No. 18-195

In the Supreme Court of the United States

WILLIAM S. POFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provision of the Mandatory Victims Restitution Act of 1996 (MVRA) under which a convicted defendant "shall be required" to apply to restitution "substantial resources [he receives] from any source, including inheritance, settlement, or other judgment, during a period of incarceration," 18 U.S.C. 3664(n), is limited only to economic gains of the defendant that were unforeseen at the time of sentencing.

2. Whether 26 U.S.C. 6334(a)(10) (2012), which is incorporated into a separate MVRA provision and creates an exemption from levy for "[a]ny amount payable to an individual as a service-connected * * * disability benefit," allows petitioner to place an account belonging to him, which contains veteran's disability benefits that have already been paid, off limits for purposes of restitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 727 Fed. Appx. 249. The order of the district court (Pet. App. 8a-23a) is not published in the Federal Supplement but is available at 2016 WL 3079001.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2018. A petition for rehearing was denied on May 16, 2018 (Pet. App. 24a). The petition for a writ of certiorari was filed on August 14, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Washington, peti-

tioner was convicted on one count of conspiracy to commit bank and wire fraud, in violation of 18 U.S.C. 1349; two counts of bank fraud, in violation of 18 U.S.C. 1344(1) and (2); 11 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); eight counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i); and seven other counts of money laundering, in violation of 18 U.S.C. 1957 (2006 & Supp. III 2009). Judgment 2. He was sentenced to 135 months of imprisonment, to be followed by five years of supervised release, and ordered to pay $4,258,529.13 in restitution. Judgment 3-5. While petitioner was serving his sentence, the government learned that he had a balance of at least $2,663.05 in his Bureau of Prisons (BOP) inmate trust account, and the government filed a motion with the district court for an order authorizing the BOP to turn over those funds to the clerk of the district court to be paid as restitution. See Pet. App. 10a. The court granted the government's motion. *Id.* at 8a-23a. The court of appeals affirmed. *Id.* at 1a-7a.

1. From 2004 to 2009, petitioner, his wife, and their co-conspirators engaged in a scheme to defraud mortgage lenders and real estate sellers in connection with the sale of real property. Presentence Investigation Report (PSR) ¶¶ 13, 17. Petitioner was a mortgage loan officer, and his wife was a licensed real estate agent. PSR ¶ 14. The couple jointly owned and operated two mortgage brokerage businesses. *Ibid.* They and their co-conspirators acquired cash surpluses from loans by various means, such as by falsely inflating the subject properties' values, obtaining commissions and fees from

transactions completed through straw buyers, and securing undisclosed private loans from sellers. PSR ¶¶ 17-18, 20, 22-23. All told, the members of the conspiracy obtained at least 80 separate loans and more than $18 million in loan proceeds. PSR ¶ 54. The fraud caused the financial institutions and private lenders to incur $4,314,529.13 in losses. *Ibid.*

2. a. A grand jury in the Western District of Washington charged petitioner and others in a superseding indictment with one count of conspiracy to commit bank and wire fraud, in violation of 18 U.S.C. 1349; two counts of bank fraud, in violation of 18 U.S.C. 1344(1) and (2); 11 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); eight counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i); and seven other counts of money laundering, in violation of 18 U.S.C. 1957 (2006 & Supp. III 2009). PSR ¶ 1; C.A. E.R. 87.

After a bench trial, the district court found petitioner guilty on all 30 counts. PSR ¶ 2; Pet. App. 38a. Prior to sentencing, the Probation Office prepared a report assessing the financial impact of petitioner's crimes on his victims, in order to assist the court in awarding restitution. PSR ¶¶ 113, 124-126. The Probation Office requested that petitioner complete a statement describing his financial resources and cash flow, as required of him by the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227 (18 U.S.C. 3664(d)(3)). Petitioner, however, "failed to return any financial information" despite "multiple requests." PSR ¶ 113.

The district court sentenced petitioner to 135 months of imprisonment, to be followed by five years of supervised release, and ordered him to pay restitution in the amount of $4,258,529.13, "due immediately." Pet. App. 9a (citation and capitalization omitted); see *id.* at 43a-45a. The judgment ordered petitioner to make restitution payments of "no less than 25% of [his] inmate gross monthly income or $25.00 per quarter, whichever is greater." *Id.* at 43a. The court stated that this payment schedule was "the minimum amount that the defendant is expected to pay" and that he should "pay more than the amount established whenever possible." *Ibid.*

b. In April 2016, after learning that petitioner had a balance of at least $2,663.05 in his BOP inmate trust account, the United States Attorney's Office requested that the BOP encumber petitioner's account to prevent him from making withdrawals. Pet. App. 10a; C.A. E.R. 49; Gov't C.A. Br. 9. The government then moved in the district court for an order authorizing the BOP to turn over funds from petitioner's inmate trust account to the clerk of the court, to be paid to petitioner's victims as restitution. Pet. App. 10a; C.A. E.R. 80-84. The government relied in part on 18 U.S.C. 3664(n), which provides that when a person who owes restitution "receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration," the person "shall be required to apply the value of such resources to any restitution or fine still owed." See C.A. E.R. 82 (citation omitted).

In response, petitioner argued (as relevant here) that: (1) he had been continuously in compliance with his court-ordered payment schedule, and the funds in

his inmate trust account were not "substantial resources from any source" that were required to be applied to restitution under 18 U.S.C. 3664(n); and (2) most of the funds in his account were military-service-connected disability payments from the U.S. Department of Veterans Affairs that he claimed were exempt from restitution under 26 U.S.C. 6334(a)(10) (2012), which exempts from tax levy "[a]ny amount payable to an individual as a service-connected * * * disability benefit," and which is incorporated into a separate portion of the MVRA through 18 U.S.C. 3613(a) and (f). See Pet. App. 19a, 21a-22a.

c. The district court granted the government's motion. Pet. App. 8a-23a. The court rejected petitioner's argument that the funds in his inmate trust account were not "substantial resources" within the meaning of 18 U.S.C. 3664(n), reasoning "that $2,663.05 satisfies the ordinary meaning of this term." Pet. App. 22a. And the court determined, citing decisions of "numerous courts," that a defendant's compliance with a court-ordered payment schedule "'does not prevent the United States from levying on a defendant's property to satisfy the order of restitution.'" *Ibid.* (citation omitted).

The court rejected petitioner's reliance on 26 U.S.C. 6334(a)(10) (2012), finding that the exemption "only protects amounts 'payable to an individual,' not amounts already paid and deposited in the recipient's account." Pet. App. 19a. The court noted that another subsection, 26 U.S.C. 6334(a)(9), exempts certain "amount[s] payable to or received by" an individual, and the court reasoned that "the term 'payable' in Section 6334(a)(10) cannot be construed to include amounts already paid without rendering the clause 'or received by' in Section

6334(a)(9) to be mere surplusage." Pet. App. 19a-20a (citation omitted). The court stated that, "[b]ecause [petitioner] has already received the funds in his inmate trust account, those funds are no longer 'payable' to him and are therefore not exempt from collection." *Id.* at 20a.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-7a.

The court of appeals rejected petitioner's argument that the *ejusdem generis* canon of statutory construction required interpreting the phrase "substantial resources from any source" in 18 U.S.C. 3664(n) to "refer[ ] only to windfalls," which petitioner defined as "economic gains that are unexpected and therefore were not foreseen at the time of sentencing." Pet. App. 2a.[1] The court explained that the *ejusdem generis* canon does not apply if a term's meaning can be discerned "upon a consideration of the context and the objects sought to be attained and of the act as a whole." *Ibid.* (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934)). The court reasoned that, "[b]ecause 'the primary and overarching goal of the MVRA is to make victims of crime whole,' the plain language of the MVRA does not support the conclusion that the funds in [petitioner's] inmate trust account are beyond the reach of § 3664(n)." *Ibid.* (quoting *United States* v. *Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004), cert. denied, 546 U.S. 957 (2005)). The court also determined that the district court did not err in finding that the funds in petitioner's inmate trust account were

[1] Petitioner did not raise this argument to the district court, and accordingly should have been required to show plain error on appeal, but the government did not mention petitioner's forfeiture or argue that plain error review applied. Gov't C.A. Br. 12-13.

"substantial" within the meaning of that term in Section 3664(n). *Id.* at 3a.

The court of appeals also rejected petitioner's claim that "his veteran disability benefits were exempt from levy for taxes under the Internal Revenue Code and, hence, exempt from enforcement under the MVRA." Pet. App. 3a-4a (citing 18 U.S.C. 3613(a)(1) and 26 U.S.C. 6334(a)(10) (2012)); see 18 U.S.C. 3613(f). Like the district court, the court of appeals reasoned that, "[b]ecause the tax code distinguishes between accounts that are 'payable to,' amounts that are 'received by,' and amounts that are 'payable to or received by' an individual, the expression of one of these alternatives necessarily excludes another." Pet. App. 4a (citation omitted). The court of appeals agreed with the district court that the veteran's disability benefits in petitioner's inmate trust account were "paid to him, not 'payable to' him," and therefore "were not exempt from enforcement under the MVRA." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-20) that the court of appeals' interpretation of the term "substantial resources from any source" in 18 U.S.C. 3664(n) conflicts with this Court's recent decision in *Lagos* v. *United States*, 138 S. Ct. 1684 (2018), and that the Court should grant the petition for a writ of certiorari, vacate the judgment, and remand for further consideration in light of *Lagos*. He argues in the alternative (Pet. 20-29) that the court of appeals' interpretation of 26 U.S.C. 6334(a)(10) (2012) conflicts with *Porter* v. *Aetna Casualty & Surety Co.*, 370 U.S. 159 (1962), and that this Court should grant review on that issue. The court of appeals' unpublished decision is correct, is consistent with both *Lagos* and *Porter*, and does not conflict with

the decision of any other court of appeals. Further review is unwarranted.

1. In addition to specifying procedures for calculating and imposing restitution at sentencing, the MVRA provides for collection and enforcement of a restitution judgment. Section 3663(n) provides that, when a person who owes restitution "receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration," he "shall be required to apply the value of such resources to any restitution * * * still owed." 18 U.S.C. 3664(n). If the government locates property of the defendant that he refuses to turn over, 18 U.S.C. 3664(m)(1)(A) provides that an order of restitution "may be enforced by the United States in the manner provided for in * * * subchapter B of chapter 229 of this title; or by all other available and reasonable means." In that subchapter, 18 U.S.C. 3613(a)(1) provides that the United States may enforce a judgment "in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law"—which include levying the defendant's property—and may pursue "all property or rights to property of the [defendant] * * * except * * * property exempt from levy for taxes pursuant to" certain enumerated provisions of the Internal Revenue Code in 26 U.S.C. 6334(a). See also 18 U.S.C. 3613(f) ("In accordance with [18 U.S.C. 3664(m)(1)(A)], all provisions of this section are available to the United States for the enforcement of an order of restitution."). As an alternative to seizing the defendant's property by levy, the MVRA permits the government (or a victim) to request that the district court modify the defendant's restitution payment schedule. 18 U.S.C. 3664(k).

2. The petition for a writ of certiorari should be denied because the court of appeals correctly rejected petitioner's argument that 18 U.S.C. 3664(n) does not apply to the funds in his inmate trust account.

a. Petitioner contends (Pet. 14-15) that Section 3664(n) is limited to "unexpected" economic gains that "were not taken into account when the restitution schedule was set at the time of sentencing." But the statutory text refers broadly to "substantial resources from *any* source," 18 U.S.C. 3664(n) (emphasis added), not merely from "unexpected" sources. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008) (the word "'any'" "suggests a broad meaning") (citation and emphasis omitted). The funds in petitioner's inmate trust account accordingly constitute such "resources." Petitioner's assertion (Pet. 2) that he was in compliance with his court-ordered restitution schedule, is irrelevant to that statutory question. Indeed, the district court explicitly instructed him that restitution was "due immediately," that his payment schedule set "the minimum amount [he] was expected to pay," and that he should "pay more than the amount established whenever possible." Pet. App. 43a (capitalization omitted).

Petitioner relies (Pet. 14-15) on the *ejusdem generis* canon to argue that the exemplar sources of income that 18 U.S.C. 3664(n) "includ[es]" in the phrase "substantial resources"—"inheritance, settlement, or other judgment"—limit that provision to sources of income that were unexpected at sentencing. That canon counsels that "[w]here general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates* v. *United States*, 135 S. Ct. 1074, 1086

(2015) (plurality opinion) (brackets and citation omitted). But "[a]uthorities have traditionally agreed that [a] specific-general sequence"—*i.e.*, one in which the specific words appear *first*—"is required" for *ejusdem generis* and that the canon "does not apply to" a statute like Section 3664(n) that uses "a general-specific sequence." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 203 (2012).

The scope of the canon reflects its core purpose of avoiding superfluity: The canon applies only where the specific terms would be unnecessary if the general term were "given [its] full and natural abstract meaning." 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:17, at 382-383 (7th ed. 2014). Where the specific terms *follow* the general term and are introduced by "including," the specific terms are not superfluous; they merely provide additional clarification or examples. See Scalia & Garner 204 ("Following the general term with specifics can serve the function of making doubly sure that the broad * * * general term is taken to include the specifics. Some formulations suggest or even specifically provide this belt-and-suspenders function by introducing the specifics with a term such as *including*."); see also *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.").

Section 3664(n)'s clarification that the term "substantial resources from any source" "*includ[es]* inheritance, settlement, or other judgment" thus does not implicate the *ejusdem generis* canon and does not limit that provision to windfall receipts. 18 U.S.C. 3664(n)

(emphasis added). It instead simply reinforces that provision's breadth.

Contrary to petitioner's suggestion (Pet. 14-15), the court of appeals' interpretation of 18 U.S.C. 3664(n) does not conflict with the decision of any other circuit court. Petitioner cites unpublished decisions (Pet. 14-15) stating that Section 3664(n) *reaches* "a windfall during imprisonment" and "unanticipated resources." *United States* v. *Bratton-Bey*, 564 Fed. Appx. 28, 29 (4th Cir. 2014) (per curiam); *United States* v. *Scales*, 639 Fed. Appx. 233, 239 (5th Cir. 2016) (per curiam). But those unpublished decisions do not hold that Section 3664(n) is *limited* to sources of income that were unexpected at sentencing.

b. In addition, this case would not be a suitable vehicle for considering petitioner's argument (Pet. 14-15) that Section 3664(n) reaches only sources of income that "were not taken into account when the restitution schedule was set at the time of sentencing."

To the extent that petitioner's service-connected-disability benefits "were not taken into account" at sentencing, it was because petitioner himself undermined the effective preparation of the restitution schedule by refusing, despite multiple requests, to comply with the MVRA's requirement that he "prepare and file with the probation officer an affidavit fully describing [his] financial resources * * * , including a complete listing of all assets owned or controlled by [him] * * * [and his] financial needs and earning ability." 18 U.S.C. 3664(d)(3); see PSR ¶ 113. Petitioner argued below that certain testimony at the trial discussed his veteran's disability benefits, so the United States Attorney's Office and the district court were aware of them. Pet. C.A. Reply Br. 12. But that does not excuse petitioner's

refusal to comply with the Probation Office's repeated requests for information and the MVRA's mandatory procedure, both of which were designed to produce a restitution schedule that accurately accounted for his financial resources. See 18 U.S.C. 3664(f)(2). Petitioner cannot deliberately withhold information that the MVRA required him to provide in advance of sentencing and then, upon discovery of that information by the government, claim that it was accounted for at sentencing.

c. Contrary to petitioner's contention (Pet. 19-20), no reason exists to grant, vacate, and remand this case to the court of appeals in light of *Lagos*. In *Lagos*, this Court interpreted a provision in the MVRA that requires reimbursement 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." 18 U.S.C. 3663A(b)(4). The Court determined that the words "investigation" and "proceedings" were "limited to government investigations and criminal proceedings," *Lagos*, 138 S. Ct. at 1687, based on textual and practical indicators of the statute's meaning, *id.* at 1689-1690. The Court also stated that the MVRA's "broad general purpose" of ensuring full restitution for victims "does not always require [the Court] to interpret a restitution statute in a way that favors an award." *Id.* at 1689. Petitioner's arguments that *Lagos* conflicts with the court of appeals' decision in this case are mistaken.

Petitioner first argues (Pet. 13, 16-19) that *Lagos* undermines the court of appeals' "deep reliance on the particular policy goal of expanding restitution," and that *Lagos* abrogated *United States* v. *Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004), cert. denied, 546 U.S. 957

(2005), which he characterizes as a "lynchpin" of the decision below. But while the court of appeals cited *Gordon* to support its statement that the MVRA's objective is full restitution for victims, Pet. App. 2a (quoting *Gordon*, 393 F.3d at 1048), the court also stated that "the *plain language* of the MVRA" did not support petitioner's reading of Section 3664(n), *ibid.* (emphasis added). Although *Lagos* abrogated *Gordon*'s interpretation of Section 3663A(b)(4), see 393 F.3d at 1056-1057, *Lagos* did not address Section 3664(n), and *Gordon*'s recognition that the MVRA's "overarching goal" is to "make victims of crime whole," Pet. App. 2a (quoting *Gordon*, 393 F.3d at 1048), is correct. See *Dolan* v. *United States*, 560 U.S. 605, 612 (2010) ("[T]he statute seeks primarily to ensure that victims of a crime receive full restitution."). This Court in *Lagos* simply explained that the MVRA's "broad general purpose * * * does not always require [the Court] to interpret a restitution statute in a way that favors an award" where other considerations "tip the balance in favor of [a] more limited interpretation." 138 S. Ct. at 1689-1690. The Court did not foreclose courts from citing the statute's purpose, or suggest that a defendant may subvert that purpose by resisting the payment of an award through a crabbed reason of Section 3664(n)'s "plain language." Pet. App. 2a.

Next, petitioner argues (Pet. 14) that "whereas this Court endorsed the use of *noscitur a sociis* in *Lagos*," the court of appeals here "rejected [petitioner's] textual argument, which was based on" the "similar" *ejusdem generis* canon. But Section 3664(n) has a different structure than Section 3663A(b)(4), and *ejusdem generis* does not apply to Section 3664(n) for the reasons explained above. See pp. 9-10, *supra*. Moreover, this Court's decision in *Lagos* was based not on a single

canon but a combination of textual and practical indicators that informed the meaning of "investigation" and "proceedings" in Section 3663A(b)(4). See 138 S. Ct. at 1688-1690.

Third, petitioner asserts (Pet. 15-16) that, "just as the Court compared the narrow provision at issue in *Lagos* with broader restitution provisions," Congress must have intended a "limited application * * * for Section 3664(n)" or else the government "would simply seize under Section 3664(n) any additional funds the defendant obtained" while incarcerated, rather than utilizing the MVRA's procedure for modifying the defendant's restitution schedule. See 18 U.S.C. 3664(k). *Lagos* sheds no light on the interaction between Subsections 3664(k) and (n) that would be relevant to this case. In any event, petitioner's interpretation of the MVRA is incorrect. When the government located thousands of dollars in an account belonging to petitioner, nothing in Section 3664(k) barred the government from asking the district court for permission to seize those funds consistent with 18 U.S.C. 3664(n), rather than requesting that the defendant pay more over time pursuant to a modified schedule. A revised schedule under Section 3664(k) is one of multiple tools that the MVRA affords the government to collect restitution; Section 3664(m)(1)(A) gave the government the additional power to pursue petitioner's funds directly through levy. If the district court had believed that a revised payment schedule was more appropriate than immediate collection, it could have denied the government's motion and revised the restitution schedule "on its own motion." 18 U.S.C. 3664(k).

This Court has explained that a grant, vacate, and remand is "potentially appropriate" only where there is

a "reasonable probability" that reconsideration of an issue would "determine the ultimate outcome of the litigation." *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). Because no reasonable probability exists that the court of appeals here would reach a different construction of Section 3664(n) in light of *Lagos*, a grant, vacate, and remand is not warranted.

3. The petition for a writ of certiorari should be denied for the additional reason that, even if petitioner was not required to apply the funds in his inmate trust account toward restitution under 18 U.S.C. 3664(n), the court of appeals correctly determined that the government was entitled to collect those funds under 18 U.S.C. 3664(m)(1)(A). Pursuant to that provision, which cross references 18 U.S.C. 3613, the government may enforce a restitution order "against all [the defendant's] property or rights to property" except, as relevant here, "property exempt from levy for taxes pursuant to section 6334(a)(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code." 18 U.S.C. 3613(a)(1); see 18 U.S.C. 3613(f). Section 6334(a)(10) of the tax code exempts from levy "[a]ny amount payable to an individual as a service-connected * * * disability benefit." 26 U.S.C 6334(a)(10) (2012). The court of appeals correctly determined that the exemption for disability benefits "payable to" an individual does not include benefits already received by petitioner. Pet. App. 4a.

a. In drafting Section 6334(a)(1), Congress chose the term "payable to" rather than "paid to" or "received by," indicating that it was focused on amounts that were not yet paid and preventing a levy on the source of the benefits. See *Black's Law Dictionary* 1016 (5th ed. 1979) (defining "payable" as "[c]apable of being paid"

and referring to money that "a person is under an obligation to pay"). At the time Congress added Section 6334(a)(10) in 1986, other subsections of the same provision exempted (as they do today) payments "received by a person" or "amount[s] payable to or received by an individual," 26 U.S.C. 6334(a)(6) and (9). This Court "normally presume[s] that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 63 (2006) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

The other courts to have considered the issue have held that Section 6334(a)(10) does not protect from levy a veteran's benefits once they are received and placed in his account. See *Calhoun* v. *United States*, 61 F.3d 918, 1995 WL 411832, at *1 (Fed. Cir. 1995) (Tbl.) (per curiam); *Maehr* v. *Koskinen*, No. 16-cv-512, 2018 WL 1406877, at *2-*3 (D. Colo. Mar. 21, 2018); *Hughes* v. *IRS*, 62 F. Supp. 2d 796, 800-801 (E.D.N.Y. 1999). And courts have similarly concluded that the other provisions of Section 6334(a) that refer to amounts "payable to" an individual do not prevent levy of benefit payments that have already been received. See *Cathey* v. *IRS*, 200 F.3d 814, 1999 WL 1093370, at *1 (5th Cir. 1999) (Tbl.) (per curiam) (construing 26 U.S.C. 6334(a)(7), regarding workmen's compensation benefits); *United States* v. *Coker*, 9 F. Supp. 3d 1300, 1301-1302 (S.D. Ala. 2014) (same); *Fredyma* v. *United States Dep't of Treasury*, No. 96-477, 1998 WL 77993, at *3-*4 (D.N.H.) (same), aff'd on other grounds *sub nom. Fredyma* v. *Lake Sunapee Bank*, 181 F.3d 79 (1st Cir. 1998) (Tbl.), cert. denied, 527 U.S. 1006 (1999); *Hughes*, 62 F. Supp. 2d at 800-801 (construing 26 U.S.C.

6334(a)(11), regarding public assistance payments); *United States* v. *Place*, No. 00-30043-01, 2018 WL 3354971, at *2 (W.D. La. June 18, 2018) (magistrate judge's report and recommendation) (construing 26 U.S.C. 6334(a)(4), regarding unemployment benefits), report and recommendation adopted, No. 00-30043-01, 2018 WL 3352961 (W.D. La. July 9, 2018). The court of appeals' decision here is thus consistent with the reasoning of the other courts to have considered the meaning of the term "payable to" throughout Section 6334(a).

Petitioner contends (Pet. 21) that Congress "surely had no intention" to remove protection from veterans' disability benefits "as soon as they are deposited into a bank account." But Congress could have reasonably distinguished between a levy on the benefits' source, which would prevent a service member from receiving any funds in the future, and a levy on funds that the service member has already received, which will typically (though not always) be commingled with other funds, and which will be available to the beneficiary until the government takes action to levy them. Congress could have believed that allowing the government to levy only funds the beneficiary has received would provide increased opportunity for consideration of the beneficiary's individual financial circumstances if—as in this case—the levy comes under judicial review. Contrary to petitioner's claim (Pet. 16), the government does not use 18 U.S.C. 3664(n) to "simply seize" funds from incarcerated defendants "without the need to obtain the court's approval." The government's ordinary practice, which it followed here, is to request that the BOP encumber the funds and then move for a court order consistent with Section 3664(n) to apply the funds to the restitution award. See Pet. App. 10a; C.A. E.R. 80-84.

Cf. 26 U.S.C. 6330(c) (affording a taxpayer with an assessed deficiency the right to a hearing to contest a notice of intent to levy, during which an appeals officer will consider, *inter alia*, "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary").

Petitioner proposes (Pet. 24) that the term "payable to" "refer[s] to the requirement that the individual claiming the exemption is the same individual who is entitled to the benefits in the first place," such that the exemption would not apply to benefits that a veteran "directs * * * to someone else (such as by gift or transfer)." But that reading of 26 U.S.C. 6334(a) lacks merit, and petitioner points to no court that has accepted it. If a veteran received a service-connected benefit and then gifted or transferred it to another person, the benefit would not be "received by" the final transferee "as a service-connected * * * disability benefit." 26 U.S.C. 6334(a)(10) (2012). Instead, it would be received as a gift or payment from the veteran. Thus, Congress's decision in Section 6334(a)(10) not to exempt payments "received by" a veteran cannot be explained as an attempt to prevent non-veterans from claiming exemptions for money that can be traced to a veteran's disability benefits.

b. Petitioner contends (Pet. 20) that the court of appeals' interpretation of Section 6334(a)(10) "ignores and conflicts with this Court's decision" in *Porter* v. *Aetna Casualty & Surety Co.*, 370 U.S. 159 (1962). That is incorrect. The Court in *Porter* held that a private judgment creditor could not attach a bank account containing a veteran's disability benefits under a statute providing that Veterans Administration benefits "shall

be exempt from the claim of creditors, and shall not be liable to attachment, levy or seizure * * * either before or after receipt by the beneficiary." *Id.* at 159-160 & n.1 (quoting 38 U.S.C. 3101(a) (1958), now 38 U.S.C. 5301(a)(1)). The Court held that the veteran's benefits in his savings account "should remain inviolate," noting Congress's longstanding policy "to exempt veterans' benefits from creditor actions as well as from taxation," and observing that "legislation of this type should be liberally construed." *Id.* at 160, 162.[2]

The statute at issue in *Porter* differed from 26 U.S.C. 6334(a)(10) (2012) in at least two critical respects. First, the statute in *Porter* protected veterans' benefits "before or after receipt by the beneficiary," 38 U.S.C. 3101(a) (1958); see 38 U.S.C. 5301(a)(1), which only reinforces that Congress took a different approach when it created 26 U.S.C. 6334(a)(10) (2012) and exempted only benefits "payable to" an individual. Second, the statute in Porter did "not apply to claims of the United States." 38 U.S.C. 3101(a) (1958); see 38 U.S.C. 5301(d). The Court in *Porter* thus had no occasion to consider whether its rule of "liberal[ ] constru[ction]" would apply to efforts by the United States to collect restitution as part of a criminal sentence. And in any event, even a rule of liberal construction could not overcome the clear meaning of 26 U.S.C. 6334(a)(10) (2012) in light

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[2] Petitioner is not entitled to exempt his disability benefits from restitution under 38 U.S.C. 5301, both because the MVRA specifies that only property listed in 26 U.S.C. 6334(a) is exempt, see 18 U.S.C. 3613(a) and (f), and because the Internal Revenue Code is explicit that, "[n]otwithstanding any other law of the United States * * * , no property or rights to property shall be exempt from levy other than the property specifically made exempt by [26 U.S.C. 6334(a)]," 26 U.S.C. 6334(c).

of the material difference between its text and that of its companion subsections.

c. Contrary to petitioner's contention (Pet. 20-28), the court of appeals' interpretation of 26 U.S.C. 6334(a)(10) (2012) does not conflict with the decision of any other court of appeals. Petitioner emphasizes *Maehr* v. *Koskinen*, 664 Fed. Appx. 683 (10th Cir. 2016), cert. denied, 137 S. Ct. 2140 (2017), but that decision merely reversed the dismissal of a taxpayer's suit on the ground that he had raised a "potentially meritorious claim" that the government had improperly levied bank accounts containing his veteran's disability payments. *Id.* at 684. The court "express[ed] no opinion" on whether the accounts were actually exempt, *id.* at 686, and on remand, the district court agreed with the government that Section 6334(a)(10) does not exempt from levy accounts containing benefits that have already been received by a taxpayer, *Maehr*, 2018 WL 1406877, at *2-*3. Moreover, the Tenth Circuit's decision in *Maehr* was non-precedential and was not binding even within that circuit. See 10th Cir. R. 32.1(A).

Petitioner also cites (Pet. 26) *United States* v. *Griffith*, 584 F.3d 1004, 1021 (10th Cir. 2009), *Nelson* v. *Heiss*, 271 F.3d 891, 896 (9th Cir. 2001), and *Smith* v. *United States*, 460 F.2d 985, 987 (9th Cir. 1972). But none of those cases addressed the second question presented here or said anything about 26 U.S.C. 6334(a)(10) (2012); instead, all three cases concerned 38 U.S.C. 5301 (or its predecessor)—the same statute at issue in *Porter*. *Griffith* invoked that provision to hold that, even after disability benefits are received by a veteran, a theft of those benefits constitutes a theft of "U.S. property" in violation of 18 U.S.C. 641. 584 F.3d at 1019. *Nelson* held that state prison officials had violated 38

U.S.C. 5301 by drawing on the plaintiff's veteran's disability benefits in his inmate trust account as repayment for items purchased by him from the prison canteen. 271 F.3d at 893-896. And *Smith* concerned only whether the government was obligated to reimburse the plaintiff for litigation over disputed benefits, with the court merely making a passing reference to *Porter*'s discussion of the protection in 38 U.S.C. 3101(a) (1958) for veteran's benefits after they are deposited. None of those cases conflicts with the decision of the court of appeals in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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