

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Mustafa Hassan Arif — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For the First Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mustafa Hassan Arif
(Your Name)

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(Address)

Philipsburg, PA 16866
(City, State, Zip Code)

None

(Phone Number)

QUESTION(S) PRESENTED

1. Whether petitioner was wrongly prosecuted under the Wire Fraud statute because Congress intended such allegations of false advertising of non-prescription drugs to be prosecuted only under 15 U.S.C. 52-57?
2. Whether petitioner's advertising practices in themselves constituted Wire Fraud despite his honest belief in the efficacy of his remedies, and where there was no claim that the remedies were not actually effective as advertised nor their physical contents or licensing status misrepresented?
3. Whether an 'intent to harm' is a necessary part of the 'intent to defraud' element of Wire Fraud, as held by a majority of appellate courts but disputed by the First Circuit which also dispensed away with any such requirement in petitioner's case?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B & C to the petition and is

☒ reported at 2016 US Dist. LEXIS 126162 & 139089
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 07/18/2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 08/17/2018, and a copy of the order denying rehearing appears at Appendix E.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C.S. 52-57

18 U.S.C. 1343

Full text of provisions reproduced in Appendix F, due to their length.

STATEMENT OF THE CASE

This case involves a federal Wire Fraud prosecution that precipitated in the United States District Court, District of New Hampshire, where petitioner entered a conditional plea of guilty to one count of Wire Fraud while specifically reserving the right to appeal two pretrial legal rulings made by the court reproduced in Appendix B and C. The rulings were made as a matter of law in light of a stipulated set of facts reproduced in Appendix D. The United States First Circuit Court of Appeals affirmed the rulings in an opinion reproduced in Appendix A and also denied a petition for rehearing en banc (Appendix E). The appellate court had jurisdiction under 28 U.S.C. 1291, the trial court under 28 U.S.C. 3231 and this Honorable Court has jurisdiction under 28 U.S.C. 1254(1).

As per the agreed facts, petitioner was in the business of selling non-prescription health remedies of the naturopathic and homeopathic schools of medicine through a number of internet websites he created and operated. In order to induce the purchase of the remedies from consumers, the websites:

- a) depicted that the effectiveness of the remedies had been verified by certain 'clinical studies', when in reality none of these studies were done
- b) contained testimonials that were from fictitious, not actual, customers and endorsements that were not actually from impartial third parties as said
- c) employed 'mail forwarding' addresses in various western countries to make potential customers 'more comfortable' buying the remedies while the business was actually run from the eastern country of Pakistan

However, as the government conceded and the trial court ruled, there was no claim whatsoever that the remedies sold were not actually effective as depicted by the advertising nor that their physical contents or non-FDA approved licensing status was misrepresented. The sole contention was

whether as a matter of law the deliberate employment of said advertising practices to sell the remedies constituted the felony of Wire Fraud.

The trial court rejected the argument that the government could not charge the matter under the Wire Fraud statute because Congress specifically intended the precisely drawn statutory scheme of 15 U.S.C. 52-57 to be the sole avenue for prosecuting such allegations of false advertising of non-prescription drugs, including when the conduct was alleged to be willful. The trial court ruled that the strong judicial policy against implied repeals of statutes required that prosecutors be able to elect at their discretion whether to proceed under the terms of the special law of 15 U.S.C. 52-57 or under the more general Wire Fraud statute (Appendix B - pages 7 to 10). The First Circuit further emphasized the need for such discretion by adding the view that "[t]he FTCA penalties for first or second offenders would hardly have been an adequate deterrent for such egregious conduct. Crime must be made not to pay." (Appendix A - page 16).

The trial court also rejected, as a matter of law, the argument that where petitioner's purpose in the advertising was to convince customers of an efficacy he truly believed to exist in the remedies then the 'intent to defraud' element of Wire Fraud could not be met. The court's ruling re-emphasized that there was no allegation that petitioner sold remedies "that did not work as intended" nor that he engaged in "harming his customers" (Appendix C - page 10). Rather, the court explained that it was enough to offend the Wire Fraud law that customers were not made to buy the remedies based only on truthful advertising statements (Appendix C - pages 10 to 16). The appellate court affirmed the trial court's ruling (Appendix A - pages 16 to 20).

A petition for rehearing en banc, also treated as a petition for rehearing

before the original appellate panel under First Circuit local rules, was filed by petitioner's counsels. It argued that the appellate court's ruling on the first argument was plainly at odds with controlling Supreme Court precedent of Basic v. United States, 446 U.S. 398, 399 (1980) which held that absent affirmative Congressional expression of intent the comprehensive and graduated criminal penalty terms of a statute specifically addressing the conduct cannot be negated by allowing prosecution under a more general statute, regardless of the temporal sequence of the statutes' enactment. The petition for rehearing was denied on 8/17/2018 (Appendix E).

REASONS FOR GRANTING THE PETITION

INTRODUCTION

The food, non-prescription drug and cosmetic industry is one of the most significant and vibrant sectors of the American economy. It is an area of special interest to the American public and where, as will be illustrated below, Congress has been particularly sensitive to public and industry sentiment about the appropriate form and extent of governmental control over advertising claims. As will also be shown below, in deciding what the First Circuit recognized as an issue of first impression the Honorable appeal's court did nothing but entirely negate the carefully drawn comprehensive statutory framework embodying long-standing Congressional policies governing the veracity of advertising claims in the industry. The supervisory role of the Honorable Supreme Court is called for an urgent rescue of Congressional policy in this vital public matter and to serve a reminder that legislation be interpreted while giving hospitable scope to Congressional purpose and defining crime and prescribing its punishment remain a purely congressional prerogative. In addition, regardless of industry area, businesses have a fundamental right to a clear legal demarcation capable of uniform application in courts on the vital issue of when advertising misstatements cross the line into a serious federal fraud felony. The ruling of the First Circuit contradicts every other circuit to have ever addressed the matter and for the first time in judicial history makes an act of deceptive advertising, notwithstanding its condemnable nature, in and of itself a Wire Fraud crime. Finally, the case squarely presents an opportunity to resolve a burning and important circuit split over whether the 'intent to defraud' element of the Federal Mail and Wire Fraud statutes incorporates the requirement of an 'intent to harm'. The divergent views of federal circuit courts on the issue are now leading to frequent and significant inconsistencies in the application

of federal fraud law.

In sum, all three of the questions presented in this petition independantly merit the granting of a writ of certiorari by the Honorable Supreme Court. A more detailed discussion on each question follows.

QUESTION 1: Whether petitioner was wrongly prosecuted under the Wire Fraud statute because Congress intended such allegations of false advertising of non-prescription drugs to be prosecuted only under 15 U.S.C. 52-57?

It is well documented that in 1938 Congress comprehensively revised the food and drug laws of the country. A thorny issue that kept halted this entire legislative overhaul for many years prior to 1938 was how and by which governmental body should false advertising of food, drugs and cosmetics be governed. (See generally; Holloway v. Bristol-Meyers Corp., 485 F.2d 986, 992 (DC Cir., 1973), also David F. Cavers, "The Food, Drug and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions," 6 Law and Contemporary Problems, 2-24 (Winter 1939)). The final legislation embodying Congressional solutions to these questions was 15 U.S.C. 52-57, a detailed and comprehensive statutory scheme specifically drawn for governing the veracity of advertising in the food, drug and cosmetic industry. Despite being an integral part of the food and drug legislation of the country the scheme was deliberately not made part of the Food, Drug and Cosmetic Act ("FDCA"), the enabling legislation of the Food and Drug Administration ("FDA"), but was engrafted on to the Federal Trade Commission Act ("FTCA") in order to give the FTC exclusive control over false advertising in the food, drug and cosmetic industry. See, Holloway at 993:

"As in prior Congresses the House was unwilling to accede to the advertising controls embodied in the Senate Food & Drug bill. Instead of merely striking these offending provisions from S.5 the House Committee took the further step of revising these paragraphs and grafting them on to the Trade Commission Act amendments, thus placing in the hands of the FTC exclusive control over food,

drug and cosmetic advertising." (Emphasis Added)

See also, Earl W. Kinter, "Federal Trade Commission Regulation of Food Drug and Cosmetic Advertising," 16 The Business Lawyer, 81-97, 86 (Nov. 1960), (The primary issue resolved by Congress in 1938 concerning food, drug and cosmetic advertising was whether or not regulation and control of false advertising should be with an executive agency or a quasi-judicial independent regulatory body of the government.)

Amongst an array of enforcement options, 15 U.S.C. 52-57 lays out various potential penalties for false advertising. It saves criminal penalties for the most serious offenders whose conduct evinces an "intent to defraud" or whose products are "injurious to health" (see, 15 U.S.C. 54(a)). But even in this area of heightened concern the penalties are studiously graded depending upon the persistence of the offender, with a fine of not more than \$5,000/- and imprisonment of not more than 6 months for a first offense and a fine of not more than \$10,000/- and imprisonment of not more than one year for any subsequent offense. In addition, all civil and criminal enforcement actions are required to follow specific statutory procedures under 15 U.S.C. 56 that contemplate prior consideration and 'certification of facts' by the FTC to the Attorney General to establish probable liability. See, Holloway at 994 "Under §16 [15 U.S.C. 56], these punitive measures were conditioned upon FTC certification to the Attorney General of probable liability." (Emphasis Added). See also, Free Enterprise Fund v. Public Company Accounting Oversight Bd, 561 U.S. 477 (2010) "Generally, when congress creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." Further, under 15 U.S.C. 54(b) various parties, such as advertising mediums, are provided immunities from criminal prosecutions. Finally, the entire scheme is premised in the definition of false advertisements in 15 U.S.C. 55,

with its own statutory exemptions, and whose administrative refinement is solely the FTC's prerogative. See Holloway at 995;

"Congress voiced approval of the Commission's record in shaping the fluid contours of generalized statutory policy pronouncements into meaningful and coherent rules of business conduct, and it felt that the agency's experience in making concrete the proscriptions of the 1914 Act against "unfair methods of competition" rendered the FTC particularly well suited to the responsibility of giving life to the broad standard of "deceptiveness" as applied to advertising. Until such an administrative refinement of definition could take place, Congress pointedly rejected any effort to hold business accountable to judicially imposed liability."

(Emphasis Added)

Hence, the statutory text, structure and underlying Congressional policies make clear that if without any affirmative expression of intent from Congress its enactment of the Wire Fraud statute in 1952 is treated as an alternate grant of authority to the precise and specifically drawn terms of 15 U.S.C. 52-57 then Congressional purpose in legislating 15 U.S.C. 52-57 will be substantially negated. Most obviously it would render nugatory:

- a) the specific refusal of Congress to vest investigative and enforcement authority over false food, drug and cosmetic advertising in any executive branch agency in favor of FTC as an independent quasi-judicial body
- b) the congressional design and purpose in graduating and proportioning the criminal penalties for fraudulent advertising under 15 U.S.C. 54(a), (See, Busic v. United States, 446 U.S. 398, 399 (1980) holding that criminal penalty enhancements of specific statute cannot be negated by applying a broader statute, regardless of the statutes' temporal sequence and absent affirmative Congressional intent. Also, Dowling v. United States 473 U.S. 207, 225 (1985) holding that the 'studiously graded' penalties of the Copyright Act, 17 U.S.C. 506, confirmed the conclusion that Congress did not intend the National Stolen Property Act, 18 U.S.C. 2314, to cover the conduct)
- c) the enactment of specific civil and criminal enforcement procedures (15 U.S.C 56) contemplating 'certification of facts' from the FTC for prosecution

d) the statutory exemptions from criminal liability (15 U.S.C. 54(b)) (See United States v. Saade (652 F.2d 1126, 1132) (1st Cir., 1981) (Refusing to recognize a broader statute as an 'alternate delegation of power' where it would nullify a more specific statute's 'limited protection' for a certain class of potential offenders, citing Busic v. United States 446 U.S. 398 (1980) and its 'elementary principle' that specific trumps over general)

e) the delegation to the FTC of refining the definition of what constitutes false advertising in the first instance as per the FTC's expertise

Wherefore, holding the Wire Fraud statute as an alternate avenue to 15 U.S.C. 52-57 for prosecuting false advertising of non-prescription drugs works an implied repeal of the precisely drawn terms of 15 U.S.C. 52-57. See Wall v. Alaska, 451 U.S. 259, 281 (1981):

"The maxim that repeals by implication are disfavored has force when the argument is made that a general statute, wholly occupying a field, eviscerates an earlier and more specific enactment of limited coverage but without an indication of congressional intent to do so. In such a case, it may not be reasonable to presume that Congress had not anticipated that its broad pronouncement would have serious implications in a peripheral, or even quite different area and had it recognized that a specific earlier law would be rendered meaningless by a new enactment, it would have expressly indicated its intent to repeal or amend."

See also, Busic at 407-408. ("were the government correct then we would be forced to conclude that with regard to firearms cases 924 (c) impliedly repealed all pre-existing enhancement provisions.")

The most contradictory aspect of the appellate court's ruling was that it approved this implied repeal of 15 U.S.C. 52-57 in a ruling emphasizing the strong judicial presumptions against implied repeals. This self-contradiction was the result of the appellate court ignoring the often stressed canon of giving precedence to the precisely drawn terms of a statute more specifically addressing a conduct over a more general law, regardless of the temporal sequence of the statutes' enactment. See Morton

v. Mancari 417 U.S. 535, 550 (1974), "Where there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (Emphasis Added) Similarly, Bulova Watch Co. v. United States 365 U.S. 753, 758 (1961), "It is familiar law that a specific statute controls over a general one "without regard to priority of enactment"". Also, Townsend v. Little 109 U.S. 504, 512 (1883), "General and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general."

Ignoring these canons the appellate court assumed that the answer in instant case lied somewhere in the temporal sequence of the statutes. The court then struggled long to establish this sequence to ascertain its solution (Appendix A - pages 7 to 9).

The appellate court then made another major mistake by immediately resorting to the Blockburger rule and concluding that the two statutes, Wire Fraud and 15 U.S.C. 52-57, could not conflict because they were addressing different conduct as the Wire Fraud statute required proof of an element, the use of 'wires', that the other statute does not necessarily require (Appendix A - page 10). Here, the Blockburger rule was totally unwarranted.

The Blockburger rule could not be used to ignore the conflicts obvious from the statutory text and structure of the statutes, as previously explained. See Garrett v. United States 471 U.S. 773, 779 (1985) "The Blockburger rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history." Here, the application of the rule was even more problematic because apart from ignoring the conflicts obvious from the statutes the appellate court affirmatively declined to even conduct a careful review of the legislative history of

the statutes involved (Appendix A - page 10, footnote 5). The appellate court misapplied the rule that where the text of a statute is clear resort to legislative history is not necessary to interpret the meaning of the text. The appellate court ignored the basic point that ambiguity concerning the ambit of statutes does not just arise from the meaning of their texts but also because of the interaction of the statutes with other statutes enacted elsewhere. See e.g. United States v. Hutcheson 312 U.S. 219, 229 (1940)"[A]n indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred by him may draw the sting of criminality from the allegations".

Here, a basic review of the concise, yet comprehensive, committee report H.R.Rep. 75-1613, p.5 (1938) that accompanied the version of the bill adopted into law would have confirmed the conclusion that Congress quite clearly intended 15 U.S.C. 52-57 to be the sole legislation available to the government for prosecuting claims of false advertising of non-prescription drugs such as brought against petitioner. H.R.Rep. 75-1613, p.5 (1938) defines the scope of the legislation as:

"[b]road enough to cover every form of advertisement deception over which it would be humanly practicable to exercise governmental control. It covers every case of imposition on a purchaser for which there could be a practicable remedy. It reaches every case that of inadvertent or uninformed advertising to that of the most subtle as well as the most vicious types of advertisement."

After defining 15 U.S.C. 52-57 as comprehensively covering the entire area of false food, drug and cosmetic advertising, the report unambiguously consolidates all enforcement and penalization powers to be exercised within the terms, procedures and penalties established under this statutory scheme. On this point the report says:

"The Federal Trade Commission has the machinery and trained personnel to investigate in a proceeding against false advertising of all industries and all commodities. The common motive of false

advertisement is the same in every line of industry, to gain an economic advantage by defrauding or misleading the purchaser.

This method of protecting the public should be harmonized and unified under one organization with consistent and uniform methods of enforcement and penalization. Efficiency, uniformity and economy suggest this course. This legislation is framed with that purpose in mind.

The Federal Trade Commission as an independant quasi-judicial body, has a procedure better calculated to handle multitudinous types of advertising and to do its work to the greater confidence and satisfaction of the public than any purely administrative body. Its work carries with it the combined elements of searching investigation, orderly procedure, prevention rather than penalization in minor cases, and that judicial fairness that is essential for the enlistment of confidence by the public." (Emphasis Added)

Hence, the statutory text, structure, broad Congressional policy prerogatives and the clear legislative history leave no doubt that by allowing the government to proceed outside the framework of 15 U.S.C. 52-57 the First Circuit has violated Congressional intent and rendered superfluous many years of legislative efforts. The First Circuit also did not take any caution from the 80 year history where such claims of advertising misconduct in the consumer drug field have consistently been proceeded against only within the framework of 15 U.S.C. 52-57 without any hint from the Department of Justice that they warrant wire fraud prosecutions. It may be noted here that prescription drug cases are inapposite as prescription drug advertising control has been transferred to the FDA in 1962. ~~The vast~~ public importance of the issue and the potential damaging impact that can flow from the First Circuit's ruling merits that the Honorable Supreme Court grant a writ of certiorari to address the question presented.

QUESTION 2: Whether petitioner's advertising practices in themselves constituted Wire Fraud despite his honest belief in the efficacy of his remedies and where there was no claim that the remedies were not actually effective as advertised nor their physical contents or licensing status

misrepresented?

Advertising is the backbone of the American consumer economy. To state the obvious, most advertising is the work of fiction involving actors, mock testings and grand statements of capacity, performance and results. Courts that have considered the matter have uniformly held that such statements can only enter the boundries of fraud under one condition. That is when the promoter is knowingly peddling a product or service that inherently, or as a matter of its substantial identity, fails to bear a reasonable resemblance to what the advertising promises. Such occurs when:

- a) the product or service's basic legal identity is misrepresented, such as a non-FDA approved drug is promoted as FDA approved etc
- b) the product's basic physical constituency is substituted, such as if chalk powder is sold in place of salt etc
- c) the product or service inherently fails to perform or function as should reasonably be expected from the advertising

In the instant case it was conceded that there was no claim or allegation that the products sold differed in any of these aspects from what the advertising promised. In reality, this was to concede that the basic value proposition promised by the advertising was not false, but merely that the proposition had been made via the use of excessively fictitious statements. But such dissatisfaction could at most give rise to a deceptive advertising cause of action but not by a far margin to an actual fraud claim. There was no claim in this case of what these products are in terms of their physical composition, why such products should inherently fail to perform or what petitioner knew or believed in this regard. The entire case was missing in this regard of what has always been considered the very heart of an enquiry into whether fraud has occured and instead the case was

invariably focused on a distaste with petitioner's advertising methods. See American School of Magnetic Healing v. McAnnulty 187 U.S. 94 (1902) (Fraud cannot be found when the inherent effectiveness of the healing techniques at issue were merely a matter of opinion), Harrison v. United States 200 F. 662 (6th Cir., 1912) (The essence of a scheme is a plan to deceive as to the substantial identity of the things customers are to receive in exchange), Kar-Ru Chemical co. v. United States 264 F. 921, 927 (9th Cir., 1920) "[I]f you find that the defendant has only used in its several preparations homeopathic remedies for the alleviation of ailments, then your verdict should be not guilty, and you will not be called to consider any other question in the case." (Emphasis Added), United States v. Rabinowitz 327 F.2d 62 (6th Cir., 1964) "[T]he inherent utility of the knitting machine removed it from the ordinary run of mail fraud prosecutions" (citing Harrison, supra), also Rabinowitz at 66:

"The article sold here was not a worthless stock. The defendants were not running a bucket shop under the pretense of doing real trading; they were not running a 'fake' marriage bureau; they were not consignments with no intention of remitting. Here, the defendants through their companies were selling a sturdy, well designed and well constructed device with unusual capabilities for the fashioning of useful and artistic items of apparel."

Also, United States v. Regent Office Supply Co. 421 F.2d 1174, 1180 (2nd Cir., 1970) "[C]laims or statements in advertising may go beyond mere puffing and enter the realm of fraud where the product must inherently fail to do what is claimed for it." (Emphasis Added)

Hence, by affirmatively disclaiming any allegation in this case that the basic promise of the advertising was false, i.e. that the products advertised were not in fact highly effective remedies of a certain composition and licensing status as claimed, it was wrong to suggest that this was a fraud case under the criminal fraud statutes. By failing to even allege any

such misrepresentation and affirmatively disclaiming it, the Appellate Court was wrong to say that there was a misrepresentation of the "essence of a bargain" (Appendix A - page 19) and was also wrong to say that customers were deprived of "facts obviously essential in deciding whether to enter the bargain." (Appendix A - page 19) Such language was applied out of context here.

By conflating a case that at most could be argued as 'deceptive advertising' with that of 'wire fraud', the First Circuit has become the first appellate court to ever validate such a theory from a lower court. If the ruling stands, then it has the potential to open the flood gates of criminal litigation and subject innocent businesses whose aggressive advertising practices may be violative of the law but were nonetheless a distant cry from amounting to a mail or wire fraud crime. To rectify such sanctioning by the appellate court, the supervisory role of the Honorable Supreme Court is called for. The following words in a ruling by any appellate court validating a Wire Fraud theory should never be left standing undisturbed:

"The trial judge accurately ruled that Arif was not being charged "with selling drugs that did not work as intended... or for harming his customers." Rather, he was charged with "making misrepresentations on his websites," which were designed to give false comfort to buyers, in order to induce their purchases." (Appendix A - page 17)

QUESTION 3: Whether an 'intent to harm' is a necessary part of the 'intent to defraud' element of Wire Fraud, as held by a majority of appellate courts but disputed by the First Circuit which also dispensed away with any such requirement in petitioner's case?

The dispute over the requirement of an 'intent to harm' under the mail and wire fraud statutes between federal appellate courts has now developed into a critical situation of fundamental and frequent inconsistency in the application of federal fraud law in courts. Cases that would not even merit

an indictment in the majority of federal circuits are leading to long prison sentences in a minority of circuits, such as the instant case. The very meaning of the word 'defraud' is now disputed. Just in the year 2017 in New York federal courts alone two published rulings were made granting post trial motions for acquittal due to the failure of proof of an 'intent to harm' under the mail and wire fraud statutes. See United States v. Davis, 2017 U.S. Dist. LEXIS 122643 and United States v. Jabar, 2017 U.S. Dist. LEXIS 159559 (found guilty of making 'material false statements' but innocent of Wire Fraud as no 'intent to harm')

The majority of appellate courts that require a finding of an 'intent to harm' include the second, fourth, fifth, sixth, eighth and eleventh United States circuit courts of appeal. See United States v. Starr 816 F.2d 94, 98 (2nd Cir., 1987) (intent to deceive not enough, 'intent to harm' or 'contemplated harm to victim' also required), United States v. Raza 876 F.3d 604, 623 (4th Cir., 2017) (acknowledging the requirement of 'intent to harm'), United States v. Jimenez 77 F.3d 95, 97 (5th Cir., 1996) "Intent to defraud requires intent to (1) deceive and (2) cause some harm to result from the deceit.", United States v. Daniel 329 F.3d 480 (6th Cir., 2003) (Intent to harm is required), United States v. Lamoreaux 422 F.3d 750 (8th Cir., 2005) "The essence of a scheme to defraud is an intent to harm the victim." United States v. Takhalov 827 F.3d 1307, 1313 (11th Cir., 2016) "[I]f there is no intent to harm, there can only be a scheme to deceive, but not one to defraud" (Emphasis in Original).

On the other hand, the first, seventh and tenth circuits take the opposite stance. See United States v. Fernandez 282 F.3d 500, 507 (7th Cir., 2001) "This circuit has never required the government to establish a "contemplated harm to the victim"", United States v. Welch 327 F.3d 1081 (10th Cir., 2003)

(Asserting the correctness of the First Circuit's en banc ruling of United States v. Kenrick 221 F.3d 19, 29 (1st Cir., 2000) (en banc) and declaring that "the intent necessary to a mail or wire fraud conviction is not the intent to harm").

In the en banc decision of Kenrick the First Circuit Court of Appeals asserted that at common law the intent required for fraud was an 'intent to deceive' and there was no requirement of an 'intent to harm'. The First Circuit held that in Neder v. United States 527 U.S. 1, 20-23 (1999) explained that 'materiality' of falsehood was a required finding under the mail and wire fraud statutes because such finding was required at common law. Therefore, the First Circuit held that because an 'intent to harm' was not required at common law so it should not be required under the general federal fraud statutes.

Contradicting the above, the Eleventh Circuit, in endorsing the position long championed by the Second Circuit, went in elaborate detail on the issue in United States v. Takhalov, supra. Takhalov explained that ordinary usage makes clear that there is a difference between deceiving and defrauding and cited numerous dictionary definitions. It also cited Antonin Scalia & Bryan A. Garner's "Reading Law" 69 (2013) "[t]he ordinary-meaning rule is the most fundamental semantic rule of interpretation".

In United States v. Tagliaferri 820 F.3d 568, 572 (2nd Cir., 2016) the Second Circuit also casted doubt over the First Circuit's premise that fraud at common law did not require an intent to harm, mentioning SEC v. Capital Gains Research Bureau, Inc 375 U.S. 180, 195 (1963).

Petitioner respectfully asserts that the minority position endorsed by the First Circuit appears to be the weaker view. Firstly, the First Circuit in Kenrick appeared to derive its understanding of common law fraud from

treatise discussing the "tort of deceit". The analysis appears to overlook the fact that tort law's transposition in a criminal context does not usually come at the expense of ignoring the fundamental premises that distinguish the two kinds of laws. The purpose of tort law is to make whole the wronged, as opposed to a crime made to punish a wrongdoer. Hence, constructive fraud with its lesser requirement of constructive intent is incompatible with criminal fraud, as is well established. The positive or actual fraud requirement of criminal fraud has by definition always incorporated a requirement of detriment to the victim, beyond the victim's mere subjection to a falsehood, to be specifically intended.

Secondly, the First Circuit in Kenrick either overlooked or failed to address whether at common law the terms 'deceit' and 'defraud' carried the same precise and identical meaning, the very heart of the instant dispute.

Thirdly, making fraud merely tricking someone into a transaction that involves money would render any deliberate unfair sales practice into a felonious fraud crime. Such a draconian expansion of fraud law should require some affirmative clarity from Congress, as a matter of lenity. The long practice of maintaining a distinction between an unfair sales practice or false advertising on the one hand and claims of fraud on the other without any counter action from Congress also impliedly indicates the correctness of the majority position. See e.g. John P. Villano Inc. v. CBS, Inc. 176 F.R.D. 130, 131 (S.D.N.Y. 1997) "[A] claim of false advertising under the Lahman Act... is not identical to a claim of fraud. Fraud requires not just a making of a statement known to be false but: also, inter alia, a specific intent to harm the victim and defraud him..."

The instant case presents the question in a most square and "matter of law" fashion. The trial court was presented the issue for decision on stipulated facts (Appendix D) and the court made a purely legal ruling upholding a theory of wire fraud while affirmatively disclaiming any intent to harm, see Appendix C - page 10. A resolution of the conflict between the appellate courts would not only serve justice to petitioner but will surely bring much needed uniformity in the application of federal fraud law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mustafa Hassan Arif

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