

No. 17-522

IN THE
Supreme Court of the United States

ANNE MARIE HANKINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

Where a victim entitled to restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. §§ 3663A-3664, neither accepts restitution nor assigns it to the Crime Victims Fund, may the district court nonetheless order the defendant to pay restitution to the Fund, despite the absence of statutory authority for such an order?

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REPLY IN SUPPORT OF CERTIORARI

The Government does not dispute that the courts of appeals are divided, 2-2, on the question presented, which concerns the authority of district courts under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A-3664. *See* Pet.7-17. The Second and Ninth Circuits hold that district courts can order defendants to pay restitution under the MVRA to the Crime Victims Fund even where the victim does not assign the restitution payments to the Fund, despite the absence of any statutory authority for such an order. Pet.App.9a-15a; *United States v. Johnson*, 378 F.3d 230 (2d Cir. 2004). In acknowledged conflict with those courts, the Seventh and Tenth Circuits hold that such orders are unlawful. *United States v. Speakman*, 594 F.3d 1165 (10th Cir. 2010); *United States v. Pawlinski*, 374 F.3d 536 (7th Cir. 2004).

Nor does the Government dispute that the question presented is an important one that merits this Court's attention. District courts order restitution in thousands of cases every year, and this Court has often granted certiorari to resolve circuit splits on questions involving the MVRA. *See Manrique v. United States*, 137 S. Ct. 1266 (2017); *Roberts v. United States*, 134 S. Ct. 1854 (2014); *Dolan v. United States*, 560 U.S. 605 (2010). And the lower courts' competing answers to the question presented turn on their conflicting views on a basic question of federal law that should be answered by this Court: In the context of criminal sentencing, does a district court have discretion to do anything that is not expressly prohibited by law, or is its

discretion limited to only those actions authorized by law? *See* Pet.18-19.

Rather than contest the circuit conflict or its importance, the Government rests its opposition on the argument that Hankins lacks standing because she “has not identified any way in which the Court’s resolution of that question would affect her.” U.S. Br. 8. The Government is wrong. Hankins has a substantial financial stake in this Court’s decision on the merits. The question presented asks whether a district court has authority to order a defendant to pay restitution under the MVRA to the Fund when the victim neither accepts the restitution payments nor assigns them to the Fund. Pet.i.¹ Were this Court to resolve the question presented in Hankins’ favor, Hankins would benefit in one of two ways; either possibility establishes standing.

First, Hankins’ argument is that the District Court’s order directing restitution to the Fund is legally invalid, because Horton’s decision to disclaim restitution without assigning it to the Fund (or anyone else) left the District Court without authority to direct restitution to the Fund (much less to anyone else). A ruling that the District Court’s order is invalid would relieve Hankins of the six-figure balance of her restitution obligation by eliminating the last arguably valid recipient of the restitution payments.

¹ Because nothing in this case turns on the distinction between a victim and the victim’s assignee, this brief (like the Government’s) uses the term “victim” to refer to both actual victims and their assignees, including Horton.

The Government suggests that if the Fund is not a valid recipient, then the money will simply go to the district court clerk. But Hankins makes payments to the clerk only so that the clerk can pass them along to the designated payee (which was originally the victim and is now the Fund). In the absence of any valid payee, there would be no basis for requiring further payments to the clerk. Accordingly, if Hankins prevails on the merits, then she will not be obligated to make further restitution payments. She thus has a substantial financial stake in this Court's resolution of the question presented.

Second, even if the Government were correct that Hankins will remain obligated to pay the full restitution amount *to someone*, she would still have a financial stake in having the District Court's order invalidated and Horton reinstated as the payee. Under state-law unjust enrichment principles, if Horton receives the full stream of restitution payments from the clerk, then Hankins would be entitled to the return of the \$5000 payment she made to Horton pursuant to their settlement agreement. By contrast, under the District Court's order, Horton has not been unjustly enriched (because the Fund receives Hankins' restitution payments), and so Hankins has no such right. This financial stake is more than adequate to confer standing to seek the invalidation of the District Court's illegal order.

Finally, the Government tries to narrow the question presented and avoid the split by proposing a groundless distinction between district courts that order restitution to the Fund as part of the

defendant's initial sentence and those that do so in an amendment to the initial sentence. But there is no basis in law or logic to suppose that a district judge has *more* discretion to order restitution to the Fund after it enters a final judgment than it has beforehand. And the other decisions in the split do not mention that spurious distinction. In any event, even if the Government's distinction were relevant, the decision below would still conflict with *Pawlinski*, in which the district court (as in Hankins' case) ordered restitution payments to the Fund in an amendment to a concededly valid initial sentence. 374 F.3d at 537-38.

I. Hankins would benefit from a ruling that the Fund is not a valid recipient for her payments

1. Rather than focus on the question presented, the Government devotes much of its brief to arguing that “a victim cannot unilaterally extinguish a defendant's obligation to pay restitution.” U.S. Br. 8; *see* U.S. Br. 8-15. The Government simultaneously asserts that this issue is not certworthy and faults Hankins for not “directly” challenging the Ninth Circuit's ruling on this point. U.S. Br. 8, 15.

But whether a victim has some abstract power to extinguish a restitution obligation is not the proper question in this case. The question presented is whether a district court can order restitution to the Fund where the victim neither accepts the restitution payments nor assigns them to the Fund, despite the absence of statutory authority for the district court to do so. Pet.i. If Hankins is correct that the answer is “no,” then a district court in that position cannot require the defendant to pay

restitution because there is no valid recipient for the restitution payments.

2. Hankins' answer to the question presented makes clear that she has standing to seek this Court's review. In support of her position on the question presented, Hankins contends that a district court cannot order restitution payments without statutory authorization and that there is no statutory authorization to order payments to the Fund, except at the victim's direction under 18 U.S.C. § 3664(g)(2). Pet.19-22; *see also Speakman*, 594 F.3d at 1174-78; *Pawlinski*, 374 F.3d at 539-41. Hankins would benefit from a decision in her favor because such a decision would eliminate the Fund as the last arguably lawful recipient for the restitution payments and would thereby save her from having to pay the six-figure balance of the restitution obligation.

The Government responds that, if the restitution payments cannot be sent to the Fund, then they will accumulate with the district court clerk and may ultimately "revert ... to the U.S. Treasury's federal unclaimed property fund" or "escheat to the state." U.S. Br. 7, 16-17 (quoting Pet.App.13a). But the district court originally sentenced Hankins to pay the clerk "for transfer to the payee," not for the court's own benefit. Pet.App.32a (original sentence, ordering payments to the clerk for transfer to the victim, U.S. Bank); *see also* District Court Docket No. 26 (directing the clerk to send future payments to Horton, the victim's assignee); Pet.App.23a (unlawfully directing future payments to the Fund).

No order directing restitution to the clerk *for the court itself to keep*, rather than for transfer to a third

party, has ever been entered in this case. And there would be no authority to require payments to the clerk in the absence of a valid payee. Indeed, if Hankins is correct that the District Court lacks authority to direct the payments to the Fund (which it chose to do because the MVRA refers to the Fund as a possible recipient in § 3664(g)(2), *see* Pet.App.22a), then *a fortiori* it lacks authority to designate the court itself as the payee.

If this Court accepts Hankins' argument that the District Court lacked authority to order restitution to the Fund, then the Government will have no valid basis to require further payments to the clerk. Hankins plainly has standing to pursue that outcome.²

² Like the Government, the court below suggested that if the payments could not be directed to the Fund, then they would accumulate with the clerk. But its judgment in affirming the District Court's order was only that the District Court could redirect the payments to the Fund, not that the clerk could keep them. Because "[t]his Court ... does not review lower courts' opinions, but their *judgments*," Hankins has no occasion to challenge the specious reasoning of the opinion below in her question presented. *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015).

If Hankins prevails in this Court but the District Court on remand orders her to make payments to the clerk for the court to keep, then Hankins may apply for a writ of error *coram nobis* to correct that unlawful order. *See, e.g., United States v. Mischler*, 787 F.2d 240 (7th Cir. 1986) (approving use of that writ to correct an invalid restitution order).

II. Hankins would also benefit from having Horton reinstated as the recipient of the restitution payments

1. The Government also suggests that, if the District Court's order directing payments to the Fund is invalidated, then Hankins may be required to pay the balance of the restitution obligation to Horton. U.S. Br. 16. Hankins disagrees because Horton has disclaimed future payments, as it was entitled to do under 18 U.S.C. § 3664(g)(1), and is no longer a valid recipient of her restitution payments. But if the Government were correct, Hankins would benefit financially from having Horton reinstated as the payee, and so that possibility cannot deprive her of standing.

If Horton is reinstated as the payee of the full amount of restitution, then Hankins will be entitled to the return of the \$5000 settlement payment she made to Horton. *See* Pet.5. After all, were Horton to keep that payment (which has not been credited against Hankins' restitution obligation), it would benefit from both the settlement payment and the stream of restitution payments that it agreed to give up in return for the settlement—it would have its cake and eat it, too. That would be a classic case of unjust enrichment, for which Hankins would have a remedy in state court if necessary. *See, e.g., Restatement (Third) of Restitution and Unjust Enrichment* §§ 1, 32-33. The District Court's order deprived Hankins of this state-law right: Under that order, Hankins has no right to the return of the \$5000 because, as things stand, Horton no longer receives restitution payments and thus was not unjustly enriched by the \$5000 payment.

2. The Government concedes that “the defendant in *Pawlinski* ... had a financial stake in th[e] question” of the district court’s authority to order restitution to the Fund. U.S. Br. 16. Hankins’ argument is even stronger than Pawlinski’s, so the Government’s concession confirms that she has standing.

Pawlinski was a Wisconsin politician who was convicted of defrauding campaign contributors. 374 F.3d at 537. The district court entered a restitution sentence under the MVRA, which required Pawlinski to pay restitution to his victims, the defrauded contributors. *Id.* at 537-38. Pawlinski paid the restitution to the court for transfer to the victims, but only a few victims came forward to claim their share. *Id.* In response, the district court amended the order to redirect the remaining restitution money to the Fund and then deposited the money in the Fund. *Id.* at 538.

The Seventh Circuit reversed. It first considered whether Pawlinski had standing to appeal the district court’s order. *Id.* at 538-39. Pawlinski argued that the remaining money should be given to his political campaign fund. *Id.* Noting that Wisconsin state law might impose certain fines on the campaign fund (for Pawlinski had broken state as well as federal law), the Seventh Circuit held that Pawlinski had standing to seek to have the remaining restitution money returned to the campaign fund, where it could be used to pay any such state penalties and thereby save Pawlinski from having to pay them out of his personal assets. *Id.* at 538-39.

Turning to the merits, the Seventh Circuit ruled that the district court's order was "illegal." *Id.* at 540; *see* Pet.8-10. The court vacated the district court's order and "emphasized" that "the [MVRA's] conditions for restitution to nonvictims [such as the Fund] have not been satisfied." 374 F.3d at 541. But it did not order that the money be transferred to Pawlinski's campaign fund. Because the district court had already "dispatched" the restitution money "to the Crime Victims Fund," the Seventh Circuit concluded that "[w]hat happens to the money ... will be an issue between Wisconsin, the U.S. Department of Justice, which administers the Fund, ... and possibly the U.S. Treasury as well." *Id.*

Hankins has a greater financial stake than Pawlinski had in his appeal, for at least two reasons. First, Pawlinski asserted only an interest in having the restitution money given to his campaign fund, where it *might* benefit him *if* state-law fines were assessed against the campaign fund that would otherwise have been assessed against him personally. By contrast, a ruling in Hankins' favor would restore her state-law right to the disgorgement of the \$5000 settlement payment. Hankins would have an unconditional right to disgorgement, whereas Pawlinski's interest was only in avoiding fines that the state *might* impose. (As discussed above, Hankins also hopes to save the full six-figure balance of her restitution obligation. The point here is that the \$5000 settlement payment is sufficient on its own to establish standing.)

Second, because the entire balance of Pawlinski's restitution amount had already been sent to the Fund and the Seventh Circuit was unwilling to order

the U.S. Treasury to pay it back, Pawlinski's stake was contingent in an additional way: A ruling in his favor could only give him the possibility of having the money returned, with the outcome depending on the decisions of several third parties. *See* 374 F.3d at 541. By contrast, the bulk of Hankins' restitution obligation remains unpaid, and Hankins seeks to avoid being required to make further payments in the future. Alternatively, if Horton is reinstated as the payee, then Hankins' right to the return of the \$5000 settlement payment will be reinstated as well. Thus, while the Government emphasizes that "[t]he court [in *Pawlinski*] did not decide ... what should happen to the unclaimed restitution payments," U.S. Br. 15, that detail is irrelevant here because the money at issue has yet to be paid to the Fund or even to the District Court.

In short, Hankins' substantial financial stake in this Court's resolution of the question presented is more than enough to give her standing.

III. The circuit split is squarely implicated

The Government halfheartedly attempts to distinguish the decision below from the conflicting decisions in *Pawlinski* and *Speakman* by pointing out that the District Court here ordered restitution to the Fund in an order entered after the initial sentence rather than in the initial sentence itself. The Government submits that "[t]he process of deciding where to send restitution payments already ordered is distinct from the authority to order restitution in the first instance." U.S. Br. 13-14 (quoting Pet.App.15a).

The Government borrows this point from the decision below, but neither the Government nor the Ninth Circuit defends their distinction between pre- and post-judgment orders directing restitution to the Fund. Nor does *Pawlinski*, *Speakman*, or any other case mention this distinction or suggest that it has legal significance.

It does not. If a district court cannot unilaterally direct restitution to the Fund in its initial sentence, then surely it cannot do so through an amendment to that sentence (perhaps an amendment entered on the same day). There is no ground to suppose that a judge may accomplish by using two sheets of paper what he cannot accomplish with one. To the contrary, a judge has *more* authority over a case before final judgment has been entered than he has afterward. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016); *see also* 18 U.S.C. § 3664(o) (“A sentence that imposes an order of restitution is a final judgment”).

In any event, the sentence held illegal in *Pawlinski* was also an amended sentence, not an initial sentence. 374 F.3d at 537-38. *Pawlinski* never challenged the validity of the initial sentence, which ordered restitution to his victims. And he had already paid the full restitution amount under that sentence to the court (for transfer to the victims) when the court “amended the order of restitution to direct that the money go to the Fund.” *Id.* at 538. Thus, *Pawlinski* concerned “[t]he process of deciding where to send restitution payments already ordered,” not “the authority to order restitution in the first instance.” U.S. Br. 13-14 (quoting Pet.App.15a). And *Pawlinski* held that the district court lacked authority to send the restitution payments to the

Fund, whereas the court below reached the opposite conclusion. Even on the Government's (and the Ninth Circuit's) view, then, there is a circuit split worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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