No. 12-9012

In the Supreme Court of the United States

BENJAMIN ROBERS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

When the victim of a crime is entitled to restitution for the loss of property and return of the lost property is "impossible, impracticable, or inadequate," 18 U.S.C. 3663A(b)(1)(B) provides that a defendant shall pay "an amount equal to—(i) the greater of * * * (I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less (ii) the value (as of the date the property is returned) of any part of the property that is returned." The question presented is:

Whether the district court correctly calculated a restitution award for victims who lost money because of the defendant's loan fraud when the court reduced the victims' losses by the amount of money they recouped from the sale of the collateral securing the loans.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 143-181) is reported at 698 F.3d 937. The order of the district court (J.A. 132-142) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2012. A petition for rehearing was denied on November 28, 2012 (J.A. 182). The petition for a writ of certiorari was filed on February 26, 2013, and was granted on October 21, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Wisconsin to one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. J.A. 144. He was sentenced to three years of probation and ordered to pay $218,952.18 in restitution to the victims of his scheme. J.A. 132-142. The court of appeals affirmed the restitution award except to the extent it included attorney's fees and certain expenses. J.A. 144-181.

1. The Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, requires a sentencing court to order restitution to victims when sentencing defendants for specified crimes, including "any offense committed by fraud or deceit" and other offenses against property. See 18 U.S.C. 3663A(c)(1)(A)(ii). The statute provides that, if the offense of conviction results in "damage to or loss or destruction of property of a victim of the offense," then "[t]he order of restitution shall require that such defendant * * * return the property to the owner of the property." 18 U.S.C. 3663A(b)(1)(A). The statute further provides that, when "return of the property * * * is impossible, impracticable, or inadequate," the defendant must be ordered to compensate the victim in other ways. 18 U.S.C. 3663A(b)(1)(B). In particular, a sentencing court must order a defendant to "pay an amount equal to":

> (i) the greater of—
>
> (I) the value of the property on the date of the damage, loss, or destruction; or
>
> (II) the value of the property on the date of sentencing, less

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

Ibid. This case concerns Section 3663A(b)(1)(B)(ii), which requires that the amount of restitution required be reduced by the "offset" value of any portion of the lost or damaged property that is returned to the victim.

2. Petitioner pleaded guilty to participating in a mortgage-fraud scheme that involved approximately 15 houses in a small geographic area in Walworth County, Wisconsin. J.A. 80-81, 147; see J.A. 13-16 (plea agreement). In furtherance of the scheme, petitioner's co-conspirators recruited straw buyers (including petitioner) to submit fraudulent mortgage-loan applications that materially misrepresented the straw buyers' incomes, qualifications, and intentions to live in the houses and repay the mortgages. J.A. 147. The fraudulent loan applications caused loan funds to be wired from lending institutions to settlement companies that closed the loans. *Ibid.* The sellers of the properties (at least some of who were in on the scheme) paid monies characterized as "consulting fees" to the two organizers who recruited petitioner. J.A. 14-15.

In exchange for payments from his co-conspirators, petitioner submitted fraudulent loan applications for two properties—900 Inlet Shores and 911 Grant Street. J.A. 81, 147-148. Using his own name, petitioner signed and submitted loan applications that misrepresented his income and assets as well as his intentions to repay the loans and to occupy the houses. J.A. 15, 148. Petitioner also signed the mortgage documents that resulted in the sale of the properties and the funding of the mortgages. *Ibid.* Based on petitioner's

misrepresentations, M.I.T. Lending/Challenge Financial Services approved a $330,000 mortgage note for the Inlet Shores property, and Paragon Lending approved a $141,000 mortgage note for the Grant Street property. J.A. 38, 60, 102, 148-149. Petitioner made no payments on either loan and the loans went into default. J.A. 16, 148. The lenders (or their successors in interest) foreclosed on the loans and ultimately resold the houses that had served as collateral. J.A. 38, 148-149.

3. Petitioner pleaded guilty to an information charging him with conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. J.A. 144. In his plea agreement, he admitted that restitution is mandatory "regardless of [his] financial resources" and "agree[d] to pay restitution as ordered by the court." J.A. 21.

Before sentencing, the probation office prepared a Presentence Investigation Report (PSR) that recommended that petitioner be required to pay $52,592 to Mortgage Guaranty Insurance Company (MGIC) (the ultimate victim of the fraud as to the Grant Street property) and $136,000 to American Portfolio (the ultimate victim of the fraud as to the Inlet Shores property). See J.A. 38-39.[1] Petitioner objected to the PSR's restitution recommendation, arguing that he should pay only $4800 because of his minimal role in the fraudulent scheme and his inability to pay the full amount recommended in the PSR. J.A. 29-32. Petitioner argued in the alternative that "the difference between the original loan amount and what the [fraud-

[1] The parties have agreed that the recommended amounts stated in the PSR were based on factual and calculation errors and should have been $52,952.18 and $166,000 instead. Pet. C.A. Br. 9 n.4; Gov't C.A. Br. 5 n.3; see J.A. 39, 56.

ulently obtained] propert[ies] sold for at a sheriff's sale is not caused by [petitioner's] crime" but was instead caused by factors such as "the housing market" or "the victim[s'] rush to cut their losses." J.A. 34-35.

At petitioner's sentencing hearing, the government presented evidence about the amount of money lost by the victims as a result of petitioner's fraud. See J.A. 53-131. With respect to the Grant Street loan, a representative of MGIC testified that at the time of default, the mortgage was owned by Fannie Mae (which had acquired it from the original lender) and insured against default by MGIC. J.A. 58-62, 148-149. After petitioner defaulted on the note and Fannie Mae acquired title to the Grant Street property, Fannie Mae submitted a claim for $159,214.91 to MGIC. J.A. 61-65, 149. Under the terms of its insurance agreement, MGIC had the option of either paying a percentage of Fannie Mae's claim or paying the full amount of the claim, acquiring the Grant Street property collateral, and then selling the collateral. J.A. 62, 65, 149. Using a computer model that predicts the best outcome for the company, MGIC chose to pay the full amount. J.A. 77, 149. After acquiring title to the Grant Street collateral, MGIC maintained the collateral and received periodic updates from its broker about the potential sales price of the house. J.A. 63-66, 70-71. MGIC ultimately sold the Grant Street collateral for $118,000. J.A. 66. Deducting expenses from the sale, MGIC's net gain from the sale was $107,908.93, which reduced its total loss resulting from petitioner's fraud to $52,952.18. J.A. 66-67, 149, 176.

With respect to the Inlet Shores loan, an agent from the Federal Bureau of Investigation testified that the original mortgage note was ultimately purchased by

American Portfolio for $330,000 (the amount of the original loan). J.A. 79, 86-89, 92, 149. The mortgage servicing company (Merrill Lynch Mortgage Lending) took title to the collateral when no one bid on the house during the sheriff's foreclosure sale. J.A. 89, 95-96. The house later sold for $164,000, resulting in a net loss to American Portfolio of $166,000. J.A. 87, 90, 149.

At the hearing, petitioner renewed his argument that the restitution amount should be reduced because he played only a minor role in the offense and could not afford to pay more than a few thousand dollars. J.A. 111-113. He also argued generally that the victims' losses were caused by "the real estate market" rather than petitioner's fraud. J.A. 113-114. The district court rejected petitioner's arguments, holding petitioner jointly and severally liable for the full amount of the victims' losses. J.A. 117-121. The court explained that, "[w]ithout [petitioner's] participation, these properties wouldn't have been sold to these victims in the fashion that they were." J.A. 117. The district court thus ordered petitioner to pay $218,952.18 in restitution—$52,952.18 to MGIC and $166,000 to American Portfolio—pursuant to the MVRA. J.A. 117, 121, 138-139; see J.A. 129-130 (joint and several liability).

4. The court of appeals affirmed the district court's calculation of the restitution (with the exception of its inclusion of attorney's fees and certain expenses, which are not at issue here). J.A. 144-181. For the first time, petitioner argued on appeal that Section 3663A(b)(1)(B)(ii) required the district court to offset the victims' losses by the value of the collateral at the time the victims took title to the houses

rather than by the amount of money the victims ultimately recouped when they sold the houses. Pet. C.A. Br. 21-36; see J.A. 150. The court of appeals rejected that argument, holding that "in calculating a restitution award where, as in this case, cash is the property taken, the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold." J.A. 152.

The court of appeals relied on "the plain language of the MVRA" and its use of the phrase "the property" in particular. J.A. 151-154. The court noted that the offset provision in Section 3663A(b)(1)(B)(ii) applies when there is "damage to or loss or destruction of property of a victim of the offense." J.A. 152-153 (quoting 18 U.S.C. 3663A(b)(1)). The references thereafter to "the property," the court of appeals reasoned, "must" refer to "the property originally taken from the victim." J.A. 152. In this case, "the property taken from the victims was cash," not the real estate that served as collateral for the loan of cash. J.A. 153. The court thus explained that "the property" taken through fraud is "returned" to the victim only when the victims get cash back. *Ibid.* In statutory terms, the court of appeals held that the offset provision's direction that the restitution award be reduced by "the value (as of the date *the property* is returned) of any part of *the property* that is returned" requires that the restitution award be reduced by the amount of money the victims recouped upon selling the collateral rather than by some measure of the value of the collateral when the victims took title to the houses. J.A. 152-153 (quoting 18 U.S.C. 3663A(b)(1)(B)(ii)). Because money is liquid and real estate is not, the court explained, "[t]he two cannot be equated." J.A. 153.

The court of appeals further explained that its reading of the statutory text made sense in light of the structure and purpose of the MVRA. J.A. 151-157. As the court noted, under its interpretation of the MVRA, "the phrase 'the property' [has] a consistent meaning throughout the statute: It always means 'the property stolen.'" J.A. 153. In contrast, the court noted, petitioner would "give the phrase 'the property' a different meaning within the same statutory section." *Ibid.* The court also explained that its view is "consistent with" the "MVRA's overriding purpose" of "compensat[ing] victims for their losses." J.A. 154 (citation omitted). In contrast, "victims would not be made whole again" under petitioner's view "because the eventual sales proceeds could be, as they were in this case, woefully inadequate to fully compensate the victims for their loss and to put them in the position they would have been absent the fraud." J.A. 155.

The court of appeals also rejected petitioner's argument that the district court's ruling "makes him the insurer of real estate values and improperly holds him responsible for declines in the real estate market." J.A. 155. As the court of appeals explained, petitioner's fraud "actually caused the losses at issue here" because, "[a]bsent his fraudulent loan applications, the victim lenders would not have loaned the money in the first place," the mortgage notes "would not have been extended, not paid, and then defaulted upon," and "the banks would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value." *Ibid.* The court rejected petitioner's contention that "[t]he decline in the real estate market * * * mitigate[d] his fraud" because,

"[a]bsent [petitioner's] fraud, the decline in the real estate market would have been irrelevant." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner seeks to reduce his restitution obligation by claiming an offset for the "return" of "the property" he fraudulently acquired. But none of the property petitioner acquired through fraud was returned to the victims when they foreclosed on the collateral securing the fraudulently obtained loans. Petitioner obtained *money* through his fraud and the victims did not receive *money* until the collateral was sold.

A. When a covered crime results in a victim's loss of property, the MVRA requires the defendant to return the lost property to his victim. If return of the property in full is not possible, the MVRA requires the defendant to pay the victim for the value of the lost property and allows an offset for the value of "any part of the property" that is returned to the victim. 18 U.S.C. 3663A(b)(1)(B). Because the victims of petitioner's mortgage-fraud scheme lost money as a result of petitioner's offense, no "part of the property" that was lost was returned to them until they received money from selling the collateral. Section 3663A(b)(1) addresses the treatment of property lost by a victim and every reference to "the property"—including Section 3663A(b)(1)(B)(ii)'s reference to "any part of the property that is returned"—is a reference to the property that was lost, not to any substitute property.

Petitioner's contrary reading of the statutory text is incorrect. Read in context, the reference in Section 3663A(b)(1) to some or all of the property that is "returned" is plainly a reference to some or all of the property that was lost as a result of the criminal conduct and that is later returned to the victims. That

meaning is consistent with Section 3663A(b)(1)(B)'s application to situations in which the return of the lost property is impossible, impracticable, or inadequate. Subparagraph (i) addresses situations in which none of the lost property can be returned and Subparagraph (ii) addresses situations in which either some (but not all) of the lost property can be returned or return of the original property is inadequate to compensate the victim because, *e.g.*, it has been damaged. Throughout both subparagraphs, "the property" referred to is the property that was lost.

B. The government's interpretation of Section 3663A(b)(1)(B) is consistent with the structure of the MVRA more generally. Section 3663A governs the substantive calculation of a defendant's restitution obligation. Section 3664 governs the procedures and means of enforcing that obligation. Different considerations are appropriate under each statute. Though a court may order a defendant to satisfy his restitution obligation with substitute property under Section 3664, it may not grant an offset for substitute property when calculating the restitution amount that is due under Section 3663A.

C. Petitioner's interpretation of Section 3663A would also undermine the MVRA's purpose of efficiently assuring that crime victims receive full restitution. A lender that is fraudulently deprived of money is not restored to its pre-fraud state until it gets that money back; the collateral is not the same until it is sold. Nor does this view of Section 3663A(b)(1)(B)(ii) lead to anomalous results. A victim of mortgage fraud has every incentive to maximize the money it receives from foreclosed real estate and any increase in value the collateral gains between foreclosure and resale

will inure to the benefit of both the victim and the defendant. Under petitioner's view, in contrast, victims of mortgage fraud must bear the full burden of any loss in value while defendants will enjoy the benefit of any gain.

D. Petitioner further errs in arguing that the district court should have valued the offset as of the time the lenders took title to the houses because petitioner's criminal scheme did not directly and proximately cause the loss in value of the houses from that moment to the moment of their resale. The chain of causation from petitioner's fraud to the victims' ultimate loss is clear and direct. Petitioner is incorrect that his victims' acquisition of the collateral through foreclosure was an intervening event that broke the chain of causation. If not for petitioner's fraud, the victims would not have loaned him the money, would not have taken title to the houses when he defaulted on the loans, and would not have had to sell the houses in a declining market. Petitioner's criminal conduct was a direct and proximate cause both of the victims' losses and of the relevance of the declining market to the offset calculation.

E. Petitioner errs in relying on principles of mortgage and foreclosure law. The MVRA's broadly applicable provisions—which apply notwithstanding any other provision of law—should not be distorted to accommodate mortgage principles. Petitioner is, moreover, incorrect that a lender who forecloses has agreed that the collateral is equal in value to the outstanding loan proceeds. Foreclosure is tantamount to a settlement of some or all of the lender's civil claim. The MVRA specifically takes account of the possibility that crime victims will receive some compensation for

their losses and forbids a sentencing court from taking such compensation into account in determining the amount of restitution due. Foreclosure proceedings should receive the same treatment.

F. Finally, petitioner's reliance on the rule of lenity is unavailing because Section 3663A(b)(1)(B)(ii)'s text is not ambiguous at all, let alone grievously so.

ARGUMENT

WHEN A DEFENDANT FRAUDULENTLY OBTAINS LOAN FUNDS TO PURCHASE A HOUSE AND THE VICTIM LENDER SUBSEQUENTLY OBTAINS THE HOUSE THROUGH FORECLOSURE, A DISTRICT COURT SHOULD OFFSET THE AMOUNT OF RESTITUTION DUE BY THE AMOUNT OF MONEY THE LENDER ULTIMATELY OBTAINS BY RESELLING THE HOUSE

Petitioner was convicted of conspiring to fraudulently obtain money from lenders so that he could purchase two houses. The loss his victim lenders suffered was a loss of money, not a loss of the houses, which the lenders did not own before petitioner's fraud and had no intention of ever buying. The MVRA requires a district court to order a defendant who has committed a fraud crime to pay restitution to his victims in "the full amount of each victim's losses." 18 U.S.C. 3663A(a)(1), 3664(f)(1)(A). When petitioner's victims took title to petitioner's houses through foreclosure proceedings, petitioner did not return any part of the property his victims lost as a result of his fraud—*i.e.*, money. The victims recouped their lost property when they later sold the houses petitioner purchased with their money. The district court correctly determined the amount of offset to be applied against petitioner's restitution amount as the amount of money the victims recouped when they sold the houses.

A. Under The Plain Text Of The MVRA, The Proper Measure Of The Offset Amount Is The Amount Of Money The Victims Received When They Sold Petitioner's Houses

Congress enacted the MVRA to make restitution mandatory for all victims of specified crimes, without regard to the defendant's ability to pay. See S. Rep. No. 179, 104th Cong., 1st Sess. 18-21 (1995) (1995 Senate Report). Section 3663A specifies the crimes for which restitution is mandatory and dictates the manner in which a sentencing court should determine the amount of a victim's loss. 18 U.S.C. 3663A. Section 3664 generally specifies the procedures available for issuing and enforcing an order of restitution. 18 U.S.C. 3664.

1. The MVRA provides that, "when sentencing a defendant convicted of" specified offenses (including fraud), a district court "shall order * * * that the defendant make restitution to the victim of the offense" in "the full amount of each victim's losses." 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii), 3664(f)(1)(A). When a victim suffers a "loss * * * of property" as a result of the offense of conviction, the MVRA requires the defendant to "return the property to the owner of the property." 18 U.S.C. 3663A(b)(1)(A). In this case, institutional lenders (and their successors in interest) suffered a loss of money as a result of petitioner's fraud. In the normal course, the MVRA would thus require petitioner to "return the property"—*i.e.*, the money—to his victims. 18 U.S.C. 3663A(b)(1)(A). Because petitioner does not have the amount of money that he stole from his victims, "return of the property" he obtained through fraud "is impossible [or] impracticable." 18 U.S.C. 3663A(b)(1)(B). In such a situation, the MVRA requires that a defendant pay restitu-

tion in an amount "equal to * * * the greater of * * * the value of the property on the date of the * * * loss" or "the value of the property on the date of sentencing." 18 U.S.C. 3663A(b)(1)(B)(i)(I) and (II). But when "any part of the property" is returned to the victim, the amount of restitution the defendant owes must be reduced (or offset) by "the value (as of the date the property is returned)" of the portion of the property that is returned. 18 U.S.C. 3663A(b)(1)(B)(ii). The question in this case turns on the meaning of the phrase "any part of the property that is returned" in Section 3663A(b)(1)(B)(ii).

In determining the meaning of a statutory provision, courts must "look first to the language of the statute itself." *Hughey* v. *United States*, 495 U.S. 411, 415 (1990); see *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). The plain text of Section 3663A unambiguously dictates that, when a defendant gives his victim (or allows his victim to acquire) substitute property that is different from the property the victim lost as a result of the defendant's crime, he has not "returned" "any part of the property" that was lost for purposes of the MVRA. 18 U.S.C. 3663A(b)(1)(B)(ii). Section 3663A(b)(1) governs situations in which a defendant's crime caused "damage to or loss or destruction of property." Every reference in that subsection to "the property" therefore refers to the property the victim lost. See *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). A defendant cannot satisfy the statute's command that,

when a victim has lost property, a defendant must "return the property to the owner of the property" by giving the victim some other property. 18 U.S.C. 3663A(b)(1)(A) and (B). If a defendant fraudulently obtains a victim's gold necklace, for example, the defendant does not "return the property to the owner of the property" (for purposes of the MVRA or for purposes of normal English parlance) by keeping the necklace and instead giving the victim a gold bracelet or a valuable stamp collection. If the defendant has the property he stole, he must return it to the victim—because "the property" in Section 3663A(b)(1)(A) refers to the property that was lost.

The same is true of Section 3663A's treatment of lost property that cannot be returned to the victim. When lost property cannot be returned at all, a defendant must pay the victim the greater of the value of the property when taken or the value of the property at sentencing. 18 U.S.C. 3663A(b)(1)(B)(i). Sometimes, property that is lost can be returned in part. For example, if a defendant fraudulently obtained a gold necklace and a gold bracelet and then gave the necklace to a third party in exchange for a stamp collection, it would be impossible or impracticable for the defendant to return the necklace to the victim. But he could return the bracelet—and if he did so, he would be entitled to an offset for "the value (as of the date the property is returned) of [the] part of the property that is returned" (*i.e.*, the bracelet). 18 U.S.C. 3663A(b)(1)(B)(ii). He would not be entitled to an offset equal to his victim's entire loss, however, if he returned the bracelet and gave the victim the stamp collection he obtained in exchange for the stolen necklace. Because the stamp collection would not be "any

part of the property" stolen, it would not qualify for an offset under Section 3663A(b)(1)(B)(ii).

2. In this case, petitioner fraudulently obtained money from his victims (or their predecessors in interest). Thus, for purposes of the MVRA (and common sense), the "property" the victims lost was money, and petitioner is entitled to an offset only for the amount of money that was returned to the victims. Of course, petitioner never directly returned any portion of the money he fraudulently obtained to the victims or their successors in interest. Instead, the victims obtained title to the houses that petitioner purchased with their money. That collateral was used to secure the loans petitioner fraudulently obtained; it was not the property that was lost as a result of the fraudulent scheme. If it had been, petitioner's restitution debt would have been fully satisfied when the lenders took title to the houses.

When each victim took title to the houses petitioner had purchased, no "part of the property" that was lost was "returned." 18 U.S.C. 3663A(b)(1)(B)(ii). At that moment, each victim received something else altogether—an illiquid asset that may be converted into liquid funds only after the investment of time and resources. Although the houses at issue in this case undoubtedly had monetary value when the victims took title to them, no part of the property they lost because of petitioner's scheme was returned to them until they later sold the houses in exchange for money. The district court therefore properly calculated the offset due under Section 3663A(b)(1)(B)(ii) as the proceeds the victims recouped when they sold the properties after foreclosure.

Petitioner errs in contending (Br. 34-36) that, for purposes of the MVRA, he returned "the identical property that the victim[s] originally lost" when his victims took title to the collateral because the houses "temporarily" "store" the money's "value," if in a different "form." Br. 35. The money and the houses are not the same; petitioner took the money from the lenders and used it to purchase the houses. It is nonsensical to determine the "value" of the money according to the value of the houses. The money is worth what the money is worth—and no money is returned until some money is returned. There is equally little merit to petitioner's contention (Br. 23 n.9, 36) that the money he fraudulently obtained was no more liquid than the houses he purchased with it because he was obligated to use the money to purchase the houses. Under the MVRA, what is relevant is the value of the lost property to the victims, not to the defendant. Regardless of how liquid the money was from petitioner's perspective, it was perfectly liquid to the banks before he took it.

3. Petitioner's contrary reading of Section 3663A's text is mistaken in several respects.

First, petitioner argues (Br. 18-19) that the word "return" need not connote "the return of items formerly in another person's possession, but can include the giving of property to replace property previously received from that person." Br. 18. Although it is true that "return" may be used to convey that broader meaning, "[t]he ordinary meaning of 'return' is 'to bring, send, or put (a person or thing) back to or in a former position.'" *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (quoting *Webster's Third New International Diction-*

ary 1941 (1986)); see also *Merriam-Webster's Collegiate Dictionary* 1001 (10th ed. 1999) (defining "return" as "to restore to a former * * * state"). In construing any word's meaning in a statutory provision, this Court "follow[s] 'the cardinal rule that statutory language must be read in context [because] a phrase gathers meaning from the words around it.'" *Hibbs* v. *Winn*, 542 U.S 88, 101 (2004) (quoting *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596 (2004)). As petitioner correctly points out, the word "return" cannot mean "return of items formerly in another person's possession," Br. 18, when it is used in a phrase such as "the grand jury returned an indictment." But when a person states that he "returned a sweater to a department store," everyone understands him to mean that he returned a sweater that formerly belonged to that store. A man could not purchase a pair of pants from a store and later "return" a sweater, expecting to receive in exchange the money he paid for the pants. In both examples, context gives meaning to the word "returned."

In the context of Section 3663A, Congress plainly intended the word "return" to mean "return to a victim property that the victim formerly had possession of." That meaning is apparent in Congress's use of the phrase "the property" every time it uses a form of the verb "return." 18 U.S.C. 3663A(b)(1)(A) and (B). As discussed, "the property" referenced in Section 3663A(b) is the property that was lost by the victim as a result of a defendant's criminal offense. In that context, references to a "return" of "the property" are limited to actions that actually restore possession of the lost property to the victim. When a defendant gives his victim a horse instead of the car that he

fraudulently obtained from the victim, he may compensate the victim for her loss, but he does not "return the property" (or "any part of the property") that was "damage[d]" or "los[t]" or "destr[oyed]." 18 U.S.C. 3663A(b)(1), (b)(1)(A), and (b)(1)(B)(ii). The same is true here: because the houses petitioner purchased were not any part of the property he fraudulently obtained from his victims, no part of the relevant property was returned to the victims when they took title to the houses.

Second, petitioner argues (Br. 19) that Congress's use of the word "any" in the phrase "any part of the property that is returned" means that a defendant may substitute any thing of value for the property that was lost. That argument fails for the same reason. Even under the most expansive interpretation of the word "any," a house is not "any part of the property" petitioner fraudulently obtained from his victims, who lent him money.

Third, petitioner argues (Br. 17-18, 21) that Congress's use of the passive phrase "is returned" somehow indicates that a victim's acquisition of substitute property that once belonged to a defendant qualifies as a "return[]" of "any part of the property" that was lost. 18 U.S.C. 3663A(b)(1)(B)(ii). By using the passive voice, however, Congress merely intended to cover situations (such as this one) in which a victim indirectly reacquires some or all of the property a defendant took from it. Here, for example, petitioner's victims had some part of the property they lost returned to them when they sold the houses to which they had obtained title through foreclosure. Although petitioner did not himself return any lost property to his victims, Congress's use of the passive voice en-

sures that he nevertheless is entitled to an offset for the portion of the money his victims were able to recoup on their own. But that phrasing does not alter the meaning of "the property," which refers only to the property that was lost.

Finally, petitioner errs in arguing (Br. 21-25) that the phrase "the property" in Section 3663A(b)(1)(B)(ii) refers to substitute property because it applies only when the return of the original property is impossible, impracticable, or inadequate. Paragraph (B) of Section 3663A(b)(1) applies in situations in which "return of the property" that was lost as a result of a defendant's offense is "impossible, impracticable, or inadequate" and Subparagraph (i) generally requires a defendant to compensate his victims for the value of the lost property. 18 U.S.C. 3663A(b)(1)(B)(i). But property that is lost as a result of a crime often can be returned in part even when return of the full property is impossible, impracticable, or inadequate. And Subparagraph (ii) applies in those cases, requiring a defendant to return "any part of the [lost] property" he can and providing an offset for the return of that portion of the property. 18 U.S.C. 3663A(b)(1)(B)(ii).

Although petitioner acknowledges the possibility that Subparagraph (ii) applies where a "defendant has disposed of some of the original property but has kept some other divisible part," he dismisses that straightforward interpretation of the statutory language because it would have only "a narrow range of application." Br. 23. Nothing in the statute indicates that every subparagraph should apply in every case—each provision applies to the set of cases it describes and Subparagraph (ii) applies when it is possible to return "any part of the property" that was damaged, lost, or

destroyed, but not all of it. 18 U.S.C. 3663A(b)(1)(B)(ii). Because Section 3663A applies to "any offense committed by fraud or deceit," 18 U.S.C. 3663A(c)(1)(A)(ii), moreover, it covers a large number of crimes resulting in a loss of money (or other fungible property) by the victim. In such cases, a defendant may well have retained a portion of the ill-gotten gains at the time of prosecution or sentencing.

Subparagraph (ii) also applies when property was damaged (but neither lost nor destroyed) as a result of a defendant's crime. In those cases, a defendant can return the original (damaged) property to the victim, but such property may be "inadequate" to compensate the victim for the full amount of its loss. 18 U.S.C. 3663A(b)(1)(B). Section 3663A would require a defendant to compensate the victim for the remaining value of the loss, but would also offset a restitution award by an amount equal to the value of the returned (damaged) property.[2] See S. Rep. No. 532, 97th Cong., 2d Sess. 32 (1982) ("The property restoration provision should require either that the condition of the returned property be at least as good as it was at the time of the offense, or that the defendant should pay for restoring it to that condition.") (in reference to MVRA's predecessor law, which contained substantively identical language).

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[2] Petitioner errs in contending that the original property that was taken from the victims in this case—in petitioner's words, "the money loaned to [petitioner] in 2005"—"was not returnable and was not returned." Br. 25. As this Court has repeatedly recognized, "[m]oney is fungible." *Ransom* v. *FIA Card Servs., N.A.*, 131 S. Ct. 716, 729 (2011); *Sabri* v. *United States*, 541 U.S. 600, 606 (2004). Because one dollar is the same as any other dollar, repayment of misappropriated cash by any other cash qualifies as the return of the ill-gotten money.

B. The Structure Of The MVRA Confirms That The Property That Is Taken From A Lender In A Mortgage-Fraud Case Is Returned To The Lender Only When The Lender Sells Collateral It Obtained Through Foreclosure

Petitioner relies (Br. 25-28) on Section 3664's allowance of in-kind payments to satisfy a defendant's restitution obligation, arguing that it would be "bizarre" to allow such payments after sentencing but not before. Br. 27. In so arguing, petitioner misapprehends the distinct functions of Sections 3663A and 3664. As this Court explained (with reference to substantively identical provisions of the MVRA's predecessor) in *Hughey*, Section 3663A (formerly 18 U.S.C. 3579 (1982)) determines "the *amount* of restitution" a defendant may be required to pay to compensate his victim's losses while Section 3664 (formerly 18 U.S.C. 3580 (1982)) "delineates '[p]rocedure[s] for issuing order[s] of restitution.'" 495 U.S. at 418 (brackets in original). Section 3663A ties the amount of restitution to the amount of loss a victim suffers because of a defendant's crime. Section 3664 dictates how a court may ensure that a defendant actually pays the amount due under Section 3663A.

Petitioner is correct (Br. 25-26) that Section 3664 permits a district court to order a defendant to fulfill a restitution order with "in-kind payments," including "replacement of property." 18 U.S.C. 3664(f)(3)(A) and (4)(B). As petitioner acknowledges (Br. 27), however, the provisions of Section 3664 do not govern the calculation of restitution under Section 3663A. See *Hughey*, 495 U.S. at 418 ("[I]t would be anomalous to regard [Section 3664], which delineates '[p]rocedure[s] for issuing order[s] of restitution,' rather than [Sec-

tion 3663A], which governs the court's authority to issue restitution orders, as fixing the substantive boundaries of such orders."). Indeed, far from supporting petitioner's interpretation of Section 3663A, Congress's allowance of in-kind payments in Section 3664 and omission of such payments in Section 3663A strongly indicate that Congress did not intend such payments to be included in the calculation of an offset under Section 3663A(b)(1)(B)(ii). See *Nken* v. *Holder*, 556 U.S. 418, 430 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)).

Section 3664's allowance of in-kind payments as one payment option reflects Congress's judgment that, although a sentencing court must order restitution "in the full amount of each victim's losses * * * without consideration of the economic circumstances of the defendant," 18 U.S.C. 3664(f)(1)(A), "[u]pon determination" of that amount, the court must consider the defendant's economic circumstances in fashioning "the manner in which, and the schedule according to which, the restitution is to be paid," 18 U.S.C. 3664(f)(2). The offset in Section 3663A(b)(1)(B)(ii) is a tool for determining the full amount of each victim's actual losses. It does not consider any in-kind compensation a victim may have received. The same is true with respect to a victim's receipt of "compensation with respect to a loss from insurance or any other source"—a court may not consider such compensation "in determining the amount of restitution," 18 U.S.C.

3664(f)(1)(B), but must credit "any amount later recovered as compensatory damages for the same loss by the victim in" any federal or state civil proceeding against the restitution award, 18 U.S.C. 3664(j)(2). Neither an insurance payment for stolen property nor an in-kind payment of substitute property (such as collateral) restores "the property" that was lost to a victim. Thus, neither is considered in measuring a victim's loss. But because both types of payment have value, they may be credited against a defendant's ultimate restitution obligation.

C. The Purpose Of The MVRA Confirms That The Property That Is Taken From A Lender In A Mortgage-Fraud Case Is Returned To The Lender Only When The Lender Sells Collateral It Obtained Through Foreclosure

Petitioner's approach is also inconsistent with the "substantive purpose" of the MVRA "to assure that victims of a crime receive full restitution" for the losses caused by the defendant's offense. *Dolan* v. *United States*, 130 S. Ct. 2533, 2539 (2010); see *Hughey*, 495 U.S. at 416 ("[T]he ordinary meaning of 'restitution' is restoring someone to a position he occupied before a particular event.").

1. When an institutional lender is wrongfully deprived of money by a defendant's scheme, the lender's possession of other property—even collateral that secured the fraudulent loan—does not restore the victim to its pre-crime state and thus does not erase the victim's loss for purposes of the MVRA. Nor does mere possession by the lender of title to the collateral partially offset the victim's loss—because a lender cannot extract value from the foreclosed property until the property is sold. See J.A. 153 ("The victim-lender was defrauded out of cash and wants cash back; the victim

does not want the houses and they do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale."). Valuing surrendered collateral when the lender sells it rather than when foreclosure occurs effectuates the purpose of the MVRA because only when the lender recoups the sale proceeds is "any part of the property" the lender lost returned to it. 18 U.S.C. 3663A(b)(1)(B)(ii).

Although petitioner submits that the district court should have valued the offset as the value of the collateral at the time of foreclosure, he does not spell out how that "value" should be measured. His argument suggests (see Br. 31), however, that the court should have used the foreclosure sales prices. But the foreclosure prices neither capture the real value of the collateral at that time nor (more importantly) accurately reflect the value of the collateral to the victims. See Catharine M. Goodwin, *Federal Criminal Restitution* § 7.7, at 269 (2013 ed.) (noting that, under the MVRA, "courts generally look to what measure of value would best restore or compensate the victim to the victim's pre-offense condition"). That value is accurately measured as the price for which the lenders later sell each house.

Fair market value reflects "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." *Black's Law Dictionary* 1691 (9th ed. 2009); see also Restatement of Restitution § 151 cmt. b (1937) ("The value of property is its exchange value measured in money, or the amount for which it could be exchanged if there were an open market with a wide opportunity for buyers."). But as this Court has acknowledged, "market value, as it is commonly understood, has no

applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); see *id.* at 538 ("In short, 'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale."). Relying on the assessed value of property at the time of foreclosure would also be an unreliable method of determining the value of collateral to a victim lender. As the court of appeals correctly explained, "real property is not liquid and, absent a huge price discount, cannot be sold immediately." J.A. 163. Any reconstructed appraisal at the time of foreclosure is therefore unlikely to capture the relevant liquidity value of collateral to the lender.

2. Petitioner's construction of Section 3663A's offset provision is also inconsistent with Congress's intent to avoid prolonged or unnecessarily complicated sentencing proceedings. In enacting the MVRA, Congress sought not only to ensure "full restitution to all identifiable victims of covered offenses" but also to "guarantee[] that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings." 1995 Senate Report 18; see also *id.* at 19 ("In all cases, it is the committee's intent that highly complex issues related to the cause or amount of a victim's loss not be resolved under the provisions of mandatory restitution."). In contrast to the relative ease of calculating the offset by using the actual sale price of the collateral, petitioner's approach would require sentencing courts to estimate the value of the collateral at a time when it was not sold under normal market conditions (itself a difficult undertaking) and at a time that is

potentially years before the date of the restitution hearing.

Petitioner argues (Br. 39) that valuing collateral at the time a lender sells it would undermine the MVRA's efficiency purpose because such a sale might take place "years" after sentencing. The factual premise of petitioner's argument is mistaken. In a typical mortgage-fraud case (as here), a lender will foreclose on a house and resell it long before a defendant is convicted and sentenced for the underlying fraud. See Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 Loy. Consumer L. Rev. 562, 570 n.47 (2012) (Renuart) (noting that nearly 80% of homes purchased at foreclosure by banks in 2006 were resold within a year).[3] In the unusual case in which a

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[3] Petitioner cites (Br. 39) two cases to support his claim that victims may wait years before selling the collateral—but neither case supports his claim that any delay in reselling collateral will undermine the purposes of the MVRA. The two-year wait in *United States* v. *Hutchinson*, 22 F.3d 846, 856 (9th Cir. 1993), abrogated on other grounds by *United States* v. *Wells*, 519 U.S. 482 (1997), occurred not only before sentencing, but also before the operative indictment was filed. See Appellant's Br. at 2-3, 31-32, *United States* v. *Hutchison*, 983 F.2d 1497 (9th Cir.), superseded by 22 F.3d 846 (9th Cir. 1993) (Nos. 91-10225, 91-10598). And the Fifth Circuit's decisions in *United States* v. *Holley*, 23 F.3d 902 (*Holley I*), cert. denied, 513 U.S. 1043 (1994); 149 F.3d 1178, 1998 WL 414260 (July 9, 1998) (*Holley II*), illustrate the difficulties inherent in petitioner's reading of the MVRA. In *Holley I* (a case governed by the MVRA's predecessor statute and involving a fraudulent scheme to finance the purchase of a shopping center), the court of appeals agreed with petitioner's interpretation and held that the lost property was returned when the victim purchased the collateral at a trustee's sale. 23 F.3d at 914-915. On remand, however, the district court valued the offset as the amount the victim sold

lender has not yet sold the collateral by the time of sentencing, the district court may sentence a defendant while postponing the entry of a restitution order until the sale takes place. See *Dolan*, 130 S. Ct. at 2539-2540; *United States* v. *Bowling*, 619 F.3d 1175, 1187 (10th Cir. 2010) (approving district court's retaining jurisdiction to modify the restitution order as necessary upon victim's further recovery of property). The MVRA "provides adequate authority to * * * essentially fill in an amount-related blank in a judgment that ma[kes] clear that restitution [is] applicable." *Dolan*, 130 S. Ct. at 2544 (internal quotation marks omitted).

3. Petitioner errs in contending (Br. 36-40) that the court of appeals' interpretation of Section 3663A(b)(1)(B) will create anomalous results that undermine the statute's purposes.

First, petitioner is incorrect (Br. 38-40) that measuring the amount of "the property" that "is returned" to a lender under Section 3663A(b)(1)(B)(ii) as the proceeds from a post-foreclosure sale will produce windfalls for victims in mortgage-fraud cases. If sale

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the collateral for six years after taking title to it. The court of appeals affirmed in *Holley II*. The court rejected the defendant's argument that the district court should have relied on appraisals of the collateral's worth at the time the victim took title to it, explaining that neither the foreclosure sale price nor the defendant's appraisals reliably determined the collateral's value. The court found "no evidence that anyone was willing to purchase the property for any amount of money, prior to its sale" by the victim and approved the district court's finding that, "by holding onto the property through the nadir of the Texas real estate market, the bank was able to command a higher price in 1993 than it would have received in 1987," thereby increasing the defendant's offset. *Holley II*, 1998 WL 414260, at *1-*2.

proceeds exceed the amount of money a victim lender lost, a court cannot order the defendant to pay any amount of restitution *for that loss*. See *United States* v. *Boccagna*, 450 F.3d 107, 117 (2d Cir. 2006) ("[The court] cannot award the victim 'a windfall,' i.e., more in restitution than he actually lost."). In contrast, under petitioner's view, any increase in the value of collateral between foreclosure and later sale seemingly could not be included in the offset even though the victim will have recouped (in cash) an amount equal to the increase in value. If the ultimate sales price could not be credited against restitution, it *would* award a windfall to victims at the expense of defendants. See J.A. 156-157 (explaining that the MVRA cannot be interpreted as "a one-way ratchet" pursuant to which "the victimizers," and not "the victims" would always have the advantage) (citations omitted).

Second, none of the hypothetical situations petitioner posits (Br. 36-37) would undermine the purposes of the MVRA under the government's view. Petitioner first imagines (*ibid.*) a consumer who spends $20,000 to purchase a car with a rolled-back odometer that is actually worth only $16,000. Petitioner misunderstands the operation of Section 3663A in contending (Br. 37) that calculation of the appropriate restitution would vary depending on how much the consumer later resold the car for. In petitioner's hypothetical, the victim consumer was not fraudulently deprived of $20,000 that the fraudulent dealer promised to pay back. The victim consumer was fraudulently deprived of a car worth $20,000 when she instead received a car worth only $16,000. Her loss is therefore easy to

calculate ($4000) and the offset provision in Section 3663A(b)(1)(B)(ii) does not apply.[4]

Petitioner's fanciful hypothetical (Br. 37) about a "remorse-stricken arsonist" who volunteers a cash payment to his victim also would not lead to an untoward result under the government's interpretation of Section 3663A(b). The victim's actual loss under Section 3663A(b)(1)(B) is the value of his destroyed home; the defendant's cash payment does not offset that amount. Once that value is determined, however, a defendant would get *credit* for that cash payment against his restitution obligation to prevent double recovery to the victim. See *United States* v. *Bright*, 353 F.3d 1114, 1121 (9th Cir. 2004) ("In its current form, § 3664 directs the court to order restitution of the full amount of a victim's loss * * * *without regard to other sources of compensation for the victims*. Any such offsets are instead to be handled separately as potential credits against the defendant's restitution obligation—not as reductions in the amount of that obligation in the first instance."); see also *United States* v. *McDaniel*, 398 F.3d 540, 554-555 (6th Cir. 2005) (holding that, because the MVRA does "not permit victims to obtain multiple recoveries for the same

[4] To alter the hypothetical somewhat, if a defendant stole a woman's car and the woman received an insurance payment for that car, the victim of the property crime would be the insurance company—and the victim's lost property would be money. If the stolen car were later recovered and handed over to the insurance company, calculation of the company's losses for restitution purposes should be offset by the price for which the company later sells the car. See *United States* v. *Mahone*, 453 F.3d 68, 73-74 (1st Cir. 2006) (approving offset based on the money the insurer received from selling the recovered car rather than the car's suggested retail value on the date it was returned to the victim).

loss," the district court must reduce defendant's restitution amount by the amount already paid as restitution to victims in state-court actions).

D. Petitioner Directly And Proximately Caused The Victim Lenders' Losses, Including Those Reflected In The Collateral's Loss Of Value

1. Petitioner also argues (Br. 28-30) that a court may not order him to pay the difference between the value of the collateral at the time of foreclosure and its later sale price because his criminal scheme was not the "cause" of the drop in value. Petitioner is incorrect. The MVRA incorporates traditional criminal-law principles of causation. The term "victim" for restitution purposes is defined as "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). And the statute provides that the government bears "[t]he burden of demonstrating the amount of loss sustained by a victim as a result of the offense." 18 U.S.C. 3664(e). The word "result" "plainly suggests causation." *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 690 (2012).

Criminal law generally analyzes questions of causation under the rubric of both "cause in fact" and "'legal' or 'proximate' cause." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003). Petitioner does not appear to dispute that his fraudulent scheme was a "cause in fact" of the victims' losses and of the reduced amount of money returned to the victims because of the downturn in the housing market. If not for petitioner's fraud, the lenders would not have loaned him hundreds of thousands of dollars and would not have found themselves in possession of the houses he purchased with that money. *Ibid.* (noting

that "cause in fact * * * usually (but not always) means that but for the conduct the result would not have occurred"). Petitioner mistakenly argues (Br. 28-30), however, that his fraud was not the legal or proximate cause of the reduction in money returned to his victims because of the houses' depreciation between the foreclosures and subsequent sales.

"[T]he phrase 'proximate cause' is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011). The Court generally uses the phrase "to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). This Court has treated proximate cause as "a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (quoting *Holmes*, 503 U.S. at 272 n.20). Each articulation of proximate cause is intended to "guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 537 (1983). In the case of the restitution remedy under the MVRA, the appropriate test must reflect Congress's intent to fully compensate victims for their losses, while enabling sentencing courts to expeditiously determine restitution by excluding losses that are only tenuously linked to the offense. See *Holmes*, 503 U.S. at 268 ("At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possi-

ble and convenient.'") (quoting William P. Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 264 (5th ed. 1984)).

Courts of appeals applying the MVRA's proximate-cause requirement—like Justices of this Court in other contexts—have characterized the proximate-cause inquiry in different ways. Some have required a "'direct relation[ship] between the injury asserted and the injurious conduct alleged,'" *United States* v. *Church*, 731 F.3d 530, 538 (6th Cir. 2013) (quoting *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 9 (2010)), rejecting a "link that is 'too remote,' 'purely contingent,' or 'indirec[t],'" *United States* v. *Evers*, 669 F.3d 645, 659 (6th Cir. 2012) (quoting *Holmes*, 503 U.S. at 268, 271, 274) (brackets in original). Others have considered whether an injury was a "foreseeable" consequence of a defendant's wrongful act. See *United States* v. *Marino*, 654 F.3d 310, 324 (2d Cir. 2011); see also *McBride*, 131 S. Ct. at 2652 (Roberts, C.J., dissenting); *Hemi Grp., LLC*, 559 U.S. at 22-23 (Breyer, J., dissenting); see also Pet. Br. 29. And others have looked to whether there was an intervening or superseding cause that was not "directly related to the defendant's conduct." *United States* v. *Kennedy*, 643 F.3d 1251, 1262-1263 (9th Cir. 2011); see *United States* v. *Wilfong*, 551 F.3d 1182, 1187 (10th Cir. 2008), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Robertson*, 493 F.3d 1322, 1334 (11th Cir. 2007), cert. denied, 552 U.S. 1212 (2008); see also *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 837 (1996); *Miller* v. *Union Pac. R. Co.*, 290 U.S. 227, 235 (1933); Pet. Br. 29.

2. Petitioner argues that the courts below improperly required him to "pay for any decline in the houses' values between the time the lenders fore-

close[d] and the time the lenders res[old]" the houses even though he did not directly or proximately cause that decline in value. Br. 29. Petitioner is mistaken.

First, although proximate-cause principles limit the types of losses for which a defendant is responsible in the first instance, they have no bearing on the offset provision in Section 3663A(b)(1)(B)(ii). There is no dispute that petitioner's criminal conduct directly and proximately caused his victims to initially lose $330,000 and $141,000, respectively. Principles of causation do not bear on the determination of when "any part of the property" that was lost is returned to a victim. 18 U.S.C. 3663A(b)(1)(B)(ii). As the Second Circuit has explained in a securities-fraud case:

> The fact that independent market forces may have contributed to the decline in [collateral] held by [brokerage houses] is irrelevant to the restitution calculation, because the stock was merely securing the fraudulently-obtained loans. The loss to the brokerage houses resulted from [defendant's] inducement of the loans, and it is for this loss that [defendant] must provide restitution.

United States v. *Paul*, 634 F.3d 668, 678, cert. denied, 132 S. Ct. 538 (2011).

Second, petitioner is incorrect (Br. 29) that the victims' retention of the collateral after they acquired title was an intervening event that broke the causal chain. Courts of appeals that have considered whether an intervening event broke the chain of causation for restitution purposes have generally agreed that an intervening event that is "directly related to the offense conduct" does not defeat a chain of causation. See, *e.g.*, *United States* v. *Speakman*, 594 F.3d 1165, 1172 (10th Cir. 2010); see also *Church*, 731 F.3d at 538

(6th Cir.); *United States* v. *Berger*, 473 F.3d 1080, 1107 (9th Cir. 2007), cert. denied, 552 U.S. 1097 (2008). Here, that direct relationship is manifest. As the court of appeals explained, "[a]bsent [petitioner's] fraudulent loan applications, the victim lenders would not have loaned the money in the first place" and "would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value" after petitioner defaulted on the loans. J.A. 155. "The declining market only became an issue because of [petitioner's] fraud." J.A. 156.[5]

Third, petitioner also errs in suggesting that the courts below should have essentially awarded petitioner a credit against his restitution award to account for the decrease in value of the collateral because the downturn in the real estate market was "unforeseeable." Br. 29. Even if foreseeability were always required to establish proximate cause—which it is not, see *Hemi Grp., LLC*, 559 U.S. at 12—it was certainly foreseeable that the value of the collateral petitioner used to secure his fraudulently obtained loans would fluctuate. By its very nature, the housing market gains and loses value over time. A defendant who fraudulently obtains loan proceeds and then depends

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[5] If a victim lender opts to dispose of collateral in a manner that is not a fair market transaction, it may be appropriate not to use the sales price to value the returned property because a non-market transaction is generally not a good basis for measuring value. See, *e.g.*, *Boccagna*, 450 F.3d at 109-120 (after the United States Department of Housing and Urban Development foreclosed on collateral securing fraudulently obtained loans, it sold the properties to a New York City housing agency for nominal prices as low as one dollar; the court of appeals reversed the district court's use of nominal sales prices rather than fair market value to measure the restitution offset).

on the foreclosure of the collateral to partially compensate his victims for their loss predictably (and by his own volition) ties the amount of restitution he will have to pay to the health of the housing market.

Fourth, petitioner's case-specific arguments (Br. 29-30) have no basis in fact. Petitioner insists that "the lenders could have disposed of the property long before the resale dates and thus avoided the declines." Br. 29. Nothing in the record supports that assertion. On the contrary, to the extent that the record speaks to the issue at all, it shows that there were no ready buyers when foreclosure occurred. See J.A. 89 (testimony that no one bid on the Inlet Shores property at the sheriff's sale); J.A. 70-71 (MGIC placed the Grant Street property on the market and periodically got updated values from its broker when the property did not sell). It is also incorrect as a general matter that a bank may resell foreclosed property the instant it acquires it after default. See Renuart 571 ("A bank with [real-estate-owned] inventory is faced with property it does not want to own, possible title, repair, lien, and tax issues that it must clear before it can sell, mounting maintenance costs, and other headaches."); see also J.A. 63-66 (after taking title to house, MGIC had to inspect the property, invest in maintenance, and ensure clear title before placing the house on the market).

Finally, petitioner's view of Section 3663A(b)(1)(B)(ii) would require victims to bear the full risk of loss from a declining market and award the full benefit of any gain to the defendant. Such an allocation of risk gets it exactly backwards for purposes of the MVRA. See *United States* v. *Rhodes*, 330 F.3d 949, 954 (7th Cir. 2003) ("[The defendant], rather than the victims,

should bear the risk of forces beyond his control.") (quotation marks and citation omitted). The text of the MVRA itself allocates the risk of declining value to a defendant, requiring the defendant to compensate a victim for "the greater of" the value of the lost property on the date of loss or the date of sentencing. 18 U.S.C. 3663A(b)(1)(B). "To accept [petitioner's] argument would be to encourage would-be fraudsters to roll the dice on the chips of others, assuming all of the upside benefit and little of the downside risk." *United States* v. *Turk*, 626 F.3d 743, 750 (2d Cir. 2010). The government's view also maintains proper incentives for victim lenders in mortgage-fraud cases. Because most defendants lack significant financial resources with which to promptly pay a restitution award, lenders have every incentive to minimize their net losses by selling foreclosed collateral reasonably quickly in a declining housing market. If a lender takes title to a house when the real estate market is on an upswing, any delay in selling the house will inure to the benefit of the defendant in the form of a larger offset.

E. Mortgage Law Principles Do Not Dictate The Amount Of Offset Petitioner Is Entitled To Under The MVRA

Petitioner argues (Br. 30-34) that the court of appeals "failed to undertake any analysis of well-established principles of state mortgage law in dismissing [petitioner's] argument that the collateral served as replacement property for the lost loan proceeds." Br. 30. Petitioner's argument fails for several reasons.

First, because the MVRA is not specific to mortgage fraud, the meaning of its generally applicable terms should not be distorted based on principles of

mortgage law. Petitioner argues that, "when a lender forecloses and takes title to the [collateral], foreclosure law values the [collateral] as of the date the lender takes title, not as of the date the [collateral] is sold." Br. 32; see *ibid.* (noting that a lender is generally entitled to a deficiency judgment for the difference between the outstanding loan amount and the value of the home at the time of foreclosure). Those foreclosure practices say nothing, however, about the meaning of the phrase "any part of the property" in Section 3663A(b)(1)(B)(ii). As discussed at pp. 13-24, *supra*, Section 3663A(b)(1) does not talk about collateral or substitute property—it refers to "property of a victim" that is "damage[d]" or "los[t]" or "destr[oyed]" as a result of a defendant's criminal conduct. The value of collateral on the date the victim takes title to it does not mitigate the loss because no part of "the property" that was lost has been returned to the victim on that date.

More broadly, the mandatory provisions of the MVRA apply to a wide swath of crimes, including many that have nothing to do with mortgages. The meaning of Section 3663A(b)(1)(B)(ii)'s reference to a return of "any part of the property" should be consistent across the MVRA's applications; that could not happen if the phrase had a special meaning in the mortgage-fraud context. And requiring such a context-specific interpretation of the statutory text would be directly contrary to the statute's mandate that the sentencing court shall order restitution "[n]otwithstanding any other provision of law." 18 U.S.C. 3663A(a)(1). The district court therefore correctly determined the amount of restitution petitioner must pay under the MVRA notwithstanding any provision

of mortgage law that may govern the state-law rights of lenders.

Second, petitioner is incorrect (Br. 19-20, 30-34) that the district court should have valued the collateral for offset purposes as of the date the lenders took title because "the lenders accepted the collateral as *full satisfaction* of their claims." Br. 34. Initially, if petitioner were correct that obtaining title to the collateral fully compensated the lenders for their losses, petitioner would not owe any restitution at all. Even petitioner does not go that far. Instead, he contends that, in extending a mortgage, a lender "commit[s] to accept[] the real estate collateral as a replacement for the loan proceeds" for all purposes. Br. 32. That is incorrect.

Where, as here, a lender forecloses on collateral and agrees to waive its right to pursue a deficiency claim on the remainder of the defaulted loan, the lender essentially settles its legal claim against the borrower. Such a settlement is not tantamount to an agreement that the collateral alone is equivalent in value to the amount of the lender's loss (*i.e.*, the amount of the outstanding loan) any more than a settlement of any civil action indicates that the plaintiff believes the settlement terms fully compensate her losses. The loss a victim suffers because of another party's unlawful or tortious conduct is determined by the consequences of that conduct, not the amount the victim is willing to accept in exchange for foregoing a civil remedy. The MVRA plainly contemplates that a victim remains entitled to restitution even if it has received partial compensation for its losses. See 18 U.S.C. 3664(f)(1)(B) and (j)(2). It also commands that "[i]n no case shall" a determination of "the amount of

restitution" take into account any compensation a victim has received with respect to a relevant loss from insurance or any other source. 18 U.S.C. 3664(f)(1)(B). The only relevant data point in adjusting the amount of restitution due is how much of the property that was actually lost has been returned to a victim as of sentencing. Cf. *United States* v. *Bearden*, 274 F.3d 1031, 1041 (6th Cir. 2001) (holding that "a private settlement between a criminal wrongdoer and his victim releasing the wrongdoer from further liability does not preclude a district court from imposing a restitution order for the same underlying wrong"); *United States* v. *Gallant*, 537 F.3d 1202, 1249-1250 (10th Cir. 2008) (holding that victim's settlement agreement with defendants that released them from further liability did not bar restitution), cert. denied, 556 U.S. 1198 (2009).

Finally, courts should not conflate foreclosure and criminal-restitution rules because different policy priorities inform the allocation of benefits in each context. Rules governing foreclosure have developed based on concerns about market forces, notice, fairness, and efficiency. See generally 1 Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* §§ 7.6, 7.18, 7.30, at 782-786, 843-845, 919-920 (5th ed. 2007) (discussing policy reasons supporting the right to foreclosure and different methods of implementing foreclosures). Restitution, in contrast, serves different goals. The primary goal of restitution is to compensate victims for their losses. But Congress also mandated restitution for certain crimes under the MVRA "to mete out appropriate criminal punishment for" the offense conduct. *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005); see 1995 Senate Re-

port 12 (noting that one purpose of the MVRA is to "ensure that the offender * * * pays the debt owed to * * * society); see also *United States* v. *Dubose*, 146 F.3d 1141, 1144 (9th Cir.) ("[R]estitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes."), cert. denied, 525 U.S. 975 (1998). The allocation of risks and benefits in mortgage and foreclosure law thus has no bearing on determining the criminal restitution award required in this case.[6]

F. The Rule Of Lenity Does Not Apply

Petitioner is incorrect (Br. 40-42) that the rule of lenity applies here. The rule of lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citations omitted). Neither "[t]he mere possibility of

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[6] In addition, petitioner did not rely on principles of mortgage law in the district court or the court of appeals. It is hardly surprising, therefore, that neither court below took such principles into account. Indeed, to the extent petitioner made any reference to mortgage law in the district court, he appeared to argue that the foreclosure proceedings were not relevant at all to the restitution determination. Petitioner argued that the Seventh Circuit had "ma[d]e clear" that "restitution is no synonym for common law damages" and that considering common-law damages "would complicate criminal sentencing unduly and unnecessarily." J.A. 113. Petitioner then stated that his victims "ha[d] a shot at collecting common law damages" and took advantage of that opportunity through foreclosure—and that consideration of those proceedings "complicated this sentencing." *Ibid.*

articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted). "Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved." *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).

No such equipoise exists here. The plain text of Section 3663A(b)(1)(B)(ii) requires the sentencing court to assess the value of any offset to a victim's loss as of the date "any part of the property" that was actually lost (here, money) is returned to the victim. That statutory text's meaning is plain and is consistent with the structure and purposes of the MVRA. The language is not ambiguous at all—and certainly not "grievous[ly]" so.[7]

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[7] Because petitioner did not argue to the district court that Section 3663A(b)(1)(B)(ii) requires the sentencing court to determine the amount of offset as the value of the collateral on the date that the victims took title to the houses, his argument must be reviewed for plain error. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997); see also Gov't C.A. Br. 11-12. To establish reversible plain error, a defendant must show (1) that there was an error, (2) that was obvious, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-467. The court of appeals did not address whether petitioner's argument should be reviewed for plain error. If this Court were to conclude that the district court and court of appeals erred in their construc-

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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tion of Section 3663A(b)(1)(B)(ii), it should remand for application of plain-error review by the court of appeals in the first instance.

STATUTORY APPENDIX

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

§ 3663A. Mandatory restitution to victims of certain crimes

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

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

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

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

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

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

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

(i) the greater of—

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

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

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

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

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

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

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

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

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

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

(A) that is—

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

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

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

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

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

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

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

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

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

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

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

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the

court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

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

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

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

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

(A) provide notice to all identified victims of—

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

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

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

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

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

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

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

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

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

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

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

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

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and

without consideration of the economic circumstances of the defendant.

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

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

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

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

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

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

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

the foreseeable future under any reasonable schedule of payments.

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

(A) return of property;

(B) replacement of property; or

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

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

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

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

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

all other victims receive full restitution before the United States receives any restitution.

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

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

(A) any Federal civil proceeding; and

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

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

require immediate payment in full, as the interests of justice require.

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

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

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

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

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other

judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

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

(1) such a sentence can subsequently be—

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

(B) appealed and modified under section 3742;

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

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

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

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.