No. 24-482

In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether restitution ordered pursuant to the Mandatory Victims Restitution Act of 1996, is a criminal punishment for purposes of the Ex Post Facto Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-9a) is reported at 113 F.4th 839. The order of the district court (Pet. App. 12a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a-11a) was entered on August 23, 2024. A petition for rehearing en banc was denied on September 30, 2024 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 25, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1996, following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2113(a) and (d); and using a firearm during a

crime of violence, in violation of 18 U.S.C. 924(c) (1994). Pet. App. 17a. He was sentenced to 322 months of imprisonment, to be followed by five years of supervised release, and ordered to pay $7,567.25 in restitution. *Id.* at 19a-20a, 24a-25a.

On July 27, 2022, petitioner's supervised release was transferred to the United States District Court for the Western District of Missouri. Pet. App. 12a. Petitioner subsequently filed a pro se motion challenging the continued enforcement of his court-ordered restitution obligation. *Ibid.* The district court denied the motion. *Id.* at 12a-16a. The court of appeals affirmed. *Id.* at 2a-9a.

1. Congress enacted the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248, "to enhance and protect the necessary role of crime victims * * * in the criminal justice process" and "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims * * * without infringing on the constitutional rights of the defendant," § 2(b)(1) and (2), 96 Stat. 1249. To that end, the VWPA provided that, when sentencing a defendant convicted of a Title 18 offense, the district court "may order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to any victim of such offense." 18 U.S.C. 3663(a)(1) (1994). The VWPA authorized the United States to enforce a restitution order through the imposition of a lien for a period of 20 years from the entry of the judgment. 18 U.S.C. 3663(h)(1), 3664 (1994); see 18 U.S.C. 3613(b)(1)(1994).

In 1996, Congress enacted the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, which superseded the VWPA in part. As relevant here, the MVRA changed

the end of the period of liability for paying restitution to "the later of 20 years from entry of judgment or 20 years after the release from imprisonment of the [defendant]." 18 U.S.C. 3613(b) (Supp. II 1996); see 18 U.S.C. 3663A(d), 3664(m)(1)(A)(i). The MVRA also made interest on restitution orders of more than $2500 mandatory, unless the restitution was paid within 15 days of the entry of judgment, but gave the district court authority to waive or modify the payment of interest based on the defendant's inability to pay. 18 U.S.C. 3612(f)(1) and (3). Congress made the MVRA effective as to all sentencing proceedings in "cases in which the defendant [wa]s convicted" on or after its April 24, 1996 enactment date, "to the extent constitutionally permissible." MVRA § 211, 110 Stat. 1241 (18 U.S.C. 2248 note).

2. On December 4, 1995, petitioner and an accomplice robbed a bank in Savannah, Georgia, of $15,134.50. Pet. App. 13a; Gov't C.A. Br. 2. On August 29, 1996, a jury convicted petitioner of bank robbery and use of a firearm during a crime of violence. See Pet. App. 13a, 17a. On November 19, 1996, the district court sentenced petitioner to 322 months of imprisonment, to be followed by five years of supervised release, and ordered that he pay $7,567.25 in restitution—half the amount stolen by petitioner and his accomplice. See *id.* at 13a, 17a-28a. Because petitioner was convicted and sentenced after the effective date of the MVRA, the statute covered his order of restitution. See 18 U.S.C. 2248 note.

On June 2, 2022, petitioner was released from federal custody. Pet. App. 13a; Gov't C.A. Br. 2. At that time, petitioner had paid $2,154.04 in restitution (making the vast bulk of his payments, all but $350, before December 2004). See Gov't C.A. Addendum A4-A6. On July

27, 2022, petitioner's supervised release was transferred to the United States District Court for the Western District of Missouri, the jurisdiction to which he relocated after serving his term of imprisonment. Pet. App. 3a; Gov't C.A. Br. 3.

3. In March 2023, petitioner filed a pro se motion in district court challenging the continued enforcement of his court-ordered restitution obligation, which had grown with the accumulation of interest. See Pet. App. 3a; see also Gov't C.A. Addendum A8 (petitioner's restitution balance was $13,915.84 as of February 1, 2024). Petitioner maintained that the statutory period for paying restitution under the VWPA had expired in 2016, and that retroactively applying a longer liability period under the MVRA violated the United States Constitution's prohibition on Congress's "pass[ing]" any "ex post facto Law." Art. I, § 9, Cl. 3; see Pet. App. 13a.

The district court denied petitioner's motion. Pet. App. 12a-16a. The court explained that the retroactive application of a criminal law does not result in an "ex post facto violation * * * if the change effected is merely procedural, and does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Id.* at 15a (quoting *Weaver* v. *Graham*, 450 U.S. 24, 29 n.12 (1981)). The court agreed with "the great majority of the federal circuit courts that have confronted this question" and "concluded that application of § 3613(b)'s expanded liability period for an order of restitution does not violate the Ex Post Facto Clause." *Ibid.* (citing cases). The court therefore denied petitioner's challenge to the application of the MVRA's liability period. *Id.* at 16a.

4. The court of appeals affirmed in a per curiam opinion. Pet. App. 2a-9a.

a. The court of appeals explained that, because the Ex Post Facto Clause "applies only to criminal penalties," the threshold question before it was "whether MVRA restitution is a criminal or civil penalty." Pet. App. 4a. The Eighth Circuit had previously held that "because restitution under the MVRA 'is designed to make victims whole, not to punish perpetrators, . . . it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.'" *Id.* at 5a (quoting *United States* v. *Carruth*, 418 F.3d 900, 904 (8th Cir. 2005)).

The court of appeals suggested that two subsequent decisions of this Court had "called * * * into question" its holding that MVRA restitution is a civil remedy. Pet. App. 5a (citing *Paroline* v. *United States*, 572 U.S. 434 (2014); *Pasquantino* v. *United States*, 544 U.S. 349 (2005)). The Eighth Circuit, however, had previously "declined" to overrule its precedent in light of those decisions, reaffirming after *Paroline* that *Carruth* "remain[s] binding precedent." *Id.* at 6a (citing *United States* v. *Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015)). Because those decisions "remain the binding precedent in the Eighth Circuit," the court held that "retroactive application of the MVRA to [petitioner's] restitution order does not violate the Ex Post Facto Clause." *Id.* at 6a-7a.

The court of appeals accordingly did not reach the second step of ex post facto analysis—whether retroactively applying the MVRA's longer liability period had actually "disadvantage[d]" petitioner by "increasing the punishment for the crime." Pet. App. 4a (quoting *United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997)).

b. In a concurring opinion, Judge Melloy, joined by Judge Kelly, stated that, but for the Eighth Circuit's post-*Paroline* decision reaffirming *Carruth*, he "would conclude *Paroline* overruled *Carruth*." Pet. App. 7a.

c. In a separate opinion concurring in the judgment, Judge Gruender agreed that Eighth Circuit precedent "control[led] the outcome of th[e] case," but found "nothing in *Pasquantino* or *Paroline*" that called those precedents "into question." Pet. App. 8a. Judge Gruender explained that, even though this Court has "noted that restitution serves penological purposes," the Court had also made clear that "'[t]he primary goal of restitution is remedial or compensatory.'" *Id.* at 9a (quoting *Paroline*, 572 U.S. at 456). And the "mere presence of [a penological] purpose [such as deterrence] is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals." *Ibid.* (brackets in original) (quoting *Hudson* v. *United States*, 522 U.S. 93, 105 (1997)). "Whether restitution is primarily civil or criminal," Judge Gruender explained, "is a matter of statutory construction and not based solely on 'the character of the actual sanctions imposed.'" *Ibid.* (quoting *Hudson*, 522 U.S. at 101). Judge Gruender therefore saw no inconsistency between Eighth Circuit precedent and this Court's decisions. *Id.* at 8a.

5. The court of appeals denied the petition for panel rehearing and rehearing en banc with no noted dissent. Pet. App. 1a.

ARGUMENT

Petitioner contends (Pet. 8-21) that this Court's review is warranted to address a conflict in the courts of appeals as to whether restitution under the MVRA constitutes punishment for purposes of the Ex Post Facto Clause. This Court has repeatedly denied review on

that question. And even if petitioner prevailed on the question presented, he would not be able to show a violation of the Ex Post Facto Clause. Retroactively applying the MVRA's liability period to his restitution obligation did not increase his punishment, and almost every court of appeals to consider the issue would have affirmed the judgment of the district court on that basis. Further review is not warranted.

1. The Constitution provides that "[n]o * * * ex post facto Law shall be passed" by Congress. U.S. Const. Art. I, § 9, Cl. 3. The Ex Post Facto Clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 504 (1995) (quoting *Collin*s v. *Youngblood*, 497 U.S. 37, 43 (1990)). Thus, one who claims an ex-post-facto violation must establish "two critical elements." *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981). First, he must show that a change in the relevant "criminal or penal law" is "retrospective" because it "appl[ies] to events occurring before its enactment." *Ibid.* Second, he must show that retrospective application of the new law "disadvantage[s]" him in comparison to the earlier law. *Ibid.*

a. Petitioner is correct (Pet. 8-12) that the courts of appeals are divided on the threshold question whether restitution ordered under the MVRA is criminal punishment subject to the Ex Post Facto Clause. Five courts of appeals have held that MVRA restitution constitutes such punishment. See *United States* v. *Edwards*, 162 F.3d 87, 89-92 (3d. Cir. 1998); *United States* v. *Richards*, 204 F.3d 177, 213 (5th Cir.), cert. denied, 531 U.S. 826 (2000), overruled on other grounds by *United States* v. *Cotton*, 535 U.S. 625 (2002); *United States* v. *Schulte*, 264 F.3d 656, 662 (6th Cir. 2001); *United States* v. *Bag-*

gett, 125 F.3d 1319, 1322 (9th Cir. 1997); *United States* v. *Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998). The Seventh and Tenth Circuits, like the Eighth Circuit (Pet. App. 6a-7a), have concluded that it does not. See *United States* v. *Newman*, 144 F.3d 531, 538-539 (7th Cir. 1998); *United States* v. *Nichols*, 169 F.3d 1255, 1279-1280 (10th Cir.), cert. denied, 528 U.S. 934 (1999).[1]

That conflict is longstanding, but this Court repeatedly denied petitions for a writ of certiorari raising the question presented, including on direct appeal in the few years after the MVRA's enactment. See, *e.g.*, *Roberts* v. *United States*, 531 U.S. 1128 (2001) (No. 00-6119); *Stoecker* v. *United States*, 531 U.S. 1127 (2001) (No. 00-6007); *Smith* v. *United States*, 528 U.S. 987 (1999) (No. 99-6008); *Bach* v. *United States*, 528 U.S. 950 (1999) (No. 99-127).

b. This Court should follow the same course here, as almost every court of appeals to consider the issue would have reached the same result as the Eighth Circuit in this case.

The majority of courts of appeals have held that, regardless of whether restitution under the MVRA is pe-

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[1] The court of appeals below stated that the Tenth Circuit had overruled its precedent holding that "MVRA restitution was a civil penalty." Pet. App. 5a; see *id.* at 5a-6a (citing *United States* v. *Anthony*, 25 F.4th 792 (10th Cir. 2022)); see also Pet. 11, 12 (discussing *Anthony*). In *Anthony*, the Tenth Circuit considered whether restitution is a component of a defendant's criminal sentence and, therefore, included in the judgment of conviction; it had no occasion to reconsider whether restitution under the MVRA is a criminal punishment for purposes of the Ex Post Facto Clause. *Anthony*, 25 F.4th at 795-796. While the Tenth Circuit stated that this Court's decision in *Paroline* "call[ed] into question [its] view that the MVRA lacks a penal element," it stopped short of overruling its precedent. *Id.* at 798 n.5 (citation omitted).

nal, applying the MVRA's extended period for paying an outstanding restitution amount does not increase the defendant's punishment. See *United States* v. *Weinlein*, 109 F.4th 91, 101 (2d Cir. 2024), petition for cert. pending, No. 24-458 (filed Oct. 21, 2024); *United States* v. *Blackwell*, 852 F.3d 1164, 1166 (9th Cir. 2017) (per curiam); *United States* v. *McGuire*, 636 Fed. Appx. 445, 446-447 (10th Cir. 2016); *United States* v. *Rosello*, 737 Fed. Appx. 907, 908-909 (11th Cir. 2018) (per curiam); but see *United States* v. *Norwood*, 49 F.4th 189, 218 (3d Cir. 2022) (reaching a contrary conclusion). Those courts of appeals would thus hold—as the Eighth Circuit did in the decision below—that there is no violation of the Ex Post Facto Clause in such circumstances.

That near-consensus is correct and would preclude petitioner from obtaining relief on his ex-post-facto claim even if an order of restitution under the MVRA constitutes punishment.

The Ex Post Facto Clause applies only to laws that "make innocent acts criminal, alter the nature of the offense, or," as particularly relevant here, "increase the punishment." *Collins*, 497 U.S. at 46 (citing *Beazell* v. *Ohio*, 269 U.S. 167, 170 (1925)). That last "category" includes laws "'that change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed.'" *Peugh* v. *United States*, 569 U.S. 530, 532-533 (2013) (quoting *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). "The touchstone of this Court's inquiry is whether a given change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 539 (citations and internal quotation marks omitted).

The application of the MVRA's extended period for paying restitution did not increase petitioner's punish-

ment. The only punishment that the MVRA, and its predecessor VWPA, arguably "annex[] to the underlying crime is the obligation to compensate the defendant's victims in the amount determined by the district court at sentencing." *Weinlein*, 109 F.4th at 101. Petitioner's potential "punishment" was the $7,567.25 in restitution that the district court ordered him to pay his victim. Pet. App. 25a. That amount did not change when the MVRA amended 18 U.S.C. 3163(b) because the amendment "merely increased the time period over which the government could collect" the outstanding restitution amount. *Blackwell*, 852 F.3d at 1166. And "the time horizon in which a defendant may meet that obligation is not a separate punishment." *Weinlein*, 109 F.4th at 103.

The effect of applying the MVRA's extended liability period is similar to that of retroactively extending the statute-of-limitations period for a crime that is not yet time-barred. "Each type of provision provides a deadline at which the consequences that normally attach to criminal activity will terminate." *Weinlein*, 109 F.4th at 102. And the federal courts of appeals have long held that the Ex Post Facto Clause does not bar a legislature from extending an *unexpired* limitations period. See *Stogner* v. *California*, 539 U.S. 607, 618 (2003) (acknowledging that case law and distinguishing between an expired and an unexpired limitations period for ex-post-facto purposes); *id.* at 650 (Kennedy, J., dissenting) ("[T]he Court is careful to leave in place the uniform decisions by state and federal courts to uphold retroactive extension of unexpired statutes of limitations against an *ex post facto* challenge."). For while it would be "unfair and dishonest" for the state to "assure a man that he has become safe from its pursuit, and thereafter

withdraw its assurance," "it does not shock us," "while the chase is on * * * to have it extended beyond the time first set." *Falter* v. *United States*, 23 F.2d 420, 426 (2d Cir.) (Hand, J.), cert. denied, 277 U.S. 590 (1928).

Petitioner was not disadvantaged by the application of the MVRA at the time of his sentencing, as "imposing the longer enforcement period did not increase the present value of the restitution payments [he] was obligated to make." *Weinlein*, 109 F.4th at 99 n.7. If the longer period now means, as a practical matter, that petitioner will pay more of his restitution obligation, that would "only [be] a consequence of [his] having made only modest payments toward [his] obligation" in the first 20 years after his conviction. *Id.* at 102. Nor does the accrual of interest on petitioner's outstanding restitution obligation during the MVRA's longer liability period, see 18 U.S.C. 3612(f)(1), operate to increase his punishment. "[B]y extending the period for charging interest and collecting restitution, the MVRA ensures only that [petitioner] does not receive a windfall from his criminal activity by having to pay later-in-time amounts that are not worth as much as if they had been paid earlier." *Norwood*, 49 F.4th at 221-222 (Phipps, J., dissenting); accord *Weinlein*, 109 F.4th at 101 n.9 (noting the "time value of money").

Because petitioner would not be entitled to relief on his ex-post-facto challenge, even if he prevailed on the question presented, this Court's review is not warranted. Cf. *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).[2]

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[2] As petitioner notes (at 16 n.4), another pending petition for a writ of certiorari presents the question whether the retroactive ap-

2. The question whether the MVRA may be applied to criminal offenses committed before the date of its enactment is also of diminishing significance. That question has relevance only to those defendants who (i) committed their underlying offenses before April 24, 1996; and (ii) were convicted on or after that date, when the MVRA became effective, see 18 U.S.C. 2248 note, and who further (iii) failed to pay their outstanding restitution amounts during the first 20 years after their judgments (*i.e.*, the payment period applicable before the MVRA), and (iv) were released from imprisonment in the last 20 years (*i.e.*, are still in the MVRA-extended payment period) or are subject to an ongoing enforcement proceeding that was initiated during that period. The number of individuals potentially affected by the question that petitioner presents is therefore limited.[3]

Petitioner contends (Pet. 15-16) that the question warrants review because many defendants have little ability to pay restitution, such that the MVRA's extended period for paying restitution "expos[es them] to the associated collateral consequences of a failure to pay for many years to come." The MVRA, however, has built-in safeguards to account for a defendant's financial cir-

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plication of the MVRA's extended liability period increases the defendant's punishment for purposes of the Ex Post Facto Clause. See *Weinlein* v. *United States*, No. 24-458 (filed Oct. 21, 2024).

[3] Another pending petition for a writ of certiorari presents the question whether restitution imposed under a Michigan statute is punishment for purposes of the Ex Post Facto Clause. See *Neilly* v. *Michigan*, No. 24-395 (filed Oct. 7, 2024). The question whether a provision is penal is one of "statutory construction," *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997) (citation omitted), which means that the resolution of the question presented here would have limited significance for the retroactive application of state restitution statutes.

cumstances: First, when imposing restitution, the district court has authority to waive or modify the payment of interest based on the defendant's inability to pay, including "limit[ing] the length of the period during which interest accrues." 18 U.S.C. 3612(f)(3)(C). Second, the district court may set a payment schedule for restitution that accounts for the defendant's financial resources. 18 U.S.C. 3664(f)(2). Third, if a defendant lacks the financial resources to pay "the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments," the district court may "direct the defendant to make nominal periodic payments." 18 U.S.C. 3664(f)(3)(B). Finally, if the defendant experiences a "material change" in economic circumstances, the court may "adjust the payment schedule" for restitution obligations "as the interests of justice require." 18 U.S.C. 3664(k).

In all events, this case would provide no opportunity to address petitioner's broader policy concerns about the MVRA or its longer liability period (Pet. 14-15), as the statute indisputably applies to the many defendants who have committed federal crimes since its enactment in 1996. Further review is accordingly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2025

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* The Acting Solicitor General is recused in this case.