No. _____

IN THE

Supreme Court of the United States

WILLIAM S. POFF,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is a disabled military veteran currently serving a federal prison sentence. While incarcerated, Petitioner is entitled to approximately $133 a month in veterans disability benefits. At sentencing, the district court issued a restitution payment schedule based on Petitioner's financial circumstances. Petitioner has fully complied with that payment schedule.

Without notice, the government seized Petitioner's accumulated monthly veterans disability benefits as payment toward the restitution he owes. Petitioner challenged the seizure as beyond the scope of the Mandatory Victims Restitution Act of 1996 ("MVRA"). The questions presented are:

1. Under the MVRA, an individual who "receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, . . . shall be required to apply the value of such resources to any restitution . . . still owed." 18 U.S.C. § 3664(n). Does the periodic deposit of regular payments that were in effect at sentencing qualify as the receipt of windfall payments akin to "inheritance, settlement, or other judgment" that constitute "substantial resources" and can be immediately seized under the MVRA?

2. The MVRA exempts from restitution enforcement "[a]ny amount payable to an individual as a service-connected . . . disability benefit." 26 U.S.C. § 6334(a)(10); 18 U.S.C. § 3613. Do veterans disability benefits lose their exempt status when paid by the government?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William S. Poff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a) is reported at 727 F. App'x 249. The district court opinion (Pet. App. 8a) is unpublished but is available at 2016 WL 3079001.

JURISDICTION

The Ninth Circuit issued its opinion on March 7, 2018 (Pet. App. 1a), and denied rehearing en banc on May 16, 2018 (*id.* 24a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent text of 18 U.S.C. § 3664, 18 U.S.C. § 3613, and 26 U.S.C. § 6334, is reproduced at Pet. App. 25a.

STATEMENT

In *Lagos v. United States*, 138 S. Ct. 1684 (2018), this Court unanimously rejected the United States' broad construction of the Mandatory Victims Restitution Act ("MVRA"), holding that the MVRA's "broad general purpose" of "ensur[ing] that victims of a crime receive full restitution" did not "always require [the Court] to interpret a restitution statute in a way that favors an award." *Id.* at 1689. Rather, courts should adopt "narrower construction[s]" of terms used in the MVRA where doing so is consistent

with surrounding words and context, and in a manner that avoids "broad reading[s]" that "create significant administrative burdens." *Id.*

Shortly before *Lagos* was decided, the Ninth Circuit in this case, construing a different section of the MVRA, committed precisely the same error that this Court would disapprove in *Lagos*. Petitioner William S. Poff was in full compliance with a court-ordered restitution schedule. Yet the United States seized the entirety of his veterans disability benefits on the authority of 18 U.S.C. § 3664(n), which permits immediate seizure of funds when an incarcerated defendant receives "substantial resources from any source, including inheritance, settlement, or other judgment." Mr. Poff argued that the government's broad construction of "substantial resources" as reaching any resources, of any type and in any amount, received by a defendant defied the clear meaning of the statute, and that the proper construction of Section 3664(n) was that it reaches only unanticipated, windfall payments akin to the "inheritance[s], settlement[s]," and "judgment[s]" identified by Congress. Mr. Poff further argued that an overly broad reading of Section 3664(n) would cause it to overrun the remainder of the statutory scheme, which calls for a payment schedule based on a defendant's ability to pay.

The Ninth Circuit rejected Mr. Poff's statutory analysis and declined to perform a close analysis of the statutory terms. Instead, the Ninth Circuit reasoned that "[b]ecause '[t]he primary and overarching goal of the MVRA is to make victims of crime whole,' . . . the plain language of the MVRA does not support the conclusion that the funds in Poff's

inmate trust account are beyond the reach of" the MVRA. Pet. App. 2a. In other words, the Ninth Circuit summarily dismissed Mr. Poff's statutory analysis of the MVRA—a context-based analysis substantially similar to that applied by this Court in *Lagos*—in favor of a statutory construction that is based on implementing a generic, pro-restitution statutory "goal." And it did so in reliance on its previous decision in *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004), which was abrogated by *Lagos*. This Court's later decision in *Lagos* confirms the error in the Ninth Circuit's decision to permit the statutory purpose to override the plain language of the statute, an error that permeates the entirety of the opinion. The Ninth Circuit should be given the opportunity to reconsider its decision in light of *Lagos*.

Alternatively, this Court should grant certiorari to review the Ninth Circuit's holding that Mr. Poff's veterans disability benefits were not protected by the statutory exemption for "service-connected . . . disability benefit[s]." 26 U.S.C. § 6334(a)(10). The Ninth Circuit held that because the statutory exemption protected "[a]ny amount payable to an individual as a service-connected . . . disability benefit," the exemption was no longer applicable as soon as the benefits were paid to Mr. Poff. That extremely narrow reading of Section 6334(a)(10) conflicts with this Court's decision in *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159 (1962), which held that legislation exempting veterans benefits from creditor actions and taxation "should be liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof." *Id.* at 162 (citation omitted). In addition, the

Ninth Circuit's opinion disregards the concern raised by the Tenth Circuit about the same section of the MVRA, which noted that the narrow construction adopted by the Ninth Circuit here would allow the government to "do indirectly what it may not do directly"—*i.e.*, seize exempt funds. *Maehr v. Koskinen*, 664 F. App'x 683, 686 (10th Cir. 2016). The consequences of the Ninth Circuit's near-erasure of the exemption Congress made to the MVRA for military veterans benefits would extend far beyond the context of the particular exemption at issue in this case, causing several other exemptions from restitution also to be virtually without effect.

Accordingly, the Court should grant the Petition, vacate the decision of the Ninth Circuit, and remand for further consideration in light of this Court's recent precedent in *Lagos*. Alternatively, the Court should grant plenary review of the second question presented by the Petition.

1. Petitioner William S. Poff is a disabled military veteran who is entitled to monthly disability benefits from the Department of Veterans Affairs ("VA") for disabilities arising from his ten years of service in the United States Marine Corps. D. Ct. Dkt. 310 at Ex. 3. Mr. Poff is currently serving an eleven-year sentence, with an anticipated release date in April 2020. Pet. App. 40a. Mr. Poff's criminal judgment included an order to pay $4,258,529.13 in restitution. *Id.* 41a. At sentencing, the district court issued a restitution payment schedule "[d]uring the period of imprisonment," which required Mr. Poff to make payment of "no less than 25% of [his] inmate gross monthly income or $25.00 per quarter, whichever is greater, . . . in accordance with the Inmate Financial

Responsibility Program." *Id.* 43a. Mr. Poff has been in full compliance with that payment schedule throughout his period of incarceration. D. Ct. Dkt. 308 at 2.

Under federal law, veterans disability benefits are reduced, but—unlike other types of benefits—are not eliminated while a disabled veteran is incarcerated. During Mr. Poff's incarceration, the VA is required to deposit approximately $133 of disability benefits on a monthly basis into Mr. Poff's inmate trust account. *See* D. Ct. Dkt. 310 at Ex. 2.

The United States Attorney for the Western District of Washington (the office that had prosecuted Mr. Poff's criminal case) noticed the veterans disability benefits in Mr. Poff's inmate trust account and requested the Bureau of Prisons to "encumber [Mr. Poff's] trust account, without giving prior notice to Mr. Poff, to prevent all outbound transactions that would reduce the balance below [the then-outstanding restitution balance of] $4,255,611.63." D. Ct. Dkt. 308-3 at Ex. 3. As authority for the encumbrance on Mr. Poff's inmate trust account, the U.S. Attorney cited 18 U.S.C. § 3664(n), which permits the government to seize "substantial resources from any source, including inheritance, settlement, or other judgment," that are received by an inmate who owes restitution.

Four days later, the Bureau of Prisons complied with the U.S. Attorney's request and encumbered the veterans disability benefits in Mr. Poff's inmate trust account by debiting the full balance of $2,663.05 from his account. D. Ct. Dkt. 308-1 at Ex. 1. The vast majority—approximately 98 percent—of the

encumbered funds represented Mr. Poff's veterans disability benefits. *See id.*

2. Following the encumbrance of Mr. Poff's inmate trust account, the government filed a motion in the district court requesting "entry of an Order requiring the [Bureau of Prisons] to turn over . . . funds held in the inmate trust account for [Poff], to pay towards the criminal money penalties imposed in this case." D. Ct. Dkt. 306. Over Mr. Poff's objections, the district court granted the government's motion and ordered the Bureau of Prisons to turn over the entire $2,663.05. Pet. App. 23a.

Mr. Poff timely appealed to the Ninth Circuit, arguing that the government did not have statutory authority to encumber his veterans disability benefits. D. Ct. Dkt. 317. Upon review of the record and briefing, the Ninth Circuit appointed pro bono counsel to represent Mr. Poff. Ct. App. Dkts. 16, 17.

On appeal, as in the district court, Mr. Poff argued that his veterans disability benefits, which were known to the district court when it crafted the restitution schedule and were owed on a regular, periodic basis, were not the type of windfall payments the statute reaches. Rather, the "substantial resources" section provides an avenue for the government to seize from an incarcerated person funds akin to the statutorily enumerated categories of "inheritance[s], settlement[s], or other judgment[s]," regardless of the source of such windfall payments. 18 U.S.C. § 3664(n). Such payments are unquantifiable and unknowable at sentencing, and thus are not taken into account when the restitution schedule is set. Moreover, Mr. Poff argued that his veterans disability

benefits were shielded by the statutory exemption for "[a]ny amount payable to an individual as a service-connected . . . disability benefit." 26 U.S.C. § 6334(a)(10).

After briefing and oral argument, the Ninth Circuit affirmed the district court's order. Relying on the premise that the "primary and overarching goal of the MVRA is to make victims of crime whole," the court held that the funds in Mr. Poff's inmate trust fund were "substantial resources" and therefore subject to seizure under 18 U.S.C. § 3664(n). Pet. App. 2a–3a. In addition, the court concluded that the funds in Mr. Poff's inmate trust account did not qualify for the MVRA's exemption for service-connected disability benefits, reasoning that Mr. Poff's veterans disability benefits were "paid to him, not 'payable' to him," and "Congress declined to extend the exemption to those same benefits once they have been paid." *Id.* 4a.

Mr. Poff timely filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied. Pet. App. 24a.

3. Less than two weeks after the Ninth Circuit denied Mr. Poff's petition for rehearing, this Court issued its unanimous opinion in *Lagos v. United States*, 138 S. Ct. 1684 (2018). In *Lagos*, this Court interpreted the scope of the MVRA's requirement for reimbursement of expenses relating to "investigation[s]" and "proceedings." *Id.* at 1688. Citing the *noscitur a sociis* canon of interpretation, this Court concluded that these words should be interpreted by reference to specifically enumerated items in the statute. *Id.* at 1688–89. Applying that

rule to the MVRA's use of "investigation" and "proceedings," the Court rejected the government's broad interpretation of those words and held that they did not extend to private investigations and civil and bankruptcy proceedings. *Id.*

In so holding, this Court emphasized that despite the argument of the United States that the purpose of the MVRA is "to ensure that victims of a crime receive full restitution," "a broad purpose of this kind does not always require . . . interpret[ation] [of] a restitution statute in a way that favors an award." 138 S. Ct. at 1689. The Court warned against broad interpretations of the MVRA that would "invite controversy," and instead favored "narrower construction[s]" that would "avoid[] . . . requir[ing] courts to resolve . . . potentially time-consuming controversies as part of criminal sentencing—particularly once one realizes that few victims are likely to benefit because more than 90% of criminal restitution is never collected." *Id.* at 1689.

REASONS FOR GRANTING THE PETITION

The United States and the decisions below embraced an extraordinarily broad interpretation of the MVRA, relying heavily on the same analysis of statutory purpose that this Court rejected in *Lagos*. That analysis was key to upholding the government's seizure of Mr. Poff's funds, which would have been invalidated if the Ninth Circuit had agreed with Mr. Poff *either* (1) that the turned over funds (monthly deposits of $133) did not represent "substantial resources" under 18 U.S.C. § 3664(n), *or* (2) that the funds (which represent veterans disability benefits) are subject to the statutory exemption for funds

"payable to an individual as a service-connected . . . disability benefit" under 26 U.S.C. § 6334(a)(10). The Ninth Circuit's rejection of both arguments should be vacated in light of *Lagos*.

First, the Ninth Circuit explicitly based its rejection of Mr. Poff's argument under Section 3664(n) on the principle that the MVRA should be interpreted broadly to maximize payment of restitution. Pet. App. 2a. This holding depended on the same rationale that this Court would reject mere weeks later in *Lagos*, and on *United States v. Gordon*, 393 F.3d 1044 (9th Cir. 2004), circuit precedent that *Lagos* would abrogate. Second, having established a backdrop of a pro-restitution statutory purpose, the Ninth Circuit construed Section 6334(a)(10)'s exemption as extraordinarily narrow, effectively ruling out all future application. Although the United States concedes, and the Ninth Circuit did not dispute, that Mr. Poff's funds were bona fide veterans disability benefits that would have been shielded from seizure by the statutory exemption before they were paid, it nonetheless concluded they fell outside the exemption because they were no longer "payable to" Mr. Poff. This extremely strict construction of Section 6334(a)(10)'s exemption is the exact opposite of this Court's instruction to "liberally construe[]" statutory exemptions for veterans benefits, *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962), and in conflict with the analysis of the Tenth Circuit, which followed *Porter*'s instruction on the same issue, *see Maehr v. Koskinen*, 664 F. App'x 683, 686 (10th Cir. 2016).

This Court should grant the Petition and vacate and remand the judgment of the Ninth Circuit so that

it may reconsider its decision in light of *Lagos*. In the alternative, this Court should grant plenary review of the Ninth Circuit's departure from this Court's instructions in *Porter*.

I. *Lagos* Forecloses the Ninth Circuit's Policy-Driven, Broad Interpretation of "Substantial Resources" Under Section 3664(n).

The Ninth Circuit's judgment expressly relies on analysis and circuit precedent that this Court abrogated less than two weeks later in *Lagos*. This case presents an ideal scenario for an order granting the Petition, vacating the decision below, and remanding for further proceedings.

A. The Ninth Circuit's Decision Interpreted the MVRA in the Manner that this Court Rejected in *Lagos*.

1. In *Lagos*, the district court ordered the convicted defendant to reimburse the victim for the fees of attorneys, accountants, and consultants relating to the victim's own private investigation and to another company's bankruptcy that the defendant's fraud had caused. *See* 138 S. Ct. at 1687. The U.S. Court of Appeals for the Fifth Circuit affirmed, reasoning that these fees constituted "expenses incurred during participation in the investigation . . . of the offense or attendance at proceedings related to the offense" under the MVRA. *Id.* (quoting 18 U.S.C. § 3663A(b)(4)). The Fifth Circuit observed that several other Circuits, including the Ninth Circuit in *Gordon*, had adopted similarly broad constructions of the MVRA. *United States v. Lagos*, 864 F.3d 320,

323 n.2 (5th Cir. 2017) (citing *Gordon*, 393 F.3d at 1057), *rev'd*, 138 S. Ct. 1684 (2018).

This Court granted certiorari to consider whether the Fifth Circuit properly construed the terms "investigation" and "proceedings." The Court unanimously reversed, rejecting the Fifth Circuit's broad interpretation and holding that "the words 'investigation' and 'proceedings' . . . are limited to government investigations and criminal proceedings." *Lagos*, 138 S. Ct. at 1688. The Court provided three principal rationales for its narrow construction of the MVRA, each of which is applicable here: (1) the proper construction of the MVRA is not necessarily the construction that favors restitution, *id.* at 1689; (2) the canon of *noscitur a sociis* suggested a narrower interpretation based on the words surrounding those terms directly at issue, *id.* at 1688–89; and (3) the narrow construction of words in the relevant section of the MVRA was confirmed by Congress's use of broader language more favorable to restitution elsewhere in the statute, *id.* at 1689–90.

First, the Court rejected the argument that the Fifth Circuit's broad construction was necessary to give effect to the MVRA's statutory purpose of promoting restitution. The Court assumed the premise of this argument: *i.e.*, that a narrow construction of the provision would indeed "run[] contrary to the broad purpose of the [MVRA], namely 'to ensure that victims of a crime receive full restitution.'" *Lagos*, 138 S. Ct. at 1689 (quoting *Dolan v. United States*, 560 U.S. 605, 612 (2010)). However, the Court explained, "a broad general purpose of this kind does not always require us to interpret a restitution statute in a way that favors an award." *Id.*

Rather, the MVRA must be interpreted first and foremost based "upon the statute's wording, both its individual words and the text taken as a whole." *Id.* at 1688. And even to the extent policy concerns should inform the construction of the MVRA, those concerns involve more than simply picking the construction that amplifies restitution: the Court was also careful to avoid a construction that would "create significant administrative burdens" and "invite controversy" in individual cases. *Id.* at 1689.

Second, the Court gave a limited construction based on the words of the MVRA. Specifically, the Court used the "well-worn" canon of *noscitur a sociis*, explaining that the provision containing the words at issue ("investigation" and "proceedings") also lists three specific items that must be reimbursed ("lost income," "necessary child care," and "transportation"), each of which is narrow. *Lagos*, 138 S. Ct. at 1688 (citing 18 U.S.C. § 3663A(b)(4)). The Court explained that the presence of these specific items "suggests limitation" of the nearby words at issue. *Id.* at 1689.

Third, the Court added another rationale for its construction of the words "investigation" and "proceedings": Congress used similar language in another provision which differed in a way that made it more favorable to restitution than Section 3663A(b)(4), confirming that the latter must be interpreted narrowly. The Court contrasted Section 3663A(b)(4) with restitution provisions that "specifically require restitution for the 'full amount of the victim's losses,' defined to include 'any losses suffered by the victim as a proximate result of the offense.'" *Lagos*, 138 S. Ct. at 1689 (ellipsis omitted) (citing 18 U.S.C. §§ 2248(b), 2259(b), 2264(b),

2327(b)). Because Section 3663A(b)(4) "contains no such language," the contrast "tip[s] the balance in favor of [the] more limited interpretation." *Id.* at 1690.

2. Each of the three rationales this Court used in *Lagos* to reach a narrow construction of the MVRA would, if applied below, have resulted in a narrow construction of the MVRA's "substantial resources" requirement. *Lagos* therefore confirms that the Ninth Circuit erred in affirming the district court's judgment.

First, the Ninth Circuit's stated holding on the meaning of "substantial resources" reveals its deep reliance on the particular policy goal of expanding restitution: "Because the primary and overarching goal of the MVRA is to make victims of crime whole, the plain language of the MVRA does not support the conclusion that the funds in Poff's inmate trust account are beyond the reach of § 3664(n)." Pet. App. 2a (internal quotation marks, alterations, and citation omitted). The Ninth Circuit further justified its holding in an effort to ensure that "'the will of the Legislature shall not fail,'" *id.* (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934)), and focused on Congress's intent "to restore to victims of crime 'the restitution that they are due,'" *id.* (quoting S. Rep. No. 104-179, at 12 (1995)). If this single-minded focus on a particular policy goal when interpreting a statute was not already outmoded by the time of *Lagos*, it is certainly clear now that the particular policy goal underlying the MVRA, which drove the Ninth Circuit's decision, in fact "does not always require [a court] to interpret a restitution

statute in a way that favors an award." *Lagos*, 138 S. Ct. at 1689.

Second, whereas this Court endorsed the use of *noscitur a sociis* in *Lagos*, the Ninth Circuit actually rejected Mr. Poff's textual argument, which was based on a similar interpretive canon. The court of appeals should consider that argument anew in light of *Lagos*. In particular, Section 3664(n) provides three examples in which a defendant "receives substantial resources"—namely, "inheritance, settlement, or other judgment." Each of these examples reflects a lump-sum payment that cannot be valued at the time of the criminal judgment and, if not paid towards restitution, could amount to a windfall to the defendant. As Mr. Poff argued below, the term "substantial resources" should therefore be interpreted in light of these examples, consistent with the established interpretive canon that "[g]eneral words . . . are construed to embrace only objects similar in nature to those objects enumerated by the [surrounding] specific words." *Sossamon v. Texas*, 563 U.S. 277, 292 (2011); *see also Lagos*, 138 S. Ct. at 1689 ("[S]tatutory words are often known by the company they keep."). Read in context in light of the company it keeps, the term "substantial resources" refers only to windfalls, which are economic gains that are unexpected, like "inheritance[s], settlement[s], [and] other judgment[s]." 18 U.S.C. § 3664(n). *See, e.g., United States v. Bratton-Bey*, 564 F. App'x 28, 29 (4th Cir. 2014) ("[A] defendant's receipt of a *windfall* during imprisonment triggers an automatic payment requirement." (citing 18 U.S.C. § 3664(n)) (emphasis added)). Such payments, unlike Mr. Poff's veterans disability benefits, were not taken into account when

the restitution schedule was set at the time of sentencing. *See United States v. Scales*, 639 F. App'x 233, 239 (5th Cir. 2016) (Section 3664(n) provides a "statutory right to draw on *unanticipated* resources to pay restitution" (emphasis added)).

Third, just as the Court compared the narrow provision at issue in *Lagos* with broader restitution provisions, a comparison of Section 3664(n)'s narrow provision for immediate seizure of "substantial resources," on the one hand, to the subsections more generally addressing how the restitution schedule is set and may be changed, on the other hand, highlights the limited application Congress intended for Section 3664(n). That is, the MVRA elsewhere provides that the Court is obligated to specify "the schedule according to which[] the restitution is to be paid," after considering the defendant's "financial resources and other assets," "projected earnings and other income," and "any financial obligations." 18 U.S.C. § 3664(f)(2). That schedule may then be "adjust[ed]" by the district court *sua sponte* or upon motion whenever there is "any material change in the defendant's economic circumstances." 18 U.S.C. § 3664(k). The defendant's overall restitution obligations are therefore dealt with by these much broader provisions, which take into account all of the defendant's "economic circumstances." By contrast, Section 3664(n) allows for immediate seizure, despite the restitution schedule, only in the narrow event of occasions where the defendant's circumstances change dramatically by his receipt of a "substantial" windfall payment akin to "inheritance, settlement, or other judgment." If the narrower language in Section 3664(n) is read to reach every receipt of funds by a defendant, the restitution

schedule mandated by Section 3664(f)(1) would not limit the government. Section 3664(k) would then have no application at all to improved financial circumstances of an incarcerated defendant, because the government would simply seize under Section 3664(n) any additional funds the defendant obtained, without the need to obtain the court's approval.

3. In this way, the reasoning in *Lagos* is sharply at odds with the Ninth Circuit's decision. *Lagos* rejected the elevation of a policy goal over the words of the MVRA, and instructed courts to interpret the statutory words in their broader context using tools of construction. Even though the "individual words" at issue in *Lagos* did not, in the Court's view, "demand" the "limited interpretation" it applied, the Court reached that construction based on "both its individual words and the text taken as a whole." 138 S. Ct. at 1688. Upon application of the same approach here—in lieu of the Ninth Circuit's reliance on a single policy goal of amplifying restitution—Mr. Poff is entitled to reversal of the district court's opinion. The Ninth Circuit should be given the opportunity to reach this conclusion in light of *Lagos*.

B. The Ninth Circuit's Decision Relies on Now-Abrogated Precedent.

The Ninth Circuit cited only one case—*United States v. Gordon*, 393 F.3d 1044 (9th Cir. 2004)—in the pivotal sentence setting forth its holding regarding Section 3664(n). Pet. App. 2a ("Because '[t]he primary and overarching goal of the MVRA is to make victims of crime whole,' *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004), the plain language of the MVRA does not support the

conclusion that the funds in Poff's inmate trust account are beyond the reach of § 3664(n).").

Lagos abrogated *Gordon*. In *Lagos*, this Court acknowledged a circuit split that it sought to resolve. On one side was the D.C. Circuit, which had held that Section 3663A(b)(4) does not extend to the cost of private investigations. 138 S. Ct. at 1687. On the other side were several circuits, including the Fifth Circuit in *Lagos* itself and the Ninth Circuit in *Gordon*. *Id.* These courts interpreted the MVRA's "investigation" and "proceedings" provision broadly, including on the ground that the MVRA should be interpreted expansively to serve its remedial purposes. *See Gordon*, 393 F.3d at 1056–57.

Prior to its abrogation by *Lagos*, *Gordon* was the controlling law in the Ninth Circuit on the scope of the MVRA's reimbursement requirement. *Gordon*'s construction of the MVRA was based on the express objective of giving effect to the "primary and overarching goal of the MVRA," namely "to make victims of crime whole." 393 F.3d at 1048. The Ninth Circuit in this case therefore followed prior circuit precedent in "adopt[ing] a *broad* view of the restitution authorization for investigation costs." *Id.* at 1056–57 (emphasis in original) (alteration omitted) (quoting *United States v. Phillips*, 367 F.3d 846, 863 (9th Cir. 2004)).

That this Court abrogated *Gordon* in *Lagos* is clear: after identifying *Gordon* as resting on the same side of the circuit split as the Fifth Circuit, this Court reversed the Fifth Circuit's decision. *See* 138 S. Ct. at 1387. At least one court (the Sixth Circuit), which *Lagos* listed with the Fifth and Ninth Circuits on the

wrong side of the circuit split, has recently acknowledged that *Lagos* abrogated its decision that was listed alongside *Gordon*. *See United States v. Sexton*, 894 F.3d 787, 800 (6th Cir. 2018). The rationale in *Lagos* confirms that *Gordon*'s framework for interpreting the MVRA is no longer good law: *Lagos* clarified that the proper construction of the MVRA is not necessarily the one that expands restitution—exactly the opposite of *Gordon*'s presumption that disputes involving the MVRA's meaning should be "resolved with a view toward achieving fairness to the victim." *Gordon*, 393 F.3d at 1048.

The now-abrogated *Gordon* precedent was a lynchpin of the Ninth Circuit's decision below. The panel decision includes one paragraph on whether the turned over funds "qualify as 'substantial resources from any source, including inheritance, settlement or other judgment.'" Pet. App. 2a (quoting 18 U.S.C. § 3664(n)). Specifically, the panel confronted Mr. Poff's argument "that 'substantial resources' refers only to windfalls; or, what he characterizes as 'economic gains that are unexpected and therefore were not foreseen at the time of sentencing.'" *Id.* In answer to Poff's arguments, the court recited the legislative history of the MVRA, *id.* (citing S. Rep. No. 104-179, at 12 (1995)), and in a single sentence provided its reasoning and holding:

> Because "the primary and overarching goal of the MVRA is to make victims of crime whole," *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004), the plain language of the MVRA does not support the conclusion that the funds in

> Poff's inmate trust account are beyond the reach of § 3664(n).

Id. (alteration omitted). In short, the panel's rationale for its holding relied exclusively on *Gordon*. After *Lagos*, that rationale cannot stand.

C. An Order Granting the Petition, Vacating the Decision Below, and Remanding for Further Consideration in Light of *Lagos* Is Appropriate.

Had the Ninth Circuit considered this case with the benefit of *Lagos*, its analysis could not have been the same and its outcome should have been different. As it stands, however, the Ninth Circuit denied Poff's petition for rehearing two weeks before this Court decided *Lagos*. Therefore, the Ninth Circuit's decision plainly should be reconsidered in light of *Lagos*, either by this Court's grant of plenary review or the Ninth Circuit's reconsideration on remand. *See, e.g.*, *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166 (1996) ("[T]he GVR order has . . . become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions . . . ."). Such an order is especially appropriate where it "both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Stutson v. United States*, 516 U.S. 193, 197 (1996).

A GVR order here would readily satisfy both purposes: avoiding the unfair outcome in which Mr. Poff continues to suffer under a decision that is fatally

flawed under a unanimous decision issued just weeks later by this Court, and providing the Ninth Circuit the opportunity to decide this case with the benefit of *Lagos*.

II. The Ninth Circuit's Decision Warrants Plenary Review Because Its Interpretation of Section 6334(a)(10) Conflicts with *Porter* on an Issue of Substantial Importance.

Because the Ninth Circuit's understanding of the significance of the MVRA's pro-restitution purpose heavily influenced the court's evaluation of this case, the Ninth Circuit's judgment should be vacated and the case remanded for reconsideration of all of Mr. Poff's statutory arguments.

But the Ninth Circuit's holding with respect to the statutory exemption for veterans disability benefits also warrants plenary review because it ignores and conflicts with this Court's decision in *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159 (1962), and is in tension, if not conflict, with the decision of the Tenth Circuit in *Maehr v. Koskinen*, 664 F. App'x 683 (10th Cir. 2016). The need for clarification and harmonization on this exceptionally important issue warrants plenary review if the case is not remanded to provide the Ninth Circuit a second opportunity to review the case.

Under the MVRA, a restitution judgment may be enforced "against all property or rights to property," *except* for property that is exempt from levy for taxes under specific provisions of 26 U.S.C. § 6334(a). 18 U.S.C. § 3613(a), (f). This case concerns one of those exemption provisions, which protects "[a]ny amount

payable to an individual as a service-connected . . . disability benefit" from restitution enforcement. 26 U.S.C. § 6334(a)(10). This exemption reflects Congress's judgment that "military service-connected disability payments should be exempt from levy." S. Rep. No. 99-313, at 210 (1986). It is undisputed that the funds the United States seized from Mr. Poff were protected by this exemption before they were paid to Mr. Poff.

The Ninth Circuit concluded that the veterans disability benefits in Mr. Poff's inmate trust account *lost* that protection, however, as soon as they were paid to Mr. Poff. *See* Pet. App. 4a. Section 6334(a)(10) shields funds that qualify as "amount[s] payable to an individual as a service-connected . . . disability benefit." The panel observed that other exemptions listed in the same statute—in the context of different types of funds—apply to funds that are "payable to or received by an individual." *See, e.g.*, 26 U.S.C. § 6334(a)(9). The panel therefore interpreted Section 6334(a) as "distinguish[ing] between amounts that are 'payable to,' amounts that are 'received by,' and amounts that are 'payable to or received by' an individual," and it posited that "the expression of one of these alternatives necessarily excludes another." Pet. App. 4a. The panel thus held that "the veteran disability benefits in Poff's inmate trust account were paid to him, not 'payable to' him," such that they "were not exempt from enforcement under the MVRA." *Id.*

Under the Ninth Circuit's decision, veterans disability benefits shed the protection of Section 6334(a)(10) as soon as they are deposited into a bank account, even though Congress surely had no intention to cause that result, and even though other

equally plausible constructions of the statutory language, more consistent with Congressional intent, were available. That approach, and the Ninth Circuit's statutory construction, conflicts with this Court's instruction to "liberally constru[e]" statutory protections for veterans benefits, *Porter*, 370 U.S. at 162 (citation omitted), and it further conflicts with the decisions of other courts that have followed *Porter*. Accordingly, in addition to warranting a GVR for all the reasons set forth above, the Ninth Circuit's construction of Section 6334(a)(10) warrants plenary review.

1. This Court has recognized, and required deference to, Congress's "long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 551 (1983). Accordingly, this Court has held that statutory exemptions for veterans benefits should be "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof." *Porter*, 370 U.S. at 162. The Ninth Circuit's decision defies that instruction.

As this Court explained in *Porter*, "[s]ince 1873 it has been the policy of the Congress to exempt veterans' benefits from creditor actions as well as from taxation." 370 U.S. at 160. Therefore, in *Porter*, this Court held that a federal statute exempting veterans benefits from levy applied to benefits that had been deposited into a federal savings and loan association account. The Court justified this holding on the basis that Congress "intended that veterans in the safekeeping of their benefits should be able to utilize th[e] normal modes adopted by the community for

that purpose—provided the benefit funds" are used "for support and maintenance" and "actually retain the qualities of moneys." *Id.* at 162; *see also Thompson v. Clifford*, 408 F.2d 154, 158–59 (D.C. Cir. 1968) ("Courts have traditionally read laws" that "repay those whose service safeguards [the country's] very existence" "liberally, with a view to spreading the boon broadly.").

Rather than heed *Porter*'s principle that veterans exemption statutes should be "liberally construe[d]," the panel's decision was premised on the very opposite presumption: that exemption statues should be strictly interpreted in light of the MVRA's "primary and overarching goal" of making "victims of crime whole." Pet. App. 2a. But as this Court explained in *Lagos*, the statutory scheme balances many competing objectives, and this "broad general purpose . . . does not always require [the court] to interpret a resitutiton statute in a way that favors an award." 138 S. Ct. at 1689. And that "broad general purpose" certainly cannot overcome this Court's prior instruction in *Porter* that such pro-veteran exemptions must be "liberally construed." *Porter*, 370 U.S. at 162; *cf. Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (1976) (failure to "liberally construe[]" exemption statute for the benefit of dependent Indian tribes is reversible error).

2. The panel's narrow construction of Section 6334(a)(10) as protecting veterans benefits exclusively before they are paid to the veteran (but not after) was not the only—or even better—reading of the statute. As the Tenth Circuit observed, such a narrow construction of Section 6334(a)(10) allows the United States to "do indirectly what it may not

directly"—that is, to "wait until exempt VA disability benefits have been directly deposited into [the taxpayer's] bank account and then promptly obtain them through a levy on all funds in the bank account, despite their previously exempt status." *Maehr*, 664 F. App'x at 686. An alternative, more natural interpretation of Section 6334(a)(10) protects Mr. Poff's funds, while still giving the terms "payable to" and "received by" independent meanings, avoiding superfluity, and reinforcing Congress's long-standing policy of affording the strongest of protections to veterans.

Specifically, Section 6334(a)(10)'s use of "payable to" is better read to refer to the requirement that the individual claiming the exemption is the same individual who is entitled to the benefits in the first place. This requirement ensures that only those who actually have an entitlement to the benefits—*i.e.*, the veterans themselves—are protected. For instance, if a veteran directs his disability benefits to someone else (such as by gift or transfer), the Section 6334(a)(10) exemption does not protect the recipient from having those funds to fulfill his own restitution obligations because the benefits were only "payable to" the veteran, and not the transferee. By limiting the protection of Section 6334(a)(10) to the veterans whom the benefits are "payable to," this interpretation aligns with Congress's desire to provide exemptions for the "maintenance and support" of veterans. *Porter*, 370 U.S. at 162.

Likewise, this interpretation also gives independent meaning to the use of "received by" in other exemptions listed in Section 6334(a). Unlike "payable to" (which only applies to the person to whom

the entitlement is owed), "received by" encompasses *all* funds an individual may have, regardless of whether those funds were earned, gifted, or obtained through some other means. So while the statute includes only "payable to" in subsections where, as with Section 6334(a)(10), Congress's concern is with protecting a specific *class of individuals*, the statute uses "payable to or received by" where Congress's concern was with protecting a specific *type of funds*, regardless of whether they were initially owed to the individual claiming the exemption. *Compare* 18 U.S.C. § 6334(a)(10) (protecting "amount[s] payable to an individual as a service-connected . . . disability benefit"), *with id.* § 6334(a)(9) (protecting "amount[s] payable to or received by an individual as wages or salary," up to a certain amount). In the latter circumstance, Congress sought to protect the type of funds *regardless* of whether they were "payable to" the individual claiming the exemption, and thus included the term "received by." Thus, under this construction, each term has a different meaning, so neither is surplusage.

This reading of Section 6334(a)(10) is consistent with the long-standing congressional purpose, recognized in *Porter*, 370 U.S. at 162, of protecting veterans benefits, while the Ninth Circuit's construction defies that purpose. Veterans, of course, cannot make use of their benefits until those benefits are paid to them. To tell an individual that his or her benefits are fully protected from seizure so long as they are never paid to him or her is to say the benefits are, for all intents and purposes, not protected at all. Under the panel's interpretation, Congress's enactment of Section 6334(a)(10), though appearing

on its face to protect veterans, would provide meaningful protection to *no one*. Regardless of whether such an illogical construction of the language could be adopted if determinative weight were given to the presumed pro-restitution purpose of the MVRA, it cannot be adopted under *Lagos*.

3. The Ninth Circuit's decision also parted ways with the other courts that have addressed similar issues—an unsurprising consequence of the conflict between the decision below and *Porter*.

Consistent with *Porter*'s reasoning, courts across the country have regularly recognized that veterans benefits do not lose their character as veterans benefits, or otherwise shed their statutory protections, simply because they have been deposited into a bank account. *See, e.g.*, *United States v. Griffith*, 584 F.3d 1004, 1021 (10th Cir. 2009) ("[E]ven if VA funds are commingled in an account with other funds, they will retain their VA character."); *Nelson v. Heiss*, 271 F.3d 891, 896 (9th Cir. 2001) ("Even after receipt and deposit, the funds remained subject to the call of the veteran . . . and could not be touched."); *Smith v. United States*, 460 F.2d 985, 987 (9th Cir. 1972) ("[T]he proceeds from these [VA] policies do not lose their statutory protections even after . . . they have been deposited into bank accounts."); *Roop v. Ryan*, No. 12-cv-270, 2013 WL 3155402, at *4 (D. Ariz. June 20, 2013) ("[F]ederal veterans' benefits retain their exempt status even after being deposited in a bank account."). In a sharp break from this precedent, the Ninth Circuit's interpretation of Section 6334(a)(10) would arbitrarily premise the exemption on whether or not the veterans benefits had been deposited into a bank account. The panel's

elevation of form over substance is inconsistent with the treatment of veterans benefits by other courts, and even the Ninth Circuit in other cases.

Furthermore, the Tenth Circuit recently criticized the very interpretation of Section 6334(a)(10) that the Ninth Circuit would ultimately endorse in this case. In *Maehr v. Koskinen*, the government sought to collect unpaid taxes by levying a taxpayer's bank account containing veterans disability benefits. 664 F. App'x at 684. As in this case, the taxpayer argued that the funds were exempt from levy under Section 6334(a)(10). While the district court dismissed this argument, the Tenth Circuit reversed, holding that the taxpayer had raised a "potentially meritorious claim" that the government "improperly levied exempt VA disability benefits by placing a levy on all funds in the bank account where Appellant's disability benefits are deposited." *Id.* at 684, 686. The Tenth Circuit criticized that interpretation as allowing the government to "do indirectly what it may not directly—that it may wait until exempt VA disability benefits have been directly deposited into [the taxpayer's] bank account and then promptly obtain them through a levy on all funds in the bank account, despite their previously exempt status." *Id.* at 686.[1]

The government advanced the same interpretation of Section 6334(a)(10) in *Maehr* (where

[1] On remand from the Tenth Circuit, the district court followed the decision of the district court in this case, rejecting application of the exemption for veterans disability benefits. *See Maehr v. Koskinen*, No. 16-cv-512, 2018 WL 1750476 (D. Colo. Feb. 20, 2018), *report and recommendation adopted by* 2018 WL 1406877 (D. Colo. Mar. 21, 2018).

the Tenth Circuit refused, at least at that stage, to adopt it) as it advanced here (where the Ninth Circuit adopted it). The same flaw undercut the government's interpretation below, yet the Ninth Circuit was unmoved by that flaw or by this Court's direction in *Porter*.

4. Finally, the correct interpretation of Section 6334(a)(10) is a question of far-reaching consequence that warrants this Court's review. Restitution orders are enforced on a routine basis, often with little or no judicial oversight. Error is likely given the complexity of "attempt[ing] to find a correct path through the labyrinth of federal execution statutes." *Paul Revere Ins. Grp. v. United States*, 500 F.3d 957, 961 (9th Cir. 2007). Yet the government often operates without clear guidance from the courts of appeals. This case presents a clean opportunity for this Court to clarify and harmonize the scope of Section 6334(a)(10)'s exemption across the circuits, thereby giving substantial guidance to the courts and—equally importantly—to the government.

Moreover, in addition to affecting the millions of veterans who receive benefits in recognition of their service to the country, Section 6334(a) contains parallel provisions, using the same language, for other categories of individuals that Congress sought to protect: the receipients of unemployment benefits, 26 U.S.C. § 6334(a)(4); workmen's compensation benefits, *id.* § 6334(a)(7); public assistance and welfare, *id.* § 6334(a)(11), and assistance under the federal Job Training Partnership Act, *id.* § 6334(a)(12). The exemption at issue also is not limited to the restitution context. The Ninth Circuit used its restitution-broadening modality to interpret

an Internal Revenue Code provision, Section 6334(a)(10), which is incorporated into the MVRA through 18 U.S.C. § 3613. Thus, the prejudicial effect of the Ninth Circuit's error will extend to the taxation context, as well as any other statutes that incorporate the exemption. Allowing the Ninth Circuit's decision to evade scrutiny risks cementing a dangerous precedent that could wipe away the statutory protections that Congress enacted for the most economically vulnerable people in society in a variety of contexts.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted.

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