No. 12-9012

IN THE

Supreme Court of the United States

BENJAMIN ROBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

The Solicitor General argues that Mr. Robers forfeited the question presented. But Mr. Robers raised that question at least twice during the restitution hearing, which is why the Seventh Circuit reviewed the question de novo in a 44-page opinion.

The Solicitor General also argues that only the Ninth and Seventh Circuits have decided the question presented. As the Seventh Circuit acknowledged, however, at least seven circuits have joined the split on that question. Pet. App. 20a, 37a. Moreover, that split will grow deeper still. After Mr. Robers filed the cert. petition, for instance, the question presented arose before a district court in the Eleventh Circuit. The split therefore requires this Court's intervention.

Finally, the Solicitor General defends the Seventh Circuit's holding that Mr. Robers returned no "part" of the lenders' money by surrendering the houses that secured that money. 18 U.S.C. § 3663A(b)(1)(B)(ii). The court was thus purportedly correct in refusing to reduce the restitution award by the houses' values on the surrender dates. But Mr. Robers did return part of the lenders' money by surrendering the houses. He returned the economic value that he had transferred from the money to the houses when he bought them. Section 3663A(b)(1)(B)(ii) therefore required the district court to reduce the restitution award accordingly. The Court should grant this petition to correct the Seventh Circuit's error on a recurring issue.

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The Solicitor General argues that, during the restitution hearing, Mr. Robers forfeited the question presented. Opp. 21–24. If that were true, the Seventh Circuit would have reviewed the question for plain error. See Fed. R. Crim. P. 52(b). The Seventh Circuit also would have made short work of the question, since a district court cannot plainly err on an issue that divides the circuits. *United States* v. *Story*, 635 F.3d 1241, 1249 (10th Cir. 2011). But the court reviewed the question "de novo" in a 44-page opinion. Pet. App. 8a. Hence the court recognized that Mr. Robers had preserved the question presented.

That is for good reason. Defense counsel twice urged the district court to reduce the restitution award by the houses' values on the surrender dates, rather than the dates on which the lenders eventually resold the houses. First, he pressed a witness to admit that the values on the pre-recession surrender dates would be more accurate than the values on the post-recession resale dates. Pet. App. 99a–100a. Second, he argued in closing that reducing the restitution award by the resale price, rather than the houses' values at foreclosure, would require Mr. Robers to overpay. *Id.* at 119a–120a; see also Def.'s Restitution Mem., *United States* v. *Robers*, No. 10-cr-95 (E.D. Wis. Nov. 18, 2010), ECF No. 11 at 6–7. Mr. Robers thus sought the same result he seeks here, albeit with different arguments. That is sufficient to preserve the question presented. *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) ("Once a federal claim is properly presented, a party can make any argument in support of that claim;

parties are not limited to the precise arguments they made below.") (quotation marks and alterations omitted); *United States* v. *Billups*, 536 F.3d 574, 578 (7th Cir. 2008).

The Solicitor General also argues that the record "contains no evidence" to establish the houses' values on the surrender dates. Opp. 24. Thus, Mr. Robers purportedly cannot show that he would owe less if this Court decides to reduce the restitution award by the values on the surrender dates. *Id.* But the prosecution must prove the houses' values on the correct dates to establish the net amount of restitution that Mr. Robers owes. See *United States* v. *Huff*, 609 F.3d 1240, 1247 (11th Cir. 2010). If the record lacks evidence of the values on the surrender dates, then the prosecution failed to prove that Mr. Robers owes $218,952.18 in restitution. In any event, the Court may remand for the district court to hear more evidence about the houses' values on the surrender dates. See *United States* v. *Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006); see generally *United States* v. *Chalupnik*, 514 F.3d 748, 755 (8th Cir. 2008). Such evidence will likely show that the surrender-date values were higher than the resale-date values, since the resales occurred after the housing market collapsed. For either reason, this Court's decision to use the surrender dates will likely reduce the restitution award. This case is an appropriate vehicle for resolving the question presented.

II. AT LEAST SEVEN CIRCUITS DISAGREE ON THE QUESTION PRESENTED.

1. According to the Solicitor General, Opp. 14–20, only the Ninth Circuit has held that defendants return "part" of victims' money by surrendering the collateral that secures the money. See *United States*

v. *Yeung*, 672 F.3d 594, 604 (9th Cir. 2012) (citing *United States* v. *Smith*, 944 F.2d 618, 625 (9th Cir. 1991)). The Solicitor General misreads decisions from the Fifth and Second Circuits, however, which have held the same as the Ninth Circuit.

The Solicitor General disputes that the Fifth Circuit joined the split in *United States* v. *Holley*, 23 F.3d 902, 915 (5th Cir. 1994). Opp. 18–19. There, the court concluded that the defendants "partial[ly] return[ed]" the victims' money when the defendants surrendered the collateral that secured the money. *Holley*, 23 F.3d at 915. The Solicitor General gives three reasons why that conclusion is not the Fifth Circuit's position on the question presented here. First, a different restitution statute controlled in that case, 18 U.S.C. § 3663. Opp. 18. But as the Solicitor General acknowledges, that statute's relevant text is the same as the text that controls here. *Id.* at n.6. Second, the *Holley* court purportedly explained its conclusion inadequately. Opp. 18. But the court decided the issue regardless, which is what matters to district courts in that circuit. Moreover, the court expressly adopted the reasoning of the Ninth Circuit, which undisputedly has decided the question presented. *Holley*, 23 F.3d at 902 (citing *United States* v. *Smith*, 944 F.2d 618 (9th Cir. 1991)). Third, a later panel in the same case did not follow the original panel's holding. *United States* v. *Holley*, No. 96-11160, 1998 WL 414260, at *2 (5th Cir. July 9, 1998) (per curiam). But the later decision was an unpublished, summary opinion by three judges not on the original panel. *Id.* According to the Fifth Circuit's own rules, the later panel's failure to follow the *Holley* decision was error. *Young* v. *Merill Lynch & Co.*, 658 F.3d 436, 443 (5th Cir. 2011) ("[T]he rule of orderliness forbids one of our panels from

overruling a prior panel.") (quotation marks omitted). The original *Holley* decision is thus Fifth Circuit law, and that circuit has joined the split.

The Solicitor General also disputes that the Second Circuit joined the split in *Boccagna*, 450 F.3d 107. Opp. 17–18. The Solicitor General dismisses as dicta the court's conclusion that the defendant "partial[ly] return[ed]" the victim's money by surrendering collateral that secured the money. *Boccagna*, 450 F.3d at 112 n.2; Opp. 17. But the conclusion was one reason the court held that § 3663A(b)(1)(B)(ii) required the district court to reduce the restitution award by the collateral's value on the surrender date. *Boccagna*, 450 F.3d at 118. Hence the purported "dicta" was in fact part of the holding. See *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."). Three circuits have therefore adopted Mr. Robers's position on the question presented.

2. According to the Solicitor General, the Seventh Circuit alone has held the opposite; namely, that courts must reduce restitution awards by the collateral's value on the resale date, because only then does a defendant partially return the victims' money. The Solicitor General dismisses three decisions that—based on facts the same as those here—also chose the resale date. *United States* v. *Innarelli*, 524 F.3d 286, 293, 295 (1st Cir. 2008); *United States* v. *Himler*, 355 F.3d 735, 739, 745 (3d Cir. 2004); *United States* v. *Statman*, 604 F.3d 529, 537, 538 (8th Cir. 2010).[1] Those decisions, the

[1] The Solicitor General argues that *Statman* is distinguishable because the victim purportedly sold the

Solicitor General notes, did not address explicitly when the defendants partially returned the victims' money. But courts in those circuits must nonetheless use the resale date when they confront facts like those here—the same as if *Innarelli*, *Himler*, and *Statman* had explicitly held that the resale date is when the defendants partially returned the victims' money. Cf. *United States* v. *Russell*, 461 F.2d 605, 608 (10th Cir. 1972) (a higher court's decision is precedential even if that court overlooked an argument that might have changed the result). Thus, those three circuits agree with the Seventh Circuit on the question presented.

3. The question presented is recurring. It arose in the Tenth Circuit weeks before Mr. Robers filed his cert. petition. *United States* v. *Lipsey*, No. 11-1536, 2013 WL 386529, at *4–5 (11th Cir. Feb 1, 2013), *petition for cert. filed* (U.S. June 4, 2013) (No. 12-10638). The issue has since bedeviled another court. *United States* v. *Jordan*, No. 1:12-CR-2, 2013 WL 1333506 (M.D. Ga. Mar. 29, 2013). In *Jordan*, the court postponed the restitution hearing for supplemental briefs on the question presented here. *Id.* at *5. The court explained that the question was "complicated," the subject of a "Circuit split," and "critical" to deciding the restitution amount. *Id.* at

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collateral without first taking control of the collateral. The Solicitor General misreads the opinion. The victim there "[e]ventually" resold the collateral after "regain[ing] control" of the collateral. 604 F.3d at 537; *see also* Sentencing and Restitution Hr'g Tr., *United States* v. *Statman*, No. 4:05-cr-0057 (E.D. Ark. Feb. 20, 2009), ECF No. 145 at 41–43, 64; *United States* v. *Rund*, No. 09-1767, 2009 WL 1764406 (8th Cir. June 10, 2009) (Statman's co-defendant's brief, arguing that the court should reduce the restitution award by the collateral's value on the date the victim "received" the collateral, rather than when the victim "finally took action to sell" the collateral).

*5. After the prosecution "failed to address the Circuit split," however, the court resolved the case on other grounds. *Id.* at *6, 8–11. More courts will confront the "complicated," *id.* at *5, question presented unless this Court intervenes. See Morgan Clemons, *Restitution for Federal Crimes: Will Mortgage Criminals Pay for the Real Estate Bubble?* 130 Banking L.J. 316, 317 (2013).

III. THE SEVENTH CIRCUIT IS INCORRECT.

Finally, the Solicitor General defends the Seventh Circuit's holding that Mr. Robers did not return the lenders' money by surrendering the houses that secured the money. Opp. 9. But the statute says that, to reduce the restitution award, a defendant need return only "part" of the lenders' money. *Id.* Mr. Robers did just that when he surrendered the houses. He returned the economic value that he transferred from the money to the houses when he bought the houses. See *United States* v. *Shepard*, 269 F.3d 884, 887–88 (7th Cir. 2001) (Easterbrook, J.). Thus the Solicitor General and Seventh Circuit are incorrect.

According to the Solicitor General, its reading ensures that the defendant pays the exact amount necessary to compensate lenders completely. Opp. 10–11, 13. But sometimes the Solicitor General's reading will require the defendant to overpay. Under that reading, a court may reduce a restitution award only if the lenders resell the houses before the restitution hearing. In some cases, the lenders cannot do so: Resale can take years, and courts may delay the restitution hearing more than 90 days after sentencing only if they timely and expressly reserve the power to do so. *Holley*, 23 F.3d at 914; *United States* v. *Pileggi*, 703 F.3d 675, 682–83 (4th Cir. 2013) (citing *Dolan* v. *United States*, 130 S. Ct. 2533

(2010)). In such cases, the defendant must therefore pay the *full balance* of the loans. The lenders may then resell the houses for a windfall. Thus the Solicitor General's reading creates the very "anomalies" the Solicitor General decries. Opp. 13.

The Solicitor General's reading will also impermissibly force defendants to pay for losses they did not proximately cause. See generally *United States* v. *Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009); 18 U.S.C. § 3663A(a)(2). That reading requires defendants to compensate lenders for any decline in the houses' values between the time the defendants surrender the houses and the time the lenders resell the houses. See Pet. at 13. In some cases, the decline will result from unforeseeable events—like the Great Recession here. Hence the Solicitor General's reading (and the Seventh Circuit's) conflicts with the statute's policies as well as the statute's text. The Court should grant certiorari to correct that error before the error spreads further.

CONCLUSION

For these reasons, and the reasons stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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