No. 18-6667

IN THE SUPREME COURT OF THE UNITED STATES

KHALED ELBEBLAWY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court clearly erred in finding that petitioner knowingly and voluntarily waived the protections of Federal Rule of Evidence 410 with respect to the admission at trial of a signed written statement that he made as part of a plea agreement that he later breached.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 899 F.3d 925.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2018. The petition for a writ of certiorari was filed on November 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of

one count of conspiracy to commit healthcare and wire fraud, in violation of 18 U.S.C. 1349, and one count of conspiracy to defraud the United States and pay healthcare kickbacks, in violation of 18 U.S.C. 371. Pet. App. 2. The district court sentenced petitioner to 240 months of imprisonment, to be followed by three years of supervised release, and ordered petitioner to forfeit approximately $36 million. Id. at 32-33, 36. The court of appeals affirmed petitioner's convictions and sentence, vacated the forfeiture order, and remanded for further proceedings. Id. at 30.

1. Petitioner directed and participated in a scheme to defraud Medicare of tens of millions of dollars over the course of seven years by paying doctors illegal bribes and kickbacks to refer patients and billing Medicare for unnecessary or nonexistent services.

In 2005, petitioner was working as a billing agent at Willsand Home Health (Willsand), a company owned by Eulises Escalona that operated as a "home health agency," providing in-home medical nursing and physical therapy services for homebound patients. Pet. App. 3; see Gov't C.A. Br. 4-5. Petitioner asked Escalona to promote him to a marketing position so that he could recruit doctors who would accept kickbacks in exchange for referring patients to the company. Pet. App. 3. Escalona agreed, and the two men paid doctors between $400 and $800 in cash for each

referred patient. Id. at 3-4. Petitioner and Escalona also paid the doctors to approve unnecessary medical services. Id. at 4. Petitioner falsified records for the most profitable medical services and paid doctors in cash to sign the necessary documentation. Ibid.

In addition to paying off doctors, petitioner hired between eight and ten patient "recruiters," who purchased referrals from nurses, staffing groups, and other entities that lacked the authority to bill Medicare independently. Pet. App. 4. Petitioner and Escalona consulted an attorney who informed them that paying for patient referrals was illegal, so the two men disguised the payments to the groups by inflating the rate that they paid for staffing services. Ibid. Escalona later testified that 90% of the patients referred to Willsand were referred because of a kickback of some kind. Ibid.

In 2007, petitioner and Escalona agreed that they would become equal partners in a new firm, JEM Home Health (JEM). Pet. App. 4; see Gov't C.A. Br. 8. Petitioner managed the firm's day-to-day operations and ultimately pushed out Escalona. See Gov't C.A. Br. 8-9. At JEM, petitioner employed the same fraudulent methods and referral sources that he had employed at Willsand to secure patients. Pet. App. 4-5. In November 2009, Medicare suspended payments to JEM, and a Medicare contractor responsible for investigating healthcare fraud audited the firm. Id. at 5. The

audit revealed that almost 74% of the claims submitted between July 2008 and July 2009 should not have been paid and that almost 99% of claims submitted between August 2009 and February 2010 should not have been paid. Ibid.

Petitioner then started a third home health agency, Healthy Choice Home Health (Healthy Choice). Pet. App. 5. Medicare rules generally prohibit an individual affiliated with a suspended agency, such as JEM, from moving to another agency; petitioner evaded that restriction by using his then-wife's name to start the company. Gov't C.A. Br. 9. Petitioner ran the company from its inception and entered into an agreement to buy his wife's interest in it for a nominal amount during their divorce proceeding in 2013. Id. at 10 & n.3; Pet. App. 5.

All told, Medicare paid $29.1 million for claims from Willsand, $8.7 million for claims from JEM, and $2.5 million for claims form Healthy Choice. Pet. App. 5.

2. In 2013, after Escalona had been arrested and petitioner's now-former wife had been interviewed by federal agents, petitioner approached the government through counsel and offered to cooperate. 1/12/16 Tr. 205-206; see 1/19/16 Tr. 210. In a March 2013 meeting with counsel present (and without any promises from the government not to use his statements against him), petitioner admitted that he knew that what he had done was wrong. 1/19/16 Tr. 116-117. Petitioner provided the government

with a list of doctors, home-health groups, and recruiters involved in the scheme. Id. at 125-126. Petitioner later met with physicians on the list and recorded conversations with them. 1/14/16 Tr. 75-76. Petitioner cooperated with the government for over two years and made more than 30 recordings. Pet. App. 5-6.

In June 2015, petitioner signed a plea agreement in which he agreed to plead guilty to healthcare fraud, in violation of 18 U.S.C. 1349, in exchange for the government's recommendation of a three-level reduction in his offense level for acceptance of responsibility and a sentence within the advisory Sentencing Guidelines range. Pet. App. 37-50. On June 15, 2015, petitioner and his counsel signed an "Agreed Factual Basis for Guilty Plea," which detailed petitioner's role in the offense. Id. at 51-53 (capitalization altered; emphasis omitted).

The plea agreement provided that petitioner's "fail[ure] to comply with any of [its] provisions" -- one of which was his promise to "plead guilty" to one count of healthcare fraud -- would constitute a breach of the agreement. See Pet. App. 37, 48-49. The agreement further provided that, in the event of petitioner's breach, he would "waive[] any protections afforded by * * * Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, and the Government will be free to use against [petitioner], directly and indirectly, in any criminal or civil proceeding any of the information, statements, and materials

provided by him pursuant to th[e] [a]greement, including offering into evidence or otherwise using the attached Agreed Factual Basis for Guilty Plea." Id. at 49.

Notwithstanding his written agreement, petitioner later "changed [his] mind" and declined to enter a guilty plea. Pet. App. 7 (brackets in original).

3. On December 22, 2015, a federal grand jury sitting in the Southern District of Florida returned a superseding indictment charging petitioner with one count of conspiracy to commit healthcare and wire fraud, in violation of 18 U.S.C. 1349, and one count of conspiracy to pay kickbacks and defraud the United States, in violation of 18 U.S.C. 371. Superseding Indictment 7, 9.

Before trial, petitioner moved to suppress the statements he made during his cooperation with the government, as well as his plea agreement and the agreed factual basis for the plea. D. Ct. Doc. 28, at 3-4 (Nov. 6, 2015). His sole argument at the time was that he "did not knowingly and voluntarily waive the protections of Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410." Id. at 4. Rule 410, which is incorporated by reference in Rule 11(f), provides that evidence of "a statement made during plea discussions with an attorney for the prosecuting authority" is generally not admissible in a criminal trial against the defendant who made the statement, "if the discussions did not result in a guilty plea." Fed. R. Evid. 410(a)(4); see Fed. R.

Crim. P. 11(f) ("The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.").

Following a two-day evidentiary hearing, the district court denied petitioner's motion from the bench. 11/17/15 Tr. 89-94. The court explained that a defendant "may waive the protections afforded by" Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f), "as long as the waiver is knowing and voluntary." Id. at 89. With respect to the period from March 2013 to March 2015, the court found that "no plea negotiations" occurred at all, and that petitioner "voluntarily made a decision to cooperate," with "no promises" from the government about the use of his statements. Id. at 90. The court found that plea negotiations did begin in March 2015, but that petitioner "knowingly and voluntarily" entered into the plea agreement, including the Rule 410 waiver, which allowed the use of his plea-related statements against him in the event he breached the agreement. Id. at 91, 93. In finding the waiver knowing and voluntary, the court observed that petitioner "has a college degree" and "actively participated" in plea discussions "by asking questions of his attorney." Id. at 91. It also "assess[ed] the demeanor of the witnesses testifying" at the evidentiary hearing and declined to credit petitioner's testimony that he was "nervous" or "rushed" in signing the plea agreement. Id. at 91, 92.

At petitioner's trial, the government introduced the agreed factual basis into evidence in its case-in-chief. Pet. App. 7. The government also introduced evidence derived from petitioner's pre-plea cooperation, including the recordings he made discussing his past kickback payments. Gov't C.A. Br. 13. The government additionally called Escalona (petitioner's co-conspirator), as well as one of the doctors with whom petitioner had discussed past kickback arrangements on a recording petitioner made. Ibid.; see Pet. App. 7-8. Petitioner fired his counsel during the trial and proceeded to represent himself, claiming that he had been "framed." 1/21/16 Tr. 200; see Gov't C.A. Br. 13. Petitioner admitted that the doctors on the videos were talking about accepting kickbacks from him, but he stated that he found it "kind of surprising." 1/21/16 Tr. 71.

The jury found petitioner guilty on both counts. Pet. App. 8. The district court sentenced petitioner to 240 months of imprisonment, to be followed by three years of supervised release, and ordered petitioner to forfeit approximately $36 million. Id. at 32-33, 36.

4. The court of appeals affirmed petitioner's convictions and sentence, but vacated the district court's forfeiture order for reasons not relevant here. Pet. App. 1-30.

In pertinent part, the court of appeals determined that the district court did not err when it admitted the agreed factual

basis into evidence. Pet. App. 11-17. The court of appeals explained that "'an agreement to waive' the protections" of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) "is 'valid and enforceable,' * * * 'absent some affirmative indication that the agreement was entered into unknowingly or involuntarily.'" Id. at 11-12 (quoting United States v. Mezzanatto, 513 U.S. 196, 210 (1995)). After quoting the waiver provision of petitioner's plea agreement, the court rejected petitioner's argument that the waiver was ambiguous, finding that the "text of the agreement makes clear" that "a decision not to plead guilty" would be a breach of the agreement. Id. at 13-14. The court also determined that the district court did not clearly err in finding that petitioner knowingly and voluntarily waived Rule 410. Id. at 15-17. The court of appeals explained that "the testimonies of [petitioner], his attorney, and a government investigator over the course of a two-day evidentiary hearing amply support the findings by the district court" that petitioner knowingly and voluntarily executed the waiver. Id. at 16. The court observed that petitioner's attorney had been present when petitioner signed the agreement and had discussed each paragraph of the agreement with him. Ibid.

ARGUMENT

Petitioner contends (Pet. 7-16) that the court of appeals erred in "exten[ding]" this Court's holding in United States v.

Mezzanatto, 513 U.S. 196 (1995), to permit a defendant to knowingly and voluntarily waive the protections of Federal Rule of Evidence 410 against the use of the defendant's plea-related statements in the government's case-in-chief (as opposed to for impeachment purposes). That contention does not warrant this Court's review. Petitioner never challenged the admission of his statements on that basis below, and the court of appeals did not address the distinction petitioner now draws. In any event, the decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Furthermore, this case would be an unsuitable vehicle to consider the question presented, not only because petitioner failed to raise it below, but also because any error in admitting the agreed factual basis was harmless in light of the overwhelming evidence of petitioner's guilt. Accordingly, the petition should be denied.

1. Federal Rule of Evidence 410 generally provides that evidence of "a statement made during plea discussions with an attorney for the prosecuting authority" may not be admitted against the defendant in a criminal trial "if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea." Fed. R. Evid. 410(a)(4). In turn, Federal Rule of Criminal Procedure 11(f) provides that "[t]he admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."

In Mezzanatto, this Court addressed the enforceability of a defendant's waiver of Rule 410's protections, which in that case allowed the government to use the defendant's plea-related statements for impeachment purposes. 513 U.S. at 198.[1] The Court held that "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable." Id. at 210. The Court explained that, "in the context of a broad array of constitutional and statutory provisions," it has "adhered to the * * * presumption" that waiver is available "absent some sort of express" provision to the contrary. Id. at 200-201. The Court further explained that "in the context of evidentiary rules," in particular, "[c]ourts have 'liberally enforced' agreements to waive various exclusionary rules." Id. at 202 (citation omitted). Such "evidentiary stipulations," the Court observed, "are a valuable and integral part of everyday trial practice," id. at 203, and allowing "interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining

[1] At the time, Federal Rule of Criminal Procedure 11(e)(6) was "substantively identical" to Rule 410, and the Court discussed both rules interchangeably. Mezzanatto, 513 U.S. at 200. In 2002, Rule 11 was amended, and the version of Rule 11(e)(6) discussed in Mezzanatto was replaced with Rule 11(f)'s current cross-reference to Rule 410. See Fed. R. Crim. P. 11 advisory committee's note (2002 Amendments).

chips" facilitates plea negotiations and cooperation discussions, id. at 208.

Consistent with Mezzanatto, the court of appeals correctly rejected petitioner's contentions that the district court erred in its interpretation of the Rule 410 waiver in his plea agreement or clearly erred in finding that petitioner knowingly and voluntarily agreed to the waiver. The court found the waiver's plain language "unambiguous." Pet. App. 14. It also recognized that, in Mezzanatto, this Court held that a Rule 410 waiver is enforceable "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily." Id. at 15 (quoting Mezzanatto, 513 U.S. at 210). Following an extensive review of the record, the court of appeals found no such indication. Id. at 15-17. As the court explained, the record indicates that petitioner's counsel was present when petitioner signed the agreement, petitioner's counsel discussed each paragraph separately with petitioner, and petitioner's counsel "literally read" the agreement to petitioner. Id. at 16. The court additionally observed that petitioner has a college degree, asked his counsel many questions about the agreement, and never indicated to his counsel that he could not understand the agreement. Id. at 16-17. The court therefore correctly upheld the admission. Id. at 17.

2. Petitioner asks this Court to review the question whether "the impeachment-use waiver doctrine established" in Mezzanatto applies to the use of a defendant's plea-related statements in the government's case-in-chief. Pet. i. That question, however, was neither pressed below by petitioner nor passed upon by the court of appeals. Indeed, petitioner's present arguments contradict his prior recognition that "[t]he Rule 410 protections can be waived by agreement, but only if the record shows the defendant made the waiver knowingly and voluntarily." Pet. C.A. Br. 25 (citing Mezzanatto, 513 U.S. at 210) (emphasis omitted). At no point in the court of appeals proceedings did petitioner suggest that the distinction between using his statements for impeachment or as substantive evidence in the government's case-in-chief was at all significant; he limited his argument, instead, to the contentions that this particular waiver was ambiguous or that his agreement to it was not knowing and voluntary. See id. at 25-32; accord Pet. C.A. Reply Br. 1-9.

Because this Court sits as "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), its "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below,'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see Lee v. Kemna, 534 U.S. 362, 388 (2002) (noting that this Court "ordinarily do[es] not decide in the first

instance issues not decided below") (citation and internal quotation marks omitted). Petitioner identifies no reason to depart from that practice here. The petition accordingly should be denied.

3. In any event, petitioner's contention (Pet. 7-15) that the court of appeals erred in affirming the admission of his plea-related statements lacks merit.

a. Petitioner stresses (Pet. 9-10) that the specific Rule 410 waiver that the Court held to be enforceable in Mezzanatto permitted the use of the defendant's plea-related statements for impeachment purposes. See 513 U.S. at 198, 204-205. The Court's "hold[ing] that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable" was not expressly limited to the impeachment context. Id. at 210. And although three concurring Justices reserved the question whether other concerns "may" exist with a "a waiver to use [plea-negotiation] statements in the case in chief," id. at 211 (Ginsburg, J., concurring), the logic of the decision would apply in that circumstance as well, see id. at 217 (Souter, J., dissenting) (recognizing that the logic of the majority opinion necessarily implied that Rule 410 can also be "waived for use [of the defendant's statements] as affirmative evidence"). As previously explained (pp. 11-12, supra), the Court

rested its holding principally on a "presumption of waivability" applicable to a broad range of constitutional rights and rules of evidence and procedure, Mezzanatto, 513 U.S. at 202 -- a presumption that applies equally to waiving Rule 410 for affirmative and impeachment uses of the defendant's statements. And Rule 410 itself does not distinguish between the two uses.

As petitioner appears to recognize (Pet. 10-11), the courts of appeals that have addressed the issue have uniformly upheld case-in-chief Rule 410 waiver provisions. See United States v. Mitchell, 633 F.3d 997, 1004 (10th Cir. 2011) ("We see no analytical distinction between Rule 410's application to impeachment waivers and case-in-chief waivers."); see also United States v. Stevens, 455 Fed. Appx. 343, 345 (4th Cir. 2011) (per curiam); United States v. Sylvester, 583 F.3d 285, 288-294 (5th Cir. 2009), cert. denied, 559 U.S. 916 (2010); United States v. Hardwick, 544 F.3d 565, 569-571 (3d Cir. 2008); United States v. Young, 223 F.3d 905, 910-911 (8th Cir. 2000), cert. denied, 531 U.S. 1168 (2001); United States v. Burch, 156 F.3d 1315, 1321-1322 (D.C. Cir. 1998), cert. denied, 526 U.S. 1011 (1999); cf. Petrosian v. United States, 661 Fed. Appx. 903, 904 & n.1 (9th Cir. 2016) (observing that circuit precedent did not "prohibit[] introduction of [plea-related] statements during the government's case-in-chief" under a knowing and voluntary waiver), cert. denied, 137 S. Ct. 1215 (2017). Other courts of appeals have upheld Rule 410

waivers for the use of plea-related statements for purposes of rebutting evidence presented by the defendant, even if he does not testify, without deciding whether such statements may be used in the government's case-in-chief. See United States v. Velez, 354 F.3d 190, 195-196 (2d Cir. 2004); United States v. Rebbe, 314 F.3d 402, 406-407 & n.1 (9th Cir. 2002). No court of appeals has adopted the position petitioner advocates here.

Petitioner also argues (Pet. 7-8) that the admission of "plea agreements" in the government's case-in-chief pursuant to a knowing and voluntary Rule 410 waiver "bypasses" Rule 11 because "plea agreements are like guilty pleas" for which the defendant never received the warnings required by Rule 11. See Fed. R. Crim. P. 11(b). As a threshold matter, that argument proceeds from the incorrect premise that the government in this case introduced the plea agreement itself into evidence. In fact, the government introduced only the agreed factual basis that petitioner signed (Pet. App. 51-53) in connection with his plea agreement, not the agreement itself (id. at 37-50). See Gov't C.A. Br. 18 n.6. Except for a single instance at trial in which defense counsel attempted to have a witness read parts of it, see 1/12/16 Tr. 243-244, the plea agreement was discussed at trial only in connection with the agreed factual basis. In any event, petitioner's argument is incorrect. Rule 11 itself makes clear that the "admissibility or inadmissibility of a plea, a plea discussion, and any related

statement is governed by Federal Rule of Evidence 410," Fed. R. Crim. P. 11(f), not by the procedures in Rule 11 governing the acceptance of a plea. Cf. Libretti v. United States, 516 U.S. 29, 42 (1995) (holding that no Rule 11 colloquy is necessary regarding a forfeiture provision in a plea agreement). Petitioner cites no authority suggesting that the waiver of an evidentiary rule requires a Rule 11 colloquy, and none exists.[2]

Furthermore, any concerns about the knowing and voluntary nature of petitioner's agreement to the waiver were addressed by the district court's extensive inquiry into, and findings on, that matter. To the extent the petition could be read to challenge whether petitioner's Rule 410 waiver was knowing and voluntarily (see Pet. 14-15), that fact-bound determination does not warrant this Court's review. The district court held a two-day evidentiary hearing and found that petitioner knowingly and voluntarily entered into the waiver. See p. 7, supra. Petitioner does not identify any error in that factual finding, let alone clear error.

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[2] Petitioner's reliance (Pet. 7, 9) on Rule 410(a)(1) is misplaced. Petitioner did not enter into "a guilty plea that was later withdrawn," Fed. R. Evid. 410(a)(1), and petitioner does not explain why treating his agreed factual basis as though it were a withdrawn plea would have been appropriate or would have made any difference. The Rule 410 waiver to which petitioner knowingly and voluntarily agreed specifically provided that the government could "offer[] into evidence" the "Agreed Factual Basis" if petitioner breached the plea agreement. Pet. App. 49.

3. Even if the question presented warranted this Court's review, this case would be an unsuitable vehicle. As noted, petitioner did not press the issue below, and the court of appeals did not address it. See pp. 13-14, supra. In any event, any error in admitting the agreed factual basis was harmless because the evidence of petitioner's guilt was, as the district court observed, "overwhelming." 4/15/16 Tr. 73 (ruling on post-trial motions). Apart from the agreed factual basis, the government introduced evidence at trial that petitioner had confessed to government agents and had admitted to paying kickbacks -- inculpatory statements not covered by Rule 410 because they occurred before plea negotiations began. See 11/17/15 Tr. 90; Gov't C.A. Br. 32. The government also introduced the videos that petitioner himself had made in which he recorded his discussions with physicians about his previous kickback arrangements. Gov't C.A. Br. 32-33. And two of petitioner's co-conspirators -- Escalona and one of the physicians on the recordings -- testified against him. Exclusion of the agreed factual basis would have made no difference to the outcome of petitioner's trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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