No. _____

In The

Supreme Court of the United States

PAUL BURKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Contrary to the rule in *James v. United States*, 366 U.S. 213 (1961), is the substantial existence of uncertainty in the governing substantive tax law irrelevant to the determination of a pretrial motion to dismiss in a federal criminal tax proceeding so long as the indictment alleges the elements of the charged offense?

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OPINION AND ORDER BELOW

The opinion of the court of appeals is not reported. It is reprinted in the Appendix to this petition.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 23, 2018. A timely petition for rehearing and/or rehearing *en banc* was filed on September 6, 2018. On September 18, 2018 the court of appeals entered an order denying the petition. The jurisdiction of this Court is invoked in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

No person shall be ... deprived of life, liberty, or property, without due process of law ....

United States Code, Title 18: § 371 - Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Code of Federal Regulations, Title 26: § 1.451–2:

Constructive receipt of income.

(a) General rule. Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. Thus, if a corporation credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt. In the case of interest, dividends, or other earnings (whether or not credited) payable in respect of any deposit or account in a bank, building and loan association, savings and loan association, or similar institution, the following are not substantial limitations or restrictions on the taxpayer's control over the receipt of such earnings:

(1) A requirement that the deposit or account, and the earnings thereon, must be withdrawn in multiples of even amounts;

(2) The fact that the taxpayer would, by withdrawing the earnings during the taxable year, receive earnings that are not substantially less in comparison with the earnings for the corresponding period to which the taxpayer would be entitled had he left the account on deposit until a later date (for example, if an amount equal to three months' interest must be forfeited upon withdrawal or redemption before maturity of a one

year or less certificate of deposit, time deposit, bonus plan, or other deposit arrangement then the earnings payable on premature withdrawal or redemption would be substantially less when compared with the earnings available at maturity);

(3) A requirement that the earnings may be withdrawn only upon a withdrawal of all or part of the deposit or account. However, the mere fact that such institutions may pay earnings on withdrawals, total or partial, made during the last three business days of any calendar month ending a regular quarterly or semiannual earnings period at the applicable rate calculated to the end of such calendar month shall not constitute constructive receipt of income by any depositor or account holder in any such institution who has not made a withdrawal during such period;

(4) A requirement that a notice of intention to withdraw must be given in advance of the withdrawal. In any case when the rate of earnings payable in respect of such a deposit or account depends on the amount of notice of intention to withdraw that is given, earnings at the maximum rate are constructively received during the taxable year regardless of how long the deposit or account was held during the year or whether, in fact, any notice of intention to withdraw is given during the year. However, if in the taxable year of withdrawal the depositor or account holder receives a lower rate of earnings because he failed to give the required notice of intention to withdraw, he shall be allowed an ordinary loss in such taxable year in an amount equal to the difference between the amount of earnings previously included in gross income and the amount of earnings actually received. *See* section 165 and the regulations thereunder.

(b) Examples of constructive receipt. Amounts payable with respect to interest coupons which have matured and are payable but which have not been cashed are constructively received in the taxable year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. Dividends on corporate stock are constructively received when unqualifiedly made subject to the demand of the shareholder. However, if a dividend is declared payable on December 31 and the corporation followed its usual practice of paying the dividends by checks mailed so that the shareholders would not receive them until January of the following year, such dividends are not considered to have been constructively received in December. Generally, the amount of dividends or interest credited on savings bank deposits or to shareholders of organizations such as building and loan associations or cooperative banks is income to the depositors or shareholders for the taxable year when credited. However, if any portion of such dividends or interest is not subject to withdrawal at the time credited, such portion is not constructively received and does not constitute income to the depositor or shareholder until the taxable year in which the portion first may be withdrawn. Accordingly, if, under a bonus or forfeiture plan, a portion of the dividends or interest is accumulated and may not be withdrawn until the maturity of the plan, the crediting of such portion to the account of the shareholder or depositor does not constitute constructive receipt. In this case, such credited portion is income to the depositor or shareholder in the year in which the plan matures. However, in the case of certain deposits made after December 31, 1970, in banks, domestic building and

loan associations, and similar financial institutions, the ratable inclusion rules of section 1232(a)(3) apply. *See* § 1.1232-3A. Accrued interest on unwithdrawn insurance policy dividends is gross income to the taxpayer for the first taxable year during which such interest may be withdrawn by him.

STATEMENT OF THE CASE

Petitioner—who is 71 years of age with no prior criminal record-- is the former owner of Rex Venture Group (hereafter, "RVG"), a single-member L.L.C. formed in 2003 and headquartered in Lexington, North Carolina. RVG's business took different forms during its existence but always retained, as prime components, the sale of products on the internet and multi-level marketing. During the years at issue in this case, RVG was comprised of two divisions: (1) Zeekler, an auction website; and (2) ZeekRewards, a multi-level marketing program that was conceived and promoted as the marketing arm of Zeekler. Zeekler was founded in early 2010 and held online auctions in which customers could bid on a wide variety of consumer goods such as cameras, gift cards, or iPads. ZeekRewards, launched in January, 2011, was conceived as a way to drive traffic to the Zeekler website. Instead of employing a traditional advertising budget, Petitioner envisioned a multi-level marketing approach in which ZeekRewards participants, called affiliates, would promote Zeekler by placing ads online and giving away bids as samples to use in the auctions. In exchange, affiliates would have the opportunity to participate in a profit sharing arrangement called the Retail Profit Pool (hereinafter "RPP"). As set out on the ZeekRewards website, RVG promised that at the end of each day, it would share up

to 50 percent of its net profits with participating affiliates through the RPP. Appendix A.

The government contended that ZeekRewards operated as a scheme to defraud and obtained a four-count indictment against Petitioner. Count One charged Petitioner with conspiring to commit mail and wire fraud, in violation of 18 U.S.C. § 1349. Counts Two and Three alleged substantive counts of mail and wire fraud in violation of, respectively, 18 U.S.C. §§ 1341 and 1343. These counts alleged, *inter alia*, that RVG kept no books and records; that Petitioner defrauded affiliates by falsely representing that the RPP was paid from Zeekler profits; that ZeekRewards was a Ponzi scheme; and that Petitioner made up the RPP percentage with no reference to RVG's profits. Appendix A.

Count Four charged Petitioner with conspiring to obstruct the functions of the Internal Revenue Service, in violation of 18 U.S.C. § 371. It alleged that by issuing forms 1099 to affiliates based on "all constructive income received" Petitioner obstructed the Internal Revenue Service. Along similar lines, the indictment alleged that Petitioner and co-conspirators committed two "overt acts" to further the tax fraud conspiracy:

> a. During 2012, Defendant PAUL BURKS and his co-conspirators filed or caused to be filed false IRS Forms 1099 in the names of victim-investors with the IRS which reported fictional income;
>
> b. During 2011 and 2012, Defendant PAUL BURKS and his co-conspirators opened numerous bank accounts and used e-wallets, including e-wallets based in foreign countries, to receive and disburse the fraudulent payments in the scheme.
>
> Appendix A.

Prior to trial, Petitioner filed a motion to dismiss Count Four, arguing that in a criminal prosecution for the violation of a tax law, where the interpretation of the law is vague or debatable, a defendant lacks the requisite intent to violate it as a matter of law. *See*, *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985). In his motion, Petitioner argued that by adhering to the doctrine of constructive receipt he had in fact been following the law. Petitioner's motion was supported by citation to the governing United States Treasury regulation, which states:

> income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given.

26 C.F.R. § 1.451–2; Treas. Reg. § 1.451–2.

As further support, Petitioner also cited to case law from the United States Tax Court which stated:

> The concept of constructive receipt is well established in tax law … Following the regulatory definition, courts have held that income is recognized when a taxpayer has an unqualified, vested right to receive immediate payment. *See Martin v. Commissioner*, 96 T.C. 814, 823 (1991); *Ross v. Commissioner*, 169 F.2d 483, 490 (1st Cir.1948) … Normally, the constructive receipt doctrine precludes the taxpayer from deliberately turning his back on income otherwise available. *See Martin v. Commissioner*, supra; *Young Door Co. v. Commissioner*, 40 T.C. 890, 894 (1963) … In any event, the essence of constructive receipt is the unfettered control over the date of actual receipt. *See Hornung v. Commissioner*, 47 T.C. 428, 434 (1967).
>
> *Ames v. C.I.R.*, 112 T.C. 304, 312 (1999) (ellipses added).

In addition to the foregoing, Petitioner's motion included as an exhibit an opinion letter from Curtis Elliott, a partner in a law firm whose practice is exclusively

devoted to tax law. After analyzing the ZeekRewards program, Mr. Elliott formed the "opinion that each Member who elected bid repurchase as their Award would reasonably be treated as being in constructive receipt of gross income at the time the bonus percentage was calculated and the resulting in kind bid repurchase were set aside and credited to such Member's account. The fair market value of any such Points awarded were therefore properly included in the Member's gross income and properly reportable on the 1099s issued by the Company, to the extent of the Point award's fair market value." Appendix D.

The government opposed Petitioner's motion, arguing that the motion should be denied because it raised a factual matter which should be resolved by the jury. The district court denied the motion on the stated grounds that the indictment alleged every element of the offense, and the question of whether the government could prove the charged offenses was a matter for resolution at trial. Appendix B.

Following the denial of the motion, Petitioner was convicted following a three week jury trial. Regarding Count Four, the jury indicated on the verdict form that they found that Petitioner had committed Overt Act B, related to the opening of bank accounts and e-wallets, and not Overt Act A, which alleged false filings of forms 1099. Petitioner was sentenced to 176 months incarceration concurrent on the counts involving mail and wire fraud, and 60 months concurrent on the conspiracy to defraud count, as well as being ordered to forfeit $244 million. Appendix A.

Petitioner appealed his convictions to the Fourth Circuit on the grounds that the district court erred by not granting his pretrial motion to dismiss the tax fraud

conspiracy charge, and by denying his motion for judgment of acquittal as to the tax fraud conspiracy. Petitioner further argued that the necessary consequence of the court's denial of his pretrial motion to dismiss was that it allowed the government to introduce unfairly prejudicial and otherwise inadmissible evidence which infected the entire trial.

The Fourth Circuit affirmed the district court's ruling on the grounds that because the indictment appropriately alleged each element of a conspiracy to defraud the United States, the district court did not err in denying Petitioner's pretrial motion to dismiss Count 4. The court's opinion further held that "The resolution of such a question about the application of the tax laws to the specific facts of the case is a quintessential role of the jury." Appendix A.

REASONS FOR GRANTING THE PETITION

In various contexts, this Court has held that a defendant cannot "fairly be said to 'know' that the law forbade conduct" where the conduct was "objective[ly] reasonable[] … as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). One of the most esoteric areas of the law is that of federal taxation. It is replete with "full-grown intricacies," and it is rare that a "simple, direct statement of the law can be made without caveat." 1 Mertens Law of Federal Income Tax § 1.01. In *James v. United States*, 366 U.S. 213 (1961), a majority of this Court agreed that the willfulness necessary to sustain a criminal tax conviction of an embezzler could not be proven in light of the uncertainty at that time under the substantive tax law that embezzled funds were includible in the

embezzler's taxable income. Although it concluded that the embezzled funds should have been included in James's income, this Court reversed his conviction for willfully attempting to evade taxes and directed the district court to dismiss the indictment. In so doing, it rejected Justice Harlan's explicit request (joined by Justice Frankfurter) that James' conviction be vacated and a new trial ordered to determine whether--despite evidence below that James' " 'acts were done in a knowing and conscious attempt to evade and defeat' his tax obligations,"--the defendant himself had been aware of the uncertain state of the tax law; whether "misapprehension may have existed in the mind of the petitioner as to the applicable law, in determining whether the Government had proved that petitioner's conduct had been willful as required by the statute." 366 U.S. 242 at 244, 248.

The holding in *James* was thus based firmly on the Court's finding of uncertainty in the applicable tax laws. The lower courts subsequently applied *James* to hold that even though embezzled funds were properly includible in taxable income for years prior to the Court's resolution of this uncertain tax issue, neither civil nor criminal tax fraud penalties could be applied. *Compare*, *e.g.*, *Estate of Geiger v. Commissioner*, 352 F.2d 221 (8th Cir. 1965) (holding funds embezzled prior to the James decision were includible in taxable income), cert. denied, 382 U.S. 1012 (1966), with *Kahr v. Commissioner*, 414 F.2d 621, 627 (2d Cir. 1969) (holding that *James* not only precluded criminal penalties for failure to include embezzled funds in income during the period prior to the *James* decision, but also that the uncertainty of the substantive tax law necessarily barred a finding of the "identical" element of willful

specific intent required under the civil tax fraud statute: "Kahr, like James, ... could not, in legal contemplation, have formed the intent necessary to commit a tax fraud.") (emphasis added).

Although this Court has on several occasions subsequent to *James* reviewed cases applying the willfulness requirement, it has never retreated from its holding that where the tax law is uncertain, a conviction for willful violation of the tax laws cannot stand; nothing this Court has subsequently said undermines its rejection in *James* of Justice Harlan's suggestion that the defendant must demonstrate his own subjective intent. The Court's objective interpretation of the law is dispositive.

The *James* decision barring criminal tax prosecutions in the face of uncertain substantive tax law strikes an appropriate balance. It recognizes that the trial and appellate courts are perfectly capable of rejecting frivolous claims of uncertainty, *see*, *e.g.*, *United States v. Burton,* 737 F.2d 439, 441-42 (5th Cir. 1984) (rejecting defendants' claim that the tax law requirement that wages qualify as income is uncertain); but, at the same time, limits the Government's ability to use necessarily selective criminal tax prosecutions as occasions for advancing highly debatable, uncertain or novel theories of tax law. Accord, *Hughey v. United States*, 495 U.S. 411, 422 (1990) (lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant"); *United States v. Bass*, 404 U.S. 336, 347-50 (1971) (rule of lenity premised on concepts that "fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed" and that "legislatures and not courts should define criminal

activity") (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *United States v. Harris,* 942 F.2d 1125, 1131 (7th Cir. 1991); *United States v. Mallas*, 762 F.2d 361, 361 (4th Cir. 1985). *See also Sorich v. United States*, 555 U.S. 1204, 1207 (2009) (Scalia, J., dissenting from denial of certiorari) ("It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail. 'How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?") (citation omitted).

Here, Petitioner presented a claim of vagueness prior to trial and was ignored. Instead of making its own determination and entering a ruling, the trial court simply reviewed whether the indictment alleged the elements of the offense and let the case proceed to the jury.

A. The question presented warrants this Court's review.

1. The lower courts are divided.

The rationale for the holding in *James* is straightforward- - criminal liability cannot be imposed for a violation of a vague and uncertain tax law since no one could possibly "know" that he or she has violated the law. *James*, 366 U.S. at 220-221. This holding notwithstanding, lower courts are divided on the question of whether the objective vagueness of a particular law negates criminal liability as a matter of law. *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974) (vacating conviction); *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985) (vacating conviction); *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991) (vacating conviction); *United States v.*

Dahlstrom, 713 F.2d 1423 (9th Cir. 1983) (vacating conviction); *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987) (vacating conviction); *United States v. Pirro*, 212 F.3d 86 (2d Cir. 2000) (striking portion of indictment based on vagueness of tax law); *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (*en banc*) (treating vagueness as having both legal and factual components); *United States v. Atkins*, 869 F.2d 135 (2d Cir. 1989) (affirming conviction based on narrow definition of economic substance); *United States v. Ingredient Technology Corp.*, 698 F.2d 88 (2d Cir. 1983) (affirming conviction based on narrow definition of tax law at issue); *United States v. Curtis*, 782 F.2d 593 (6th Cir. 1986) (finding vagueness in the tax law irrelevant and affirming conviction). Review is thus warranted to provide guidance and promote uniformity in the lower courts.

2. The panel opinion conflicts with decisions of the Second and Seventh Circuits as well as other lower courts.

The panel opinion squarely holds that when presented with a defendant's pretrial motion to dismiss based on a claim of vagueness, a district court has no obligation beyond determining whether the indictment alleges the elements of the offense and should leave the rest to the jury. This is contrary to the opinions of other circuits, which require judicial determination of issues of vagueness and Due Process. *See*, *United States v. Pirro*, 212 F.3d 86 (2d Cir. 2000); *United States v. Harris*, 942 F.2d 1125, 1132 n.6 (7th Cir. 1991) ("A claim of objective ambiguity requires that the court examine all of the relevant precedents and dismiss the indictment if it concludes that the tax obligation is ambiguous as a matter of law."); *United States v. Mallas*, 762 F.2d at 364 n.4 ("[T]he uncertainty of a tax law, like all questions of vagueness,

is decided by the court as an issue of law."); *United States v. Brodnick*, 710 F. Supp. 2d 526, 553 (S.D.W.Va. 2010) (". . . [I]n this case, the question presented is whether Defendants had fair warning that their use of domestic and foreign entities in the employee leasing and deferred compensation program to transfer Dr. Brodnik's earnings into offshore accounts constituted income tax evasion. . ."); *United States v. Lewis*, 730 F. Supp. 691, 693 (W.D.N.C. 1990) ("Defendants assert that the transfer of assets to an unincorporated business organization (U.B.O.) is not inherently unlawful. . . Hence, Defendants argue that they lacked notice that their actions in promoting the U.B.O.'s violated the tax laws."), affirmed in part and vacated on other grounds in *United States v. Schmidt*, 935 F.2d 1440 (4th Cir. 1991). Review to establish uniformity is thus warranted in this regard as well.

B. This case is a particularly good vehicle for addressing the question presented.

The issue presented was litigated in the district court and the court of appeals, and comes to this Court on direct appeal. The court of appeals directly addressed and rejected the Due Process claim Petitioner presents here, without suggesting that it had been somehow forfeited or waived. The question presented is also almost certainly outcome-determinative here. If this Court decides that *James* requires trial courts to rule on claims of vagueness in tax prosecutions instead of leaving such determinations to a jury, the decision of the Fourth Circuit cannot stand.

C. The panel opinion is wrong.

The court of appeals accused Petitioner of going far beyond the four corners of the indictment and asking the district court to conduct a mini-trial to determine

his vagueness claim. With respect, Petitioner's argument was based on the language of the indictment itself- - whose core premise was that he broke the law by issuing forms 1099 based on "all constructive income received." Nor did Petitioner request or require a mini-trial to have the merits of his vagueness argument determined- - what he did request was a judicial determination based on case law, Treasury regulations, and an opinion letter from tax counsel. Although the panel opinion was premised on the fact that many opinions in this area involve facts developed after a jury trial, there is no basis for the counterintuitive proposition that it should be left to juries, and not judges, to determine the complexities of tax law where there is a bona fide dispute. *Pirro*, 212 F.3d at 91 ("[W]illfulness under the tax laws requires a voluntary, intentional violation of a known legal duty.") (citation and internal quotations omitted). While these cases refer to proof at trial, this principle has application as well to an indictment, where criminal liability for perjury turns on an underlying violation of tax law.").

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests that the Court grant this petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, reverse the court's decision, and grant any other relief this Court finds to be just and proper.

Respectfully submitted this the 14th day of December, 2018.

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