No. 24-5032
Vide 24-23, 24-25

In the Supreme Court of the United States

JACKSON JACOB,
Petitioner-Appellant
v.

UNITED STATES OF AMERICA,
Respondent-Appellee

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

PETITIONER'S REPLY BRIEF

SARA A. JOHNSON*
Counsel of Record
SARA A. JOHNSON,
ATTORNEY AT LAW, LLC
700 Camp Street
New Orleans, Louisiana 70130
sara@sarajohnsonlaw.com
(504) 528-9500

Counsel for Petitioner

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* Counsel of Record

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INTRODUCTION

The wide gulf between the jury's verdict and the restitution order underscores the need for a jury determination concerning restitution and demonstrates why this case is an ideal vehicle to consider the issue. For all defendants, the jury's verdict on the multi-object conspiracy expressly rejected a conspiracy to violate the Travel Act (charging privately paid claims), and a conspiracy to violate the AKS *and* the Travel Act, in favor of a guilty verdict on a conspiracy to violate the AKS (charging federally paid claims), *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 _____

The government's brief ignores entirely this important fact.

The resulting sentence and restitution order imposed against Mr. Jacob comprised a 100:1 ratio of claims paid privately versus federally. This result is inconsistent with the jury's verdict and the AKS because the record is silent on whether payment of the private claims could have been made "in whole or in part by a Federal health care program."

ARGUMENT

I. The Court should grant Certiorari because the Court of Appeals' application of the AKS exceeded the statute's scope when it did not require a finding that the private payments could have been made by a Federal health care program.

The government's restatement of the issue incorrectly focuses on whether the AKS "categorically excludes kickbacks for services that *the defendant knew* could have been paid for by either a private insurer or a federal healthcare program." Br. Opp. I. But Mr. Jacob's claim is not (and never has been) one of *knowledge*.

Mr. Jacob and the government agree that the statute plainly bars illegal remunerations for referrals for services "for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. § 1320a-7b(b). The issue presented is not one of knowledge, but whether the statute swallows privately paid claims when the record is silent as to whether those claims could have been paid for "in whole or in part under a Federal health care program." Indeed, the government acknowledged as much when it indicted the claims under two different statutes: the federally paid claims under the AKS and the privately paid claims under the Travel Act (18 U.S.C. § 1952). Pet. App. 5a-7a.

The government relies on the Fifth Circuit's analysis of a non-petitioner's claim that concerned knowledge. Br. Opp. 20-21. That analysis is not properly applied to Mr. Jacob's conspiracy conviction because it concerned facts specific to the non-petitioner. Mr. Jacob's issue does not concern his, or any defendant's knowledge—the issue is whether the privately paid claims fell under the AKS when the record is silent on whether those claims *could have been paid in whole or in part by a Federal health care program. Compare* Pet. App. 8 ("Won argues that there was insufficient evidence to prove that he agreed to violate the AKS and that he willfully sent federal patients to Forest Park—arguing that the government had to prove that he knew the patients he sent were federally insured.") *with id.* 68 ("Shah, Forrest, and Jacob contend that the AKS conspiracy involved only federal patients, so the improper-benefit calculation cannot include private-pay patients.").

On that note, the government's claim that the Fifth Circuit's holding is consistent with the other courts of appeals is incorrect. Br. Opp. 21. The Eleventh Circuit in *Ruan* explicitly acknowledged what the Fifth Circuit chose to ignore—that there was no evidence that any of the privately paid claims could have been paid for by a Federal healthcare

program. *United States v. Ruan,* 966 F.3d 1101 (11th Cir. 2020), *rev'd on other grounds*, 597 U.S. 450 (2022). The government's analysis conflates all payments into a monolith but that's not how the payments were indicted, and that's not what the jury's verdict rendered.

Rather, the conspiracy charged three buckets of payments: federal, private, and both. The jury returned a verdict finding Mr. Jacob guilty of a conspiracy to pay kickbacks for federal claims, only. To lump the private payments into that conviction ignores the jury's verdict. And to the issue presented, it ignores the logical application of the statute to *a claim* for a service, instead applying it to a large group of claims, finding that because some claims were paid for by a Federal healthcare program, all claims *could* have been paid for by a Federal healthcare program. This reading does not find support in the record or the statute.

The Fifth Circuit's flawed decision held that the AKS reaches services paid for by private insurers without a concomitant finding that any of those services *could have been paid for by a* Federal healthcare program. This erroneous reading of the statute had real consequences for Mr. Jacob by virtue of a lengthy prison sentence and eye-popping

restitution order and will continue to subject defendants in the Fifth Circuit to disparate outcomes.

II. The Court should grant certiorari to decide whether the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts that increase the maximum restitution amount for which a criminal defendant may be liable.

Mr. Jacob and his codefendants Mrugeshkumar Kumar Shah ("Dr. Shah") and Michael Bassem Rimlawi ("Dr. Rimlawi") have (in this case and case numbers 24-25 and 24-23, respectively) asked this Court to grant certiorari to determine whether the Constitution confers a right to a jury determination, beyond a reasonable doubt, of facts necessary to establish the amount of mandatory restitution that must be imposed under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A. Mr. Jacob adopts and incorporates by reference all arguments on this point made by Dr. Shah and Dr. Rimlawi but submits the following brief rejoinder to the government's arguments.

The government mentions, but does not appear to place great reliance on, the fact that "[s]ome courts have [ ] reasoned that 'restitution is not a penalty for a crime for *Apprendi* purposes,' or that, even if restitution is criminal, its compensatory purpose distinguishes it from purely punitive measures." Br. Opp. 14 (citations omitted). The

government is wise not to put all its eggs in this basket, since that position is not only a distinct minority position in the federal circuits,[1] but is also contrary to this Court's cases. *See Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from denial of certiorari) (citing *Paroline v. United States*, 572 U.S. 434, 456 (2014), and *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)). "Besides, if restitution really fell beyond the reach of the Sixth Amendment's protections in ***criminal*** prosecutions, [the Court] would then have to consider the Seventh Amendment and its independent protection of the right to a jury trial in ***civil*** cases." *Hester*, 586 U.S. at 1107 (Gorsuch, J., dissenting from denial of certiorari) (emphasis in original).

The government appears to place more stock in its argument that the MVRA does not set a statutory maximum within the meaning of the *Apprendi* rule because "when the court fixes the amount of restitution based on the victim's losses, it is not increasing the punishment beyond what is authorized by the conviction." Br. Opp. 14 (citation omitted). And, indeed, it is this "no statutory maximum" argument that underlies the

[1] The Seventh Circuit has noted that only it and the Eighth and Tenth Circuits have adopted this position. *See United States v. Wolfe*, 701 F.3d 1206, 1217 (7th Cir. 2012) (citing cases).

Fifth Circuit's refusal to recognize a jury-trial right for restitution.[2] *See, e.g., United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014).

Justice Gorsuch has, however, explained why this argument is unpersuasive, or at least highly questionable:

> But the government's argument misunderstands the teaching of our cases. We've used the term "statutory maximum" to refer to the harshest sentence the law allows a court to impose based on facts the jury has found or the defendant has admitted. *Blakely v. Washington*, 542 U.S. 296, 303 (2004). In that sense, 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. And just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order.

Hester, 586 U.S. at 1107 (Gorsuch, J., dissenting from denial of certiorari) (emphasis in original).

Furthermore, to the extent the government relies, for this argument, on the fact that restitution "is imposed to an indeterminate scheme," Br. Opp. 16—meaning, we suppose, that the amount of

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[2] At least in the Fifth Circuit, this reasoning sits uneasily alongside that court's holdings that a restitution order in excess of what is authorized under the MVRA ***is*** a sentence in excess of the statutory maximum and thus not subject to plea-agreement provisions waiving appeal of the sentence. *See, e.g., United States v. Kim*, 988 F.3d 803, 809-11 (5th Cir. 2021); *United States v. Sharma*, 703 F.3d 318, 320 n.1 (5th Cir. 2012) ("At oral argument, the government conceded that the [plea agreement's appeal] waivers do not bar this appeal of restitution orders that purportedly exceed the statutory maximum authorized by the [MVRA].") (citation omitted).

restitution varies from case to case, depending on the unique facts of each case—that argument is unavailing because historical practice demonstrates that the requirements of grand jury indictment and proof to, and a finding by, a jury beyond a reasonable doubt applied to restitution notwithstanding its variable nature. *See id.* (Gorsuch, J., dissenting from denial of certiorari); *see also* James Barta, *Guarding the Rights of the Accused and the Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 AM. CRIM. L. REV. 463, 472-76, 479-80 (2014).

Moreover, as Justice Gorsuch highlighted, this question is an important one and worthy of this Court's review, given the ubiquity of restitution orders, especially in federal cases. *See Hester*, 586 U.S. at 1105-06 (Gorsuch, J., dissenting from denial of certiorari). Although the government takes the familiar tack of cataloguing denials of certiorari in previous cases raising the same, or a similar, question, Br. Opp. 11 & n.3, those denials import, of course, no view on the merits of the question presented. Indeed, the sheer number of cases raising this issue on a recurring basis is a factor counseling that this Court should finally, in one or more of these cases, grant certiorari to settle that question.

For these reasons, the Court should grant certiorari to decide this question.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

SARA A. JOHNSON
Counsel of Record
SARA A. JOHNSON,
ATTORNEY AT LAW, LLC
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500
sara@sarajohnsonlaw.com