestees, *id.* § 3665; the proper disposition of bribe money, *id.* § 3666; and the duties of the Director of the Administrative Office of the U.S. Courts, *id.* § 3672.

Finally, petitioner also points out that an offender's failure to make good on restitution obligations can sometimes authorize a district court to revoke probation or supervised release or to increase the offender's sentence for the crime of conviction, including where doing so would advance "the purposes of punishment and deterrence." Pet. Br. 20-22 (quoting 18 U.S.C. § 3614(b)). That does not show that Congress intended the restitution obligation itself to be punitive. There is nothing inconsistent about classifying restitution as a civil remedy while providing that a defendant's failure to make good to victims when ordered to do so may warrant an increased period of confinement for the offense of conviction. That behavior is new information bearing on an offender's acceptance of responsibility and reintegration into society and the harm caused by the offense.

But even if an additional period of imprisonment were understood to be punishment for the failure to pay restitution, rather than for the underlying crime, that would not mean that Congress intended the restitution obligation itself to be a form of punishment. Petitioner's argument is akin to saying that because failing to pay taxes or violating an injunction can lead to imprisonment, taxes and injunctions are forms of criminal punishment.

4. The Parties' Other Arguments Are Not Relevant To Congressional Intent

The parties raise a number of step-one arguments that are not relevant to the question of Congress's intent in 1996 in enacting the MVRA.

First, the parties invoke provisions of the pre-1996 VWPA, judicial decisions construing that statute, and its legislative history. Pet. Br. 27-29; U.S. Br. 22-23. But the original VWPA's discretionary regime differed materially from the MVRA, allowing judges to take account of ordinary penological objectives in deciding whether to impose restitution and in what amount. *See* pp. 4-8, 16, *supra*. That statute does not illuminate Congress's intent in enacting a very different mandatory regime.

Second, both parties emphasize the post-enactment view of the Department of Justice. Pet. Br. 30; U.S. Br. 23 n.2. That has no bearing on congressional intent.

Third, petitioner presents (Br. 34-36) a historical analysis stretching back to ancient civilizations and medieval Europe. The historical understanding of victim compensation is relevant at step two of the

Mendoza-Martinez framework, *see* pp. 45-48, *infra*, but not at step one. *See* Pet. Br. 17, 20-23 (discussing other step-two considerations at step one). While Congress may be expected to legislate against the backdrop of an on-point decision of this Court or settled legal principles, *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) (cited Pet. Br. 27), there is no reason to think that the Members who voted for the MVRA were thumbing through dog-eared copies of Hammurabi or Samuel Johnson.

* * *

The parties have not identified "conclusive evidence of congressional intent as to the penal nature" of the MVRA. *Mendoza-Martinez*, 372 U.S. at 169. Accordingly, whether restitution under the MVRA is criminal punishment depends on its form and effect at step two of *Mendoza-Martinez*.

B. Restitution Imposed Under The MVRA Is Not Punitive In Form Or Effect

At step two, the Court evaluates whether the imposition at issue is "so punitive in form and effect as to render [it] criminal." *Ursery*, 518 U.S. at 290. Several "helpful" factors guide that inquiry. *United States v. Ward*, 448 U.S. 242, 249 (1980). The "factors most relevant to" the analysis are whether the imposition:

1. "has a rational connection to a nonpunitive purpose";
2. "is excessive with respect to this purpose";
3. "has been regarded in our history and traditions as a punishment";

4. "imposes an affirmative disability or restraint"; or

5. "promotes the traditional aims of punishment."

Smith, 538 U.S. at 97.

The Court also has identified two other factors that often carry "little weight," *Smith*, 538 U.S. at 105:

6. "whether [the imposition] comes into play only on a finding of *scienter,*" and

7. "whether the behavior to which [the imposition] applies is already a crime,"

Hudson, 522 U.S. at 99 (quotation omitted).

In considering those factors, this Court has typically sought the "clearest proof" that the statute is punitive—including where the legislature has not expressly labeled the remedy "civil." *See Hudson*, 522 U.S. at 103-05. But even under a lower standard, the factors demonstrate that the MVRA restitution is not criminal punishment.

Nonpunitive purpose. A sanction's "rational connection to a nonpunitive purpose is a '[m]ost significant'" factor. *Smith*, 538 U.S. at 102 (quoting *Ursery*, 518 U.S. at 290). For instance, in *Ursery*, the Court determined that certain forfeiture proceedings were not "so punitive in form and effect as to render them criminal" in large part because they "serve[d] important nonpunitive goals," like "encourag[ing] property owners to take care in managing their property." 518 U.S. at 290. Similarly, this Court held that the sex-offender registration scheme in *Smith* had "a legitimate nonpunitive purpose of public safety," 538 U.S. at 102-03 (quotation omitted), and a challenged

monetary penalty served "to promote the stability of the banking industry," *Hudson*, 522 U.S. at 105.

Here, the connection between MVRA restitution and a nonpunitive purpose is more than merely rational; MVRA restitution's primary focus is victim compensation. *See Dolan*, 560 U.S. at 612; pp. 31-34, *supra*. That counsels strongly in favor of deeming it nonpunitive.

Petitioner reiterates (Br. 45-46) his argument that victims play a small role in the MVRA process as compared to ordinary tort litigation and observes that restitution balances are often uncollectible. The first point is overstated and does not in any event detract from the compensatory nature of restitution. *See* pp. 24-36, *supra*. The latter would be true under any regime, civil or criminal, that seeks compensation from frequently judgment-proof individuals.

Petitioner also adverts (Br. 46) to the drug-crimes provision involving unidentifiable victims, 18 U.S.C. § 3663(c), but that provision expressly authorizes compensation for "public harm" and devotes the money collected to helping victims and those who struggle with substance abuse. That reflects a prototypical nonpunitive purpose.

Proportionality. MVRA restitution is not "excessive with respect to" its nonpunitive purpose of victim compensation. *Smith*, 538 U.S. at 97. This factor does not ask "whether the legislature has made the best choice possible to address the problem" but merely "whether the regulatory means chosen are reasonable" given "the nonpunitive objective." *Id.* at 105. Under that standard, the Court did not deem the worldwide applicability and extensive duration of the

sex-offender reporting requirements in *Smith* to be excessive. *Id.* at 103-05.

Under the MVRA, courts cannot order restitution exceeding the "victim's losses," 18 U.S.C. § 3664(f)(1)(A), unless the defendant agrees to make restitution to other parties, *id.* § 3663A(a)(3), and restitution must be offset by any civil judgment the victim obtains, *id.* § 3664(j)(2). Courts of appeals have thus widely recognized that the MVRA limits restitution to "the full amount" of victim losses and "nothing more." *United States v. Newman*, 144 F.3d 531, 542 (7th Cir. 1998); *see, e.g.*, *United States v. Borino*, 123 F.4th 233, 247 (5th Cir. 2024). The statute therefore imposes no more liability than what is necessary to achieve its nonpunitive purpose. Petitioner does not appear to disagree.

History and Tradition. In the Anglo-American legal tradition, compensatory remedies have been almost universally understood to be nonpunitive. In fact, this Court has observed that "the payment of * * * money" as a "[r]emedial sanction[]" has been "recognized" as civil since the Founding. *Helvering*, 303 U.S. at 399-401; *accord Hudson*, 522 U.S. at 104 ("[N]either money penalties nor debarment has historically been viewed as punishment.").

"Under the Saxon legal system in pre-Norman England, the victim of a wrong would, rather than seek vengeance through retaliation or 'blood-feud,' accept financial compensation for the injury from the wrongdoer." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 287 (1989) (O'Connor, J., concurring in part and dissenting in part). As the English legal system developed, compensation

was largely integrated into civil proceedings through tort damages. Stephen Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 246-47 & n.6 (1995). That tradition carried over to the American legal system, where "tort law provided the principal, usually the sole, source of compensation for injuries suffered." John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478, 1478 (1966).

Thus, the prominent legal reformer Edward Livingston (who also served as President Jackson's Secretary of State) explained that the "distinction between penal and civil laws" is that penal laws "exclude the idea of private compensation." 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 243 (1873). Indeed, the word "penal" signified "all acts which impose by way of punishment damages *beyond compensation for the benefit of the injured party*." William M. Lile et al., *Brief Making and the Use of Law Books* 344 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914) (quoted in BLACK'S LAW DICTIONARY, *supra* (def. of "penal")) (emphasis added). Although some early criminal statutes provided for forms of victim compensation, *see* pp. 47-48, *infra*, *amicus* is aware of no prominent judicial opinions or scholarly legal works from early American history that characterized those remedies as a component of criminal punishment.

Accordingly, the most that can be said of the historical understanding of restitution is that victims usually obtained compensation through the tort system, and little attention was paid to the character of restitution imposed during the criminal process. That limited historical record does not support the view

that modern systems of victim restitution must be classified as criminal punishment as a matter of constitutional law.

Petitioner offers a different interpretation of the history (Br. 34-36, 41-42), but it is deeply flawed. Petitioner begins by misreading Justice James Wilson's observation that a "leading maxim in the doctrine of punishments" is that in "the punishment of every crime, reparation for the included injury ought to be involved." Pet. Br. 34 (quoting 2 COLLECTED WORKS OF JAMES WILSON 1105 (Kermit L. Hall & Mark David Hall eds., 2007)). Wilson was *contrasting* the present state of affairs in English law, where restitution was absent, with the "otherwise and better" rule of ancient times, in which "part of the composition"—*i.e.*, compensation—"was given to the relations of the person deceased." 2 WILSON, *supra*, at 1106. Moreover, Wilson observed that those older restitutionary remedies "had the nature of a *civil* redress," confirming that he viewed them as inherently civil, not punitive. 2 WILSON, *supra*, at 1106 (emphasis added).

Petitioner next adverts (Br. 34-35) to legal systems from civilizations that existed thousands of years ago. Petitioner's own source, however, explains that the cited practices arose "before the conceptual separation of civil and criminal law" and that the "primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 933 (1984). Such alien legal regimes have no more relevance to the meaning of the U.S. Constitution than the justice systems of Westeros or Middle-earth.

Petitioner points out (Br. 35) that in English and American law, courts sometimes required defendants convicted of larceny or other property offenses to return stolen property to the victims. But none of the cited historical materials characterize that sort of remedy as part of criminal punishment—the question here. That history is equally consistent with the view that a legislature may integrate a civil compensatory remedy into the sentencing process without transforming it into punishment. *See* pp. 36-40, *supra*.

Further, the Founding-era statutes that petitioner cites imposed punitive monetary awards on top of victim compensation. The 1802 statute prohibiting theft in the Indian territories required payment of "a sum equal to *twice* the just value of the property so taken or destroyed." An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 13, § 4, 2 Stat. 139, 141 (1802) (emphasis added). And the 1790 statute prohibiting theft on the high seas imposed a fine of up to "the *fourfold* value of the property," with only half the fine paid to the victim. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 16, 1 Stat. 112, 116 (1790) (emphasis added). Colonial laws employing restitution were "everywhere the same," requiring larceny offenders to "make good what had been stolen *plus* an additional amount as punitive damages to the victim." EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND 34 (1993) (emphasis added). It would be no surprise if such extra-compensatory monetary exactions were deemed punishment.

Finally, petitioner cites *Caldwell v. State*, 55 Ala. 133 (1876), as support for his historical claims. But

the statute at issue there required payment of "costs * * * to the officers of court," not restitution to victims. *Id.* at 135. Petitioner relies on dicta in which the court observed that under other provisions of the state code, a "fine" paid to a "party injured" qualified as "punishment." *Ibid.* (citing sections 3733 and 3738). But as the opinion says, those provisions imposed *fines*, not compensation for losses. *See* Ala. Code §§ 3733 ($20-$500 fine for malicious injury to animals); 3738 (fine goes to injured party when injury is "to private property") (1867). *Caldwell* is thus irrelevant.

Disability or Restraint. MVRA restitution involves no "affirmative disability or restraint." *Mendoza-Martinez*, 372 U.S. at 168. Resisting that self-evident conclusion, petitioner claims (Br. 38) that the Court must take account of the fact that failing to pay restitution can result in resentencing or revocation of probation or supervised release. *See* pp. 39-40, *supra*. As noted, on that logic, a tax could be deemed penal because a person's failure to pay it might result in imprisonment. So could an ordinary civil injunction, which courts may enforce through imprisonment. 18 U.S.C. § 401.

Citing *Smith*, petitioner claims that the analysis must focus on the entire statutory "scheme," including penalties for failure to pay restitution. But that misreads *Smith*, which did not expand the well-established inquiry into whether *"the sanction* involves an affirmative disability or restraint." *Mendoza-Martinez*, 372 U.S. at 168 (emphasis added). *Smith* used the phrase "statutory scheme" only because the sanction there was an entire regime of sex-offender registration and notification requirements.

Indeed, in *Smith* itself, the Court held that the registration requirements imposed no affirmative restraint even though, as here, failing to comply with them could result in imprisonment. 538 U.S. at 90, 101-02. Petitioner dismisses that holding on the ground that the *Smith* regime required the government to "initiate[] a new prosecution" (Pet. Br. 39) (emphasis omitted), whereas failure to honor restitution obligations can result in reimprisonment for the underlying conviction. But *Smith*'s point was that conditions of probation or supervised release that curtail an offenders' freedom "to move where they wish and to live and work as other citizens," upon threat of revocation without a new prosecution, impose affirmative restraints. 538 U.S. at 101. A mere financial obligation entails no such limitation on movement.

Petitioner suggests (Br. 40) that defendants who cannot afford to pay restitution obligations are subject to imprisonment. A defendant's inability to pay, however, cannot be the basis for reincarceration, 18 U.S.C. § 3614(c), or revocation of supervised release or probation, *Black v. Romano*, 471 U.S. 606, 611 (1985). And the MVRA requires courts to develop payment plans that take into account defendants' financial resources and circumstances, *id.* § 3664(d)(3) and (f)(2)-(3).

Traditional aims of punishment. MVRA restitution does not advance the traditional aims of punishment more than any other civil monetary remedy. Unlike other systems of restitution, *e.g.*, *Kelly*, 479 U.S. at 49, the MVRA does not allow courts to take into account deterrence, just punishment, or other penological goals. 18 U.S.C. § 3664(f)(1)(A). The sole determinant of the restitution amount is the victim's loss. *Ibid.* And as noted, unlike with restitution for

child-pornography offenses, *see Paroline*, 572 U.S. at 453, it is hard to imagine that MVRA restitution is necessary to educate offenders that acts of violence, property destruction, and fraud have real victims.

To be sure, all civil monetary exactions naturally "have some deterrent effect," *Hudson*, 522 U.S. at 102, but that does not render them punitive. *See Ursery*, 518 U.S. at 292. For example, in *Hudson*, the "presence of a deterrent purpose" for the monetary penalty at issue did not render it criminal given that it also "serve[d] to promote the stability of the banking industry." 522 U.S. at 105. Likewise, in *Smith*, although the sex-offender registration requirements served deterrent and retributive purposes, those purposes did not outweigh the fact that the requirements were "reasonably related to" the non-punitive purpose of preventing recidivism. 538 U.S. at 102. In short, a statute that has "certain punitive aspects" does not impose criminal punishment so long as it primarily "serve[s] important nonpunitive goals." *Ursery*, 518 U.S. at 290; *see also 89 Firearms*, 465 U.S. at 364.

Other factors. The two lesser factors that this Court has identified marginally favor a punitive characterization of MVRA restitution. Petitioner is correct that most MVRA crimes require scienter, and the conduct giving rise to restitution for crimes is obviously criminal. But those factors typically bear "little weight," at least when applying the regulatory scheme to criminal conduct is "necessary" to achieve its nonpunitive objectives. *Smith*, 538 U.S. at 105; *see Hudson*, 522 U.S. at 105. Here, the goal of obtaining compensation for *victims of crime* presupposes the commission of criminal offenses—something that would be equally true if Congress had created a

separate civil cause of action for victims based on the collateral-estoppel effect of federal criminal judgments, *see* 18 U.S.C. § 3664(*l*). That differs from statutes where the ostensible nonpunitive purpose—*e.g.*, raising revenue—does not by its nature depend on a criminal offense. *See, e.g.*, *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781 (1994).

Moreover, legislatures have "impose[d] both a criminal and a civil sanction in respect to the same act or omission" in a variety of contexts, *Helvering*, 303 U.S. at 399, including asset forfeiture, *89 Firearms*, 465 U.S. at 362; *Ursery*, 518 U.S. at 291; sex-offender registration, *Smith*, 538 U.S. at 105; qui tam suits, *Marcus*, 317 U.S. at 549-52; income-tax evasion, *Helvering*, 303 U.S. at 399-405; and pollution, *Ward*, 448 U.S. at 250. That choice does not transform the overwhelmingly compensatory nature of MVRA restitution into something so punitive that the Constitution demands it be treated as punishment.

A final consideration bears mention. Excluding MVRA restitution from the scope of the Ex Post Facto Clause would not give Congress a free hand to impose retroactive monetary liability on criminal defendants. MVRA restitution is bounded by the victim's loss. Should Congress expand its scope to authorize other relief, restitution could evolve into criminal punishment.

CONCLUSION

The Court should dismiss the writ as improvidently granted. In the alternative, the Court should affirm the judgment below.

Respectfully submitted.

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APPENDIX

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APPENDIX

PUBLIC LAW 104–132—APR. 24, 1996

110 STAT. 1227

TITLE II—JUSTICE FOR VICTIMS

Subtitle A—Mandatory Victim Restitution

SEC. 201. SHORT TITLE.

This subtitle may be cited as the "Mandatory Victims Restitution Act of 1996".

SEC. 202. ORDER OF RESTITUTION.

Section 3556 of title 18, United States Code, is amended—

(1) by striking "may" and inserting "shall"; and

(2) by striking "sections 3663 and 3664." and inserting "section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section.".

SEC. 203. CONDITIONS OF PROBATION.

Section 3563 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (3), by striking "and" at the end;

(B) in the first paragraph (4) (relating to conditions of probation for a domestic crime of violence), by striking the period and inserting a semicolon;

(C) by redesignating the second paragraph (4) (relating to conditions of probation concerning drug use and testing) as paragraph (5);

(D) in paragraph (5), as redesignated, by striking the period at the end and inserting a semicolon; and

(E) by inserting after paragraph (5), as redesignated, the following new paragraphs:

"(6) that the defendant—

"(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

"(B) pay the assessment imposed in accordance with section 3013; and

"(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments."; and

(2) in subsection (b)—

(A) by striking paragraph (2);

(B) by redesignating paragraphs (3) through (22) as paragraphs (2) through (21), respectively; and

(C) by amending paragraph (2), as redesignated, to read as follows:

"(2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A));".

SEC. 204. MANDATORY RESTITUTION.

(a) IN GENERAL.—Chapter 232 of title 18, United States Code, is amended by inserting immediately after section 3663 the following new section:

"§ 3663A. Mandatory restitution to victims of certain crimes

"(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in sub-[110 STAT. 1228] section (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 or, if the victim is deceased, to the victim's estate.

"(2) For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

"(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

"(b) The order of restitution shall require that such defendant—

"(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

"(A) return the property to the owner of the property or someone designated by the owner; or

"(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

"(i) the greater of—

"(I) the value of the property on the date of the damage, loss, or destruction; or

"(II) the value of the property on the date of sentencing, less

"(ii) the value (as of the date the property is returned) of any part of the property that is returned;

"(2) in the case of an offense resulting in bodily injury to a victim—

"(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

"(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

"(C) reimburse the victim for income lost by such victim as a result of such offense;

"(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

"(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

[110 STAT. 1229] "(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

"(A) that is—

"(i) a crime of violence, as defined in section 16;

"(ii) an offense against property under this title, including any offense committed by fraud or deceit; or

"(iii) an offense described in section 1365 (relating to tampering with consumer products); and

"(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

"(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

"(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

"(A) the number of identifiable victims is so large as to make restitution impracticable; or

"(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

"(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.".

(b) CLERICAL AMENDMENT.—The analysis for chapter 232 of title 18, United States Code, is amended by inserting immediately after the matter relating to section 3663 the following:

"3663A. Mandatory restitution to victims of certain crimes.".

SEC. 205. ORDER OF RESTITUTION TO VICTIMS OF OTHER CRIMES.

(a) IN GENERAL.—Section 3663 of title 18, United States Code, is amended—

(1) in subsection (a)(1)—

(A) by striking "(a)(1) The court" and inserting "(a)(1)(A) The court";

(B) by inserting ", section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section)," before "or section 46312,";

(C) by inserting "other than an offense described in section 3663A(c)," after "title 49,";

(D) by inserting before the period at the end the following: ", or if the victim is deceased, to the victim's estate";

(E) by adding at the end the following new subparagraph:

"(B)(i) The court, in determining whether to order restitution under this section, shall consider—

"(I) the amount of the loss sustained by each victim as a result of the offense; and

"(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's [110 STAT. 1230] dependents, and such other factors as the court deems appropriate.

"(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order."; and

(F) by amending paragraph (2) to read as follows:

"(2) For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.";

(2) by striking subsections (c) through (i); and

(3) by adding at the end the following new subsections:

"(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

"(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

"(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine ordered for the offense charged in the case.

"(3) Restitution under this subsection shall be distributed as follows:

"(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

"(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

"(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

"(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

"(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

[110 STAT. 1231] "(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

"(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

"(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.".

(b) SEXUAL ABUSE.—Section 2248 of title 18, United States Code, is amended—

(1) in subsection (a), by inserting "or 3663A" after "3663";

(2) in subsection (b)—

(A) by amending paragraph (1) to read as follows:

"(1) DIRECTIONS.—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).";

(B) by amending paragraph (2) to read as follows:

"(2) ENFORCEMENT.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.";

(C) in paragraph (4), by striking subparagraphs (C) and (D); and

(D) by striking paragraphs (5) through (10);

(3) by striking subsections (c) through (e); and

(4) by redesignating subsection (f) as subsection (c).

(c) SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN.—Section 2259 of title 18, United States Code, is amended—

(1) in subsection (a), by inserting "or 3663A" after "3663";

(2) in subsection (b)—

(A) by amending paragraph (1) to read as follows:

"(1) DIRECTIONS.—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).";

(B) by amending paragraph (2) to read as follows:

"(2) ENFORCEMENT.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.";

(C) in paragraph (4), by striking subparagraphs (C) and (D); and

(D) by striking paragraphs (5) through (10);

(3) by striking subsections (c) through (e); and

(4) by redesignating subsection (f) as subsection (c).

(d) DOMESTIC VIOLENCE.—Section 2264 of title 18, United States Code, is amended—

(1) in subsection (a), by inserting "or 3663A" after "3663";

(2) in subsection (b)—

(A) by amending paragraph (1) to read as follows:

"(1) DIRECTIONS.—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).";

(B) by amending paragraph (2) to read as follows: [110 STAT. 1232]

"(2) ENFORCEMENT.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.";

(C) in paragraph (4), by striking subparagraphs (C) and (D); and

(D) by striking paragraphs (5) through (10);

(3) by striking subsections (c) through (g); and

(4) by adding at the end the following new subsection (c):

"(c) VICTIM DEFINED.—For purposes of this section, the term 'victim' means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.".

(e) TELEMARKETING FRAUD.—Section 2327 of title 18, United States Code, is amended—

(1) in subsection (a), by inserting "or 3663A" after "3663";

(2) in subsection (b)—

(A) by amending paragraph (1) to read as follows:

"(1) DIRECTIONS.—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).";

(B) by amending paragraph (2) to read as follows:

"(2) ENFORCEMENT.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.";

(C) in paragraph (4), by striking subparagraphs (C) and (D); and

(D) by striking paragraphs (5) through (10);

(3) by striking subsections (c) through (e); and

(4) by redesignating subsection (f) as subsection (c).

SEC. 206. PROCEDURE FOR ISSUANCE OF RESTITUTION ORDER.

(a) IN GENERAL.—Section 3664 of title 18, United States Code, is amended to read as follows:

"§ 3664. Procedure for issuance and enforcement of order of restitution

"(a) For orders of restitution under this title, the court shall order the probation officer to obtain and

include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

"(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or [110 STAT. 1233] other report pertaining to the matters described in subsection (a) of this section.

"(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

"(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

"(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

"(A) provide notice to all identified victims of—

"(i) the offense or offenses of which the defendant was convicted;

"(ii) the amounts subject to restitution submitted to the probation officer;

"(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

"(iv) the scheduled date, time, and place of the sentencing hearing;

"(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

"(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

"(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

"(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

"(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

"(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

"(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

[110 STAT. 1234] "(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

"(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and

without consideration of the economic circumstances of the defendant.

"(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

"(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

"(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

"(B) projected earnings and other income of the defendant; and

"(C) any financial obligations of the defendant; including obligations to dependents.

"(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

"(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable

future under any reasonable schedule of payments.

"(4) An in-kind payment described in paragraph (3) may be in the form of—

"(A) return of property;

"(B) replacement of property; or

"(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

"(g)(1) No victim shall be required to participate in any phase of a restitution order.

"(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

"(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

[110 STAT. 1235] "(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

"(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

"(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

"(A) any Federal civil proceeding; and

"(B) any State civil proceeding, to the extent provided by the law of the State.

"(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

"(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal

civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

"(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

"(ii) by all other available and reasonable means.

"(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

"(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

"(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inherit-[110 STAT. 1236]ance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

"(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

"(1) such a sentence can subsequently be—

"(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

"(B) appealed and modified under section 3742;

"(C) amended under section 3664(d)(3); or

"(D) adjusted under section 3664(k), 3572, or 3613A; or

"(2) the defendant may be resentenced under section 3565 or 3614.

"(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.".

(b) TECHNICAL AMENDMENT.—The item relating to section 3664 in the analysis for chapter 232 of title 18, United States Code, is amended to read as follows:

"3664. Procedure for issuance and enforcement of order of restitution.".

SEC. 207. PROCEDURE FOR ENFORCEMENT OF FINE OR RESTITUTION ORDER.

(a) AMENDMENT OF FEDERAL RULES OF CRIMINAL PROCEDURE.—Rule 32(b) of the Federal Rules of Criminal Procedure is amended—

(1) in paragraph (1), by adding at the end the following: "Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may

direct, shall be required in any case in which restitution is required to be ordered."; and

(2) in paragraph (4)—

(A) by redesignating subparagraphs (F) and (G) as subparagraphs (G) and (H), respectively; and

(B) by inserting after subparagraph (E), the following new subparagraph:

"(F) in appropriate cases, information sufficient for the court to enter an order of restitution;".

(b) FINES.—Section 3572 of title 18, United States Code, is amended—

(1) in subsection (b) by inserting "other than the United States," after "offense,";

(2) in subsection (d)—

(A) in the first sentence, by striking "A person sentenced to pay a fine or other monetary penalty" and inserting "(1) A person sentenced to pay a fine or other monetary penalty, including restitution,";

(B) by striking the third sentence; and

(C) by adding at the end the following:

"(2) If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set [110 STAT. 1237] by the court, but shall be the shortest time in which full payment can reasonably be made.

"(3) A judgment for a fine which permits payments in installments shall include a requirement that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine. Upon

receipt of such notice the court may, on its own motion or the motion of any party, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.";

(3) in subsection (f), by inserting "restitution" after "special assessment,";

(4) in subsection (h), by inserting "or payment of restitution" after "A fine"; and

(5) in subsection (i)—

(A) in the first sentence, by inserting "or payment of restitution" after "A fine"; and

(B) by amending the second sentence to read as follows: "Notwithstanding any installment schedule, when a fine or payment of restitution is in default, the entire amount of the fine or restitution is due within 30 days after notification of the default, subject to the provisions of section 3613A.".

(c) POSTSENTENCE ADMINISTRATION.—

(1) PAYMENT OF A FINE OR RESTITUTION.—Section 3611 of title 18, United States Code, is amended—

(A) by amending the heading to read as follows:

"§ 3611. Payment of a fine or restitution";

and

(B) by striking "or assessment shall pay the fine or assessment" and inserting ", assessment, or restitution, shall pay the fine, assessment, or restitution".

(2) COLLECTION.—Section 3612 of title 18, United States Code, is amended—

(A) by amending the heading to read as follows:

"§ 3612. Collection of unpaid fine or restitution";

(B) in subsection (b)(1)—

(i) in the matter preceding subparagraph (A), by inserting "or restitution order" after "fine";

(ii) in subparagraph (C), by inserting "or restitution order" after "fine";

(iii) in subparagraph (E), by striking "and";

(iv) in subparagraph (F)—

(I) by inserting "or restitution order" after "fine"; and

(II) by striking the period at the end and inserting "; and"; and

(v) by adding at the end the following new subparagrah:

"(G) in the case of a restitution order, information sufficient to identify each victim to whom restitution is owed. It shall be the responsibility of each victim to notify the Attorney General, or the appropriate entity of the court, by means of a form to be provided by the Attorney General or the court, of any change in the victim's mailing address while restitution is still owed the victim. The confidentiality [110 STAT. 1238] of any information relating to a victim shall be maintained.";

(C) in subsection (c)—

(i) in the first sentence, by inserting "or restitution" after "fine"; and

(ii) by adding at the end the following: "Any money received from a defendant shall be

disbursed so that each of the following obligations is paid in full in the following sequence:

"(1) A penalty assessment under section 3013 of title 18, United States Code.

"(2) Restitution of all victims.

"(3) All other fines, penalties, costs, and other payments required under the sentence.";

(D) in subsection (d)—

(i) by inserting "or restitution" after "fine"; and

(ii) by striking "is delinquent, to inform him that the fine is delinquent" and inserting "or restitution is delinquent, to inform the person of the delinquency";

(E) in subsection (e)—

(i) by inserting "or restitution" after "fine"; and

(ii) by striking "him that the fine is in default" and inserting "the person that the fine or restitution is in default";

(F) in subsection (f)—

(i) in the heading, by inserting "and restitution" after "on fines"; and

(ii) in paragraph (1), by inserting "or restitution" after "any fine";

(G) in subsection (g), by inserting "or restitution" after "fine" each place it appears; and

(H) in subsection (i), by inserting "and restitution" after "fines".

(3) CIVIL REMEDIES.—Section 3613 of title 18, United States Code, is amended to read as follows:

"§ 3613. Civil remedies for satisfaction of an unpaid fine

"(a) ENFORCEMENT.—The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that—

"(1) property exempt from levy for taxes pursuant to section 6334(a) (1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code of 1986 shall be exempt from enforcement of the judgment under Federal law;

"(2) section 3014 of chapter 176 of title 28 shall not apply to enforcement under Federal law; and

"(3) the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the judgment under Federal law or State law.

"(b) TERMINATION OF LIABILITY.—The liability to pay a fine shall terminate the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined.

[110 STAT. 1239] "(c) LIEN.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 of this title, or an order of restitution made pursuant to sections 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the

United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b).

"(d) EFFECT OF FILING NOTICE OF LIEN.—Upon filing of a notice of lien in the manner in which a notice of tax lien would be filed under section 6323(f) (1) and (2) of the Internal Revenue Code of 1986, the lien shall be valid against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor, except with respect to properties or transactions specified in subsection (b), (c), or (d) of section 6323 of the Internal Revenue Code of 1986 for which a notice of tax lien properly filed on the same date would not be valid. The notice of lien shall be considered a notice of lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. A notice of lien that is registered, recorded, docketed, or indexed in accordance with the rules and requirements relating to judgments of the courts of the State where the notice of lien is registered, recorded, docketed, or indexed shall be considered for all purposes as the filing prescribed by this section. The provisions of section 3201(e) of chapter 176 of title 28 shall apply to liens filed as prescribed by this section.

"(e) DISCHARGE OF DEBT INAPPLICABLE.—No discharge of debts in a proceeding pursuant to any chapter of title 11, United States Code, shall discharge liability to pay a fine pursuant to this section, and a lien filed as prescribed by this section shall not be voided in a bankruptcy proceeding.

"(f) APPLICABILITY TO ORDER OF RESTITUTION.—In accordance with section 3664(m)(1)(A) of this title, all provisions of this section are available to the United States for the enforcement of an order of restitution.".

(4) DEFAULT.—Chapter 229 of title 18, United States Code, is amended by inserting after section 3613 the following new section:

"§ 3613A. Effect of default

"(a)(1) Upon a finding that the defendant is in default on a payment of a fine or restitution, the court may, pursuant to section 3565, revoke probation or a term of supervised release, modify the terms or conditions of probation or a term of supervised release, resentence a defendant pursuant to section 3614, hold the defendant in contempt of court, enter a restraining order or injunction, order the sale of property of the defendant, accept a performance bond, enter or adjust a payment schedule, or take any other action necessary to obtain compliance with the order of a fine or restitution.

"(2) In determining what action to take, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the fine or restitution order, and any other circumstances that may have a [110 STAT. 1240] bearing on the defendant's ability or failure to comply with the order of a fine or restitution.

"(b)(1) Any hearing held pursuant to this section may be conducted by a magistrate judge, subject to de novo review by the court.

"(2) To the extent practicable, in a hearing held pursuant to this section involving a defendant who

is confined in any jail, prison, or other correctional facility, proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other communications technology without removing the prisoner from the facility in which the prisoner is confined.".

(5) RESENTENCING.—Section 3614 of title 18, United States Code, is amended—

(A) in the heading, by inserting "or restitution" after "fine";

(B) in subsection (a), by inserting "or restitution" after "fine"; and

(C) by adding at the end the following new subsection:

"(c) EFFECT OF INDIGENCY.—In no event shall a defendant be incarcerated under this section solely on the basis of inability to make payments because the defendant is indigent.".

(d) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter B of chapter 229 of title 18, United States Code, is amended to read as follows:

"Sec.

"3611. Payment of a fine or restitution.

"3612. Collection of an unpaid fine or restitution.

"3613. Civil remedies for satisfaction of an unpaid fine.

"3613A. Effect of default.

"3614. Resentencing upon failure to pay a fine or restitution.

"3615. Criminal default.".

SEC. 208. INSTRUCTION TO SENTENCING COMMISSION.

Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to reflect this subtitle and the amendments made by this subtitle.

SEC. 209. JUSTICE DEPARTMENT REGULATIONS.

Not later than 90 days after the date of enactment of this subtitle, the Attorney General shall promulgate guidelines, or amend existing guidelines, to carry out this subtitle and the amendments made by this subtitle and to ensure that—

(1) in all plea agreements negotiated by the United States, consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded; and

(2) orders of restitution made pursuant to the amendments made by this subtitle are enforced to the fullest extent of the law.

SEC. 210. SPECIAL ASSESSMENTS ON CONVICTED PERSONS.

Section 3013(a)(2) of title 18, United States Code, is amended—

(1) in subparagraph (A), by striking "$50" and inserting "not less than $100"; and

(2) in subparagraph (B), by striking "$200" and inserting "not less than $400".

[110 STAT. 1241] **SEC. 211. EFFECTIVE DATE.**

The amendments made by this subtitle shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act.