No. 18-29

In the Supreme Court of the United States

SHAILENDRA BHAWNANI, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, ET AL.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE PETITION

Petitioners are "victim[s]" under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A(a)(2), which broadly requires restitution to any victim harmed "in the course of" an unlawful "scheme" or "pattern." The courts below incorrectly denied petitioners restitution based on an unduly narrow interpretation of the MVRA. That constrained view of mandatory restitution conflicts with the MVRA's statutory text and Congress's intent to expand the definition of "victim" in cases of fraud offenses in the wake of this Court's decision in *Hughey* v. *United States*, 495 U.S. 411 (1990).

The government's opposition to this petition fails to confront the merits of petitioners' claim to restitution. In addition, the government glosses over the clear split in the courts of appeals. Contrary to the government's arguments, courts of appeals and district courts unsuccessfully have tried for decades to apply the definition of victim consistently.

This case is an excellent vehicle to resolve the confusion and division among federal courts. The courts below denied petitioners restitution based on a legal error regarding the scope of the MVRA.

This Court should grant the petition for a writ of certiorari to resolve the substantial confusion and variation on a question that affects the mandatory legal right to restitution of thousands of victims of federal crimes each year.

I. The Text, Statutory History, and Legislative Intent of 18 U.S.C. 3663A(a)(2) Demonstrate that Petitioners Are Entitled to Restitution Under the MVRA as Victims of Dharia's Scheme to Defraud.

Section 3663A(a)(2) defines the term "victim" to encompass anyone harmed by a "defendant's criminal conduct in the course of" the defendant's "scheme, conspiracy, or pattern of criminal activity." The ordinary, contemporary meaning of those terms establishes that a "victim" of a fraudulent scheme or pattern is not limited to an individual harmed by the defendant's charged *offense* conduct. Rather, the broad textual language encompasses victims harmed by all of the defendant's criminal conduct "in the course of" the scheme to defraud or "in the course of" the "pattern" of criminal activity. 18 U.S.C. 3663A(a)(2); see, *e.g.*, *United States* v. *Dickerson*, 370 F.3d 1330, 1339 (11th Cir. 2004), cert. denied, 543 U.S. 937 (2004) ("[C]ourts have held that 'when the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense,' the court may order restitution for 'acts of related conduct for which the defendant was not convicted.'" (quoting *United States* v. *Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999))). "[I]n the course of" a "scheme" or "pattern" expands the requirement to restitution beyond the offense of conviction to losses caused by the defendant's fraudulent, scheme, pattern, method, or means during the same general timeframe as the charges on which the defendant was convicted. Pet. 1, 17–19.

Here, the lower courts erred in failing to apply the MVRA's plain language. The defendant Falgun Dharia defrauded petitioners in the same manner and during the same time he committed the fraud he pleaded guilty

to. As with the offense of conviction, Dharia caused harm to petitioners by obtaining financing for businesses by misrepresenting his ownership interest, converting the proceeds for his own benefit, and then defaulting on his loan obligations. See Pet. 4–6. Nonetheless, the district court and court of appeals impermissibly denied petitioners restitution because petitioners' losses were not caused by the "criminally charged schemes," as set out in the charging document – Dharia's criminal Information. Pet. App. 7a–9a, 23a; see Br. in Opp. 7 (arguing that petitioners are not entitled to restitution because they were not harmed by Dharia's offense conduct). But the MVRA is not limited only to the victims of the offense of conviction – if so, the broad term "conduct in the course of" a "scheme" or "pattern of criminal activity" would have no meaning. 18 U.S.C. 3663A(a)(2); see *United States* v. *Chalupnik*, 514 F.3d 748, 753 (8th Cir. 2008) (examining "the defendant's total conduct in committing the offense").

The district court's exclusive focus on the charging document and Dharia's offense conduct is inconsistent with the history and intent of the post-*Hughey* amendments to the definition of "victim" in the MVRA and its companion statute, the Crime Victims' Rights Act. See Pet. 19–21. In response to *Hughey* v. *United States*, 495 U.S. 411 (1990), Congress broadened the category of individuals who are entitled to restitution as victims of an unlawful scheme, conspiracy, or pattern. *Ibid.* The district court ignored the expanded definition of "victim" by limiting restitution to the two banks named in the Information. Pet. App. 7a–9a, 23a. Allowing such a restrictive reading of the MVRA to stand would revive *Hughey*'s since-abrogated holding that restitution is permitted only where a loss stemming from a scheme or pattern was "caused by the specific

conduct that [wa]s the basis of the offense of conviction." 495 U.S. at 413. That is no longer the law with respect to scheme offenses, like the bank fraud at issue here. Likewise, the lower courts' narrow interpretation of the MVRA conflicts with Congress's clearly expressed intent to permit courts "to consider the course of criminal conduct" in addition to the offense conduct, and to "*order restitution for crimes other than the offense of conviction*." 139 Cong. Rec. S15990 (1993) (Sen. Nickles) (emphasis added).

In its opposition, the government does not even attempt to rebut these arguments based on the text of 18 U.S.C. 3663A, the historic amendments to that text, and the legislative intent of the MVRA. With minimal explanation, the government simply endorses the district court's narrow test that restitution requires an ill-defined "nexus" to the defendant's offense conduct set out in the charging document. Br. in Opp. 6, 10; see Pet. App. 7a–9a, 23a. The government does not explain how the lower courts' narrow construction of the terms "pattern," "scheme," and "in the course of" can be reconciled with the plain meaning or historic origins of the MVRA. See Br. in Opp. 8–9. The government fails to harmonize the broad language, history, and remedial purpose of the MVRA with the lower courts' erroneous conclusion that petitioners are not victims.

The government's position in this case is particularly puzzling given that the Department of Justice's (DOJ) own guidance manuals advance a reading of the MVRA consistent with the broad manner-and-means approach. The DOJ Criminal Tax manual explains that "when the count of conviction includes a scheme, conspiracy, or patter of criminal activity as an element of the offense * * * the restitution order may include losses caused by acts of related conduct for which the defendant was not

convicted." U.S. Dep't of Justice, *Criminal Tax Manual* § 44.03[2][b] (2012 ed.). Likewise, the DOJ Guidance on Restitution explains that "an individual can qualify as a [MVRA] victim regardless of whether he or she is named in the indictment." U.S. Dep't of Justice, *Attorney General Guidance for Victim and Witness Assistance* 8 (2011).

The government fails to explain why it argues for an unduly narrow interpretation of the MVRA here that is utterly at odds with its own published guidance. The government's long-standing and published guidance is correct and mandates restitution for victims like petitioners.

II. Federal Courts Disagree on the Proper Interpretation of the MVRA.

Notwithstanding Congress's clear intent to establish a broad definition of "victim" under the MVRA in the wake of *Hughey* v. *United States*, 495 U.S. 411 (1990), courts around the country have exhibited widespread confusion in applying that mandate. Although they use varying terminology, in substance, the First, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits have followed the statutory mandate and held that the definition of a "victim" for a scheme, conspiracy, or pattern is expansive, and encompasses those victims not only harmed by the particularly charged crime, but also victims harmed during the same time period and by the same manner and means. Pet. 8–12. For example, the First Circuit approvingly has noted that courts of appeals "demarcate the [criminal] scheme, including its mechanics * * * [,] the location of the operation, the duration of the criminal activity, [and] the methods used to effect it." *United States* v. *Hensley*, 91 F.3d 274, 277

(1st Cir. 1996) (ellipses and brackets in original; citation and internal quotation marks omitted). Similarly, the Fourth Circuit permits restitution "so long as the loss is a direct result of the defendant's criminal conduct or is 'closely related to the scheme.'" *United States* v. *Karam*, 201 F.3d 320, 325–26 (4th Cir. 2000) (citation omitted). The Seventh Circuit has interpreted the term "victim" to cover "all individuals harmed during the course of the scheme, conspiracy, or pattern of criminal behavior for which the defendant was convicted." *United States* v. *Jennings*, 210 F.3d 376 (7th Cir. 2000) (tbl.), 2000 WL 32005, at *4. The Eighth Circuit considers the defendant's "total conduct," including criminal conduct directed toward entities unnamed in the charging documents. *United States* v. *Chalupnik*, 514 F.3d 748, 753 (8th Cir. 2008); *United States* v. *Jackson*, 155 F.3d 942, 945, 949–50 (8th Cir. 1998), cert. denied, 525 U.S. 1059 (1998). The Ninth Circuit allows victims of any part of the defendant's scheme or pattern to recover restitution, regardless of whether or not the defendant was convicted of those parts. *United States* v. *Lawrence*, 189 F.3d 838, 846–47 (9th Cir. 1999). And the Eleventh Circuit has observed that the term "scheme" should be broadly construed to include all common, unitary plans. See *United States* v. *Dickerson*, 370 F.3d 1330, 1339, 1343 (11th Cir. 2004), cert. denied, 543 U.S. 937 (2004).

Consistent with these authorities, petitioners urge this Court to construe "scheme" and "pattern" broadly by adopting a manner-and-means approach that requires restitution for harms caused by all of the defendant's criminal conduct "in the course of" a scheme or pattern. *Chalupnik*, 514 F.3d at 753; see, *e.g.*, *Lawrence*, 189 F.3d at 846; *United States* v. *Boyd*, 222 F.3d 47, 50 (2d Cir. 2000) (per curiam) (explaining that the MVRA

allows "for restitution payable by all convicted co-conspirators in respect of damage suffered by all victims of a conspiracy, *regardless of the facts underlying counts of conviction in individual prosecutions*" (emphasis added)); *United States* v. *Kones*, 77 F.3d 66, 70 (3d Cir. 1996), cert. denied, 519 U.S. 864 (1996) ("[W]here a defendant is convicted of defrauding person X and a fraudulent scheme is an element of that conviction, the sentencing court has power to order restitution for the loss to defrauded person Y directly caused by the defendant's criminal conduct, *even where the defendant is not convicted of defrauding Y*." (emphasis added)).

In contrast, the Fifth and Tenth Circuits have adhered to an impermissibly narrow view that, as a matter of law, no individuals other than those harmed by the charged conduct can qualify as a "victim" under the MVRA. Pet. 9–17; see Br. in Opp. 13–14. Meanwhile, the Second and Third Circuits' decisions are internally incoherent, some adopting broad views of "victim," and others, like the court of appeals here, adopting narrow, atextual views. Pet. 14–16.

The government does not dispute that various federal appellate courts have adopted a more expansive reading of "victim" than that applied below. Br. in Opp. 8–9; *Lawrence*, 189 F.3d at 846–47. Indeed, the government overlooks the variation among federal courts. Br. in Opp. 12–14. Moreover, the government attempts to misdirect this Court by arguing that each circuit agrees that *Hughey* "remains good law except to the extent that it excluded harm resulting from a scheme, conspiracy, or pattern that is an element of the offense of conviction." *Id.* 12. But the extent to which restitution must be ordered in the case of a scheme-based crime is exactly the question presented and the precise question on which federal courts disagree.

Courts' agreement in other circumstances is not relevant.

The considerable differences among the lower federal courts on the scope of restitution for scheme offenses warrants this Court's review.

III. This Case Presents an Excellent Vehicle to Clarify the Definition of Victim Under the MVRA.

The lower courts' rulings incorrectly held, as a matter of law, that petitioners were not victims entitled to restitution based on the defendant's fraudulent scheme. Now the government incorrectly asserts that the district court and court of appeals engaged in a "fact-specific," Br. in Opp. 11, analysis to find that petitioners were not directly harmed by Dharia's criminal conduct in the course of the scheme, conspiracy, or pattern underlying his conviction. In its opposition, the government attempts to recast the district court's decision by reciting facts that were not found or cited by the district court. Br. in Opp. 4–5, 11–12. In actuality, the district court reviewed only the defendant's criminal Information to conclude that petitioners were not victims of the specific crimes of conviction. See Pet. App. 7a–9a, 23a, 27a. The district court did not make any factual findings or inferences in support of that determination. See Pet. App. 14a–27a; cf. *United States* v. *Alisuretove*, 788 F.3d 1247, 1259 (10th Cir. 2015) (Gorsuch, J., concurring in the judgment), cert. denied, 136 S. Ct. 370 (2015) (explaining that 18 U.S.C. 3663A requires "factual findings from the district court").

Specifically, the district court held that petitioners had no entitlement to restitution because they had not

shown "a nexus to the criminally charged schemes."[1] *Id.* at 23a. But the district court's "nexus" analysis focuses solely on the "criminally charged schemes" listed in Dharia's Information, as opposed to Dharia's "criminal conduct in the course of" those schemes – *i.e.*, the inquiry mandated by the MVRA's statutory text. 18 U.S.C. 3663A(a)(2). The district court never evaluated the similarities in Dharia's fraud against petitioners and the fraud against the two banks for which he was convicted. Pet. App. 1a–27a. And it did not consider the arbitration findings that previously established that Dharia committed fraud against petitioners; that he used the same means of doing so; and that he did so during precisely the time frame alleged in the bank frauds charged in Dharia's Information. *Ibid.*; see *United States* v. *Locke*, 643 F.3d 235, 247 (7th Cir. 2011) ("In constructing a restitution order for Locke's multiple wire fraud convictions, * * * the district court should have made specific findings regarding Locke's scheme or schemes to ensure its order complied with the MVRA."). Thus, the court's determination that petitioners were not "victims" was a purely legal determination made without reference to the record evidence.

The government is also mistaken that the district court's "complexity" determination is an alternative, fact-bound basis for affirmance that weighs against this Court's intervention. Br. in Opp. 15–16. That argument is circular and unfounded. Indeed, the "complexity" exception, 18 U.S.C. 3663A(c)(3)(B), permits a district court to avoid awarding restitution if its "finds, from facts on the record," that doing so would force it to

[1] Even if this "nexus" standard is correct, the district court's conclusion rests on the flawed assumption that petitioners were afforded an adequate opportunity to make such a showing.

"determin[e] complex issues of fact" about "the cause or amount of the victim's losses." *Ibid.* The applicability of that exception to *mandatory* restitution hinges on (i) who is a "victim" under the MVRA, *i.e.*, the very question the district court decided incorrectly; and (ii) the existence of on-the-record fact findings, which the district court failed to make here.

Moreover, the complexity exception is plainly inapplicable here. Petitioners' claim involved a single victim and all the relevant facts, including the amount of restitution, were established by the prior arbitration award. The court of appeals' and district court's invocation of the complexity exception should not pose a barrier to this Court's review.

This Court should grant the petition for a writ of certiorari to resolve the uncertainty among the lower federal courts regarding this issue of substantial importance to crime victims seeking to assert their entitlement to mandatory restitution under the MVRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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