

# Supreme Court Hears Argument to Determine Whether Mandatory Federal Restitution Statute Covers Professional Costs Incurred by Corporate Victims

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On April 18, 2018, the U.S. Supreme Court heard oral argument in *Lagos v. United States*.<sup>1</sup> On appeal from the United States Court of Appeals for the Fifth Circuit, *Lagos* presents the important issue of whether a corporate victim's professional costs—such as investigatory and legal expenses—incurred as a result of a criminal defendant's offense conduct must be reimbursed under the Mandatory Victims Restitution Act (“MVRA”).<sup>2</sup>

The issue has been subject to a recurring circuit split and *Lagos* now offers the Supreme Court an opportunity to resolve the conflict.<sup>3</sup> Moreover, as noted by the certiorari petition, the Court's decision will necessarily have implications “every time corporations engage in internal investigations or audits at the suspicion of wrongdoing.”<sup>4</sup>

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<sup>1</sup> *United States v. Lagos*, 864 F.3d 320 (5th Cir. 2017), *cert granted*, No. 16-1519 (U.S. Jan. 12, 2018); <https://www.supremecourt.gov/>, Docket for 16-1519, *Lagos v. United States*.

<sup>2</sup> *Lagos*'s Br. at (I); Government's Br. at (I).

<sup>3</sup> See Petition for Writ of Certiorari, at 15-16. Compare *United States v. Nosal*, 844 F.3d 1024, 1046-1047 (9<sup>th</sup> Cir. 2016) *cert. denied*, 138 S. Ct. 314 (2017); *United States v. Janosko*, 642 F.3d 40, 42 (1st Cir. 2011); *United States v. Elson*, 577 F.3d 713, 727-728 (6th Cir. 2009) *United States v. Hosking*, 567 F.3d 329, 332 (7th Cir. 2009); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009); *United States v. Amato*, 540 F.3d 153, 159-160 (2d Cir. 2008), *cert. denied*, 556 U.S. 1138 (2009); *United States v. Phillips*, 477 F.3d 215, 224 (5<sup>th</sup> Cir.), *cert denied* 552 U.S. 820 (2007) with *United States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011).

<sup>4</sup> Petition for Writ of Certiorari at 3.



## Factual Background and Procedural History

Under the MVRA, a sentencing court “shall order . . . that the defendant make restitution to the victim” of certain qualifying offenses.<sup>5</sup> As relevant here, this includes “an offense against property under [Title 18] . . . including any offense committed by fraud or deceit . . . in which an identifiable victim . . . has suffered a . . . pecuniary loss.”<sup>6</sup> Under the MVRA, the sentencing court must order the defendant to “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.”<sup>7</sup> The question presented in *Lagos* is whether a corporate victim’s investigatory and legal expenses must be reimbursed under the MVRA as “expenses incurred during participation in the investigation or prosecution of the offense[.]”<sup>8</sup>

### Factual Background

Petitioner Sergio Fernando Lagos (“Lagos”) was the owner and CEO of a holding company that owned, among other operating subsidiaries, a trucking company that specialized in cross-border trucking services.<sup>9</sup> The trucking company had a revolving loan financing agreement with General Electric Capital Corporation (“GECC”).<sup>10</sup> For two years, Lagos and his co-defendants conspired to mislead GECC about the value of the trucking company’s accounts receivables in a manner that caused GECC to continue to provide a line of credit to the trucking company and loan the trucking company tens of millions of dollars.<sup>11</sup> The fraudulent scheme ultimately led to the trucking company declaring bankruptcy.<sup>12</sup>

As a result of the fraud, GECC—the relevant “victim” for purposes of the MVRA—spent nearly \$5 million hiring professionals (e.g., lawyers, forensic experts, consultants) “to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud.”<sup>13</sup>

### District Court

Lagos and his co-defendants were charged with one count of conspiracy to commit wire fraud and five counts of wire fraud.<sup>14</sup> Lagos pled guilty to all six counts.<sup>15</sup> The district court sentenced Lagos to 97 months’ imprisonment and “ordered [him] to pay restitution under the MVRA.”<sup>16</sup>

The District Court, over Lagos’s objection, ordered Lagos to pay approximately \$5 million in “restitution for the legal, expert, and consulting fees incurred by [GECC] in investigating the fraud” and for GECC’s legal fees from the bankruptcy proceedings caused by the fraud.<sup>17</sup> In doing so, the district court relied on the MVRA’s provision requiring reimbursement of “the victim for . . . any other expenses incurred during participation in the investigation or prosecution of the offense . . . .”<sup>18</sup> Lagos appealed.

### The Fifth Circuit’s Decision

On appeal, the Fifth Circuit reviewed the district court’s restitution order *de novo* and affirmed.<sup>19</sup> The Fifth Circuit held that “under the MVRA, the restitution order properly included the costs of [the] internal investigation and bankruptcy-related expenses.”<sup>20</sup> The Fifth Circuit reasoned that its precedent, which controls “the scope of restitution under subsection 3663A(b)(4),” “gave a broad reading” to the MVRA provision at issue.<sup>21</sup>

<sup>5</sup> 18 U.S.C. § 3663A(a)(1).

<sup>6</sup> *Id.* § 3663A(c)(1).

<sup>7</sup> 18 U.S.C. § 3663A(b)(4) (emphasis added).

<sup>8</sup> *Lagos v. United States*, No. 16-1519, Petition for Writ of Certiorari at (I); *see also* Government’s Br. at 8, 12, 3a.

<sup>9</sup> Joint Appendix at 33-34 ¶¶ 6-7.

<sup>10</sup> *Id.* at 34 ¶ 12.

<sup>11</sup> *Id.* at 36 ¶ 16; Government’s Br. at 2.

<sup>12</sup> Joint Appendix at 16; Lagos’s Br. at 10; Government’s Br. at 5.

<sup>13</sup> *Lagos*, 864 F.3d at 322; Lagos’s Br. at 10.

<sup>14</sup> Joint Appendix at 32.

<sup>15</sup> *Id.* at 33.

<sup>16</sup> Lagos’s Br. at 10.

<sup>17</sup> *Id.* at 10-11 (internal citations omitted).

<sup>18</sup> 18 U.S.C. § 3663A(b)(4); *see* Government’s Br. at (I).

<sup>19</sup> *See Lagos*, 864 F.3d at 321.

<sup>20</sup> Lagos’s Br. at 11 (citing *Lagos*, 864 F.3d at 322-23).

<sup>21</sup> *Lagos*, 864 F.3d at 322; *see also* Lagos’s Br. at 11.

One of the Fifth Circuit judges joined in the affirmance, but “wr[ote] separately only to suggest that [the Fifth Circuit] may be interpreting Section 3663A(b)(4) too broadly.”<sup>22</sup> Specifically, the concurring opinion agreed with the D.C. Circuit’s contrary interpretation that “‘participating’ in a government investigation does not embrace an internal investigation, ‘at least one that has not been required or requested by criminal investigators or prosecutors.’”<sup>23</sup>

## The Certiorari Petition and Merits Briefs

### Petition for Writ of Certiorari Granted

Lagos filed for a writ of certiorari and the Supreme Court granted his petition on January 12, 2018.<sup>24</sup>

### Lagos’s Key Arguments

In his merits brief, Lagos argues that the text of Section 3663A(b)(4) establishes that professional costs awarded by the courts below do not qualify as “expenses incurred during participation in the investigation or prosecution of the offense.”<sup>25</sup> Lagos asserts that the “plain” and “unambiguous” meaning of this text is that the costs must be incurred in connection with “the government’s investigation” of the criminal offense.<sup>26</sup> Specifically, Lagos asserts that, because only the government can prosecute “the offense,” Congress’s pairing of “the offense” with the words “investigation or prosecution” demonstrates that the language is intended to cover expenses incurred during the federal government’s investigation.<sup>27</sup> Similarly, Lagos points out that under the MVRA the costs must be incurred by the victim during “participation” in the investigation or the prosecution, and argues that participation necessarily entails

working with the government, not an unsolicited internal investigation.<sup>28</sup>

Thus, Lagos argues that Section 3663A(b)(4) is unambiguous in not providing for restitution for professional costs arising from an internal corporate investigation.<sup>29</sup> But to the extent there is any ambiguity, Lagos argues “it must be construed against increased punishment.”<sup>30</sup>

### The Government’s Key Arguments

In its brief, the Government argues that the types of costs at issue in this case “are recoverable in restitution” under the MVRA.<sup>31</sup> In making its statutory arguments, the Government asserts that the costs were “necessary” here, because “they were *appropriate* under the circumstances and were *useful* to unraveling [Lagos’s] fraud.”<sup>32</sup> Moreover, the Government argues that the Court should understand the term “investigation” in line with its dictionary definition, as “broad and not limited to the government’s work.”<sup>33</sup> And the Government argues that Congress did not intend “proceedings related to the offense” to be limited to “*criminal* proceedings.”<sup>34</sup> Had it so intended, Congress “could have included [that] modifier.”<sup>35</sup>

<sup>28</sup> *Id.* at 18-20. Lagos also argued that the doctrine of *ejusdem generis* supports the same result that professional costs from internal investigations and civil litigation are not “other expenses” under the MVRA. *Id.* at 23-25. Under this doctrine, “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words.” *Id.* at 25 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (emphasis in original)). Accordingly, Lagos argued that “other expenses” should not be construed to embrace professional costs when such costs are not similar to the other listed expenses listed in this section of the MVRA—lost income, necessary child care and transportation.

<sup>29</sup> *Id.* at 17.

<sup>30</sup> *Id.* at 31.

<sup>31</sup> Government’s Br. at 36; *see generally id.* at 23-46.

<sup>32</sup> *Id.* at 26 (emphasis added); *see id.* at 33.

<sup>33</sup> *Id.* at 26.

<sup>34</sup> *Id.* at 38 (emphasis in original).

<sup>35</sup> *Id.* at 38.

<sup>22</sup> *Lagos*, 864 F.3d at 324 (Higginson, J., concurring); *see also Lagos’s Br.* at 12.

<sup>23</sup> *Lagos*, 864 F.3d at 324 (Higginson, J., concurring) (quoting *Papagno*, 639 F.3d at 1098-99).

<sup>24</sup> *Lagos’s Br.* at (1); <https://www.supremecourt.gov/>, Docket for 16-1519, *Lagos v. United States*.

<sup>25</sup> *Id.* at 14 (citing 18 U.S.C. 3663A(b)(4)).

<sup>26</sup> *Id.* at 17 (emphasis in original).

<sup>27</sup> *Id.* at 17-18.

In addition, the Government asserts that the district court’s restitution order is “independently supported” by another section of the MVRA—18 U.S.C. § 3663A(b)(1).<sup>36</sup> Under that section, in the case of an offense resulting in “damage to or loss or destruction of property of a victim,” the sentencing court “shall require that such defendant . . . return the property to the owner of the property.”<sup>37</sup> In other words, because GECC’s money is “property,” and Lagos’s conduct “result[ed]” in the “loss” of that property, the restitution order may also be upheld under this other section of the MVRA.<sup>38</sup>

## The Supreme Court Oral Argument

On April 18, 2018, the Supreme Court heard argument in this case.<sup>39</sup>

### Lagos’s Argument

During Lagos’s argument, the Justices focused largely on teasing out whether, under Lagos’s view of the MVRA, certain expenses would be covered under their hypotheticals.

- Chief Justice Roberts asked whether the cost of an investigation would be covered under the MVRA if the government approached GECC, asked GECC to conduct an investigation, and then the government used the results of that investigation in its prosecution. When Lagos’s counsel responded that they would not be, Chief Justice Roberts wondered why the MVRA’s “pretty open phrase”<sup>40</sup>—*viz.*, “other expenses incurred during participation in the investigation”—would not cover the expenses in his hypothetical where the government asked the victim to investigate itself and the victim incurred costs doing so.<sup>41</sup>
- Justice Gorsuch asked whether hiring a lawyer as a witness in a government investigation would be

covered.<sup>42</sup> Lagos argued it would not be, because it does not fall within the expenses enumerated under 3663A(b)(4).<sup>43</sup>

- Similarly, Justice Alito asked whether expenses that were incurred during a state investigation would be covered under the MVRA provision at issue, and Lagos argued that the offense refers only to “a conviction under federal law.”<sup>44</sup> Justice Alito followed up by asking whether the MVRA would treat the following scenarios differently in terms of whether it would cover the expenses: (i) a company employee traveled to be questioned as part of a federal investigation; (ii) a company complied with that investigation by going through its own records at the government’s request.<sup>45</sup> Justice Alito seemed to disagree with Lagos’s explanation that only the former of these two scenarios would be covered under the MVRA, and Lagos then conceded that the latter might be covered “but only in the case of the government telling or asking someone to do it.”<sup>46</sup>
- Justice Kagan’s question asking Lagos to identify the “common denominator” of expenses covered by the MVRA summed up the focus of most of the Justices’ questions.<sup>47</sup> Lagos argued that the MVRA covers “indirect incidental out-of-pocket expenses that someone incurs when they’re meeting with the government.”<sup>48</sup>

### The Government’s Argument

During the Government’s time, the Justices appeared concerned with some of the Government’s arguments in its brief.

- Justice Breyer said the Government has “a big problem . . . with the language of the statute.”<sup>49</sup> Justice Gorsuch later emphasized this same point,

<sup>36</sup> *Id.* at 46 (citing 18 U.S.C. § 3663A(b)(1)).

<sup>37</sup> *Id.* at 47 (citing 18 U.S.C. § 3663A(b)(1)).

<sup>38</sup> *Id.* (internal citations omitted).

<sup>39</sup> <https://www.supremecourt.gov/>, Docket for 16-1519, *Lagos v. United States*.

<sup>40</sup> Supreme Court Oral Argument Tr. at 6.

<sup>41</sup> *Id.* at 5-6.

<sup>42</sup> *Id.* at 7-8.

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.* at 15-16.

<sup>45</sup> *Id.* at 19.

<sup>46</sup> *Id.* at 20.

<sup>47</sup> *Id.* at 7.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 34-35.

stating that the Government takes “such a purposivist account of the statute” to “make sure everybody gets everything.”<sup>50</sup>

- Justice Kagan noted that what “strikes me about the statute, and . . . I think is giving [the Government] problems on several dimensions, is that this statute is pretty clearly written with an individual victim in mind.”<sup>51</sup> In making that statement, she referred to the MVRA’s coverage of expenses incurred for child care, transportation and attending proceedings—concepts that do not make sense in relation to a corporation.<sup>52</sup> Interestingly, the Government conceded that Congress’s purpose in enacting Section 3663A(b)(4) was aimed towards individual victims.<sup>53</sup> If that is the case, Justice Gorsuch said that “pose[s] a serious problem” for the Government’s arguments that the MVRA should also cover expenses where the government aims to “leverag[e] private internal investigations.”<sup>54</sup>
- Moving on to the intended breadth of the MVRA, Justice Breyer referred to Congress when stating that “if you’re going to make something mandatory, you say we better narrow it and be specific. And then that would explain why this is limited to the government’s investigation[.]”<sup>55</sup>
- Justice Alito seemed to indicate that, “if Congress intended to cover an investigation conducted by a company” then it would have used a term involving “reasonable” expenses instead of “necessary” expenses, and asked the Government how to “determine whether the scope of an internal investigation is necessary[.]”<sup>56</sup> The Government responded that “necessary” really “means ordinary, reasonable, expected” and noted that district courts often make this type of

determination.<sup>57</sup> Chief Justice Roberts seemed skeptical that “Congress would want the district courts to spend a lot of time on that sort of restitution litigation.”<sup>58</sup> Justice Gorsuch further asked the Government whether an internal investigation is “ever necessary” to a government investigation, and seemed to indicate that it would be difficult for a court to determine what is necessary.<sup>59</sup>

### Significance of the Case

The Court’s decision in *Lagos* will determine whether corporations will be able to seek restitution under the MVRA from criminal defendants when they are the victim of an offense. If the Court holds that companies are able to seek such restitution it will create another incentive to conduct internal investigations into misconduct within or against a corporation, in addition to the existing governance, compliance, and regulatory benefits of doing so. This further highlights the need for companies to keep records of the costs and expenses incurred during the course of an investigation, not only for internal tracking purposes and possible insurance claims, but also for potential requests for court-ordered restitution. Particularly where the criminal wrongdoer is another corporation, the ability to seek restitution may have significant value. In cases involving individual defendants, on the other hand, the right to restitution may be more a matter of principal, given that an individual’s attorney’s fees may leave little or no funds remaining for restitution payments to victims.

While the outcome of *Lagos* is currently uncertain, there is no doubt that however the Court rules later this term, it will impact a company’s considerations when deciding whether and how to conduct an internal investigation, particularly when the corporation is the potential victim of a crime.

<sup>50</sup> *Id.* at 37.

<sup>51</sup> *Id.* at 43-44.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 44-45.

<sup>54</sup> *Id.* at 45-46.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 50-51.

<sup>57</sup> *Id.* at 51-52.

<sup>58</sup> *Id.* at 52.

<sup>59</sup> *Id.* at 53-54.