No. 24-482

In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR RESPONDENT SUPPORTING VACATUR

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The court of appeals held 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 civil penalty and therefore not subject to the Ex Post Facto Clause. Pet. App. 5a. Before defending the court's reasoning, the Court-appointed amicus curiae (amicus) first argues (Br. 12-20) that this Court should dismiss the petition as improvidently granted. The government opposed certiorari, and it has consistently maintained that the judgment of the court of appeals—which affirmed the denial of petitioner's particular ex post facto claim—is correct. See U.S. Br. 29-31. This Court, however, granted certiorari to resolve whether restitution under the MVRA is a criminal punishment for purposes of the Ex Post Facto Clause. The Court presumably viewed this case as an adequate vehicle for addressing that question, and the Court could answer it.

On the merits, the government explained in its opening brief that Congress implemented restitution under the MVRA as a criminal punishment. The statute provides that MVRA restitution is a "penalty" that courts attach to a criminal "offense," 18 U.S.C. 3663(a)(1)(A), 3663A(a)(1); it is codified within the criminal code as part of the "sentencing" for such an offense, *ibid.*; and it is intertwined with other criminal penalties, see 18 U.S.C. 3563(a)(6) (probation); 18 U.S.C. 3583(d) (supervised release). During the sentencing proceedings, the government—not the victim—stands as the adversarial party. 18 U.S.C. 3664(e). And the government—not the victim—exercises primary authority to collect a restitution obligation, 18 U.S.C. 3612(c), with penalties for nonpayment including imprisonment, 18 U.S.C. 3613A(a)(1).

Amicus can discount these features only through a divide-and-conquer approach: Congress's reference to "penalty" might refer to a criminal or civil sanction. Amicus Br. 24 (citation omitted). The "mere fact" that restitution is predicated on a conviction is not "conclusive." *Id.* at 38 (citation omitted). The placement in the criminal code is not dispositive. *Id.* at 38-39. And Congress's choice "to integrate victim compensation into the sentencing process," standing "alone," "is not enough." *Id.* at 36. When viewed as a whole, however, the statutory scheme makes clear that MVRA restitution serves as part of the defendant's criminal punishment, as all these factors pull strongly in the same direction.

That is especially so given the legal backdrop against which Congress enacted the MVRA. At that time, the courts of appeals had uniformly recognized that the restitution scheme established by a predecessor statute, the Victim and Witness Protection Act of 1982 (VWPA),

Pub. L. No. 97-291, 96 Stat. 1248, provided for criminal punishment. The MVRA not only carried forward that judicial consensus by replicating the relevant language, it reinforced the criminal nature of the restitution obligation, including by enhancing the authority to enforce it. See 18 U.S.C. 3611-3614, 3664.

Thus, while amicus (Br. 23-30)—like the court of appeals—emphasizes that restitution serves compensatory goals as well, the MVRA's text, structure, and history make plain that "the intention of the legislature was to impose punishment," which "ends the inquiry." *Smith* v. *Doe*, 538 U.S. 84, 92 (2003). The proper disposition of this case is to correct the court of appeals' erroneous classification of MVRA restitution as civil and remand so that the court of appeals can address alternative bases for reaching the same judgment.

I. THIS COURT CAN RESOLVE THE QUESTION PRESENTED

This Court granted certiorari to resolve whether "restitution under the [MVRA] is penal for purposes of the Ex Post Facto Clause." Pet. I. The court of appeals squarely decided that issue, and this Court could do the same.

A. The MVRA, by its terms, applies to any "sentencing proceeding[]" in a "case[] in which the defendant [wa]s convicted" on or after the April 24, 1996, enactment date. § 211, 110 Stat. 1241 (18 U.S.C. 2248 note). Because petitioner was convicted on August 29, 1996, the MVRA governed petitioner's sentencing. See Pet. App. 13a. And the parties have a live dispute as to whether the MVRA's period for repaying restitution, 18 U.S.C. 3613(b), can constitutionally be applied to restitution for a crime that occurred before the MVRA's enactment.

While petitioner maintained before the court of appeals that the MVRA did not apply, see Amicus Br. 14-15, the government disputed that contention, see Gov't C.A. Br. 44-47, and the court accepted the government's position. The court decided the case on the assumption that "the MVRA ha[d] been applied to [petitioner's] sentence retroactively" and addressed whether "'an order of restitution under the MVRA is punishment for Ex Post Facto Clause purposes.'" Pet. App. 4a (citation omitted). The question presented was therefore pressed and passed upon below.

B. Amicus observes (Br. 13-14) that the district court may have ordered restitution as a matter of its discretion under 18 U.S.C. 3663, a provision originally enacted in the VWPA. But that does not make his restitution obligation "VWPA restitution." The MVRA amended the entire statutory scheme, including Section 3663. It also amended the procedures for imposing restitution, 18 U.S.C. 3664; the authority for collecting it, 18 U.S.C. 3611-3614; and, as particularly relevant here, the period for repaying it, 18 U.S.C. 3613(b). See U.S. Br. 6-8. Under the express terms of the MVRA, petitioner is subject to all of those provisions "to the extent constitutionally permissible." 18 U.S.C. 2248 note.

The sentencing court's application of Section 3663, as opposed to the MVRA's newer mandatory restitution obligation in 18 U.S.C. 3663A, would have been consistent with the government's position that "in cases where a defendant commits criminal offenses before the effective date of the Act," application of Section 3663A would violate the Ex Post Facto Clause by increasing the punishment for a pre-MVRA crime. Gov't Br. 4, *United States* v. *Edwards*, 162 F.3d 87 (3d Cir. 1998)

(No. 98-1055). But application of the MVRA's repayment period, 18 U.S.C. 3613(b), does not increase the punishment of a pre-MVRA crime. See U.S. Br. 29-31. That period was therefore correctly applied to petitioner, even though it was subject to ex post facto analysis. See *ibid.*

C. The court of appeals here, however, took the view that no ex post facto analysis is necessary at all, on the theory that restitution under the MVRA is a civil penalty to which the Ex Post Facto Clause is categorically irrelevant. Pet. App. 4a-7a. This Court has the ability, if it chooses, to review that rationale. Even if this case does not involve mandatory restitution ordered pursuant to Section 3663A, discretionary restitution under Section 3663 has been folded into, and is imposed under, the MVRA. See 18 U.S.C. 3556 (allowing for restitution under "section 3663" as well as "section 3663A"). As a result, while restitution under Section 3663 remains discretionary, it shares other features in common with mandatory restitution under Section 3663A: each is imposed "when sentencing a defendant" as a "penalty" for the commission of a criminal "offense," compare 18 U.S.C. 3663A(a)(1), with 18 U.S.C. 3663(a)(1)(A); each is subject to the procedures set forth in 18 U.S.C. 3664, see 18 U.S.C. 3556; and each has the same enforcement mechanisms, 18 U.S.C. 3613(f).

II. RESTITUTION UNDER THE MVRA IS CRIMINAL PUNISHMENT FOR PURPOSES OF THE EX POST FACTO CLAUSE

When "the intention of the legislature was to impose punishment," the Ex Post Facto Clause applies. *Smith* v. *Doe*, 538 U.S. 84, 92 (2003). As the government's opening brief explained (at 15-29), that is the case here, where Congress implemented restitution under the

MVRA as part of a defendant's criminal punishment for the commission of a crime.

A. The MVRA Implements Restitution As Criminal Punishment

The plain text of the MVRA specifies that restitution is a "penalty," 18 U.S.C. 3663(a)(1)(A); 18 U.S.C. 3663A(a)(1)—that is, restitution is "[p]unishment imposed on a wrongdoer," *Black's Law Dictionary* 1153 (7th ed. 1999); see *The American Heritage Dictionary of the English Language* 1337 (3d ed. 1992) (defining "penalty" as "[a] punishment * * * for a crime or an offense"). Amicus is correct that "both criminal and civil sanctions may be labeled 'penalties,' " Amicus Br. 24 (citation omitted), because "penalties are * * * sometimes imposed for civil wrongs," *Black's* 1153. But the MVRA's text and structure make plain that restitution under the statute serves as a penalty "for crimes." *Ibid.*

1. MVRA restitution is fully integrated into the scheme for sentencing a defendant for the commission of a criminal offense

Under the MVRA, the "penalty" of restitution is attached to a criminal "offense" and imposed during criminal "sentencing" against a criminal "defendant." 18 U.S.C. 3663(a)(1)(A); 18 U.S.C. 3663A. Congress codified restitution within the criminal code, and a district court's authority to impose restitution is part of the same chapter (titled "Sentences") as the other provisions authorizing criminal punishment such as imprisonment, fines, and probation. 18 U.S.C. 3551, 3556. The placement of a penalty within "the criminal code," *Smith*, 538 U.S. at 94 (citation omitted), that is predicated on a "criminal conviction," *Kansas* v. *Hendricks*, 521 U.S.

346, 362 (1997), and is imposed personally against the defendant in a "criminal action[]," *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984), is more readily understood as a form of criminal punishment.

The "procedural mechanisms to implement" restitution, *Smith*, 538 U.S. at 95, reinforce that understanding. When the district court imposes restitution, it must adhere to procedures similar to those applicable to other criminal penalties, including the Federal Rules of Criminal Procedure. See 18 U.S.C. 3664(c). The government —not the victim—is the adversarial party during those proceedings, 18 U.S.C. 3664(e), and bears principal responsibility for collecting unpaid restitution, 18 U.S.C. 3612(c). And Congress attached punitive consequences —including revocation of probation or supervised release, and incarceration—for failure to pay restitution. See 18 U.S.C. 3613A(a)(1), 3614.

Together, those aspects of the MVRA undercut amicus's assertion (Br. 12) that Congress included restitution as part of the "sentencing process" merely as a matter of "procedural efficiency." Instead, "[s]entencing courts are required to impose restitution as part of the sentence" itself, such that restitution serves as part of the defendant's criminal punishment. *Manrique* v. *United States*, 581 U.S. 116, 118 (2017). That is why other provisions of Title 18 refer to a "person who is sentenced to pay * * * restitution," 18 U.S.C. 3611; 18 U.S.C. 3572(d)(1), in the same way that they refer to "[a] person sentenced to pay a fine or other monetary penalty," 18 U.S.C. 3572(d)(1). Both are forms of criminal punishment.

2. Restitution differs from the noncriminal measures identified by amicus

Amicus's efforts (Br. 32, 36-37) to analogize MVRA restitution to various noncriminal measures are misplaced. Amicus cites (Br. 36-37), for instance, the registration requirements for sex offenders considered in *Smith*, which the Court held not to implicate the Ex Post Facto Clause. See 538 U.S. at 105-106. Those registration requirements were "designed to protect the public from harm," suggesting a "regulatory power" distinct from "add[ing] to the punishment." *Id.* at 93-94. While the legislature required that defendants be "notified" of the registration requirements "during their criminal prosecutions," Amicus Br. 36, the requirements themselves were not part of a criminal defendant's sentence. Instead, the legislature adopted "'distinctly civil procedures'" for the imposition of registration requirements, without "any safeguards associated with the criminal process." *Smith*, 538 U.S. at 96 (citation omitted). That is not the case here.

Amicus also observes (Br. 37) that the courts of appeals have not treated certain conditions of supervised release as punishments for purposes of the Ex Post Facto Clause. *United States* v. *Jackson*, 189 F.3d 820, 822-824 (9th Cir. 1999) (drug testing); *United States* v. *Coccia*, 598 F.3d 293, 296-299 (6th Cir. 2010) (DNA testing); *United States* v. *Winston*, 850 F.3d 377, 381-382 (8th Cir. 2017) (search conditions). Unlike restitution, however, those supervised-release conditions did not "penal[ize]" a prior criminal offense. 18 U.S.C. 3663(a)(1)(A), 3663A(a)(1). Rather than "affix culpability for prior criminal conduct," *Hendricks*, 521 U.S. at 362, these measures facilitate the offender's reintegration with society. See *Mont* v. *United States*, 587 U.S. 514, 523

(2017) ("Supervised release is a form of postconfinement monitoring that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison. * * * Congress provided for supervised release to facilitate a transition to community life.") (citations and internal quotation marks omitted).

Finally, amicus highlights (Br. 32) "a forfeiture provision" for firearms that this Court held not to be criminal punishment for double-jeopardy purposes. See *89 Firearms*, 465 U.S. at 364. But as the government explained in its opening brief (at 20-21), that provision allowed for forfeiture through in rem proceedings, in contrast to "the *in personam* nature of criminal actions." *89 Firearms*, 465 U.S. at 363. In addition, the forfeiture requirement did not penalize a particular criminal offense, but instead "cover[ed] a broader range of conduct than [wa]s proscribed" by the associated substantive criminal laws. *Id.* at 366. Restitution under the MVRA, by contrast, is more akin to "criminal forfeiture" authorized under 18 U.S.C. 3554, which amicus accepts (Br. 24) is criminal in nature. As with "criminal forfeiture," courts may order restitution under Sections 3663 and 3663A only when "imposing a sentence on a defendant who has been found guilty of a[]" specified offense. Compare 18 U.S.C. 3554, with 18 U.S.C. 3556. The in personam imposition of the penalty as part of the sentencing for a criminal offense is an indication that it is a penalty for committing that crime.

B. Precedent Supports Treating MVRA Restitution As A Criminal Penalty

As the government explained in its opening brief (at 22-26), this Court's precedents, as well as cases in the

courts of appeals, further support interpreting restitution under the MVRA as a criminal penalty.

1. The MVRA incorporated, and added to, features of restitution schemes that had been treated as criminal punishment

When Congress enacted the MVRA, it did so against a backdrop of decisions by the courts of appeals that uniformly treated restitution under the VWPA as "a criminal, rather than civil, penalty" for purposes of the Seventh Amendment. *United States* v. *Palma*, 760 F.2d 475, 479-480 (3d Cir. 1985); accord *Kelly* v. *Robinson*, 479 U.S. 36, 53 n.14 (1986). Likewise, this Court in *Kelly* v. *Robinson* had treated a particular state restitution obligation imposed as part of a state sentence as a "criminal sanction." 479 U.S. at 52-53 (citation omitted).

Amicus asserts (Br. 34, 40) that the MVRA "differs materially" from the VWPA, as well as from the state scheme at issue in *Kelly*. Amicus notes (Br. 34) that *Kelly* considered a restitution scheme that did not "require imposition of restitution in the amount of the harm caused," 479 U.S. at 53, and that a district court's authority to impose restitution under the VWPA was itself "discretionary." Amicus theorizes (Br. 34, 40) that because the MVRA added a provision (18 U.S.C. 3663A) that requires courts to impose restitution in certain cases, Congress meant to depart from those precedents, such that restitution under the MVRA—or, at least, restitution ordered pursuant to Section 3663A—would not be criminal.

That contention is unsound. Making restitution mandatory for many crimes in no way suggests that it is civil, rather than criminal. In *Kelly*, the Court focused substantially on "the context in which [restitution] is imposed"—namely, during criminal sentencing

—in concluding that restitution was a "'criminal sanction.'" 479 U.S. at 52, 53 (citation omitted). "Because criminal proceedings focus on the State's interests in rehabilitation and punishment," the Court reasoned, "[t]he sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State." *Id.* at 53. The MVRA, like the VWPA before it, has that feature in common with the state scheme at issue in *Kelly*. See 18 U.S.C. 3663, 3663A; 18 U.S.C. 3663 (1994).

Far from suggesting that Congress was departing from the judicial consensus that the VWPA was criminal punishment under the Ex Post Facto Clause, the MVRA doubled down on punitive features. Congress not only left in place authorization for a discretionary restitution order under 18 U.S.C. 3663(a)(1)(A)—which had been held to be punitive—but it replicated the relevant language for Section 3663(a)(1)(A) in Section 3663A. See 18 U.S.C. 3663A(a)(1). And additional MVRA changes added even more weight to the punishment side of the scale. For instance, the MVRA adopted procedural protections commensurate with the procedural protections for criminal punishment. See 18 U.S.C. 3664(c). The MVRA also made "[t]he Attorney General * * * responsible for collection" of restitution obligations, 18 U.S.C. 3612(c), and it reinforced that the United States (but generally not victims) could enforce restitution in the same manner as a criminal fine, see 18 U.S.C. 3664(m)(1)(A)(i); see also 18 U.S.C. 3613(f).

2. This Court's precedent treats MVRA restitution as criminal punishment

In the years since the MVRA's enactment, the Court has twice treated restitution as a criminal penalty, de-

scribing its "purpose" as "to mete out appropriate criminal punishment for [the defendant's] conduct." *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005); see *Paroline* v. *United States*, 572 U.S. 434, 456 (2014). Amicus characterizes (Br. 32-34) the Court's statements as "dicta," but at minimum, it is telling that this Court understood restitution as "criminal punishment," based on the same features discussed above.

Contrary to amicus's contention (Br. 31-32), the Court did not indicate otherwise in *Dolan* v. *United States*, 560 U.S. 605 (2010). The Court there did not consider ex post facto issues, but instead whether the MVRA's 90-day deadline for determining victims' losses, 18 U.S.C. 3664(d)(5), was a "claims-processing rule[]" or carried jurisdictional consequences. *Dolan*, 560 U.S. at 610. The Court held that it was the former, in part because 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. That is a feature commonly associated with criminal punishment.

As amicus observes (Br. 31-32), *Dolan* also noted that the statute "seeks primarily to ensure that victims of a crime receive full restitution." 560 U.S. at 612. A compensatory purpose, in itself, is often associated with a civil penalty. See, *e.g.*, *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551 (1943) (concluding that qui tam statute requiring fraudster to "'forfeit and pay'" double damages to the government, with "chief purpose * * * to provide for restitution," was not criminal). But such a purpose is not incompatible with criminal punishment, as the Court later made clear in *Paroline*, which referred to mandatory restitution for child-pornography offenses as "'criminal punishment,'" even as

it recognized that the "primary goal" of that statute was "remedial." 572 U.S. at 456 (quoting *Pasquantino*, 544 U.S. at 365).

C. Amicus's Focus On Restitution's Compensatory Features Is Misplaced

As the Court's precedent reflects, a restitution statute can serve compensatory ends but still be implemented as criminal punishment. Amicus's focus (Br. 23-30), like the court of appeals', on the compensatory aspects of restitution is therefore misplaced.

The government's opening brief acknowledged that restitution "attempts to make whole the victims of a criminal offense," and that its "'primary goal'" is accordingly often "'remedial or compensatory.'" U.S. Br. 16 (quoting *Paroline*, 572 U.S. at 456); see *id.* at 26. But notwithstanding its compensatory nature, restitution can simultaneously "serve[] punitive purposes" as well. *Paroline*, 572 U.S. at 456. The MVRA implements restitution in a manner that is sufficiently punitive to qualify as "criminal punishment," *ibid.* (citation omitted), for purposes of the Ex Post Facto Clause.

Amicus observes (Br. 27) that some features of the MVRA are largely "victim-centric." Because restitution is principally driven by the "loss caused to" victims, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 765 (2d ed. 1995), victims are usually (but not always) the recipients of restitution, 18 U.S.C. 3663(a)(1)(A), 3663A(a)(1); their losses affect the amount of the restitution obligation, 18 U.S.C. 3664(f)(1)(A); they must be consulted (to the extent practicable) by the government and the Probation Office when determining the amount of the loss, 18 U.S.C. 3664(d); and their changed circumstances may result in later adjustments to the restitution amount, 18 U.S.C. 3664(d)(5) and (j)(2).

Most (if not all) restitution schemes contain such features, which effectuate restitution's general compensatory goals. But as the Court's decision in *Kelly* illustrates, a restitution scheme can be punitive even if it has victim-centric features. See 479 U.S. at 52-53. There, payments of restitution were similarly "forwarded to the victim" and "calculated by reference to the amount of harm the offender has caused." *Id.* at 52. While the Court acknowledged that restitution therefore "resemble[d] a judgment 'for the benefit' of the victim," it considered "the context in which it was imposed" to determine whether it served as punishment. *Ibid.* And it reasoned that restitution "imposed in" "criminal proceedings" "necessarily considers the penal and rehabilitative interests of the States." *Id.* at 52-53.

Under amicus's reasoning, however, it is difficult to see how restitution would *ever* constitute a criminal penalty. In amicus's view, restitution is "inherently" civil in nature (Br. 46), and Congress's use of "[t]he term 'restitution' itself * * * reflects the statute's compensatory purpose" (Br. 24). But viewing restitution as inherently civil is untenable—it plainly matters how restitution is implemented.

Restitution under the MVRA is implemented as criminal punishment, with a variety of provisions that further punitive goals. See U.S. Br. 27-29. The district court can, for instance, impose restitution for certain drug offenses even when there is "no identifiable victim." 18 U.S.C. 3663(c)(1). For offenses as to which restitution is discretionary, a defendant's personal circumstances are part of the calculus for deciding whether to require it. See 18 U.S.C. 3663(a)(1). And even where restitution is mandatory, the court may forgo restitu-

tion for certain crimes if it unduly "burden[s]" the "sentencing process," 18 U.S.C. 3663A(c)(3)(B); may account for a defendant's circumstances by ordering "nominal" payments on restitution obligations, 18 U.S.C. 3664(f)(3)(B); and may adjust the restitution obligation after sentencing in light of a change in a defendant's personal circumstances, see 18 U.S.C. 3664(k). Those features of the scheme, in combination with the imposition and enforcement of restitution obligations in a manner intertwined with other forms of criminal sentencing, see pp. 6-7, *supra*, support treating MVRA restitution as punitive.

D. Congress Was Not Required To Do More To Make Its Intent Clear

Finally, amicus appears to contend that even if the MVRA were most naturally understood as criminal punishment, Congress would nonetheless need to be more "clear" in order for the statute to be treated as such for ex post facto purposes. Amicus Br. 21 (citation omitted). That contention is mistaken.

1. The Court has not adopted a rigid "clear-statement requirement" (Amicus Br. 21) in this context. In classifying a penalty as "civil" or "criminal," a legislature can either "expressly" or "impliedly" indicate its preference "for one label or the other." *Smith*, 538 U.S. at 93 (citation omitted). As the Court has explained, the inquiry is an issue of "'statutory construction'" that depends on an examination of "the statute's text and its structure," which includes not only any "declared objective" of the legislature, but also "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes." *Id.* at 92-94 (citation omitted).

Amicus observes that this Court has sought "*conclusive* evidence of congressional intent as to the penal nature of a statute" before treating it as criminal punishment for constitutional purposes. Br. 20 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169 (1963)) (emphasis omitted). But a requirement of "conclusive" evidence, while exacting, is not the same as a rigid clear-statement rule. In *Kennedy* v. *Mendoza-Martinez*, for instance, the Court concluded that "objective manifestations of congressional purpose" demonstrated "conclusively that the provisions in question can only be interpreted as punitive," even though the text did not explicitly designate the provisions as punitive. See *ibid.* In reaching that conclusion, the Court relied on the same interpretive tools that the parties do here, including the statutory history and the backdrop of judicial decisions against which Congress legislated. See *id.* at 170-184. And using those tools, the "objective manifestations" of Congress's intent with the MVRA are "unmistakable," as they were in *Mendoza-Martinez*. *Id.* at 169, 170 n.30.

2. Amicus also errs in suggesting (Br. 30-34) that the constitutional-avoidance doctrine requires additional clarity. First and foremost, the inquiry into whether a scheme is punitive for ex post facto purposes inherently has constitutional implications: the inquiry determines whether the Ex Post Facto Clause will apply. The Court's approach to statutory construction in that context therefore necessarily must already factor in whatever avoidance principles might apply, *Smith*, 538 U.S. at 92. And, as explained, that approach does not include a clear-statement rule. See pp. 15-16, *supra*.

In any event, constitutional avoidance allows a court only to "adopt an alternative [interpretation] that *avoids*" constitutional problems. *Jennings* v. *Rodriguez*, 583

U.S. 281, 286 (2018) (emphasis added). Amicus's construction, however, could raise the separate constitutional issue of whether restitution is subject to the Seventh Amendment's jury-trial requirement. That concern would have been top of mind for the Congress that enacted the MVRA, as it had been litigated extensively, see *Kelly*, 479 U.S. at 53 n.14, with courts of appeals uniformly holding that federal restitution was not subject to the Seventh Amendment precisely because it was a criminal penalty. See *ibid.*; p. 10, *supra*.*

Finally, it is especially clear that Congress did not buck that judicial consensus because it expressly recognized the potential application of the Ex Post Facto Clause when it specified that the amendments of the MVRA would apply retroactively only to the extent "constitutionally permissible." 18 U.S.C. 2248 note. It therefore was not seeking to "avoid[]" ex post facto implications, *Jennings*, 583 U.S. at 286—it recognized and accepted them.

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* Amicus posits (Br. 30-31) that if restitution is criminal punishment, the Sixth Amendment might require a jury trial as to the amount of restitution pursuant to this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). But as the government explained in its opening brief (at 26 n.3), even if restitution were criminal for purposes of the Sixth Amendment, it would not be subject to *Apprendi*. Under the statute, "there is no specific or set upper limit for the amount of restitution," and therefore findings underlying a restitution order cannot increase a defendant's maximum punishment. *Ibid.* (citation omitted). Thus, although the majority of the courts of appeals already treat restitution under the MVRA as criminal punishment, see U.S. Br. 25-26 (collecting cases), every court to consider the issue has held that restitution is not subject to *Apprendi*, Br. in Opp. at 13-14, *Rimlawi* v. *United States*, No. 24-23 (Nov. 20, 2024) (collecting cases).

In doing so, Congress did not "*intend[]* to violate the Constitution." Amicus Br. 30. It simply anticipated that, notwithstanding the applicability of the Ex Post Facto Clause, at least some of the MVRA's provisions—such as the repayment period at issue here—would be "constitutionally permissible" in future sentencing of defendants for pre-MVRA crimes. See U.S. Br. 29-31; see also, *e.g.*, *United States* v. *Phillips*, 303 F.3d 548, 551 (5th Cir. 2002), cert. denied, 537 U.S. 1187 (2003) (upholding application of MVRA's collection authorities). This Court should give effect to Congress's choice to implement restitution under the MVRA that way, and allow the court of appeals to affirm the district court by applying, rather than pretermitting, ex post facto analysis.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

SEPTEMBER 2025