No. 16-1519

In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court erred in ordering restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, for a crime victim's investigatory and legal expenses that were caused by the defendant's offense but were not requested by the government.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 1
Summary of argument 12
Argument:
The MVRA required petitioner to pay restitution for GE Capital's investigatory and legal expenses caused by his fraud 15
A. GE Capital's investigatory and legal expenses entitled it to restitution as a "victim" of petitioner's fraud 16
B. GE Capital's investigatory and legal expenses are recoverable in restitution under 18 U.S.C. 3663A(b)(4) 23
1. GE Capital incurred recoverable expenses when it participated in the investigation of petitioner's fraud 23
2. GE Capital incurred recoverable expenses when it attended Dry Van's bankruptcy proceedings 36
3. The MVRA does not categorically deny restitution for attorney's fees and other professional fees 40
4. The rule of lenity does not support petitioner's requested limitations on restitution 45
C. The district court's restitution order is independently supported by 18 U.S.C. 3663A(b)(1) 46
Conclusion 49
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) 41, 42
Ayestas v. *Davis*, No. 16-6795, 2018 WL 1402425 (Mar. 21, 2018) 34
Baker Botts L.L.P. v. *ASARCO LLC*, 135 S. Ct. 2158 (2015) 44
Commissioner v. *Tellier*, 383 U.S. 687 (1966) 34
Czyzewski v. *Jevic Holding Corp.*, 137 S. Ct. 973 (2017) 22, 36
Dolan v. *United States*, 560 U.S. 605 (2010) ..... *passim*
Hughey v. *United States*, 495 U.S. 411 (1990) 18, 45
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 32
Kelly v. *Robinson*, 479 U.S. 36 (1986) 22
Kirtsaeng v. *John Wiley & Sons, Inc.*, 568 U.S. 519 (2013) 32
Lexmark Int'l, Inc. v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) 19
Muscarello v. *United States*, 524 U.S. 125 (1998) 45
Paroline v. *United States*, 134 S. Ct. 1710 (2014) 19, 21, 43, 44
Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 30
Robers v. *United States*, 134 S. Ct. 1854 (2014) 19, 22, 45, 47, 48
Russello v. *United States*, 464 U.S. 16 (1983) 30
Schweiker v. *Hogan*, 457 U.S. 569 (1982) 47
Thigpen v. *Roberts*, 468 U.S. 27 (1984) 46
United Sav. Ass'n v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988) 22
United States v. *Abdelbary*, 746 F.3d 570 (4th Cir. 2014) 46

Cases—Continued: Page

United States v. *Adcock*, 534 F.3d 635 (7th Cir. 2008) 28
United States v. *Amato*, 540 F.3d 153 (2d Cir. 2008), cert. denied, 556 U.S. 1138 (2009) 24, 28, 41, 42
United States v. *Bahel*, 662 F.3d 610 (2d Cir. 2011) 28
United States v. *Corey*, 77 Fed. Appx. 7 (1st Cir. 2003) 20, 46
United States v. *Cummings*, 281 F.3d 1046 (9th Cir. 2002) 39
United States v. *Cuti*, 778 F.3d 83 (2d Cir. 2015) 28, 42
United States v. *DeRosier*, 501 F.3d 888 (8th Cir. 2007) 28
United States v. *Dwyer*, 275 Fed. Appx. 269, (5th Cir.), cert. denied, 553 U.S. 1043 (2008) 28
United States v. *Ekanem*, 383 F.3d 40 (2d Cir. 2004) 32
United States v. *Elson*, 577 F.3d 713 (6th Cir. 2009) 23
United States v. *Eyraud*, 809 F.3d 462 (9th Cir. 2015) 20, 33, 40
United States v. *Herrera*, 606 Fed. Appx. 748 (5th Cir. 2015) 27
United States v. *Hosking*, 567 F.3d 329 (7th Cir. 2009) 20, 24, 27, 32, 40, 46
United States v. *Janosko*, 642 F.3d 40 (1st Cir. 2011) 23
United States v. *Juvenile Female*, 296 Fed. Appx. 547 (9th Cir. 2008) 32, 40, 41
United States v. *Martin*, 128 F.3d 1188 (7th Cir. 1997) 32
United States v. *Maynard*, 743 F.3d 374 (2d Cir. 2014) 33, 34
United States v. *Nosal*, 844 F.3d 1024 (9th Cir. 2016), cert. denied, 138 S. Ct. 314 (2017) 23, 34

Cases—Continued: Page

United States v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) 11, 12, 26, 30
United States v. *Phillips*, 477 F.3d 215 (5th Cir.), cert. denied, 552 U.S. 820 (2007) 24
United States v. *Qurashi*:
No. 05-CR-498, 2009 WL 10677000 (E.D.N.Y. Sept. 1, 2009) 28
634 F.3d 699 (2d Cir. 2011) 27
United States v. *Scott*, 405 F.3d 615 (7th Cir. 2005) 46
United States v. *Sharma*, 703 F.3d 318 (5th Cir. 2012), cert. denied, 134 S. Ct. 78 (2013) 10
United States v. *Skowron*, 839 F. Supp. 2d 740 (S.D.N.Y. 2012) 40
United States v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009) 24

Statutes:

Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, § 202, 122 Stat. 3561 (18 U.S.C. 3663(b)(6)) 35
International Parental Kidnapping Crime Act of 1993, 18 U.S.C. 1204 39
Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A (§ 201 *et seq.*), 110 Stat. 1227 7
18 U.S.C. 3663A 8, 39, 1a
18 U.S.C. 3663A(a) 45, 1a
18 U.S.C. 3663A(a)(1) 7, 12, 16, 17, 18, 1a
18 U.S.C. 3663A(a)(2) ..... *passim*, 1a
18 U.S.C. 3663A(b) 13, 16, 18, 22, 23, 44, 2a
18 U.S.C. 3663A(b)(1) ..... *passim*, 2a
18 U.S.C. 3663A(b)(1)(B) 49, 2a

Statutes—Continued: Page

18 U.S.C. 3663A(b)(1)(B)(i) 49, 2a
18 U.S.C. 3663A(b)(4) ..... *passim*, 3a
18 U.S.C. 3663A(c)(1) 7, 17, 18, 3a
18 U.S.C. 3663A(c)(1)(A) 16, 3a
18 U.S.C. 3663A(c)(1)(B) 16, 3a
18 U.S.C. 3663A(d) 8, 4a
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248:
§ 2(a)(1), 96 Stat. 1248 42
§ 5, 96 Stat. 1253-1255 16
18 U.S.C. 3663 17
18 U.S.C. 3663(a)(1)(A) 16, 17
18 U.S.C. 3663(a)(1)(B)(i) 17
18 U.S.C. 3663(a)(2) 18
18 U.S.C. 3663(b) 18
18 U.S.C. 3663(b)(1) 17
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 40504, 108 Stat. 1947 (18 U.S.C. 3663(b)(4)) 17, 31, 32, 39
1 U.S.C. 1 ..... 19, 26
11 U.S.C. 362(a) 36
18 U.S.C. 2 2
18 U.S.C. 1028(a) 35
18 U.S.C. 1028(d)(3) 35
18 U.S.C. 1028(d)(4) 35
18 U.S.C. 1028(d)(7) 35
18 U.S.C. 1028A(a) 35
18 U.S.C. 1343 2
18 U.S.C. 1349 1
18 U.S.C. 1962(c) 30
18 U.S.C. 2248 43

Statutes—Continued: Page

18 U.S.C. 2259(b)(1) 43
18 U.S.C. 2259(b)(3) 43
18 U.S.C. 2259(b)(3)(C) 43
18 U.S.C. 2264 43
18 U.S.C. 3664(a) 8, 4a
18 U.S.C. 3664(d) 8, 5a
18 U.S.C. 3664(d)(6) 9, 31, 7a
18 U.S.C. 3664(e) 9, 19, 31, 7a
18 U.S.C. 3664(f)(1)(A) ..... *passim*, 7a
18 U.S.C. 3664(h) 7, 9a
18 U.S.C. 3771(a)(3) 28, 33, 12a
18 U.S.C. 3771(a)(4) 28, 38, 12a
26 U.S.C. 162(a) (1964) 34

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 19, 25, 26, 30, 33, 37
Catharine M. Goodwin, *Federal Criminal Restitution* (2017 ed.) 19, 27, 32
Identity Theft: Innovative Solutions for an Evolving Problem: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the Senate Comm. on the Judiciary 110th Cong., 1st Sess. (2007) 35
Hon. William H. Pryor Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, Federal Probation (Sept. 2017), http://www.uscourts.gov/ sites/default/files/ federalprobation-sept2017-508.pdf 31
Restatement (Second) of Torts (1979) 39
S. Rep. No. 179, 104th Cong., 1st Sess. (1995) 18

Miscellaneous—Continued: Page

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Webster's Third New International Dictionary (1993) 19, 25, 26, 30

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 864 F.3d 320.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. The petition for a writ of certiorari was filed on June 15, 2017, and was granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349, and five counts of

wire fraud, in violation of 18 U.S.C. 1343 and 2. Pet. App. 12a-15a. He was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. *Id.* at 16a-18a. He was ordered to pay restitution in the amount of $15,970,517.37. *Id.* at 23a-24a. The court of appeals affirmed. *Id.* at 1a-11a.

1. Petitioner was the owner and CEO of a holding company that owned USA Dry Van Logistics LLC (Dry Van),[1] a trucking company that specialized in cross-border transportation services. J.A. 33-34. Over the course of nearly two years, petitioner fraudulently induced General Electric Capital Corporation (GE Capital), a public company's wholly owned subsidiary, to loan tens of millions of dollars to Dry Van by modifying Dry Van's records in difficult-to-detect ways that made the business appear substantially more valuable than it actually was. GE Capital ultimately incurred nearly $5 million in losses getting to the bottom of petitioner's fraud and attempting to recover as much from the ruined business as it could.

a. The subject of petitioner's fraud was GE Capital's revolving-loan finance agreement for Dry Van. J.A. 34. The loan was secured by Dry Van's accounts receivable, the balance of which Dry Van periodically reported on "Borrowing Base Certificates." J.A. 34-35. The amount of the line of credit was 85% of Dry Van's "eligible" accounts receivable, which were accounts that were less than 90 days old, up to a set limit. *Ibid.* In May 2003, Dry Van obtained an initial line of credit of between $2 million and $3 million, which eventually increased as high as $35 million at the height of the fraud. J.A. 36.

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[1] "Dry Van" refers collectively to USA Dry Van Logistics LLC, its holding company, and the holding company's other subsidiaries.

Around March 2008, petitioner met with his associate, Aurelio Aleman-Longoria, and Dry Van's controller, Oscar Cano Barbosa, and proposed a scheme to fraudulently mislead GE Capital by overstating the amount of Dry Van's accounts receivable in order to increase the amount that Dry Van was permitted to borrow. J.A. 36-37. The fraud involved both the creation and management of fictitious customer accounts and the fraudulent modification of older legitimate accounts to make them appear more recent. *Ibid.*

Petitioner and his confederates disconnected their accounting software from their transportation-dispatch system, which kept track of their legitimate sales, thereby enabling them to input false sales invoices into the accounting software. J.A. 38. In order to create the appearance that the fraudulent invoices were being paid by genuine customers, the conspirators used some of the funds that GE Capital itself was providing. J.A. 37. They transferred a portion of the GE Capital loan proceeds from Dry Van's operating account to the "Lockbox" account where Dry Van normally received customer payments, and then applied the GE Capital funding to the fictitious customer accounts. J.A. 37, 39-40. The conspirators also took older invoices from actual customers that were too stale to qualify for the borrowing base and altered them to make them appear to have been issued more recently. J.A. 37. The conspirators issued a "credit" for the amount due on the older sales invoices, then issued new sales invoices with the same value but a more recent date. J.A. 37 & n.4, 39-40.

As the scheme generated increasingly more loan proceeds, petitioner and Aleman-Longoria personally took millions of dollars out of Dry Van. J.A. 41. Petitioner used the money to fund an extravagant lifestyle.

J.A. 40; see C.A. ROA 471-473 (listing some of petitioner's lavish spending during the conspiracy on luxury vehicles, travel, retail, and entertainment). Because petitioner and Aleman-Longoria spent so much, Dry Van was required to continuously increase the amount of its fraudulent borrowing. J.A. 40. Petitioner would monitor Dry Van's operating account and, whenever a shortfall existed, would tell Barbosa the amount of additional false invoices to create to obtain additional funds from GE Capital. *Ibid.* The end result of petitioner's scheme was that, of the approximately $37.266 million in accounts receivable that Dry Van showed on its books, $26.725 million was fraudulent. J.A. 38.

b. Petitioner and his confederates took extensive measures to prevent GE Capital and its auditors from detecting the fraud. J.A. 39-41. Each time Dry Van was audited, Barbosa would delay the auditors so that he could provide the requested invoices the following day. J.A. 39. Barbosa and the accounting staff would then work late that night creating fake invoices to give to the auditors. *Ibid.* Accounting staff would also make the accounts appear even more genuine by pairing the fake invoices with legitimate proof-of-delivery documents with proximate dates. *Ibid.* And each time fraudulent invoices reached past-due status, Dry Van employees would post fake payments on them to the Lockbox account or would delete the fraudulent invoices from the system and create new fraudulent invoices for the same amount with a newer date. J.A. 39-40.

Petitioner and Aleman-Longoria also developed another ruse to prevent auditors from discovering the money they were taking out of Dry Van. J.A. 41. Toward the end of each calendar year of the fraud, petitioner and Aleman-Longoria would take money that

had been loaned to Dry Van from GE Capital and transfer it into certificates of deposit. *Ibid.* They would then obtain personal loans for themselves, using the money in the certificates of deposit as collateral. *Ibid.* They used the proceeds from the personal loans to pay back the distributions that they had taken from Dry Van during the past year. *Ibid.* The following year, they would use the money in the certificate-of-deposit accounts to pay off the personal loans in their names. *Ibid.*

c. The scheme collapsed in late 2009, when Dry Van could no longer make payments on its line of credit. J.A. 41. Dry Van hired a consultant to assist with its financial difficulties, and the consultant detected fraudulent activity. J.A. 42-43; C.A. ROA 298. On January 25, 2010, petitioner and Aleman-Longoria accompanied the consultant to inform GE Capital that they had been fraudulently overstating their accounts receivable, and Dry Van declared bankruptcy the following week. J.A. 43; C.A. ROA 298. Even after that, however, petitioner continued to withdraw proceeds of the fraud for his personal use. J.A. 43-44.

d. When GE Capital learned of petitioner's scheme, it acted immediately to investigate the fraud and mitigate its effects. "Given the magnitude and nature" of the fraud and the financial circumstances of Dry Van, J.A. 26, including that not all of Dry Van's accounts receivable were fictitious and that petitioner's scheme had plunged Dry Van into bankruptcy, GE Capital incurred significant additional losses responding to petitioner's offense.

First, GE Capital conducted an investigation that produced substantial information and analysis that was ultimately provided to the Federal Bureau of Investigation (FBI). See J.A. 18, 28-29. Shortly after discovering

the fraud, GE Capital ensured that key electronic documents and systems at Dry Van would not be lost or destroyed by petitioner or anyone else before the full scope and effects of the fraud could be uncovered. GE Capital hired Stroz Friedberg, a "computer forensics, investigations[,] and electronic discovery technical services firm," which took forensic images of hard drives at Dry Van; made backups of Dry Van's accounting system and transportation-dispatch system; and forensically copied the accounts receivable system, the billing system, and the Exchange database files, including emails. J.A. 28-29. GE Capital then hired Conway Del Genio, a financial consulting firm, to investigate the extent of the fraud by determining Dry Van's true financial condition. J.A. 29. Two law firms (Latham & Watkins and Winston & Strawn) also assisted in the investigation or provided legal advice related to the fraud. J.A. 27-28.

Second, the onset of bankruptcy proceedings for Dry Van required GE Capital to make further expenditures in order "to protect its rights and preserve its collateral." J.A. 27. GE Capital filed proofs of claim in those proceedings that sought to recover the value of its unpaid loans. J.A. 24. Later on, Dry Van's owners decided to liquidate the business, and GE Capital participated in that proceeding as well. *Ibid.* GE Capital was ordered by the bankruptcy court to "ma[ke] advance[s] to [Dry Van] during the bankruptcy case to enable [Dry Van] to continue operating." *Ibid.* Latham & Watkins provided counsel to GE Capital in connection with the proceedings, as did two other law firms (Foley & Mansfield and Jordan, Hyden, Womble, Culbreth & Holzer). J.A. 27-28. When the final bankruptcy proceeding was completed, GE Capital was still owed $11,074,047.64 from loans that Dry Van had not repaid. J.A. 68. GE

Capital's other expenses from the investigation and the bankruptcy proceedings totaled $4,895,469.73. J.A. 70.[2]

2. In 2013, a federal grand jury indicted petitioner (along with Aleman-Longoria and Barbosa) on one count of conspiracy to commit wire fraud and five counts of wire fraud. J.A. 32. Petitioner pleaded guilty to all counts without a plea agreement. J.A. 33. He was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. Pet. App. 16a-18a. He was also ordered to pay restitution, jointly and severally with his co-defendants, in the amount of $15,970,517.37. *Id.* at 23a-24a; see 18 U.S.C. 3664(h).

a. The order of restitution in petitioner's case was based on the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A (§ 201 *et seq.*), 110 Stat. 1227. The MVRA governs restitution in most cases involving federal crimes with an identifiable victim. See 18 U.S.C. 3663A(c)(1). As particularly relevant here, it applies "in all sentencing proceedings for convictions of * * * an offense against property under [Title 18], * * * including any offense committed by fraud or deceit[,] * * * in which an identifiable victim or victims has suffered a * * * pecuniary loss." *Ibid.*

The MVRA requires that a sentencing court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). The term

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[2] Separate from the bankruptcy proceedings, in March 2010, GE Capital filed a civil action against petitioner and Aleman-Longoria, which resulted in separate agreed judgments against each of them for over $33.555 million, plus interest. J.A. 44-45; see Agreed Judgment at 1, *General Elec. Capital Corp.* v. *Aleman*, No. 10-cv-77 (S.D. Tex. Aug. 16, 2010). As of petitioner's sentencing proceeding, however, GE Capital had received only $580,000 from petitioner. J.A. 45.

"victim" is defined as "a person directly and proximately harmed as a result of the commission of" an offense covered by Section 3663A, "including, in the case of an offense that involves as an element a scheme [or] conspiracy, * * * any person directly harmed by the defendant's criminal conduct in the course of the scheme." 18 U.S.C. 3663A(a)(2).

The MVRA provides that "in the case of an offense resulting in damage to or loss or destruction of property," the order of restitution "shall require" that the defendant "return the property" to its owner or, if such return is "impossible, impracticable, or inadequate, pay an amount equal to" the "value of the property" less "the value * * * of any part of the property that is returned." 18 U.S.C. 3663A(b)(1). The MVRA additionally provides that, "in any case," the order of restitution shall require the 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).

The sentencing court must "order restitution to each victim in the full amount of each victim's losses," and restitution must be determined "without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A); 18 U.S.C. 3663A(d) (a restitution order under Section 3663A "shall be issued and enforced in accordance with section 3664").

To aid sentencing courts, the Probation Office conducts research and includes factual details relevant to restitution in a defendant's presentence investigation report. 18 U.S.C. 3664(a) and (d). When disputes arise between the parties regarding restitution, the district

court may refer any issue to a magistrate judge or special master, subject to a de novo determination by the district court. 18 U.S.C. 3664(d)(6). The statute places the burden of proof on the government, by "the preponderance of the evidence," to "demonstrat[e] the amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. 3664(e).

b. In this case, the Probation Office ultimately recommended, in agreement with the government and based on two victim impact statements from GE Capital, that the district court order restitution in the amount of $15.971 million. J.A. 70; see J.A. 23-25, 26-29. That amount included $11.074 million in restitution for GE Capital's unrecovered loan principal, which petitioner has never contested. See Pet. Br. 11 n.5. The amount also included restitution for the $4.895 million in additional losses that GE Capital incurred in the investigation of petitioner's fraud and in the bankruptcy proceedings that followed the collapse of his scheme. J.A. 70. Petitioner objected to that portion of the restitution order, arguing that his own admission of wrongdoing to GE Capital had obviated the need for any investigation and that "recovery losses," including attorney's fees, are not eligible for restitution. J.A. 76.

The government responded by informing the district court that GE Capital's efforts had been critical to the investigation of petitioner's offense, and were "ultimately vital to the later prosecution of [him]." J.A. 18. The government observed that, even after petitioner's outside consultant had discovered his fraud and accompanied him to GE Capital, petitioner had not fully revealed the fraud. See C.A. ROA 298. The government noted that GE Capital had thus needed to spend "an

inordinate amount of resources" on experts, consultants, and lawyers to "investigat[e] the extent of the defendants' fraud to determine the amount of actual loss." J.A. 18. The government also stated that because Dry Van's bankruptcy proceedings were a "direct and proximate" result of petitioner's fraudulent scheme, GE Capital's expenses in those proceedings were eligible for restitution as well. J.A. 16-17. The government offered to introduce witnesses at the sentencing hearing, including officials from GE Capital, to further substantiate restitution. J.A. 79-81.

The district court found additional evidence unnecessary to resolve the contested issues, see C.A. ROA 255-257, and it agreed with the Probation Office and the government that restitution should include "damages incurred in overturning and discovering the loss," Pet. App. 39a. The court accordingly ordered $15,970,517.37 in restitution. *Id.* at 26a.

3. The court of appeals affirmed. Pet. App. 1a-11a. Applying de novo review, the court rejected petitioner's contention that the MVRA categorically disallows restitution for "forensic expert fees, legal fees, and consulting fees." *Id.* at 2a; see *id.* at 2a-5a.

The court of appeals observed that the MVRA "instructs a sentencing court to order restitution for a victim's 'actual loss directly and proximately caused by the defendant's offense of conviction.'" Pet. App. 2a (quoting *United States* v. *Sharma*, 703 F.3d 318, 323 (5th Cir. 2012), cert. denied, 134 S. Ct. 78 (2013)). The court further observed that under 18 U.S.C. 3663A(b)(4), mandatory restitution "includes '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.'" Pet. App. 2a.

The court of appeals determined that restitution was proper under Section 3663A(b)(4). Pet. App. 4a. It found that petitioner's "wire fraud scheme caused [GE Capital] to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud." *Ibid.* It accordingly reasoned that those expenses were "incurred by [GE Capital] during the investigation of the fraud" and "were necessary and compensable in the restitution award." *Ibid.* The court similarly reasoned that Section 3663A(b)(4) supported restitution for GE Capital's "legal fees incurred in the related bankruptcy proceedings." *Ibid.* The court determined that those fees "were directly caused by the defendants' fraud for purposes of restitution," because petitioner's "fraudulent scheme directly caused" Dry Van "to file for bankruptcy" and "[t]he bankruptcy court ordered [GE Capital] to continue to make advances to [Dry Van] during the bankruptcy proceedings." *Ibid.* The court noted that its determination accorded with its own precedent as well as the decisions of each of the other circuits to have addressed the issue, with the exception of the D.C. Circuit's decision in *United States* v. *Papagno*, 639 F.3d 1093 (2011). Pet. App. 4a-5a & n.2.

Judge Higginson concurred. Pet. App. 6a-11a. Although he acknowledged that the court of appeals' decision followed circuit precedent, he took the view that "'participating' in a government investigation does not embrace an internal investigation, 'at least one that

has not been required or requested by criminal investigators or prosecutors.'" *Id.* at 6a-7a (quoting *Papagno*, 639 F.3d at 1098-1099).

SUMMARY OF ARGUMENT

The district court correctly awarded restitution for the investigatory and legal expenses that GE Capital incurred as a result of petitioner's fraud. Those expenses in themselves made GE Capital the "victim" of petitioner's fraud for purposes of the MVRA, requiring a mandatory order of restitution. 18 U.S.C. 3663A(a)(1) and (2). That order must include restitution for "necessary * * * expenses incurred during participation in the investigation * * * of the offense," such as the costs of unraveling petitioner's fraud, as well as restitution for "expenses incurred during * * * attendance at proceedings related to the offense," such as the costs incurred in the bankruptcy proceedings that the fraud precipitated. 18 U.S.C. 3663A(b)(4). The expenses were alternatively recoverable in restitution because the additional money that GE Capital was forced to spend was "property" lost as a "result[ ]" of the offense. 18 U.S.C. 3663A(b)(1). Petitioner's contrary interpretation of the MVRA would impose limitations on the statute that its text does not contain and that would contravene its "substantive purpose * * * to ensure that victims of a crime receive full restitution." *Dolan* v. *United States*, 560 U.S. 605, 612 (2010).

A. GE Capital's investigatory and legal expenses were "direct[ ] and proximate[ ] harm[s]" that resulted from petitioner's fraud, and they are part of what makes GE Capital a "victim" of petitioner's offense entitled to mandatory restitution under the MVRA. 18 U.S.C. 3663A(a)(1) and (2). GE Capital's efforts to get to the bottom of petitioner's fraud, and to recover as much as

it could in the bankruptcy proceedings that the fraud caused, were an expected, necessary, and societally desirable response to the crime. The ordinary definition of criminal "restitution" is the restoration of the victim to the position that it occupied before the offense. The restitution order in this case accords with that principle, and with multiple other provisions of the MVRA that reinforce that a sentencing court should broadly construe the categories of losses for which a victim may obtain restitution in 18 U.S.C. 3663A(b) in order to ensure that the victim receives full restitution.

B. GE Capital's investigatory and legal expenses are recoverable in restitution under 18 U.S.C. 3663A(b)(4), which requires restitution for "necessary * * * expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."

GE Capital participated in the investigation of petitioner's offense by hiring forensic experts, consultants, and attorneys who preserved crucial evidence and unraveled petitioner's fraudulent scheme. That information was turned over to the FBI and was vital to the successful prosecution of petitioner. And the expenses were necessary because they were directed to investigating petitioner's offense and were reasonable in light of its magnitude and nature. Petitioner principally contends that "the investigation * * * of the offense" in Section 3663A(b)(4) refers exclusively to the *government's* investigation, but the statute does not include any such limitation. The term "investigation" does not naturally describe the work of the government alone. And Congress would have known that victims routinely contribute to the investigation of a crime before the government gets involved, as many federal decisions show.

Petitioner's interpretation of the term "investigation," and his related attempts to redefine other terms in Section 3663A(b)(4), would produce anomalous results that Congress would not have intended.

GE Capital was also entitled to recover its losses incurred while attending Dry Van's bankruptcy proceedings. Petitioner's fraud against GE Capital was the cause of the bankruptcy; the debts that Dry Van incurred to GE Capital through petitioner's fraud were Dry Van's greatest liability in the bankruptcy; and GE Capital's involvement in those proceedings reduced the amount of petitioner's restitution for unreturned loan principal. The statutory text does not limit "proceedings related to the offense" exclusively to criminal proceedings, and reading in that limitation would conflict with the statute's objective of full restitution in cases, like this one, where the crime forces victims to participate in additional proceedings.

Contrary to petitioner's contention, Section 3663A(b)(4) does not categorically deny restitution for attorney's and other professional fees. Section 3663A(b)(4)'s express identification of certain types of expenses recoverable in restitution—such as "child care" or "transportation"—illustrates the provision's breadth by covering expenses that might otherwise be overlooked. They do not, however, suggest any obvious or readily definable *limitation* that would justify narrowing the scope of the catchall provision. And Congress's allowance in other statutes of restitution for *all* attorney's fees incurred by victims of select crimes does not suggest that Congress disallowed restitution to MVRA victims who incur legal expenses in the investigation or prosecution of the offense or in related proceedings.

C. GE Capital's investigatory and legal losses are also recoverable in restitution under 18 U.S.C. 3663A(b)(1), which provides an alternative basis for affirming the judgment below. GE Capital's investigatory and legal expenses are part of its "property" that was "los[t]" as a "result[ ]" of petitioner's fraud offense. *Ibid.* Those losses were directly and proximately caused by petitioner's offense, and they were incurred in order to recover as much as possible of the tens of millions of dollars in property that petitioner stole from GE Capital through his fraud.

ARGUMENT

THE MVRA REQUIRED PETITIONER TO PAY RESTITUTION FOR GE CAPITAL'S INVESTIGATORY AND LEGAL EXPENSES CAUSED BY HIS FRAUD

The correct amount of restitution in this case is the full $15,970,517.37 that GE Capital lost as a result of petitioner's fraud. The MVRA requires petitioner to pay back not only the remaining loan principal of which GE Capital was deprived, but also the expenses that GE Capital incurred in unraveling the fraud and obtaining evidence that it passed along to the FBI, as well as the expenses that it incurred attempting to recover as much of the principal as it could in the bankruptcy proceedings. Those additional expenses were proximately caused by petitioner's fraud and in themselves render GE Capital the "victim" of the crime entitled to restitution under the MVRA. The district court was accordingly required to include those expenses in the restitution order both as "necessary * * * expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" under 18 U.S.C. 3663A(b)(4), and as "property" whose "loss" was the "result[ ]" of petitioner's

offense under 18 U.S.C. 3663A(b)(1). In contending otherwise, petitioner would impose limitations on the statute —primarily, a requirement that the victim's expenses be requested or required by the government, and a categorical exclusion on recovery of attorney's and other professional fees—that appear nowhere in the MVRA's text and would subvert its basic purpose of making crime victims whole.

A. GE Capital's Investigatory And Legal Expenses Entitled It To Restitution As A "Victim" Of Petitioner's Fraud

The MVRA provides that a court "shall order * * * that the defendant make restitution to the victim" in any case involving, *inter alia*, a "crime of violence" or an "offense against property" under various provisions of the federal criminal code, "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. 3663A(a)(1), (c)(1)(A), and (B). The Act broadly defines a "victim" to include any "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered," including direct harms caused by the defendant's conduct "in the course of [a] scheme [or] conspiracy." 18 U.S.C. 3663A(a)(2). In this case, the direct and proximate harms to GE Capital from petitioner's criminal fraud consisted not only of the loss of its principal, but also the investigatory and legal expenses that it incurred attempting to recover the fraudulently loaned amounts. See 18 U.S.C. 3663A(b).

1. Before the MVRA, federal restitution was primarily governed by the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5, 96 Stat. 1253-1255, which gave sentencing courts discretion to order the defendant to make restitution to any victim of the offense, see 18 U.S.C. 3663(a)(1)(A) (as amended). In

determining whether to order restitution and how much, the VWPA directed sentencing courts to consider, *inter alia*, "the amount of the loss sustained by each victim as a result of the offense," as well as "the financial resources of the defendant." 18 U.S.C. 3663(a)(1)(B)(i).

The VWPA focused on restitution for the types of losses that victims most commonly experience. In cases involving offenses against property, the victim could recover the property or the value of the property. 18 U.S.C. 3663(b)(1). In 1994, Congress amended the VWPA by providing that a sentencing court may, "in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1947 (18 U.S.C. 3663(b)(4)).

2. In 1996, Congress enacted the MVRA. For a wide range of offenses where the statute applies—including most violent and property offenses—the MVRA withdraws the availability of discretionary restitution under the VWPA and replaces it with a requirement of mandatory restitution. See 18 U.S.C. 3663A(a)(1) and (c)(1); 18 U.S.C. 3663(a)(1)(A) (Section 3663 does not apply to an "offense described in section 3663A(c)"). Because the MVRA covers most federal offenses with a victim, it controls restitution in tens of thousands of sentencing proceedings every year. See U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, S-36 Tbl. 15 (2017) (describing offenders sentenced to restitution by type of offense).

Although the MVRA makes restitution mandatory rather than discretionary for the covered offenses, the

statute otherwise largely replicates the VWPA. The MVRA's definition of "victim" as "a person directly and proximately harmed" by such an offense mirrors the VWPA's similar definition. 18 U.S.C. 3663A(a)(2); see 18 U.S.C. 3663(a)(2). And the categories of losses covered by the MVRA—including loss of property and expenses incurred participating in the investigation or prosecution of the offense—were also largely copied from the VWPA. Compare 18 U.S.C. 3663A(b), with 18 U.S.C. 3663(b).

The "substantive purpose" of the MVRA is "primarily to ensure that victims of a crime receive full restitution." *Dolan* v. *United States*, 560 U.S. 605, 612 (2010). The Senate Report accompanying the MVRA explained Congress's intent to provide "full restitution to all identifiable victims of covered offenses." S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995) (Senate Report). In particular, Congress deemed it "essential that the criminal justice system * * * , to the extent possible, ensure that [an] offender be held accountable to repay the[ ] costs" that his offense imposes "on the victim." *Ibid.* The MVRA makes that objective explicit in the statutory text by "provid[ing] that restitution shall be ordered in the 'full amount of each victim's losses' and 'without consideration of the economic circumstances of the defendant.'" *Dolan*, 560 U.S. at 612 (quoting 18 U.S.C. 3664(f)(1)(A)).

3. Petitioner does not dispute that his fraud consisted of crimes for which the MVRA mandates "that the defendant make restitution to the victim." 18 U.S.C. 3663A(a)(1); see 18 U.S.C. 3663A(c)(1). And the "ordinary meaning" of the statutory term "restitution" is "restoring" the victim "to [the] position [it] occupied before" the offense. *Hughey* v. *United States*, 495 U.S.

411, 416 (1990); see Catharine M. Goodwin, *Federal Criminal Restitution* § 2:1, at 16-17 (2017 ed.) (the fundamental principle of criminal restitution is that "the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being"); Senate Report 12-13; see also *Black's Law Dictionary* 1313 (6th ed. 1990) (restitution occurs when "a person is restored to his or her original position prior to loss or injury"); *Webster's Third New International Dictionary* 1936 (1993) ("restoration of a person to a former position or status").

The status of a "person" (including a corporation) as a "victim" entitled to restitution under the MVRA turns on whether that person suffered "direct[ ] and proximate[ ] harm[s]" that "result[ed from] the commission of [the] offense." 18 U.S.C. 3663A(a)(2); see *Robers* v. *United States*, 134 S. Ct. 1854, 1859 (2014) (noting the MVRA's "proximate cause requirement" in 18 U.S.C. 3663A(a)(2) and 18 U.S.C. 3664(e)); see also 1 U.S.C. 1 ("person" includes "corporation[ ]"). Here, GE Capital's direct and proximate harms included not only the remaining loss of principal, but also the investigatory and litigation expenses that GE Capital incurred in an effort to mitigate its harms from petitioner's fraud. Those additional losses bore "'a sufficiently close connection to the conduct' at issue" in the offense to trigger mandatory restitution under the MVRA. *Robers*, 134 S. Ct. at 1859 (quoting *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014)).

A proximate-causation inquiry of the sort relevant to criminal restitution "is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline* v. *United States*, 134 S. Ct.

1710, 1719 (2014). Here, it was it was entirely foreseeable to petitioner that his crime would require GE Capital to incur significant losses to unravel his fraud, determine its extent, and then recover what it could for its shareholders. See, *e.g.*, *United States* v. *Eyraud*, 809 F.3d 462, 468 (9th Cir. 2015) (defendant "should have anticipated * * * that unearthing the full consequences of her embezzlement would take additional time, effort, and money"); *United States* v. *Hosking*, 567 F.3d 329, 332 (7th Cir. 2009) ("The time and effort spent by the [victim's] employees and outside professionals in unraveling the [defendant's] twelve-year embezzlement scheme was a direct and foreseeable result of the defendant's conduct."); *United States* v. *Corey*, 77 Fed. Appx. 7, 9, 11-12 (1st Cir. 2003) (affirming restitution for "legal expenses associated with [defendant's] bankruptcy" because "[t]he loan was premised upon a sham and, as a matter of course, [the victim's] response to that fraud entailed routine legal expenses that are necessarily incurred when a heavily regulated secured lender mitigates its losses").

Petitioner knew or should have known that his Ponzi-like scheme—in which he used loans from GE Capital to create fake customer accounts to obtain tens of millions of dollars more from GE Capital—would eventually collapse. The scheme could never have lasted forever, and GE Capital would necessarily be left holding the bag. It was entirely to be expected that GE Capital would, at that point, make expenditures to separate petitioner's true statements from his falsehoods in order to determine the degree to which it had been duped and to learn the actual state of Dry Van's business. And in the inevitable bankruptcy—the eminently foreseeable result of a fraud that caused two-thirds (and $26 million) of Dry

Van's accounts receivable to be fictitious, see J.A. 38—GE Capital would necessarily incur expenses to recover as much as it could.

Petitioner does not meaningfully contest that GE Capital's investigatory expenses were caused by, and were the readily foreseeable result of, his crime. Petitioner does assert (Br. 32), however, that GE Capital's expenses in the bankruptcy proceedings are not recoverable because they were "directly caused by the *bankruptcy*" rather than by his fraud. That assertion—which is like saying that a battery victim's hospital bills were caused by her hospitalization rather than by the defendant's crime—cannot be reconciled with any sensible understanding of proximate causation. See *Paroline*, 134 S. Ct. at 1719. It was readily foreseeable that petitioner's crime would both cause Dry Van to go bankrupt and cause GE Capital—Dry Van's largest creditor and its primary source of capital—to incur significant expenses in those multi-million dollar bankruptcy proceedings.

Including GE Capital's investigatory and legal expenses in its losses as a "victim" of the offense takes account of petitioner's "conduct in light of the broader causal process that produced" those losses. *Paroline*, 134 S. Ct. at 1728. If restitution were limited to the value of Dry Van's unpaid loans as petitioner suggests, then even if petitioner repaid that amount, GE Capital would still have $4.895 million in losses that were directly and proximately caused by petitioner's offense. Petitioner's requested outcome would not fulfill the statutory mandate of full restitution or see GE Capital restored to its position before the offense.

4. Petitioner is wrong to suggest (Br. 31) that the definition of "victim" in Section 3663A(a)(2)—and the remainder of the MVRA—are irrelevant to determining

the proper measure of restitution under Section 3363A(b). "Statutory construction," this Court has explained, "is a holistic endeavor," and courts should interpret individual provisions in a manner that "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); see *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) (instructing that a court's interpretation of a statute "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (citation omitted); see also, *e.g.*, *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017).

This Court in *Robers* accordingly looked to provisions throughout the MVRA, and especially the statute's incorporation of principles of proximate causation, to interpret the restitution available under Section 3663A(b)(1). 134 S. Ct. at 1858-1859; see *Dolan*, 560 U.S. at 611-614 (considering multiple MVRA provisions to interpret a procedural requirement). Petitioner's blinkered readings of the loss categories in Section 3663A(b) are not only flawed on their own terms, see Sections B and C, *infra*, but also lose sight of the MVRA's overall structure. Section 3663A(b) does not mandate restitution for *all* losses proximately caused by the defendant's offense, but Congress set out loss categories that will effectuate the statute's overarching function to provide "full restitution." *Dolan*, 560 U.S. at 612. The MVRA as a whole—from the ordinary meaning of "restitution," to the expansive definition of "victim," 18 U.S.C. 3663A(a)(2), to the requirement of restitution for "the full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A)—thus

instructs sentencing courts to construe the loss categories in Section 3663A(b) in a manner that harmonizes the statute's provisions and makes them effective.

B. GE Capital's Investigatory And Legal Expenses Are Recoverable In Restitution Under 18 U.S.C. 3663A(b)(4)

The investigatory and legal expenses that GE Capital incurred as a result of petitioner's fraud are recoverable through restitution under 18 U.S.C. 3663A(b)(4). That provision directs that an order of restitution must require the 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." *Ibid.* A straightforward application of that statutory text encompasses the expenses at issue here.

1. GE Capital incurred recoverable expenses when it participated in the investigation of petitioner's fraud

GE Capital invested considerable resources investigating petitioner's fraud and enabling the government's later prosecution of it. As the court of appeals recognized —in accord with six other circuits—those losses were "expenses" that were both "necessary" and "incurred during participation in the investigation or prosecution of the offense." 18 U.S.C. 3663A(b)(4).[3]

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[3] See, *e.g.*, *United States* v. *Nosal*, 844 F.3d 1024, 1046-1047 (9th Cir. 2016) (internal "investigation costs and attorneys' fees" are recoverable if they are a "'direct and foreseeable result' of defendant's wrongful conduct") (citation omitted), cert. denied, 138 S. Ct. 314 (2017); *United States* v. *Janosko*, 642 F.3d 40, 42 (1st Cir. 2011) (Souter, J.) (cost of credit monitoring after data breach); *United States* v. *Elson*, 577 F.3d 713, 727-728 (6th Cir. 2009) (attorney's fees

a. When GE Capital discovered that petitioner had engaged in a complex conspiracy to fraudulently obtain tens of millions of dollars, it acted immediately "to investigate the extent of the fraud." J.A. 26. "Given the magnitude and nature" of the fraud, *ibid.*—in which petitioner obtained more than $25 million in fraudulent loans over 21 months, and took extensive steps to cover up his wrongdoing, J.A. 33-42—a thorough (and thus costly) investigation was required. GE Capital hired forensic investigators who preserved Dry Van's financial records, accounting system, accounts receivable and billing systems, and emails, thereby ensuring that key records were not lost or destroyed. J.A. 28-29. Financial consultants then untangled Dry Van's fraudulent accounting practices and "assist[ed] in determining [Dry Van's] true financial condition," J.A. 29, which required, among other things, figuring out which of its accounts were fraudulent and which were not. Attorneys further "assist[ed] in the investigation of [Dry Van's] fraud." J.A. 27-28.

As the government explained to the sentencing court, GE Capital's investigatory actions were "ultimately vital to the later prosecution." J.A. 18. The electronic data (including emails) preserved and analyzed by GE Capital's investigators helped the government

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incurred in "discovering and investigating" defendant's fraud in an attempt to recover lost funds); *Hosking*, 567 F.3d at 332 (7th Cir.) (bank's internal investigation costs); *United States* v. *Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009) (attorney's fees and accountant fees incurred during internal investigation of defendant's fraud); *United States* v. *Amato*, 540 F.3d 153, 159-160 (2d Cir. 2008) (attorney's fees and internal investigation costs), cert. denied, 556 U.S. 1138 (2009); *United States* v. *Phillips*, 477 F.3d 215, 224 (5th Cir.) (costs of internal damage assessment and of contacting other victims of data breach); cert. denied, 552 U.S. 820 (2007).

establish the factual basis for charging petitioner with a conspiracy count. See C.A. ROA 13-19 (Indictment). GE Capital's investigation also revealed how many times, and on what dates, petitioner caused fraudulent documents to be transmitted, which helped determine how many counts of wire fraud to charge against petitioner and the factual basis for each count. See *id.* at 20 (Indictment) (charging petitioner with five counts of wire fraud for five fraudulently transmitted documents on particular dates). GE Capital's investigators further supported the prosecution by "determin[ing] the actual amount of [petitioner's] fraud," J.A. 18, which affected, among other things, petitioner's offense level under the Sentencing Guidelines. See J.A. 48. And had petitioner not pleaded guilty, the material preserved and analyzed by GE Capital's investigation would have been a critical part of the evidence against petitioner at trial.

The amounts that GE Capital spent on the investigation of petitioner's criminal fraud were thus "expenses incurred during participation in the investigation or prosecution of the offense." 18 U.S.C. 3663A(b)(4). The ordinary meaning of the term "expense"—"[t]hat which is expended in order to secure a benefit or bring about a result"—readily encompasses such expenditures. *Black's Law Dictionary* 577; see *Webster's Third New International Dictionary* 800 (defining "expense" as "the financial burden involved typically in a course of action"). Those expenses were incurred when GE Capital "participat[ed]" in "the investigation" of petitioner's offense—indeed, it was the driving force in the initial phase of the investigation, before the investigation was handed over to federal officials. Without GE Capital's participation, the investigation and prosecution of petitioner's fraud may not have been as speedy or as successful. And as

both lower courts recognized, the expenses here were "necessary": they were appropriate under the circumstances and were useful to unraveling petitioner's fraud and bringing him to justice. See Pet. App. 4a; *id.* at 39a; see also *Black's Law Dictionary* 1029 (defining "necessary" as "that which is * * * convenient, useful, appropriate, suitable, proper, or conducive to the end sought").

b. Petitioner's efforts to avoid restitution for GE Capital's investigatory expenses center on his contention that Section 3663A(b)(4)'s reference to "the investigation" of the offense must refer exclusively to "the *government's* investigation." Pet. Br. 17 (citation omitted). The D.C. Circuit decision on which petitioner relies took that premise as a given, because neither party contested it in that case. See *United States* v. *Papagno*, 639 F.3d 1093, 1098 (2011). But the text of Section 3663A(b)(4) does not say "the government's investigation," and petitioner presents no sound reason to infer that extratextual limitation.

The definition of "investigation" is broad and not limited to the government's work. See *Black's Law Dictionary* 825 (defining "investigation" as "[t]he process of inquiring into or tracking down through inquiry"); *Webster's Third New International Dictionary* 1189 (a "detailed examination" or "a searching inquiry"). Nothing in the statutory text suggests Congress believed that "the investigation" of a crime is comprised only of government agents, or that it cannot begin until the government gets involved. Indeed, the text of Section 3663A(b)(4) does not even dictate that only one "investigation" may occur. See 1 U.S.C. 1 (by default, "words importing the singular include and apply to several persons, parties, or things").

As Congress presumably recognized, and as this case illustrates, victims are often better positioned than the government to move quickly to investigate crime. GE Capital's prompt action played a critical role in the investigation by preserving crucial evidence and revealing the extent of the fraud. J.A. 18. GE Capital's efforts thus were not "entirely separat[e]" from the criminal investigation (Pet. Br. 21), but were instead the first phase of "the investigation * * * of the offense." Especially (but not exclusively) in fraud cases, many "government investigations would not occur if it were not for the prior internal investigation of the victim." *Federal Criminal Restitution* § 7:36, at 376.

Congress would have understood that criminal prosecutions commonly occur as a result of the victim's internal investigation. In *United States* v. *Hosking*, for example, the defendant "confessed" to embezzling $135,000 from her employer, but the victim's internal investigation revealed that she had actually embezzled more than $500,000, see 567 F.3d at 330-331, and the court of appeals accordingly determined that the victim's "investigation was clearly an important part of 'the investigation . . . of the offense,'" *id.* at 332 (quoting 18 U.S.C. 3663A(b)(4)). In *United States* v. *Herrera*, 606 Fed. Appx. 748 (5th Cir. 2015) (per curiam), the victim discovered the defendant's theft through an annual audit, then uncovered the full extent of her theft in an investigative audit and referred the matter to the FBI. See *id.* at 750. And in *United States* v. *Qurashi*, 634 F.3d 699 (2d Cir. 2011), the victim's internal investigation detected that the defendant's insurance claims were fraudulent. The magistrate judge found that, without the victim's investigation expenses, "the complexities of the fraud engaged in by Defendant might never have

been fully resolved, nor would Defendant's prosecution have been as effective." *United States* v. *Qurashi*, No. 05-CR-498, 2009 WL 10677000, at *19 (E.D.N.Y. Sept. 1, 2009).[4]

Congress in Section 3663A(b)(4) accordingly addressed expenses incurred in both the "prosecution of the offense," which only the government can initiate, and in "the investigation * * * of the offense," which naturally could either involve the government or not. 18 U.S.C. 3663A(b)(4). Section 3663A(b)(4) likewise authorizes restitution for other expenses that do not require government direction or mandate by allowing recovery for victims' expenses for "attendance at proceedings related to the offense." *Ibid.* After passage of the MVRA, Congress has affirmed and codified victims' rights with respect to certain criminal proceedings—for example, "to be reasonably heard" at a defendant's sentencing proceeding—and those rights do not depend on government request. 18 U.S.C. 3771(a)(3) and (4).

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[4] See also, *e.g.*, *United States* v. *Cuti*, 778 F.3d 83, 88 (2d Cir. 2015) (victim disclosed results of its internal investigation to the U.S. Attorney's Office); *United States* v. *Bahel*, 662 F.3d 610, 620 (2d Cir. 2011) (victim prepared "a report detailing" procurement fraud and "referred the report to the United States Attorney's Office"); *Amato*, 540 F.3d at 162 (law firm "assisted [the victim] in completing its internal investigation of the fraud and then reporting the fraud to the government"); *United States* v. *Adcock*, 534 F.3d 635, 643 (7th Cir. 2008) (victim's audit "uncovered [the] wrongdoing"); *United States* v. *DeRosier*, 501 F.3d 888, 895 n.11 (8th Cir. 2007) (victim "provided the results of its own internal investigation to the FBI"); *United States* v. *Dwyer*, 275 Fed. Appx. 269, 270 (5th Cir.) ("[t]he fruits of [the victim's] investigation were turned over to the F.B.I. and the U.S. Attorney's Office, enabling the government to prosecute [defendant] without conducting a significant investigation"), cert. denied, 553 U.S. 1043 (2008).

Petitioner's narrow reading of "the investigation * * * of the offense" would produce anomalous results. See *Dolan*, 560 U.S. at 620 (the MVRA should not be read to "create[ ] a serious statutory anomaly"). According to petitioner, a victim like GE Capital that is proactive in investigating fraud and then shares its investigation with the government cannot receive restitution, whereas a victim that drags its feet and must be prodded (or even compelled) to provide information would receive restitution. Petitioner's position would also appear to preclude restitution for expenses incurred by, for example, a violent-crime victim during her initial cooperation with *state* law enforcement, before the matter is referred to federal authorities.

The implications of petitioner's approach make little sense and are not consistent with the guiding principle of restitution—restoring the victim to its rightful position. From the standpoint of restitution, it makes no difference whether the victim was forced to incur additional expenses soon after the defendant's crime to prevent destruction of critical evidence and uncover the extent of the loss, or whether the victim incurred those expenses later because the government asked for its assistance. In both cases, the victim's losses were a direct and proximate result of the criminal offense, and allowing restitution for those losses is the only way to provide "full" restitution that restores the victim to its position before the offense. 18 U.S.C. 3664(f)(1)A).

c. Petitioner also contends (Br. 19) that the term "participation in," in the context of "the investigation of the offense," can refer only to "taking part in the government's work." As a threshold matter, that contention assumes petitioner's (incorrect) premise that "the

investigation" means only "the government's investigation." But even if "the investigation" did mean "the government's investigation," restitution under 18 U.S.C. 3663A(b)(4) still would not require that the victim's investigation expenses be requested or required by the government.

"Participate" is a "term[ ] and concept[ ] of breadth," *Russello* v. *United States*, 464 U.S. 16, 21-22 (1983). It commonly means "to take part in" something—not to have sole or even "primary" responsibility for it. *Reves* v. *Ernst & Young*, 507 U.S. 170, 179 (1993) (citation omitted); see *Webster's Third New International Dictionary* 1646 ("to take part in something (as an enterprise or activity) usu[ally] in common with others"). Under that standard definition, a victim can, for example, "take part in" the investigation of a criminal offense by preserving evidence and uncovering the defendant's conduct even before the victim starts actively cooperating with law enforcement.[5]

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[5] The D.C. Circuit in *Papagno* pointed out that this Court concluded in *Reves* that "participate" is not synonymous with "aid and abet." 639 F.3d at 1098 (quoting 507 U.S. at 178-179). *Reves* addressed the phrase "participate, directly or indirectly in the conduct of [an] enterprise's affairs" in 18 U.S.C. 1962(c). The Court held that "participate" had a narrower meaning than "aid and abet," which would "comprehend[ ] all assistance rendered by words, acts encouragement, support or presence." *Reves*, 507 U.S. at 178 (quoting *Black's Law Dictionary* 68 (6th ed. 1990)). But the Court recognized that "participate" is a "term of breadth" and that the statute's application was "not limited to those with primary responsibility for the enterprise's affairs." *Id.* at 178-179 (brackets, citation, and ellipsis omitted). Petitioner here does not contend that GE Capital's actions were too insubstantial to constitute "participation"; he instead argues that no actions by a victim can qualify as "participation" unless requested by the government.

The phrase "participation in the investigation or prosecution" is not without some limits, cf. Pet. Br. 20, and determining whether a victim's unprompted contribution to the investigation or prosecution was sufficient to constitute "participation" will depend on all the facts and circumstances. But petitioner offers no evidence that courts in the seven circuits that allow restitution in circumstances like those here have encountered substantial difficulty making that determination. Among other things, sentencing courts can call upon the "remarkable expertise" of the Probation Office, Hon. William H. Pryor Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, Federal Probation 15 (Sept. 2017), and refer disputed issues regarding restitution to a magistrate judge for proposed findings of fact and recommendations. 18 U.S.C. 3664(d)(6). The burden of proof is also ultimately on the government to demonstrate the amount of the victim's loss. 18 U.S.C. 3664(e). The government met that burden here by showing that GE Capital played a vital role in the investigation of petitioner's offense, which was sufficient by any measure to show GE Capital's "participation."

d. Petitioner further contends (Br. 21) that GE Capital's expenses were not incurred "during" the investigation of petitioner's offense because they were incurred before the government's own investigation began. That contention again assumes petitioner's first and erroneous premise that the "the investigation" means "the government's investigation."

In any event, petitioner's reading of "during" is unsound for other reasons. Petitioner perceives (Br. 22) a "critical" distinction between the preexisting text of the VWPA, which refers to "expenses related to participation in the investigation," 18 U.S.C. 3663(b)(4), and the

text of the MVRA, which refers to "expenses incurred during participation in the investigation," 18 U.S.C. 3663A(b)(4). But as this Court has recently recognized in rejecting a similar preposition-focused argument, even within the context of a single statute, "there is no 'canon of interpretation that forbids interpreting different words used in different [provisions] to mean roughly the same thing.'" *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 845 (2018) (rejecting suggested distinction between "for" and "pending") (quoting *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013)). Multiple courts of appeals have accordingly found no meaningful difference between Section 3663(b)(4) and Section 3663A(b)(4). See, *e.g.*, *Hosking*, 567 F.3d at 331 n.2 (the provisions are "functionally identical"); *United States* v. *Juvenile Female*, 296 Fed. Appx. 547, 549 n.1 (9th Cir. 2008) (the provisions are "substantially the same").

Moreover, petitioner's suggestion that the MVRA allows *less* restitution for victims' investigative expenses than did the VWPA is at odds with the MVRA's overarching objective "to expand, rather than limit, the restitution remedy." *United States* v. *Ekanem*, 383 F.3d 40, 44 (2d Cir. 2004). On petitioner's view, Congress identified offenses sufficiently important to warrant mandatory restitution, yet withdrew a form of restitution that courts could previously have ordered for those offenses as a matter of discretion (and can still order for offenses not covered by the MVRA). The "MVRA's clear purpose," however, "was to increase the frequency of restitution, not reduce it." *Federal Criminal Restitution* § 5:4, at 148; see *United States* v. *Martin*, 128 F.3d 1188, 1190 (7th Cir. 1997) (the criminal restitution statutes do not have "a history marked by steady congressional erosion, but rather by constant expansion").

e. Petitioner also contends (Br. 23) that a victim's expenses are not "necessary" when they are not requested or required by the government. That contention yet again assumes petitioner's initial premise that the provision is limited to government investigations. And it would be flawed even if that premise were correct. The term "necessary" applies to every expense covered by 18 U.S.C. 3663A(b)(4) except "lost income," including, for example, "transportation" or "child care" expenses incurred for "attendance at proceedings related to the offense." On petitioner's reading of "necessary," a victim who attends the defendant's criminal trial—as he or she has a right to do under 18 U.S.C. 3771(a)(3)—could not receive restitution for transportation or child-care costs unless the government specifically requested the victim to attend.

The modifier "necessary" in Section 3663A(b)(4) requires only that the victim's costs be "appropriate" under the circumstances and "reasonably useful" to the investigation or prosecution of the defendant's offense or to attendance at related proceedings. *Black's Law Dictionary* 1029; *Eyraud*, 809 F.3d at 467-468 (expenses under Section 3663A(b)(4) must be "reasonably necessary to aid in the investigation or prosecution of the defendant") (citation omitted); *United States* v. *Maynard*, 743 F.3d 374, 381 (2d Cir. 2014) ("'necessary'" expenses are those that "the victim was required to incur to advance the investigation or prosecution of the offense," even if the expenses were not "requested by the government"). This Court has explained that a "necessary" expense in federal law can mean "an expense that is merely helpful and appropriate," and the Court has accordingly interpreted a statutory reference to "reasonably necessary" services to call for "a determination by

the district court, in the exercise of its discretion," as to whether the services were "sufficiently important." *Ayestas* v. *Davis*, No. 16-6795, 2018 WL 1402425, at *10 (Mar. 21, 2018) (citing *Commissioner* v. *Tellier*, 383 U.S. 687, 689 (1966), interpreting 26 U.S.C. 162(a) (1964)). Section 3663A(b)(4) uses "necessary" in much the same way.

Section 3663A(b)(4)'s "necessary" requirement does, of course, preclude restitution for expenses that "served no investigatory purpose," even if they were caused by the defendant's offense. *Maynard*, 743 F.3d at 381 (affirming restitution for a victim's internal-investigation expenses while disallowing other expenses). The term "necessary" also excludes expenses that are "disproportionate to the task." *United States* v. *Nosal*, 844 F.3d 1024, 1047-1048 (9th Cir. 2016) (affirming restitution for a victim's "internal investigation costs to uncover the extent of the breach" while distinguishing other expenses), cert. denied, 138 S. Ct. 314 (2017). Section 3663A(b)(4) does not cover the cost for the victim to arrive at the hearing in a stretch limousine, or the cost of hundreds of law-firm billable hours to investigate $50 missing from the cash register. Courts actively enforce these limits, as in *Maynard* and *Nosal*. But both lower courts here determined that GE Capital's expenses were reasonably appropriate and helpful in light of the fact that GE Capital's investigation set out to untangle petitioner's complex scheme to fraudulently obtain more than $25 million.

f. Finally, petitioner's reliance (Br. 5, 27) on a 2008 amendment to the VWPA that allows restitution for "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense," is misplaced.

Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, § 202, 122 Stat. 3561 (18 U.S.C. 3663(b)(6)). Contrary to petitioner's suggestion (Br. 27), that amendment does not indicate that Congress had previously restricted restitution under 18 U.S.C. 3663A(b)(4) to expenses required or requested by the government. Section 3663(b)(6) does not refer to internal investigations at all, but instead to the "time value" of remediation efforts by identity-theft victims—who are nearly always "individual[s]," 18 U.S.C. 1028(d)(3), (4), and (7); see 18 U.S.C. 1028(a), 1028A(a).

Congress understood that identity-theft victims must often spend months or years rehabilitating their damaged creditworthiness or monitoring to prevent additional losses, and it sought to ensure that the time value of doing so was included as a harm for which restitution could be ordered. See *Identity Theft: Innovative Solutions for an Evolving Problem: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the Senate Comm. on the Judiciary*, 110th Cong., 1st Sess. 111 (2007) (statement of Ronald J. Tenpas) (describing proposed amendment submitted by Department of Justice). But the sentencing court here did not order restitution for the "time value" of all of GE Capital's remediation efforts; it ordered recovery only for GE Capital's actual expenses incurred when it participated in the investigation of petitioner's offense. Nothing in the 2008 statute suggests that Congress believed that victims who investigate a crime and hand over the results to federal authorities should be denied restitution for those expenses under Section 3663A(b)(4).

2. GE Capital incurred recoverable expenses when it attended Dry Van's bankruptcy proceedings

After petitioner's fraud drove Dry Van into bankruptcy, GE Capital was forced to spend millions of dollars attempting to recover as much of its loan principal as possible in the bankruptcy proceedings. Those efforts—which significantly *reduced* the amount of principal that petitioner would otherwise have owed as restitution—are recoverable in restitution as "necessary * * * expenses incurred during * * * attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). The MVRA should not be interpreted to put GE Capital in a worse position, for purposes of restitution, for having attempted to mitigate its losses in the bankruptcy proceedings.

a. As petitioner recognizes (Br. 10), "[t]he fraud * * * caused petitioner's companies to file for bankruptcy." Once that happened, GE Capital could not reasonably have avoided the bankruptcy proceedings. Among other reasons, GE Capital had no other way to meaningfully mitigate its losses. See *Czyzewski*, 137 S. Ct. at 979 (explaining that, under 11 U.S.C. 362(a), "an 'automatic stay' of all collection proceedings against the debtor takes effect" upon filing a Chapter 11 bankruptcy petition). No victim with the ability to appear—and in particular, no public-corporation victim with a duty to recover for its shareholders—would have sat out the bankruptcy proceedings.

GE Capital's expenses in the bankruptcy proceedings bore an especially close connection to petitioner's offense in the circumstances of this case. The discharge of Dry Van's debts overwhelmingly concerned money that had been obtained through petitioner's fraud. See J.A. 38 (estimating that of $37.266 million in accounts receivable claimed by Dry Van, $26.725 million was

fraudulent). As a result, the amounts paid by Dry Van to GE Capital in bankruptcy directly affected the amount of restitution that petitioner owed as part of his criminal sentence. Thus, although petitioner defrauded GE Capital of more than $26 million, see J.A. 48, by the end of the bankruptcy proceedings, GE Capital was owed $11.074 million, see J.A. 70, an amount that petitioner concedes his obligation to repay in restitution, see Br. 11 n.5. That $11.074 million figure might have been higher—potentially by millions of dollars—had it not been for GE Capital's active role in the bankruptcy proceedings with the assistance of counsel.

b. The amounts that GE Capital spent in the bankruptcy proceedings were "expenses incurred during * * * attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). A bankruptcy case, like any matter in litigation, involves "proceedings." *Black's Law Dictionary* 1204 (defining "proceeding" as "the form and manner of conducting juridical business before a court or judicial officer"). The bankruptcy proceedings here were "related to the offense" because they were intimately "connected" to the offense. *Id.* at 1288 (defining "related"). As petitioner himself recognizes (Br. 10), his fraud was the cause in fact of the bankruptcy proceedings because it triggered them; and it was also the proximate cause because the proceedings were readily foreseeable to petitioner, see pp. 19-21, *supra*. The term "attendance" naturally encompasses participatory attendance (*e.g.*, "attendance at a meeting"), and Congress plainly intended to use the term that way.

The phrase "attendance at" (used in connection with "proceedings") is broader, not narrower, than the phrase "participation in" (used in connection with the

"investigation" or "prosecution"). It would be anomalous to conclude that a crime victim is entitled to restitution if he simply shows up at a proceeding related the offense, but forfeits that right if he speaks at or otherwise contributes to that proceeding, which he has a statutory right to do. See 18 U.S.C. 3771(a)(4). Nor can "attendance" costs reasonably be limited to costs incurred at the hearing itself; "transportation," for example, is expressly covered, see 18 U.S.C. 3663A(b)(4), and reasonable preparation time would be as well. And particularly where, as here, a victim is not an individual, it can "attend" a hearing by sending an attorney acting on its behalf. Indeed, in the context of proceedings like a bankruptcy, any meaningful form of "attendance" necessarily requires an attorney.

The lower courts thus correctly determined that GE Capital's expenses for attorney representation in the bankruptcy proceedings were "necessary" expenses covered by the statute, 18 U.S.C. 3663A(b)(4). As GE Capital explained to the district court, it needed to appear in the bankruptcy proceedings "to protect its rights and preserve its collateral." J.A. 27. And GE Capital's bankruptcy expenses were additionally necessary because the bankruptcy courts ordered GE Capital to continue making advance payments to Dry Van. See J.A. 24.

c. Contrary to petitioner's contention (Br. 18), the phrase "proceedings related to the offense" in Section 3663A(b)(4) is not limited exclusively to *criminal* proceedings. Congress could have included the modifier "criminal," but did not do so. Indeed, although Section 3663A(b)(4) elsewhere refers to the "prosecution of the offense," Congress employed the broader term "proceedings related to the offense" in this clause. 18 U.S.C. 3663A(b)(4).

Petitioner argues (Br. 19) that it would not serve "Section 3663A's aims" to allow restitution for a victim's losses in non-criminal proceedings. But as this Court has explained, Section 3663A's aim is to enable victims to "receive full restitution" that restores them to their position before the offense. *Dolan*, 560 U.S. at 612. Congress evidently recognized that, among the wide variety of crimes covered by the MVRA, some crimes proximately cause victims to incur expenses in noncriminal "proceedings related to the offense." Especially where attendance at those proceedings is necessary, as it was here, to remediate the harm of the offense itself, the expenses associated with that attendance are properly understood as losses recoverable by the victim in restitution. Cf. Restatement (Second) of Torts § 919(2) (1979) ("One who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm.").

Cases in which the provision has been applied illustrate the point. In *United States* v. *Cummings*, 281 F.3d 1046 (9th Cir. 2002), for example, the defendant kidnapped the victim's children overseas in violation of the International Parental Kidnapping Crime Act of 1993, 18 U.S.C. 1204, and the court of appeals affirmed restitution for the victim's attorney's fees in two proceedings attempting to get the children back. 281 F.3d at 1048, 1052.[6] In *United States* v. *Eyraud*, the defendant embezzled funds from her employer that were for

[6] *Cummings* applied the restitution provision in 18 U.S.C. 3663(b)(4) because Section 3663A did not apply to the offense of conviction. But multiple courts have recognized that there is no meaningful difference between 18 U.S.C. 3663(b)(4) and 18 U.S.C.

the Internal Revenue Service, thereby causing the victim to incur significant tax deficiencies and penalties, and the victim received restitution for attorney's fees incurred while working with the IRS to resolve the tax problems. See 809 F.3d at 465-469; Gov't C.A. Br. at 7-8, *Eyraud*, *supra* (No. 14-50261). And in *United States* v. *Skowron*, 839 F. Supp. 2d 740 (S.D.N.Y. 2012), the district court held that the victim was entitled to restitution for its expenses incurred while participating in a Securities and Exchange Commission civil investigation that resulted from the defendant's insider-trading scheme and cover-up. See *id.* at 745, 747-749. The court also ordered restitution under Section 3663A(b)(4) for legal fees that the victim was legally and contractually obligated to advance to the defendant (its employee) while he maintained his innocence. See *id.* at 748.

3. The MVRA does not categorically deny restitution for attorney's fees and other professional fees

In addition to petitioner's efforts to engraft extratextual limitations onto terms like "investigation" and "proceedings," he also launches a broader attack (Pet. Br. 24-26) on restitution by arguing that victims can never receive restitution under Section 3663A(b)(4) for "professional fees," including fees for "attorneys, auditors, [or] forensic accountants." Petitioner's argument lacks merit.

a. Petitioner first invokes (Br. 25) the statutory canon of *ejusdem generis* and contends that professional fees are not "comparable" to the expenses that

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3663A(b)(4). See, *e.g.*, *Hosking*, 567 F.3d at 332 n.2 (the provisions are "functionally identical"); *Juvenile Female*, 296 Fed. Appx. at 549 n.1 (9th Cir.) (extending *Cummings*'s reasoning to a restitution award under Section 3663A(b)(4)).

Section 3663A(b)(4) explicitly mentions—"lost income," "child care," and "transportation" expenses—because they are not "minor" and "incidental." But the *ejusdem generis* canon does not apply where, as here, the statute's specific terms "do not fit into any kind of definable category." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 209 (2012); see *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 225 (2008) (rejecting application of *ejusdem generis* in part because "no relevant common attribute immediately appears from [the general] phrase"). In Section 3663A(b)(4), there is no "obvious and readily identifiable genus," *Reading Law* 199, linking "lost income," "child care," and "transportation" expenses, save the fact that they are all "expenses that one might conceivably incur while participating in an investigation or prosecution or attending proceedings." *United States* v. *Amato*, 540 F.3d 153, 160-161 (2d Cir. 2008), cert. denied, 556 U.S. 1138 (2009). Petitioner's attempt to group those expenses under the heading of "minor" and "incidental" (Br. 25) does not suffice because a victim's lost income, in particular, might be quite substantial depending on the magnitude of the defendant's offense and the scope of the investigation and prosecution. See, *e.g.*, *Juvenile Female*, 296 Fed. Appx. at 549 (victim's mother missed seven months of work while searching for her son before learning he had been murdered).

It would, moreover, be highly anomalous for Congress to have provided restitution for "incidental" or "minor" expenses while ignoring "direct" or "major" expenses—thereby remedying only the apparently more trivial and tangential forms of harm. Far more likely is that Congress was particularly concerned that

courts would overlook lost income, child care, or transportation expenses "unless th[o]se items were specifically named," *Amato*, 540 F.3d at 161, and enumerated them in order "to remove any doubt" about their eligibility for restitution, *Ali*, 552 U.S. at 226. Attorney's fees and accounting costs, by contrast, would not likely have been overlooked because they are so obviously associated with a victim's participation in the investigation and prosecution of an offense, especially a fraud offense like the one here. See *Amato*, 540 F.3d at 161.

Petitioner's *ejusdem generis* argument would also have the unwarranted effect of denying restitution even to victims who incur substantial costs in response to requests for assistance from the government. Although victims regularly incur expenses during the investigation of an offense before the government gets involved (as shown above), victims also cooperate with the government in the investigation and prosecution, and they will often bring lawyers with them to interact with prosecutors or government regulators. See, *e.g.*, *United States* v. *Cuti*, 778 F.3d 83, 88 (2d Cir. 2015) (affirming restitution for the victim's attorney's fees incurred "cooperat[ing] in the [government's] investigation" by "attending meetings[,] * * * participating in telephone calls, and responding to numerous requests for documents and information"). Requiring victims to bear that cost with no possibility of restitution would both be deeply inequitable and would frustrate Congress's stated objective to obtain the participation of victims in criminal prosecutions. See VWPA § 2(a)(1), 96 Stat. 1248 ("Without the cooperation of victims and witnesses, the criminal justice system would cease to function.").

b. Petitioner next attempts (Br. 27) to categorically exclude attorney's fees from Section 3663A(b)(4) on the

ground that certain offenses have their own offense-specific restitution provisions that specifically mention attorney's fees. See, *e.g.*, 18 U.S.C. 2259(b)(3) (restitution for victims of child pornography). But as this Court has recognized, Congress's offense-specific restitution statutes have a distinct structure: they require restitution for "the full amount of the victim's losses" and then define that term to "include[ ]" particular costs, including "attorney's fees, as well as other costs incurred," and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(1) and (3); see *Paroline*, 134 S. Ct. at 1718-1721; see also 18 U.S.C. 2248, 2264.

The availability of restitution for *any* attorney's fees proximately caused by a child-pornography offense and certain other offenses does not suggest that victims of most crimes can *never* receive restitution for attorney's fees, or other professional fees, as "expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" under 18 U.S.C. 3663A(b)(4). The statutes define restitution in different ways, and no reason exists to interpret the availability of restitution under one as foreclosing it under the other. The child-pornography statute also lists, for example, "temporary housing" as eligible for restitution, 18 U.S.C. 2259(b)(3)(C), but an MVRA victim's housing costs would be recoverable under the text of Section 3663A(b)(4) if she travels to another city to cooperate with law enforcement in the investigation or prosecution. Conversely, the child-pornography statute does not specifically list expenses incurred by participating in the investigation of the offense, but such expenses would nevertheless be recoverable in restitution as "other losses" proximately

caused by the offense, notwithstanding the MVRA's more specific provision.

Restitution under the MVRA is not fully coextensive with restitution under the child-pornography and other offense-specific restitution statutes because the MVRA requires the victim's losses to fall within a category in Section 3663A(b). Within those categories, however, Congress borrowed from the text of the offense-specific restitution statutes by requiring restitution for "the full amount of [the] victim's losses. 18 U.S.C. 3664(f)(1)(A).[7]

c. Petitioner's last objection (Br. 26) to restitution for victims' professional fees is that such fees can comprise "significant sums" that are difficult for defendants to repay. But the amount of GE Capital's losses here was a function of the magnitude and nature of petitioner's offense, which involved fraudulently obtaining tens of millions of dollars, disguising his conduct, and plunging Dry Van into years of bankruptcy proceedings. As explained above, GE Capital's expenses on professionals during the investigation and in those bankruptcy proceedings were necessary to unravel the crime and mitigate GE Capital's losses, and the bankruptcy attorney's fees, in particular, had the effect of

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[7] Petitioner errs in invoking (Br. 19 n.6) the principle that a deviation from the "American Rule" of attorney's fees—under which each party in a civil case bears its own fees—requires an explicit instruction from Congress. See *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015). This Court has never held that such a clear-statement rule applies to Congress's criminal restitution statutes, which "serve[ ] purposes that differ from (though they overlap with) the purposes of" civil law. *Paroline*, 134 S. Ct. at 1724; see *id.* at 1724, 1726 (noting "the manifest procedural differences between criminal sentencing and civil tort lawsuits" and that restitution "serves punitive purposes" as well as compensatory).

directly reducing the amount of petitioner's (undisputed) restitution obligation for the unpaid loans. See pp. 36-37, *supra*. Petitioner's arguments (Br. 7-9, 26) about the adverse effects on the criminal-justice system of large restitution orders simply take issue with Congress's deliberate choices in the MVRA to make restitution mandatory, 18 U.S.C. 3663A(a), and to require "full" restitution "without consideration of the economic circumstances of the defendant," 18 U.S.C. 3664(f)(1)(A).

4. The rule of lenity does not support petitioner's requested limitations on restitution

Petitioner finally contends that the rule of lenity requires interpreting the MVRA "against increased punishment." Br. 31 (citing *Hughey*, 495 U.S. at 412-413). But this Court has explained that the rule of lenity comes into play "only if, after using the usual tools of statutory construction, [the Court is] left with a 'grievous ambiguity or uncertainty in the statute.'" *Robers*, 134 S. Ct. at 1859 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998)); see *Dolan*, 560 U.S. at 621. No such circumstance exists here.

The Court has previously declined to apply the rule of lenity to multiple provisions of the MVRA. In *Dolan*, the Court found no ambiguity "sufficiently 'grievous' to warrant" application of the rule of lenity "after considering the statute's text, structure and purpose," 560 U.S. at 621, even though the text seemingly created a mandatory rule in the defendant's favor, *id.* at 607-608. In *Robers*, the Court applied traditional tools of statutory construction and interpreted the statute in favor of greater restitution, rejecting the defendant's argument based on the rule of lenity. 134 S. Ct. at 1859.

Section 3663A(b)(4) similarly does not warrant application of the rule of lenity, because it is not ambiguous,

let alone grievously so. The MVRA's text, structure, and purpose all confirm that the statute makes restitution broadly available for the victim's losses. See *Dolan*, 560 U.S. at 612. Congress mandated restitution here because GE Capital incurred necessary expenses when it participated in the investigation of petitioner's offense, and then incurred necessary losses in bankruptcy proceedings that were directly and proximately related to the offense. The lower courts' interpretation of Section 3663A(b)(4) adheres to the ordinary meaning of "restitution" by restoring the victim to the position it occupied before petitioner's offense, and it is most consistent with the statutory mandate of restitution for the "full amount of each victim's losses." *Dolan*, 560 U.S. at 612 (quoting 18 U.S.C. 3664(f)(1)(A)).

C. The District Court's Restitution Order Is Independently Supported By 18 U.S.C. 3663A(b)(1)

Although the lower courts in this case applied circuit precedent to hold that restitution for GE Capital's investigative and legal expenses was proper under 18 U.S.C. 3663A(b)(4), other courts of appeals would order restitution for GE Capital's losses by applying 18 U.S.C. 3663A(b)(1).[8] Thus, as the government observed in its opposition to the petition for a writ of certiorari, see Br. in Opp. 7, 12-13, Section 3663A(b)(1) provides an additional basis for affirming the judgment in this case. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984) ("[This Court] may affirm on any ground that the law and the

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[8] See, *e.g.*, *Hosking*, 567 F.3d at 332 (7th Cir.) (investigation costs for attorneys and accounting consultants); *United States* v. *Scott*, 405 F.3d 615, 618-620 (7th Cir. 2005) (audit fees); *United States* v. *Abdelbary*, 746 F.3d 570, 579 (4th Cir. 2014) (legal fees); *Corey*, 77 Fed. Appx. at 12 (1st Cir.) (legal fees).

record permit and that will not expand the relief granted below."); *Schweiker* v. *Hogan*, 457 U.S. 569, 584-585 & n.24 (1982) (an appellee may assert an argument "for the first time" in this Court "as a basis on which to affirm [the lower] court's judgment" and the argument "may be decided on the basis of the record developed in [the lower] court").

1. Section 3663A(b)(1) provides that "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense," the sentencing court "shall require" that the defendant "return the property to the owner of the property * * * ; or," if return of the property "is impossible, impracticable, or inadequate, pay an amount equal to" "the value of the property," less "the value * * * of any part of the property that is returned." 18 U.S.C. 3663A(b)(1).

Petitioner's fraud offense "result[ed] in damage to or loss or destruction of property" of GE Capital. 18 U.S.C. 3663A(b)(1). GE Capital's money is its "property," as petitioner necessarily recognizes in acknowledging that restitution is warranted for the $11.074 million in fraudulently obtained loans that remained unpaid at sentencing. See *Robers*, 134 S. Ct. at 1856. And the additional $4.895 million of GE Capital's property at issue here, which was spent in efforts to recover that fraudulently obtained principal, was likewise "los[t]" as a "result[ ]" of the "offense," 18 U.S.C. 3663A(b)(1). See *Robers*, 134 S. Ct. at 1857 (the words "the property" in Section 3663A(b)(1) "naturally * * * refer to the 'property' that was 'damaged,' 'lost,' or 'destroyed' as a result of the crime") (brackets and citation omitted). As discussed above, pp. 36-37, *supra*, those additional expenses were necessary to reduce the amount of unpaid principal that petitioner owed.

Section 3663A(b)(1) makes restitution available regardless of whether the property was personally taken by the defendant or "los[t]" in some other way, so long as the defendant's offense "result[ed] in" the loss of the property. 18 U.S.C. 3663A(b)(1). The Court in *Robers* accordingly recognized that concepts of proximate causation are useful in determining the appropriate amount of restitution under Section 3663A(b)(1). See 134 S. Ct. at 1859 (noting that the statute "has a proximate cause requirement"). For reasons already discussed, see pp. 19-21, *supra*, those principles are amply satisfied here.

2. Petitioner argued at the certiorari stage that Section 3663A(b)(1) does not authorize restitution here because restitution is available only for the property that is "targeted in the offense." Pet. Reply Br. 7 (emphasis omitted). But Section 3663A(b)(1) requires restitution whenever the defendant's offense "result[s] in" loss of property, not just for specific "targeted" property. Petitioner's artificially narrow construction of "the property" would abandon time-tested concepts of proximate causation and frustrate the statutory object of "full restitution." *Dolan*, 560 U.S. at 612.

Petitioner further contended (Reply Br. 8) that Section 3663A(b)(1) cannot refer to any property losses that were incurred after the offense was complete. That contention lacks merit. Again, the statute requires restitution when the offense "*result[s] in* damage to or loss or destruction of" the property. 18 U.S.C. 3663A(b)(1) (emphasis added). If a defendant steals a precious vase from the victim, then drops and breaks it months later while preparing to sell it, the offense resulted in destruction of the property and the victim is entitled to restitution —including for any increase in value since the theft—

even though the destruction occurred after the offense (the theft) was completed. See 18 U.S.C. 3663A(b)(1)(B)(i). Reinforcing that commonsense interpretation, the statute recognizes that the defendant's "return of the property" might be "impossible." 18 U.S.C. 3663A(b)(1)(B).

3. Restitution is accordingly warranted in this case not only under Section 3663A(b)(4), but also Section 3663A(b)(1). The two provisions do not always overlap. Mileage fees for transportation to a proceeding in a personal vehicle, for example, might not constitute lost property and thus might be covered only by the former, and not the latter. But both subsections reflect Congress's broad intent to ensure "full restitution" in a case like this one. *Dolan*, 560 U.S. at 612.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3663A provides:

Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) 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. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, 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.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea spe-

cifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining 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.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

2. 18 U.S.C. 3664 provides:

Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances

exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such

order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the man-

ner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(*l*) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or

indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(*o*) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a

cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

3. 18 U.S.C. 3771 (2012 & Supp. IV 2016) provides:

Crime victims' rights

(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

(b) RIGHTS AFFORDED.—

(1) IN GENERAL.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) HABEAS CORPUS PROCEEDINGS.—

(A) IN GENERAL.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) ENFORCEMENT.—

(i) IN GENERAL—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) MULTIPLE VICTIMS.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) LIMITATION.—This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) DEFINITION.—For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) BEST EFFORTS TO ACCORD RIGHTS.—

(1) GOVERNMENT.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) ADVICE OF ATTORNEY.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) ENFORCEMENT AND LIMITATIONS.—

(1) RIGHTS.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipu-

lated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) ERROR.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) LIMITATION ON RELIEF.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) NO CAUSE OF ACTION.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its

officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) DEFINITIONS.—For the purposes of this chapter:

(1) COURT OF APPEALS.—The term "court of appeals" means—

(A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or

(B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.

(2) CRIME VICTIM.—

(A) IN GENERAL.—The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.

(B) MINORS AND CERTAIN OTHER VICTIMS.—In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(3) DISTRICT COURT; COURT.—The terms "district court" and "court" include the Superior Court of the District of Columbia.

(f) PROCEDURES TO PROMOTE COMPLIANCE.—

(1) REGULATIONS.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) CONTENTS.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.