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1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   HOLSEY ELLINGBURG, JR.,                                 )  
4                                 Petitioner,                         )  
5                                 v.                                 ) No. 24-482  
6   UNITED STATES,   )  
7                                 Respondent.                         )  
8   - - - - -  
9  
10                                 Washington, D.C.  
11                                 Tuesday, October 14, 2025  
12  
13           The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 11:37 a.m.  
16  
17   APPEARANCES:  
18   AMY M. SAHARIA, ESQUIRE, Washington, D.C.; on behalf  
19         of the Petitioner.  
20   ASHLEY ROBERTSON, Assistant to the Solicitor General,  
21         Department of Justice, Washington, D.C.; on behalf  
22         of the Respondent, supporting vacatur.  
23   JOHN F. BASH, Austin, Texas; Court-appointed amicus  
24         curiae in support of the judgment below.  
25

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1 P R O C E E D I N G S

2 (11:37 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next this morning in Case 24-482,  
5 Ellingburg versus United States.

6 Ms. Saharia.

7 ORAL ARGUMENT OF AMY M. SAHARIA

8 ON BEHALF OF THE PETITIONER

9 MS. SAHARIA: Mr. Chief Justice, and  
10 may it please the Court:

11 The MVRA classifies restitution as  
12 criminal punishment and is thus subject to the  
13 Ex Post Facto Clause. Just like imprisonment  
14 and fines, restitution is part of an offender's  
15 criminal sentence, imposed at the end of a  
16 criminal proceeding as a consequence of  
17 conviction. The sentence is the punishment for  
18 the crime.

19 Other features of the MVRA confirm  
20 this conclusion. Restitution is intertwined  
21 with other punishments and can be the only  
22 punishment for misdemeanors. Like fines,  
23 restitution is enforced with the threat of  
24 summary imprisonment. And the Federal Rules of  
25 Criminal Procedure and the chapters of Title 18

1     that govern sentencing apply.

2             All of this is why, in a trio of  
3     cases, Paroline, Pasquantino, and Kelly, this  
4     Court called restitution a criminal punishment  
5     that serves punitive and penological purposes  
6     and a criminal sanction that furthers the  
7     government's interests in rehabilitation and  
8     punishment.

9             Amicus responds that victim  
10    compensation is the primary purpose of  
11    restitution. But that purpose-based analysis  
12    overlooks the threshold classification  
13    question: Does the statute on its face impose  
14    criminal punishment?

15            The answer here is yes. Criminal  
16    punishments may serve multiple purposes at the  
17    same time. Imprisonment punishes but also  
18    protects the public. The same is true of  
19    restitution. It punishes the offender and, if  
20    the offender pays, compensates the victim.

21            Finally, this case presents the  
22    question presented: The MVRA is the law being  
23    applied to Petitioner retroactively. The  
24    district court that denied the show-cause  
25    motion applied the MVRA, and the Eighth Circuit

1     then affirmed on the ground that the MVRA  
2     imposes a civil remedy. The petition  
3     challenges that case-dispositive holding.

4             I welcome the Court's questions.

5             JUSTICE THOMAS: Aren't we going to  
6     have to wrestle with the fact that Petitioner  
7     was not originally sentenced under the MVRA?

8             MS. SAHARIA: We don't think you --  
9     the Court needs to wrestle with that fact. And  
10    I'll start by saying it's not clear what  
11    statute the original sentencing a court --  
12    court applied 30 years ago. All we have is a  
13    judgment form. The judgment form simply  
14    imposes an amount of restitution. And at  
15    the -- there's one portion of the judgment form  
16    that -- at Pet. App. 27a that cites to Section  
17    3663 in one paragraph, but the checks -- check  
18    box in front of that paragraph is not checked.

19            So there's nothing in the judgment  
20    form that indicates whether the district court  
21    that sentenced Mr. Ellingburg applied the VWPA  
22    or the MVRA.

23            Now, under the rationale of the  
24    decision below of the Eighth Circuit, the MVRA  
25    was the statute that governed the restitution

1 order imposed at sentencing because the Eighth  
2 Circuit held, at the urging of the government  
3 in this case, that the MVRA imposes only a  
4 civil remedy. As a result, under the effective  
5 date provision of the MVRA, it was in effect at  
6 the time of the sentencing, and it applied  
7 because there was no constitutional barrier to  
8 its application.

9 That is the rationale that the  
10 government argued to the Eighth Circuit below.  
11 The Eighth Circuit accepted that argument. The  
12 government continued to argue that in its brief  
13 in opposition to our cert petition at page 3,  
14 where it, again, said that the MVRA was the  
15 statute that governed this restitution order.

16 JUSTICE JACKSON: And isn't your key  
17 point that regardless, regardless of what  
18 happened 30 years ago, today, your client is  
19 being held to the responsibilities of the MVRA?

20 MS. SAHARIA: Absolutely, Your Honor.  
21 The --

22 JUSTICE JACKSON: So, you know, you  
23 still, I would think, have an ex post facto  
24 argument because no one disputes that the MVRA  
25 was not in existence at the time he committed

1 the crime.

2 MS. SAHARIA: Correct. We all agree  
3 that the statute that is being applied  
4 retroactively is the MVRA.

5 JUSTICE JACKSON: Is the MVRA.

6 MS. SAHARIA: Correct. We couldn't  
7 make an argument that the VWPA was applied  
8 retroactively. That was in effect at the time  
9 of the offense in this case.

10 JUSTICE JACKSON: And, of course, you  
11 would win if you did because then he couldn't  
12 be held to the very provision that you are  
13 trying to get nullified.

14 MS. SAHARIA: That is the argument  
15 that -- that we will make on remand if we end  
16 up on remand. I think the government takes a  
17 different position on that issue. They think  
18 that the MVRA's liability period provision can  
19 apply even if the restitution order was -- was  
20 imposed under the VWPA. But that would be an  
21 issue for the Eighth Circuit to resolve on  
22 remand.

23 Now, on the merits, I will just start  
24 by saying that it's crystal-clear that  
25 restitution is part of the criminal sentence.



1 This Court said that in Manrique, and there are  
2 a number of textual indications of that fact in  
3 the statute. Starting with Section 3556, which  
4 is in the chapter entitled Sentences, that  
5 provision instructs courts to impose  
6 restitution in imposing a sentence on a  
7 defendant. It then points courts to 3663 for  
8 discretionary restitution and 3663A for  
9 mandatory restitution, both of which instruct  
10 courts to impose restitution when sentencing a  
11 defendant.

12 In numerous parts of the code, the  
13 court -- Congress used language, the language  
14 "a sentence of restitution." For instance, in  
15 3611, it said a person who has been sentenced  
16 to pay a fine, assessment, or restitution,  
17 sentenced to pay restitution. And it makes  
18 sense that Congress made restitution part of  
19 the sentence because it viewed restitution as a  
20 punishment that had consequences for other  
21 criminal punishments.

22 JUSTICE ALITO: Section 3664(m) allows  
23 victims to enforce restitution as a judgment  
24 lien under state law. Are you aware of any  
25 criminal punishments that victims can enforce

1 personally?

2 MS. SAHARIA: No. I think this is  
3 probably the only one. The MVRA gives victims  
4 a very limited right to enforce restitution by  
5 obtaining a lien on property within the state  
6 where the conviction was imposed.

7 It does not give victims the full  
8 range of civil enforcement mechanisms, such as  
9 garnishment, for instance. It does give that  
10 full range of enforcement mechanisms to the  
11 attorney general. The attorney general has the  
12 same authority to collect restitution as -- as  
13 she does to collect fines. And it's telling  
14 that Congress treated restitution just like  
15 criminal fines, both in terms --

16 JUSTICE ALITO: But doesn't -- doesn't  
17 the fact that the victims can enforce the  
18 restitution order themselves cut strongly  
19 against your argument that -- that restitution  
20 is penal rather than -- than looking to -- to  
21 provide remedies for the victims?

22 MS. SAHARIA: I don't think so when  
23 you look at the entirety of the statutory  
24 scheme. Again, first, the fact that it is part  
25 of the sentence. Second, that the sentence can

1 be enforced not only through civil liens but  
2 through the defendant's freedom.

3 This Court made that point in  
4 Pennsylvania Department of Welfare versus  
5 Davenport, where it noted that restitution  
6 obligations differ from ordinary civil  
7 obligations because they are secured by the  
8 defendant's freedom.

9 In Section 3614, Congress authorized  
10 courts to -- to impose any term of imprisonment  
11 that may have originally been imposed as a  
12 re-sentence in cases where defendants fail to  
13 pay both restitution and criminal fines.

14 JUSTICE KAVANAUGH: You -- you --

15 CHIEF JUSTICE ROBERTS: Is -- is there  
16 any reason you can't have a civil proceeding  
17 running parallel to the criminal proceeding?

18 You know, there -- there's a -- a  
19 state has an agency to allocate fault in the  
20 case of auto -- auto accidents, you know, and  
21 whoever has to pay, you know, and somebody  
22 steals a car and, you know, crashes the car and  
23 he's criminally prosecuted for that and, on the  
24 same -- in the same accident, just has to go  
25 through a civil process where he may also be

1       assessed a fine.

2               Is there -- is there anything wrong  
3       with that?

4               MS. SAHARIA: No. I think Congress  
5       could have chosen to do something like that.

6               Now, depending on how it was  
7       structured, that may raise some serious  
8       problems under the Seventh Amendment, but  
9       putting the Seventh Amendment consequences of  
10      such a scheme aside, Congress might have  
11      created such a system. But that's not what it  
12      did here.

13              JUSTICE KAVANAUGH: Could it just say,  
14      we intend this to be civil, and have the  
15      operations of the statute operate in the same  
16      way and then we would say it's civil?

17              In other words, it seems odd that  
18      so much turns on the label as opposed to the  
19      operations of how the statute works.

20              MS. SAHARIA: Well, I think, if  
21      Congress perhaps just said the word "civil"  
22      but did everything exactly the same, we would  
23      still be before you arguing that that is  
24      quintessential criminal punishment. But this  
25      Court has said that the -- that the inquiry at

1 the first step of the criminal punishment --

2 JUSTICE KAVANAUGH: Quintessential  
3 why, if it's payment to the victim, just like  
4 a tort suit? I know some folks have  
5 characterized this as just a -- tort suit-like.

6 MS. SAHARIA: Sure. I think, if  
7 it's -- if it's still part of the sentence that  
8 is imposed by the sentencing court as part of  
9 the sentence, together with imprisonment,  
10 fines, probation, all of the other criminal  
11 punishments, I think our position would still  
12 be that is criminal punishment. But Congress  
13 could have written a different statute that  
14 would have accomplished something civil, again,  
15 wrestling with the Seventh Amendment  
16 consequences of that.

17 The Seventh Amendment is, I think,  
18 important here because it is part of the  
19 backdrop against which Congress legislated in  
20 the MVRA.

21 In the wake of the VWPA, which was the  
22 predecessor to the MVRA, the courts of appeals  
23 uniformly rejected Seventh Amendment challenges  
24 to restitution on the ground that restitution  
25 is criminal punishment.

1           This Court commented on that uniform  
2     consensus in Kelly versus Robinson before  
3     Congress enacted the MVRA. This Court also  
4     construed the VWPA in Hughey before the MVRA  
5     and applied lenity to the VWPA as a criminal  
6     statute.

7           All of that is part of the backdrop  
8     against which Congress enacted the MVRA. And  
9     not only did Congress not do anything to signal  
10    it was intending to depart from that consensus,  
11    but it carried forward the same operative  
12    language from Section 3663 in the VWPA.

13           JUSTICE JACKSON: And in its  
14    legislative history, didn't it seem as though  
15    Congress was pretty clear that this was not  
16    just about compensating the victims? I mean,  
17    I see here a quote that Congress says that the  
18    MVRA is "needed to ensure that the loss to  
19    crime victims is recognized and that they  
20    receive the restitution that they are due. It  
21    is also necessary to ensure that the offender  
22    realizes the damage caused by the offense and  
23    pays the debt owed to the victim as well as  
24    society."

25           So it seems as though, at a minimum,

1 Congress was doing more than just saying the  
2 victim has to be compensated, and if that's the  
3 case, why is it characterized as a criminal  
4 statute if there are two motives operating?

5 MS. SAHARIA: Sure. May I answer?

6 CHIEF JUSTICE ROBERTS: Please.

7 MS. SAHARIA: So, to take those  
8 questions in -- in two parts, first,  
9 absolutely, Congress made crystal-clear in the  
10 legislative history that it thought the MVR --  
11 MVRA was a criminal statute. If you read the  
12 Senate Judiciary Committee Report, it uses the  
13 word "criminal" more than 40 times, and the  
14 only time it uses the word "civil" is to  
15 distinguish restitution from civil proceedings.

16 Now, to take the second part of Your  
17 Honor's question, the -- the inquiry that this  
18 Court has adopted for when is something  
19 criminal punishment just asks whether Congress  
20 intended to create criminal punishment. And  
21 whether it has some other purpose, such as  
22 here compensation, such as in the case of  
23 imprisonment, protecting the public, doesn't  
24 matter because all punishments serve more than  
25 one purpose.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas, anything further?

4 Justice Alito?

5 JUSTICE ALITO: What will be left of  
6 Smith if we rule in your favor?

7 Suppose that a state sex offender law  
8 provided that the sentencing judge would  
9 determine how long an offender needed to  
10 register. Or suppose that the state could  
11 summarily revoke probation if a defendant  
12 failed to maintain his registration.

13 Would that mean that the sex offender  
14 law would be penal?

15 MS. SAHARIA: Not necessarily, Your  
16 Honor. We don't think there is any  
17 inconsistency between a holding in our favor  
18 here and Smith.

19 In Smith, the -- the requirement to  
20 register as a sex offender was not imposed as  
21 part of the sentence.

22 The -- the legislature used the  
23 sentencing process simply to notify the  
24 offender of the need to register, but it was  
25 not imposed as a punishment.



1           There is a distinction between the  
2 sentence itself and conditions of release or  
3 probation. Those are conditions on the  
4 sentence but are not the sentence itself.

5           So we don't think that a condition of  
6 release, such as the obligation to register as  
7 a sex offender, would -- would necessarily  
8 amount to criminal punishment in the same way  
9 that conditions of imprisonment, like cell  
10 phone restrictions, are not themselves  
11 punishment.

12           JUSTICE ALITO: Would you say that  
13 the primary function of restitution under this  
14 statute, the statute you would like us to  
15 apply, is penal or -- or civil?

16           MS. SAHARIA: We think the --

17           JUSTICE ALITO: The primary  
18 function -- is -- is the primary function to  
19 punish, or is the primary function to provide  
20 compensation for -- to make victims whole to  
21 the extent possible? Which is primary?

22           MS. SAHARIA: The -- the court in  
23 Paroline said the primary purpose is  
24 compensation. But we think the penal purpose  
25 here is just as -- just as important and

1 primary, I would say, as the -- as the  
2 compensatory purpose.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor?

5 JUSTICE SOTOMAYOR: Under the statute,  
6 drug offenses order restitution to the society,  
7 don't they?

8 MS. SAHARIA: Yes. And we think --

9 JUSTICE SOTOMAYOR: So it's -- that's  
10 why you're saying it's equal?

11 MS. SAHARIA: Yes. That's a very good  
12 indication that Congress was intending to do  
13 more than simply compensate individual victims.

14 JUSTICE SOTOMAYOR: Number two,  
15 our ex post facto jurisprudence has three  
16 components: Was it being applied to previous  
17 conduct, the first is the question before us,  
18 is it criminal or civil, but that there is a  
19 third component, does it increase punishment.

20 On that question, there's a circuit  
21 split, and we didn't grant cert on that,  
22 correct?

23 MS. SAHARIA: That's correct.

24 JUSTICE SOTOMAYOR: So this, at worst,  
25 would be a reverse remand?

1 MS. SAHARIA: Yes, we agree with that,  
2 and I think the government does as well.

3 JUSTICE SOTOMAYOR: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: What about these  
6 provisions that say that on the one hand, the  
7 award is offset by any civil judgment received,  
8 and on the other hand, that the victim can keep  
9 coming in, you know, however many years later  
10 to offer proof of further damages?

11 That really -- both of those seem very  
12 odd if the statute is primarily punitive.

13 MS. SAHARIA: Sure. So, as to the  
14 first one, we think that feature of the scheme  
15 supports us as a matter of statutory  
16 construction because those provisions, which  
17 are in 3664(j) and (l), distinguish between  
18 what happens at restitution -- at sentencing,  
19 at the imposition of restitution, and what  
20 happens in a subsequent civil proceeding.

21 And the fact that Congress used the  
22 word "civil" proceeding in those particular  
23 provisions, we think, makes quite clear that it  
24 understood that what is happening at sentencing  
25 when restitution is imposed is not a civil

1 proceeding.

2 Now, as to the second point, the fact  
3 that victims can come back at future points,  
4 first, that is cabined by a good-cause  
5 requirement. There needs to be some reason why  
6 that was not presented to the sentencing court  
7 at the time of sentencing.

8 But putting that aside, we think that  
9 one particular feature of the statute, similar  
10 to the -- the narrow opportunity to obtain a  
11 civil lien, just doesn't overcome all of the  
12 indications that Congress understood it was  
13 imposing a sentence.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Gorsuch?

17 Justice Kavanaugh?

18 Justice Barrett?

19 Justice Jackson?

20 Thank you, counsel.

21 MS. SAHARIA: Thank you.

22 CHIEF JUSTICE ROBERTS: Ms. Robertson.

23 ORAL ARGUMENT OF ASHLEY ROBERTSON

24 ON BEHALF OF THE RESPONDENT, SUPPORTING VACATUR

25 MS. ROBERTSON: Mr. Chief Justice, and

1     may it please the Court:

2                 Congress implemented restitution under  
3     the Mandatory Victims Restitution Act as  
4     criminal punishment.

5                 The text makes plain first that  
6     restitution is punishment. In the statute's  
7     terms, it is a penalty or sanction.

8                 And, Justice Alito, to your question,  
9     that fact alone distinguishes restitution in  
10    this case from the registration requirements at  
11    issue in Smith versus Doe, which the Court held  
12    wasn't punishment at all.

13                Then the Court has to consider whether  
14    this is criminal or civil punishment. And we  
15    think the text is equally plain that it is  
16    criminal. Restitution is imposed for a  
17    criminal offense on a criminal defendant at  
18    criminal sentencing, where the United States  
19    stands as the adversarial party.

20                And if there were any doubt, the  
21    statutory history dispels it. The court of  
22    appeals had uniformly held that restitution  
23    under a predecessor statute was criminal  
24    punishment, and Congress replicated the  
25    relevant language in the MVRA and doubled down

1 on features indicating a punitive intent.

2 This Court should vacate so the court  
3 of appeals can consider in the first instance  
4 the United States' alternative arguments for  
5 affirmance.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Does it make a  
8 difference if this sanction was imposed in a  
9 separate proceeding?

10 MS. ROBERTSON: Does it make a  
11 difference if it had been imposed outside of  
12 the sentencing --

13 JUSTICE THOMAS: Yeah.

14 MS. ROBERTSON: -- context? Well, I  
15 don't think it would change the nature of  
16 restitution as punishment given that Congress  
17 refers to it as a penalty, but it might change  
18 whether we conceive of it as a civil penalty  
19 like the administrative penalties at issue in  
20 Hudson or in Ward or whether we consider it a  
21 criminal punishment.

22 The fact that this penalty is imposed  
23 in criminal -- in a criminal proceeding is one  
24 strong indication that it is meant to serve as  
25 criminal punishment.

1 JUSTICE THOMAS: Do you think that all  
2 sanctions imposed in criminal proceedings are,  
3 in fact, penal or criminal?

4 MS. ROBERTSON: So I think this is an  
5 important distinction, Justice Thomas, and I  
6 want to be clear that we do distinguish between  
7 what is part of a criminal sentence and what  
8 occurs at criminal sentencing because we agree  
9 with amicus that not everything that occurs in  
10 criminal sentencing or even that appears in a  
11 criminal judgment is necessarily part of the  
12 punishment and, therefore, part of the criminal  
13 defendant's sentence.

14 So the classic example here would be  
15 the registration requirements at issue in Smith  
16 versus Doe because those requirements were  
17 announced at sentencing. They even appeared in  
18 a judgment. But that didn't make them part of  
19 the sentence because they weren't meant to add  
20 to the defendant's punishment at all.

21 So, here, it is quite important to our  
22 analysis that Congress has specified that  
23 restitution itself is meant to serve as a  
24 penalty or a sanction. And that is a point  
25 that we would hope that the Court would be

1 clear on in its analysis because we do think  
2 that there are things that might come up at  
3 criminal sentencing, including conditions of  
4 supervised release, that we wouldn't conceive  
5 of as punishment at all.

6           So we do think that when the Court  
7 engages in the statutory construction here, it  
8 is paramount to us that Congress labeled this  
9 as a penalty or a sanction, and we think that  
10 that really washes away many of amicus's  
11 arguments about the non-punitive purposes that  
12 restitution might serve because, of course, we  
13 agree that restitution can serve important  
14 compensatory goals, but when Congress has told  
15 us expressly that it intends restitution to be  
16 punitive, it intends it to be a penalty, that  
17 answers the question as a matter of statutory  
18 construction.

19           JUSTICE KAVANAUGH: So what -- just to  
20 summarize, what should we say, in your view, in  
21 the opinion to prevent the spillover effect  
22 that you're concerned about? What are the key  
23 components?

24           MS. ROBERTSON: So we think there  
25 would be two important points for the Court to



1     make in the opinion. First is to be clear that  
2     it is resolving this as a matter of statutory  
3     construction under step 1, not under step 2, of  
4     the Mendoza-Martinez test because we do think  
5     restitution is the type of penalty that can be  
6     implemented as either criminal or civil.

7             And Congress and state legislatures  
8     have chosen in some circumstances to implement  
9     restitution as a civil penalty. So we think a  
10    decision that makes clear that the Court is  
11    resting on a matter of statutory construction  
12    under the MVRA will leave appropriate room for  
13    legislatures in future cases to treat  
14    restitution as civil.

15            When it comes to statutory  
16    interpretation, we think it's important that  
17    the Court not single out any one particular  
18    feature that makes restitution a criminal  
19    punishment. Rather, we think it's important  
20    both that the text is plain that it is  
21    punishment, as I said, it's referred to as a  
22    penalty. Elsewhere, it's referred to as a  
23    sanction. Elsewhere, the text refers to  
24    defendants who are sentenced to restitution or  
25    a sentence of restitution.

1                   And then, when it comes to the  
2     question of whether it's a criminal punishment,  
3     it's important to us that all the textual clues  
4     here point in the same direction, and that  
5     includes that restitution is predicated on a  
6     criminal conviction, that it's imposed  
7     personally against the criminal defendant, that  
8     it occurs at criminal sentencing, that for  
9     misdemeanor offenses it's the only punishment a  
10    defendant might receive, that it's the United  
11    States that is the adversarial party that can  
12    enforce restitution, and the obligation to  
13    impose restitution in the first instance and  
14    then exercises the primary authority on the  
15    back end, and then, on top of all of that, that  
16    restitution is codified within the criminal  
17    code.

18                  JUSTICE KAGAN:   So, if I can  
19    paraphrase, Ms. Robertson, your suggestion to  
20    us is that we throw in absolutely everything --

21                  (Laughter.)

22                  JUSTICE KAGAN:   -- so that in some  
23    future case we will be sure to have some sort  
24    of distinction?

25                  MS. ROBERTSON:   I think our test

1     here --

2                     (Laughter.)

3                     MS. ROBERTSON:  -- is consistent with  
4     any ordinary principle of statutory  
5     construction, which is we don't want to suggest  
6     there are hard-and-fast rules here.  And, yes,  
7     we -- we do say --

8                     JUSTICE KAVANAUGH:  You can say yes.  
9     You can just say yes.

10                    (Laughter.)

11                    MS. ROBERTSON:  We do think it's  
12     important to rely on all the textual clues.

13                    JUSTICE ALITO:  Well, what about the  
14     prior statute?  Was that -- was that punitive  
15     too?

16                    MS. ROBERTSON:  Yes, we do think that  
17     restitution under the VWPA was criminal  
18     punishment.  The government took that position  
19     when it --

20                    JUSTICE ALITO:  Well, then what do you  
21     do with -- what do you have to say about  
22     Section 2 of the VWPA, which says explicitly  
23     the purpose of this is to -- is to help  
24     victims?

25                    MS. ROBERTSON:  The reason that the

1 government took the position when this question  
2 was litigated that the VWPA was criminal  
3 punishment is because that statute uses similar  
4 language to the one at issue here. It does  
5 refer to restitution as a penalty. There was  
6 also plenty of statements within the  
7 legislative history there that Congress  
8 intended a --

9 JUSTICE ALITO: Well, legislative  
10 history --

11 MS. ROBERTSON: -- penological  
12 purpose.

13 JUSTICE ALITO: -- legislative  
14 history, in the statute itself, Congress  
15 lamented that the criminal justice system had  
16 ignored the physical, psychological, and  
17 financial hardship of victims, found that the  
18 criminal justice system focused only on  
19 identifying and punishing offenders. As a  
20 consequence, victims had lost valuable property  
21 to a criminal -- to the criminal. Congress  
22 enacted with the -- that Act with the stated  
23 purpose of ensuring that the federal government  
24 does all that is possible within limits of  
25 available resources to assist victims.

1           If this is -- if this turns on  
2   congressional intent, how much clearer could  
3   congressional intent be than that right in the  
4   statute itself?

5           MS. ROBERTSON: Well, we would draw a  
6   line between whether Congress intends something  
7   to be punishment and the purposes that a  
8   particular punishment might serve. It's not  
9   unusual, for instance, for criminal fines to  
10   serve a compensatory purpose. By statute, most  
11   criminal fines are obligated to the crime  
12   victims fund.

13           So we -- we do think that a punishment  
14   can serve a compensatory purpose, but there's  
15   still the threshold question of whether  
16   Congress intended to implement the measure as a  
17   punishment. And for purposes of this --

18           JUSTICE ALITO: Well, I thought the  
19   question was congressional intent. If Congress  
20   says our intent is to assist victims, isn't  
21   that open and shut then?

22           MS. ROBERTSON: Well, we think the  
23   fact that Congress refers to restitution as a  
24   penalty is similar to saying restitution is  
25   punishment. And there's no plainer statement

1 of intent than that from the text. But, for  
2 purposes of this case, I think it is important  
3 that whatever questions might have existed  
4 about the VWPA when it was first enacted, the  
5 courts of appeals uniformly treated VWPA as  
6 criminal punishment. That's a consensus that  
7 this Court observed in Kelly. Congress was  
8 legislating against that backdrop.

9 JUSTICE ALITO: Well, maybe that's --  
10 maybe they were right, maybe they weren't.  
11 Maybe they, like possibly you, are worried  
12 about the -- the consequences of saying that  
13 it's not -- that it's not penal. But then you  
14 have the VWPA followed by the MVRA, the  
15 mandatory victims, talks expressly about  
16 victims. Doesn't that show what Congress was  
17 getting at?

18 MS. ROBERTSON: Again, we don't want  
19 to -- to gainsay the important role that  
20 victims play in -- in Congress's motivation  
21 here, but just as to the threshold question, we  
22 do think Congress's intent to implement  
23 criminal punishment is clear.

24 And as to the consequences, there is a  
25 real consequence to treating restitution under

1 the MVRA as a civil penalty, and that's the  
2 concerns that it would implicate the Seventh  
3 Amendment. We think that that was the true  
4 concern that was outlined.

5 JUSTICE KAVANAUGH: And -- and  
6 we're --

7 JUSTICE BARRETT: Ms. Robertson -- oh.

8 JUSTICE KAVANAUGH: Go ahead.

9 JUSTICE BARRETT: Ms. Robertson, I  
10 just wanted to ask you analytically, and, you  
11 know, I'll show my cards and say just because  
12 of thinking about this DIG argument, do you  
13 think analytically we should be thinking about  
14 these as two distinct statutes, or should we be  
15 thinking about the VWPA and the MVRA as just  
16 different amendments to the same basic statute?

17 MS. ROBERTSON: We think that you can  
18 think today of both Section 3663 and 3663A as  
19 part of the MVRA because restitution imposed  
20 under either scheme would be subject to all of  
21 the MVRA's many provisions, including its  
22 collection authorities, its procedural  
23 safeguards, and all of those provisions are  
24 relevant to the Court's analysis.

25 But, to be direct about the DIG, if

1 the Court wants to identify the provision at  
2 issue here, we do think it should take the case  
3 on the premise that it's Section 3663A. That  
4 was the government's position before the court  
5 of appeals. The court of appeals accepted that  
6 premise. Petitioner is no longer disputing it  
7 or asking this Court to revisit that factual  
8 predicate.

9 And so we think it's appropriate for  
10 the Court to resolve this case on the same  
11 basis that we asked the Eighth Circuit to rule  
12 in our favor below.

13 JUSTICE JACKSON: And that section was  
14 not in effect when he committed the crime,  
15 correct?

16 MS. ROBERTSON: That's correct. So  
17 Section --

18 JUSTICE JACKSON: So that's the --  
19 that's the source of the ex post facto problem.  
20 No matter what happened at sentencing, at the  
21 time he committed the crime, 3663A was not in  
22 effect, and today he's being held to account  
23 under that provision?

24 MS. ROBERTSON: That's correct,  
25 Justice Jackson. I would make one



1 clarification. The MVRA by its terms applied  
2 to Petitioner. So, if the district court  
3 didn't apply 3663A, it could have only done so  
4 if it determined that that provision was  
5 criminal punishment, the very question at issue  
6 here.

7 Now there would be a separate question  
8 as to whether the limitations period that the  
9 government is currently attempting to apply to  
10 Petitioner might constitutionally apply. It's  
11 our position that it could, even though his  
12 restitution obligation was criminal punishment,  
13 because we don't think increasing the time to  
14 collect restitution increases his punishment.

15 JUSTICE JACKSON: That's the argument  
16 you want to preserve?

17 MS. ROBERTSON: But that's the -- the  
18 argument we're trying to preserve for remand.

19 JUSTICE JACKSON: Can I just go back  
20 to Justice Alito's colloquy with you because I  
21 guess I'm still wondering whether your argument  
22 flows from the idea that there might be  
23 different purposes of punishment and that you  
24 could have a punitive measure that is imposed  
25 for rehabilitative circumstances and with an

1 idea that you were making this person pay back  
2 society, you're making this person make amends  
3 for what it is that he's done, but it really is  
4 still a part of the punishment in the way that  
5 theorists have traditionally understood various  
6 purposes of punishment.

7 MS. ROBERTSON: We think that's right.  
8 And this Court made a similar observation in  
9 Kelly itself where it said that restitution  
10 serves as a particularly effective  
11 rehabilitative penalty precisely because it  
12 forces the offender to confront in concrete  
13 terms the harms that his actions have caused to  
14 a real person, more than a fine, which is paid  
15 to an abstract entity like the state would.

16 It also serves a particularly  
17 effective deterrent purpose for that reason  
18 that closely aligning the punishment that the  
19 defendant faces with the harm that he's caused.

20 JUSTICE JACKSON: So, even if -- even  
21 if it's defend -- even if it's victim-focused,  
22 it can still be punitive in this way?

23 MS. ROBERTSON: Yes, absolutely. And  
24 we do think that this punishment here serves  
25 penological goals as well as compensatory ones.

1 JUSTICE JACKSON: Thank you.

2 JUSTICE KAVANAUGH: With respect to  
3 our opinion, if we rule in your favor, you also  
4 want us to say something about the Sixth  
5 Amendment or to avoid saying anything  
6 problematic about the Sixth Amendment, correct?

7 MS. ROBERTSON: That's --

8 JUSTICE KAVANAUGH: What -- what  
9 should -- what -- what do you suggest?

10 MS. ROBERTSON: We think that the  
11 cleanest way to resolve this case when it comes  
12 to constitutional avoidance is to recognize  
13 that constitutional avoidance only comes into  
14 play where, after exhausting all the ordinary  
15 tools of construction, the court is left with  
16 competing interpretations that are plausible,  
17 and one would avoid constitutional concerns.

18 Here, we don't think that there are  
19 competing plausible constructions. We think  
20 that Congress's intent is unambiguous. We also  
21 don't think that there's a construction that  
22 would avoid constitutional concerns because  
23 calling restitution a civil penalty would raise  
24 Seventh Amendment --

25 JUSTICE KAVANAUGH: You might be

1 referring to the Seventh Amendment.

2 MS. ROBERTSON: Yeah.

3 JUSTICE KAVANAUGH: My question was  
4 about your footnote about the Sixth Amendment.

5 MS. ROBERTSON: Right. So we don't  
6 think that the -- the -- the Court would only  
7 need to address the Sixth Amendment if there  
8 were a legitimate claim to be made for  
9 constitutional avoidance. And we simply think  
10 that there's no legitimate claim here because  
11 there are constitutional concerns on either  
12 side.

13 Of course, even if the Court agrees  
14 with us that restitution is criminal  
15 punishment, we have alternative arguments for  
16 why restitution wouldn't implicate this Court's  
17 decision in Apprendi which we would continue to  
18 make.

19 JUSTICE KAVANAUGH: Right. That's  
20 what I was getting at.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Thomas, anything further?

23 Justice Alito?

24 Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Even if this were  
4 civil, we -- civil retroactivity is not -- not  
5 something that we countenance without a clear  
6 statement, right?

7 MS. ROBERTSON: So we -- we think that  
8 the Court has been clear that the Ex Post Facto  
9 Clause itself only applies to criminal  
10 punishment.

11 JUSTICE KAVANAUGH: Right. You  
12 disagree with Professor Logan on that. Yes.

13 MS. ROBERTSON: Yes, we do. We do --

14 JUSTICE KAVANAUGH: Yeah.

15 MS. ROBERTSON: -- disagree on that  
16 point. We take the case as a --

17 JUSTICE KAVANAUGH: But we do Landgraf  
18 and other cases, civil retroactivity is  
19 something that's antithetical to basic  
20 rule-of-law notions at least without -- in --  
21 in many instances, not always, not always, but  
22 Landgraf says that too, right?

23 MS. ROBERTSON: So we -- we agree that  
24 it would be unusual for Congress to apply  
25 either a civil or a criminal penalty

1 retroactively, of course -- without, of course,  
2 a clear statement that it intends to do so. We  
3 have that here. Congress clearly intended to  
4 apply the MVRA retroactively to the extent  
5 constitutionally permissible.

6 And it's important to us that many of  
7 the MVRA's provisions can apply retroactively  
8 even though it's criminal punishment because  
9 not all of the MVRA's provisions increase that  
10 punishment.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Jackson? No?

14 Thank you, counsel.

15 MS. ROBERTSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Bash.

17 ORAL ARGUMENT OF JOHN F. BASH

18 COURT-APPOINTED AMICUS CURIAE

19 IN SUPPORT OF THE JUDGMENT BELOW

20 MR. BASH: Thank you, Mr. Chief  
21 Justice, and may it please the Court:

22 I'll take the DIG argument I make  
23 first and then I'll move on to the merits.

24 To clarify the DIG argument, and this  
25 goes to questions from Justice Thomas, Justice

1 Jackson, and Justice Barrett, it's not only  
2 that the time of -- at the time of sentencing  
3 the judgment forms of the old statute.

4 The position of the solicitor general  
5 at the time, consistent with the proviso in the  
6 statute that said only apply this retroactively  
7 to the extent you believe constitutionally  
8 permissible, was not to apply the statute in  
9 cases like this.

10 The district court found in this  
11 proceeding that the sentencing court did not  
12 apply the statute on which the question was  
13 presented in this case. The court of appeals  
14 did not disrupt that finding as far as I can  
15 see. And I don't think it would matter if it  
16 did, but at page 4a of the Pet. App., the court  
17 of appeals says the MVRA is being applied  
18 retroactively in this case, but what it meant  
19 by that was the 20-year extension provision.  
20 But, Justice Jackson, whether that would be an  
21 ex post facto problem turns entirely on what  
22 it's extending.

23 So, if that provision applied to  
24 something that, let's say, this Court had  
25 already determined was a civil penalty, the

1     mere fact that it's contained in the same  
2     statute as a restitution obligation that is  
3     assertedly criminal would not make the  
4     application of the 20-year provision to the  
5     civil penalty into criminal punishment.

6             So I do think, Justice Thomas, that  
7     the Court has to decide what was applied in  
8     this case because the question presented  
9     relates only to the second statute, not the  
10    first statute.

11            And, Justice Barrett, this isn't a  
12    context in which, as Justice Kavanaugh noted,  
13    congressional intent is one of the key  
14    considerations. And the intent behind the '82  
15    statute may have been very different than the  
16    intent behind the '96 statute.

17            And just to respond to one more point  
18    on this, I think I heard the government say  
19    that, well, even if it applied the other  
20    statute, it's all part of the same statute now.  
21    But, remember, the -- what the sentencing court  
22    likely did, consistent with the solicitor  
23    general's position, was apply the pre-MVRA  
24    version of the VWPA. So it's not as if it  
25    applied the amended version, which maybe that



1 would present a closer question on the DIG. It  
2 applied the pre-MVRA version.

3 I see my yellow light, so I'm happy to  
4 take questions from the Court, Mr. Chief  
5 Justice.

6 JUSTICE THOMAS: But it's -- the  
7 considerations between the two different  
8 statutes would on a higher level -- level of  
9 generality be about the same, wouldn't they?

10 I mean, there's not that much  
11 difference and we're not dealing with the --  
12 the -- the -- the increase in time that it --  
13 that it expands at this level. So what  
14 difference would it make?

15 MR. BASH: Justice Thomas, I do think  
16 there are some pretty critical differences  
17 between the statute, although my ultimate --  
18 the two statutes, although my ultimate position  
19 would be that neither are punitive.

20 But one big difference is that  
21 especially under the earlier version of the  
22 VWPA, the sentencing court could not only  
23 decide whether to enter restitution amount --  
24 award but decide the amount based on ordinary  
25 penological considerations, culpability, the

1 defendant's circumstances, whether the  
2 defendant has dependents and so forth.

3 That is prototypical of the criminal  
4 justice system, which focuses a lot on the  
5 circumstances of the offense and the defendant.  
6 The -- the MVRA is totally different. The MVRA  
7 is a pure compensation regime that parallels  
8 the tort system. It does not care about the  
9 defendant's culpability. It does not care if  
10 the defendant has dependents. It's full  
11 restitution.

12 That is characteristic of the civil  
13 tort system. And so I do think there are  
14 differences. The legislative history is very  
15 different. The MVRA is way more focused on  
16 victim compensation than is the legislative  
17 history of the VWPA.

18 JUSTICE THOMAS: Would -- would it  
19 have made a difference had there been a  
20 separate proceeding that looked more like a  
21 civil proceeding than doing this at the  
22 sentencing stage?

23 MR. BASH: I think that would make it  
24 an easier case, but I don't think the outcome  
25 should turn on it. So let me just put it this

1 way. Virtually every feature of this statute,  
2 it's full restitution, no less, no more.  
3 There's offsets for civil judgments. The  
4 victim can continue to petition indefinitely  
5 for further compensation, for example, for  
6 medical bills that continue to arise in old age  
7 based on an assault.

8 It can be enforced through a civil  
9 lien. Even when the attorney general enforces  
10 it, he or she enforces it in the manner of a  
11 civil judgment.

12 The defendant has to notify the victim  
13 when his or her ability to pay changes. All of  
14 those are clearly features of a civil  
15 compensatory system.

16 Now, I think if that was set up with a  
17 different case number, where what happened is  
18 the victim or the attorney general could take  
19 advantage of the collateral estoppel effect of  
20 the criminal judgment and just do everything  
21 exactly the same but it had a different case  
22 number on it, I think there would be no  
23 question that the court would consider it a  
24 non-punitive remedy.

25 So I think the question before the

1 Court is if Congress chose, for what I think  
2 are pretty obvious efficiency reasons, to fold  
3 that compensatory remedy into criminal  
4 sentencing, does that make it punitive?

5 Here's the reason -- here's why I  
6 think the answer to that question is no. When  
7 this Court has in the past look -- looked at  
8 the nature of the proceedings to answer this  
9 question, and those were invariably cases in  
10 which the proceedings were civil and so the  
11 Court said the remedy was civil, there was  
12 really no other explanation for why Congress  
13 chose that form of proceeding than that it  
14 intended the remedy to be civil in nature.  
15 That's not true here.

16 Here there's a preexisting criminal  
17 proceeding that will happen, no matter if  
18 there's restitution or not, in order to impose  
19 a criminal judgment and imprisonment and so  
20 forth. And there's a perfectly plausible and I  
21 think likely explanation for why Congress  
22 folded this compensatory remedy into this  
23 proceeding, which is is way more efficient to  
24 get victims the compensation they need --

25 JUSTICE JACKSON: But your argument --

1 MR. BASH: -- and do all sentencing --

2 JUSTICE JACKSON: -- it just seems to  
3 beg the question, right? The question is  
4 whether Congress intended this to be a  
5 compensatory remedy. We're not sort of asking,  
6 well, why did Congress put this compensatory  
7 remedy here; we're asking, is this  
8 compensatory, meaning civil, or not?

9 And I guess I feel like you're  
10 struggling a little bit against the weight of  
11 all of the consensus that existed with regard  
12 to the VWPA. The preexisting statute that this  
13 statute was amending everybody thought was  
14 criminal. It was all over the legislative  
15 history. It was in the statute. It was -- no  
16 one questioned it.

17 And so I guess I'm asking you, is  
18 there some kind of indication that Congress was  
19 intending to shift or depart from that  
20 well-established understanding when it enacted  
21 this statute that was just amending the prior  
22 one?

23 MR. BASH: There is substantial  
24 indications, Justice Jackson, and here they  
25 are. I'd start with the structure of the

1 statute. Under the VWPA as it existed when  
2 those courts of appeals decisions were  
3 rendered, the sentencing court could take into  
4 account culpability, deterrence, just  
5 punishment, the circumstances of the defendant  
6 and his or her dependents in deciding not only  
7 whether to impose restitution but in  
8 calibrating the amount. In that respect --

9 JUSTICE JACKSON: Right. So they made  
10 it mandatory. You didn't -- you don't get to  
11 take those things into account. But why does  
12 that mean that it becomes less criminal?

13 MR. BASH: Because that is the  
14 prototypical characteristic of the civil tort  
15 system. When you sue somebody for injuring you  
16 or defrauding you, and the jury says, yes, they  
17 did it and now we need to award damages, the  
18 jury cannot take into account, well, I think  
19 this person's going to reform themselves; this  
20 was their first offense. The jury cannot take  
21 into account this person -- this defendant has  
22 dependents and we want to calibrate this. None  
23 of that's relevant.

24 The characteristic of the civil tort  
25 system is the same as the MVRA, full

1 compensation and no more. So that is why  
2 there's a huge difference between the MVRA and  
3 both the VWPA and the state system that this  
4 Court considered in Kelly.

5 But can I just offer you a syllogism  
6 that I think makes the point especially clear?

7 JUSTICE JACKSON: Sure.

8 MR. BASH: So two propositions, both  
9 from this Court's case law. One, in -- in a  
10 lot of cases going back to Helvering versus  
11 Mitchell in '38 and Marcus versus Hess in '43,  
12 this Court has said that when a remedy is  
13 compensatory, it is not punitive. And even  
14 treble damages provisions, the Court said,  
15 well, that's a rough form of liquidated  
16 damages --

17 JUSTICE JACKSON: I'm sorry. Was this  
18 in criminal cases or are these civil cases?  
19 I'm not --

20 MR. BASH: These were cases deciding  
21 that a remedy was not punitive, I think in the  
22 double jeopardy context. So it was --

23 JUSTICE JACKSON: But in the context  
24 of a civil action?

25 MR. BASH: These were civil actions.

1 That's true.

2 JUSTICE JACKSON: Okay.

3 MR. BASH: That's true. That is a  
4 distinction here, and I can address that here  
5 in a second. But this Court --

6 JUSTICE JACKSON: I mean, isn't that  
7 relevant? We're in the contention of a  
8 criminal proceeding and the court, the  
9 sentencing court, is imposing this as part of  
10 the punishment.

11 MR. BASH: It -- it -- it's relevant,  
12 but as I said to Justice Thomas a few moments  
13 ago, I think the nature of the proceedings has  
14 been relevant when it gives rise to an  
15 unavoidable inference about what Congress  
16 intended, but it's very different here where  
17 those proceedings would happen either way and  
18 there's an obvious efficiency --

19 JUSTICE JACKSON: What do you with the  
20 legislative history for the MVRA where Congress  
21 says it is needed to ensure that the loss to  
22 crime victims is recognized and that they  
23 receive the restitution they are due; it is  
24 also necessary to ensure that the offender  
25 realizes the damage caused by the offense and



1 pays the debt owed to the victim as well as  
2 society?

3 That second sentence --

4 MR. BASH: And -- and that --

5 JUSTICE JACKSON: -- sounds very  
6 rehabilitative to me, which is a purpose of  
7 punishment.

8 MR. BASH: And that's exactly the  
9 second part of the syllogism I wanted to get  
10 to. In 89 Firearms, one of this Court's cases  
11 in this area, the Court said that the inquiry  
12 -- inquiry is whether the remedy is more  
13 remedial than punitive. In both Paroline,  
14 which is one of my opponent's favorite cases,  
15 and Dolan, this Court said the primary purpose  
16 of restitution is remedial.

17 If you put those two things together,  
18 if the question is whether it's more remedial  
19 than punitive -- and this cuts to a lot of the  
20 questions Justice Alito was asking to my  
21 friends on the other side -- clearly this  
22 compensatory tort-like system is more remedial  
23 than punitive. It's designed to give victims  
24 compensation.

25 The last thing I'd say about that,

1 Justice Jackson, is this Court has repeatedly  
2 recognized that virtually any monetary exaction  
3 or other sanction, whether civil or not, has a  
4 deterrent effect --

5 JUSTICE GORSUCH: Mr. --

6 MR. BASH: -- just like the tort  
7 system has a deterrent effect.

8 JUSTICE GORSUCH: -- Bash, on -- on --

9 MR. BASH: When you get at -- I'm  
10 sorry, Justice Gorsuch.

11 JUSTICE GORSUCH: No, no. Please  
12 finish your --

13 MR. BASH: I mean, just like the tort  
14 system has a deterrent effect. That's a --  
15 that's a big purpose of the tort system, is to  
16 deter tortfeasors from doing torts. But that  
17 doesn't make it punitive. And so if the only  
18 deterrent effect that arises from a monetary  
19 exaction is the deterrent effect that any form  
20 of compensation would have on the relevant  
21 behavior, then that's not enough to shift the  
22 balance from remedial to punitive.

23 Justice Gorsuch, I'm sorry.

24 JUSTICE GORSUCH: I just wanted to  
25 give you an alternative hypothesis about the

1 shift between the VWPA and the MVRA going from  
2 more discretionary amounts to a mandatory  
3 amount.

4 Could Congress have thought, yeah,  
5 this is punishment -- for sure, it's punishment  
6 -- for all the reasons your friends on the  
7 other side say and all the courts of appeals  
8 concluded with respect to the VWPA, but  
9 district courts are simply not exercising their  
10 discretion appropriately and we're going to  
11 take that discretion away, in much the same way  
12 that sometimes Congress takes discretion in  
13 sentencing prison terms away and creates  
14 mandatory minimums. Thoughts?

15 MR. BASH: Well, I -- I think it's  
16 conceivable that Congress could have had that  
17 intent, but at least in terms of the  
18 legislative history of the MVRA, nothing like  
19 that is shown. What's shown --

20 JUSTICE GORSUCH: How about the MVRA?  
21 Isn't it pretty clear that's -- that was what  
22 was going on?

23 MR. BASH: I think what's -- in the  
24 MVRA?

25 JUSTICE GORSUCH: Yeah. Congress

1     thought discretion needed to be taken -- more  
2     discretion had to be taken away.

3             MR. BASH:  Oh.  Oh, no, Justice  
4     Gorsuch.  I think what Congress looked at was  
5     an epidemic of hospitalizations and fraud  
6     wiping out people's life savings and it being  
7     too hard for victims to get the compensation  
8     they needed.

9             JUSTICE GORSUCH:  Oh, okay.  All  
10    right.  And -- and -- and the awards were not  
11    appropriate.  They needed to be more severe.

12            MR. BASH:  Well, you know, they needed  
13    to be more compensatory.

14            JUSTICE GORSUCH:  Okay.

15            MR. BASH:  As I said, in cases like  
16    Marcus versus Hess and Helvering versus  
17    Mitchell, the compensatory nature of a remedy  
18    has been the lode star --

19            JUSTICE GORSUCH:  It -- it could be  
20    more --

21            MR. BASH:  -- for --

22            JUSTICE GORSUCH:  -- it could be --

23            MR. BASH:  -- non-punitive --

24            JUSTICE GORSUCH:  -- more compensatory  
25    or it could be more punitive, couldn't it?

1           MR. BASH: Well, again I go back to  
2           this Court's precedents. This Court has said  
3           that compensatory remedies, even treble damages  
4           that operate --

5           JUSTICE GORSUCH: I understand -- I  
6           understand that in the civil context, but --  
7           but I'm asking you to spot a lot, and I'm  
8           asking you to spot that, you know, the -- the  
9           circuits were not completely crazy in thinking  
10          that the VWPA was punitive. And if that's  
11          true, then -- then maybe that -- that's really  
12          the source of our disagreement or at least in  
13          this colloquy.

14          MR. BASH: I -- I understand the  
15          intuition, Justice Gorsuch, that, well, when  
16          you make something mandatory, doesn't that make  
17          it more severe and --

18          JUSTICE GORSUCH: Yeah, I -- I guess  
19          --

20          MR. BASH: -- so, more punitive?

21          JUSTICE GORSUCH: -- that -- thank  
22          you, Mr. Bash.

23          MR. BASH: But -- but --

24          JUSTICE GORSUCH: You stated my  
25          question better than I did.

1           MR. BASH: But I don't think that  
2 ultimately holds up because it is the tort  
3 system that is a mandatory compensation regime.  
4 It is the civil justice system that is a  
5 mandatory compensation scheme --

6           JUSTICE GORSUCH: It was compensatory  
7 in both cases before, just an insufficient one,  
8 and Congress made it more punitive, more --  
9 more compensatory.

10          MR. BASH: It really wasn't. It was  
11 -- it was capped at compensation, but it  
12 empowered judges to say how do I impose an  
13 appropriate punishment on this person by  
14 calibrating the amount of restitution in  
15 connection with all the other things I'm going  
16 to impose at sentencing. So it -- it -- it was  
17 really more of a criminal system.

18          JUSTICE GORSUCH: I understand your  
19 point.

20          JUSTICE KAGAN: And as I understand  
21 your argument, Mr. Bash, you're saying, well,  
22 look, this is compensatory; here are all the  
23 ways we can see that it's compensatory. But I  
24 think the opposite argument is that just  
25 doesn't get you home because a compensatory

1 system can have punitive -- like, it could be  
2 part of a punishment scheme. And, indeed,  
3 there's a theory behind this, right, which is  
4 you're forcing the defendant to confront the  
5 nature and the extent of the harm that he's  
6 committed and that is a powerful way of driving  
7 home his wrongdoing?

8 So, you know, to say it's  
9 compensation, it's compensation, it's, like,  
10 okay, it's compensation, but compensation can  
11 be a form of punishment.

12 MR. BASH: Well, Justice -- Justice  
13 Kagan, I don't think we need the rule as broad  
14 as all forms of compensation are not  
15 punishment. I think that would be open to the  
16 Court and consistent with its precedents, but I  
17 don't think you need to do that. I think you  
18 can distinguish the VWPA and the statutes,  
19 statutes like the one at issue in Kelly, that  
20 say in imposing comp- -- a compensatory remedy,  
21 don't just look at victim loss; look at what's  
22 best for this defendant, what's going to  
23 promote the purposes of criminal punishment and  
24 deterrence and so forth.

25 But when you have a regime that's

1 essentially just a mechanical compensatory  
2 regime, I think under this Court's precedents  
3 like Marcus and Helvering versus Mitchell,  
4 that's non-punitive. And -- and I go back to  
5 --

6 JUSTICE KAGAN: I guess I'm wondering  
7 why. If the whole idea of the theory is that  
8 it's punishment when you force the defendant to  
9 confront the extent of his wrongdoing, what  
10 better way to do that than to make the  
11 restitution scheme entirely focus on the  
12 defendant's loss?

13 MR. BASH: Well, Justice Kagan, let me  
14 try it this way. I mean, you -- 3664(1) allows  
15 victims to take advantage of the collateral  
16 estoppel effect of the criminal judgment in  
17 bringing a separate civil suit.

18 So you can imagine a system where the  
19 victim -- it works exactly the same way as it  
20 does here, but the victim just goes under a  
21 different case number, say, maybe even the  
22 attorney general initiates it or maybe not, and  
23 just invokes the collateral estoppel effect of  
24 the judgment and everything's the same. It's a  
25 compensatory remedy, it's offset by civil



1 judgments, all the same features here that are  
2 laser-focused on compensation.

3 I think it would be pretty clear that  
4 that's a typical civil compensatory statute.  
5 And so the question is, does the fact that  
6 Congress arguably -- and I think it's only  
7 arguably -- made this part of the sentence or  
8 part of sentencing proceedings change things?

9 And I think the -- the government has  
10 to admit that that can't be the line because a  
11 lot of civil things are imposed at sentencing  
12 through conditions of supervised release.

13 This Court hasn't decided that  
14 question before, but lower courts have almost  
15 uniformly said that DNA testing, these are in  
16 ex post facto challenges, drug testing, you  
17 know, consent to certain forms of searches,  
18 those are all civil things imposed at  
19 sentencing because they serve non-punitive  
20 goals.

21 In those cases, it's preventing  
22 reoffense or reintegration into society. In  
23 this case, it's compensating for harm in a way  
24 that I think is materially indistinguishable  
25 from what the tort system could provide.

1 JUSTICE JACKSON: Except, in the tort  
2 system, if the victims receive insurance or  
3 some other form of compensation, then you  
4 wouldn't have the ability to get the complete  
5 relief in the context of the proceeding. I'm  
6 not aware here of restitution being offset by  
7 other forms of relief received.

8 MR. BASH: It -- it is, Justice  
9 Jackson.

10 JUSTICE JACKSON: It is?

11 MR. BASH: Yes. Under 3664, there's  
12 two ways it happens.

13 One, once there's a restitution award  
14 and the victim gets a civil judgment for the  
15 same harm, it's got to be reduced. So that's  
16 civil judgment.

17 JUSTICE JACKSON: Civil judgment.

18 MR. BASH: Right. So for --

19 JUSTICE JACKSON: But insurance?

20 MR. BASH: Insurance, it's not taken  
21 into account in the computation of the award,  
22 but then the judge can order that that portion  
23 of the restitution award go to the insurance  
24 company or the other source that either paid it  
25 or has a obligation to pay. And the only limit

1 on that is they got to get paid last after all  
2 the victims get paid. But --

3 JUSTICE KAGAN: Mr. Bash --

4 MR. BASH: But it actually is offset.

5 JUSTICE KAGAN: -- I mean, I think the  
6 argument against you would go back to the way  
7 that Ms. Robertson answered Justice Kavanaugh's  
8 question where, when Justice Kavanaugh said:  
9 What do you want? And Ms. Robertson, you know,  
10 listed about 42 different ways --

11 (Laughter.)

12 JUSTICE KAGAN: -- in which Congress  
13 said that this was criminal punishment. And  
14 then you're here to say, yes, but look at this  
15 intense focus on the victim's loss.

16 And in the context of those 42  
17 different ways, you're asking us to say: Well,  
18 the fact that they focused on the victim's loss  
19 takes us out of the criminal punishment box.

20 And I guess what I'm suggesting is  
21 that, no, in that context, it's fully  
22 consistent with the rest of everything that  
23 they did. It's like, yes, it's focused on the  
24 victim's loss, but that doesn't make it any  
25 less criminal punishment.

1           MR. BASH: I -- I -- I hate to -- to  
2     attack the premise of the question, but I don't  
3     think there are 42 different ways. Most of the  
4     things that my colleague said I don't think are  
5     persuasive at all. So the thing I kept hearing  
6     was that they denoted it a penalty.

7           But there are -- this Court said in 89  
8     Firearms that penalties can be either civil or  
9     criminal. We've given a ton of examples  
10    throughout the U.S. Code where "penalty" is  
11    used in a civil sense or the criminal sense.

12           "Sanction" is the same way. And, in  
13    fact, in one of the provisions my -- my friend  
14    relies on, the government relies on, 3551,  
15    Congress said the sentence is the fine, the  
16    imprisonment, and the probation, and the  
17    sanction is forfeiture and restitution.

18           Now there are other provisions they  
19    can point to that suggest it's a sentence. I  
20    think, in reality, Congress was of two minds on  
21    this at different points and probably never  
22    formed a judgment about whether it is, in  
23    theory, part of the sentence.

24           But, even if I accepted that it was  
25    part of the sentence, I think that just goes

1 back to the point I made before, which is, can  
2 Congress fold a clearly remedial compensatory  
3 remedy into a sentence for efficiency's sake  
4 without either triggering step 1 of  
5 Mendoza-Martinez by signaling an intent that it  
6 be punishment or making it have to be  
7 punishment at step 2, which the government  
8 doesn't even argue.

9 So I don't think there are 42  
10 different ways. I think this is overwhelmingly  
11 compensatory on almost every metric and -- I'm  
12 sorry, Justice Alito. It looks like you might  
13 have a question.

14 JUSTICE ALITO: No, I was going to ask  
15 something different, but I'll go ahead since  
16 there's -- since there's silence.

17 The -- the government wants to sail  
18 between the Scylla of the Sixth Amendment and  
19 the Charybdis of the Seventh Amendment, and it  
20 seems to think that it can escape the Seventh  
21 Amendment by listing 42 things that would be  
22 inapplicable in any other situation, but either  
23 of those would destroy this regime probably.

24 So why should -- which one is more  
25 dangerous?

1           MR. BASH: The Sixth Amendment is by  
2 far more dangerous.

3           Let me give you a quick pitch on the  
4 DIG, though, for that, which is that this is  
5 the lurking issue that actually really matters  
6 here, and the parties have barely briefed it.

7           The actual question presented is  
8 vanishingly unimportant for people who were --  
9 committed the crime before April 1996, were  
10 convicted after, for some reason, the court  
11 applied the VW -- the MVRA even though the  
12 government was saying to apply the VWPA, and  
13 they still have an outstanding award. So the  
14 actual QP is not very important.

15           As you say, though, the jury trial  
16 question could destroy the whole regime.

17           So, under the Sixth Amendment, the  
18 Apprendi rule, as elaborated on in Southern  
19 Union, says any fact necessary to increase the  
20 maximum monetary award -- I'm going to sub in  
21 monetary award, but the Court has applied that  
22 to fines -- requires a jury trial.

23           Lower courts have said in this context  
24 that, well, the conviction authorizes the  
25 maximum unlimited amount of restitution.

1           As Justice Gorsuch pointed out in a  
2       separate opinion in Hester, I mean, that just  
3       does not follow logically. Under 3664(e), the  
4       Court has --

5           JUSTICE GORSUCH: Thank you, Mr. Bash.  
6           (Laughter.)

7           MR. BASH: Under 3664(e), the Court  
8       has to find by a preponderance of the evidence  
9       that particular items of loss have been proved.  
10      Clearly, that's fact finding. There is a --  
11      for any non-zero amount of restitution, the  
12      Apprendi rule would obviously require a jury  
13      trial.

14           Of course, the Court could always draw  
15      exceptions to it. Justice Alito, in the same  
16      case, you suggested maybe just kind of drawing  
17      a line there, but -- but the Apprendi rule  
18      clearly applies under the Sixth Amendment.

19           The Seventh Amendment is much closer  
20      to me. So the -- the -- for -- for -- you  
21      know, on the original understanding of the  
22      Seventh Amendment and its plain text, it says  
23      suits at common law. So I think pretty clearly  
24      this is not a suit at common law. It's a  
25      statutory restitution proceeding. Of course,

1     this Court's cases --

2                 JUSTICE GORSUCH: Well, this Court has  
3     said, Mr. Bash, as you're well aware and may be  
4     about to say and for which I apologize --

5                 MR. BASH: I'm not going to stop  
6     there, Justice Gorsuch. I -- I've got more  
7     riffs on that.

8                 JUSTICE GORSUCH: I'm sure you do.  
9     I know.

10                MR. BASH: So --

11                JUSTICE GORSUCH: But the -- the Court  
12     has said, you know, labels don't matter. And  
13     if it's in substance a civil trial for  
14     restitution, that would have been a suit at  
15     common law surely. Wouldn't you agree?

16                MR. BASH: So what this Court has said  
17     is that statutory causes of action that mimic  
18     common law causes of action both in substance  
19     and in remedy, meaning the Beacon Theaters  
20     damages equitable distinction, trigger the  
21     Seventh Amendment right. So let's just accept  
22     that the Court would not reconsider that.

23                This is not quite a statutory cause of  
24     action. It is sort of an unusual proceeding,  
25     although the one that had a history behind it



1 at common law, as I think your opinion pointed  
2 out.

3 But here's what I think is the  
4 important point: This Court has been much more  
5 context-dependent on whether the remedy phase  
6 of a civil trial requires a jury finding.

7 So the two cases are Tull versus  
8 United States and Feltner versus Columbia  
9 Pictures.

10 In Tull, the Court said -- I mean,  
11 this was in a footnote, but the majority said:  
12 We see nothing in the Seventh Amendment that  
13 requires a jury trial for the remedy phase.  
14 Now that was a civil penalty where it was very  
15 discretionary.

16 In Feltner, nine years later,  
17 copyright damages, the Court said that requires  
18 a jury trial.

19 JUSTICE GORSUCH: Right.

20 MR. BASH: But part of that was based  
21 on the unique history of the Copyright Act.

22 So all I'm saying is I think there  
23 would be historical work to do under the  
24 Seventh Amendment.

25 The Sixth Amendment, unless this Court

1 really drew a kind of outlier exception to  
2 Apprendi, you know, I think the Sixth Amendment  
3 case is pretty open and shut on this other  
4 meaning.

5 JUSTICE GORSUCH: Well, isn't that  
6 interesting that, here, you're making an  
7 argument that the government has miscalculated  
8 its own interest in choosing to take the risk  
9 with the Sixth rather than the Seventh?

10 MR. BASH: It does that sometimes --  
11 (Laughter.)

12 MR. BASH: -- you know, and, frankly,  
13 I think that -- that that --

14 JUSTICE GORSUCH: The government's  
15 made its bed. Why shouldn't we let them lie in  
16 it, Mr. Bash?

17 MR. BASH: Well -- well, there --  
18 there is a path-dependent reason, I think, for  
19 that, which is that the government developed  
20 this position pre-Apprendi, and so it developed  
21 this position that restitution is criminal --  
22 I'm reading between the lines --

23 JUSTICE GORSUCH: Well, it made the  
24 opposite argument in the Eighth Circuit, and  
25 here we are. It's flipped its -- it flipped

1       its view.

2               MR. BASH:  Yeah, I -- I -- I think  
3       maybe the U.S. Attorney's Office there didn't  
4       follow the DOJ position overall.

5               JUSTICE GORSUCH:  And it's admirable  
6       that the DOJ flipped its view, I want to say.  
7       I -- I -- I think it is admirable that they  
8       reconsidered their position.  But they made  
9       their judgment.

10              MR. BASH:  And all I'm saying with  
11       respect to their analysis of the jury trial  
12       right is that they developed that position  
13       pre-Apprendi, I think, precisely in order to  
14       avoid the Seventh Amendment problem.

15              The problem now is -- I think,  
16       arguably, the bigger constitutional problem is  
17       the Sixth Amendment.  And, you know, I didn't  
18       hear in response to Justice Kavanaugh's  
19       question a very satisfactory explanation of  
20       what the Court would say in this opinion to  
21       avoid the Sixth Amendment problem.

22              JUSTICE GORSUCH:  Thank you.

23              JUSTICE SOTOMAYOR:  But that's  
24       unavoidable --

25              JUSTICE KAVANAUGH:  You're not

1     buying -- go ahead.

2                 JUSTICE SOTOMAYOR: I'm sorry.

3                 That's unavoidable. In the civil  
4     context at least at common law, I believe that  
5     restitution was not an equity, was it, claim,  
6     or was it a common law jury claim?

7                 MR. BASH: So, Justice Sotomayor, this  
8     depends a little bit on shifting meanings of  
9     the word "restitution." And I agree with  
10    Petitioner, who points this out in her -- in  
11    her brief -- or his brief, counsel's brief,  
12    "restitution" is a word for an equitable remedy  
13    that I think would fall on the Beacon Theatres  
14    bench trial side of the line when you're  
15    talking about restoring something taken.

16                And some of the remedies under  
17    restitution take that form. So, if someone  
18    steals your car, restitution might have to be  
19    to return the car. I think that actually would  
20    fall in the Beacon Theatres line of you don't  
21    need a jury trial --

22                JUSTICE SOTOMAYOR: But this is  
23    different. This is paying a  
24    monetary compensation.

25                MR. BASH: Some of the forms of

1     restitution, the majority in the statute here,  
2     are really traditional damages --

3             JUSTICE SOTOMAYOR:  So really jury  
4     trials would have been required in the common  
5     law.  If we required them in the criminal  
6     context, because it's a substitution for civil,  
7     wouldn't be the end of the world, counselor.  
8     It would just be taking --

9             MR. BASH:  Well --

10            JUSTICE SOTOMAYOR:  -- avoiding taking  
11     away a right to a jury trial.

12            MR. BASH:  I don't think it would be  
13     the end the world as a practical matter.  It  
14     would mean the entire statutory scheme has been  
15     unconstitutional for decades because they  
16     haven't been provided jury trials.  I don't  
17     think practically it couldn't be implemented.  
18     But as I is said, I think the Sixth Amendment  
19     problem is much clearer.

20            JUSTICE SOTOMAYOR:  Well, this would  
21     be a new rule because we've -- we've pretty  
22     much have established precedents to the  
23     contrary.  Thank you, Mr. Bash.

24            MR. BASH:  I do think there would be  
25     an argument under the Seventh Amendment that

1       this can survive under the reasoning of --

2               JUSTICE KAVANAUGH:   So you're not  
3       buying their footnote 3 in the government's  
4       brief then on the Sixth Amendment?  Where they  
5       --

6               MR. BASH:  You know, the government I  
7       think, if I'm remembering the footnote,  
8       rehashed the court of appeals' views that --

9               JUSTICE KAVANAUGH:  Correct.

10              MR. BASH:  -- the judgment of  
11       conviction authorizes unlimited restitution.  
12       That is just not true.  There has to be a  
13       finding of particular items of loss.  That is a  
14       factual finding that you can't -- that, without  
15       which, no restitution is authorized.  So it's  
16       not just not correct.  I don't think see -- a  
17       lot of court of appeals have an adopted that  
18       view, but I don't think it is correct.

19              CHIEF JUSTICE ROBERTS:  Justice  
20       Thomas, anything further?

21              Justice Alito?

22              JUSTICE GORSUCH:  I can't help myself.  
23       You'd agree that in the civil context in  
24       Seventh Amendment, when you're seeking damages,  
25       you usually get a jury trial?

1           MR. BASH: That has been -- the Court  
2       held -- so held in the copyright context --

3           JUSTICE GORSUCH: Yeah.

4           MR. BASH: -- in Feltner. I do -- I  
5       don't know the Court has --

6           JUSTICE GORSUCH: And here, nobody's  
7       asking for the return of the horse. They're  
8       seeking damages, right, effectively? That's  
9       your view? As full compensation?

10          MR. BASH: Yeah, I don't think there's  
11       a distinction between many of the heads of loss  
12       here --

13          JUSTICE GORSUCH: Yeah.

14          MR. BASH: -- and legal damages. I  
15       think that's true.

16          JUSTICE GORSUCH: Okay. That's --  
17       that was --

18          MR. BASH: The only point I would make  
19       is that under Tull and Feltner, I think there's  
20       a more nuanced analysis on whether the remedy  
21       phase of a civil jury trial, that phase of it  
22       requires a jury because it held for civil  
23       penalties, at least, that it did not.

24          JUSTICE GORSUCH: Got you.

25          MR. BASH: That's different than

1 damages on that.

2 JUSTICE GORSUCH: Got you. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Barrett?

5 Justice Jackson?

6 Thank you, counsel.

7 MR. BASH: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Saharia?

9 REBUTTAL ARGUMENT OF AMY M. SAHARIA  
10 ON BEHALF OF THE PETITIONER

11 MS. SAHARIA: Just -- just very  
12 briefly. I'd like to respond to Justice  
13 Alito's question about the findings and  
14 purposes of the VWPA that he posed to the  
15 government. If you look at Section 2 of the  
16 VWPA, it is replete with references to the  
17 criminal justice system and the criminal  
18 justice process. Congress was intending to  
19 give victims more of a role in the criminal  
20 justice system. But there's nothing in those  
21 findings or purposes that suggests that  
22 Congress thought it was creating a civil  
23 proceeding, which is the relevant question  
24 here.

25 Second, with respect to the -- the



1 Sixth Amendment and Seventh Amendment question,  
2 I'll just say the following: First, I think  
3 under the Seventh Amendment, this case is much  
4 more like Feltner than Tull because it involves  
5 compensatory damages. And what's more, the  
6 inquiries that judges make at sentencing really  
7 go to core liability-type questions of  
8 proximate causation. To determine who is a  
9 victim, the court has to determine who suffered  
10 losses proximately caused by the offense  
11 conduct. Those are the kinds of questions  
12 that, in the civil context, juries always  
13 decide.

14 And if the Court is going to pick  
15 which one is worse, well, a ruling that  
16 restitution is civil would completely upset the  
17 apple cart on the Seventh Amendment because the  
18 circuits rejected that argument uniformly on  
19 the ground that restitution is criminal  
20 punishment.

21 In the Sixth Amendment context, the  
22 courts, again, have uniformly rejected the  
23 Apprendi argument, but they've done so on two  
24 different grounds. Only a minority of courts  
25 have adopted the -- the civil remedy ground,

1 and all of the courts have said that it's an  
2 indeterminate range that just isn't subject to  
3 Apprendi. That may or may not be correct, but  
4 that would be an issue for the Court to address  
5 in some future case if it so chose.

6 And then, finally, on the point about  
7 restitution being mandatory under the MVRA, I  
8 would adopt Justice Gorsuch's response to that,  
9 which I thought was quite -- was -- was  
10 correct, that Congress simply made the relevant  
11 judgment for sentencing courts in making  
12 restitution mandatory. And I think that  
13 response -- the argument that restitution is  
14 civil because it's mandatory doesn't account  
15 for the way that Congress intertwined  
16 restitution with all of the other punishments  
17 imposed at sentencing.

18 For -- so for all those reasons, we  
19 ask the Court to vacate and remand.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Mr. Bash, this Court appointed you to  
23 brief and argue this case as an amicus curiae  
24 in support of the judgment below. You have  
25 ably discharged that responsibility, for which

1 we are grateful.

2 The case is submitted.

3 (Whereupon, at 12:42 p.m., the case  
4 was submitted.)

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## Official - Subject to Final Review

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