No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN S. ROMERO,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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Appointed Under the Criminal Justice Act of 1964

QUESTION PRESENTED FOR REVIEW

Should this Court grant the petition for *writ of certiorari* to resolve the important federal question of whether a district court may award restitution in a health care embezzlement case where all of the alleged victims received the product they bargained for – excellent health coverage with top insurers – at the price they agreed to pay.

STATEMENT OF RELATED PROCEEDINGS

The proceeding identified below are the direclty related to the above-captioned case in this Court.

- *United States v. John S. Romero*, No. 15-cr-00007-VAP-1, U.S. District Court for the Central District of California. Judgment entered January 5, 2021. Amended Judgment entered May 12, 2021.
- *United States v. John S. Romero*, Nos. 21-50004, 21-50119, U.S. Court of Appeals for the Ninth Circuit. Memorandum Opinion entered July 28, 2023.

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On January 21, 2015, the grand jury returned an indictment against Mr. Romero charging him with conspiracy to commit theft or embezzlement in connection with health care in violation of 18 U.S.C. §§ 371, 669 (count 1), substantive counts of theft in connection with health care in violation of 18 U.S.C. § 669 (counts 2-29), and making a false statement to a government agency in violation of 18 U.S.C. §§ 1001(a)(3) (count 30). The government elected not to proceed against Mr. Romero on counts 6-8, 11-13, 15-16, 18, 22, and 25-26. The district court dismissed those counts.

Mr. Romero proceeded to jury trial on February 4, 2020. On February 12, 2020, the jury returned guilty verdicts on counts 1-5, 9-10, 14, 17, 19, 20, 21, 23, and 30. The jury returned not guilty verdicts on counts 24, 27, and 29.

On January 5, 2021, the district court sentenced Mr. Romero to 144 months custody. *See* Appendix B. After a separate restitution hearing on April 20, 2021, the district court ordered Mr. Romero to pay restitution in the amount of $674,800. *See* Appendix C.

On July 28, 2023, a three-judge panel of the Ninth Circuit Court of Appeals affirmed Mr. Romero's convictions, sentence, and restitution in an unpublished memorandum. *See* Appendix A*; United States v. Romero*, 2023 WL 481874 (9th Cir. July 28, 2023).

JURISDICTION

On July 28, 2023, the Court of Appeals entered its decision affirming the conviction and sentence of the petitioner for violation of 18 U.S.C. §§ 371, 669 and 1001(a)(3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes.

18 U.S.C. § 3664. Procedure for issuance and enforcement of order of restitution.

Statutory provisions are set out verbatim in Appendix D.

STATEMENT OF THE CASE

A group of non-unionized small business owners and self-employed individuals agreed to pay a favorable monthly price, including joiner and administrative fees, to participate in a union-sponsored health plan. They received the product they bargained for – excellent health coverage with top insurers – at the price they agreed to pay. Mr. Romero, the union president, was convicted of embezzling the extra fees (called "joiner" or "administrative" fees) to pay salaries for himself and his family, rent on family-owned buildings, and a car loan for his son.

Over defense objection, at sentencing the court found the amount of loss – the amount embezzled by Mr. Romero -- to be $558,698.55, resulting in a 14-level increase to the guideline range. After numerous continuances to allow the government to improve its restitution arguments, the government disclosed a list of 706 purported "victims" consisting of individuals and small businesses who received the health insurance they purchased -- and the purported loss amounts for each. An amended Presentence Report issued calling for restitution in the amount of $674,800. The court overruled the defense objections to this figure, ordering restitution in the amount sought by the government.

On appeal, Mr. Romero challenged his convictions, sentence, and restitution. With regard to restitution, he argued that the court's order that he pay restitution in the amount of $674,800 pursuant to 18 U.S.C. § 3663A was erroneous. The 706 victims identified by the government were not victims as they received the health coverage they purchased at the price they agreed to pay. If, as the government

claimed, the money truly belonged to the health trust fund, then under ERISA law as well as the terms of the trust, the trust itself was the victim and it was inappropriate to return the money to the contributors. *See* 29 U.S.C. § 1103(c)(1) ("the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."); Exhibit 21 (Trust Agreement providing that "No Employer, Union, Employee or any other person shall have any right, title or interest in this Fund other than is specifically provided in this Agreement, and In the Benefit Plans and no part of this Fund shall revert to any Employer.") Even if these were indeed the victims, the government's methodology focusing on Mr. Romero's gains and working backwards to pro-rate the loss by percentages was both contrary to the goal of restitution and unreliable. *See United States v. Anderson*, 741 F.3d 938, 953 (9th Cir. 2013) ("[R]estitution … must reflect the victim's actual losses, not the defendant's gain.") In addition, the timing of the individual victim's participation in the plan did not align with the timing of the loss, and a significant subset of victims were no longer in existence. Mr. Romero argued that the order should be vacated and the case remanded for an accurate accounting of restitution to be returned to the trust.

The Ninth Circuit rejected Mr. Romero's arguments, affirming his convictions, sentence, and restitution in a brief unpublished memorandum. The court found that because the trust no longer existed, it was not an abuse of discretion to order restitution to the trust's contributors. It also found that the Ninth Circuit's decision

in *Anderson* "did not articulate a general, per se rule that the defendant's gain can never equal a victim's loss." 2023 WL 4841874 at *3-4; Appendix A at App-10. The district court's restitution award was based on the amount of money Mr. Romero embezzled: "But for the embezzlement, the trust would have had a reserve for the contributors' benefit." *Id*. The court found that Mr. Romero's gains just happened to equal the trust's losses, and thus the court did not abuse its discretion in the amount of the award. *Id*.

ARGUMENT

THIS COURT SHOULD RESOLVE THE IMPORTANT FEDERAL QUESTION OF WHETHER A DISTRICT COURT MAY AWARD RESTITUTION IN A HEALTH CARE EMBEZZLEMENT CASE WHERE ALL OF THE ALLEGED VICTIMS RECEIVED THE PRODUCT THEY BARGAINED FOR – EXCELLENT HEALTH COVERAGE WITH TOP INSURERS – AT THE PRICE THEY AGREED TO PAY.

Appellate courts have generally agreed that a defendant's gain may not be used as a proxy for the victims' actual losses in ordering restitution under the Mandatory Victims Restitution Act ("MVRA"). *See United States v. Zangari*, 677 F.3d 86, 91-93, n.3 (2d Cir. 2012), citing *United States v. Harvey*, 532 F.3d 326, 340 (4th Cir. 2008); *United States v. Yeung*, 672 F.3d 594 (9th Cir. 2012), abrogated on other grounds by Robers v. United States, 134 S. Ct. 1854 (2014); *United States v. Chalupnik*, 514 F.3d 748, 754 (8th Cir. 2008); *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008); *United States v. George*, 403 F.3d 470, 474 (7th Cir. 2005); *United States v. Badaracco*, 954 F.2d 928, 942-43 (3d Cir. 1992). The purpose of restitution is compensatory, and "the MVRA itself limits restitution to the full amount of each victim's loss[.]" *See id.*

at 92, citing 18 U.S.C. § 3664(f)(1)(A). "[A] restitution order must be tied to the victim's actual, provable, loss." *Id*. (citation omitted). If the court finds that "complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process," then the court may exercise its discretion not to order restitution at all. 18 U.S.C. § 3663A(c)(3)(B).

As the Ninth Circuit pointed out in the present case, there may be situations where the defendant's gain indeed is equal to the victim's loss. *See Romero*, 2023 WL 4841874 at *3-4; Appendix A at App-10; *see also Zangari*, 677 F.3d at 93 ("To be sure, there may be cases where there is a direct correlation between gain and loss, such that the defendant's gain can act as a *measure* of – as opposed to a *substitute* for – the victim's loss) (emphasis in original). But in the present case, none of the 706 "victims" so qualified under the statute. Section 3663A provides:

> For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663A(a)(2). Here, the district court made no determination that any of the 706 victims had been directly and proximately harmed as a result of Mr. Romero's embezzlement. They all received excellent health care insurance at the price they agreed to pay with no lapses in coverage. The money Mr. Romero was convicted of embezzling came from a nominal extra fee tacked onto the top of the premiums paid by subscribers called a "joiner" or "administrative" fee. Theoretically, these fees might

have served as a "reserve" in case there had ever not been enough funds to pay the premium. But such a situation never came to pass; health care premiums were always paid to Grade A providers such as Kaiser Permanente, Blue Shield, and Delta Dental, and there was no evidence that there was any danger of the premiums not being paid (premiums were not touched by the charged embezzlement scheme). Nonetheless, the court found that the money Mr. Romero embezzled was a theft from this possible reserve and found that the individuals and small businesses who purchased and received the product they ordered at the price they agreed to pay were victims entitled to restitution.

Lower courts have struggled with determining who qualifies as a victim under the MVRA. *See, e.g., United States v. Casados*, 26 F.4th 845 (10th Cir. 2022) (reversing court's restitution order requiring defendant to pay transportation expenses incurred by murder victim's son to attend defendant's detention hearing); *United States v. Farano*, 749 F.3d 658 (7th Cir. 2014) (refinancing lenders could not be counted as "victims" for restitution purposes in absence of evidence of reliance on fraudulent representations made by defendants to obtain original loans in elaborate real estate financing fraud scheme); *United States v. Frazier*, 651 F.3d 899 (8th Cir. 2011) (organizations that provided emergency services to victims of arson fire were not themselves victims under the Mandatory Victims Restitution Act); *United States v. Speakman*, 594 F.3d 1165 (10th Cir. 2010) (reversing restitution payment to financial management and advisory company). As these cases illustrate, there are frequent situations where awarding of restitution is not appropriate, and yet courts

are reluctant to exercise discretion not to do so pursuant to 18 U.S.C. § 3663A(c)(3)(B). None of the individuals and businesses in the present case qualified as "victims" pursuant to 18 U.S.C. § 3663A(a)(2), and the lower court erred by awarding them restitution by starting with the amount embezzled and then prorated to the health plan members based on the amount they had contributed. This case provides a strong vehicle to elucidate the important federal question of when a "victim" qualifies as such under the MVRA and how to determine whether and how to allocate restitution.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for writ of certiorari to resolve this important federal question.

Date: December 8, 2023

Respectfully Submitted,

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