No. 18-195

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the decision below, the Ninth Circuit relied heavily on circuit precedent that this Court would later overrule in *Lagos v. United States*, 138 S. Ct. 1684 (2018). The government nonetheless opposes Petitioner William S. Poff's request for this Court to grant the Petition, vacate the Ninth Circuit's opinion, and remand ("GVR") to allow the Ninth Circuit to consider whether and how the invalidation of that circuit precedent affects its reasoning. According to the government, this Court should instead, at the petition stage, reach the merits of the question presented and conclude that *Lagos* would not affect the Ninth Circuit's decision.

The government's position is incorrect. As it concedes, GVR is appropriate if there is a "reasonable probability" that the Ninth Circuit would have reached a different result if it had the benefit of *Lagos* from the outset. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). This Court need not address a question that no court has yet addressed—i.e., whether, after *Lagos*, Section 3664(n) of the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3664(n), authorizes the government to require turnover of all funds received by a defendant, even if the defendant is in compliance with a court-ordered restitution schedule. Instead, GVR will permit the Ninth Circuit to apply *Lagos* to this case in the first instance.

The government similarly has it backwards when it argues that the Court should not review the Ninth Circuit's interpretation of the statutory exemption for veterans disability benefits, 26 U.S.C. § 6334(a)(10).

The government misconstrues the question as whether, having narrowly construed Section 6334(a)(10) as providing no effective protection to such veterans, the Court can then distinguish *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159 (1962). Instead, the Ninth Circuit's error, which the government replicates, was in ignoring entirely the Court's direction in *Porter* to "liberally construe[]" such statutory protections for veterans. *Id.* at 162. This Court's intervention is necessary to ensure that *Porter*'s rule of construction is fully and fairly applied, consistent with congressional intent.

I. GVR Is the Appropriate Means to Evaluate the Application of New and Pertinent Authority.

GVR is proper because the Ninth Circuit's judgment expressly relied on circuit precedent, *United States v. Gordon*, 393 F.3d 1044 (9th Cir. 2004), which this Court later overruled in *Lagos*. Indeed, the Ninth Circuit's opinion relied on *Gordon* as support for the very purpose-based mode of analysis that this Court rejected in *Lagos*. This is a textbook case for GVR, which will give the Ninth Circuit "the first opportunity to consider . . . a new decision of [this Court]." *Webster v. Cooper*, 558 U.S. 1039, 1039 (2009) (Scalia, J., dissenting).

The government offers no compelling reason for this Court to replace review by the court of appeals with a first-impression merits analysis by this Court at the petition stage. To the contrary, the government concedes that GVR is appropriate if there is a "reasonable probability" that reconsideration of an issue would "determine the ultimate outcome of the

litigation." Opp. 14–15 (quoting *Lawrence*, 516 U.S. at 167). Where "a recent judgment of this Court . . . has a legal bearing upon the decision," GVR is appropriate "*without first identifying error*." *Youngblood v. West Virginia*, 547 U.S. 867, 871 (2006) (Scalia, J., dissenting) (emphasis in original).[1]

1. On one issue there is no dispute: the key passage of the Ninth Circuit's opinion cites a single, now-overruled case, *Gordon*, as support for a pro-restitution statutory purpose of the MVRA, which then guided its statutory construction. The government's own recitation of the Ninth Circuit's reasoning highlights the centrality of *Gordon* to its holding:

> The court reasoned that, "[b]ecause '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 [Petitioner's] inmate trust account are beyond the reach of § 3664(n)." [Pet. App. 2a] (quoting *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004), cert. denied, 546 U.S. 957 (2005)).

Opp. 6 (quotation marks, alterations, and citations in original). The government also does not dispute that *Lagos* overruled *Gordon*, or that *Lagos* criticized *Gordon*'s reliance on the MVRA's statutory purpose of

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[1] Justice Scalia's dissents in *Youngblood* and *Webster* adopted a *narrower* view of GVR than did the majority opinions in those cases, each of which granted the petition, vacated the court of appeals decision, and remanded even *without* intervening authority. *Youngblood*, 547 U.S. at 870; *Webster*, 558 U.S. at 1039 (Scalia, J., dissenting).

"mak[ing] victims of crime whole" as a means of justifying broad interpretations of restitution statutes. *See Lagos*, 138 S. Ct. at 1689.

Thus, the principal dispute between Petitioner and the government at this juncture is not whether the Ninth Circuit *relied* on now-overruled precedent—it plainly did—but only whether the Ninth Circuit *relied heavily enough* on defunct precedent that the outcome would be different after *Lagos*. That is a question for the Ninth Circuit in the first instance.

The government seeks to shield the Ninth Circuit's decision from *Lagos* by arguing that "*Lagos* did not address Section 3664(n), and *Gordon*'s recognition that the MVRA's 'overarching goal' is to 'make victims of crime whole' is correct." Opp. 13 (internal citation omitted). *Lagos*'s focus on a different subsection is immaterial, in light of its broadly applicable caution against "always . . . interpret[ing] a restitution statute in a way that favors an award" based on assigning a pro-restitution purpose to the MVRA's carefully calibrated statutory scheme. 138 S. Ct. at 1689. Indeed, *Gordon* also did not interpret Section 3664(n), yet the Ninth Circuit found *Gordon*'s construction of the MVRA's purpose directly relevant to its statutory interpretation. Now that *Lagos* has removed that leg of the Ninth Circuit's opinion, that court should consider whether its judgment stands or falls.[2]

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[2] The government also argues that GVR is unwarranted because Section 3664(k) provides an independent authority for upholding the government's seizure. Opp. 14. But the government never relied on Section 3664(k) below. In fact,

2. The government's arguments on the merits (Opp. 9–11) are also incorrect and underscore why GVR is necessary. The government principally argues that *ejusdem generis* "does not apply to a statute like Section 3664(n) that uses a general-specific sequence." Opp. 10 (internal quotation marks omitted). But neither precedent nor commentary supports this limitation. Even the government's preferred treatise acknowledges that "[t]he doctrine applies equally" when "specific words follow[] general ones, to restrict application of the general terms to things that are similar to those enumerated." 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:17 (7th ed. 2014); *see also* 73 Am. Jur. 2d *Statutes* § 126 (2018) ("The doctrine of ejusdem generis applies whether specific words follow general words in a statute or vice versa; in either event, the general term or category is restricted to those things that are similar to those which are enumerated specifically.").

This Court has also defined *ejusdem generis* more broadly than the government would, and lower courts have expressly rejected the government's limitation. *See, e.g.*, *Hughey v. United States*, 495 U.S. 411, 419 (1990) (defining *ejusdem generis* as the principle "that a general statutory term should be understood in light of the specific terms that surround it," and applying it to a restitution statute); *Cal. State Legislative Bd. v. Dep't of Transp.*, 400 F.3d 760, 764 n.4 (9th Cir. 2005)

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its argument to the Ninth Circuit—that "substantial resources" in Section 3664(n) encompasses all "real" and non-"illusory" resources (Ct. App. Dkt. 29)—makes Section 3664(n) so broad as to authorize seizure of *any* resources, thereby making Section 3664(k) a nullity.

("There is no reason . . . to think that reversing the order of the specific and general words makes the canon inapplicable."); *Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 812 (2d Cir. 1996) (construing a "general term . . . to include only things similar to the specific items in the list [that follows]"); *Gen. Elec. Co. v. Occupational Safety & Health Review Comm'n*, 583 F.2d 61, 64–65 (2d Cir. 1978) ("[W]here specific words follow a general word, the specific words restrict application of the general term to things that are similar to those enumerated."). And even if Section 3664(n) does not fit under the government's rigid formulation of *ejusdem generis*, the similar canon of *noscitur a sociis* would nonetheless apply and dictate the same conclusion. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 205 (2012).

Thus, just as the Court in *Lagos* held that the general statutory terms "investigation" and "proceedings" should be interpreted narrowly in light of the "presence of company that suggests limitation," 138 S. Ct. at 1689, so too does *Lagos* endorse the limiting of "substantial resources" in Section 3664(n) to those similar to "inheritance[s], settlement[s], and other judgment[s]," *see* Pet. 12, 14–15.[3]

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[3] Contrary to the government's suggestion, Section 3664(n)'s use of the word "any" does not change this interpretive principle. When this Court applies the associated words canons, it does not interpret the word "'any'" literally. *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (plurality opinion). Moreover, "any" in Section 3664(n) modifies the source from which the funds come, not the resources themselves.

Furthermore, the government's interpretation would create superfluity. "Congress would have had no reason to refer specifically to" inheritance, settlement, and other judgment if it did not mean to limit the statute's application to similar economic windfalls. *Yates*, 135 S. Ct. at 1087. The government's "unbounded reading" of Section 3664(n) "render[s] those words misleading surplusage." *Id.*

The government claims these specific examples are used to "reinforce[] t[he] provision's breadth." Opp. 11. But the statutory language—"substantial resources from any source"—already has a "full and natural abstract meaning" without the need to reference "specific terms." Opp. 10 (quoting Singer & Singer, *supra*, § 47:17). Had Congress sought to reinforce the provision's *breadth*, it surely would not have selected narrow examples that share the same character as unanticipated windfalls. For example, had Congress referenced "substantial resources from any source, including both lump sum payments and periodic payments, whether or not anticipated at sentencing"—a reader could plausibly infer that Congress used the list to emphasize the breadth of the section. Congress did not choose such broad examples. And reading "substantial resources" as broadly as the government does would *require* those subject to restitution orders to promptly pay over to the government all funds received, rendering the broader statutory scheme, with its court-ordered restitution schedule, virtually without effect.[4]

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[4] The government attempts to defend this result by assuring the Court that its "ordinary practice . . . is to request that the

Finally, contrary to the government's characterizations (*see* Opp. 11), the Ninth Circuit's decision does conflict with the decisions of at least two other courts of appeals. Pet. 14–15. The Fourth Circuit did not merely find a particular windfall payment fell within the statute; it defined Section 3664(n)'s scope by holding that it "triggers an automatic payment requirement" upon "receipt of a windfall during imprisonment." *United States v. Bratton-Bey*, 564 F. App'x 28, 29 (4th Cir. 2014) (per curiam). Similarly, when the Fifth Circuit described Section 3664(n) as "the statutory right to draw on unanticipated resources to pay restitution," it outlined Section 3664(n)'s role in the statutory scheme, a role that conflicts with the one the Ninth Circuit has given it here. *See United States v. Scales*, 639 F. App'x 233, 239 (5th Cir. 2016).

3. Finally, the government attempts to manufacture a vehicle issue to avoid this Court's review. Opp. 11. As an initial matter, this makes little sense when Petitioner seeks GVR; if any vehicle issue prevents review of the question presented, the Ninth Circuit can determine that on remand. Indeed, one purpose of a GVR is to "procur[e] the benefit of the lower court's insight" into the factual record, and "conserve[] the scarce resources of this Court that might otherwise be expended on plenary consideration." *Lawrence*, 516 U.S. at 606.

BOP encumber the funds and then move for a court order." Opp. 17. But the government's construction still imposes extra-statutory obligations on individuals by requiring that they remit all funds received to the government, a result not salvaged by the government's assurance that it will only enforce those extra-statutory obligations responsibly.

In any event, the government's alleged vehicle problem is both belied by the record and irrelevant to the question presented. Specifically, the government notes there is no evidence that Petitioner told the Probation Office of his veterans disability benefits. Opp. 11–12. But as the government acknowledges and the factual record before the Ninth Circuit demonstrated, Petitioner *did* disclose the existence of his disability benefits *to the district court*, which set the restitution schedule. *See* Opp. 11; Ct. App. Dkt. 37. Petitioner argues that Section 3664(n) is limited to windfall payments that were not taken into account by the district court; here, the district court took all financial information into account at sentencing.

At bottom, *Lagos* has a legal bearing on the issues in this case and there is a "reasonable probability" that the Ninth Circuit would have reached a different outcome had it decided the case with the benefit of *Lagos*. *Lawrence*, 516 U.S. at 167. The Court should therefore grant the Petition, vacate the decision below, and remand for further consideration.

II. In the Alternative, Plenary Review Is Appropriate Because the Decision Below Conflicts with *Porter*.

In the alternative, this Court should grant plenary review of the Ninth Circuit's interpretation of the MVRA's restitution exemption for "[a]ny amount payable to an individual as a service-connected . . . disability benefit." *See* 26 U.S.C. § 6334(a)(10); 18 U.S.C. § 3613.[5] The Ninth Circuit's evisceration of

[5] The government's citation to 18 U.S.C. § 3664(m)(1)(A) is misdirection. Section 3664(m)(1)(A) provides the "manner"

this exemption will have application far beyond the restitution context, as the same statute confers an exemption from tax levies, and beyond the particular exemption for veterans disability benefits to exemptions for other government benefits such as unemployment benefits and social security disability benefits. *See* 26 U.S.C. § 6334(a)(4), (11).

The conflict between the Ninth Circuit's decision and *Porter* is apparent given that the Ninth Circuit did not even purport to apply *Porter*'s liberal canon of construction, despite *Porter*'s clear application to all statutory exemptions for veterans benefits "to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof." 370 U.S. at 162. Instead, having established through invocation of the now-overruled *Gordon* that the MVRA must be read to fully compensate victims, the Ninth Circuit read the exemption for veterans disability benefits extraordinarily *narrowly*, ensuring that no veteran could rely on the funds Congress provided for his or her "maintenance and support."

The government argues that the Ninth Circuit's interpretation of Section 6334(a)(10) is consistent with this Court's pronouncements in *Porter*. Opp. 18–21. But that interpretation contradicts long-recognized congressional intent to give veterans special protections. Under the Ninth Circuit's (and the government's) interpretation, Section 6334(a)(10) "prevent[s] a levy on the source of the benefits," but "does not protect from levy a veterans' benefits once

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in which "[a]n order of restitution may be enforced," but does not independently specify *what* property a restitution order may be enforced against.

they are received and placed in his account." Opp. 15–16. The government claims this counterintuitive approach is in fact logical because "Congress could have believed that allowing the government to levy only funds the beneficiary has received would provide increased opportunity for consideration of the beneficiary's individual financial circumstances if . . . the levy comes under judicial review." Opp. 17. This purported congressional purpose makes little sense: there is nothing preventing judicial review of an individual's financial circumstances *before* the funds are paid.

More fundamentally, the government's wooden interpretation of Section 6334(a)(10) entirely fails to engage with this Court's repeated instructions to interpret statutes, where possible, as maximizing protections for veterans. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 551 (1983) (noting Congress's "long standing policy of compensating veterans for their past contributions by providing them with numerous advantages"); *Porter*, 370 U.S. at 160, 162 ("[s]ince 1873 it has been the policy of the Congress to exempt veterans benefits from creditor actions as well as from taxation," such that veterans benefits deposited into a savings account "should remain inviolate"). And *Porter* specifically reaches beyond the precise statute before it, holding that "legislation *of this type* should be liberally construed." 370 U.S. at 162 (emphasis added).

The government also argues that "[i]f a veteran received a service-connected benefit and then gifted or transferred it to another person, the benefit would not be 'received by' the final transferee 'as a service-

connected . . . disability benefit'" because "it would be received as a gift or payment from the veteran." Opp. 18. This is Petitioner's point exactly—once veterans benefits are gifted or transferred, they lose their nature as benefits, and thus would lose their exemption under Section 6334(a)(10). *That* is why "received by" is not surplusage in Section 6334(a)(9), which protects all funds "payable to or received by" an individual up to a minimum exemption. In that section, Congress treats *all* funds that come to an individual as part of an his or her minimum, exempted funds; the funds are fairly attributable to the individual whether he or she is owed them, is paid them, or receives them indirectly. In contrast, where, as with veterans disability benefits, Congress's interest is in protecting a particular person—the veteran—the funds are protected *only* in the hands of the person they were payable to, and not if they are "received by" a third party. The government's recognition of this fact demonstrates that Petitioner's reading would not create surplusage.

CONCLUSION

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

Respectfully submitted.

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November 28, 2018