

No. 24-482

IN THE
Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

**On Writ of Certiorari to the
U.S. Court of Appeals for the Eighth Circuit**

**BRIEF OF DEBRA RICKETTS-HOLDER
AS *AMICUS CURIAE*
IN SUPPORT OF THE JUDGMENT BELOW**

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INTEREST OF *AMICUS CURIAE**

Debra Ricketts-Holder is Christopher Ricketts's mother. Christopher was only 17 when he was senselessly murdered.



Debra and Christopher

* Pursuant to Supreme Court Rule 37.6, *amicus* represents that this brief wasn't authored in whole or in part by any party or counsel for any party. No person or party other than *amicus* or her counsel made a monetary contribution to the preparation or submission of this brief.

On the evening of June 10, 1993, Christopher was sitting in his Geo Tracker listening to music when four teenagers—who spent their evening drinking and smoking marijuana—decided they wanted his car stereo.

Two of the four—William Neilly, who was also 17, and James Brown—armed themselves with pistols, donned hooded sweatshirts, and approached Christopher. Sensing trouble and wanting to avoid a confrontation, Christopher tried to drive away. Neilly and Brown both shot at Christopher as he fled. A bullet struck him in the back and killed him.

Five months later, a jury convicted Neilly of first-degree murder (along with five other counts), and the judge sentenced him to life in prison without parole, which was the mandatory sentence. Restitution was neither sought nor ordered.

Twenty years later, the State of Michigan had to resentence Neilly in light of this Court’s decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

The court resentenced Neilly to 35–60 years in prison and ordered him to pay Ms. Ricketts-Holder \$14,895.78 in restitution—the cost she paid Langeland Funeral Home to bury her son. Neilly challenged the constitutionality of the restitution order under the Ex Post Facto Clause. The Michigan Court of Appeals and Supreme Court rejected his arguments. His petition for a writ of certiorari is pending before this Court. *Neilly v. Michigan*, No. 24-395.

Ms. Ricketts-Holder’s life has never been the same. As she wrote to the sentencing court in March 2021:

Death is so final. There is no pain like the broken heart of a grieving mother. It can take away any hope. It takes time to adjust and learn to cope with such a blow and allow your brain time to catch up to what your heart knows to be true. The pain I feel is for life. Oh, I miss my Christopher. You don't know til you go through it, it's a heartache that never goes away.

I take each day as it comes and hope it's a better day as if comes and hope it's a better day than yesterday. There's no one stronger than a mother who has lost her child. My life will never be the same.

Christopher Douglas Ricketts gone to soon 11/21/75 – 6/10/93.

Appellant's App. 29, *People v. Neilly*, No. 165185 (Mich. Oct. 26, 2023) ("Mich. S. Ct. App."), <https://t.ly/2rjh0>.

Ms. Ricketts-Holder has an interest in defending the trial court's restitution order against an Ex Post Facto challenge. The order isn't punitive—it's compensatory. It restores to her the \$14,895.78 she paid to bury her 17-year-old son 32 years ago. She also wants to ensure that other crime victims remain eligible to receive compensatory restitution for the financial harms criminals cause.

STATEMENT

In June 1993, *amicus* Debra Ricketts-Holder was traveling in California when she received a call that changed her life forever. Her 17-year-old son, Christopher Ricketts, had been murdered back home in Kalamazoo, Michigan, by four teens who wanted to steal his car stereo.

After a five-hour, cross-country flight, Ms. Ricketts-Holder arrived back home in Michigan to Christopher's lifeless body in the morgue. Devastated, she still had to arrange for Christopher's funeral. She ultimately spent \$14,895.78 to bury her son.

A Michigan jury convicted William Neilly of Christopher's felony murder. While restitution wasn't ordered as part of the original sentence, later at a resentencing the trial court ordered Neilly to pay Ms. Ricketts-Holder restitution for Christopher's funeral costs. Neilly now challenges that restitution as retroactive (and impermissible) criminal punishment under the Constitution's Ex Post Facto Clause. But in both Neilly's murder case and the robbery case under review, restitution serves to compensate victims, not to punish criminals.

Of course, some losses can never be made whole. The \$14,895.78 won't bring Christopher back to life. It won't take away his mother's pain when she can only visit Christopher's grave instead of serving him his favorite blueberry pie on a holiday. But Neilly's restitution would at least compensate Christopher's mother for a fraction of the tangible losses that she suffered.

1. Christopher Ricketts was born in Kalamazoo, Michigan, in 1975. 1993 Sentencing Hr'g Tr. 18:3–4, *People v. Neilly*, No. 1993-0756-FH (Mich. Cir. Ct. Nov. 29, 1993) (statement of Debra Ricketts-Holder). He grew up “in the country” outside Kalamazoo, so he wasn't fully “aware of the hatred and the violence that plagued the streets” in the city. *Id.* 19:17–19.

Christopher was “bashful,” “intelligent,” and caring—he'd “take the coat off his back and give it to someone who did not have one.” *Id.* 19:6–7, 11–13.

Christopher faced challenges and losses. He was acutely asthmatic, and an accident when he was a young boy left him blind in one eye. *Id.* 20:25. But he never let his challenges keep him down.

He was “an achiever” and “a scholar”—and he was particularly good with computers. *Id.* 18:18, 19:2–5. On learning that Christopher would be in her class during the upcoming school year, one computer teacher told Ms. Ricketts-Holder that she worried “there was nothing [she] could teach [Christopher] because he was so far ahead.” *Id.* 19:2–5.

Christopher enjoyed reading and collecting comic books and baseball cards. *Id.* 18:18–20. He also appreciated literature. One of the “most valued prizes in his book collection” was the “works of William Shakespeare.” *Id.* 18:21–23.

Christopher had “plans for [his] future.” Mich. S. Ct. App. 112 (statement of Aimee Maxson). He hoped to become a psychiatrist and to open a bookstore. 1993 Sentencing Hr’g Tr. 21:9–11. He also wanted to give back to his community. “[H]e wanted to take a bus load of children to Disneyland”—“that was one of Christopher’s dreams.” *Id.* 21:12–15.

He wanted to “move to Georgia,” “get married” to his girlfriend, and “have kids.” Mich. S. Ct. App. 112. Christopher “wanted his grandma to see his kids before she died.” *Ibid.* All who knew him agreed that Christopher “had so much going for him and so much to give.” *Id.* 110 (statement of Patricia Evans).

In January 1993, Christopher’s grandfather died. *Ibid.* So Christopher, only 17, “assumed a new role as man of the house and taking care of his 72 year old grandmother.” *Ibid.*

2. Five months later, Ms. Ricketts-Holder was traveling with family in San Diego, California. 1993 Sentencing Hr’g Tr. 18:4–6. Christopher was back home in Kalamazoo, sitting in his red Geo Tracker

listening to music. Mich. S. Ct. App. 97 (Presentence Investigation Report); see also 2021 Resentencing Hr’g Tr. 14:19–20, *People v. Neilly*, No. 1993-0756-FH (Mich. Cir. Ct. Apr. 21, 2021) (statement of Neilly’s attorney).

3. While Christopher was enjoying the early summer night, Neilly (also 17 years old)—who “ha[d] been involved with drugs [and alcohol] for a long period of time”—was drinking cognac and smoking marijuana with James Brown, Angelo Burnett, and Donnie Wogoman. 1993 Sentencing Hr’g Tr. 23:1–2, 25:1–3 (statement of the Court); 2021 Resentencing Hr’g Tr. 14:14–15.

Drunk and high, Neilly and the others “decided that they were going to buy more marijuana.” 2021 Resentencing Hr’g Tr. 14:17–19. A fifth person—Telly Matthews—drove them to an address near where Christopher was parked. *Ibid.*

When Neilly and his confederates arrived at the address, they noticed Christopher’s truck and heard his music. Mich. S. Ct. App. 97. Brown said, “we should jack [Christopher] for his sounds.” 1993 Sentencing Hr’g Tr. 23:17–18. So “on the spur of the moment” the group decided “to steal the sound system.” Mich. S. Ct. App. 97.

Neilly was determined “to act tough” in front of “the other boys” because he “wanted [them] to think he was cool.” 2021 Resentencing Hr’g Tr. 14:23–24. So Neilly—along with Brown—“volunteered” to rob Christopher. Mich. S. Ct. App. 99.

4. Neilly grabbed his illegally purchased pistol from the glove box. *Ibid.* Brown pulled out his own pistol too. *Ibid.* Together, they approached Christopher—sweatshirt hoods pulled up and pistols drawn. *Ibid.*

Brown stood behind Christopher's truck and Neilly circled it before approaching the driver's-side window. *Ibid.*; 2021 Resentencing Hr'g Tr. 15:1–3. Christopher looked at Neilly like he “knew he was going to be robbed.” Mich. S. Ct. App. 99.

5. Neilly and Brown “confronted” Christopher, demanding that he turn over his stereo system. *Id.* 98. But the stereo couldn't be removed because it was “locked in with lug-proof bolts.” 1993 Sentencing Hr'g Tr. 21:2–3. So Christopher “tried to drive away,” Mich. S. Ct. App. 98, heeding his mother's advice to “leave the scene” and not “argue with people that don't have sense.” 1993 Sentencing Hr'g Tr. 20:16–17.

6. Neilly and Brown shot Christopher “as he was trying to get away.” 2021 Resentencing Hr'g Tr. 24:13–14 (statement of the Court). Both Neilly and Brown shot at Christopher's truck. Mich. S. Ct. App. 98. One bullet “struck the speaker box and vehicle.” *Ibid.* The other hit Christopher in the back, killing him. *Ibid.*

When police arrived, they found Christopher “slumped over the wheel” of his truck, which had crashed into a telephone pole. *Id.* 97. The “little red truck” had “bullet holes through the rear tailgate” and “canvas[] top” and the front seat was “stained” with Christopher's “blood.” *Id.* 110. The officers rushed Christopher to the hospital, but it was too late. The bullet had fatally pierced his lungs, heart, and spleen. *Ibid.*

Ms. Ricketts-Holder “endured” an excruciating “five-hour flight” from Los Angeles “to come home to see [her] son's lifeless body in the morgue.” 1993 Sentencing Hr'g Tr. 18:6–8. She “did everything [she] could” “to make [Christopher] come back.” *Id.* 18:9–10. But he was already gone.

Ms. Ricketts-Holder was “so distraught” in the days following her son’s killing that she “was unable to attend” Christopher’s visitation services. Mich. S. Ct. App. 111.

7. Police officers arrested Neilly, Burnett, and Wogoman within hours of Christopher’s murder. *Id.* 98. Brown fled to California and was arrested later. *Ibid.*

8. In November 1993, a jury convicted Neilly of “first-degree felony murder, conspiracy to commit armed robbery, and two counts of felony-firearm.” *People v. Neilly*, 15 N.W.3d 561, 566 (Mich. 2024). The trial court sentenced Neilly to life without parole, the then-mandatory sentence for first-degree murder in Michigan. See *ibid.*

The State didn’t request—and the court didn’t impose—restitution when sentencing Neilly in 1993. At that time, Michigan had a discretionary restitution scheme. See Mich. Comp. Laws § 780.766(2), as amended by 1988 Mich. Pub. Act 21 (trial court “may order” restitution); Mich. Comp. Laws § 769.1a(1), as amended by 1985 Mich. Pub. Act 89 (same).

9. Nearly three decades later, Michigan was required to resentence Neilly in light of this Court’s decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). See *Neilly*, 15 N.W.3d at 566.

During that nearly 30-year stretch, Michigan amended its restitution statutes to make restitution mandatory instead of discretionary. See Mich. Comp. Laws § 780.766(2) (courts “shall order” restitution); Mich. Comp. Laws § 769.1a(2) (same); see also *Neilly*, 15 N.W.3d at 567.

10. Neilly was resentenced on April 21, 2021. See generally 2021 Resentencing Hrg' Tr. The trial court sentenced Neilly to 35–60 years in prison. *Neilly*, 15 N.W.3d at 566. The court also ordered Neilly to “pay restitution in the amount of \$14,895.78 to compensate [Ms. Ricketts-Holder] for funeral expenses.” *Ibid.*; see also 2021 Resentencing Hr'g Tr. 26:20–21, 28:5–8 (ordering Neilly to pay restitution for Christopher’s “funeral expenses” and “burial expenses”).



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STATEMENT OF ACCOUNT

To: Atty. James Koning
400 Kalamazoo Bldg.
Kalamazoo, MI 49007

Invoice Number: 930413
Invoice Date: March 03, 2021
Date Of Death: June 10, 1993

Services of: CHRISTOPHER DOUGLAS RICKETTS

DESCRIPTION OF SERVICES	AMOUNT
OUR SERVICES	
Funeral Directors Services	3,508.62
MERCHANDISE	
Acknowledgement Cards -	9.00
Register Book -	21.00
Service Folders -	35.00
Casket -	5,450.00
Outer Container -	1,990.00
Sales Tax -	300.20
CASH ADVANCES	
Grave Opening Charge	180.00
Sanitary Equipment Charge	50.00
Death certificates	25.00
Long Distance Phone Calls	65.00
Marker Engraving Purchase	2,720.64
Obituaries	131.32
Limousine	110.00
TOTALS	
Total Sales/Use	0.00
Total	\$14,595.78
HISTORY	
09/30/1993 balance as of 9-30-93	15,044.73
01/31/1994 credit interest	-148.95
06/24/1994 CR Dep#6-11 ck#	-14,895.78
BALANCE DUE	PAID IN FULL

If you have any questions or concerns regarding this statement, please call or come in the Burdick Street Chapel at your convenience.

Mich. S. Ct. App. 34.

11. Neilly appealed the restitution order, arguing that it violated the Ex Post Facto Clause. See *Neilly*, 15 N.W.3d at 567. According to Neilly, his criminal punishment had been increased in violation of the Ex Post Facto Clause because restitution was ordered under Michigan’s current, mandatory restitution statutes instead of the discretionary ones that were in effect when he killed Christopher in 1993. *Ibid.*

The Michigan Court of Appeals and the Michigan Supreme Court rejected Neilly’s argument.

The court of appeals held that the Ex Post Facto Clause wasn’t triggered because restitution wasn’t penal: “the primary intention of the Legislature in enacting the restitution statute [was] to * * * compensate[e] crime victims”—not “to be a criminal punishment.” *People v. Neilly*, 2022 WL 16858012, at *3 (Mich. Ct. App. Nov. 10, 2022). The court also assessed whether Michigan’s new mandatory restitution statute “functions as criminal punishment in application” and concluded it doesn’t. *Ibid.*

“Because restitution is not a penalty under the legislative intent or in its application,” the court explained, “it cannot violate the Ex Post Facto Clause as the application of the current version of the statute does not increase the punishment for a crime.” *Ibid.*

The Michigan Supreme Court agreed, holding “that because restitution imposed under the current statutes does not constitute punishment, no such violation”—of the federal or state prohibitions on ex post facto laws—“occurred here.” 15 N.W.3d at 566, 570 (“[T]he intent of the [restitution] statutes is to provide a civil remedy for victims’ injuries rather than to provide a criminal punishment for defendants.”).

Neilly has petitioned for a writ of certiorari in this Court. Pet. at i, *Neilly v. Michigan*, No. 24-395 (Oct. 7, 2024). The petition remains pending. In April 2025, this Court granted Ellingburg’s petition for certiorari to review whether “restitution under the Mandatory Victims Restitution Act * * * is a criminal punishment for the purposes of the Ex Post Facto clause.”

ARGUMENT

I. FROM LONG BEFORE THE FOUNDING TO TODAY, RESTITUTION HAS BEEN USED TO COMPENSATE VICTIMS, NOT PUNISH OFFENDERS.

From antiquity to today, Anglo-American law has understood restitution as a means to compensate crime victims for their losses, not to punish offenders for their crimes. This victim-centered understanding runs from the Old Testament through the English common law familiar to the Founders to contemporary American statutes—including the federal Mandatory Victims Restitution Act. Any attempt to recast restitution as a criminal penalty misunderstands both its legal heritage and its fundamental design.¹

Some of the earliest legal codes cast restitution as a duty owed to victims. See Paul G. Cassell, *The Crime Victims’ Rights Movement: Historical Foundations*,

¹ Ms. Ricketts-Holder agrees with the Court-appointed *amicus* (at 12–20) that Ellingburg was ordered to pay restitution under the Victim and Witness Protection Act, not the Mandatory Victims Restitution Act. As a result, Ms. Ricketts-Holder supports the Court-appointed *amicus*’s position (at 12–20) that the petition should be dismissed as improvidently granted. This *amicus* brief proceeds on the assumption that the Court nevertheless reaches the question presented and addresses restitution under the Mandatory Victims Restitution Act.

Modern Ascendancy, and Future Aspirations, 56 U. Pac. L. Rev. 387, 397 (2025). The Mosaic law in the Book of Exodus provided for restitution from offenders to victims. *Ibid.*; *Exodus* 22:1–14 (“Anyone who steals must certainly make restitution”). The Twelve Tables, a codification of Roman law, provided that an offender “could avoid retribution to himself or his family by providing compensation to the victim or the victim’s family.” *Syed v. Lee*, 322 A.3d 578, 588 (Md. 2024). These legal codes all pre-dated centralized criminal justice, underscoring that restitution is aimed at redressing private injury, not advancing state punishment.

This victim-centered understanding of restitution carried through to English common law. In the English system, private prosecution—that is, criminal prosecutions pursued by private citizens, rather than the state—was “the default position in the early modern period.” Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. Rev. 119, 122 (2022). For example, Blackstone explained that upon a judgment of forcible entry and detainer, “the justices shall make restitution by the sheriff of the possession” to the dispossessed owner—relief based on the victim’s loss, not the trespasser’s moral blame. 4 William Blackstone, *Commentaries on the Laws of England* 148 (1769). The Crown gradually assumed a supervisory role, but even then the indictment remained “at the suit of any private prosecutor.” *Beavers v. Henkel*, 194 U.S. 73, 84 (1904); see also Cassell, 56 U. Pac. L. Rev. at 398 (identifying “private prosecution as the ‘default position’ from which American criminal justice processes arose”).

English settlers brought the private-prosecution model to the American Colonies, and with it restitution's role of compensating victims. Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 Utah L. Rev. 517, 521. At the time of the Founding, victims in the colonies routinely prosecuted offenses and obtained restitution for their losses directly from offenders. Cassell, 56 U. Pac. L. Rev. at 399–401. Because the victim himself instituted and advanced the proceeding, restitution was pursued and considered as recompense, not retribution. So “restitution has historically been understood as a ‘civil’ and not a ‘punitive’ remedy.” *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1324 (D. Utah 2004) (collecting historical evidence).

Nothing in the Constitution displaced the traditional understanding of restitution as compensatory rather than punitive. To the contrary, the Founders “would have seen the likelihood of victim-initiated prosecution” and expected the practice to continue. Cassell, 56 U. Pac. L. Rev. at 404. By leaving the responsibilities of day-to-day criminal justice to the States, the Founders “were clearly crafting a federal constitution that envisioned state prosecutions initiated by victims.” *Ibid.*

Against this historical backdrop, this Court has explained that “the ordinary meaning” of restitution is to “restor[e] someone to a position he occupied before a particular event.” *Hughey v. United States*, 495 U.S. 411, 416 (1990). More recently, this Court has recognized that the “primary goal of restitution is remedial or compensatory.” *Paroline v. United States*, 572 U.S. 434, 456 (2014); see also *Restitution*, Black’s

Law Dictionary (6th ed. 1990) (restitution is an “equitable remedy”).

For good reason. “Although restitution may be included in a criminal judgment,” it has “distinctive attributes” that make it “much like a civil judgment.” *Nelson v. Colorado*, 581 U.S. 128, 146 (2017) (Alito, J., concurring in the judgment). Restitution “is an independent basis of recovery in criminal cases with a striking resemblance to compensatory damages in tort cases.” Linda Trang, *The Taxation of Crime Victim Restitution: An Unjust Penalty on the Victim*, 35 Loy. L.A. L. Rev. 1319, 1339 (2002); see also Charles R. Pengilly, *Restitution, Retribution, and the Constitution*, 7 Alaska L. Rev. 333, 347 (1990) (“There is no reason to view the compensation function [of victim restitution] as anything other than a desire to approximate civil damages within the streamlined format of sentencing.”).

So too with restitution under the Mandatory Victims Restitution Act, which is functionally like a tort statute that “casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished.” *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999). Consistent with the compensatory aim of tort law, the Mandatory Victims Restitution Act mandates full restitution for the victim’s actual losses without regard to the defendant’s financial or other circumstances. 18 U.S.C. § 3664(f)(1)(A). In this way, the decision to impose restitution turns on compensating the victim for her injury—not on the penal goals of retribution, deterrence, or rehabilitation.

Further underscoring restitution’s civil character, the Mandatory Victims Restitution Act “does not allow victims to obtain double recovery or a windfall through restitution.” *United States v. Louper-Morris*, 672 F.3d 539, 566 (8th Cir. 2012). Instead, unlike fines and penalties, the restitution a victim receives must be reduced by any compensatory damages the victim recovers in the future through civil litigation. 18 U.S.C. § 3664(j)(2)(A) (“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”). Indeed, the Mandatory Victims Restitution Act is codified in chapter 232 (“Miscellaneous Sentencing Provisions”) of Title 18, which is separate from the chapters that address imprisonment and fines.

If restitution were punitive, the victim’s injury or her total recovery wouldn’t matter. But “[r]estitution recognizes rights in the victim, and this is a principal source of its strength.” Randy Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 *Ethics* 279, 291 (1977).²

The Court should affirm that, as a matter of history and tradition, restitution remains what it has always been—a non-punitive remedy that compensates crime victims. As a result, statutes that provide for

² The American Law Institute’s 2017 *Model Penal Code: Sentencing* also recognizes the fundamentally compensatory nature of restitution: “The *primary purpose* of victim restitution as a criminal sanction is *to compensate crime victims*,” who “have a strong moral claim to restitution from those who brought about their injuries.” Model Penal Code: Sentencing § 6.07 cmt. e (emphases added); see also Cassell, 56 U. Pac. L. Rev. at 499.

restitution—like the Mandatory Victims Restitution Act and the Michigan statute at issue in *Neilly*—are categorically compensatory and therefore not subject to the Ex Post Facto Clause.

II. IF THE COURT DISAGREES THAT RESTITUTION IS CATEGORICALLY COMPENSATORY, A STATUTE-SPECIFIC, PURPOSE-OR-EFFECT ANALYSIS IS REQUIRED.

History and tradition confirm that restitution is categorically compensatory and therefore analogous to a civil remedy that doesn't implicate the Ex Post Facto Clause—even when imposed in a criminal proceeding or as part of a criminal sentence. That should begin and end the analysis—in this case, in *Neilly*, and in other similar restitution cases—and requires affirmance.

But if the Court declines to adopt the categorical approach that history and tradition require, then the Court must undertake an individualized purpose-or-effect analysis that focuses on the particular statute under which restitution was imposed to determine whether the Ex Post Facto Clause applies.³ Ms. Ricketts-Holder agrees with the Court-appointed *amicus* (at 20–51) that, should the Court reach the issue, the purpose-or-effect analysis compels the conclusion that Congress didn't clearly intend for the Mandatory Victims Restitution Act to be punitive, and that the statute isn't punitive in either purpose or effect. That

³ The statute-specific nature of this analysis confirms that Ellingburg's petition should be dismissed as improvidently granted. As the Court-appointed *amicus* explains (at 12–20), restitution in this case was ordered under the Victim and Witness Protection Act—not the Mandatory Victims Restitution Act.

conclusion is further confirmed by the analysis undertaken by the Michigan courts in *Neilly*.

Numerous States—including Michigan in the *Neilly* case—have held that the “restitution imposed” under their respective statutes “does not constitute punishment” that could be subject to the Ex Post Facto Clause. 15 N.W.3d at 566; *Neilly*, 2022 WL 16858012, at *3; accord *State v. McClelland*, 357 P.3d 906, 909 (Mont. 2015); *R.S. v. Commonwealth*, 423 S.W.3d 178, 188 (Ky. 2014); *People v. Foalima*, 239 Cal. App. 4th 1376, 1398 (2015); *State v. Lucas*, 758 S.E.2d 672, 680 (N.C. Ct. App. 2014); *State v. Freeman*, 848 P.2d 882, 885 (Ariz. Ct. App. 1993).

Under the purpose-or-effect approach, the “categorization of a particular pro[vision] as civil or criminal” for Ex Post Facto Clause purposes “is first of all a question of statutory construction.” *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). “[A]ll questions of statutory construction” are “to be judged on a case-by-case basis.” *United States v. Zacks*, 375 U.S. 59, 66 n.8 (1963).

As a result, any decision in this case reached under a purpose-or-effect test as applied to the Mandatory Victims Restitution Act will “have limited significance for the retroactive application of [other] restitution statutes.” U.S. BIO 12 n.3. An analysis of the Michigan statute at issue in *Neilly* confirms that the Mandatory Victims Restitution Act doesn’t implicate the Ex Post Facto Clause either, but it also underscores that at the very least, a one-size-fits-all result can’t follow from the purpose-or-effect analysis.

Under the two-prong, purpose-or-effect approach, courts must first analyze whether the legislature that enacted the statute at issue “intended” the authorization of restitution “to punish.” See *Smith v. Doe*, 538 U.S. 84, 92–93 (2003). Next, courts must use the “seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963),” to analyze the purpose and effect of the particular statutory restitution scheme at issue. *Smith*, 538 U.S. at 97 (identifying the “factors most relevant to” the Ex Post Facto analysis).

In *Neilly*, the Michigan Supreme Court began its analysis by noting that the Michigan Constitution expressly enumerates a crime victim’s *right* to restitution and authorizes the legislature to enact statutes “for the enforcement” of that right. 15 N.W.3d at 567 (quoting Mich. Const. art. 1, § 24). That constitutional provision was adopted in 1988, after being approved by more than 80 percent of Michigan voters. See Cassell, 56 U. Pac. L. Rev. at 454. Michigan was the first of many States to amend its constitution to enshrine victims’ rights throughout the criminal-justice process, including “[t]he *right* to restitution.” *Ibid.* (emphasis added).

Like dozens of other state constitutional amendments, Michigan’s victims’ rights provision wasn’t focused on punitive crime-control objectives, but on providing and protecting victims’ procedural rights throughout the criminal-justice process. *Id.* at 436–37, 454, 495 n.830 (restitution in state and federal

criminal-justice systems serves remedial, rather than punitive, purposes).⁴

The Michigan Supreme Court then discussed the long-standing practice of using restitution to compensate victims before determining that “the focus of the current restitution statutes remains on the victims’ losses rather than on further punishment of the defendant.” 15 N.W.3d at 570. In reaching that conclusion, the court explained that restitution under these statutes was “tailored to the harm suffered by the victim rather than the defendant’s conviction or judgment of sentence.” *Ibid.*

After detailing the various potential statutory measures of restitution, all of which are “tied to definable, specific costs and losses suffered by the victims of a defendant’s crimes,” the court concluded that “the intent of the statutes is to provide a civil remedy for victims’ injuries rather than to provide a criminal punishment for defendants” because “the amount of restitution is not dependent on the severity of the crime.” *Ibid.* (citing Mich. Comp. Laws §§ 780.766, 769.1a).

Having concluded “that the Legislature intended the statutes to create a civil remedy”—because the Legislature’s goal “was to compensate victims for the

⁴ In 2004, Congress enacted the Crime Victims’ Rights Act, which expressly codified the rights of victims of federal crimes—including the “right to full and timely restitution.” Crime Victims’ Rights Act § 102, Pub. L. 108-405, 118 Stat. 2261, 2261–64 (2004), codified at 18 U.S.C. § 3771(a)(6); see also *In re Davis*, --- F.4th---, 2025 WL 2184111, at *9 (9th Cir. Aug. 1, 2025) (Crime Victims’ Rights Act “permits crime victims * * * to file motions asserting their rights” to restitution “*after prosecution has ended*”) (emphasis added).

actual costs of their suffering”—the Michigan Supreme Court next used the seven *Mendoza-Martinez* factors to determine whether the statutes were nevertheless “punitive either in purpose or effect.” *Id.* at 572.

Several of these factors remain consistent across all restitution regimes. Restitution’s “history and tradition” as an equitable, compensatory, and remedial measure doesn’t change across statutes. *Id.* at 572–73; see *Smith*, 538 U.S. at 97 (“A historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition”); see also Part I.

The same goes for restitution’s rational connection to a nonpunitive purpose, which this Court has described as the most significant factor, and whether restitution promotes the traditional aims of punishment. See *Smith*, 538 U.S. at 102. Although restitution is an additional, negative consequence, it’s unlikely to have a substantial deterrent effect in light of the other significant consequences of criminal punishment—and in all events restitution’s focus is on alleviating the victim’s harm, not punishing the defendant’s offense. 15 N.W.3d at 574–75.

The last two factors—whether restitution imposes an “affirmative disability or restraint” or is “excessive with respect” to its nonpunitive purpose—may differ across restitution regimes. See *Smith*, 538 U.S. at 97, 102. In Michigan, these two factors don’t demonstrate either a punitive purpose or effect.

While Michigan’s restitution statutes involve an affirmative disability or restraint, the indirect nature of that disability or restraint and the statutory

protections for defendants minimize the resulting punitive effect. 15 N.W.3d at 573–74; see *Smith*, 538 U.S. at 99–100. Failure to pay restitution subjects Michigan defendants to revocation of parole or probation. Mich. Comp. Laws § 780.766(11). But statutory protections limit the circumstances in which such consequences can result. Among these protections, Michigan courts can only imprison a defendant for failing to pay if the defendant made no “good faith effort to comply with the order.” 15 N.W.3d at 573 (quoting Mich. Comp. Laws §§ 769.1a(11), 780.766(11)). That’s true even though Michigan’s statutes “no longer require[]” courts to “consider the defendant’s ability to pay when determining the restitution amount” in the first place. *Id.* at 576.

Nor is restitution in Michigan “excessive” or beyond what’s needed to accomplish its nonpunitive purposes. *Id.* at 575; see *Smith*, 538 U.S. at 102. The “amount of restitution is linked to the amount of provable damages suffered” by victims. 15 N.W.3d at 575 (citing Mich. Comp. Laws §§ 780.766(1), (3)–(8), 769.1a(1)(b), (3)–(8)).

In sum, as an analysis of Michigan’s mandatory restitution regime makes clear, a statutory-scheme-by-statutory-scheme analysis is required to determine the “purpose or effect” of a statute authorizing restitution for purposes of the Ex Post Facto Clause.

That’s because seemingly minor differences across statutory schemes—such as whether a victim’s right to restitution has been recognized or the circumstances under which probation or parole may be revoked—might have constitutional significance. See *Hendricks*, 521 U.S. at 361; *Zacks*, 375 U.S. at 66 n.8.

As a result, concluding that restitution under the federal Mandatory Victims Restitution Act is punishment for Ex Post Facto purposes wouldn't—indeed, couldn't—settle the same question as to a different victim restitution statute like Michigan's.

* * *

Debra Ricketts-Holder's son was murdered in cold blood in 1993. His murderer was sentenced to life without parole. When the murderer was resentenced thirty years later, as required by *Miller* and *Montgomery*, Michigan sought restitution to reimburse Ms. Ricketts-Holder for what she paid to bury her 17-year-old son—a cost no mother should have to bear.

The order that Neilly make restitution to Ms. Ricketts-Holder, like the restitution order in this case, doesn't violate the Ex Post Facto Clause because, under a categorical approach that considers our history and tradition, restitution is and always has been fundamentally compensatory.

A purpose-or-effect analysis of each statute at issue reaches the same result. In all events, analyzing the Mandatory Victims Restitution Act under that approach wouldn't dictate the result for different statutory schemes like the one in *Neilly*.

CONCLUSION

For these reasons, the petition should be dismissed as improvidently granted or, in the alternative, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted.

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