No. 24-458

In the Supreme Court of the United States

LAURIE WEINLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, authorized the United States to collect restitution for a period of 20 years from the entry of judgment. 18 U.S.C. 3663(h)(1) (1994). The Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, extended the period for paying a restitution obligation 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).

The question presented is whether the retroactive application of the MVRA's extended period for paying an outstanding restitution obligation increases the defendant's punishment for purposes of the Ex Post Facto Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 109 F.4th 91. The order of the district court (Pet. App. 28a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2024. The petition for a writ of certiorari was filed on October 21, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2000, following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of bank fraud, in violation of 18 U.S.C. 1344, and embezzlement from an employee welfare benefit plan, in violation of 18 U.S.C. 664. See Judgment 1. She was sentenced to 63 months of imprison-

ment, to be followed by five years of supervised release, and ordered to pay $2,185,749.87 in restitution. Judgment 2-3; Pet. App. 4a.

On July 19, 2021, the government issued two subpoenas to petitioner seeking information about her ability to resume making restitution payments, which she had stopped as of June 2009. Pet. App. 4a; Gov't C.A. Supp. App. 10. Petitioner moved to quash the subpoenas, contending, *inter alia*, that the period for enforcing her restitution obligation had expired. Pet. App. 5a. The district court granted her request to quash the subpoenas but denied petitioner's request to "terminate" her restitution obligation. *Id.* at 36a. The court of appeals affirmed. *Id.* at 1a-27a.

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." § 211, 110 Stat. 1241 (18 U.S.C. 2248 note).

2. In 1989, petitioner founded American Payroll Network, Inc. (APN), in Albany, New York. Pet. App. 2a. APN managed human-resources matters, including employee payroll, taxes, workers compensation, and insurance, for small businesses. *Ibid.*

From September 1994 to February 1995, petitioner engaged in a check-kiting scheme to defraud two banks. Pet. App. 2a. During that period, petitioner regularly moved money between APN's accounts at each bank, which artificially inflated the balance of the accounts and allowed APN to spend money that it did not have. See *id.* at 2a-3a. By the time the scheme was discovered, one of the banks had suffered approximately $1 million in losses. *Ibid.*

In addition, between May 1994 and February 1995, petitioner embezzled approximately $300,000 from APN's self-funded health-insurance plan for its employ-

ees and customers. Pet. App. 3a. Rather than timely reimburse payments for medical claims, petitioner converted plan money to her personal use. See *ibid.* The unpaid medical claims caused hundreds of APN employees to incur losses. See Gov't C.A. Br. 6.

3. On February 28, 2000, a jury convicted petitioner of bank fraud, in violation of 18 U.S.C. 1344, and embezzlement from an employee-welfare-benefit plan, in violation of 18 U.S.C. 664. Pet. App. 4a. The district court sentenced petitioner to 63 months of imprisonment, to be followed by five years of supervised release, and ordered petitioner to pay $2,185,749.87 in restitution. *Ibid.* The court found that petitioner was unable to pay interest and waived interest on the restitution payments. *Ibid.* The court of appeals affirmed on direct appeal. 234 F.3d 1263 (2d Cir. 2000) (Tbl.).

4. On April 11, 2000, the government notified petitioner by letter that the MVRA established the period for paying her restitution obligation, as her conviction was entered after the statute's effective date. See Gov't C.A. Supp. App. 8. Petitioner began serving her prison sentence on April 18, 2000, and was released from custody on November 10, 2004. Pet. App. 29a.

Petitioner made semi-regular restitution payments from June 20, 2004, until June 29, 2009, when she stopped paying restitution. Pet. App. 4a. In total, petitioner paid less than $10,000 in restitution, leaving an outstanding balance of $2,175,808.63. *Ibid.*; Gov't C.A. Supp. App. 10.

On April 13, 2021, the government requested that petitioner complete a financial statement so that it could assess her ability to renew making restitution payments. Pet. App. 4a-5a. Petitioner submitted a financial statement, but the government suspected that it was incom-

plete and requested supplemental information. *Id.* at 5a.[1] Petitioner thereafter failed to submit a complete financial statement. *Ibid.* On July 19, 2021, the government issued petitioner a subpoena duces tecum for her financial records and a testimonial subpoena. *Ibid.*

Petitioner moved to quash the subpoenas. See Pet. App. 5a; Pet. C.A. App. 2-7, 38-41. Because petitioner was then living in Texas, she contended that the subpoena violated a procedural rule requiring a court to quash or modify a subpoena if it would require compliance more than 100 miles from where the recipient resides. See Fed. R. Civ. P. 45(d)(3)(A)(ii). Petitioner also contended that the subpoenas should be quashed, and her restitution obligation terminated, because the period for enforcing that obligation under the VWPA had expired. See Pet. App. 5a. Petitioner maintained that retroactively applying a longer enforcement 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; Pet. App. 5a.

The district court rejected petitioner's ex-post-facto argument, but it granted her request to quash the subpoenas on the basis of Rule 45(d)(3)(A)(ii). See Pet. App. 26a-36a.

5. Petitioner appealed, and the court of appeals unanimously affirmed. Pet. App. 1a-22a.

a. At the outset, the court of appeals addressed its jurisdiction to consider petitioner's appeal. First, the

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[1] Before the district court, the government submitted the affidavit of an investigative financial analyst stating that petitioner had "failed to disclose a multitude of assets" in her financial statement, including "bank accounts and corporate holdings" that could "be used to satisfy her restitution obligations." Pet. C.A. App. 52; see Pet. App. 5a n.3.

court determined that petitioner's challenge did not constitute an improper collateral attack on her sentence under 28 U.S.C. 2255, because she challenged only the period for enforcing the restitution order, not the validity or amount of the restitution ordered. Pet. App. 6a-7a.[2] Second, the court rejected the government's argument that, because the district court had granted petitioner's motion to quash, petitioner lacked standing to pursue an appeal. *Id.* at 7a-9a. The court held that petitioner had standing to pursue a request to "terminate[]" her restitution obligation, as she "may be required to make [restitution] payments in the future" and "federal appellate courts 'have generally recognized' that even 'threatened harm in the form of increased risk of future injury may serve as injury-in-fact for Article III standing purposes.'" *Id.* at 8a (quoting *Baur* v. *Veneman*, 352 F.3d 625, 633 (2d Cir. 2003)).

b. On the merits, the court of appeals held that the retroactive application of the MVRA's longer period for paying restitution did not violate the Ex Post Facto Clause. Pet. App. 9a-22a. The constitutional prohibition on Congress's enactment of ex-post-facto laws, see U.S. Const. Art. I, § 9, Cl. 3, "applies only to penal statutes which disadvantage the offender affected by them." Pet. App. 10a (quoting *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990)). The court assumed, without deciding, that "the MVRA imposes a criminal punishment by extending the liability period of the restitution order and therefore meets the penal-statute requirement." *Ibid.* But the court held that retroactively applying the

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[2] Judge Menashi wrote separately to explain why, in his view, the court of appeals would have jurisdiction even if it construed petitioner's motion as a collateral attack on her sentence. Pet. App. 22a-27a (Menashi, J., concurring).

MVRA's longer liability period did not increase the punishment for petitioner's crime. *Id.* at 10a, 13a-22a.

Because "[t]he purpose of the MVRA and of the predecessor VWPA is to compensate victims," the court of appeals explained, "the punishment" that the restitution statute "annexes to the underlying crime is the obligation to compensate the defendant's victims in the amount determined by the district court at sentencing." Pet. App. 16a-17a. "The MVRA's amendment to 18 U.S.C. §3613(b) did not increase the restitution obligation but 'merely increased the time period over which the government could collect' the restitution." *Id.* at 17a (quoting *United States* v. *Blackwell*, 852 F.3d 1164, 1166 (9th Cir. 2017) (per curiam)). The court acknowledged that, as a practical matter, the longer liability period might result in petitioner paying a greater fraction of the restitution obligation that was imposed when she was convicted, but it explained that that result would "only [be] a consequence of [petitioner's] having made only modest payments toward her obligation over the twenty years following her conviction." *Id.* at 18a. The court therefore concluded that "[t]he extension does not impose a greater punishment than the preexisting obligation under the restitution order." *Ibid.*

6. On July 22, 2022, while petitioner's appeal was pending, the government attempted to obtain partial satisfaction of Weinlein's restitution obligation by petitioning to foreclose on a 2005 lien on a piece of real property in Corinth, Texas, that petitioner purchased in 2005. See *United States* v. *Weinlein*, No. 22-cv-769 (N.D.N.Y.). Those enforcement proceedings remain ongoing. See 22-cv-769 Order (Dec. 10, 2024).[3]

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[3] The government previously applied for writs to garnish petitioner's bank accounts, but the district court denied those applica-

ARGUMENT

Petitioner contends (Pet. 18-21) that retroactive application of the MVRA's extended period for paying restitution violates the Ex Post Facto Clause. That contention lacks merit. The court of appeals correctly concluded that, even if restitution imposed under the MVRA is a criminal punishment, retroactively applying the statute's extended liability period did not increase petitioner's punishment. Although petitioner contends (Pet. 6-12) that this Court should grant review to address a conflict in the courts of appeals, the conflict is shallow and concerns a narrow question that is of diminishing significance. Further review is not warranted.

1. The court of appeals correctly concluded that the retroactive application of the MVRA's extended period for paying restitution does not violate the Ex Post Facto Clause. Pet. App. 10a, 13a-22a.

a. 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 enact-

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tions. See Gov't Opp. to Pet. C.A. Mot. to Stay Mandate 3; Gov't C.A. Supp. App. 11-14. On October 18, 2024, the government also withdrew its motion in the court for an order directing petitioner to make regular installment payments on her restitution. See D. Ct. Doc. 132.

ment." *Ibid.* Second, he must show that retrospective application of the new law "disadvantage[s]" him in comparison to the earlier law. *Ibid.*

The second requirement covers 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).

b. The application of the MVRA's extended liability period did not increase petitioner's punishment. 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." Pet. App. 16a-17a.[4] Petitioner's potential "punishment"

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[4] Another pending petition for a writ of certiorari presents the question whether restitution ordered under the MVRA is punishment for purposes of the Ex Post Facto Clause that applies to Congress. See *Ellingburg* v. *United States*, No. 24-482 (filed Oct. 25, 2024). The courts of appeals are divided on that question. Compare *United States* v. *Norwood*, 49 F.4th 189, 215 (3d Cir. 2022) (holding restitution under the MVRA is penal); *United States* v. *Richards*, 204 F.3d 177, 213 (5th Cir.) (same), 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) (same); *United States* v. *Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997)

was the amount of restitution ($2,185,749.87) that the district court ordered her to pay her victims. *Id.* at 4a. But 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. *United States* v. *Blackwell*, 852 F.3d 1164, 1166 (9th Cir. 2017) (per curiam). Petitioner "remain[s] liable for the same amount of * * * restitution" under either version of the statute. *Ibid.* "[T]he time horizon in which a defendant may meet that obligation is not a separate punishment." Pet. App. 21a.

As the court of appeals explained, 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. Pet. App. 13a-15a, 19a-20a. "Each type of provision provides a deadline at which the consequences that normally attach to criminal activity will terminate." *Id.* at 19a. 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 *id.* at 14a n.8 (collecting cases); 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

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(same); *United States* v. *Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998) (same), with *United States* v. *Newman*, 144 F.3d 531, 538-539 (7th Cir. 1998) (holding restitution under the MVRA is not penal); *United States* v. *Ellingburg*, 113 F.4th 839, 841-842 (8th Cir. 2024) (same), petition for cert. pending, No. 24-482 (filed Oct. 5, 2024); *United States* v. *Nichols*, 169 F.3d 1255, 1279-1280 (10th Cir.) (same), cert. denied, 528 U.S. 934 (1999).

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 to 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 her sentencing" because "imposing the longer enforcement period did not increase the present value of the restitution payments she was obligated to make." Pet. App. 13a n.7 (emphasis omitted). On the contrary, the district court affirmatively waived the requirement that petitioner pay interest on her restitution obligation, such that the total amount did not increase—not even to account for the time value of money. *Id.* at 16a & n.9. Petitioner thus arguably "receive[d] a windfall from h[er] criminal activity by having" the opportunity "to pay later-in-time amounts," over a longer period of time, which were therefore not "worth as much as if they had been paid earlier." *United States* v. *Norwood*, 49 F.4th 189, 221-222 (3d Cir. 2022) (Phipps, J., dissenting). If, as petitioner contends (Pet. 20), the longer period now has the practical effect of increasing the proportion of the restitution obligation she ultimately pays, that would only be "because she evaded most of the restitution obligation" in the first 20 years after her conviction. Pet. App. 13a n.7.

The court of appeals correctly concluded that applying the MVRA's longer liability period did not violate the Ex Post Facto Clause.

3. Petitioner contends (Pet. 6-17) that review is warranted to resolve a conflict in authorities as to whether retroactively applying an extended period for paying a restitution obligation violates the Ex Post Facto Clause. But the shallow conflict on the narrow question presented does not warrant the Court's review in this case.

a. Like the Second Circuit, the Ninth Circuit has held that the application of the MVRA's extended period for paying a restitution order does not violate the Ex Post Facto Clause because it does not increase the defendant's punishment. *Blackwell*, 852 F.3d at 1166. The Tenth and Eleventh Circuits have held the same in unpublished decisions. *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).

Petitioner identifies (Pet. 7) only one federal court of appeals that has reached a contrary conclusion: A divided panel of the Third Circuit has held that retroactively applying the MVRA's longer liability period violates the Ex Post Facto Clause. See *Norwood*, 49 F.4th at 217-219; but see *id.* at 220-223 (Phipps, J., dissenting).[5]

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[5] In *Norwood*, the Third Circuit reasoned in part that the MVRA's longer liability period would increase the defendant's total restitution obligation because, during that period, the defendant would pay "additional interest." 49 F.4th at 218. But as the court of appeals explained in this case, that consideration is not relevant to petitioner because the district court waived the requirement that she pay interest on her unpaid restitution obligation. Pet. App. 16a; see p. 11, *supra*. In any event, the payment of additional interest during a longer liability period does not violate ex-post-facto principles. Even under the VWPA, a district court had authority to impose interest on a restitution obligation. See 18 U.S.C. 3612(f) (1994). The continued payment of interest during the MVRA's longer liability

Petitioner is incorrect in contending (Pet. 8-9) that the Sixth Circuit's decision in *United States* v. *Schulte*, 264 F.3d 656 (2001), conflicts with the decision below. In *Schulte*, the Sixth Circuit did not consider whether retroactively applying the MVRA's longer liability period violates the Ex Post Facto Clause. The defendant there challenged the district court's application of the MVRA, rather than the VWPA, "in determining the *amount* of restitution owed." *Schulte*, 264 F.3d at 658 (emphasis added); accord *id.* at 661 (defendant's argument was that the district court "operated under the incorrect understanding that restitution was mandatory"). The Sixth Circuit concluded that there was an ex-post-facto violation because retroactively applying MVRA's mandatory restitution requirement "had the potential to increase the amount of restitution [the defendant] was required to pay." *Id.* at 662. That question, however, is analytically distinct from the question presented here—whether applying the MVRA's longer liability period for paying the original amount of restitution violates the Ex Post Facto Clause. See Pet. App. 17a n.10 (noting that this case does not implicate the MVRA's "shift from discretionary to mandatory restitution") (citation omitted).

Petitioner also contends (Pet. 8) that the decision below conflicts with the West Virginia Supreme Court's decision in *State* v. *Short*, 350 S.E.2d 1 (1986). In *Short*, the court considered the retroactive application of a state restitution law. At the time of petitioner's offense, West Virginia law authorized the State to enforce a res-

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period "merely 'ensures . . . that [the defendant] does not receive a windfall from his criminal activity' in the form of the time value of money." Pet. App. 16a n.9 (quoting *Norwood*, 49 F.4th at 222 (Phipps, J., dissenting)) (brackets in original).

titution obligation only as a condition of probation, within the period of that probation. *Id.* at 1-2. The new law gave "the State much broader powers, including the ability to enforce an order of restitution beyond the period of probation in the same manner as a civil judgment." *Id.* at 2. In that context, the court held that retroactively applying the 1984 law "increased [the defendant's] punishment" by "add[ing] a[n] * * * extra penalty which could not have been imposed under the older law." *Ibid.* The court's terse, 39-year-old decision did not address the MVRA, and any inconsistency with the reasoning below does not warrant this Court's review.[6]

b. The conflict is not only shallow but narrow. As petitioner acknowledges (Pet. 17), the question in this case "concerns only the extension of the enforcement period for a restitution order" and does not present "related, but analytically distinct issues like the retroactive expansion of the *amount* of restitution," or the MVRA's "shift from discretionary to mandatory restitution," Pet. App. 17a n.10. A conflict on that narrow question does not warrant this Court's intervention.

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[6] Petitioner errs in suggesting (Pet. 11-12) that the decision below conflicts with a decision from an intermediate appellate court in New York. See *Mikhlov* v. *Festinger*, 173 A.D.3d 130 (N.Y. App. Div. 2019). In *Mikhlov*, the defendant's conviction "occurred in 1995, before the effective date of the MVRA" in 1996. *Id.* at 133. Because "there was no [relevant] conviction * * * after the effective date of the MVRA," the court recognized that the MVRA was, by its terms, "not applicable" to the defendant. *Id.* at 134. It then concluded, without additional reasoning, that application of the statute would "violate the Constitution's ex post facto prohibition." *Ibid.* The court did not consider whether the application of the MVRA's longer liability period, to a defendant covered by the statute, would violate the Ex Post Facto Clause.

4. The question whether the MVRA's longer liability period 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 presented here is therefore limited.[7]

Petitioner also cites recent amendments to various States' restitution statutes, see Pet. 14-15 nn.3, 4, and contends that the question presented arises "often in state courts," Pet. 16. The ex-post-facto analysis, however, is statute-specific, as the threshold question—whether "a particular punishment is criminal or civil"—"is, at least initially, a matter of statutory construction."

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[7] The number is particularly limited because, in the year following the MVRA's enactment, restitution was imposed in only a small fraction of federal criminal cases involving individual defendants. See U.S. Sentencing Commission, *1997 Sourcebook of Federal Sentencing Statistics* tbl. 15 (noting restitution was ordered in 19.7% of criminal sentences imposed in Fiscal Year 1997). And of the cases in which restitution was imposed, the vast majority (76%) involved crimes, such as larceny, fraud, and embezzlement, that carried median sentences of less than one year. Compare *ibid.* (charting restitution orders by primary offense type), with *id.*, tbl. 13 (charting median sentence length by primary offense type).

Hudson v. *United States*, 522 U.S. 93, 99 (1997). A case about the MVRA therefore may have limited significance to state restitution statutes, which will vary in text and structure.

In addition, most of the state-court decisions that petitioner cites (Pet. 16 n.5) did not involve ex-post-facto challenges to an extended period for paying restitution.[8] And in the handful of cited cases that addressed an extended liability period, each of the intermediate state courts held that there was no ex-post-facto violation. See *State* v. *Flygare*, 356 P.3d 698, 700 n.2 (Utah Ct. App. 2015); *Lapp* v. *State*, 220 P.3d 534, 540-541 (Alaska Ct. App. 2009); *State* v. *Serio*, 987 P.2d 133, 134-135 (Wash. Ct. App. 1999).

5. In all events, this case would be a poor vehicle for considering the question presented, as its procedural posture may impede this Court's review. Petitioner brought this proceeding to quash subpoenas in a civil action. Pet. App. 5a. Although the district court rejected her ex-post-facto argument, it quashed the subpoena on an alternative ground: The court concluded that compliance would violate Federal Rule of Civil Procedure 45(d)(3)(A)(iv). Pet. App. 5a.

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[8] See, *e.g.*, *State* v. *Cota*, 319 P.3d 242, 245-246 (Ariz. Ct. App. 2014) (rejecting ex-post-facto challenge to law authorizing court to enter criminal restitution order at sentencing); *People* v. *Lowe*, 60 P.3d 753, 757 (Colo. App. 2002) (rejecting ex-post-facto challenge to law authorizing Department of Correction to withhold percentage of deposits to inmate account to satisfy restitution obligation); *State* v. *Werner*, 1 P.3d 760, 764-765 (Haw. Ct. App. 2000) (holding that new restitution law did not apply, by its terms, to the defendant, without addressing any ex-post-facto issue); *People* v. *Kwolek*, 48 Cal. Rptr. 2d 325, 333 (Cal. Ct. App. 1995) (rejecting ex-post-facto challenge to law governing manner in which defendant made restitution payments).

Petitioner characterizes (Pet. 5) her remaining challenge as a request to "terminate" restitution. See Pet. App. 5a. The Second Circuit held that she had standing to pursue that form of "relief." *Id.* at 8a. There is, however, no freestanding basis for a court to "terminate" a restitution obligation after it has been imposed. *Ibid.* To the extent the government seeks to enforce a restitution order outside the liability period, a defendant may raise timeliness as a defense—as petitioner has already done in the separate enforcement proceeding that is currently pending against her. See p. 7, *supra*; see also Gov't C.A. Br. 15-16 (arguing that the enforcement proceeding was the proper venue for petitioner's challenge). Likewise, a defendant may challenge a restitution order on direct appeal, or seek to modify the payment schedule under 18 U.S.C. 3664(k). Petitioner, however, has never identified any statutory authority that would allow a district court to "terminate" a final restitution obligation, and it is accordingly unclear what remaining relief she could receive in this case. See *United States* v. *Lallemand*, 207 Fed. Appx. 665, 666 (7th Cir. 2006) (holding district court lacked jurisdiction to "terminate" a restitution order).

At minimum, the parallel enforcement proceeding could threaten this Court's review of the decision below. The enforcement proceeding is still pending, see p. 7, *supra*, and petitioner has argued that the government's lien is unenforceable—even assuming that the MVRA's extended-liability period applies to her—because the period in which the government could enforce the obligation expired on November 20, 2024, 22-cv-769 Doc. 37 (N.D.N.Y. Jan. 6, 2025). As petitioner observes (Pet. 4), the government has previously taken the position that it has the authority to foreclose a lien if it *commences*

the proceeding during the liability period. See Gov't C.A. Br. at 9, *Norwood*, *supra*, No. 20-3478; but see *Norwood*, 49 F.4th at 217 (rejecting that argument for restitution imposed under the VWPA). But if petitioner ultimately prevails in dismissing that proceeding, it would render moot the case before this Court, as the government has no other outstanding enforcement proceedings against petitioner, see note 3, *supra*, and it could not initiate any new proceedings against her now that the liability period under the MVRA has expired.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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