Nos. 24-23, 24-25 and 24-5032

In the Supreme Court of the United States

MICHAEL BASSEM RIMLAWI, PETITIONER

v.

UNITED STATES OF AMERICA

MRUGESHKUMAR KUMAR SHAH, PETITIONER

v.

UNITED STATES OF AMERICA

JACKSON JACOB, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment requires that facts affecting the amount of restitution ordered under the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

2. Whether the criminal prohibition against knowingly soliciting or receiving remuneration in return for referring an individual for a service "for which payment may be made in whole or in part under a Federal health care program," 42 U.S.C. 1320a-7b(b)(1), categorically excludes kickbacks for services that the defendant knew could have been paid for by either a private insurer or a federal healthcare program.

3. Whether the court of appeals erred in its harmless-error analysis by focusing on the weight of the evidence properly admitted at trial rather than on the potential effect of the error on the jury.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-85a)[1] is reported at 95 F.4th 328.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2023. The court issued a superseding opinion and denied a petition for rehearing on March 8, 2024 (Pet. App. 86a). On June 4, 2024, Justice Alito extended the time to file a petition for a writ of certiorari in No. 24-23 until July 8, 2024, and the petition was filed on July 3, 2024. On May 30, 2024, Justice Alito extended the time to file a petition for a writ of certiorari in No. 24-25 until July 8, 2024, and the petition was filed on that date. On May 29, 2024, Justice Alito extended the time to file a petition for a writ of certiorari in No. 24-5032 until July 8, 2024, and the petition was filed on July 5, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of conspiracy to pay and receive health-care bribes and kickbacks, in violation of 18 U.S.C. 371; petitioners Mrugeshkumar Kumar Shah and Jackson Jacob were convicted on three counts of offering or paying and soliciting or receiving illegal remuneration, in violation of 42 U.S.C. 1320a-7b(b); and petitioner Michael Bassem Rimlawi was convicted on two counts of offering or paying and soliciting or receiving illegal remuneration, in violation of 42 U.S.C. 1320a-7b(b). *Shah* Judgment 1; *Rimlawi* Judgment 1; *Jacob* Judgment 1.

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[1] References to the Pet. App. are to the appendix to the petition in *Shah* v. *United States*, No. 24-25.

Shah was sentenced to 42 months of imprisonment, to be followed by one year of supervised release, and was ordered to pay $40,339.37 in restitution. *Shah* Judgment 2-3, 5. Rimlawi was sentenced to 90 months of imprisonment, to be followed by two years of supervised release, and was ordered to pay $28,839,201.69 in restitution. *Rimlawi* Judgment 2-3, 5. Jacob was sentenced to 96 months of imprisonment, to be followed by two years of supervised release, and was ordered to pay $76,836,617 in restitution. *Jacob* Judgment 2-3, 5. The court of appeals affirmed. Pet. App. 1a-85a.

1. Petitioners and other co-defendants engaged in a $40 million healthcare conspiracy in Dallas, Texas. Pet. App. 2a. The conspiracy involved Forest Park Hospital, which was designed to be "an 'out-of-network' hospital, meaning that it was not affiliated with any insurance carrier and any surgeries performed there would be considered out-of-network for the patients." *Id.* at 3a. The men who opened Forest Park—Alan Beauchamp, Wade Barker, and Richard Toussaint—sought out-of-network status "because insurers were reimbursing out-of-network facilities at very high rates." *Ibid.*

To convince patients to have surgeries at Forest Park instead of an in-network facility, the hospital paid surgeons "to refer patients to Forest Park and then waive the patient's financial responsibility beyond what the surgery would cost in-network." Pet. App. 3a. The hospital and the surgeons would "then contract with a pass-through entity for sham marketing or consulting services." *Id.* at 4a. Once a surgeon referred a patient to Forest Park for surgery, the hospital "would obtain reimbursement from insurers at the out-of-network rate." *Ibid.* And in turn, the hospital "would pay the pass-through entities some of those profits," and the

pass-through entities would distribute "those profits to the surgeons for marketing and consulting services the surgeons never rendered." *Ibid.*

Rimlawi and Shah are "surgeons who contracted with a pass-through entity for marketing or consulting services and who directed some of their patients to Forest Park." Pet. App. 5a. While most of their patients "had private insurance," "some of them were covered by a federal healthcare program," such as Medicare, TRICARE, or the Department of Labor's Federal Employee Compensation Act. *Ibid.*

Jacob "owned a radiology company near the hospital" and was friends with Beauchamp. Pet. App. 5a. After agreeing to "join the enterprise," Jacob formed a pass-through entity called Adelaide Business Solutions (Adelaide). *Ibid.* "Forest Park paid Adelaide monthly for services that Adelaide never rendered to the hospital." *Ibid.* Along with the monthly check, Beauchamp would send "specific instructions as to how Jacob was to pay the surgeons he 'contracted' with for marketing or consulting services." *Ibid.*

2. a. A grand jury in the Northern District of Texas returned a second superseding indictment charging all three petitioners with conspiracy to pay and receive healthcare bribes and kickbacks, in violation of 18 U.S.C. 371; and charging Rimlawi with two counts of offering or paying and soliciting or receiving illegal remuneration, in violation of 42 U.S.C. 1320a-7b(b); Shah with three counts of offering or paying and soliciting or receiving illegal remuneration, in violation of 42 U.S.C. 1320a-7b(b); Jacob with five counts of offering or paying and soliciting or receiving illegal remuneration, in violation of 42 U.S.C. 1320a-7b(b); Jacob with nine counts of using facilities of interstate commerce for commer-

cial bribery, in violation of 18 U.S.C. 1952; Rimlawi with one count of using facilities of interstate commerce for commercial bribery, in violation of 18 U.S.C. 1952; and Jacob with one count of money-laundering conspiracy, in violation of 18 U.S.C. 1956(h). See Second Superseding Indictment 8, 30-31, 32-40.

b. Before trial, co-conspirator Wilton Burt, a Forest Park employee, reached a proffer agreement under which he would "tell the truth about Forest Park in exchange for the [g]overment not using his statements against him" in its case in chief. Pet. App. 39a. During the proffer, Burt "stated that '[y]ou don't entice doctors because that would be against the law' and that he realized from the beginning that [a] $600,000 check Beauchamp paid to Adelaide was for kickbacks." *Ibid.*

At trial, Burt's attorney presented a letter signed by Burt (among others) stating that he had no "knowledge of fraud within the hospital." Pet. App. 40a. The government objected on the ground that "Burt had breached the proffer agreement" because his presentation "directly contradicted [his] earlier statement that he knew about the kickbacks all along." *Ibid.* The district court agreed, "concluding that Burt had breached the agreement and that the [g]overnment was entitled to rebut Burt's assertion that he had no knowledge of fraud." *Ibid.* As a remedy for Burt's breach, the court "read an agreed-to statement to the jury." *Ibid.* As relevant here, the statement said that Burt had told the government during his interview "that he realized from the very beginning that the $600,000 check Beauchamp requested from Forest Park to be paid to Adelaide was for doctor kickbacks. You may consider this evidence as to Defendant Burt." *Id.* at 41a.

Later in the trial, Rimlawi took the stand in his own defense and testified that he did not receive any kickbacks. Pet. App. 50a. The government cross-examined him with statements by several individuals saying that Rimlawi had in fact received kickbacks. *Ibid.* One of the statements used to cross-examine Rimlawi was Burt's proffer statement. *Ibid.*

c. The jury convicted all three petitioners on the conspiracy to pay and receive kickbacks, convicted Shah and Jacob on three violations each of 42 U.S.C. 1320a-7b(b), and convicted Rimlawi on two violations of 42 U.S.C. 1320a-7b(b). *Shah* Judgment 1; *Rimlawi* Judgment 1; *Jacob* Judgment 1. Petitioners were acquitted on the remaining counts. See Pet. App. 149a-172a.

d. The district court sentenced Shah to 42 months of imprisonment, Rimlawi to 90 months of imprisonment, and Jacob to 96 months of imprisonment. *Shah* Judgment 2; *Rimlawi* Judgment 2; *Jacob* Judgment 2.

For purposes of restitution, the Probation Office found that the victims of the conspiracy included the insurance companies that paid inflated claims for out-of-network benefits. See *Shah* Presentence Investigation Report (PSR) ¶ 109; *Rimlawi* PSR ¶ 115; *Jacob* PSR ¶ 96. To calculate restitution amounts, the Probation Office reviewed reimbursement rates and calculated the amount that the insurance companies would have paid if the procedures had been conducted in an in-network facility. See *Shah* PSR ¶ 110; *Rimlawi* PSR ¶ 116; *Jackson* PSR ¶ 97.

Based on the Probation Office's calculations, the district court ordered Shah to pay $40,339.37 in restitution, Rimlawi to pay $28,839,201.69 in restitution, and Jacob to pay $76,836,617.00 in restitution. *Shah* Judgment 5;

Rimlawi Judgment 5; *Jacob* Judgment 5.[2] The Probation Office rejected petitioners' arguments that, because Section 1320a-7b(b)(1)(A) applies to kickbacks involving payments that "may be made in whole or in part under a Federal health care program," 42 U.S.C. 1320a-7b(b)(1)(A), private insurers could not be considered victims for purposes of restitution. See C.A. App. 3163-3164 (Shah); C.A. App. 5045 (Rimlawi); C.A. App. 10391-10392 (Jacob).

The district court agreed with the Probation Office. See C.A. App. 2676. The court explained that "partial reimbursement by a federal healthcare program" provided jurisdiction over the conspiracy offense. *Ibid.* But the court emphasized that "in calculating the Guidelines, th[e] Court considers all 'relevant conduct,' which includes all conduct that was 'part of the same course of conduct or common scheme or plan as the offense conviction.'" *Ibid.* (quoting Sentencing Guidelines § 1B1.3(a)(2)). And because the violations here "also induced fraudulent payments from private insurers," the court included those payments "when calculating the Guidelines." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-85a.

a. As relevant here, the court of appeals rejected an argument pressed by a non-petitioner defendant that, to support a conviction under Section 1320a-7b(b)(1)(A), the government had "to show he knowingly referred federally insured patients for remuneration." Pet. App.

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[2] Shah's restitution amount was considerably lower than Rimlawi's or Jacob's because the Probation Office determined that most of Shah's patients were insured under federal or state programs that operated on a fixed-fee schedule and would have paid the same amount regardless of where the surgery was performed. See *Shah* PSR ¶ 111.

11a. The court explained that Section 1320a-7b(b)(1)(A) prohibits knowingly soliciting or receiving kickbacks 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)(1)(A) (emphasis added); see Pet. App. 11a. Based on that language, the court reasoned that "[a]ll [the government] had to show was that [the defendant] knowingly agreed to accept remuneration for referring patients that *could* be federally insured." Pet. App. 11a. And the court located "[f]urther support for this proposition" in Section 1320a-7b(h), *ibid.*, which provides that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section," 42 U.S.C. 1320a-7b(h).

b. The court of appeals also considered Rimlawi's argument that the prosecution improperly used Burt's proffer statement to cross-examine him. Pet. App. 50a-52a. The court observed that the proffer statement had been used "'clearly' and 'directly' * * * against Rimlawi" when the prosecution "briefly" listed Burt's proffer statement as an example of another "individual to testify against Rimlawi." *Id.* at 50a-51a. But the court determined that "even assuming without deciding that the admission of the statement in cross-examination was error" under *Bruton* v. *United States*, 391 U.S. 123 (1968), "that error was harmless." Pet. App. 51a.

"To find an error harmless," the court of appeals explained, the court "must be convinced beyond a reasonable doubt that the error was in fact harmless in light of the other evidence presented at trial." Pet. App. 51a. The court found that that standard was met here because "no fewer than 10 other individuals implicated [Rimlawi] in the kickback scheme." *Id.* at 52a. The court emphasized that "Rimlawi admits to having fed-

erally insured patients" and that "kickback tracking sheets show that Rimlawi was credited with [federally] insured patients." *Ibid.* Given the "mountain of other evidence inculpat[ing] Rimlawi," the court found that any *Bruton* error was "harmless." *Ibid.*

c. The court of appeals further rejected petitioners' challenges to their restitution obligations. Pet. App. 77a-83a. The court found that the private insurers were "proper victims," *id.* at 81a, under the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227. The court explained that "under the MVRA," the term "'victim'" means "'a person directly and proximately harmed as a result of the commission of an offense,'" including "'any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.'" Pet App. 81a (quoting 18 U.S.C. 3663A(a)(2)). The court observed that petitioners did not dispute "that the private insurers suffered direct and proximate harm" and instead contended only "that the private insurers were outside the conspiracy's scope." *Ibid.*

The court of appeals found to the contrary, concluding that "the private insurers were within the scope of the conspiracy." Pet. App. 81a. The court acknowledged that "it was the presence of federal insureds that granted federal jurisdiction in this case and was necessary for [the] conviction." *Ibid.* But the court emphasized that the scheme of "steer[ing] patients to Forest Park by way of buying surgeries * * * covered both private and federal patients." *Ibid.* The court also reasoned that "the MVRA defines victims as those harmed 'in the course of the . . . conspiracy,'" and "[t]he private insurers were harmed at the same time and in the same manner as the federal insurers because the bribe pay-

ment that was the basis for the inflated claims was the same no matter whether the patient was insured federally or privately." *Id.* at 82a (citation omitted).

The court of appeals likewise rejected petitioners' argument "that a jury must find the restitution amount beyond a reasonable doubt." Pet. App. 83a. The court noted petitioners' "conce[ssion] that this issue is foreclosed" by circuit precedent. *Ibid.* (citing *United States* v. *Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 574 U.S. 1078 (2015)). Accordingly, the court did "not address it further." *Ibid.*

ARGUMENT

Petitioners renew (*Shah* Pet. 7-17; *Jacob* Pet. 11-17; *Rimlawi* Pet. 28-31) their contention that the Sixth Amendment requires that the amount of restitution be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. That contention lacks merit, as every court of appeals to have addressed the question has held. This Court has repeatedly denied certiorari on the first question presented and should do the same here.

Petitioner Jacob further contends (Pet. 8-11) that the court of appeals misconstrued the scope of 42 U.S.C. 1320a-7b(b)(1)(A), while petitioner Rimlawi further contends (Pet. 15-27) that the court of appeals misapplied harmless-error review. But neither petitioner identifies a conflict with this Court's precedent or a decision of another court of appeals. Accordingly, this Court's review of the second and third questions presented is also unwarranted.

1. The court of appeals correctly rejected petitioners' contention that, under the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the amount of restitution must be charged in an indictment and proved to a jury

beyond a reasonable doubt. Pet. App. 83a & n.292. Petitioners' contention lacks merit, and the courts of appeals have unanimously rejected it. This Court has repeatedly denied petitions for writs of certiorari presenting similar questions,[3] and it should follow the same course here.

a. *Apprendi* does not apply to restitution. In *Apprendi*, 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." 530 U.S. at 490; see *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (making clear that, in a federal prosecution, "such facts must also be charged in the indictment"). The "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury ver-

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[3] See, *e.g.*, *Gendreau* v. *United States*, 144 S. Ct. 2693 (2024) (No. 23-6966); *Finnell* v. *United States*, 144 S. Ct. 2529 (2024) (No. 23-5835); *Arnett* v. *Kansas*, 142 S. Ct. 2868 (2022) (No. 21-1126); *Flynn* v. *United States*, 141 S. Ct. 2853 (2021) (No. 20-1129); *Gilbertson* v. *United States*, 141 S. Ct. 2793 (2021) (No. 20-860); *George* v. *United States*, 141 S. Ct. 605 (2020) (No. 20-5669); *Budagova* v. *United States*, 140 S. Ct. 161 (2019) (No. 18-8938); *Ovsepian* v. *United States*, 140 S. Ct. 157 (2019) (No. 18-7262); *Hester* v. *United States*, 586 U.S. 1104 (2019) (No. 17-9082); *Petras* v. *United States*, 586 U.S. 944 (2018) (No. 17-8462); *Fontana* v. *United States*, 583 U.S. 1134 (2018) (No. 17-7300); *Alvarez* v. *United States*, 580 U.S. 1223 (2017) (No. 16-8060); *Patel* v. *United States*, 580 U.S. 883 (2016) (No. 16-5129); *Santos* v. *United States*, 578 U.S. 935 (2016) (No. 15-8471); *Roemmele* v. *United States*, 577 U.S. 904 (2015) (No. 15-5507); *Gomes* v. *United States*, 577 U.S. 852 (2015) (No. 14-10204); *Printz* v. *United States*, 577 U.S. 845 (2015) (No. 14-10068); *Johnson* v. *United States*, 576 U.S. 1035 (2015) (No. 14-1006); *Basile* v. *United States*, 575 U.S. 904 (2015) (No. 14-6980).

dict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted).

Here, the district court ordered petitioners to pay restitution pursuant to the MVRA. The MVRA provides that, "when sentencing a defendant convicted of an offense described in subsection (c)," which includes fraud offenses, "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1); see 18 U.S.C. 3663A(c)(1)(A)(ii). The MVRA requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see 18 U.S.C. 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."); see also 18 U.S.C. 3663A(b)(1)(A) and (B) (providing that "[t]he order of restitution shall require" the defendant to "return the property" or "pay an amount equal" to the value of the lost or destroyed property).

By requiring restitution of a specific sum—"the full amount of each victim's losses"—rather than prescribing a maximum amount that may be ordered, the MVRA establishes an indeterminate framework. 18 U.S.C. 3664(f)(1)(A); see, *e.g.*, *United States* v. *Day*, 700 F.3d 713, 732 (4th Cir. 2012) ("[T]here is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense.") (emphasis omitted), cert. denied, 569 U.S. 959 (2013); *United States* v. *Reifler*, 446 F.3d 65, 118-120 (2d Cir. 2006) (the MVRA "is an indeterminate system") (citing cases). A "judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no stat-

utory maximum." *United States* v. *Fruchter*, 411 F.3d 377, 383 (2d Cir.) (addressing forfeiture), cert. denied, 546 U.S. 1076 (2005); see *Southern Union Co.* v. *United States*, 567 U.S. 343, 353 (2012) (explaining that there can be no "*Apprendi* violation where no maximum is prescribed"). Thus, when a sentencing court determines the amount of the victim's loss, it "is merely giving definite shape to the restitution penalty [that is] born out of the conviction," not "imposing a punishment beyond that authorized by jury-found or admitted facts." *United States* v. *Leahy*, 438 F.3d 328, 337 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006).

Moreover, while restitution is imposed as part of a defendant's criminal conviction, *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005), it is not designed to punish offenders. Instead, "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct." *Leahy*, 438 F.3d at 338. "The purpose of restitution under the MVRA * * * is * * * to make the victim whole again by restoring to him or her the value of the losses suffered as a result of the defendant's crime." *United States* v. *Hunter*, 618 F.3d 1062, 1064 (9th Cir. 2010) (brackets, citation, and internal quotation marks omitted). In that additional sense, restitution "does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." *Leahy*, 438 F.3d at 338.

Nearly every court of appeals with criminal jurisdiction —and every court of appeals to have considered the question—has held that *Apprendi* does not apply to criminal restitution, whether under the MVRA or under the other primary federal restitution statute, the Victim

and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5(a), 96 Stat. 1253 (18 U.S.C. 3663). See, *e.g.*, *United States* v. *Milkiewicz*, 470 F.3d 390, 403-404 (1st Cir. 2006); *Reifler*, 446 F.3d at 114-120 (2d Cir.); *Leahy*, 438 F.3d at 337-338 (3d Cir.); *Day*, 700 F.3d at 732 (4th Cir.); *United States* v. *Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 574 U.S. 1078 (2015); *United States* v. *Churn*, 800 F.3d 768, 782 (6th Cir. 2015); *United States* v. *George*, 403 F.3d 470, 473 (7th Cir.), cert. denied, 546 U.S. 1008 (2005); *United States* v. *Carruth*, 418 F.3d 900, 902-904 (8th Cir. 2005); *United States* v. *Brock-Davis*, 504 F.3d 991, 994 n.1 (9th Cir. 2007); *United States* v. *Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006); *United States* v. *Williams*, 445 F.3d 1302, 1310-1311 (11th Cir. 2006), abrogated on other grounds by *United States* v. *Lewis*, 492 F.3d 1219 (11th Cir. 2007) (en banc).

Those courts have relied primarily on the absence of a statutory maximum for restitution in determining that, 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. See, *e.g.*, *Leahy*, 438 F.3d at 337 n.11 ("[T]he jury's verdict automatically triggers restitution in the 'full amount of each victim's losses.'"). Some courts have additionally 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. *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 593 (7th Cir. 2006); see *Visinaiz*, 428 F.3d at 1316; *Carruth*, 481 F.3d at 904.

b. This Court's holding in *Southern Union Co.* v. *United States*, 567 U.S. 343 (2012), "that the rule of *Ap-*

prendi applies to the imposition of criminal fines," *id.* at 360, does not undermine the uniform line of precedent holding that restitution is not subject to *Apprendi*.

In *Southern Union*, the Court found that a $6 million criminal fine imposed by the district court—which was well above the $50,000 fine that the defendant argued was the maximum supported by the jury's verdict—violated the Sixth Amendment. 567 U.S. at 347. The Court explained that criminal fines, like imprisonment or death, "are penalties inflicted by the sovereign for the commission of offenses." *Id.* at 349. Observing that, "[i]n stating *Apprendi*'s rule, [it] ha[d] never distinguished one form of punishment from another," *id.* at 350, the Court concluded that criminal fines implicate "*Apprendi*'s 'core concern' [of] reserv[ing] to the jury 'the determination of facts that warrant punishment for a specific statutory offense,'" *id.* at 349 (quoting *Oregon* v. *Ice*, 555 U.S. 160, 170 (2009)). The Court also examined the historical record, explaining that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Id.* at 353 (quoting *Ice*, 555 U.S. at 170). Finding that "the predominant practice" in early America was for facts that determined the amount of a fine "to be alleged in the indictment and proved to the jury," the Court concluded that the historical record "support[ed] applying *Apprendi* to criminal fines." *Id.* at 353-354.

Contrary to petitioners' argument (*Shah* Pet. 7-10; *Jacob* Pet. 13-14), *Southern Union* does not require that *Apprendi* be applied to restitution. *Southern Union*'s application of *Apprendi* concerned only "the imposition of criminal fines," 567 U.S. at 360, which are "undeniably" imposed as criminal penalties in order to punish illegal conduct, *id.* at 350. The Court had no occasion

to, and did not, address restitution, which has compensatory and remedial purposes that fines do not, and which is imposed pursuant to an indeterminate scheme that lacks a statutory maximum.

Indeed, *Southern Union* supports distinguishing restitution from the type of sentences subject to *Apprendi* because, in acknowledging that many fines during the Founding era were not subject to concrete caps, the Court reaffirmed that there cannot "be an *Apprendi* violation where no maximum is prescribed." *Southern Union*, 567 U.S. at 353. Unlike the statute in *Southern Union*, which prescribed a $50,000 maximum fine for each day of violation, the MVRA sets no maximum amount of restitution, but instead requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see *Day*, 700 F.3d at 732 (stating that, "in *Southern Union* itself, the *Apprendi* issue was triggered by the fact that the district court imposed a fine in excess of the statutory maximum that applied in that case," and distinguishing restitution on the ground that it is not subject to a "prescribed statutory maximum") (emphasis omitted).

Petitioners contend (*e.g.*, *Shah* Pet. 10-12) that the historical record supports extending *Apprendi* to restitution. They argue that *a victim* could recover restitution for certain property crimes at common law only if the stolen property was listed in the indictment and found to be stolen by the jury. *Id.* at 10 (citing *Hester* v. *United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from denial of certiorari)). But petitioners' argument provides no sound basis for extending *Apprendi* to grant additional rights to *defendants* themselves in the context of restitution. Unlike facts that determined the amount of a criminal fine, the historical

consequence of omitting facts from the indictment relevant only to restitution was not that the indictment was defective or that the defendant was permitted to retain the stolen property. Rather, the stolen property was simply "forfeit[ed], and confiscate[d] to the king," instead of to the victim. 1 Matthew Hale, *The History of the Pleas of the Crown* 538 (1736); see *id.* at 545; James Barta, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 473 (2014) ("Any goods omitted from the indictment were forfeited to the crown.").

Nor do early American larceny statutes requiring the value of stolen goods to be alleged in the indictment and proved to the jury compel the same treatment for restitution. Contra *Shah* Pet. 10-11. As petitioner Shah acknowledges (Pet. 10), those larceny statutes tied the maximum penalty to the value of the stolen goods, which would place that factual issue within the rule of *Apprendi*. See *Apprendi*, 530 U.S. at 502 (Thomas, J., concurring) (explaining with respect to larceny statutes that "[v]alue was an element because punishment varied with value"). Here, by contrast, there is no maximum penalty prescribed.

Since this Court's decision in *Southern Union*, at least eight courts of appeals have addressed in published opinions whether to overrule their prior precedents declining to extend the *Apprendi* rule to restitution. Each determined, without dissent, that *Southern Union* did not call its previous analysis into question. See, *e.g.*, *United States* v. *Vega-Martínez*, 949 F.3d 43, 55 (1st Cir. 2020) (observing that *Southern Union* "is clearly distinguishable" with respect to restitution); *United States* v. *Sawyer*, 825 F.3d 287, 297 (6th Cir.)

(observing that "*Southern Union* did nothing to call into question the key reasoning" of prior circuit precedent), cert. denied, 580 U.S. 967 (2016); *United States* v. *Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015) (finding "nothing in the *Southern Union* opinion leading us to conclude that our controlling precedent * * * was implicitly overruled"); *United States* v. *Bengis*, 783 F.3d 407, 412-413 (2d Cir. 2015) ("adher[ing]" to the court's prior precedent after observing that "*Southern Union* is inapposite"); *United States* v. *Green*, 722 F.3d 1146, 1148-1149 (9th Cir.), cert. denied, 571 U.S. 1025 (2013); *United States* v. *Read*, 710 F.3d 219, 231 (5th Cir. 2012) (per curiam), cert. denied, 569 U.S. 1031 (2013); *United States* v. *Wolfe*, 701 F.3d 1206, 1216-1217 (7th Cir. 2012), cert. denied, 569 U.S. 1029 (2013); *Day*, 700 F.3d at 732 (4th Cir.) (explaining that the "logic of *Southern Union* actually reinforces the correctness of the uniform rule adopted in the federal courts" that *Apprendi* does not apply because restitution lacks a statutory maximum); see also *United States* v. *Kieffer*, 596 Fed. Appx. 653, 664 (10th Cir. 2014), cert. denied, 576 U.S. 1012 (2015); *United States* v. *Basile*, 570 Fed. Appx. 252, 258 (3d Cir. 2014), cert. denied, 575 U.S. 904 (2015).

Petitioners assert (*Shah* Pet. 19; *Rimlawi* Pet. 29) that the Iowa Supreme Court held in *State* v. *Davison*, 973 N.W.2d 276 (2022), that restitution must be based on jury findings. But *Davison* did not involve a restitution award under the MVRA. See *id.* at 284. Instead, it involved an Iowa statute requiring a restitution award of at least $150,000 if the offender was "convicted of a felony in which the act or acts committed by the offender caused the death of another person." *Id.* at 278 (quoting Iowa Code § 910.3B(1) (2017)). Because the Iowa statute did "not require a jury finding that the de-

fendant caused the death of another person," the court held that it violated the Sixth Amendment. *Ibid.* But the court expressly distinguished "federal precedent" involving "restitution under the [MVRA] and the Victim and Witness Protection Act," which it explained "differ from [the Iowa statute] in key respects." *Id.* at 284. Specifically, the court reasoned that whereas the federal statutes set no "mandatory maximum or minimum amount of restitution to be awarded," the Iowa statute is "determinate" because it "establishes a mandatory minimum of $150,000." *Id.* at 284-285 (emphasis omitted).

Accordingly, petitioners have identified no disagreement in the lower courts warranting this Court's review.[4]

2. Petitioner Jacob separately contends (Pet. 8-11) that the court of appeals erroneously interpreted Section 1320a-7b(b) to cover some kickbacks for services ultimately paid for by private insurers. But the court's interpretation was correct, and its determination does not conflict with the decision of any other court. See Pet. App. 9a-12a.

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[4] Petitioner Shah briefly asserts (Pet. 9) that the district court erred by "calculat[ing] restitution based on the amount *private* insurers would have lost." But the MVRA requires restitution to the victim of the offense, 18 U.S.C. 3663A(a)(1), and it defines "victim" broadly to include any "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered[,] including * * * any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663A(a)(2). The court of appeals correctly determined that private insurers were victims of petitioners' conspiracy to solicit and receive kickbacks for surgeries because those insurers lost millions of dollars as a result of the conspiracy. Pet. App. 82a-83a.

As relevant here, Section 1320a-7b(b) prohibits persons from "knowingly and willfully solicit[ing] or receiv[ing] any remuneration (including any kickback, bribe, or rebate) * * * in return for referring an individual to a person 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." 42 U.S.C. 1320a-7b(b)(1)(A). As an initial matter, nothing requires the government to prove that a defendant knowingly referred federally insured patients for remuneration because the "Federal health care program" requirement, *ibid.*, is merely a jurisdictional element. And "[b]ecause jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter." *Rehaif* v. *United States*, 588 U.S. 225, 230 (2019); see *United States* v. *Feola*, 420 U.S. 671, 677 n.9 (1975).

Yet, even if the "Federal health care program" requirement, 42 U.S.C. 1320a-7b(b)(1)(A), were not a jurisdictional element, the government still would not have had "to show [that a defendant] knowingly referred federally insured patients for remuneration." Pet. App. 11a. Instead, "[a]ll it had to show was that [the defendant] knowingly agreed to accept remuneration for referring patients that *could* be federally insured." *Ibid.*

That interpretation follows from the statutory text. By its terms, Section 1320a-7b(b) requires only that payment for the item or service "*may* be made" by a federal healthcare program. 42 U.S.C. 1320a-7b(b)(1)(A) (emphasis added). And the statute further states that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section."

42 U.S.C. 1320a-7b(h). Thus, the court of appeals correctly determined that the government need establish only that a defendant "agreed to accept remuneration for referring patients for services" that he knew "'*could* be paid for through a federal healthcare program.'" Pet. App. 11a-12a.

Petitioner Jacob has no persuasive answer to the foregoing textual analysis. He maintains (Pet. 9) that Section 1320a-7b(b) "is textually restricted to kickbacks involving a 'Federal health care program,'" and thus "excludes kickbacks involving private insurers." But that argument ignores the plain text of the statute, which requires only that the kickback involve a payment that "*may* be made"—not a payment that was actually made—"in whole or in part under a Federal health care program." 42 U.S.C. 1320a-7b(b)(1)(A) (emphasis added).

Contrary to petitioner Jacob's assertion (Pet. 10-11), the court of appeals' holding is consistent with decisions of other courts of appeals. Neither of Jacob's cited decisions involved the question here (whether, in a conspiracy involving some payments made by federal healthcare programs and other payments made by private insurers, the defendant had to know that particular payments *would* be made by the federal program). In *United States* v. *Ruan*, 966 F.3d 1101 (2020), rev'd on other grounds, 597 U.S. 450 (2022), the Eleventh Circuit simply held that *none* of the relevant payments were made by a federal healthcare program. See *id.* at 1144-1146. And in *United States* v. *Patel*, 778 F.3d 607 (2015), the Seventh Circuit considered "the meaning of the term 'referring'" in Section 1320a-7b(b), *id.* at 612; it never considered any issue concerning a defendant's knowledge of a healthcare entity's federal nature.

3. Petitioner Rimlawi separately contends (Pet. 15-28) that the court of appeals erred when it found that the government's "brief[] mention[] [of] Burt's proffer statement" during Rimlawi's cross-examination was "harmless in light of the other evidence presented at trial." Pet. App. 50a-51a. Rimlawi says that the Court should grant review to provide "guidance" on whether courts should apply a "guilt-based approach to harmless error," as the court of appeals supposedly did here, or instead an "'error-based approach.'" Pet. 17 (internal quotation marks omitted). That issue merits no further review. This Court has repeatedly denied petitions raising similar questions,[5] and the same result is warranted here.

a. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see 28 U.S.C. 2111. Outside of the narrow category of "structural" errors, see *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999), the requirement that an error "affect substantial rights"

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[5] See, *e.g.*, *Boyd* v. *United States*, 142 S. Ct. 511 (2021) (No. 21-5989); *Gas Pipe, Inc.* v. *United States*, 142 S. Ct. 484 (2021) (No. 21-183); *Acosta* v. *United States*, 142 S. Ct. 717 (2021) (No. 21-5016); *Pon* v. *United States*, 142 S. Ct. 2830 (2022) (No. 20-1709); *O'Neal* v. *United States*, 141 S. Ct. 101 (2020) (No. 19-8440); *Buncich* v. *United States*, 140 S. Ct. 499 (2019) (No. 19-456); *Lynch* v. *United States*, 140 S. Ct. 1545 (2020) (No. 19-7480); *Machedo-Erazo* v. *United States*, 139 S. Ct. 2036 (2019) (No. 18-8738); *Leaks* v. *United States*, 576 U.S. 1022 (2015) (No. 14-1077); *Runyon* v. *United States*, 574 U.S. 813 (2014) (No. 13-254); *Turner* v. *United States*, 573 U.S. 980 (2014) (No. 13-127); *Gomez* v. *United States*, 571 U.S. 1096 (2013) (No. 13-5625); *Demmitt* v. *United States*, 571 U.S. 952 (2013) (No. 12-10116); *Acosta-Ruiz* v. *United States*, 569 U.S. 1031 (2013) (No. 12-6908); *Ford* v. *United States*, 569 U.S. 1031 (2013) (No. 12-7958).

to warrant reversal requires the reviewing court to examine "the district court record * * * to determine whether the error was prejudicial," *i.e.*, whether it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (discussing Rule 52(a)); see *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

This Court has established an objective test for harmlessness that asks whether "a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18. That test thus eschews "a subjective enquiry into the [actual] jurors' minds," *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991), and disregards errors that should not have altered the trial's "outcome" even though they might have "altered the basis on which the jury [actually] decided the case," *Rose* v. *Clark*, 478 U.S. 570, 582 n.11 (1986). And the test requires "weigh[ing] the probative force of th[e] evidence" to determine whether an error was sufficiently "unimportant in relation to everything else the jury considered" that its absence would not have altered the verdict. *Yates*, 500 U.S. at 403-404; see *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986).

A constitutional error judged under the standard in *Chapman* v. *California*, 386 U.S. 18 (1967), is harmless if the evidence is "so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]." *Yates*, 500 U.S. at 405 (applying *Chapman*). The Court has repeatedly made clear that such an error will be harmless where the evidence of guilt is sufficiently strong that "the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 17; see also, *e.g.*, *Schneble* v. *Florida*, 405 U.S. 427, 430 (1972);

Harrington v. *California*, 395 U.S. 250, 254 (1969). Here, the court of appeals properly applied that standard by concluding that any constitutional error in the admission of Burt's statement during the cross-examination of Rimlawi was harmless "beyond a reasonable doubt" given "the other evidence presented at trial," including statements from "no fewer than 10 other individuals implicat[ing] [Rimlawi] in the kickback scheme." Pet. App. 51a-52a.

b. There is no division of authority warranting review. Petitioner Rimlawi contends (Pet. 15-17) that the proper standard for harmless error requires clarification, because, in his view, two different approaches have evolved—one focused on the effect that the error had on the jury's deliberations, the other focused on the strength of the government's evidence. That is incorrect.

The two purportedly distinct approaches reflect the same underlying concept. Although this Court has articulated the harmless-error inquiry as asking whether the error in question "contributed to the conviction," *Chapman*, 386 U.S. at 23 (citation omitted), that formulation is just another way of asking whether a reasonable jury would have acquitted the defendant absent the error. As the Court explained in *Neder*, if "a reviewing court concludes beyond a reasonable doubt" that the evidence of guilt is so strong "that the jury verdict would have been the same absent the error," then the "error 'did not contribute to the verdict obtained.'" 527 U.S. at 17 (quoting *Chapman*, 386 U.S. at 24).

Indeed, *Neder* addressed an error that indisputably affected the jury's actual verdict because the error "prevent[ed] the jury from making a finding on [an] element" of the offense. 527 U.S. at 4, 10-11. This Court nevertheless found the constitutional error harmless

based on the "overwhelming record evidence of guilt," because "a rational jury would have found the defendant guilty absent the error," *i.e.*, the "verdict would have been the same absent the error," *id.* at 17-18. The Court has likewise held that trial errors were "harmless error[s] under the rule of *Chapman*" because the other evidence of guilt was "overwhelming." *Harrington*, 395 U.S. at 253, 254. See also, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986) (citing *Harrington* and *Schneble* as examples of cases applying *Chapman*'s standard).

Rimlawi's discussion of this question presented (Pet. 15-28) cites no case law and instead relies exclusively on academic articles dating back to the 1990s. Accordingly, he has not tried to establish that different ways of articulating a harmless-error test have actually led to conflicting results in the courts of appeals. Intervention by this Court to address the constitutional harmless-error standard is unwarranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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