No. 14-1006

IN THE
Supreme Court of the United States

SARA JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, ARKANSAS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, AND SEVENTEEN OTHER DEFENDER ORGANIZATIONS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

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STATEMENT OF INTEREST

Criminal Defense Attorneys of Michigan, Arizona Attorneys for Criminal Justice, Arkansas Association of Criminal Defense Lawyers, California Attorneys for Criminal Justice, Delaware Association of Criminal Defense Lawyers, District of Columbia Associa-

tion of Criminal Defense Lawyers, Georgia Association of Criminal Defense Lawyers, Idaho Association of Criminal Defense Lawyers, Kansas Association of Criminal Defense Lawyers, Kentucky Association of Criminal Defense Lawyers, Louisiana Association of Criminal Defense Lawyers, Massachusetts Association of Criminal Defense Lawyers, Maryland Criminal Defense Attorneys' Association, Missouri Association of Criminal Defense Lawyers, Nebraska Criminal Defense Attorneys Association, Association of Criminal Defense Lawyers of New Jersey, Ohio Association of Criminal Defense Lawyers, Oregon Criminal Defense Lawyers Association, South Carolina Association of Criminal Defense Lawyers, Utah Association of Criminal Defense Lawyers, and Washington Association of Criminal Defense Lawyers respectfully submit this brief as *amici curiae*.[1]

Founded in 1976, Criminal Defense Attorneys of Michigan (CDAM) is a statewide association of criminal defense lawyers practicing in the trial and appellate courts of Michigan. CDAM represents the interests of the state's criminal defense bar in a wide array of matters. Arizona Attorneys for Criminal Justice, Arkansas Association of Criminal Defense Lawyers, California Attorneys for Criminal Justice,

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amici curiae, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

Delaware Association of Criminal Defense Lawyers, District of Columbia Association of Criminal Defense Lawyers, Georgia Association of Criminal Defense Lawyers, Idaho Association of Criminal Defense Lawyers, Kansas Association of Criminal Defense Lawyers, Kentucky Association of Criminal Defense Lawyers, Louisiana Association of Criminal Defense Lawyers, Massachusetts Association of Criminal Defense Lawyers, Maryland Criminal Defense Attorneys' Association, Missouri Association of Criminal Defense Lawyers, Nebraska Criminal Defense Attorneys Association, Association of Criminal Defense Lawyers of New Jersey, Ohio Association of Criminal Defense Lawyers, Oregon Criminal Defense Lawyers Association, South Carolina Association of Criminal Defense Lawyers, Utah Association of Criminal Defense Lawyers, and Washington Association of Criminal Defense Lawyers are, similarly, associations that represent the interests of their states' respective criminal defense bars and strive to protect the constitutional and statutory rights of people charged with crimes. Amici have a strong and direct institutional interest in this litigation because of the implications of this case on the rights of accused citizens in their respective jurisdictions.

SUMMARY OF ARGUMENT

Amici urge the Court to take this opportunity to resolve the fundamental issue presented by the Petitioner in this case: Whether *Apprendi* and its

progeny apply to restitution and thus require that any facts necessary to impose or determine the amount of restitution be found by a jury, rather than a judge. That question is of immense importance not only to criminal defendants like Petitioner who are prosecuted under federal law, but also to the states and to thousands of defendants who are prosecuted under state law each year. The states, like the federal government, have supplanted defendants' constitutional rights to have juries determine the facts necessary to increase their punishments with a virtually one-sided, haphazard process. Amici, whose members routinely represent clients in federal and state proceedings across the country, believe that this Court's intervention is needed to resolve confusion among state courts regarding *Apprendi*'s application to restitution. The urgency of this Court's intervention is underscored by two factors:

1. The problem raised by Petitioner is pervasive. Every state and the District of Columbia leave it to judges to decide whether to impose restitution and, if so, how much. And restitution proceedings impact billions of dollars each year. At the same time, all of these jurisdictions exclude juries from restitution proceedings in violation of the Sixth Amendment. The few benchmarks that are provided for state judges in making restitution decisions fall well short of the procedural protections guaranteed by the Constitution. The unfortunate reality is that in all too many cases judges simply rubber stamp recom-

mendations made by probation officers. As a result, defendants are routinely required to pay restitution based on "unproven allegations, costs borne by people who are only tangentially connected to crime victims, and consequences resulting from conduct for which a defendant has been affirmatively acquitted." Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 104 (2014). The adverse consequences of this deficient process are severe—failure to pay restitution carries the threat of incarceration, defendants cannot discharge restitution debts in bankruptcy, and restitution is mandatory for defendants even if they are indigent and unable to pay.

2. State courts, like their federal counterparts, have struggled to reconcile this Court's *Apprendi* case law with their prior cases and practices, which treated restitution as though it were exempt from Sixth Amendment protection. Furthermore, state courts of last resort and the District of Columbia Court of Appeals, like the federal circuits, are deeply split—23 to 17—regarding the threshold issue of whether restitution is a criminal penalty to which the Sixth Amendment applies. The issue in this case is of national importance. Amici urge the Court to take this opportunity to resolve it.

ARGUMENT

I. THE IMPOSITION OF RESTITUTION BASED ON JUDICIAL FACTFINDING IS PERVASIVE AT THE STATE LEVEL.

Like the federal government, every state has recognized an interest in providing restitution to victims of crime. In eighteen states, a victim's right to restitution has a constitutional dimension.[2] And every state and the District of Columbia provides a statutory mechanism for imposing restitution as part of a criminal sentence. Much like the federal Mandatory Victims Restitution Act (MVRA), many states also provide that such restitution is mandatory for qualifying offenses. For example, Michigan law provides that "when sentencing a defendant convicted of a crime, the court *shall order* * * * that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." MICH. COMP. LAWS § 780.766 (emphasis added); *see also* FLA. STAT. ANN. § 775.089(1)(a) ("In addition to any punishment, the court shall order the defendant to

[2] *See* ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; CONN. CONST. art. I § 8(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; LA. CONST. art. I, § 25; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; WIS. CONST. art. I, § 9(m).

make restitution."); WIS. STAT. ANN. § 973.20(1r) ("[T]he court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of crime.").

Like the MVRA, state restitution laws make the imposition of restitution contingent on specific findings of fact as to the amount of loss caused by the defendant. In Petitioner's home state of Michigan, for instance, restitution must be premised on at least one of several factual findings, which include "the fair market value of the property," the "after-tax income loss suffered by the victim as a result of the crime," or the "cost of medical and related professional services." MICH. COMP. LAWS §§ 780.766(3), 780.766(4)(a). *See also, e.g.*, ALASKA STAT. § 12.55.045(a)(2) (requiring a finding of the financial burden placed on the victim as a result of the criminal conduct); CONN. GEN. STAT. § 53a-28(c) (same); IND. CODE § 35-50-5-3(a) (requiring determination of victim's property damages, medical costs, and earnings lost as a result of the crime); W. VA. CODE ANN. § 61-11A-5(d) (requiring the court to consider loss sustained by the victim).

Nonetheless, every state, with the exception of Tennessee, places authority to find these essential facts exclusively in the hands of judges—not juries. *See, e.g.*, MICH. COMP. LAWS § 780.766 (requiring that "the court" find and set the amount of restitu-

tion); NEB. REV. STAT. § 29-2281 (same); NEV. REV. STAT. § 176.033 (same); *State* v. *Kinneman*, 119 P.3d 350, 355 (Wash. 2005) ("[t]here is no right to a jury trial to determine facts on which restitution is based" under state law).

Even Tennessee, which allows juries to find the amount of restitution for certain qualifying offenses, gives judges wide latitude to impose restitution without a jury. Juries only set restitution amounts in Tennessee when "a felon is convicted of stealing or feloniously taking or receiving property, or defrauding another of property." TENN. CODE ANN. § 40-20-116(a). But Tennessee permits "a sentencing court [to] direct a defendant to make restitution * * * as a condition of probation" in all criminal cases, and on top of any restitution set by a jury under § 40-20-116. TENN. CODE ANN § 40-35-304. *See also State* v. *White*, No. W2003-00751-CCA-R3-DC, 2004 WL 2326708, at *23-24 (Tenn. Crim. App. 2004) (holding that these two provisions are not mutually exclusive and that a judge may impose restitution as a condition of probation on top of what the jury has found when it sentences under § 40-20-116).

For the reasons stated by the Petitioner, this uniform practice across the states and the District of Columbia contravenes this Court's jurisprudence. Judges routinely impose punishment that cannot be justified "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."

Blakely v. *Washington*, 542 U.S. 296, 303, 308 (2004) (emphasis in original).

II. THE PROCESS BY WHICH RESTITUTION IS IMPOSED BY THE STATES VIOLATES THE SIXTH AMENDMENT.

It is contrary to the Sixth Amendment for juries to be excluded from restitution decisions. The jury, after all, is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). And the right to a jury is meant to act as "further protection against arbitrary action." *Id.* By leaving restitution to judges who often rely heavily, if not exclusively, on reports prepared by probation officers in making restitution-related decisions, states have implemented restitution schemes with inadequate protections for defendants.

Under most state restitution schemes, as in the federal system, probation officers prepare presentencing reports, which often include a recommended restitution amount. While these are framed as "recommendations," practice has proven that "court[s] will simply rubberstamp the probation officer's report." Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After* Southern Union v. United States, 64 ALA. L. REV. 803, 819 (2013); *see*

also Jennifer S. Granick, *Faking It: Calculating Loss in Computer Crime Sentencing*, 2 I/S: J. L. & POL'Y INFO SOC'Y 207, 221 (2006) (finding that sentencing courts often matched the government's suggested restitution award).

This is immensely problematic; such reports are "bureaucratically prepared" and "hearsay-riddled." *United States* v. *Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting). In recommending restitution amounts, probation officers rely heavily on victims' own estimates of their losses. But "victims often exaggerate their losses," and "[t]he victim's word is not necessarily reliable." Father Dismas Clark, S.J., *A Priest to 'Ex-Cons',* THE ROTARIAN, Aug. 1962, at 17. "[A] victim might have questionable motives in providing testimony concerning the magnitude of a loss; e.g., the victim might exaggerate her loss in order to exact revenge on a defendant or to extract higher compensation in restitution." Robert A. Mikos, *Accuracy in Criminal Sanctions, in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 84, 87 (Alon Harel & Keith N. Hylton eds., 2012). And probation officers are not easily able to remedy any inaccuracies in a victim's report. For one, these "distorted claims * * * are difficult to test for accuracy." Daniel McGillis, *Crime Victim Restitution: An Analysis of Approaches*, Nat'l Inst. of Justice, U.S. Dep't of Justice, 38 (Dec. 1986).

On top of these procedural deficiencies, restitution hearings are rare and lack the traditional safeguards available in a jury setting. States have generally held that judges may make factual findings untethered to any evidentiary rules; many state courts have concluded that their "[state] rules of evidence do not apply at restitution hearings." *State* v. *Kisor*, 844 P.2d 1038, 1044 (Wash. Ct. App. 1993); *see also People* v. *Matzke*, 842 N.W.2d 557, 560 (Mich. Ct. App. 2013) (noting that "hearsay evidence may be properly considered at a restitution hearing").

And not only do judges impose restitution without basing their decisions on facts found by juries, but they "commonly order criminal restitution for conduct for which the defendant has not been found guilty, including acquitted conduct, conduct occurring outside the statute of limitations, and conduct involving victims not named in the indictment." Lollar, *supra* at 98; *see also, e.g., State v. Lewis*, 214 P.3d 409, 412-13 (Ariz. Ct. App. 2009).

These constitutionally flawed restitution processes are even more troubling when viewed in light of their dire consequences for criminal defendants. "The practical effects of failing to pay restitution are no different from the effects of failing to pay a criminal fine * * * Failure to pay restitution results in a defendant's continued disenfranchisement, suspension of her driver's license, continued court supervision, and constant threat of re-incarceration." Lollar,

supra at 123. Michigan courts, for example, can impose restitution as a condition of probation or parole. MICH. COMP. LAWS § 780.766(11). Failure "to comply with the [restitution] order" or lack of "a good faith effort to comply with the order" is grounds for revocation of probation or imprisonment. *Id.* When these additional criminal sanctions are triggered, they often mean that "a convicted defendant cannot vote, serve on a jury, run for public office, or possess a firearm." Lollar, *supra* at 127.

Collateral financial consequences also flow from restitution orders. Excessive restitution awards set *ad hoc* by a judge may encumber criminal defendants for years, particularly because the attendant debts are not dischargeable in bankruptcy. *See, e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). Restitution can impose such a substantial financial burden that it has been characterized as a "debtors' prison," whereby defendants are saddled with debts, sent back to prison, and accumulate more debts in the process. *See generally* American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* 37 (Oct. 2010).[3]

These harmful consequences are inevitable for many defendants. "Because the vast majority of criminal defendants and juvenile adjudicants are in

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[3] *Available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf (hereinafter "ACLU Report").

financially precarious circumstances before penalties are imposed, there is a high likelihood that debtors will be unable to make the mandated regular, often sizeable payments against their debt." Beth A. Colgan, *Reviving the Excess Fines Clause*, 102 CAL. L. REV. 277, 290 (2014). Yet restitution schemes do not exempt indigents from their purview. In fact, some "statutes prohibit courts from considering a defendant's indigency in assessing sanctions." *Id.* at 289; *see also* CAL. PENAL CODE § 1202.4(c) ("A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine."). Even in states like Michigan, where courts are given latitude to examine indigency before revoking probation or imposing imprisonment for unpaid restitution, MICH. COMP. LAWS § 780.766(11), the practical reality is that judges " 'don't believe' defendants who say they are indigent and have not been able to obtain the necessary funds." ACLU Report, *supra*, at 34. And because individuals with criminal records often struggle to find employment, imprisonment is a likely fate for indigent criminal defendants who are saddled with restitution obligations. *See, e.g.*, *Michigan: The Debtor Prison State*, DEMOCRACY TREE (Sept. 22, 2013), http://www.democracy-tree.com/michigan-debtor-prison-state/ (highlighting the example of a criminal defendant who was initially ordered to pay restitution after pleading guilty to a probation violation and was then sent to prison after failing to keep

up with his payments).

The process by which restitution is imposed by all fifty states and the District of Columbia is contrary to the precedent of this Court and violates the Sixth Amendment. This Court's intervention is needed now.

III. THE STATES NEED THIS COURT'S GUIDANCE.

State courts, much like their federal counterparts, have struggled to apply this Court's post-*Apprendi* Sixth Amendment jurisprudence. Some have exempted restitution from Sixth Amendment protection on the basis that it has "no prescribed statutory maximum." *People* v. *McKinley*, No. 2011-002060, 2013 WL 2120278, at *8 (Mich. Ct. App. May 16, 2013); *see also State* v. *Huff,* 336 P.3d 897, 901-03 (Kan. Ct. App. 2014) (following federal circuit case law to find that restitution does not apply because it has no statutory maximum); *Smith* v. *State,* 990 N.E.2d 517, 521-22 (Ind. Ct. App. 2013) (same). For the reasons stated by Petitioner, neither that rationale nor that result can be squared with this Court's decisions in *Blakely*, *Southern Union* and *Alleyne*. Pet. at 12-16.

Also like their federal counterparts, state courts are deeply divided regarding the threshold question of whether restitution is a criminal penalty that triggers the protections of the Sixth Amendment.

See Apprendi v. *New Jersey*, 530 U.S. 466, 490 (2000) (stating its application to "any fact that increases *the penalty for a crime*") (emphasis added). The depth of this split is reason enough to merit review by this Court.

Thirty-nine states and the District of Columbia have analyzed the nature of restitution.[4] Twenty-three of these jurisdictions deem restitution to be punitive.[5] These jurisdictions recognize that restitu-

[4] The eleven jurisdictions that have not analyzed the nature of restitution include: Maine, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New York, North Dakota, Ohio, and South Carolina.

[5] These jurisdictions include: Alabama, *see Jolly* v. *State*, 689 So. 2d 986, 988 (Ala. Crim. App. 1996); Alaska, *see Ortiz* v. *State*, 173 P.3d 430, 433 (Alaska Ct. App. 2007); Arkansas, *see Eichelberger* v. *State*, 323 Ark. 551, 554, 916 S.W.2d 109, 110-11 (1996); Colorado, *see People* v. *Brigner*, 978 P.2d 163, 165 (Colo. App. 1999); District of Columbia, *see Hardy* v. *United States*, 578 A.2d 178, 181 (D.C. 1990); Florida, *see Spivey* v. *State*, 531 So. 2d 965, 967 (Fla. 1988); Georgia, *see Harris* v. *State*, 413 S.E.2d 439, 440-41 (Ga. 1992); Illinois, *see People* v. *Lowe*, 606 N.E.2d 1167, 1173 (Ill. 1992); Indiana, *see Pearson* v. *State*, 883 N.E.2d 770, 772-73 (Ind. 2008); Iowa, *see State* v. *Izzolena*, 609 N.W.2d 541, 549 (Iowa 2000); Maryland, *see Goff* v. *State*, 875 A.2d 132, 139 (Md. 2005); Massachusetts, *see Commonwealth* v. *Casanova*, 843 N.E.2d 699, 704 (Mass. App. Ct. 2006); Nebraska, *see State* v. *Clapper*, 732 N.W.2d 657, 661 (Neb. 2007); New Mexico, *see State* v. *Collins*, 166 P.3d 480, 484 (N.M. Ct. App. 2007); Oregon, *see State* v. *Ramos*, 340 P.3d 703, 708 (Or. Ct. App. 2014); Rhode Island, *see State* v. *Traudt*, No. W2/88-0476A, 1995 WL 941400, at *9 (R.I. Super. Ct. Feb. 24, 1995); South Dakota, *see United Bldg. Ctrs.* v. *Ochs*, 781

tion is inherently punitive because it is made on the threat of additional incarceration for willful non-payment. *See, e.g.*, *Ortiz* v. *State*, 173 P.3d 430, 433 (Alaska Ct. App. 2007) ("[W]hen a court orders a defendant to pay restitution, the defendant faces imprisonment for willful failure to pay the restitution."); *Keller* v. *State*, 723 P.2d 1244, 1246 (Wyo. 1986) ("From the viewpoint of a defendant in a criminal trial, payment of restitution is as much a penalty as payment of a fine.").

They have also recognized that restitution promotes traditional penal goals of retribution, deterrence, and rehabilitation. For example, the Texas Court of Criminal Appeals has recognized that restitution serves these aims by "attempt[ing] to redress the wrongs for which a defendant has been charged and convicted in court." *Cabla* v. *State*, 6 S.W.3d 543, 546 (Tex. Crim. App. 1999). Other courts similarly acknowledge that restitution is "an effective rehabilitative penalty because it forces defendants to confront concretely—and take responsibility for—the harm they have inflicted, and it appears to offer a greater potential for deterrence."

N.W.2d 79, 83 (S.D. 2010); Tennessee, *see State* v. *White*, 2004 WL 2326708, at *24; Texas, *see Weir* v. *State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009); Utah, *see State* v. *Dominguez*, 992 P.2d 995, 999 n.6 (Utah Ct. App. 1999); Washington, *see Kinneman*, 119 P.3d at 355; West Virginia, *see State* v. *Short*, 350 S.E.2d 1, 2 (W. Va. 1986); and Wyoming, *see Renfro* v. *State*, 785 P.2d 491, 494 (Wyo. 1990).

Harris v. *State*, 413 S.E.2d at 441 (quoting *People* v. *Hall-Wilson*, 505 N.E.2d 584, 585 (N.Y. 1987)); *see also People* v. *Shepard*, 989 P.2d 183 (Colo. Ct. App. 1999) ("[R]estitution primarily is considered a part of the criminal sentence because the payment of restitution advances the rehabilitative and deterrence purposes of the sentencing scheme."); *McDaniel* v. *State*, 45 A.3d 916, 920 (Md. Ct. Spec. App. 2012) (finding that restitution " 'is a *criminal sanction*, not a civil remedy' " and "serves the familiar penological goals of retribution and deterrence, and especially rehabilitation") (quoting *Grey* v. *Allstate Ins. Co.*, 769 A.2d 891, 895 (Md. 2001)) (emphasis in original); *State* v. *Dillon*, 637 P.2d 602, 606 (Or. 1981) ("[Restitution] is intended to serve rehabilitative and deterrent purposes by causing a defendant to appreciate the relationship between his criminal activity and the damage suffered by the victim.").

And they recognize that restitution's penal goals are superior to its remedial goals. Florida, for example, observes that, "[u]nlike civil damages, restitution is a criminal sanction" designed "not only to compensate the victim, but also to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." *Spivey* v. *State*, 531 So.2d 965, 967 (Fla. 1988); *see also Pearson*, 883 N.E.2d at 772 ("The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused.").

On the other side of the coin, seventeen jurisdictions hold that the Sixth Amendment does not apply to restitution because it is not punishment, but rather a civil remedy.[6] *See, e.g.*, *State* v. *Howard*, 785 P.2d 1235, 1239 (Ariz. Ct. App. 1989) ("The purpose of mandatory restitution is to make the victim whole, not to punish"); *Benton*, 711 A.2d at 799("The purpose of the order of restitution was remedial and compensatory. It was intended to protect the innocent victim of [Defendant's] criminal

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[6] These states include: Arizona, *see State* v. *Fancher*, 818 P.2d 251, 253 (Ariz. Ct. App. 1991); California, *see People* v. *Harvest*, 101 Cal. Rptr. 2d 135, 140-41 (Cal. Ct. App. 2000); Connecticut, *see State* v. *Fowlkes*, 930 A.2d 644, 650 (Conn. 2007); Delaware, *see Benton* v. *State*, 711 A.2d 792, 799 (Del. 1998); Hawaii, *see State* v. *Gaylord*, 890 P.2d 1167, 1192 (Haw. 1995); Idaho, *see State* v. *Cottrell*, 271 P.3d 1243, 1253 (Idaho Ct. App. 2012); Kansas, *see State* v. *Huff*, 336 P.3d 897 at 900; Kentucky, *see Commonwealth* v. *Steadman*, 411 S.W.3d 717, 725 (Ky. 2013); Louisiana, *see State* v. *Duncan*, 738 So. 2d 706, 712 (La. Ct. App. 1999); Montana, *see State* v. *Field*, 116 P.3d 813, 817 (Mont. 2005) (quoting *United States* v. *George*, 403 F.3d 470, 473 (7th Cir. 2005); New Jersey, *see State* v. *Paladino*, 497 A.2d 562, 568 (N.J. Super. Ct. App. Div. 1985); North Carolina, *see State* v. *Easter*, 398 S.E.2d 619, 625 (N.C. Ct. App. 1990); Oklahoma, *see In re State ex rel. T.L.B.*, 218 P.3d 534, 537 (Okla. Civ. App. 2009); Pennsylvania, *see Commonwealth* v. *Darling*, 58 Pa. D. & C.4th 378, 386 (Pa. Ct. Com. Pl. 2002); Vermont, *see State* v. *Bohannon*, 996 A.2d 196, 198 (Vt. 2010); Virginia, *see McCullough* v. *Commonwealth*, 568 S.E.2d 449, 450-51 (Va. Ct. App. 2002); and Wisconsin, *see State* v. *Poach*, No. 2006AP2271-CR, 2007 WL 115996, at *1 (Wis. Ct. App. Jan. 17, 2007).

conduct from financial loss rather than to vindicate public justice.").

The punitive or non-punitive nature of restitution is also important because "[t]he distinction between a civil penalty and a criminal penalty is of some constitutional import." *United States* v. *Ward*, 448 U.S. 242, 248 (1980). And a number of constitutional protections are triggered only by punitive laws. *See, e.g.*, *Hudson* v. *United States*, 522 U.S. 93, 105 (1997) (Double Jeopardy Clause of the Fifth Amendment); *Kansas* v. *Hendricks*, 521 U.S. 346, 395 (1997) (Ex Post Facto Clause of Article I);[7] *Austin* v. *United*

[7] The split as to whether restitution is criminal or civil affects other fundamental constitutional questions, such as whether the Ex Post Facto Clause applies to restitution—a question on which the Circuits are also split. The Fifth, Seventh, and Tenth Circuits have held that restitution under the MVRA is not punitive and does not trigger the Ex Post Facto Clause. For the Fifth Circuit, *see United States* v. *Phillips*, 303 F.3d 548, 551 (5th Cir. 2002); Seventh Circuit, *see United States* v. *Newman*, 144 F.3d 531, 538 (7th Cir. 1998); and Tenth Circuit, *see United States* v. *Nichols*, 169 F.3d 1255, 1278-80 (10th Cir. 1999). Meanwhile, the Second, Third, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits have held that restitution is punitive and that retroactive application of restitution under the MVRA would violate the Ex Post Facto Clause. For the Second Circuit, *see United States* v. *Thompson*, 113 F.3d 13, 14 n.1 (2d Cir. 1997); Third Circuit, *see United States* v. *Leahy*, 438 F.3d 328, 333-35 (3d Cir. 2006); Sixth Circuit, *see United States* v. *Elson*, 577 F.3d 713, 721 (6th Cir. 2009); Eighth Circuit, *see United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); Ninth Circuit, *see United States* v. *Montgomery*, 384 F.3d 1050, 1064 (9th Cir. 2004); Eleventh Circuit, *see United States* v. *Siegel*,

States, 509 U.S. 602, 620-22 (1993) (Excessive Fines Clause of the Eighth Amendment). Yet defendants facing restitution receive different varying constitutional protections across state lines. *E.g.*, *compare Hardy*, 578 A.2d at 181 ("The question before us is whether one court may broaden or extend-or affect in any way-a criminal penalty [restitution] imposed by another court. For the reasons we have stated, we hold that such action is barred by the Double Jeopardy Clause."), *with State* v. *Duncan*, 738 So. 2d at 712 ("Based on our review of all relevant factors, we find that the restitution order in this case clearly did not constitute a criminal penalty for double jeopardy purposes.").

Guidance is needed to resolve this split of authority. The Court should grant this petition and provide it.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for writ of certiorari should be granted.

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153 F.3d 1256, 1259 (11th Cir. 1998); and D.C. Circuit, *see United States* v. *Rezaq*, 134 F.3d 1121, 1141 n.13 (D.C. Cir. 1998).

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