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 UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Other Authorities—continued:

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As the government agrees, MVRA restitution is criminal punishment because it is part and parcel of an offender's sentence. Although amicus cites cases where this Court found statutes to impose civil remedies, none involved criminal sentences. The sex offenders in *Smith* were not sentenced to register as sex offenders. *Smith v. Doe*, 538 U.S. 84, 89-91 (2003). The bank executives in *Hudson* were not sentenced to administrative monetary penalties and debarment. *Hudson v. United States*, 522 U.S. 93, 95 (1997). And the gun owner in *89 Firearms* was not sentenced to civil *in rem* forfeiture proceedings. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 356 (1984).

A bevy of other textual and structural clues confirms that Congress meant "to impose punishment," not "to establish 'civil' proceedings." *Smith*, 538 U.S. at 92 (citation omitted). Congress utilized classic criminal procedures to impose restitution; enforced restitution with other criminal punishments; and expressly articulated restitution's punitive purpose. Congress also legislated against a clear backdrop of history and precedent confirming that similar restitution statutes imposed criminal punishment.

Amicus (at 32) responds that the MVRA's "primary purpose" is compensation. But this Court has rejected the proposition that "it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *United States v. Halper*, 490 U.S. 435, 447 n.7 (1989), *disavowed by Hudson*, 522 U.S. at 96, 101-02. Congress imposed restitution as a criminal sanction in criminal proceedings. That restitution compensates victims does not change its criminal nature, as "both punitive and remedial goals may be served by criminal penalties." *See Austin v. United States*, 509 U.S. 602, 610 (1993).

None of amicus' other arguments saves the decision below. This Court does not apply a clear-statement rule to determine whether Congress has imposed criminal punishment, nor do constitutional-avoidance principles justify that novel rule. And amicus' argument for dismissing the writ ignores that the petition directly challenges the Eighth Circuit's outcome-determinative holding below.

I. Congress Intended MVRA Restitution To Be Criminal Punishment

The "well established" task at step one of the criminal-punishment inquiry is to decide whether Congress

meant "to establish 'civil' proceedings" or "to impose punishment." *Smith*, 538 U.S. at 92 (citation omitted). The task is not, as amicus (at 20) suggests, to hunt for "conclusive evidence of congressional intent." *See infra* Section I.B.2. Rightly oriented, the answer is clear: Congress intended to impose criminal punishment.

A. Every Indicator of Legislative Intent Demonstrates That Restitution Is Criminal Punishment

1. Restitution is part of the criminal sentence

The sentence is the punishment for the crime. MVRA restitution is punishment because it is part of the criminal sentence, just like imprisonment, fines, and criminal forfeiture. *See S. Union Co. v. United States*, 567 U.S. 343, 349 (2012); *United States v. Bajakajian*, 524 U.S. 321, 328 (1998); Pet. Br. 15-17, 31-33; U.S. Br. 16-18.

a. Restitution is part of the criminal sentence. In *Manrique v. United States*, 581 U.S. 116 (2017), which amicus does not mention, this Court explained that the MVRA requires courts "to impose restitution as part of the sentence" and recognized that the MVRA authorizes a "sentence of restitution." *Id.* at 118, 124. Congress also understands that the MVRA "authoriz[es] a sentence of restitution." *See* 18 U.S.C. § 3583(d). The MVRA itself states that a court "shall order restitution" "in imposing a sentence" for covered offenses. *Id.* § 3556; *see also id.* § 3663A(a)(1). And the statute refers to "sentence[s] that impose[] an order of restitution." *Id.* § 3664(*o*). Congress elsewhere recognized that offenders ordered to pay a fine or restitution are "*sentenced to pay* a fine … or restitution." *Id.* § 3611 (emphasis added). The takeaway is clear: restitution is part of the criminal sentence.

Amicus (at 25) notes that 18 U.S.C. § 3551 "describes restitution as a 'sanction' but imprisonment or a fine as a 'sentence.'" But section 3551 uses the terms "sentence"

and "sanction" merely to distinguish between measures authorized by section 3551 and subject to the section 3553(a) factors (sentences) and measures authorized elsewhere in the same subchapter (sanctions). "Sanctions" can still be part of the sentence, as evidenced by Title 18's other references to restitution as a "sentence."

Criminal forfeiture is another example of a criminal punishment that section 3551 calls a "sanction." *See* 18 U.S.C. § 3551(b) (citing *id.* § 3554). In identical language, the statutes governing criminal forfeiture and restitution instruct courts to order forfeiture and restitution "in imposing a sentence." *Id.* §§ 3554, 3556. And in *Bajakajian*, which amicus also overlooks, this Court had "little trouble" concluding in the excessive-fines context that forfeiture "constitutes punishment" when it is "impos[ed]" as a "sentence" "at the culmination of a criminal proceeding." 524 U.S. at 328 (quoting 18 U.S.C. § 982(a)(1)). If the "sanction" of criminal forfeiture is punishment, so too is restitution.

What is more, Congress enforced MVRA restitution just like fines, which section 3551 terms a "sentence," and which amicus (at 25) concedes is criminal punishment. *See* Pet. Br. 20.

b. Amicus cannot explain Congress' decision to impose restitution as part of the sentence. Amicus (at 37-38) hypothesizes that Congress utilized sentencing to impose restitution merely for efficiency's sake. But that hypothesis does not explain why Congress made restitution *part of the sentence*, rather than a civil order issued at the time of sentencing. Nor does amicus explain why, if restitution were civil, Congress would specify that for misdemeanors restitution may be the *only* penalty to which an offender is sentenced. *See* 18 U.S.C. § 3663A(a)(1); U.S. Br. 17.

Eliding the fact that restitution is part of the sentence, amicus argues that "[t]he mere fact that [an obligation] is imposed in consequence of a crime is not conclusive." Amicus Br. 38 (quoting *Murphy v. United States*, 272 U.S. 630, 632 (1926)). But his cited case merely explains that civil statutes do not impose criminal punishment just because the civil statute is triggered by criminal conduct. That does not undermine the proposition that an offender's sentence is criminal punishment. Nor does it rebut the fact that since the Founding the "thing imposed for a crime" has been understood to be "punishment." Pet. Br. 16 (citing dictionaries). This Court regularly looks to whether a sanction is "imposed at the culmination of a criminal proceeding and requires conviction of an underlying" offense in determining whether the sanction is punishment. *See, e.g.*, *Bajakajian*, 524 U.S. at 328; Pet. Br. 16-17 (citing cases).

Amicus (at 38) points out that criminal conviction triggers "a range of civil consequences," like "loss of voting and firearm rights and changes to immigration status." But none of those consequences is part of the criminal sentence. Similarly, amicus (at 37) points to conditions of supervised release, but this Court has never held that conditions of release are civil. In all events, section 3583, which governs supervised release, distinguishes between a "condition" of release and a "sentence" of restitution. 18 U.S.C. § 3583(d).

Similarly, amicus (at 36-37) analogizes to the state-law sex-offender registration requirements in *Smith*. The statute at issue in *Smith* is different than the MVRA in nearly every respect. Although the registration statute used the sentencing process "to alert convicted offenders to the civil consequences of their criminal conduct," 538 U.S. at 95, the registration and notification requirements were not part of the sentence. Unlike here, individuals

could not be punished for violating the statute without a subsequent "criminal prosecution." *Id.* at 101-02. The state law did "not require … any safeguards associated with the criminal process," suggesting "the legislature envisioned the Act's implementation to be civil and administrative." *Id.* at 96. The MVRA, by contrast, applies traditional criminal sentencing procedures. Parts of the state-law regulatory scheme were codified in a non-criminal code. *Id.* at 94. And the state legislature stated that its aim was "protecting the public safety," which "evidenc[ed] an intent to exercise … regulatory power." *Id.* at 93-94.

2. Congress utilized criminal procedures

Congressional intent "is most clearly demonstrated by the procedural mechanisms" Congress uses to impose the penalty. *89 Firearms*, 465 U.S. at 363. Amicus does not dispute that restitution is governed by criminal procedures. *See* Pet. Br. 18-20; U.S. Br. 19-21.

Amicus (at 26-28) responds by pointing to the ways in which the MVRA's procedures ensure that victims receive notice and are consulted by prosecutors. Victim participation, however, is common in criminal proceedings. Victims generally have the right to be "heard" at sentencings, to receive notice of criminal proceedings, and to confer with prosecutors. 18 U.S.C. § 3771(a). None of that changes the criminal nature of criminal proceedings.

Amicus cannot explain why, if restitution were a civil remedy, Congress denied victims the power to initiate, veto, or settle the restitution process. *See* Pet. Br. 33-34. Indeed, the bargaining process between prosecutors and defendants may deprive victims of restitution entirely. Pet. Br. 33. These features "underscore[] that the *target* of [MVRA restitution] is the offender's wrongdoing itself,

not simply the victim's loss." Restitution Scholars Br. 7; *contra* Amicus Br. 27.

The MVRA protects the "interests of the State," not just victims. U.S. Br. 27 (quoting *Kelly v. Robinson*, 479 U.S. 36, 53 (1986)). For example, restitution can be imposed for certain drug offenses "in which there is *no identifiable victim*." Mandatory Victims Restitution Act (MVRA), Pub. L. No. 104-132, § 205(a)(3), 110 Stat. 1214, 1230 (1996) (emphasis added). Amicus (at 28-29) acknowledges that this provision links restitution to general "public harm," but suggests it reflects "nonpunitive intent" because the collected restitution gets earmarked "for victim-assistance and substance-abuse prevention programs." But criminal fines—which are unquestionably criminal punishment—likewise support programs for crime victims. 34 U.S.C. § 20101(b)(1), (d)(3)(A).

Amicus (at 26-28) also emphasizes that victims can receive restitution. But amicus downplays that most restitution is never paid. *See* Pet. Br. 45. Congress understood that the MVRA would "not lead to any appreciable increase in compensation to victims," given that "85 percent of" defendants "are indigent at the time of sentencing." S. Rep. No. 104-179, at 18 (1995) (citation omitted). Yet Congress enacted the scheme because restitution produces "penalogical [sic] benefits." *Id.*

3. Congress enforced restitution with the threat of other criminal punishments

Congress also signaled its intent to impose criminal punishment by making MVRA restitution summarily enforceable by *other* criminal punishments, including incarceration. Pet. Br. 20-22; U.S. Br. 20. Amicus identifies *no* civil payment obligation enforceable by summary incarceration. Amicus (at 39-40) analogizes failing to pay

restitution to "failing to pay taxes or violating an injunction," but in those examples imprisonment must generally follow a *separate* conviction for tax evasion or contempt. *See, e.g.*, *United States v. Litwok*, 678 F.3d 208, 215 (2d Cir. 2012) (tax evasion); *In re Sealed Case*, 627 F.3d 1235, 1236-37 (D.C. Cir. 2010) (contempt).

4. Congress imposed restitution to serve penal goals

The statutory text expresses Congress' penological goals. Pet. Br. 22. If offenders fail to pay restitution, a court may resentence them to imprisonment if no alternative is "adequate to serve the purposes of punishment and deterrence." 18 U.S.C. § 3614. Amicus (at 39) counters that failing to pay a civil remedy may logically "warrant an increased period of confinement for the offense of conviction." That response ignores that Congress viewed restitution, like imprisonment, as "serv[ing] the purposes of punishment and deterrence" for the criminal offense. *See* 18 U.S.C. § 3614.

This Court has already concluded that MVRA restitution (and restitution like it) serves penal goals. Pet. Br. 22-24; U.S. Br. 23-25. Amicus' analysis of these and other cases is flawed.

Pasquantino v. United States stated that "[t]he purpose of awarding restitution" under the MVRA is "to mete out appropriate criminal punishment." 544 U.S. 349, 365 (2005). Amicus (at 33) claims that *Pasquantino* "simply conveyed that foreign tax assessment is not among the MVRA's animating purposes." But *Pasquantino* went further: it said the MVRA's purpose is to impose "criminal punishment." 544 U.S. at 365.

Paroline v. United States involved a materially identical restitution statute and recognized restitution's "punitive" and "penological purposes." 572 U.S. 434, 456-

57 (2014). Amicus distinguishes the child-pornography restitution statute in *Paroline* on the ground that the MVRA's predicate offenses have "obvious victims," making it "doubtful" that Congress sought to "impress upon [MVRA] offenders that their conduct produces concrete and devastating harms for real, identifiable victims." Amicus Br. 33 (quoting *Paroline*, 572 U.S. at 457). The Senate Judiciary Committee would disagree: it explained that the MVRA "ensure[s] that the offender realizes the damage caused by the offense." S. Rep. No. 104-179, at 12. *Paroline*'s recognition of this purpose did not turn on any unique circumstances of child pornography. To the contrary, as support, the Court cited *Kelly*, *supra* p.7. *Paroline*, 572 U.S. at 457-58. *Kelly*, in turn, involved a state-law restitution obligation in a *larceny* case. 479 U.S. at 38.

Kelly called restitution imposed as part of a sentence a "criminal sanction" that furthers the government's "interests in rehabilitation and punishment," not just "the victim's desire for compensation." *Id.* at 52-53. Amicus' sole answer to *Kelly* (at 34) is that it involved "a discretionary Connecticut statute" that allowed the offender to pay less than the amount of harm caused. But the MVRA is far *more* punitive: it is mandatory and requires the offender to pay the full amount of harm caused.

Amicus' contention (at 26, 34) that the MVRA's *mandatory* nature makes it less punitive than a discretionary scheme is as wrong as it sounds. On that theory, mandatory life imprisonment would be less punitive than discretionary incarceration. "[M]andatory penalty schemes" are uniquely punitive because the legislature has categorically made the relevant penological judgment, "prevent[ing] the sentencer from taking account" of individual circumstances. *See Miller v. Alabama*, 567

U.S. 460, 474 (2012). "[M]andatory imposition" is a "hallmark[]" of criminal penalties. Restitution Scholars' Br. 10.

Amicus (at 3, 31-32) calls *Dolan v. United States*, 560 U.S. 605 (2010), "this Court's only sustained analysis of the purposes of the MVRA." But *Dolan* analyzed whether the primary purpose of the MVRA's 90-day deadline for imposing restitution was "to help victims of crime secure prompt restitution" or "to provide defendants with certainty as to the amount of their liability." *Id.* at 613. *Dolan* had no occasion to discuss the statute's penological purposes. While amicus highlights *Dolan*'s recognition of victim compensation as a "substantive purpose" of the MVRA, amicus fails to note the Court's statement that "the statute's text places primary weight upon, and emphasizes the importance of, imposing restitution upon those convicted of certain federal crimes." *Id.* at 612. And although amicus (at 32) claims support in the dissent, he does not mention that the dissent called restitution a "criminal penalt[y]." *Id.* at 622 (Roberts, C.J., dissenting).

5. Other textual and structural clues confirm the MVRA's criminal nature

1. The MVRA's placement in Title 18 is "probative of the legislature's intent," even if not dispositive. *Smith*, 538 U.S. at 94; Pet. Br. 24; U.S. Br. 17-18; *contra* Amicus Br. 38-39. Amicus (at 39) offers his own placement argument, suggesting that MVRA restitution is not punishment because "[s]ection 3663A is not housed in the 'Sentences' chapter of Title 18 (Chapter 227), which addresses imprisonment, fines, and probation." But Congress *did* house the MVRA's foundational provision, 18 U.S.C. § 3556, within Chapter 227. U.S. Br. 18.

2. The MVRA's effective date provision—specifying that the Act applies to sentencings after its effective date

only "to the extent constitutionally permissible," MVRA § 211, 110 Stat. at 1241—further demonstrates Congress' punitive intent. While amicus (at 30) argues that Congress would not have applied the MVRA to prior offenses if it viewed restitution as criminal punishment, amicus has no plausible explanation for the "to the extent constitutionally permissible" clause. That savings clause plainly reveals ex post facto concerns. The retroactivity provision presumably reflects Congress' desire to give immediate effect to the MVRA only to the extent it did not *increase* punishment relative to preexisting law.

3. Although amicus (at 27) notes that section 3664(j)(2) requires reducing restitution orders by amounts recovered in civil judgments, he does not acknowledge that this statute distinguishes between restitution on the one hand and "compensatory damages" in a "civil proceeding" on the other. 18 U.S.C. § 3664(j)(2); *see also id.* § 3664(*l*). That distinction makes clear that Congress understood the MVRA did not involve a "civil proceeding." *See Smith*, 538 U.S. at 94 (citation omitted).

4. Congress' instruction to impose restitution alongside (or for misdemeanors, in lieu of) any other "penalty" "when sentencing a defendant convicted of an offense," 18 U.S.C. § 3663A(a)(1), further proves its punitive intent. Pet. Br. 25-26; U.S. Br. 16-17. Amicus (at 24) responds that "penalty" can refer to both criminal and civil penalties. Amicus, however, offers no example of a civil "penalty" imposed in a criminal sentence.

Amicus (at 25) claims that Congress uses "criminal penalty" when it thinks a penalty is criminal. But that is not the norm, Pet. Br. 26, and most of amicus' examples involve Congress' using "criminal penalty" to distinguish between applicable criminal and civil penalties. *See, e.g.*, 18 U.S.C. § 229A(a)-(b) (referencing both "criminal penalties" and "civil penalties"); *id.* § 670(c)-(d) (same); *id.*

§ 856(b), (d) (same). The same is true for Congress' use of the term "criminal forfeiture." *See* Amicus Br. 23-24. Congress used that term to distinguish criminal forfeiture from civil forfeiture, which appears next door in the code. *See* 18 U.S.C. §§ 981, 982.

Amicus (at 23) similarly observes that the MVRA does not use the phrase "criminal restitution." True, but Congress need not say "criminal incarceration" or "criminal fines" either. And in fact, a later Congress did call MVRA restitution "criminal restitution." *See* Firearms Excise Tax Improvement Act of 2010, Pub. L. No. 111-237, 124 Stat. 2497, 2497. Even if not "conclusive," Amicus Br. 26, that fact shows a later Congress understood the MVRA to impose criminal punishment.

6. The backdrop against which Congress legislated confirms that restitution is criminal punishment

Amicus (at 40-41) suggests that pre-MVRA judicial decisions were not sufficiently on point to establish a backdrop understanding that restitution is criminal punishment. But, as this Court explained, "[e]very Federal Court of Appeals that [had] considered the question concluded that … restitution orders" under the VWPA are not civil for purposes "of the Seventh Amendment." *Kelly*, 479 U.S. at 53 n.14; *accord* U.S. Br. 22-23 (collecting cases). This Court acknowledged that consensus in calling restitution a "criminal sanction" that furthers "penal goals." *Kelly*, 479 U.S. at 52. And, in a case that amicus ignores, this Court applied lenity to the VWPA, signaling its status as a "criminal statute[]." *Hughey v. United States*, 495 U.S. 411, 422 (1990). Congress "transplanted" the VWPA's operative language into the MVRA, carrying over the settled understanding that "restitution imposed during sentencing is a criminal penalty." U.S. Br. 24 (cleaned up).

Amicus (at 34-36) identifies portions of the legislative record signaling intent to compensate victims. But Congress wanted to compensate victims *and* punish offenders. The legislative record emphasizes "that restitution must be considered *a part of the criminal sentence*." S. Rep. No. 104-179, at 20 (emphasis added). Although restitution "restore[s] the victim," the legislative record ties "the principle of restitution" to "the sanctioning power of society … *to punish* its wrongdoers." *Id.* at 12-13 (quoting S. Rep. No. 97-532, at 30 (1982)) (emphasis added); *accord* Restitution Scholars Br. 6 (collecting examples).

While amicus (at 41) claims "there is no reason to think that the Members who voted for the MVRA" were aware of restitution's ancient history as criminal punishment, the Senate Judiciary Committee expressly noted that history, stating that "virtually every formal system of criminal justice, of every culture and every time" has employed restitution in "punish[ing] its wrongdoers." S. Rep. No. 104-179, at 13 (citation omitted).

B. Amicus' Contrary Framework Is Incorrect

1. MVRA restitution is criminal punishment even though it compensates victims

Amicus (at 26, 30, 32-33) argues that restitution is civil because victim compensation is supposedly the MVRA's "primary purpose." That is the wrong inquiry. The task is simply to decide if Congress intended "to impose punishment." *Smith*, 538 U.S. at 92. If so, "that ends the inquiry," even if Congress also had another, nonpenal purpose. *See id.*; U.S. Br. 26-27. For the reasons stated above, Congress intended MVRA restitution to be criminal punishment.

This Court has disavowed amicus' proposed primary-purpose framework. In *Halper*, 490 U.S. 435, this Court,

like amicus, was of the view that "it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.* at 447 n.7. Eight years later, this Court "disavow[ed]" that approach as "ill considered," holding that it wrongly focused on "the character of the actual sanctions" and "bypassed the threshold question" of whether the penalty "is a 'criminal' punishment." *Hudson*, 522 U.S. at 96, 101 (citation omitted).

Amicus' citation (at 32) to *89 Firearms*, 465 U.S. 354, does not change the calculus. While this Court noted the forfeiture regime's remedial purposes, the Court explained that congressional intent "is most clearly demonstrated by the procedural mechanism" Congress employs. *Id.* at 363. Here, Congress selected a textbook criminal procedural mechanism: sentencing.

Nor does *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), support amicus. *See* Amicus Br. 24. *Hess* involved a prototypical civil proceeding: a qui tam suit seeking restitution for the government "separately" from criminal proceedings. 317 U.S. at 539-40.

In any event, amicus' primary-purpose test overlooks "that both punitive and remedial goals may be served by criminal penalties." *Austin*, 509 U.S. at 610. Punishment and compensation are not mutually exclusive. Since ancient times, societies have punished offenders by forcing them to compensate victims. *See infra* pp.18-20.

For these reasons, amicus' dictionary definitions of the word "restitution" (at 24) do not help him. As petitioner (at 40-41) explained, "restitution" has long taken both civil and criminal forms. Notably, the Black's Law Dictionary definition that amicus cites refers to "restitution" as "compensation for loss … not awarded in a civil

trial for tort, but ordered as part of a criminal sentence." Restitution, Black's Law Dictionary (12th ed. 2024).

2. Amicus' clear-statement rule and reliance on constitutional-avoidance principles are unwarranted

Amicus (at 20-21) claims that the Court needs "conclusive evidence" that Congress intended to impose criminal punishment. That proposed clear-statement rule has no basis in precedent or constitutional-avoidance principles. Even if it did, the evidence here is overwhelmingly conclusive.

Amicus grounds his proposed rule in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), a due process case. In the 62 years since *Mendoza-Martinez*, this Court has never once used that case's "conclusive evidence" language to impose a clear-statement rule in the ex post facto (or any other) context. Nor did *Mendoza-Martinez* even purport to create or apply a clear-statement rule. By using the phrase "conclusive evidence," *Mendoza-Martinez* simply directed courts to use a multi-factor balancing test, "in relation to the statute on its face," if an examination of "congressional intent" produced *inconclusive* results. *Id.* at 169.

The test, as later cases have reiterated, simply requires "statutory construction" to "determine the legislative objective." *E.g.*, *Smith*, 538 U.S. at 92 (citation omitted); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *United States v. Ward*, 448 U.S. 242, 248 (1980). "If the intention of the legislature was to impose punishment, that ends the inquiry." *Smith*, 538 U.S. at 92-93 (citation omitted). As amicus (at 22) must concede, "express[] or implied[]" evidence of Congress' intent suffices. *Id.* at 93.

Nor do constitutional-avoidance principles justify amicus' proposed clear-statement rule. Amicus (at 21) contends the Court should require a clear statement of punitive intent to avoid ex post facto problems. But the constitutional-avoidance canon kicks in only "[w]hen a 'serious doubt' is raised about the constitutionality of an Act of Congress." *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018). A holding that the MVRA imposes criminal punishment does not call into doubt the statute's constitutionality.[1] The MVRA would still apply to all offenses committed after its enactment. The sole ramification of such a holding would be that the MVRA could not apply retrospectively to increase punishment for offenses committed before its effective date.[2] Congress' decision to write an ex post facto savings clause into the MVRA, *see supra* pp. 10-11, defeats amicus' constitutional-avoidance argument.

Amicus (at 30-31) also suggests the Court should construe the MVRA to impose civil remedies to avoid a Sixth Amendment jury-trial question. But that construction would walk straight into the Seventh Amendment. Pet. Br. 19-20. Amicus identifies no canon of construction that allows courts to create Seventh Amendment problems to avoid Sixth Amendment ones. If restitution is a civil compensatory award, the Seventh Amendment would

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[1] Indeed, the government (at 29-31) contends that no constitutional problem exists, even though restitution is criminal punishment, because the MVRA did not retrospectively increase Mr. Ellingburg's punishment. While Mr. Ellingburg disputes that contention, both parties agree that the question presented does not encompass that issue (which the Eighth Circuit did not reach), and so the Court should vacate and remand. Pet. Br. 47; U.S. Br. 32.

[2] This fact distinguishes cases like *Murphy v. United States*, 272 U.S. 630, 632 (1926), and *Flemming v. Nestor*, 363 U.S. 603, 617 (1960), where the Court applied constitutional-avoidance principles to avoid invalidating statutes.

guarantee defendants a civil jury when the government seeks compensation for tortious conduct, except perhaps where the defendant is disgorging property in his possession and the restitution order thus might be deemed equitable. *See* Amicus Br. 31. Congress did not require a civil jury because it understood it was imposing criminal punishment. Pet. Br. 28-29.

Moreover, holding that restitution is criminal punishment would not by itself create Sixth Amendment problems. Restitution would require jury findings under the Sixth Amendment only if it is imposed in a "criminal prosecution[]," U.S. Const. amend. VI, *and* if findings underlying a restitution award increase the statutory maximum sentence, *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). As the government notes, the courts of appeals uniformly hold that the MVRA does not contain a "specific or set upper limit for the amount of restitution" and thus does not implicate the Sixth Amendment. U.S. Br. 26 n.8 (citation omitted). Whether or not that consensus is correct, the Court should not torture Congress' intent in order to avoid confronting this Sixth Amendment question while creating Seventh Amendment concerns instead.

II. Restitution Is Criminal Punishment in Purpose and Effect

The Court need go no further than the MVRA's text and structure. *See* U.S. Br. 27. Still, the *Mendoza-Martinez* factors confirm that the MVRA imposes criminal punishment. Pet. Br. 36-46.

Factor 1: Disabilities and restraints. MVRA restitution involves affirmative disabilities and restraints. *Contra* Amicus Br. 48. The summary imprisonment that may be imposed on offenders failing to pay restitution, *see*

18 U.S.C. §§ 3613A(b), 3614(a), is the "paradigmatic" example of an affirmative disability or restraint. *See Smith*, 538 U.S. at 100. While amicus (at 48) focuses only on the restitution order itself, the question is "[w]hether [the] statutory *scheme* is civil or criminal." 538 U.S. at 92. The scheme here includes the MVRA's freedom-impinging consequences for failure to pay.

Factor 2: Historical treatment. "For at least as long as there have been written legal codes, governments have imposed restitution as a consequence for criminal conduct." Const. Accountability Ctr. (CAC) Br. 6. Although amicus pokes fun at antiquity, he (at 47) acknowledges "that in English and American law, courts sometimes required defendants" to pay money to their victims. This practice was widespread at the Founding and continued into modern state laws. *See* CAC Br. 9-13; *see also* Prof. Colgan Br. 9-22. Amicus (at 47) claims these Founding-era statutes did not "characterize" restitution "as part of criminal punishment." But they did: restitution was imposed for "criminal" offenses, through "criminal process," alongside "other readily recognized forms of punishment." Prof. Colgan Br. 9, 15 (collecting examples).

Amicus (at 47) highlights that some Founding-era statutes compensated victims for more than the amount of their loss. Blackstone, however, also records instances where English law permitted "full restitution" without apparently adding anything more. 4 William Blackstone, Commentaries *362. In any event, these predecessors need not be identical to the MVRA to prove a central flaw in amicus' argument: a statute that compensates victims may nonetheless impose criminal punishment.

Amicus' citations do not undermine this long history. Amicus (at 44) cites *Helvering v. Mitchell*, 303 U.S. 391, 399-400 (1938), for the idea that "'the payment of …

money' as a '[r]emedial sanction' has been 'recognized' as civil since the Founding." But *Helvering* involved tax-related obligations "enforceable by civil proceedings," not restitution that is part of a criminal sentence. 303 U.S. at 400.

Amicus (at 46) claims that James Wilson viewed reparation as "civil." Not so: Wilson called "[r]eparation … one great object in the Anglo-Saxon system of *criminal law*" that English law ought to replicate. 2 James Wilson, Collected Works of James Wilson 1106 (Kermit L. Hall & Mark David Hall, eds., Liberty Fund 2007) (emphasis added). As already discussed, Founding-era criminal statutes did incorporate reparation.

Amicus (at 44-45) suggests that restitution is civil because in the English and American systems "tort damages" are the primary means of compensating victims. But restitution that is part of a criminal sentence is not tort damages. Edward Livingston's treatise, which amicus (at 45) cites, simply explains that penal laws vindicate public, not just private, interests. 1 The Complete Works of Edward Livingston on Criminal Jurisprudence 243 (1873). Livingston noted that "in most laws, it has been made criminal for the injured party to interfere between the society and the offender against its laws." *Id.*; *accord* 4 Blackstone, Commentaries *133. The same is true today: victims cannot settle offenders' restitution obligations. Pet. Br. 34; Cato Institute Br. 9; Restitution Scholars Br. 7.

Amicus (at 45) also surmises that the word "penal" categorically excludes "private compensation." But the dictionary amicus references broadly defines "penal" as "[o]f, relating to, or being a penalty or punishment, [especially] for a crime." Penal, Black's Law Dictionary (12th ed. 2024). That word simply "connotes some form of punishment imposed on an individual by the authority of the

state," which captures MVRA restitution. *See id.* (citation omitted).

Factors 3 and 5: Scienter and criminal conduct. Amicus (at 50) concedes these factors "marginally favor a punitive characterization of MVRA restitution."

Factor 4: Traditional aims of punishment. Amicus appears not to dispute that the MVRA facially implicates retribution and deterrence. *See* Pet. Br. 44-45. Yet amicus (at 49) observes that sentencing courts cannot evaluate these penological aims on a case-by-case basis. Correct: the MVRA is mandatory, reflecting *Congress*' categorical judgment that offenders must be held "accountable for the harm [they] caused." S. Rep. No. 104-179, at 18.

Amicus (at 50) argues that the presence of a "deterrent effect" or some other "punitive aspect[]" is not enough, by itself, to make the MVRA punitive in purpose and effect. But "none" of the *Mendoza-Martinez* factors are "dispositive." *Smith*, 538 U.S. at 97 (citation omitted).

Amicus subtly reprises his primary-purpose test, claiming "a statute that has 'certain punitive aspects' does not impose criminal punishment so long as it primarily 'serve[s] important nonpunitive goals.'" Amicus Br. 50 (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)). But the primary-purpose language comes from amicus, not *Ursery*. *Hendricks* clarified that this factor asks only whether the statute "*implicate[s]* either of the two primary objectives of criminal punishment." 521 U.S. at 361-62 (emphasis added). The MVRA plainly does.

Factors 6 and 7: Disproportionate to nonpunitive purpose. Amicus (at 42-43) heralds the MVRA's connection to victim compensation as the end-all-and-be-all of the *Mendoza-Martinez* analysis. But a connection to a nonpunitive purpose is not "dispositive." *Smith*, 538 U.S.

at 97. The MVRA deviates from a purely compensatory scheme in numerous respects that make no sense if Congress thought it was creating a civil remedy. *See supra* Sections I.A.1-2.

III. The Case Presents the Question Presented

Amicus (at 15) is wrong to suggest that this Court should dismiss the writ on the theory that petitioner was sentenced under pre-MVRA law and thus the case does not implicate the question presented. That suggestion fails for multiple reasons.

First, the question presented matters: it was outcome-dispositive below. The Eighth Circuit characterized "the dispute" in this case as "whether *MVRA restitution* is a criminal or civil penalty." Pet.App.4a (emphasis added). The Eighth Circuit then held that restitution under the MVRA is a civil penalty, which ended Mr. Ellingburg's ex post facto challenge. The petition challenges that case-dispositive holding. Resolving the question presented in petitioner's favor would require vacating the decision below and would allow petitioner's ex post facto challenge to proceed on remand. Amicus does not address the Eighth Circuit's holding in urging dismissal of the writ.

Second, amicus overlooks the MVRA's effective date provision. The MVRA's effective date provision specified which law was in effect: the MVRA applies to sentencings after its effective date "to the extent constitutionally permissible." MVRA § 211, 110 Stat. at 1241; *see supra* pp. 10-11. Therefore, *if* restitution under the MVRA is not penal (as the Eighth Circuit held), the MVRA governed Mr. Ellingburg's sentence. Even amicus (at 13) concedes the MVRA "was in effect" at sentencing.

The government thus insisted below that Mr. Ellingburg was sentenced to restitution under the MVRA. The

government argued that the MVRA's application was "triggered by statute, because [Mr. Ellingburg] was sentenced after the MVRA's enactment." Gov't C.A.8 Br. 7. At oral argument, the government reinforced the point: "The government's position is that [Mr. Ellingburg] was sentenced pursuant to the MVRA because the MVRA went into effect on April 24, 1996, for all sentencings occurring after that date." C.A.8 Oral Arg. 11:20-11:36. Judge Kelly asked: "it's always been the Mandatory Victim [Restitution Act], that's your position?" *Id.* at 11:42-11:49. The government responded: "As required by law, yes … the district court was required by law to apply the MVRA." *Id.* at 11:49-11:58. The government again reprised this point at the certiorari stage: "Because petitioner was convicted and sentenced after the effective date of the MVRA, the statute covered his order of restitution." BIO 3.

In the Eighth Circuit, petitioner too recognized that, barring an ex post facto problem, the MVRA governed his restitution order. C.A.8 Appellant's Br. 51-52 (citing MVRA's effective date provision); C.A.8 Reply Br. 29 (same). But petitioner argued that because applying the MVRA to punish his pre-MVRA offense conduct violates the Ex Post Facto Clause, the MVRA did not apply. *E.g.*, C.A.8 Appellant's Br. 3-4, 12; C.A.8 Reply Br. 1, 30.

Ignoring the question of which statute legally governed this restitution order, amicus (at 13-15) invokes petitioner's statement below that the sentencing court "appears to" have applied the VWPA, C.A.8 Appellant's Br. 8, and the district court's observation in a footnote that the "record indicates" the same, Pet.App.14a n.2. Those observations were based on the sentencing court's use of a pre-MVRA judgment form and a citation to section 3663 in the presentence report. As far as the record reflects, the sentencing court never said which law it was

applying, nor does anyone contend that the original amount in the restitution order depended on which law applied.

Moreover, neither petitioner nor the district court ascribed any legal significance to these observations. To the contrary, the district court stated that the MVRA was "effective by its terms" at the time of Mr. Ellingburg's sentencing. Pet.App.14a n.2. And, as just discussed, petitioner agreed the MVRA applied if constitutionally permissible.

This Court should decide the case-dispositive question presented, hold that restitution under the MVRA is criminal punishment, and vacate the decision below.

CONCLUSION

The court of appeals' judgment should be vacated.

Respectfully submitted,

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