No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN AFRIYIE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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QUESTION PRESENTED

Section (b)(4) of the Mandatory Victims Restitution Act ("MVRA") requires a criminal defendant convicted of a wide variety of offenses to:

> reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

18 U.S.C. § 3663A(b)(4). In a question left open by *Lagos v. United States,* 138 S.Ct. 1684, 1690 (2018), does Section (b)(4) limit restitution for "necessary ... other expenses" to out-of-pocket expenses similar to "lost income ... child care, [and] transportation" under the principle of *noscitur a sociis,* or is there no such limitation if the expenses are incurred during participation in the criminal case?

The Second and Fifth Circuits are in conflict over this question. In *United States v. Koutsostamatis*, 956 F.3d 301 (5th Cir. 2020), the Fifth Circuit, relying on the discussion of *noscitur a sociis* in *Lagos,* and narrowly construing the MVRA, held that corporate investigative expenses unlike those enumerated in the MVRA are not subject to restitution. Declining to follow *Koutsostamatis*, the Second Circuit below treated *Lagos'* discussion of *noscitur a sociis* as nonbinding dictum and awarded corporate attorneys' fees under pre-*Lagos* circuit precedent counseling broad relief under the MVRA. Contrary to the approach of the First Circuit, the Second Circuit also awarded as "necessary" restitution fees for voluntary assistance to prosecutors to prepare witnesses for trial. *See In re Akebia Therapeutics, Inc.,* 981 F.3d 32, 37, 38-39 (1st Cir. 2020).

STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

The names of all parties to this petition appear in the caption of the case on the cover page. The parties have no parent or subsidiary companies and do not issue stock. The proceedings directly related to this case are as follows:

- *United States v. Afriyie,* No. 1:16-cr-00377-PAE-1, United States District Court for the Southern District of New York. Judgment entered July 2, 2020.
- *United States v. Afriyie,* No. 20-2269, United States Court of Appeals for the Second Circuit. Judgments entered February 25, 2022 and May 18, 2022.

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OPINIONS BELOW

The February 25, 2022 opinion of the court of appeals, vacating in part and affirming in part the restitution judgment of the district court, may be found at *United States v. Afriyie,* 27 F.4th 161 (2d Cir. 2022), and is reproduced at Appendix A. The May 18, 2022 order denying the petition for rehearing or rehearing *en banc* is reproduced at Appendix C. *United States v. Afriyie,* 20-2269 (2d Cir. May 18. 2022). The February 11, 2020 decision of the district court directing restitution of attorneys' fees is reproduced at Appendix B. *United States v. Afriyie,* 16-CR-377, 2020 WL 634425 (S.D.N.Y. 2020), *affirmed in part, vacated in part,* 27 F.4th 161 (2d Cir. 2022).

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2022. App. A. The order denying the petition for rehearing or rehearing *en banc* was entered on May 18, 2022. App. C. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

1. At all relevant times, Section (b)(4) of the Mandatory Victims Restitution Act ("MVRA") required a defendant "in any case" to:

> reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

18 U.S.C. § 3663A(b)(4).

STATEMENT OF THE CASE

A. Original Appeal

Petitioner was convicted after trial of securities fraud and wire fraud, on charges that in 2016, while a research analyst in the public equities unit at MSD Capital ("MSD"), he traded on confidential information that a firm client had consulted MSD about financing a potential acquisition of ADT Corp, a publicly traded security and alarm company. 15 U.S.C. §§ 78j(b), 78ff & 17 C.F.R. § 240.10b-5; 18 U.S.C. § 1343. At sentencing, *inter alia,* the district court ordered restitution of $663,028.92 in attorneys' fees paid to MSD's outside counsel, Sullivan & Cromwell. This included fees for (i) a private investigation of the underlying

transactions conducted by counsel; (ii) responses to subpoenas and inquiries by both the U.S. Attorney's Office for the Southern District of New York, and the Securities and Exchange Commission; (iii) the preparation of MSD witnesses to testify at trial; and (iv) litigation of the restitution claims themselves. *See* App.A at 2-3; 27 F.4th at 164-65.

On appeal, the Second Circuit court of appeals affirmed the conviction and sentence but remanded for reconsideration of restitution in light of this Court's decision in *Lagos v. United States,* 138 S.Ct.1684 (2018), decided while the appeal was pending. As summarized by the court of appeals in remanding, *Lagos* held that "a private firm's legal fees as to a corporate victim's private investigation and related civil case were not compensable as 'necessary' restitution." *United States v. Afriyie*, 929 F.3d 63, 74 (2d Cir. 2019)(citing *Lagos,* 138 S.Ct. at 1688-89). *See* App.A at 3; 27 F.4th at 165.

B. Proceedings on Remand

On remand the government sought restitution of $511,368.92 in legal fees, reducing the original claim by $151,660 to account for expenses of a private internal investigation clearly not subject to restitution under *Lagos*. App.B at 2-3. The district court otherwise awarded the full sum requested by the government, finding it to be in "scrupulous compliance" with *Lagos.* The court construed *Lagos* to only mandate that expenses be incurred in the criminal case, and deemed pre-*Lagos* caselaw in the Second Circuit allowing restitution of attorneys' fees to remain binding. App.B at 2. With respect to the three categories of restitution in dispute:

Over objection that the work was civil rather than criminal as mandated by *Lagos*, the district court ruled that the SEC work was compensable because the SDNY and SEC investigations were "parallel, coextensive and symbiotic" App.B at 3-4. Over objection that the expenses were optional rather than "necessary" under the MVRA, the court ruled that witness preparation fees were compensable because it was "done at the invitation" of the U.S. Attorney's Office. App.B at 5. Over further objection that the fees were not "necessary," the court allowed reimbursement for litigation of restitution claims, because this was part of the sentencing proceedings. App.B at 5.

C. Decision on this Appeal

In the decision below, the court of appeals affirmed except to vacate the award of restitution as to attorneys' fees related to SEC subpoenas. App. A at 7-8; 27 F.4th at 173-74.

The court rejected petitioner's argument under *Lagos'* discussion of *noscitur a sociis* that attorneys' fees are not permitted at all because they are not of a like and kind as the out-of-pocket expenses -- child care, travel and lost income -- as enumerated in the MVRA. The court of appeals deemed itself bound by its prior decision in *United States v. Amato*, 540 F.3d 153, 159-61 (2d Cir. 2008), *abrogated in part, Lagos v. United States,* 138 S.Ct. 1684 (2018), which had upheld the award of attorneys' fees over argument under the similar maxim *ejusdem generis,* that attorney fees were not like the other items referenced in the MVRA. App.A at 3-6; 27 F.4th at 166-70. Although *Lagos* had abrogated *Amato* for also permitting

restitution for private investigations, the court of appeals did not view *Lagos* as undermining *Amato* as to attorneys' fees in general. App.A at 5-6; 27 F.4th at 168-70 (citing *Amato,* 540 F.3d at 159-63). The court of appeals characterized the discussion in *Lagos* of *noscitur a sociis* as a "few words" that did not "revive" the *ejusdem generis* argument rejected in *Amato*, and therefore held that *Lagos* should be limited to its precise holding that expenses incurred outside the criminal process are precluded. App.A at 4,5; 27 F.4th at 168,169. The court commended the "commonsense" reasoning of *Amato* that corporate attorney fees are often "necessary" to respond to government requests. App.A at 5; 27 F.4th at 169.

The court of appeals also rejected petitioner's reliance on the Fifth Circuit decision in *United States v. Koutsostamatis*, 956 F.3d 301 (5th Cir. 2020) which overturned restitution for a digital security team hired made at the FBI's request. There, the Fifth Circuit relied heavily on the *noscitur a sociis* discussion in *Lagos* and held that the expenses in question do not fall under the MVRA because they were not similar in kind to the expense items enumerated in the MVRA. *Id.* at 304-08. The court below sought to distinguish *Koutsostamatis* as not involving attorneys' fees and in any event as not binding. App.A at 6; 27 F.4th at 170.

The court of appeals did vacate as to attorneys' fees related to SEC subpoenas and requests. The Court found this item precluded by *Lagos* which restricts the statutory term "investigation" to criminal investigations. Although governmental in nature, SEC proceedings are civil, and the court deemed such expenses not subject to restitution under *Lagos.* On this point only, the court of appeals vacated and

remanded for recalculation of restitution. App.A at 6-7; 27 F.4th at 24-30.

With respect to restitution for witness preparation attorneys' fees, the court concluded that these expenses were subject to restitution because they were incurred "during participation in the investigation or prosecution of the offense." The court rejected the argument that the expenses are not "necessary" under the MVRA, stating simply that they were "at the invitation" of the U.S. Attorney's Office. App.A. at 8; 27 F.4th at 173.

Lastly, over objection that the expenses were not "necessary," the court of appeals held that expenses to litigate the restitution request itself were subject to recovery because they were "incurred during participation in the ... prosecution of the offense or attendance at proceedings related to the offense." App.A at 8; 27 F.4th at 174 (quoting 18 U.S.C. § 3663A(b)(4)).

REASONS FOR GRANTING THE PETITION

This Court Should Address the Conflict Between the Decision Below and the Fifth Circuit as to the Scope of the MVRA After *Lagos.*

This case presents an important conflict left open by *Lagos v. United States,* 138 S.Ct. 1684 (2018): whether under the interpretive principle *noscitur a sociis,* "other expenses" subject to restitution under Section (b)(4) the MVRA should be limited to out-of-pocket expenses akin to "lost income and necessary child care, [and] transportation" as enumerated in the statute. Following the lead of *Lagos* which relies on *noscitur a sociis*, the Fifth Circuit overturned a restitution order applicable to a corporate digital security investigation that, while requested by the government, involved expenses wholly unlike those in the MVRA. *United States v. Koutsostamatis*, 956 F.3d 301 (5th Cir. 2020). The Second Circuit below disagreed with this approach, treating *Lagos'* discussion of *noscitur a sociis* as mere dictum and reaffirming circuit precedent that Section (b)(4) allows restitution of corporate attorneys' fees. These divergent interpretations of the MVRA after *Lagos* are in a sharp conflict that promises to deepen as more courts address these issues. Moreover, the Second Circuit also disagrees with the First Circuit whether optional assistance in helping government prosecutors prepare witnesses to testify are "necessary" expenses under the MVRA. These issues ultimately beg the question whether the MVRA, which applies in a wide variety of cases, should be construed narrowly, as in *Lagos*, or broadly as precedent in the court below maintains. The Court should address these important conflicts that are sure to recur.

A. The MVRA and *Lagos*

The MVRA requires defendants to furnish restitution to victims on conviction of a broad range of offenses, including crimes of violence, against property, and for fraud or deceit. 18 U.S.C. § 3663A(c)(1)(A); *see Lagos,* 138 S.Ct. at 1687-88. Section (b)(4) of the MVRA requires a defendant to:

> reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

18 U.S.C. § 3663A(b)(4)). *Lagos* concerned legal, accounting and other professional fees incurred by a corporate victim during its own investigation of a false invoice scheme. *Id.* at 1687. The Court held that "necessary . . . other expenses" does not cover "the costs of a private investigation that the victim chooses on its own to conduct." *Id.* at 1690. Abrogating the decisions of five courts of appeal, including the Second Circuit's decision in *United States v. Amato*, 540 F.3d 153, 159-61 (2d Cir. 2008), *abrogated in part, Lagos,* 138 S.Ct. at 1684, this Court unanimously reversed, holding that the category of expenses covered by the MVRA is "limited to government investigations and criminal proceedings," and does not include voluntary private investigations. 138 S.Ct. at 1688.

Commencing with statutory text, the Court held that the phrase "incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" most naturally referred to the government's criminal investigation and prosecution, and could not refer to a prior private investigation undertaken on its own by a victim. *Id.* at 1688.

Immediately after the textual analysis, the Court invoked "*noscitur a sociis,* the well-worn Latin phrase that tells us that statutory words are often known by the company they keep." *Id.* at 1688-89. The Court reasoned that professional fees of lawyers or accountants are not comparable to the out-of-pocket expenses in the MVRA's "three specific items that must be reimbursed, namely, lost income, child care and transportation." *Id.*

The Court added that a broad interpretation "would create significant administrative burdens" in resolving what expenses are "necessary," doubting "whether Congress intended, in making this restitution mandatory, to require courts to resolve these potentially time-consuming controversies as part of criminal sentencing." *Id.* at 1689. The Court added that there is no general requirement "to interpret a restitution statute in a way that favors an award" and that unlike other restitution statutes, Congress did not include any such explicit purpose in the MVRA itself. *Id.* Finally, the Court noted that crime victims are not without an alternative remedy, and can resort, in particular, to civil actions against the defendant. *Id.*

The Court left for another day whether the kinds of expenses at issue would be subject to restitution where "pursued at a government's invitation or request." The Court deemed it sufficient in *Lagos* "to hold that it does not cover the costs of a private investigation that the victim chooses on its own to conduct." *Id.* at 1690.

B. Attorneys' Fees Under the MVRA after *Lagos*

This case presents questions left open in *Lagos* with disagreement among federal courts of appeal, particularly between the Second and Fifth Circuits. The root disagreement is whether attorneys' fees or similar expenses unlike those enumerated in the MVRA qualify as "other expenses." The conflicts, which threaten to deepen, manifest in at least three ways.

1. The role of *noscitur a sociis* in construing the MVRA

Without question the Second and Fifth Circuits are on opposite sides of the question whether MVRA restitution is limited by the doctrine of *noscitur a sociis*. *Koutsostamatis* flatly rejects MVRA restitution for professional fees under that principle. The case involved professional investigative fees (digital security, forensic accounting, software and audio expert teams) that were requested by the FBI, and thus the case presented the open question whether such expenses were subject to restitution even if they were incurred through the criminal investigation or prosecution. *See* 956 F.3d at 304-05. Considering what is meant by "other expenses" in the MVRA, the Fifth Circuit found these expenses to be wholly foreign to those enumerated in the statute. *Id.* at 306 ("Think about it: The costs of a babysitter, a tank of gas, a parking meter – and a 44-person digital security team. One of these things is not like the others.") Then, just as in *Lagos,* the Fifth Circuit turned to "tried-and-true tools of statutory interpretation—*noscitur a sociis* and *ejusdem generis"* both standing for the "commonsense notion" that "a word may be known by the company it keeps." *Id.* at 307 (citations omitted). Following the lead

of *Lagos*, the Fifth Circuit rejected restitution because the "expenses for [the corporate victim's] digital security team and outside contractors are not remotely similar to lost income, child care, or transportation." *Id.* at 306-08. *See also id.* at 307 (relying also on *Peter v. Nantkwest, Inc.,* 140 S.Ct. 365, 372 (2019)(construing Patent Act provision allowing recovery of "expenses" to exclude attorneys' fees in part by "[r]eading the term 'expenses' alongside neighboring words in the statute").

Whereas the Fifth Circuit embraces the *noscitur a sociis* discussion in *Lagos,* the court below would disregard it. The court devotes a lengthy discussion to why it cannot overturn its prior decision in *Amato* and why it is "commonsense" to allow restitution of attorneys' fees. App. A at 5-6; 27 F.4th at 168-70. *Amato* had rejected a functionally identical argument under *ejusdem generis*, and the net of both decisions is to reject a principal point in *Lagos* that legal and investigative expenses are not subject to restitution in part because they are unlike the out-of-pocket expenses enumerated in the statute. Although the narrow holding of *Lagos* is limited to expenses growing out of the criminal case, the court below does not really explain why *noscitur a sociis* would apply to interpretation of the MVRA on some issues but not others.

The decision below also attempts to distinguish the Fifth Circuit decision in *Koutsostamatis* as not involving attorneys' fees. App.A at 6; 27 F.4th at 170. But for purposes of *noscitur a sociis* this is a distinction without a difference as the digital security investigative expenses in *Koutsostamatis* and attorneys' fees here both are entirely different than the expenses enumerated in the MVRA. Indeed, the court

below tacitly recognizes that there is no distinction for these purposes when it falls back on the conclusion that it is "not bound" by the Fifth Circuit. App.A at 6; 27 F.4th at 170.

For all of these reasons, the proper reach of the MVRA after *Lagos* is squarely in conflict between the Second and Fifth Circuits particularly as relates to *noscitur a sociis.*

2. Narrow vs broad construction of the MVRA

The Second and Fifth Circuits also exhibit conflict over whether the MVRA should be liberally or narrowly construed. *Lagos* decisively rejects the notion that it must interpret the MVRA broadly in favor of recovery. As this Court reasoned, a "broad reading would create significant administrative burdens" and "invite controversy on those and other matters; our narrower construction avoids it." 138 S.Ct. at 1689. And, it notes the absence of language in the MVRA that might otherwise be seen as mandating a broad construction. *Id.* at 1689-90 (contrasting other restitution statutes calling for broad compensation)

Koutsostamatis follows the lead of *Lagos* in rejecting any notion of broad or liberal construction of the MVRA. The Fifth Circuit notes that the MVRA is focused on the kinds of expenses such as travel costs that are incurred by individuals rather than corporations and thus does not invite expansive interpretation. 956 F.3d at 308. And, like *Lagos,* the Fifth Circuit contrasts the MVRA with other restitution statutes, noting that "[w]hen Congress chooses a more expansive form of restitution, it deploys different language and statutory structure." *Id.* at 308-09.

The decision below does not address this issue directly but it upholds the *Amato* decision that finds in the MVRA "broad authority to determine which of the victim's expenses may be appropriately included in a restitution order." *See Amato*, 540 F.3d at 160-61. *Amato* is not the only precedent in the Second Circuit standing for this proposition, precedents the government relied on below notwithstanding *Lagos*. *See, e.g., United States v. Maynard*, 743 F.3d 374, 381 (2d Cir. 2014) ("Generally, this Circuit takes a broad view ofwhat expenses are 'necessary.' "); *see* Government Brief on Appeal, No. 20-2269, Docket # 53 at pp. 10-11 (relying on quoted references to "broad" authority in both *Amato* and *Maynard*). Post-*Lagos* district court authority in the Second Circuit has also cited these principles of broad construction.[1] The message of narrow construction of the MVRA counseled by *Lagos* has arrived in the Fifth Circuit but not in the Second Circuit, it seems.

3. The requirement that expenses be "necessary"

Broad construction of the MVRA by the court below also has it in conflict with the First Circuit over the requirement that the expenses in question be "necessary." The core holding of *Lagos* is that "necessary . . . other expenses" does not cover "the costs of a private investigation that the victim chooses on its own to conduct." *Id.* at 1690. *Lagos* counsels that failing to adhere to the requirement that

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[1] *See United States v. Razzouk,* 2021 WL 1422693 *3-4 (E.D.N.Y. 2021)(rejecting argument under *Lagos* and *Koutsostamatis* that *Amato's* interpretation of "other expenses" no longer good law and citing *Amato* and *Maynard* statements construing MVRA broadly); *compare United States v. Xue,* 2021 WL 2433857 *5 (E.D.Pa. 2021)(denying MVRA restitution and emphasizing that *Lagos* held that Section (b)(4) "should be interpreted narrowly"), *aff'd on other grounds,* 2022 WL 3037138 (3d Cir. August 2, 2022).

expenses be "necessary," would entangle courts in unnecessary disputes. 138 S.Ct. at 1689.

However, the Second Circuit applied a particularly lenient definition of "necessary" in this case when it upheld restitution of corporate attorneys' fees to help prepare witnesses at trial. The court concluded that the expenses were "necessary" simply because the government requested them. *See* App.A at 8; 27 F.4th at 173. Lower courts in the Second Circuit are now ordering restitution under the MVRA on the basis of minimal connection to government demands. [2]

Even assuming *arguendo* that attorneys' fees are compensable under the MVRA, it hardly seems "necessary" that private lawyers for crime victims prepare witnesses for the prosecutors who try the case. If the measure of "necessity" is whether the government "requested" it, prosecutors can outsource almost any prosecutorial function. This has troubling implications, as it puts criminal defendants in the untenable position of having to finance assistance to the already considerable prosecutorial powers of the government. It makes better sense to interpret the statutory term "necessary" to be limited to what the government can compel by law – by subpoena or other process.[3]

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[2] *See United States v. Avenatti*, 2022 WL 452385, at *8 (S.D.N.Y. 2022)("This Court concludes that restitution under the MVRA is available for attorneys' fees incurred in connection with services that were invited, required, requested, or otherwise induced by the Government." Quoted and adopted by *United States v. Calonge,* 2022 WL 1805852 (S.D.N.Y. 2022); *United States v. Hastings,* 2022 WL 1785579 (S.D.N.Y. 2022)

[3] Although not made a focus of this petition, appellant also disputes the conclusion that fees to compensate the preparation of the restitution application are

This decision of the court below stands in conflict with a recent First Circuit decision. In *In re Akebia Therapeutics, Inc.,* 981 F.3d 32, 37, 38-39 (1st Cir. 2020), the First Circuit upheld the district court on a victim's appeal via mandamus of the district court's denial of restitution of attorneys' fees to help the government prepare witnesses for trial. The court noted that whether attorneys' fees were still recoverable after *Lagos* was an open question not raised in that case. *Id.* at 38 n.4; App.A at 9 n.3; 27 F.4th at 170 n.3. With respect to necessity, while commenting only briefly, the court upheld the district court's conclusion that "the government prosecutors were responsible for preparing these witnesses for trial testimony." *Id. See also United States v. Chan*, 2019 WL 3975579 *6 (D.Mass. 2019)(decision below: "Trial witness preparation, however, is the responsibility of the government prosecutor, not private counsel.")[4] Indeed, the First Circuit sees *Lagos* as placing "sharpened ... focus on an important qualifier within the language of the statute: only *necessary* expenses are mandated for reimbursement." 981 F.2d at 37 (emphasis in original). This additional level of conflict is further reason why this Court should hear this case.

"necessary." App.A. at 8; 27 F.4th at 173-74. It was never "necessary" for the corporate victim in this case to seek restitution.

[4] *See also United States v. Chan*, 981 F.3d 39, 64-65 (1st Cir. 2020)(affirming on defendant's appeal).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 16, 2022

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