No. 19-1087

IN THE

Supreme Court of the United States

CHARLES M. HALLINAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. ROSENSAFT
Counsel of Record
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
michael.rosensaft@kattenlaw.com
212-940-6631

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

Petitioner, a 79 year old man, has been sentenced to life in prison for usurious lending when the jury was never instructed on the "crucial element" that separates lawful from unlawful conduct – his belief in the lawfulness of his actions based on legal advice he received. Instead, the jury was told that simply collecting on high-interest loans that were determined to surpass state usury rates is criminal. Contrary to every other court that had considered the issue, Petitioner's intention to act lawfully was irrelevant. Perhaps worse, Petitioner was convicted of wire fraud for "defrauding" civil plaintiffs out of their lawsuit by purportedly lying in a deposition. The allegations rested on an expansive theory of wire fraud that assumes a legal action itself is property – an unprecedented theory that no other prosecutor had ever conjured up and no court had ever endorsed.

It is imperative that this Court address these clear errors of law, which conflict with this Court's precedents, deviate from lower court decisions, and carry extremely broad and potentially destructive implications.

First, the Third Circuit's unprecedented pronouncement that a willfulness instruction is not required for usurious lending criminalizes an entire industry of payday lenders who for years received legal opinions from prominent law firms that if they partnered with tribes then Tribal lending laws would control whether the loans were usurious – not state lending laws. It is crucial to require a scienter element for RICO usury prosecutions so that lenders, lawyers, tribes, banking partners, and prosecutors all know where the line is drawn between lawful and unlawful conduct. Anything else would be "at war with a

fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce v. United States,* 314 U.S. 306, 311 (1941).

Second, allowing the Government's novel wire fraud theory to stand has even more overarching results. Under the Government's theory, as soon as anyone files a lawsuit, they create "traditionally recognized property" for purposes of the wire fraud statute. It is immaterial whether the lawsuit is frivolous – merely typing up a complaint, walking into a clerk's office, and paying filing fees creates property. At that point, any false statement made by a witness – as Petitioner was – is suddenly a scheme to defraud. The implications of this never-before-seen theory are immense as described *infra*.

This case is unprecedented in many ways: it was one of the first criminal prosecutions of an individual adhering to the Tribal model of payday lending; it was the first wire fraud conviction resting on a theory that a legal filing is property; and it was the first RICO usury prosecution that lacked a willfulness instruction. Contrary to the Government's arguments, this is an extremely important case for the Court to accept to address the far-reaching effects of the Third Circuit's decision and stifle the great expansion of prosecutorial powers that the Government would have as a result.

I. The Lower Courts Need Guidance On The Scienter Necessary For RICO Usury.

The Government characterizes this petition as a "case-specific dispute" about jury instructions and attempts to minimize the Third Circuit's holding because it is unpublished. The Third Circuit's decision below is neither case-specific nor inconsequential; it

broadly addresses the scienter requirement for RICO usury and threatens to criminalize an entire industry of payday lenders, tribes, banking partners, and attorneys who all adhered to the so-called Tribal model believing that their conduct was legal.

Indeed, in a recent published opinion, the Second Circuit underscored the need for guidance on this issue. Two months before Petitioner was arrested in this case, prosecutors in the Southern District of New York brought charges against Scott Tucker for his participation in the Tribal model of payday lending. *United States v. Grote*, ___ F.3d ___, 2020 WL 2843880 (2d. Cir. June 2, 2020). For Tucker the Government agreed "that the requisite mental state for the RICO counts was willfulness." *Id.* at *1. This was of course diametrically opposed to the Government's submission in this case. Because a willfulness instruction was given, the Second Circuit "express[ed] no view on whether willfulness or awareness of unlawfulness was required," but felt compelled to undertake an analysis discussing the "confusing and arguably incompatible precedents regarding the required mental state for a RICO offense involving unlawful debt . . . in the hope of exposing some potential problems." *Id.* at *8. It explained:

> One source of the difficulty is that a RICO unlawful debt offense can be predicated on a violation of a state's *civil* usury statute, and that many such civil statutes impose no state of mind requirement at all. Certain applications of RICO in this context are thus in tension with the Supreme Court's recent reaffirmation of a "presumption in favor of a scienter requirement" applicable to "each of the

> statutory elements that criminalize otherwise innocent conduct."

Id. (citing *Elonis v. United States,* 135 S. Ct. 2001, 2011 (2015)). The Second Circuit then noted that in *United States v. Biasucci*, 786 F.2d 504, 513 (2d Cir. 1986), it had "declared that RICO requires that the defendant acted knowingly, willfully and unlawfully," in opposition to the Third Circuit's holding here. *Grote*, 2020 WL 2843880 at *8, *9, but nonetheless continued to explain the difficulties in assessing scienter:

> If RICO liability requires no proof of state of mind other than what is required to show that the loan is unenforceable under the predicate state statute and this rule applies where unenforceability under state law depends on only the interest rate . . . this can produce criminal liability for racketeering for unexceptionable conduct. We have serious doubts that such a rule appropriately "separate[s] wrongful conduct from otherwise innocent conduct."

Id. (citing *Elonis*, 135 S. Ct. at 2010); *see also* Pet. at 14-15 (discussing the complexity of the RICO statute depending on ever-changing and contradictory state laws). The Second Circuit concluded by predicting that "the issues we have discussed will pose troublesome questions in future cases . . ." *Grote*, 2020 WL 2843880 at *11. The Second Circuit all but invited this Court to take up this issue. Clarity is desperately needed.

The Government is absolutely wrong that this is a "case-specific dispute." Resp. at 11. Either usury under RICO requires a willfulness instruction or it does not; either the entire payday lending industry that

relied on the Tribal model of payday lending are criminals or they are not; either the tribes that took part in this industry belong in prison or their mental state may be considered in assessing the lawfulness of their actions; and either every attorney who gave a legal opinion on the Tribal model aided in the commission of a crime, or they did not because of their good faith belief in their legal analysis. If willfulness is not required and the hallmark that separates lawful from unlawful conduct is simply knowing that one is making a high interest loan, then the floodgates will open for future prosecutions (and perhaps have already). *See, e.g.,* Press Release, United States Attorney's Office for the Southern District of New York, *Scott Tucker Sentenced to More Than 16 Years In Prison For Running $3.5 Billion Unlawful Internet Payday Lending Enterprise* (Jan. 5, 2018); Brianna Bailey, *Oklahoma Tribe Agrees to Pay $48 Million To Avoid Prosecution In Payday Lending Scheme,* The Oklahoman (Feb. 10, 2016), *available at* https://oklahoman.com/article/5478088/oklahoma-tribe-agrees-to-pay-48-million-to-avoid-prosecution-in-payday-lending-scheme.

The Government's argument that this is an improper vehicle to decide the issue because the Third Circuit's decision is unpublished rings hollow. In fact, the unpublished nature underscores the crucial need for Supreme Court review. The most recent judicial report concerning the Courts of Appeals revealed that 87% of Circuit decisions are unpublished. United States Courts Statistics and Reports, Table B-12 (Sept. 30, 2019). The idea that the Third Circuit's decision below will not be relied upon by litigants and other courts is fanciful at best. *See* William T. Hangley, *Opinions Hidden, Citations Forbidden*, American College of Trial Lawyers, at 19 (March 2002) ("Modern judges have too many opinions to write and

modern lawyers have too many opinions to read, and a world in which the lawyers knew they could safely disregard eighty percent of the opinions would be a nicer place. That world does not exist."). Indeed, prosecutors in the *Tucker* case cited the Third Circuit's "unpublished" decision in an information letter. *See* Letter by USA as to Scott Tucker re: Hallinan Decision at 1-6, *United States v. Tucker,* 1:16-cr-00091-PKC (S.D.N.Y. Jan. 3, 2017), Dkt. No. 120.

The fact that the Third Circuit chose to not publish a 26-page opinion despite it involving the first-ever criminal RICO appeal addressing the Tribal model of payday lending and addressing a novel and expansive theory of wire fraud is reason to accept the petition, not to reject it. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., Scalia, J., dissenting from denial of certiorari) (calling the unpublished nature of a Fourth Circuit's opinion that raised novel issues "disturbing" and a reason to grant review); *Smith v. United States*, 112 S. Ct. 667, n.* (1991) (Blackmun, J., O'Connor, J., Souter J., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion."); *see also* Adam Liptak, *Courts Write Decisions That Elude Long View*, N.Y. Times, (Feb. 2, 2015) at A10 (quoting the honorable Justice Stevens as stating that he was more likely to vote to grant review of unpublished rulings "on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.").

The notion that federal criminal liability requires a consideration of the defendant's mental state "took deep and early root in American soil." *Elonis*, 135 S.

Ct. at 2012 (2015). Here, the jury never considered Petitioner's mental state on the crucial element of the crime. As the Tribal model payday loan prosecutions continue and the Government more aggressively uses the RICO usury provision, prosecutors, courts, litigants, lenders, and tribes must all know "in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

II. The Government Cannot Hide Behind Plain Error to Allow the Government to Contort the Wire Fraud Statute.

In *Kelly v. United States*, 590 U.S. ___, 140 S. Ct. 1565, 1571, ___ L.Ed.2d ___ (2020), this Court again emphasized that the wire fraud statute is "limited in scope to the protection of property rights." Here, the "property right" cited by the Third Circuit was "a cause of action." *United States v. Neff,* 787 F. App'x. 81, 91-92 (3d Cir. Sept. 6, 2019). A mere claim has never been recognized as property under the wire fraud statute. *See* Pet. at 27.

A. The Government's Reliance On Plain Error Is Misplaced.

In the face of the first ever criminal prosecution recognizing a mere cause of action as traditionally recognized property under the wire fraud statute, the Government relies on plain error to argue that Petitioner cannot establish an error that is "clear or obvious" because lower court holdings are contradictory as to whether a cause of action is property. In relying on plain error, the Government makes an extraordinary statement: it is inconsequential for a 79

year old man with cancer, heart disease, and celiac disease (in the midst of the coronavirus pandemic) to serve the rest of his life in prison because it is not "clear or obvious" that he committed a crime at all. This is diametrically opposite as to how this Court approaches criminal statutes. "[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). This bedrock of criminal law "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* at 266 (citation omitted); *United States v. Bass*, 404 U.S. 336, 348 (1971) (noting 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" (citing H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in *Benchmarks* 196, 209 (1967))).

The error here is obvious, however. Until this case, no Court had ever endorsed a theory that a defendant can commit wire fraud by defrauding someone out of their cause of action; no prosecutor has ever brought a case alleging such a broad theory; and this Court has been abundantly clear that "[t]he wire fraud statute thus prohibits only deceptive 'schemes to deprive [the victim of] money or property.'" *Kelly*, 140 S.Ct. 1565 at 1571 (citing *McNally v. United States*, 483 U.S. 350, 358 (1987)). *See* Pet. at 29 (describing cases that have all held that causes of action are not property). This Court is not in the habit of approving "sweeping expansion[s] of federal criminal jurisdiction[,]" when prosecutors attempt to use the wire fraud statute to punish all "wrongdoing." *Kelly*, 140 S.Ct. at 1574 (citing *United States v. Cleveland*, 531 U.S. 12, 24 (2000).

The Government primarily relies on two cases to argue that a simple cause of action is the traditionally recognized "money or property" necessary to make out wire fraud. Resp. at 15-16. It first cites *Pasquantino v. United States*, 544 U.S. 349 (2005), in which the Government claims that this Court stated that "the right to sue on a debt" is a form of property. Resp. at 15. This Court never made that statement. That quote was taken from another source this Court cited in a parenthetical. In *Pasquantino*, this Court stated that "[t]he right to be paid money" is a species of property. *Pasquantino*, 544 U.S. at 356. This is significant because *Pasquantino* addressed a country's right to collect excise taxes that were already due and owing – not the right to file a lawsuit. *Pasquantino*, 544 U.S. at 355-56. There was no debt due and owing here.

The Government also points to this Court's holding on the assignability of claims in *Sprint Commc's Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008), to argue that if a claim can be assigned it is property. Resp. at 15-16. *Sprint* spoke to the standing of assignees and made no such leap in logic. As Chief Justice Roberts noted in his dissent, "standing is not 'commutative' [, and] [l]egal claims, at least those brought in federal court, are not fungible commodities." *Id.* at 302 (internal citation omitted).

The Government cannot be permitted to invent a crime and then hide behind plain error to keep a 79 year old man locked up in prison for fourteen years. A litigant cannot be defrauded out of their complaint under the wire fraud statute and this Court should not allow the Government to put in motion a massive expansion of prosecutorial power as next described.

B. The Government Downplays The Far-Reaching Implications of the Third Circuit's Decision.

Make no mistake – if the Third Circuit's decision is allowed to stand, it will be used by prosecutors to open up an entirely new category of crime. Civil litigation wire fraud would abound. Prosecutors who are unable to gather evidence to support their case would troll through civil litigation as a replacement. As noted in this Petition, litigants can sue on a variety of ridiculous and frivolous theories. *See* Pet. at 31; s*ee also* John Harrington and Hristina Byrnes, *A Man Sues Himself? A Docket of 25 of the Weirdest, Silliest and Frivolous Lawsuits*, 24/7 Wall Street, USA Today (Feb. 3, 2020), *available at* https://www.usatoday.com/story/money/2020/02/03/25-really-weird-lawsuits-you-wouldnt-believe-were-ever-filed/41083385/ (citing, among other ridiculous cases, a man who sued himself for violating his own religious beliefs). None of these cases can seriously be considered property, but if the Third Circuit's decision were to stand, all of them would so be.

The Government tries to allay these concerns by arguing that the object of the scheme here was unique in that it was aimed to "induc[e] other parties to give up their legal claims for money damages as part of a settlement," (Resp. at 16) but that is hardly a limiting principal. Almost every lawsuit seeks money damages, the object of the defendant is always for the plaintiff to give up their legal claims, and the great majority of civil cases conclude with a settlement. *See Manfore v. Phillips,* 778 F.3d 849, 852 (10th Cir. 2015) (noting that "virtually all cases settle in part or in whole"); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 578 (1991) (arguing there is no

appreciable risk of non-recovery in class actions because "virtually all cases settle").

The question presented here is simple: is a bare cause of action property under the wire fraud statute. Until the Third Circuit's decision, no court had ever held that the wire fraud statute had such a reach. Just as the Government cannot use the wire fraud statutes to "set[] standards of disclosure and good government for local and state officials," *McNally*, 483 U.S. at 360, prosecutors should not be allowed to use wire fraud to set standards of behavior for litigants in state civil proceedings. Stubbornly clinging to a continuation of its failed arguments in *Kelly*, the Government again posits that it should be allowed to "use the criminal law to enforce (its view of) integrity," here not for politicians but for civil litigants, but "[t]he property fraud statutes do not countenance that outcome." *Kelly*, 140 S.Ct. at 1574.

III. Conclusion

For the reasons stated herein, we respectfully submit the Court should accept this petition for review.

Respectfully submitted,

MICHAEL M. ROSENSAFT
Counsel of Record
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
michael.rosensaft@kattenlaw.com
212-940-6631