

No.

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In the Supreme Court of the United States

—————  
JACKSON JACOB,  
*Petitioner-Appellant*

v.

UNITED STATES OF AMERICA,  
*Respondent-Appellee*

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

—————  
PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Does the Anti-Kickback Statute, 42 U.S.C. § 1320a-7(b), extend to services paid for by private health insurers?

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Does the Sixth Amendment reserve to juries the determination of any fact underlying a criminal restitution order?

## PARTIES TO THE PROCEEDINGS

Petitioner, Jackson Jacob, was a Defendant-Appellant in the Fifth Circuit.

Respondent, the United States, was the Appellee in the Fifth Circuit.

Defendants-Appellants in the Fifth Circuit also include Mrugeshkumar Kumar Shah, Iris Kathleen Forrest, Douglas Sung Won, Michael Bassem Rimlawi, Wilton McPherson Burt, and Shawn Mark Henry.

## RELATED PROCEEDINGS

United States District Court (N.D. Tx.):

*United States v. Beauchamp, et al.*, No. 3:16-CR-516

United States Court of Appeals (5th Cir.):

*United States v. Shah, et al.*, No. 21-10292

Supreme Court of the United States:

*Shawn Mark Henry v. United States*, No. 23-716

*Mrugeshkumar Kumar Shah v. United States*, No. 23A1057<sup>1</sup>

*Michael Bassem Rimlawi v. United States*, No. 23A1069

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<sup>1</sup> Petitioner's second question presented is set forth fully in Shah's Petition for a Writ of Certiorari.

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## PETITION FOR A WRIT OF CERTIORARI

Jackson Jacob respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### OPINIONS BELOW

The March 8, 2024, Order of the Court of Appeals is reported at 95 F.4th 328 (5th Cir. 2024) and is attached as an Appendix.

### JURISDICTION

The Court of Appeals entered its judgment October 2, 2023. The Court of Appeals issued a superseding opinion and denied timely petitions for rehearing en banc March 8, 2024. On May 29, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 8, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, which states:

(b) Illegal remunerations

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

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(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person--

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

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shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$100,000 or imprisoned for not more than 10 years, or both.

\*\*\*

(f) “Federal health care program” defined

For purposes of this section, the term “Federal health care program” means—

(1) any plan or program that provides health benefits, whether di-rectly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5); or

(2) any State health care program, as defined in section 1320a–7(h) of this title.



The Sixth Amendment provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

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The Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(c)(1)(B), provides in relevant part that criminal restitution “shall” be imposed in the full amount of the victim’s loss when “an identifiable victim or victims has suffered a physical injury or pecuniary loss.”

### STATEMENT OF THE CASE

A grand jury charged Jackson Jacob, surgeons, marketers, and hospital administrators with 1) a conspiracy to violate the Anti-Kickback Statute and the Travel Act; 2) substantive violations of the Anti-Kickback Statute; 3) substantive violations of the Travel Act; and 4) money laundering. The government claimed that the administrators of Forest Park Medical Center, a brand-new, state-of-the-art surgical center in Dallas, Texas, courted surgeons to perform out-of-network surgeries there, which were reimbursed by private insurers at higher rates than in-network surgeries. In exchange, the facility waived patient copays and paid the surgeons. The government also claimed that administrators paid kickbacks to doctors for bringing their Department of Labor – Office of Workers' Compensation Program patients to the facility, even though

DOL paid the same reimbursement rate to any facility. The indictment charged the payment or receipt of kickbacks related to federal healthcare under the AKS and those related to private insurance under the Travel Act.

There was no dispute that all medical services were performed by competent service providers to patients under their care, and that the services were medically necessary. There was no allegation of upcoding or improper billing, either.

A jury acquitted Jackson Jacob of all Travel Act and money laundering charges. It convicted him of three substantive AKS counts, amounting to \$5,000 in kickbacks paid. For all defendants, the jury's verdict on the multi-object conspiracy expressly rejected a conspiracy to violate the Travel Act, and a conspiracy to violate the AKS *and* the Travel Act, in favor a guilty verdict on a conspiracy to violate the AKS, *only*:

If you find all Defendants not guilty of Count 1 (Conspiracy), proceed to the next Count. If you find one or more Defendants guilty of Count 1, you must unanimously answer the following:

The object of the conspiracy charged in Count 1 was to commit (check one):

- Illegal Remuneration (Anti-Kickback Statute Violation)
- Travel Act Violation by way of Commercial Bribery
- Both Illegal Remuneration and Travel Act Violation

At sentencing, the district court adopted the government’s explanation that the defendants were convicted of conspiracy under Count One, and that conspiracy included payments from federal programs *and* private insurers. It explained that “partial reimbursement by a federal healthcare program was a jurisdictional hook: the conspiracy included both federal and private patients” and in this case, the “violation of the Anti-Kickback Statute also induced fraudulent payments from private insurers[.]”

The district court used this analysis to apply sums associated with privately paid claims to drastically increase Mr. Jacob’s sentence and restitution. The district court ordered Mr. Jacob to pay restitution under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A as follows:

Blue Cross Blue Shield	\$5,372,823.15
AETNA	\$27,112,942.50
CIGNA	\$2,461,892.67
United Healthcare	\$41,119,951.35
FEHBP	\$769,007.33
Total:	\$76,836,617.00

The loss incurred by the federal healthcare program was \$769,007.33. The remainder of more than \$76 million all came from private insurance. The district court held Mr. Jacob responsible for more

than \$142 million in intended loss, adding 24 points to his guidelines' offense level. This number represented the total amount Forest Park Medical Center received from the private insurers, minus a direct cost calculation.

The Fifth Circuit's statutory analysis focused on the language of the AKS that requires only that payment "may" be made by a federal healthcare program. App. 10. This analysis concerned a co-defendant, Dr. Won's sufficiency claim. While his patients were covered by private insurance, one of them had secondary coverage by a federal healthcare program (that was never charged). App. 8. This claim was different from Mr. Jacob's. Jacob argued that he should be held accountable only for claims paid by a federal healthcare program, and not claims paid by private insurance. The Fifth Circuit applied the same analysis to all of the AKS claims raised on appeal:

So, contrary to Won's argument, the Government did not have to show he knowingly referred federally insured patients for remuneration. All it had to show was that he knowingly agreed to accept remuneration for referring patients that could be federally insured. The Government met that burden. To the extent defendants argue they cannot be guilty because they intentionally avoided federally insured patients, they admit that they had agreed to accept remuneration for

referring patients for services that could be paid for through a federal healthcare program. The Government did not need to prove Won knew he was referring federally insured patients.

App. 11.

While the Fifth Circuit disagreed that the federal payor requirement of the AKS was merely a jurisdictional hook, it affirmed the convictions and sentences on the basis that private-pay surgeries were part of the offense. App. 69-70 (recognizing that it was a close call, though). Finding that private insurers were restitution victims under the AKS, too, the Fifth Circuit explained:

[T]he private insurers were within the scope of the conspiracy. While true that it was the presence of federal insureds that granted federal jurisdiction in this case and was necessary for conviction, the conspiracy was one to steer patients to Forest Park by way of buying surgeries. It covered both private and federal patients.

App. 78. Despite the AKS's textual limit to "Federal health care programs," the Fifth Circuit declared "private insurers were part of the count-one AKS conspiracy conviction." App. 82.

Each of these applications relied on a fundamentally incorrect interpretation of the AKS—that it reaches services paid for by private insurers. As explained below, Congress never intended this result.

## REASONS FOR GRANTING THE PETITION

### **I. The Court should grant Certiorari because the Court of Appeals’ application of the AKS exceeded the statute’s scope.**

Congress enacted the AKS in 1972 with the goal of protecting Medicare from waste, fraud, and abuse. *See* Pub. L. No. 92-603, § 242(b), 86 Stat. 1329, 1419 (1972). The legislators specifically sought to protect *federal* programs:

Your committee believes that a specific provision defining acts subject to penalty under the medicare and medicaid programs should be included to provide penalties for certain practices which have long been regarded by professional organizations as unethical, as well as unlawful in some jurisdictions, and which contribute appreciably to the cost of the medicare and medicaid programs.

H.R. Rep. No. 231, 92d Cong., 1st Sess. 107 (1971). Congress expressed no concern about protecting private insurers or preventing kickbacks generally. It created misdemeanor penalties for the offer or solicitation of any “kickback or bribe” in connection with Medicare or Medicaid

services as well as any “rebate of any charge or fee for referring” a patient for such service. 86 Stat. at 1419; 42 U.S.C. § 1395nn(b), 1396h(b) (1976).

In 1977, Congress amended the AKS to provide felony penalties and substantial monetary fines. Pub. L. No. 95-142, § 4(a), 91 Stat. 1175, 1179-1183 (1977); *see also* 123 Cong. Rec. H45-46 (daily ed. Jan. 4, 1977) (remarks of Sen. Rostenkowski) (“I renew our commitment to seek prompt congressional action on legislation designed to help curb the growing number of fraudulent practices in the Federal health programs—medicare and medicaid.”).

Today (and at the time of the conduct alleged), the AKS prohibits the payment or receipt of “any remuneration (including any kickback, bribe, or rebate)” for referring an individual for any service paid “in whole or in part under a Federal health care program.” 42 U.S.C. § 1320a-7b(b). Because the AKS is textually restricted to kickbacks involving a “Federal health care program” the statute necessarily excludes kickbacks involving private insurers.

Recognizing that the AKS only applies to medical services paid for by a federal healthcare program, and not to privately insured patients, in October 2018, Congress passed the Substance Use-Disorder

Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act. Sections 8121 and 8122 of the SUPPORT Act contain the Eliminating Kickbacks in Recovery Act of 2018 to cover illegal remunerations when a private insurance company pays for medical services. SUPPORT for Patients and Communities Act of 2018, Pub. L. No. 115-271, 132 Stat. 3894, 4108-4110 (codified as amended at 18 U.S.C. § 220 (2018)).

One of the bill's sponsors addressed the kickback provision's reach directly, noting that there was not then a Federal law that prohibited kickbacks in private health insurance:

Our bill [the Eliminating Kickbacks in Recovery Act] targets unscrupulous actors who prey on patients seeking treatment to exploit their health insurance by making it illegal to provide or receive kickbacks for referring patients to recovery homes and treatment facilities. **These kickbacks are already illegal under Federal healthcare plans like Medicare, but there is no Federal law to prohibit them in private health insurance plans.**

164 Cong. Rec. S6467-02, 164 Cong. Rec. S6467-02, S6473 (remarks of Sen. Klobuchar) (emphasis added).

No other circuit court of appeal has followed the Fifth Circuit's strained interpretation. The Eleventh Circuit explained,



Because the 42 U.S.C. § 1320a-7b(b) offense was alleged as an 18 U.S.C. § 371 conspiracy, federal jurisdiction was premised on the existence of a “Federal health care program,” in addition to that also being an element of the substantive crime.

*United States v. Ruan*, 966 F.3d 1101, 1144–45 (11th Cir. 2020), *vacated on other grounds and remanded*, 597 U.S. 450, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022), *and cert. granted, judgment vacated sub nom. Couch v. United States*, 142 S. Ct. 2895, 213 L. Ed. 2d 1109 (2022), *and adhered to in part*, 56 F.4th 1291 (11th Cir. 2023); *see also United States v. Patel*, 778 F.3d 607, 612 (7th Cir. 2015) (“The Anti-Kickback Statute is designed to prevent Medicare and Medicaid fraud.”).

AKS transgressions require and are limited to claims for services paid by a federal health care program. The Fifth Circuit’s extension of the AKS to claims for services paid by private insurers expanded the statute beyond Congress’s express limitation.

**II. The Court should grant Certiorari because the Court of Appeals’ decision affirmed a restitution order in violation of the Sixth Amendment.**

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>2</sup>

Since then, the Court has applied this “bright-line rule” to a “variety of sentencing schemes that allowed judges to find facts that increased a defendant’s maximum authorized sentence.” *Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012). The Court has held that a jury must find any fact necessary to increase the sentencing range under mandatory sentencing guidelines, *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); that a jury must find any fact necessary to establish a statutory minimum, *Alleyne v. United States*, 570 U.S. 99, 116 (2013); that a jury must find any fact necessary to impose a death sentence, *Ring v. Arizona*, 536 U.S. 584, 609 (2002); and, most recently, that a jury must find any fact necessary to increase the statutory maximum and minimum sentences. *Erlinger v. United States*, No. 23-370 (U.S. June 21, 2024), slip op. at 11. And, the Court has held that a jury must find any fact necessary to determine the allowable amount of a criminal fine. *Southern Union*, 567 U.S. at 348.

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<sup>2</sup> Petitioner Shah has fully briefed this argument in his Petition for a Writ of Certiorari, No. 23A1057, and Jacob adopts those arguments.

*Southern Union* controls the question here. In holding that the *Apprendi* rule “applies to sentences of criminal fines,” the Court clarified that the Sixth Amendment governs both custodial and monetary punishments. *Id.* It explained that it has “never distinguished one form of punishment from another.” *Id.* at 350. Instead, *Apprendi* and subsequent cases “broadly prohibit judicial factfinding that increases maximum criminal sentences, penalties, or punishments—terms that each undeniably embrace fines.” *Id.* at 350 (cleaned up). The Court thus held that facts that increase the allowable amount of monetary penalties must be found by the jury, because “the amount of a fine, like the maximum term of imprisonment \*\*\* is often calculated by reference to particular facts.” *Id.*

A criminal restitution order is no different. Like a criminal fine, “[t]he purpose of awarding restitution \*\*\* is to mete out appropriate criminal punishment.” *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). And restitution, like a fine, is “calculated by reference to particular facts,” such as “the amount of the defendant’s gain or the victim’s loss.” *Southern Union*, 567 U.S. at 349-50. Under the Mandatory Victims Restitution Act, a sentencing court must impose criminal

restitution in the full amount of losses by each victim who was “directly and proximately” harmed by the offense. *See* 18 U.S.C. § 3663A(a)(2), (c)(1)(B), 3664(f)(1)(A).

Relying on *Apprendi*'s statement that judicial factfinding is prohibited when it increases a penalty beyond a “statutory maximum,” the Fifth Circuit and other courts have concluded that the MVRA does not set a “statutory maximum” because it requires restitution only for a specific sum—the amount of the victim’s loss. *See United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (restitution falls outside *Apprendi* “because no statutory maximum applies to restitution.”); App. 80. Members of this Court have observed that this rationale is “doubtful” under this Court’s decisions and “difficult to reconcile with the Constitution’s original meaning.” *Hester v. United States*, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

The Fifth Circuit and other lower courts holding that criminal restitution is exempt from *Apprendi* because the MVRA prescribes no statutory maximum are incorrect, as a matter of both precedent and first principles. By its terms, the statute requires restitution only in the

amount of the victim’s loss. 18 U.S.C. § 3663A(b). The amount of the victim’s loss is thus the statutory maximum; that is, “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Southern Union*, 567 U.S. at 348 (quoting *Blakely*, 542 U.S. at 303). A restitution order that exceeds the victim’s loss imposes a penalty beyond what the statute permits. *See Lagos v. United States*, 584 U.S. 577, 585 (2018) (holding that a defendant was “not obliged to pay” any amount of restitution exceeding the properly computed loss). Absent further factfinding, therefore, “the statutory maximum for restitution is usually zero, because a court can’t award any restitution without finding additional facts about the victim’s loss.” *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). And because the penalty authorized by statute depends on determination of a fact (the amount of loss), “[t]he Sixth Amendment reserves to juries [that] determination.” *Southern Union*, 567 U.S. at 346.

Nor is criminal restitution exempt from *Apprendi* because it is civil in nature rather than criminal. For one, the Sixth Amendment right to a jury applies “[i]n all criminal prosecutions.” U.S. Const. Amend. VI.

Restitution indisputably is imposed as part of a criminal prosecution; it is “imposed by the Government ‘at the culmination of a criminal proceeding and requires conviction of an underlying’ crime.” *Paroline v. United States*, 572 U.S. 434, 456 (2014) (quoting *United States v. Bajakajian*, 524 U.S. 321, 328 (1998)).

Beyond that, this Court has repeatedly held that criminal restitution “serves punitive purposes” in addition compensatory ones. *Paroline*, 572 U.S. at 456. “The purpose of awarding restitution is \*\*\* to mete out appropriate criminal punishment.” *Pasquantino*, 544 U.S. at 365. Indeed, “[t]he victim has no control over the amount of restitution awarded or over the decision to award restitution.” *Kelly v. Robinson*, 479 U.S. 36, 52 (1986).

“Federal statutes, too, describe restitution as a ‘penalty’ imposed on the defendant as part of his criminal sentence \*\*\* .” *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial or certiorari). It is significant that Congress chose to place the MVRA in Title 18 along with other criminal penalties—a choice this Court has held is “relevant in determining whether its content is civil or criminal in nature.” *Kellogg Brown & Root Servs., Inc. v. United States ex rel.*

*Carter*, 575 U.S. 650, 659 (2015). For these reasons, criminal restitution may even implicate the Eighth Amendment’s Excessive Fines Clause in extreme cases. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial or certiorari). And even if criminal restitution could plausibly be viewed as a civil remedy, the Seventh Amendment would guarantee a jury determination, too. *Id.* From each angle, restitution is part of a criminal penalty authorized by statute and subject to the Sixth Amendment’s jury requirement.

## CONCLUSION

Congress intended and expressly limited the Anti-Kickback Statute to claims for services paid for by a federal health care program. The Fifth Circuit’s interpretation impermissibly broadened the statute as written. The Fifth Circuit then used that overbroad interpretation to affirm a restitution order that was not based on facts found by a jury, in violation of the Sixth Amendment. Each of these reasons provides a sound basis for certiorari.

Respectfully submitted.

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