

No. 17-__

IN THE
Supreme Court of the United States

ANNE MARIE HANKINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Mandatory Victims Restitution Act of 1996, “when sentencing a defendant convicted of” any of a large number of federal crimes, “the court shall order ... that the defendant make restitution *to the victim* of the offense.” 18 U.S.C. § 3663A(a)(1) (emphasis added). The Act also provides that “[n]o victim shall be required to participate in any phase of a restitution order” and that the “*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.” *Id.* § 3664(g) (emphasis added). The Act does not, however, state that a *district court* may assign restitution payments to the Crime Victims Fund if the victim neither accepts restitution nor makes such an assignment.

The question presented, which has divided the courts of appeals, is:

Where a victim entitled to restitution under the Mandatory Victims Restitution Act of 1996 neither accepts restitution nor assigns it to the Crime Victims Fund, may the district court nonetheless order the defendant to pay restitution to the Fund, despite the absence of statutory authority for such an order?

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OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion is published at 858 F.3d 1273 and reproduced in the appendix to this petition. Pet. App. 1a-15a. The District Court's order redirecting the restitution to the Crime Victims Fund and its original judgment sentencing Hankins to pay restitution are unpublished. Pet. App. 16a-33a.

JURISDICTION

The Ninth Circuit entered judgment on June 6, 2017. Pet. App. 1a. On August 17, 2017, Justice Kennedy granted Hankins's application to extend the time to file this petition to October 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Mandatory Victims Restitution Act of 1996, 18 U.S.C. §§ 3663A-3664, is reproduced at Pet. App. 34a-45a.

STATEMENT

1. Under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. §§ 3663A-3664, "when sentencing a defendant convicted of" an enumerated federal crime, "the court shall order ... that the defendant make restitution to the victim of the offense." *Id.* § 3663A(a)(1). The MVRA applies to a wide range of federal crimes, including crimes of violence, property crimes, and offenses committed by fraud or deceit. *Id.* § 3663A(c)(1). "An order of restitution under [section 3663A] shall be issued and enforced in accordance with section 3664." *Id.* § 3663A(d).

Section 3664, in turn, provides that “[n]o victim shall be required to participate in any phase of a restitution order.” *Id.* § 3664(g)(1). And it empowers the court to order restitution to be paid to someone other than the victim in just a handful of situations, which Congress was careful to delineate clearly and explicitly.

One of these situations is principally relevant to the statutory question in this case: “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.” *Id.* § 3664(g)(2) (emphasis added). The Fund is a federal government account established to make grants to crime victim compensation programs and funded by fines imposed on persons convicted of federal crimes. 42 U.S.C. § 10601 *et seq.*; *see also United States v. Munoz-Flores*, 495 U.S. 385, 398-99 (1990).

The other situations in which the court is empowered to order restitution to be paid to someone other than the victim are as follows:

First, “if the victim is deceased,” then the court shall order restitution “to the victim’s estate.” 18 U.S.C. § 3663A(a)(1).

Second, “[i]n 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." *Id.* § 3663A(a)(2).¹

Third, "[t]he court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense." *Id.* § 3663A(a)(3).

Fourth, "in the case of an offense resulting in damage to or loss or destruction of property," "[t]he order of restitution shall require that [the] defendant ... return the property to the owner of the property or someone designated by the owner." *Id.* § 3663A(b); *see also Robers v. United States*, 134 S. Ct. 1854, 1856 (2014) ("the specific property lost ... in the case of a fraudulently obtained loan, is the money lent").

Fifth, if the court orders restitution in the form of in-kind payments pursuant to § 3664(f)(3)(A) and "if the victim agrees," restitution may be ordered in the form of "services rendered to ... a person or organization other than the victim." 18 U.S.C. § 3664(f)(4).

Sixth, "[i]f a victim has received compensation from insurance or any other source ..., the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation." *Id.* § 3664(j)(1).

In each of these situations, the court's power to order restitution to anyone other than the victim is

¹ It is not entirely clear whether "the victim's rights" that the designated person may "assume" under this provision include the right to receive restitution. Because § 3663A(a)(2) has no bearing on this case, any ambiguity is irrelevant to the resolution of the question presented.

predicated on some precondition: that the victim “assign[s] the victim’s interest in restitution payments to the Crime Victims Fund”; that the victim “is under 18 years of age, incompetent, incapacitated, or deceased”; that the parties agreed “in a plea agreement” that restitution to those other persons should be ordered; that the victim designates another person to receive property; or that the restitution order requires in-kind payments and “the victim agrees” that services be performed for other persons.

2. In 2001, Petitioner Anne Marie Hankins was charged with bank fraud in the U.S. District Court for the District of Oregon. Pet. App. 2a, 16a-17a. The government alleged that Hankins had submitted a false application for a \$350,000 loan to U.S. Bank Special Assets Group (“U.S. Bank”). Pet. App. 2a. Hankins pleaded guilty and was sentenced to 30 days in jail. *Id.*

Pursuant to the MVRA (which applies to all federal fraud crimes, *see* 18 U.S.C. § 3663A(c)(1)(A)(ii)), the District Court also sentenced Hankins to pay \$350,000 in restitution to the victim, U.S. Bank. Pet. App. 2a. The restitution was to be paid “at the maximum installment possible, and not less than \$50 per month,” and was to be deposited with the clerk of the court “for transfer to the payee.” Pet. App. 2a-3a.

U.S. Bank assigned its interest in the restitution judgment to Horton & Associates LLC. Pet. App. 3a. The District Court entered an order substituting Horton for U.S. Bank as the victim. *Id.*

From 2002 to 2013, Hankins made monthly payments ranging from \$50 to \$400. *Id.* As of 2013, she had paid a total of \$13,044.30, leaving her with a balance of \$336,955.70. *Id.* That year, Hankins and Horton settled the balance for \$5000. *Id.* Hankins stopped making payments, and Horton filed with the District Court a notice acknowledging “Full Satisfaction of Judgment.” Pet. App. 3a-4a.

In 2015, after the federal government garnished an additional \$21,765 from Hankins to apply toward the restitution judgment, Hankins moved the District Court (which had jurisdiction over this criminal case under 18 U.S.C. § 3231) for an order acknowledging that she had satisfied the restitution judgment and was not obligated to make further payments. Pet. App. 4a.

The District Court denied the motion and, at the government’s request, ordered that Hankins make future payments to the Crime Victims Fund rather than to Horton. *Id.* In support of its decision, the District Court pointed to the provision of the MVRA that provides: “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.” 18 U.S.C. § 3664(g)(2); *see* Pet. App. 21a-22a. Yet neither Horton nor the original victim, U.S. Bank, had purported to make an assignment to the Fund.

3. The Ninth Circuit affirmed. It first concluded that Hankins’ settlement with Horton could not extinguish the District Court’s original restitution order. Pet. App. 6a-7a. It then held that the District Court’s decision to redirect future

restitution payments to the Crime Victims Fund “makes practical sense within the spirit and confines of the MVRA” and that the court “had the flexibility under the MVRA to effect this solution.” Pet. App. 10a.

The Ninth Circuit reasoned that “[t]he MVRA is clear that the award of full restitution is mandatory.” *Id.* (citing 18 U.S.C. § 3664(f)(1)(A)). It allows the victim “at any time to assign the victim’s interest in restitution payments to the Crime Victims Fund.” 18 U.S.C. § 3664(g)(2). But “this provision does not extend beyond the victim’s ability to assign and cannot be read to constrain the district court’s authority to redirect payments.” Pet. App. 11a. The Ninth Circuit relied on the Second Circuit’s decision in *United States v. Johnson*, which held that “[a]lthough § 3664(g)(2) authorizes victims to make such an assignment, it does not preclude the Court from doing so” where the victim chooses not to. 378 F.3d 230, 245 (2d Cir. 2004). But while it reasoned that § 3664(g)(2) does not *prohibit* a district court from unilaterally redirecting restitution payments to the Crime Victims Fund, the Ninth Circuit did not point to any statutory provision that *authorizes* the court to enter such an order in the first place. Rather, the court thought that “[t]he statute’s silence gives us flexibility to construe the scope of the district court’s authority” Pet. App. 11a. The Ninth Circuit further reasoned that “allowing the district court to redirect restitution serves the MVRA’s compensatory and punitive purposes,” by ensuring that “the offender ... pays the debt owed to the victim *as well as to society*.” Pet. App. 12a (quoting S. Rep. No. 104-179, at 12 (1995)).

The Ninth Circuit recognized that its decision conflicted with “the two circuits that have determined that a district court cannot redirect restitution,” but it was “not persuaded” by their reasoning. Pet. App. 13a; *see* Pet. App. 13a-15a (discussing *United States v. Speakman*, 594 F.3d 1165 (10th Cir. 2010), and *United States v. Pawlinski*, 374 F.3d 536 (7th Cir. 2004)). The Court of Appeals concluded that, “[o]nce Horton disclaimed further interest in restitution, redirecting restitution to the Fund was within the district court’s power.” Pet. App. 15a.

REASONS FOR GRANTING THE WRIT

The question whether a district court may redirect restitution payments to the Crime Victims Fund where the victim neither accepts restitution nor assigns it to the Fund has divided the federal courts of appeals. The question presented is also important, both in light of the frequency and significance of criminal restitution sentences, and because it encompasses a fundamental underlying disagreement regarding the power of a federal district court to impose criminal punishment that no statute authorizes. And the decision below is wrong: It ignores both the text of the MVRA and the essential principle that a court may not impose a criminal sentence absent statutory authorization.

This Court should grant the petition for a writ of certiorari and reverse the judgment of the Ninth Circuit.

I. THE COURTS OF APPEALS ARE DIVIDED

As the Government acknowledged below, the courts of appeals are divided on the question

presented. See Answering Brief for the United States, *United States v. Hankins*, 858 F.3d 1273 (9th Cir. 2017) (No. 15-30345), 2016 WL 2772771, at *12 (describing circuit split on “[t]he question of what happens if a victim declines restitution but does not assign it to the [Crime Victims Fund]”); see also Brief for the United States in Opposition, *Wright v. United States*, 134 S. Ct. 1710 (2014) (Nos. 12-8505, 12-8561), 2013 WL 6917438, at *26 (acknowledging that the “question” of the effect of a victim’s decision to decline restitution “has divided the courts of appeals” and citing *Johnson*, *Pawlinski*, and *Speakman*).

In the Second and Ninth Circuits, district courts can order defendants to pay restitution to the Crime Victims Fund even where the victim does not assign the payments to the Fund, despite the absence of any statutory authority for such an order. In the Seventh and Tenth Circuits, district courts are prohibited from doing so. The circuits have repeatedly acknowledged the split and have adopted their conflicting positions with full awareness of its existence. And they are not coalescing around one answer. Rather, each new decision has rejected the position taken by the preceding decision. That the decisions of the lower courts have ping-ponged between the two answers to the question presented indicates that the split is deeply entrenched. This Court’s intervention is therefore necessary to secure the “uniformity and consistency of federal criminal law.” *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990).

A. The Seventh Circuit

The defendant in *Pawlinski* was a local politician who was convicted of defrauding campaign contributors. 374 F.3d at 537. The district court

sentenced him to pay restitution to the defrauded contributors under the MVRA, but only a handful of them came forward to claim it. *Id.* at 537-38. So the district court amended the order to redirect the remaining restitution to the Crime Victims Fund. *Id.* at 538.

The Seventh Circuit reversed. It began by noting that an order of restitution under the MVRA “must go to victims of the defendant’s crimes, and the Crime Victims Fund is neither a victim of Pawlinski nor a representative of his victims.” *Id.* at 539.² The court acknowledged that the MVRA permits an order directing restitution to someone else “if the order is imposed pursuant to a plea agreement which provides for restitution to nonvictims, or if the victims assign their right to restitution to the Crime Victims Fund.” *Id.* at 539-40 (citing 18 U.S.C. §§ 3663A(a)(3), 3664(g)(2)). But neither exception applied to Pawlinski’s case. *Id.* at 540.

The Government argued that the absence of statutory authorization was irrelevant, because “in the absence of a clear statutory directive, the sentencing court was free to exercise its discretion in fashioning a restitution order.” *Id.* (internal quotation marks omitted). But the Seventh Circuit rejected the notion that “the district court has discretion to order restitution to nonvictims other than as authorized by the statute.” *Id.* “Federal

² The MVRA defines the term “victim” to mean “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.” 18 U.S.C. § 3663A(a)(2).

courts cannot order restitution in a criminal case without a statutory basis,” and so “[t]he sentence was illegal.” *Id.* Indeed, the Seventh Circuit said that the district judge’s decision was “plain error, because there was not even an arguable basis for what he did.” *Id.*

B. The Second Circuit

In *Johnson*, the Second Circuit reached the opposite conclusion. It was reviewing a sentence that ordered restitution under the MVRA and provided that if the victim declined the restitution payments, then they would be redirected to the Crime Victims Fund. 378 F.3d at 245-46. The defendant argued that a district court has no authority to order payments to the Fund unless the “victim ... assign[s] the victim’s interest in restitution payments to the” Fund, as authorized by 18 U.S.C. § 3664(g)(2). 378 F.3d at 245. But the Second Circuit affirmed the sentence.

The Second Circuit reasoned that “a district court may—indeed, must—impose orders of restitution [under the MVRA] even if their victims decline restitution. To hold otherwise would be inconsistent with the MVRA’s statutory scheme of mandatory restitution.” *Id.* at 244. As for assigning the restitution payments to the Fund, the Second Circuit thought that “[a]lthough § 3664(g)(2) authorizes victims to make such an assignment, it does not preclude the Court from doing so.” *Id.* at 245. Indeed, the Second Circuit viewed § 3664(g) as irrelevant because § 3663A(a)(1), which provides that the court “shall order ... that the defendant make restitution to the victim,” indicates that it applies “notwithstanding any other provision of law.” 378

F.3d at 244-45. That phrase, the Second Circuit thought, made clear that “defendants’ victims may not veto the obligation of the District Court to impose orders of restitution” by declining to accept restitution themselves. *Id.* at 245. The Second Circuit did not point to any statutory provision authorizing the district court to redirect payments to the Fund in the absence of an assignment by the victim; in the Second Circuit’s view, it was enough that the MVRA does not expressly prohibit district courts from doing so.

The Second Circuit also rejected the defendant’s argument based on the legislative history of the MVRA. *Id.* at 245 n.21. According to the Senate Report, the Senate considered a version of § 3664(g)(1) that would have empowered district courts to redirect restitution to the Fund in the absence of an assignment by the victim: “No victim shall be required to participate in any phase of a restitution order. *If a victim declines to receive restitution made mandatory by this title, the court shall order that the victim’s share of any restitution owed be deposited in the Crime Victims Fund*” 378 F.3d at 245 n.21 (quoting S. Rep. No. 104-179, at 6 (Dec. 6 1995)). The Second Circuit rejected the inference that, in choosing not to enact the italicized language, Congress had chosen not to give district courts the power that the language would have conferred. “By removing this text before enacting § 3664(g)(1), Congress may have suggested that assignment to the Crime Victims Fund is not *mandatory*. It certainly did not suggest that assignment to that fund is *prohibited*.” *Id.*

C. The Tenth Circuit

In *Speakman*, the Tenth Circuit agreed with the Seventh Circuit and rejected the Second Circuit's view. *Speakman* was convicted of defrauding his wife. 594 F.3d at 1166-67. She declined restitution because she wanted to cut all ties with him. *Id.* at 1169. The district court believed that the MVRA required that *Speakman* pay restitution to someone, so it ordered him to pay the restitution that would have gone to his wife to the Crime Victims Fund. *Id.* *Speakman's* wife had not assigned her interest in the restitution payments to the Fund (as she could have done under § 3664(g)(2)), and *Speakman* argued that the district court lacked authority to do so unilaterally. *Id.* The Tenth Circuit agreed.

1. The “starting point of [the Tenth Circuit’s] analysis” was that “federal courts possess no inherent authority to order restitution, and may only do so as explicitly empowered by statute.” 594 F.3d at 1175 (internal quotation marks omitted). The court “agree[d]” that the MVRA requires courts “to order restitution in certain cases,” but it also recognized that the MVRA’s mandate refers only to restitution that is “ordered either to ‘the victim of the offense or, if the victim is deceased, to the victim’s estate.” *Id.* (quoting 18 U.S.C. § 3663A(a)(1)). “[R]ead in isolation,” § 3663A(a)(1) mandated that the court order restitution to *Speakman's* wife, since she was alive. 594 F.3d at 1175. But as § 3663A(d) requires, the Tenth Circuit read § 3663A(a)(1) in light of § 3664(g)(1), “which permits a victim to decline restitution.” 594 F.3d at 1175. “Because restitution is only mandatory when ordered to the victim or the victim’s estate, *see ...* § 3663A(a)(1), and

because victims are not ‘required to participate in any phase of a restitution order,’ *see* ... § 3664(g)(1), courts are not required to order restitution if the victim declines the restitution without assigning her interest to the Fund.” *Id.*

2. Nor, in the Tenth Circuit’s view, did § 3664(g)(2) empower the district court to order restitution to the Fund. “By its own terms, that provision only permits restitution to be made to the Fund if the *victim* ‘assign[s] the victim’s interest in restitution payments to the Crime Victims Fund.” 594 F.3d at 1175 (quoting § 3664(g)(2)).

“The statute could have been written so as to authorize the court to order restitution payments to the Fund even when the victim failed to assign her interest, or to require the victim to either accept restitution or assign her interest to the fund.” *Id.* But the statute that Congress actually wrote does neither: “[A]s written, the statute only authorizes restitution to (1) the victim (§ 3663A(a)(1)), (2) the victim’s estate, if the victim is deceased (§ 3663A(a)(1)), (3) ‘persons other than the victim’ if ‘agreed to by the parties in a plea agreement (§ 3663A(a)(3)), or (4) the Crime Victims Fund, *if the victim* assigns her interest to the Fund (§ 3664(g)(2)).” *Id.* Because “the predicates for (2), (3), and (4)” were not met and the victim had “renounced her interest in restitution,” there was “no statutory basis to support the district court’s award of restitution to the Fund.” *Id.* at 1176.

3. The Tenth Circuit next discussed how the legislative history of the MVRA “reinforce[d]” its conclusion. *Id.* First, the relevant provisions—§§ 3663A(a)(1), 3664(g)(1), and 3664(g)(2)—were

enacted together, which “underscores the importance of reading” them in conjunction with one another to conclude that “while Congress intended to order mandatory restitution *to victims*, ... it also expressly gave victims the right to decline that restitution.” *Id.* (emphasis added).

Moreover (as the Second Circuit also discussed), “the Senate considered and rejected a broader version of § 3664(g)(1): ‘(g)(1) No victim shall be required to participate in any phase of a restitution order. If a victim declines to receive restitution made mandatory by this title, *the court shall order that the victim’s share of any restitution owed be deposited in the Crime Victims Fund in the Treasury.*’” *Id.* (quoting S. Rep. No. 104-179). “[T]he proposed legislation would have explicitly authorized the restitution order entered by the district court here,” but the version that Congress actually enacted did not. *Id.* “While evidence of what Congress considered but did not enact may not be conclusive proof of the proper construction of the statute, this legislative history further underscores what we believe is the proper reading: that Congress only authorized courts to order a restitution payment to the Fund when the victim herself assigns her interest to the Fund.” *Id.*

4. Finally, the Tenth Circuit discussed the conflicting positions staked out by its sister circuits. *Id.* at 1176-77. It drew support from the Seventh Circuit’s decision in *Pawlinski*. Just as the Seventh Circuit had reasoned that “[f]ederal courts cannot order restitution in a criminal case without a statutory basis,” the Tenth Circuit held that the district court’s order “lack[ed] a statutory basis ...

and so the district court could not order Mr. Speakman to pay restitution to the Fund.” *Speakman*, 594 F.3d at 1176-77 (quoting *Pawlinski*, 374 F.3d at 540).

The Tenth Circuit “respectfully disagree[d]” with the Second Circuit’s decision in *Johnson*. *Id.* at 1177. “Because the MVRA only authorizes restitution payments to victims (except in certain specifically delineated circumstances), and because § 3664(g)(1) allows victims to decline restitution, the MVRA is expressly made subject to the victim accepting restitution. In other words, ... restitution payments under the MVRA are mandated only when the victim accepts them.” *Id.* The Second Circuit had “disregard[ed] the principle that ‘[f]ederal courts cannot order restitution in a criminal case without a statutory basis.’” *Id.* (quoting *Pawlinski*, 374 F.3d at 540).

D. The Ninth Circuit

In the decision below, the Ninth Circuit expressly rejected the decisions of the Seventh and Tenth Circuits and adopted the reasoning and conclusion of the Second Circuit, resulting in a 2-to-2 split.

1. The Ninth Circuit reasoned as follows: First, situations in which the victim declines restitution without assigning it to the Crime Victims Fund fall into a “gap” in the MVRA. Pet. App. 12a; *see also* Pet. App. 9a (“faced with a situation in which payment of mandatory restitution is continuing and the victim has declared its debt satisfied, the district court dealt with a dilemma—where does the money go?”). Second, “[t]he MVRA is clear that the award of

full restitution is mandatory,” which the Ninth Circuit took to mean that the victim could not relieve the defendant of her obligation to pay restitution (or the district court of its obligation to order restitution). Pet. App. 10a (citing 18 U.S.C. § 3664(f)(1)(A)). Third, while the MVRA expressly allows the victim to assign the restitution payments to the Fund, 18 U.S.C. § 3664(g)(1), it does not expressly *prohibit* the court from doing so unilaterally; the MVRA is simply silent on what the court may or should do in that situation. Pet. App. 11a (quoting *Johnson*, 378 F.3d at 245). Fourth, “allowing the district court to redirect restitution serves the MVRA’s compensatory and punitive purposes,” which it inferred from a statement in the legislative history that the MVRA is intended to ensure that “the offender ... pays the debt owed to the victim *as well as to society*.” Pet. App. 12a.

For these reasons, the Ninth Circuit concluded that allowing a district court to redirect payments to the Fund “makes practical sense within the spirit and confines of the MVRA,” Pet. App. 10a, and that “[t]he statute’s silence gives us flexibility to construe the scope of the district court’s authority” in order to “fill[] a gap in the MVRA,” Pet. App. 11a-12a.

2. The Ninth Circuit was “not persuaded by the two circuits that have determined that a district court cannot redirect restitution.” Pet. App. 13a. It acknowledged the Tenth Circuit’s reasoning in *Speakman*: Because the MVRA permits a victim to decline restitution, “restitution payments under the MVRA are mandated only when the victim accepts them.” Pet. App. 14a (quoting 594 F.3d at 1177). But the Ninth Circuit thought that the Tenth Circuit

had wrongly disregarded the “mandatory nature of restitution” and the principle that “[v]ictims cannot control the applicability of a penal statute.” *Id.*

The Ninth Circuit also recognized that, in *Pawlinski*, the Seventh Circuit reasoned that “[f]ederal courts cannot order restitution in a criminal case without a statutory basis,” 374 F.3d at 540, and concluded that a district court may not redirect restitution payments to the Crime Victims Fund except pursuant to a plea agreement or at the victim’s direction, since the MVRA provides no authority for such an order. The Ninth Circuit thought that the rule was irrelevant to this case because “[n]o one disputes that the district court entered a valid restitution order at the outset” when it ordered Hankins to pay restitution to U.S. Bank. Pet. App. 15a. In the Ninth Circuit’s view, “[t]he process of deciding where to send restitution payments already ordered is distinct from the authority to order restitution in the first instance.” *Id.* But *Pawlinski* too dealt with an initial sentence ordering restitution to the victims that the district court then amended to send the restitution payments to the Fund. 374 F.3d at 537-38. The Seventh Circuit did not treat the distinction between an initial sentence and a later order amending it as relevant to the district court’s power to send restitution to the Fund, and the Ninth Circuit did not explain why that distinction would make a difference.

II. THIS CASE MERITS THE COURT’S ATTENTION

1. Federal district courts enter thousands of restitution orders every year. For example, in fiscal

year 2015, district courts ordered restitution in more than 11,000 criminal cases. U.S. Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, tbl. 15 (20th ed.). The total value of fines and restitution ordered that year was close to \$11 billion. *Id.* Given the frequency and significance of these restitution orders, the proper and consistent interpretation of the laws governing criminal restitution is of substantial importance.

2. This Court has frequently granted certiorari to resolve conflicts among the courts of appeals on questions arising under the MVRA. *See Manrique v. United States*, 137 S. Ct. 1266 (2017); *Roberts*, 134 S. Ct. 1854; *Dolan v. United States*, 560 U.S. 605 (2010). This case presents another such conflict. In little more than a decade, four federal courts of appeals have taken conflicting positions on the question presented. The split is well-entrenched; it can be resolved only through this Court's intervention.

3. Finally, the conflicting decisions of the courts of appeals on the question presented reflect an even deeper disagreement about a basic issue of federal law: When it comes to criminal sentencing, is everything permitted unless expressly prohibited by law, or is everything prohibited unless expressly permitted? As discussed above, the Second and Ninth Circuits conclude that a district court can order restitution payments to the Crime Victims Fund because they believe that such an order is within the court's power unless expressly prohibited. The Seventh and Tenth Circuits, by contrast, start from the premise that a district court has no power to order criminal restitution unless authorized by

statute. The lower courts' disagreement on this fundamental issue should be resolved by this Court.

III. THE DECISION BELOW IS WRONG

A. A federal court cannot order criminal restitution except as authorized by statute, and no statutory authority supports the District Court's restitution order

A federal court has no authority to impose a criminal sentence, including a sentence of restitution, except as authorized by statute. *See, e.g., Paroline v. United States*, 134 S. Ct. 1710 (2014) (vacating restitution sentence imposed in excess of statutory authority); *Hughey v. United States*, 495 U.S. 411 (1990) (same); *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (“Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.”); *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980) (“a defendant may not receive a greater sentence than the legislature has authorized”); *see also Dolan*, 560 U.S. at 626 (Roberts, C.J., dissenting) (“a court lacks ‘authority’ to impose a sentence above the statutory maximum”).

As discussed above, the MVRA authorizes a court to order restitution to persons other than the victim in only a handful of discrete scenarios, none of which is even arguably applicable here. In particular, the MVRA authorizes the court to order restitution to: (1) the victim's estate, if the victim is deceased, 18 U.S.C. § 3663A(a)(1); (2) a suitable representative of the victim, if the victim is under 18, incompetent,

incapacitated, or deceased, *id.* § 3663A(a)(2); (3) persons other than the victim, if the parties so agree in a plea agreement, *id.* § 3663A(a)(3); (4) a person designated by the victim, if the restitution consists of the return of property damaged by the offense, *id.* § 3663A(b); (5) a person or organization other than the victim, if the restitution takes the form of in-kind payments and the victim so agrees, *id.* § 3664(f)(4); (6) a third party (such as an insurer) who has compensated the victim or is obligated to do so, *id.* § 3664(j)(1); or (7) the Crime Victims Fund, if the victim “assign[s] the victim’s interest in restitution payments to the” Fund, *id.* § 3664(g)(2).

None of these narrow provisions could justify the order at issue here. Neither the victim (U.S. Bank) nor its assignee (Horton) is under 18, incompetent, incapacitated, or deceased, and in any event the Fund is not the estate or a representative of either entity. Hankins did not agree in her plea agreement that the Fund would receive restitution payments. The Fund has not compensated U.S. Bank or Horton for the \$350,000 loss and is not obligated to do so. And neither U.S. Bank nor Horton has designated the Fund to receive restitution or assigned its interest in restitution payments to the Fund. Indeed, U.S. Bank assigned its interest to Horton (as the District Court recognized), and Horton accepted a settlement to extinguish Hankins’s obligation to pay restitution.

In short, no provision of the MVRA authorized the District Court to enter the order at issue here. And neither the Government nor the courts below suggested that any other provision of federal law empowered the District Court to enter that order.

The order was not authorized by statute and was therefore unlawful.

B. The MVRA does not require a district court to unilaterally order restitution to the Fund

In reaching a contrary conclusion, the Ninth Circuit pointed out that, while § 3664(g)(2) permits the victim to assign restitution to the Fund, it does not prohibit the court from doing so unilaterally. Pet. App. 11a. That is true but irrelevant. As discussed above, the question is not whether the restitution order was *prohibited* by statute, but whether it was *authorized*.

The Ninth Circuit (and the Second Circuit in *Johnson*) further reasoned that the MVRA *requires* the court to order restitution in cases to which it applies, and that directing restitution to the Fund is a reasonable alternative means of complying with that requirement if the victim does not accept restitution. Pet. App. 10a.

This reasoning fails at the threshold because its premise—that the MVRA imposes a mandate that can be satisfied by ordering restitution *to the Fund*—is incorrect. The MVRA does not require the court to “order restitution” in the abstract (much less to “order restitution to the Crime Victims Fund”). Rather, it says that “the court shall order ... that the defendant make restitution *to the victim*.” 18 U.S.C. § 3663A(a)(1) (emphasis added). Even if, as the Second and Ninth Circuits believe, this provision creates an ironclad mandate, it simply cannot be satisfied by an order that the defendant pay restitution to someone other than the victim—be it

the Crime Victims Fund, the federal judiciary, or a charity of the judge's choice (as in *United States v. Wolf*, 90 F.3d 191 (7th Cir. 1996)).³

The Ninth Circuit's assertion that redirecting restitution to the Fund "reconcile[s] the mandatory nature of restitution with" the victim's right to decline it, Pet. App. 11a, is therefore a non sequitur: The "mandatory" nature of the MVRA cannot justify an order that the MVRA clearly does not mandate.

³ As discussed above, it is true that the MVRA allows the court to order restitution to persons other than the victim when certain specified preconditions are met. But none of the statutory preconditions is met in this case, and the Second and Ninth Circuits did not purport to rely on any of them. Rather, they grafted a new judge-made exception onto the statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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