In The

Supreme Court of the United States

—♦—

In re
LOCAL # 46 METALLIC LATHERS UNION AND REINFORCING IRON WORKERS AND ITS ASSOCIATED BENEFIT AND OTHER FUNDS,
Petitioners,

– against –

UNITED STATES OF AMERICA; CHARLES DOHERTY; HON. JOANNA SEYBERT, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK; HON. DENNIS JACOBS, CHESTER STRAUB, PETER HALL AND REMAINING JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. The Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (the "Act" or "CVRA"), guarantees federal crime victims an array of substantive and participatory rights, including the right to full and timely restitution as provided in law. Violations of the Act are enforceable by mandamus petition to the appropriate circuit court, which must clearly state the reasons for any denial in a written opinion. The Act is silent, however, as to the availability of further recourse in this Court for aggrieved victims. Given the Act's twin goals of vindicating victims' rights and expanding their role in federal criminal proceedings, does this Court have jurisdiction – by way of certiorari, extraordinary writ, Article III of the Constitution or any other source – to review circuit court denials of mandamus petitions under the CVRA?

2. In *Hughey v. United States*, 495 U.S. 411 (1990), this Court held that restitution under the Victim and Witness Protection Act, 18 U.S.C. § 3663 ("VWPA"), is limited to losses caused by the conduct comprising the offense of conviction. Courts have extended this holding to the subsequently passed Mandatory Victims' Restitution Act of 1996, 18 U.S.C. § 3663A ("MVRA"). After *Hughey*, Congress broadened the scope of the term "victim" as it appears in both the VWPA and MVRA, defining it identically to mean: "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

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involves as an element a ... conspiracy ..., any person directly harmed by the defendant's criminal conduct in the course of the ... conspiracy...." Given the congressional trend toward enforcing victim rights and expanding restitution's availability, should this Court grant certiorari to resolve a conflict among the circuits over the following substantial question: did the quoted language extend restitution to losses caused by acts of related conduct for which the defendant was not convicted – not just the conduct comprising the offense of conviction – in conspiracy cases, abrogating *Hughey* to that extent?

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List of Parties

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PETITION FOR A WRIT OF CERTIORARI (AND/OR EXTRAORDINARY WRIT) TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, a local labor union and its associated benefit and other funds (collectively, the "Union"), respectfully seek review of the Second Circuit's denial of their mandamus petition under 18 U.S.C. § 3771(d)(3) – part of the CVRA – arising from the sentencing of a convicted defendant in a criminal case. *See United States v. Charles Doherty*, 05-CR-494 (E.D.N.Y.). In denying relief, the Second Circuit opined that the Union was not a "victim" of Doherty's money laundering conspiracy offense (18 U.S.C. § 1956(h)) within the meaning of 18 U.S.C. § 3663A(a)(2) – part of the MVRA – and therefore not entitled to an order of restitution.

Opinions Below

The Second Circuit's opinion, *In re Local # 46 Metallic Lathers Union and Reinforcing Iron Workers, et al.*, 568 F.3d 81 (2d Cir. June 9, 2009), is reproduced at 1a *et seq.* The district court's opinion, *United States v. Doherty*, 2009 WL 1310877 (E.D.N.Y. May 7, 2009), is reproduced at 27a *et seq.*

Supreme Court Jurisdiction

This Court has putative jurisdiction under 28 U.S.C. § 1254(1), the All Writs Act (28 U.S.C. § 1651) and/or U.S. CONST. art. III. On August 26, 2009, Justice Ginsburg extended the deadline for this petition through November 6, 2009. The petition timely follows.

Statutory Provisions

The CVRA and MVRA, codified at 18 U.S.C. §§ 3771 and 3663A, respectively, are fully reproduced in the appendix. Their salient provisions follow.

1. 18 U.S.C. § 3771(a)(6)

> **Rights of crime victims.** – A crime victim has the following rights: ... The right to full and timely restitution as provided in law.

2. 18 U.S.C. § 3771(d)(3)

> **Enforcement and limitations.** – ... **Motion for relief and writ of mandamus.** – The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted.... If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus.... The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.... If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

3. 18 U.S.C. § 3663A(a)(1)-(2)

> **Mandatory restitution to victims of certain crimes[.]** Notwithstanding any other provision of law, when sentencing a defendant convicted of a[covered] offense ... the court shall order ... that the defendant make restitution to the victim of the offense....
>
> For 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.

District Court Jurisdiction

The district court had jurisdiction under 18 U.S.C. §§ 1956, 3231, 3551 *et seq.*, 3663A and 3771.

Statement of the Case

1. Doherty pleaded guilty to a single money laundering conspiracy violation under 18 U.S.C. § 1956(h). 568 F.3d at 82.

2. At sentencing, the Union moved under the CVRA, 18 U.S.C. § 3771(a)(4) and (6), to participate as a victim with a view to recovering restitution from Doherty.

3. After extended proceedings in which the Union participated, the district court denied its restitution request. 568 F.3d at 83-84.

4. Challenging the denial, the Union sought mandamus in the Second Circuit under CVRA § 3771(d)(3).

5. The Second Circuit affirmed, opining that the Union was not a "victim" as defined in MVRA § 3663A(a)(2), and therefore not entitled to restitution.

6. In so ruling, the Court interpreted subsection (a)(2)'s operative phrase "in the case of an

offense that involves as an element a ... conspiracy ..., [a victim is] any person directly harmed by the defendant's criminal conduct in the course of the ... conspiracy...."

7. Notably, the Second Circuit recognized that this language "expands" what will "give rise to a compensable loss when a ... conspiracy ... is involved." 568 F.3d at 87. Nonetheless, the Court read the provision narrowly, construing it to refer solely to conspiratorial conduct constituting an element of the offense of conviction – as opposed to the defendant's broader "criminal conduct in the course of the ... conspiracy." 18 U.S.C. § 3663A(a)(2).

8. Finding that the Union was not directly harmed by the charged money laundering conspiracy to which Doherty pled, the Court thus concluded that the Union did not qualify as a "victim" for MVRA purposes and upheld the denial of restitution.

9. In reaching this result, the Second Circuit acknowledged that its reading of subsection (a)(2) created a potential conflict with at least that of the Ninth. 568 F.3d at 87 n.3. That court, by contrast, permits restitution for "harm[s] in the course of the defendant's scheme *even beyond the counts of conviction*" – that is, for harms from "related conduct" not specifically

charged in a conspiracy indictment. *United States v. Brock-Davis*, 504 F.3d 991, 999-1000 (9th Cir. 2007) (emphasis in original) (citation and internal quotes omitted).

10. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD HEAR THIS CASE TO DETERMINE ITS OWN JURISDICTION TO REVIEW CVRA MANDAMUS DENIALS IN THE COURTS OF APPEALS

Sprung from a 10-year push for a constitutional amendment "explicitly recogniz[ing] victims' rights," *United States v. Turner*, 367 F. Supp. 2d 319, 337 (E.D.N.Y. 2005), the CVRA is a "relatively new statute that effects dramatic changes to our criminal justice system." *In re Antrobus*, 563 F.3d 1092, 1101 (10th Cir. 2009). The Act immensely empowers federal crime victims, making them "independent participants in the ... justice process," *Kenna v. U.S. Dist. Ct., Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006), with their own "seat at the table." *Antrobus*, 563 F.3d at 1101.

Yet, while the parcel of rights the CVRA confers are expressly enforceable by mandamus petition in the "court of appeals," 18 U.S.C. § 3771(d)(3), the Act is conspicuously silent about further review in this Court.

Even so, nothing in the statute purports to strip the Court of certiorari jurisdiction, *cf.* 28 U.S.C. § 2244(b)(3)(E),[1] which ordinarily lies for "a 'party' to a case in the Court of Appeals." *Automobile Workers v. Scofield*, 382 U.S. 205, 208-09 (1965) (quoting 28 U.S.C. § 1254(1)). And as this Court has long held, a "case" in this context extends to any "'proceeding in court.'" *Hohn v. United States*, 524 U.S. 236, 241 (1998) (quoting *Blyew v. United States*, 13 Wall. 581, 595 (1871)).

Since the Union's mandamus petition was a "case" in the Court of Appeals and the Union a named "party" there, this Court's jurisdiction would thus seem unassailable. *Cf. Antrobus*, 563 F.3d at 1097 (assuming certiorari jurisdiction to review CVRA mandamus denials in circuit courts); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (exercising certiorari jurisdiction to review mandamus grant). That conclusion is reinforced by the Court's flexible conception of the term "party,"[2] and the "apparent legislative intent" to afford victims "direct standing" to

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[1] "The grant or denial of an authorization by a court of appeals to file a second or successive [habeas] application ... shall not be the subject of a petition ... for a writ of certiorari."

[2] *See Devlin v. Scardelletti*, 536 U.S. 1, 7-8, 10 (2002) (noting that Court has never "restricted" appeal right to "named parties to the litigation," and instructing that the "label 'party' does not indicate an absolute characteristic," only a contextual "conclusion about the applicability of various procedural rules").

"vindicate their rights independent of prosecutors," *Turner*, 367 F. Supp. 2d at 324, 336, with broad appellate recourse. *Cf. In re Siler*, 571 F.3d 604, 605 (6th Cir. 2009) (though victims "did not formally intervene and become parties," district court so treated them and decided merits of their motions, thus conferring appellate standing) (citing *Karcher v. May*, 484 U.S. 72, 77 (1987)).

As the CVRA's cosponsor aptly explained: "Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This [statute] ensures review and encourages courts to *broadly defend* the victims' rights." 150 CONG. REC. S4270 (2004) (statement of Sen. Feinstein) (emphasis supplied). In short, if this Court has certiorari jurisdiction to review a mere denial of leave to appeal where the applicable habeas statute did not expressly provide for it, *see Hohn*, then the Court certainly has jurisdiction to review the denial of a fully litigated mandamus petition by lengthy published opinion.

Any doubt on this score is dispelled by several additional considerations:

A. The statute's text requires the court of appeals to "clearly state[]" its reasons for any mandamus denial "on the record in a written opinion," 18 U.S.C. § 3771(d)(3), which typically contemplates and facilitates further appellate review.

B. The statute's complexities raise many unanswered questions, *see Turner*, 367 F. Supp. 2d 319, and the "participants in [our] system – prosecutors, defendants, victims, and courts alike – are rightfully struggling with its scope and meaning." *Antrobus*, 563 F.3d at 1101. With no recourse in this Court, these questions would elude definitive settlement, fostering uncertainty, undermining uniformity, spawning inefficient piecemeal litigation, and freezing the law in disarray. These concerns are compounded by the statute's 72-hour window for deciding mandamus petitions, 18 U.S.C. § 3771(d)(3), leaving the circuit courts little time for reasoned analysis or coherent development of the law. *See* U.S. Govt. Accountability Office, Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act, at 50 (Dec. 2008) (judges and others say 72-hour window "may not provide enough time to decide on complex issues, produce well-thought-out opinions, and allow parties to respond to the petition").

C. Absent a government appeal in the underlying prosecution, *see* 18 U.S.C. § 3771(d)(4), victims aggrieved by circuit court mandamus denials would have no "means" of vindicating their CVRA rights without review in this Court, *Devlin*, 536 U.S. at 11 – anathema to the statutory goals of victim empowerment, independent standing, "liberal[]" application, and ensuring victim primacy in "criminal cases." *Turner*, 367 F. Supp. 2d at 335-36.

Since this Court alone has jurisdiction to determine its own jurisdiction, *United States v. Ruiz*, 536 U.S. 622, 628 (2002), this issue will endlessly recur yet forever evade review unless the Court confronts it sometime. This case presents a perfect opportunity to do so.

II. THE COURT SHOULD HEAR THIS CASE TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER RESTITUTION IN CONSPIRACY CASES IS LIMITED TO HARM CAUSED BY THE OFFENSE OF CONVICTION, OR EXTENDS MORE BROADLY TO RELATED UNCHARGED CONDUCT BY THE DEFENDANT

A. *HUGHEY* AND ITS AFTERMATH

In its 1990 *Hughey* opinion, this Court construed 18 U.S.C. § 3663 (formerly § 3579) of the original VWPA, providing that "'a defendant convicted of an offense' may be ordered to 'make restitution to any victim of such offense.'" 495 U.S. at 412-13 & n.1, 415-16. Relying on the VWPA's plain "language and structure," the Court concluded that this provision strictly limited restitution awards to losses caused by the "specific conduct" underlying the "offense of conviction." *Id.* at 413, 416, 419-20, 422.

By subsequent amendments, Congress added a subsection (a)(2) to § 3663, broadly redefining "victim" to mean "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 ... conspiracy ..., any person directly harmed by the defendant's criminal conduct in the course of the ... conspiracy...." Concomitantly, Congress also enacted an "identical" victim definition as MVRA § 3663A(a)(2), the provision at issue here. *In re Local #46*, 568 F.3d at 86.

B. THE POST-AMENDMENT CIRCUIT SPLIT IN CONSPIRACY CASES

These amendments have proven vexing, splintering the lower courts as to their meaning and proper application in conspiracy prosecutions. Among the disputes are whether the amendments serve to nullify *Hughey*'s offense of conviction limitation, and whether they extend restitution to uncharged acts by the defendant that relate to, but are not actually part of, the conspiracy as charged.

1. The Closely Related Uncharged Conduct Approach

At least five circuits answer these questions in the affirmative. Representative is *United States v. Holthaus*, which observed that the amendments "supersede[] *Hughey*" and authorize restitution for

"every victim harmed in the course of the defendant's ... conspiracy ..., not just the offense of conviction." 486 F.3d 451, 458 n.6 (8th Cir.), *cert. denied,* 128 S. Ct. 343 (2007) (citation and internal quotes omitted); *accord United States v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996) ("expansive[]" amendments "discard" *Hughey* in conspiracy context, allowing restitution regardless of whether the defendant's "*particular criminal conduct* ... which directly harmed the victim was alleged in a count to which the defendant pled guilty, or was even charged in the indictment") (collecting cases) (emphasis in original).

In what one court calls the "majority view," the amendments thus "partially overruled *Hughey*'s restrictive interpretation" and broadened restitutionary authority to conduct "closely related" to the charged conspiracy – whether or not "the defendant is convicted for each criminal act within" its scope. *United States v. Henoud*, 81 F.3d 484, 488 (4th Cir. 1996) (citations and internal quotes omitted); *accord United States v. Dickerson*, 370 F.3d 1330, 1334-36 & n.8, 1338-43 (11th Cir. 2004) (amendments "all but eviscerated *Hughey* with respect to crimes involving [conspiracies]" and require restitution "for all losses resulting from a common [plan]"); *Brock-Davis*, 504 F.3d at 998-1000 (amendments partly overruled *Hughey*, expanding restitution in conspiracy cases to "*acts of related conduct for which the defendant was not convicted*") (citation omitted) (emphasis in *Brock-Davis*).

2. The Strict Elements of the Offense of Conviction Approach

Conversely, a bloc of five other circuits takes a starkly different tack. Courts in this camp recognize that Congress responded to *Hughey* by "expand[ing] the definition of 'victim.'" *United States v. Elson*, 577 F.3d 713, 723 (6th Cir. 2009). Curiously, though, they insist that the decision continues to "'exclude injuries caused by offenses that are not part of the conspiracy of which the defendant has been convicted.'" *Id.* (quoting *United States v. George*, 403 F.3d 470, 474 (7th Cir. 2005)) (alterations omitted).

As the Second Circuit put it in the opinion below: "While the [amendments] expand[] what ... will give rise to a compensable loss when a ... conspiracy ... is involved, the reference point ... remains the 'offense' of which the defendant has been convicted.... [The 'conspiracy'] must be an 'element' of that 'offense' in order for the conduct in the course of the ... conspiracy to be considered ... a basis" for restitution. *In re Local # 46*, 568 F.3d at 87 (quoting 18 U.S.C. § 3663A(a)(1)-(a)(2)); *accord United States v. Akande*, 200 F.3d 136, 141 (3d Cir. 1999) (claiming that amendments merely "enlarged the group of [eligible] victims" while leaving the "triggering event" and "boundaries of [] restitution[]" the same: "the offense of conviction"); *United States v. Hughey*, 147 F.3d 423, 437-38 (5th Cir. 1998) ("*Hughey II*") (despite amendments, "[t]hat part of *Hughey* which restricted the award of restitution to

the limits of the offense ... still stands"; district court lacks authority to award restitution in excess of harm directly resulting from conduct supporting conviction).

C. CERTIORARI IS IMPERATIVE GIVEN THE UNPRECEDENTED EMPOWERMENT OF VICTIMS IN FEDERAL PROSECUTIONS

As this brief survey illustrates, the Union's petition presents a square and mature circuit conflict on a pure question of law: Do amended VWPA § 3663(a)(2) and MVRA § 3663A(a)(2) overrule *Hughey* in conspiracy cases by authorizing restitution for related conduct by the defendant beyond the elements of the offense of conviction? Or does *Hughey* survive those provisions and continue to limit restitution to the specific conduct encompassed by the conspiracy as charged?

With the growing emphasis on the rights of victims, and their increasing ubiquity and influence in federal criminal proceedings via the CVRA and MVRA, the Court should grant certiorari to resolve this conflict. And in resolving it, the Court should adopt the broader, victim-friendlier position of the first group of circuits, rejecting the narrow, elements-of-the-offense-based approach advocated by the second. This is so for several preliminary reasons, to be augmented and amplified in a merits brief.

D. THIS COURT SHOULD ENDORSE THE CLOSELY RELATED UNCHARGED CONDUCT APPROACH

First, an element-based, offense-of-conviction standard contravenes the MVRA's (and VWPA's) plain text. Had Congress intended to maintain *Hughey*'s strictures in conspiracy cases, it would have tracked *Hughey*'s terminology in §§ 3663(a)(2) and 3663A(a)(2), writing "in the case of an offense that involves as an element a ... conspiracy," a "victim" includes "any person directly harmed by the defendant's criminal conduct" *underlying* or *forming the basis* of that element. *See Hughey*, 495 U.S. at 413 (limiting restitution to "specific conduct that is the basis of the offense of conviction"); *id.* at 416 (limiting restitution to "conduct underlying the offense of conviction"); *id.* at 420 ("conduct underlying the offense of conviction establishes the outer limits of a restitution order").

Instead, Congress consciously chose the phrase "any person directly harmed by the defendant's criminal conduct *in the course* of the ... conspiracy," meaning conduct in a conspiracy's "usual or natural order," Webster's Third New International Dictionary 522 (2002) – a broader concept connoting all criminal activity generally accompanying the conspiracy. The Second Circuit's contrary contention – the MVRA "expands" what will "give rise to a compensable loss" in conspiracy cases, but the reference point remains the elements of the "'offense'" of conviction, *In re Local #*

46, 568 F.3d at 87 – reads the "in the course of" language out of the statute. It thereby reduces the statute to redundancy and "revives the *Hughey* holding [since] discarded by Congress." *Hensley,* 91 F.3d at 277. Yet the *Hughey* Court had "no opportunity" to consider this new "definition of 'victim'" because it simply did not exist at the time. *Dickerson*, 370 F.3d at 1338 (*Hughey* decided before Congress amended VWPA and enacted MVRA).

Second, legislative history confirms that Congress intended the "in the course of" language to lift *Hughey* 's restrictions and extend restitution beyond the confines of the conspiracy as charged. As Sen. Nickles pointedly explained in his floor statement supporting a precursor to amended VWPA § 3663(a)(2) and MVRA § 3663A(a)(2):

> Section 902 ... *overturns the Supreme Court's ruling in the* Hughey *case* which stated restitution could not be ordered for crimes beyond the scope of the offense of conviction. So, if a criminal is convicted of a criminal offense, but plea bargains his way out of a conviction on a second offense, he cannot be held responsible

> to repay the victim of the second offense. This obvious shortcoming is corrected by allowing the court to *consider the course of criminal conduct and order restitution for crimes other than the offense of conviction.*

139 CONG. REC. S15990 (1993) (emphasis supplied).

By adding the "in the course of" phrase, then, Congress accepted *Hughey*'s invitation to use language other than the unadorned "'offense'" if it contemplated recovery for a wider range of conduct "[]related to the offense of conviction." 495 U.S. at 418; *cf. Turner*, 367 F. Supp. 2d at 326-27 & n.7 (CVRA's "similar" definition of "victim" is "intentionally broad" because all crime victims "deserve to have their rights protected, *whether or not they are the victim of the count charged*") (quoting legislative history) (emphasis in *Turner*).

Third, awarding restitution for related conduct beyond the conspiracy as charged promotes the policy of expanding and aggressively enforcing victims' rights. The MVRA's purpose, after all, is to "*requir[e]* Federal criminal defendants to pay *full* restitution to the identifiable victims of their crime," ensuring that victim losses are "recognized," that they receive the

"restitution they are due," and that the offender "realizes the damage caused by the offense" and pays his debt to the victim and society. S. Rep. No. 104-179, at 15 (1995) (emphasis supplied), *reprinted in* 1996 U.S.C.C.A.N. 924, 925. Similarly, the CVRA – born of a "decade-long drive to amend the Constitution to explicitly recognize victims' rights," *Turner*, 367 F. Supp. 2d at 337 – aims to "amplif[y]" and "codify" those rights, providing a robust "enforcement mechanism." H.R. Rep. No. 108-711, at 4 (2004), *reprinted in* 2005 U.S.C.C.A.N. 2274, 2277. A strict elements-of-the-offense approach thwarts these goals and defies the congressional commands of liberal application, *Turner*, 367 F. Supp. 2d at 335, and broad construction, 150 CONG. REC. S4270 (2004) (statements of Sen. Kyl and Sen. Feinstein)

Fourth, the MVRA's and VWPA's dual constraints of proximate causation (*cf.* 18 U.S.C. § 1964(c))[3] and direct harm from the defendant's own conduct – not that of coconspirators – answer *Hughey*'s pre-amendment concern that going beyond the offense of conviction would prompt "an open-ended inquiry into losses resulting from the defendant's related course of conduct." 495 U.S. at 419 n.4; *cf. In re Local # 46*, 568 F.3d at 87 (worrying that expanding victim definition – exactly what Congress has done – would "force"

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[3] *See, e.g., In re Rendon Galvis*, 564 F.3d 170, 175-76 (2d Cir. 2009) (denying restitution for insufficient "causal connection" between crime and injury).

courts to "ascertain some overarching uncharged" conspiracy, "one element of which is the specific offense" of conviction); *Akande*, 200 F.3d at 140-41 (fearing awards based on "vague allegations" of "broad, unsubstantiated conduct") (citations and internal quotes omitted). In any event, courts routinely make similar determinations in assessing relevant conduct under the Sentencing Guidelines, and considering a defendant's uncharged acts relating to the charged conspiracy roughly aligns restitution and sentencing law – albeit less than fully so with respect to restitution. *Cf. Dickerson*, 370 F.3d at 1334 n.8, 1342-43 ("[i]f a district court may consider relevant conduct ... in determining the offense level ..., we fail to see what precludes it from considering such conduct in fashioning a restitution order"); *contra Akande*, 200 F.3d at 143; *United States v. Scott*, 250 F.3d 550, 553 (7th Cir. 2001).

Fifth, allowing recovery for related conduct in conspiracy cases reduces "undercompensation" by prosecutorial charging discretion, as indictments are often framed "with a view to success at trial rather than ... a victim's interest in full compensation." *Hughey*, 495 U.S. at 421 (citation omitted). By amending the VWPA and passing the MVRA to enlarge the class of eligible victims in the conspiracy context, Congress signaled its belief that *Hughey* had undervalued this factor. An element-oriented, offense-of-conviction approach – essentially preserving *Hughey*'s limitations in conspiracy prosecutions –

would judicially repeal the change, returning the law to its pre-amendment state and infringing the separation of powers.

CONCLUSION

The Court should grant this petition and vacate the judgment below, as the Union was "admittedly" harmed by a common "plan" involving the charged money laundering conspiracy – if not the conspiracy itself. *In re Local # 46*, 568 F.3d at 86.

Respectfully submitted,

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