No. 19-_____

In The
Supreme Court of the United States

MICHAEL BAKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal fraud statutes define the offense of fraud as a scheme to "obtain[] money or property" by deceptive means. 18 U.S.C. § 1343; *see also* 18 U.S.C. §§ 1341, 1348. Interpreting other federal criminal statutes, this Court has held that the statutory phrase "obtain property" is a common-law term of art with a well-recognized meaning. Consistent with its ordinary meaning and its common-law definition, this Court has held that "obtaining property" means acquiring some property that the victim gives up. *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017); *Sekhar v. United States*, 570 U.S. 729, 732-34 (2013).

Some circuits have held, however, that the same phrase has a different meaning in the federal fraud statutes. They have ruled that this Court's prior definition of the phrase "obtain property" is inapplicable to the fraud statutes. They have held that any conduct that "affects a victim's property rights" constitutes fraud, regardless of whether the defendant sought to obtain property.

The question presented is whether *obtaining property* has the same meaning in the fraud statutes as it does in other provisions in the federal criminal code.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Michael Baker, No. 1:13-cr-346-SS-1 (judgment entered Nov. 16, 2017).

United States v. Michael Gluk, No. 1:13-cr-346-SS-1 (judgment entered Jan. 23, 2018).

United States v. John Raffle, No. 1:12-cr-314-SS-1 (judgment entered Dec. 5, 2014).

United States v. David Applegate, No. 1:12-cr-314-SS-2 (judgment entered Dec. 5, 2014).

United States Court of Appeals (5th Cir.):

United States v. Michael Baker, No. 17-51034 (judgment entered April 26, 2019).

United States v. Michael Gluk and Michael Baker, No. 14-51012 (judgment entered Aug. 4, 2016).

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Petitioner Michael Baker respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's opinion was published at 923 F.3d 390 and is reproduced at App. 1-37.

JURISDICTION

The Fifth Circuit issued its amended opinion on April 26, 2019 and denied petitioner's timely request for rehearing en banc on June 27, 2019. App. 1-37, 38-39. On September 6, 2019, Justice Alito extended the time for filing this petition to and including October 25, 2019. *See* No. 19A266. On October 3, 2019, Justice Alito further extended the time for filing this petition to November 22, 2019. *See id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 1343 of the United States Code states, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Title 18, Section 1348 of the United States Code states, in pertinent part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15

> U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));
>
> shall be fined under this title, or imprisoned not more than 25 years, or both.

INTRODUCTION

The federal fraud statutes, 18 U.S.C. § 1341 et seq., prohibit schemes to obtain money or property by deceptive means. This Court has held that those statutes, which are derived from the common law crimes of fraud and false pretenses, should generally be interpreted in accordance with the common law.

This Court has also held, as to other federal criminal statutes, that the statutory phrase "obtaining property" should be interpreted in accordance with its common-law meaning. Obtaining property does not mean a mere interference with another's property rights. Rather, "[o]btaining property requires 'not only the deprivation but also the acquisition of property.'" *Sekhar v. United States*, 570 U.S. 729, 734 (2013) (quoting *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 403 (2003)).

If fraud is a crime derived from common law, and *obtaining property* is a phrase with a well-recognized common-law meaning, then it stands to reason that *obtaining property* should be given its common-law meaning in the federal fraud statutes. But that is not what some lower courts have done. Instead, they have

held that *obtaining property* has a different and broader meaning in the fraud statutes. They have held that anything that interferes with or affects a property interest constitutes fraud.

The petitioner in this case was convicted on the basis of that theory. He was charged with wire fraud and securities fraud under §§ 1343 and 1348, as well as conspiracy to commit both. He argued that the government should be required to plead and prove that he either obtained or sought to obtain money or property from the alleged victims. He requested a jury instruction to that effect—an instruction drawn directly from this Court's cases defining "obtain property." But the district court and the Fifth Circuit below rejected his arguments. Notwithstanding the text of the statute and this Court's cases, they held that obtaining property is not required. They held that *affecting property rights* is enough—and they held that petitioner, even if he had not obtained property from the victims, had affected their property rights.

Lower courts are divided on this issue, and they continue to struggle to define fraud. *See United States v. Kelerchian*, 937 F.3d. 895, 912-14 (7th Cir. 2019) (discussing the circuit split). To be blunt, the reality is that some lower courts have not been faithfully applying this Court's cases limiting the scope of the fraud statutes. At the government's urging, some lower courts have endorsed creative and expansive conceptions of what it means to obtain property. Not content with the common-law conceptions of fraud, they have expanded the statute far beyond its traditional roots. They have

evaded this Court's fraud jurisprudence—limiting cases to their facts, characterizing holdings as dicta, responding to new rulings with new end-runs.

Given the ubiquity of fraud prosecutions in federal criminal practice, these issues are of utmost importance. This Court should grant certiorari to clarify whether *obtain property* has its common-law meaning in the fraud statutes—and to ensure that the circuits enforce this Court's fraud jurisprudence. At a minimum, this Court should hold this petition pending the outcome of *Kelly v. United States*, No. 18-1059, which presents related issues.

STATEMENT OF THE CASE

1. Petitioner Michael Baker was the CEO of ArthroCare, a publicly traded medical device company. ArthroCare developed and sold devices used for minimally invasive surgical procedures. The company enjoyed many years of success, including growing earnings and a rising stock price. As the company matured, however, the growth rate began to slow, and at times, the company disappointed Wall Street.

In late 2007, prominent short sellers began to question ArthroCare's earnings. The New York Post picked up the accusations and questioned some of ArthroCare's business practices. ArthroCare commenced an internal investigation, led by outside auditors and outside counsel. They determined that ArthroCare had, in fact, overstated its earnings. The false earnings

reports were based largely on a practice known as "channel stuffing," whereby companies book excess sales at the end of a quarter.

ArthroCare restated its earnings in 2008, in the midst of the financial crisis. Its stock plummeted from over $40 per share to just a few dollars per share. It eventually recovered in 2009 and 2010—the company, after all, had an excellent product line and the great majority of its revenues were legitimate. Nonetheless, investors who sold during the restatement crisis suffered substantial losses.

2. In late 2008, the SEC and the DOJ commenced a joint investigation into the accounting practices at ArthroCare. They initially concluded that two of petitioner's subordinates, John Raffle and David Applegate, were responsible for the fraud. Those two ran the divisions where the channel stuffing had taken place. The investigation revealed, in fact, that Raffle and Applegate had gone so far as to book entirely false sales in order to make their sales quotas.

In a civil complaint, the SEC alleged that Raffle and Applegate had intentionally violated securities law. In 2012, the DOJ indicted Raffle and Applegate for mail fraud and securities fraud.

Shortly before they were set to go to trial, Raffle and Applegate reached plea agreements with the government. They then claimed that Baker, their boss, had directed the fraud. They claimed that while Baker was unaware of certain details regarding false sales, he was generally aware of the channel stuffing and fraudulent

accounting practices. They claimed they had acted under his instructions.

3. Based on Raffle and Applegate's belated claims, the government indicted Baker and his CFO Michael Gluk in July 2013—over five years after the accounting irregularities were first exposed. The government filed a superseding indictment in 2014. The superseding indictment alleged various counts of wire fraud under 18 U.S.C. § 1343 and securities fraud under 18 U.S.C. § 1348, as well as conspiracy and false statements charges.

Baker and Gluk first proceeded to trial in 2014, and both were found guilty. In 2016, the Fifth Circuit reversed their convictions based on numerous procedural and evidentiary errors. *United States v. Gluk*, 831 F.3d 608 (5th Cir. 2016). The case was remanded for retrial. Prior to the retrial, Gluk also reached a plea agreement with the government. Baker thus proceeded to retrial alone.

The second trial took place in August 2017. Gluk, Raffle, and Applegate all testified pursuant to their cooperation agreements. All three claimed that Baker was aware of and had participated in the scheme to overstate earnings.

4. At trial, the defense did not dispute that ArthroCare had overstated earnings. Rather, the defense disputed Baker's knowledge and intent. It argued that Baker was unaware of the fraudulent activities of his subordinates, particularly Raffle and Applegate, who were responsible for the false sales numbers.

Baker also argued that he did not intend to defraud investors. After all, Baker himself was one of the largest shareholders, so his interests were aligned with legitimate investors' interests.

Many of the wire fraud counts, for example, were based on allegedly false statements Baker made on conference calls with professional investors and analysts in early 2008. Baker claimed that at the time he made the statements, he was relying on information from Raffle and Applegate, and he did not learn until later that they had been lying. In addition, Baker claimed that he was not seeking to defraud legitimate investors—to the contrary, he was seeking to *defend* legitimate investors and the company from attacks by short sellers.

When ArthroCare restated earnings and the stock tanked, the legitimate investors lost a great deal of money—as did Baker. The only winners were the short sellers. The defense argued that Baker did not gain from the investors' loss; in fact, he lost with them. It argued that while there was undoubtedly fraud at ArthroCare, Baker never intended to defraud investors.

5. Consistent with that factual defense, Baker argued that to prove the alleged crimes, the government should be required to prove that he intended to obtain money or property. After all, the statutes under which he was charged define the crime of fraud as "obtaining money or property" by deception. *See*, *e.g.*, 18 U.S.C. § 1343. In the course of interpreting other criminal statutes, this Court has held that the phrase

"obtaining property" is a common-law term of art with a well-recognized meaning. *See Scheidler*, 537 U.S. at 403-05; *Sekhar*, 570 U.S. at 734; *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017).

Baker requested that the jury be instructed on the obtaining property element.[1] His proposed instructions would have required the jury to find that he "intended to obtain money or property from the victim by fraudulent means." His proposed instructions defined "obtaining property" as "acquire[ing] some money or property that the victim gives up." That language defining the obtaining property element was taken directly from this Court's decisions in *Scheidler*, *Sekhar*, and *Honeycutt*.

The district court, however, rejected those cases as "inapplicable" to the charged offenses. Relying on prior Fifth Circuit law, it held that obtaining property (or seeking to obtain property) is not a necessary element of the offense. Instead, it held that fraud only requires some deceptive conduct that "affected" the victims' property rights.

On that basis, the district court rejected Baker's arguments about the obtaining property element. It gave the jury two different instructions on the essential meaning of a scheme to defraud. First, in defining

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[1] Baker also argued before trial, along the same lines, that the indictment had failed to allege the obtaining property element. And at the close of the government's case, he argued that the government had failed to prove the obtaining property element.

the elements of the offense, it stated that a scheme to defraud means a plan "to deceive investors about ArthroCare Corporation's financial condition." App. 40. Second, in a subsequent definition, it stated that a scheme to defraud includes "any plan, pattern, or course of action intended to deprive another of money or property, or bring about some financial gain to the person engaged in the fraud." App. 41.

Those two definitions are not entirely consistent, with the former being broader than the latter. More importantly, neither definition required the jury to find that the defendant sought to obtain property from the victims.

The district court's instructions on the securities fraud counts, brought under § 1348, were in this regard identical to the wire fraud counts, brought under § 1343. App. 43-44. In other words, the jury was not instructed that it had to find the obtain property element to convict under § 1348 and that the requirement was identical under both fraud statutes.

6. The jury acquitted Baker on several counts but convicted him on most of the charged counts, including most of the core wire fraud counts. The district court sentenced him to a term of 20 years' imprisonment.

Baker appealed. He argued, among other things, that the government had failed to plead and prove the obtaining property element of the fraud charges, and that the district court had failed to instruct on that element.

The Fifth Circuit rejected petitioner's arguments. Like the district court, it rejected Baker's reliance on this Court's decisions in *Sekhar* and *Honeycutt* simply because those cases interpreted different statutes and "did not consider the wire fraud statute." App. 29. Adopting the Third Circuit's rationale in *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004), the court below rejected the claim that a scheme to defraud must be "designed to actually 'obtain' the victim's property." *Id.* (quoting *Hedaithy*, 392 F.3d at 601).

Instead, the Fifth Circuit held that fraud only requires some conduct that "affected the victims' property rights." App. 31. It held that the government had sufficiently alleged and proven that Baker affected investors' property rights, and it held that the district court's instructions properly stated that requirement. It thus affirmed the conviction.

Baker remains in custody, serving his 20-year sentence at FCI Bastrop.

REASONS FOR GRANTING CERTIORARI

The question presented in this case is whether the statutory phrase "obtain property" has the same meaning or different meanings across the federal criminal code. Interpreting the Hobbs Act and the federal forfeiture statute, this Court has held that obtain property means acquiring property from another—gaining possession of some property that the victim gives up. Some circuits, however, have declined to apply that same

definition to the federal fraud statutes. They have held that in the fraud statutes, the phrase "obtain property" has a different and much broader meaning. And the Courts of Appeals have applied this Court's fraud cases in inconsistent and varying ways.

This Court should grant review to clarify the scope of the federal fraud statutes, and to ensure that its interpretation of the phrase "obtain property" is given the same meaning in fraud statutes as it has in other provisions of the federal criminal code. In particular, the Court's intervention is warranted to determine whether fraud merely requires a scheme to *interfere* with property, as some circuits have held, rather than a scheme to *obtain* property from the victim.

A. This Court Has Held That The Statutory Phrase "Obtaining Property" Has A Well-Recognized Meaning That Must Be Applied To Federal Statutes Incorporating That Phrase.

The federal fraud statutes prohibit schemes to "obtain[] money or property." 18 U.S.C. § 1343; *see also id.* § 1348. The same statutory phrase—obtain property—appears frequently in the federal criminal code. This Court, in a series of cases involving other federal criminal statutes, has held that the statutory phrase "obtain property" is a common-law term of art. It has a well-recognized meaning, which this Court has applied to other statutes. But some circuits have refused to apply that ordinary meaning to the fraud statutes.

1. This Court addressed the statutory phrase "obtain property" in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003). *Scheidler* was a civil case brought under the Hobbs Act, 18 U.S.C. § 1951, which prohibits "the obtaining of property from another" by force or threat. The plaintiffs alleged that the defendants violated the Act by interfering with women's rights to seek services from abortion clinics and clinics' rights to provide those services.

The Seventh Circuit had held that even if the defendants had not "obtained" anything from the victims, they had nonetheless violated the act by interfering with their rights. "A loss to, or interference with the rights of, the victim is all that is required." 267 F.3d 687, 709 (7th Cir. 2001) (quoting *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

This Court disagreed. It held that merely interfering with rights is not the same as obtaining property. Looking to the statute's common-law roots, it held that the Act's " 'obtaining of property' requirement included both a deprivation and acquisition of property." 537 U.S. at 403. It held that even though the defendants had committed acts of "interference and disruption," which had harmed plaintiffs, the defendants' "acts did not constitute extortion because [defendants] did not " 'obtain' [plaintiffs'] property." *Id*. at 404-05.

The Hobbs Act requires obtaining property, and this Court held that the statutory phrase means what it says. Interference is insufficient. "To conclude that such actions constituted extortion would effectively

discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id*.

2. This Court again reiterated that same interpretation in *Sekhar v. United States*, 570 U.S. 729 (2013), a criminal case brought under the Hobbs Act. This Court began with the foundational principle that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Id*. at 732 (quoting *Neder v. United States*, 527 U.S. 1, 23 (1999)). It noted that the crime of extortion has deep common-law roots, and over time, case law developed a well-understood definition of what it means to wrongfully obtain property from another.

The meaning is simple: "Obtaining property requires 'not only the deprivation but also the acquisition of property.'" *Id*. at 734 (quoting *Scheidler*, 537 U.S. at 404). Put differently, obtaining property "requires that the victim 'part with' his property . . . and that the extortionist 'gain possession' of it." *Id*. (citations omitted). A crime that has an element of obtaining property requires a transfer, where a criminal illicitly gains what the victim loses. That is the common-law meaning of "obtain property."

3. More recently, this Court reaffirmed the same definition in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), which involved the forfeiture statute, 21 U.S.C. § 853. That statute also uses a variant of the common-law phrase "obtain property." It requires forfeiture of

"any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain crimes. The government argued in favor of joint and several liability, which would have allowed forfeiture of property that the defendant did not personally acquire. This Court rejected that interpretation.

Like *Sekhar*, the decision in *Honeycutt* turned on the meaning of "obtain property." Turning to dictionaries, this Court noted that the word "obtain" means "to come into possession of" or to "get or acquire." 137 S. Ct. at 1632 (quoting Random House Dictionary of the English Language 995 (1966)). And citing *Sekhar*, this Court noted that the ordinary English meaning is consistent with the common-law meaning.

In sum, this Court has repeatedly held that to obtain property means to acquire it from another.

B. Ordinary Principles Of Statutory Interpretation Favor Applying The Same Meaning To The Fraud Statute.

In *Scheidler*, *Sekhar*, and *Honeycutt*, this Court has determined that the phrase "obtain property" has a straightforward and well-understood definition that applies to the Hobbs Act and the federal forfeiture statute. It makes sense to apply the same definition to the fraud statutes. Several bedrock principles of statutory interpretation prescribe that result.

1. First and foremost, it is a foundational principle of statutory interpretation that common-law terms in statutes should be given their common-law meanings. As this Court said in *Sekhar*, quoting Justice Frankfurter, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." 570 U.S. at 733 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). Consequently, absent some indication of contrary Congressional intent, "a common-law term of art should be given its established common-law meaning." *Johnson v. United States*, 559 U.S. 133, 139 (2010). That is especially true with a crime like fraud that has common-law origins.

This Court has already determined that the phrase "obtain property" is a common-law term of art. There is no indication that when it used that term in the fraud statute, Congress had a different meaning in mind. There is no reason why the presumption in favor of common-law meaning applies any less to the fraud statutes than it does to the Hobbs Act or the forfeiture statute.

2. Where there is no well-understood common-law meaning, this Court interprets statutory terms "in a manner consistent with ordinary English usage." *Nichols v. United States*, 136 S. Ct. 1113, 1119 (2016) (quoting *Abramski v. United States*, 573 U.S. 169, 196 (2014) (Scalia, J., dissenting)). The transitive verb "obtain" has a straightforward meaning in ordinary English. As this Court held in *Honeycutt*, the ordinary

English meaning of "obtain" is "[t]o come into the possession or enjoyment of (something)." 137 S. Ct. 1632 (quoting 7 Oxford English Dictionary 37 (1933)). That was the ordinary meaning of the term at the time the fraud statutes were enacted, and it remains the ordinary meaning today.

The task of statutory interpretation here is made easier by the fact that the ordinary English meaning of the phrase is entirely consistent with its common-law meaning. Both approaches point to the same conclusion: To obtain property means to acquire it from another. In the context of a criminal fraud statute, illegally obtaining property means acquiring property from a victim by deceptive means. It means tricking a victim into turning over money or property.

3. The presumption of consistent usage also militates in favor of a uniform interpretation across the federal criminal code. Ordinarily, where Congress uses the same term in different statutory sections, this Court "presume[s] that the same term has the same meaning" across the different provisions. *Envtl. Def. v. Duke Energy Corp*., 549 U.S. 561, 574 (2007); *cf. Clark v. Martinez*, 543 U.S. 371, 386 (2005) (stating that it is "dangerous" when judges "give the same . . . text different meanings in different cases").

To be sure, the presumption of consistent usage is not irrebuttable—it is a guideline rather than an iron-clad rule. Nonetheless, absent some indication that Congress intended the phrase "obtain property" to have a different meaning in different federal criminal

statutes, it is sensible to assume that Congress intended a consistent meaning. Simply put, the federal fraud statutes should be interpreted *in pari materia* with other provisions of the federal criminal code. *See Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005).

4. The surplusage canon counsels the same result. With respect to the securities fraud statute, giving the phrase "obtain property" its ordinary meaning is necessary to give the statute independent meaning. Securities fraud cases have traditionally been brought under § 10(b) of the Securities and Exhange Act, 15 U.S.C. § 78j(b). That statute has no obtain property element—rather, it forbids any deceit in connection with the purchase or sale of securities.

The government in this case could have proceeded under § 10(b), but it chose instead to proceed under § 1348. The latter statute, which was added to the federal code as part of the Sarbanes-Oxley Act, carries a higher penalty. It also has an additional element—it requires that the defendant obtain property. 18 U.S.C. § 1348(2).[2]

But the Fifth Circuit's interpretation of the statute effectively eliminates any independent meaning of the obtain property element. Under that interpretation, § 10(b) and § 1348 prohibit precisely the same

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[2] Section 1348 has two sub-clauses. In this case, the government's charges in the indictment and the district court's instructions both reflected the assumption that the two clauses are identical, therefore prohibiting the same conduct. App. 40-45.

conduct (even though they carry different penalties). That reading violates the canon against surplusage, which counsels against adopting an interpretation that "would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). The surplusage canon also mandates giving *obtain property* its ordinary, common-law meaning.

5. Finally, were there any remaining doubt, the rule of lenity would compel a narrow interpretation. At a minimum, there are two reasonable interpretations of the obtain property element. Under the broader interpretation, "obtaining property" means interfering with property. Under the narrower interpretation, "obtaining property" means acquiring property.

In such circumstances, ambiguity concerning the ambit of a criminal statute must be resolved in favor of lenity. *Yates v. United States*, 135 S. Ct. 1075, 1088 (2015). If Congress desires to prohibit any conduct that merely *affects* a property interest, it should speak more clearly. And it should be Congress, rather than circuit courts, that makes the choice to expand criminal statutes. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.). Application of the rule of lenity reinforces the conclusion that obtaining property means acquiring property.

The various methods of statutory interpretation all suggest the same result. The phrase "obtain property" in the federal fraud statutes should be interpreted in accordance with its common-law meaning, its

ordinary meaning, and its use in other criminal statutes.

C. Some Circuits Have Unjustifiably Applied A Different Meaning To The Fraud Statutes.

1. The most natural conclusion is that the phrase "obtaining property" should be given its common-law meaning in the fraud statutes just as it has in other federal statutes. Several circuits, however, have rejected that straightforward, unified approach. They have held instead that "obtain property" has a different meaning in the fraud statutes.

According to these circuits, proof of that element does not require proof that the defendant acquired some money or property that the victim gave up. Lower courts have explicitly rejected the notion that this Court's rulings in *Scheidler*, *Sekhar*, and *Honeycutt* should be applied to the fraud statutes. At best, they have defined the obtain property element in a broader or more amorphous sense—at worst, they have ruled that the fraud statutes do not have any such element at all.

2. The Tenth Circuit blazed the trail. In the wake of *Scheidler*, a defendant there accused of fraud argued that he had not obtained property, as this Court had interpreted that phrase. In a brief footnote, the Tenth Circuit rejected that argument. It held that *Scheidler* was "readily distinguishable" because "neither the mail nor wire fraud statute requires that a defendant 'obtain' property before violating the statute." *United*

States v. Welch, 327 F.3d 1081, 1108 n.27 (10th Cir. 2003). That statement is baffling, since the fraud statutes, by their plain text, do in fact require a scheme to obtain property.

Nonetheless, the same rationale was adopted by the Third Circuit in *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004). The *Hedaithy* Court similarly declined to apply *Scheidler*, *id*. at 602 n.21, and it held that there is no "requirement that a mail fraud scheme must be designed to 'obtain' property," *id*. at 602. The Third Circuit relied in part on the distinction between the two clauses of the fraud statute: the obtain-property clause and the scheme-to-defraud clause. It reasoned that the latter clause is broader than the former, and thus that not all fraud requires a scheme to obtain property. *Id*.

In other words, the Third Circuit relied on the notion that the fraud statute prohibits not one but two distinct offenses. That interpretation of the statute cannot be squared with this Court's decision in *McNally v. United States*, 483 U.S. 350, 358-59 (1987).[3] The Third Circuit, however, suggested that in that regard, *McNally* did not mean what it said. It thus reiterated its prior holdings that the second clause of the statute was intended to "broaden the scope" of the

[3] *See also Cleveland v. United States*, 531 U.S. 12, 26 (2000) ("Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities.").

statute beyond what the first clause by itself prohibited. 392 F.3d at 602.

As this Court reiterated more recently and more forcefully, however, the mail fraud statute defines "just one offense." *Loughrin v. United States*, 573 U.S. 351, 359 (2014). The two portions of the statutory text simply restate and clarify the same definition. "The provision's back half . . . merely codified a prior judicial decision applying the front half." *Id*. (citing *McNally*). There is only one offense defined by the mail fraud statute, and it requires a scheme to obtain property.

The "two offenses" interpretation of the fraud statute has been squarely rejected by this Court, and yet, like a zombie, it will not die in the lower courts. Indeed, it was reaffirmed by the Fifth Circuit in this case.

3. Even after *Sekhar*, other Courts of Appeals continued to follow the same path, undeterred. The rationale of *Hedaithy*—although thoroughly undermined by both *Sekhar* and *Loughrin*—was adopted by the Second Circuit without a hint of criticism in *United States v. Finazzo*, 850 F.3d 94, 107 (2d Cir. 2017). The Second Circuit rejected the notion that *Sekhar* could be applied to the fraud statutes because "[t]here, the Supreme Court analyzed the scope of the concept of 'property' for purposes of the Hobbs Act, not the wire fraud statute." *Id*. at 107 n.13 (quoting an unpublished summary order). No other reason was given—*Finazzo's* rejection of *Sekhar* was pure *ipse dixit*.

In any event, relying on *Hedaithy* and *Welch*, the Second Circuit reaffirmed the same untenable

conclusion. "Thus, we reject[ ] the appellant's argument that the mail fraud statute requires that defendants obtain or seek to obtain money or property." *Id*. at 106. That conclusion is at odds with the text of the statute, which states that fraud means "obtaining money or property."

4. Those rulings formed the basis of the Fifth Circuit's decision in this case. The court below adopted the rationale of *Hedaithy* and *Finazzo.* It therefore rejected petitioner's claim that a fraud conviction requires a scheme to obtain money or property. App. 27 & n.46. It held that *Scheidler*, *Sekhar*, and *Honeycutt* do not apply to the fraud statutes. It held that proving fraud only requires a showing that "the victims' property rights were affected." App. 31 (internal quotation marks omitted).

That is *exactly* the argument that this Court rejected in *Scheidler*. To conclude that such conduct constitutes fraud "would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute [fraud]." 537 U.S. at 405. The only possible justification for the Fifth Circuit's ruling is that somehow, although both statutes are derived from the common law, "obtaining property" has a different meaning in the fraud statutes than it does in the Hobbs Act.

5. These lower court rulings dramatically expand the fraud statutes. Merely "affecting" or "interfering"

with property rights is not the same as obtaining property. If a homeowner plays loud music, she may affect her neighbor's property rights, but she does not thereby acquire her neighbor's property. If a vandal scratches the side of a car with a key, he may affect the victim's property rights, but he does not obtain the victim's property.

Moreover, deceit alone is not fraud. The district court's instructions in this case stated that a scheme to defraud means simply a plan "to deceive investors about ArthroCare Corporation's financial condition." App. 40. "[D]eceiving is a necessary condition of defrauding but not a sufficient one." *United States v. Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016). And, again contrary to the jury instructions, deceit coupled with an intent to gain is also insufficient. "For if there is no intent to harm, there can only be a scheme *to deceive*, but not one *to defraud*." *Id*.

* * *

Notwithstanding the statutory text and this Court's prior case law, several circuits have held that fraud does not require a defendant to obtain or seek to obtain property. In so doing, they have dramatically expanded the scope of the fraud statutes. This Court should grant certiorari to ensure that the lower courts are faithfully applying its precedents and that the fraud statutes are not being used far more expansively than Congress intended.

D. The Courts of Appeals Have Taken Varying And Inconsistent Approaches In Applying This Court's Fraud Cases, Including *Cleveland* and *Skilling*.

Several Courts of Appeals have justified their refusal to apply *Scheidler*, *Sekhar*, and *Honeycutt* by stating that those cases interpreted different statutes. That is of course true as a formal matter, but it is not persuasive in light of the ordinary command that common-law terms be given their common-law meanings. It is also not persuasive in light of this Court's jurisprudence interpreting the fraud statutes themselves. The circuits have split in their assessment of the proper application of this Court's cases interpreting the obtaining property element.

1. In *Skilling*, this Court described the usual requirement of common-law fraud as demonstrating that "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." *Skilling v. United States*, 561 U.S. 358, 400 (2010) (internal quotation marks omitted). That is a pithy statement of what it means to "obtain property," and it is perfectly consistent with this Court's definition of that phrase in the Hobbs Act and the forfeiture statute.

Some lower courts, however, have dismissed that language as "dicta." *See*, *e.g.*, *United States v. Gatto*, 295 F. Supp. 3d 336, 346 n.56 (S.D.N.Y. 2018). The government has repeatedly so argued in cases across the country. Indeed, in its arguments to the Fifth Circuit in this case, the government characterized the

language from *Skilling* as "dicta."[4] The Fifth Circuit agreed, stating that the portion of *Skilling* defining the traditional conception of fraud was not a "holding." App. 27.

But the "mirror image" language in *Skilling* was not a one-time stray remark. The bilateral component of fraud has always been central to this Court's definition of the offense. It was pivotal, for example, to this Court's decision in *Cleveland v. United States*, 531 U.S. 12 (2000). The holding of *Cleveland* is straightforward: "for purposes of the mail fraud statute, *the thing obtained must be property* in the hands of the victim." *Id*. at 15 (emphasis added). The thing obtained must fit within a traditional notion of "property," and it must be transferable—otherwise it cannot be obtained. *See Pasquantino*, 544 U.S. at 355-56.

2. At least some circuits have recognized this as the necessary implication of *Cleveland*. Indeed, even before *Cleveland*, Judge Easterbrook explained that mere interference with property rights cannot be enough. Because "only a scheme to obtain money or other property from the victim by fraud violates § 1341," losses that occur "as byproducts of a deceitful scheme do not satisfy the statutory requirement." *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993); *see also United States v. Bruchhausen*, 977 F.2d 464, 470 (9th Cir. 1992). More recently, Judge Sutton similarly recognized that under *Cleveland*, the fraud

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[4] *United States v. Baker*, No. 17-51034, Brief for the United States at 47 (5th Cir. Aug. 17, 2018).

statutes require proof that the defendant sought to obtain from the victim some actual, transferable property. *United States v. Sadler*, 750 F.3d 585, 590-91 (6th Cir. 2014) (Sutton, J.); *see also United States v. Blagojevich*, 794 F.3d 729, 736 (7th Cir. 2015) (Easterbrook, J.).

But other courts, like the Fifth Circuit in this case, have disagreed. They have clung to the notion that merely interfering with property rights constitutes fraud. They have not only rejected application of this Court's other cases defining what it means to "obtain property," they have also evaded this Court's cases defining fraud itself.

Lower courts are in disarray in their approaches to fraud. As the Seventh Circuit recently recognized, the circuits are split regarding what constitutes "the edge of the reach of the wire and mail fraud statutes." *United States v. Kelerchian*, 937 F.3d. 895, 913 (7th Cir. 2019); *see also id*. at 913-14 (rejecting the Ninth Circuit's approach in *Bruchhausen* and instead adopting the Second Circuit's approach).

In sum, some circuits have more faithfully applied this Court's case law, which has consistently endorsed enforcing common-law notions of property. They have held that fraud requires acquiring actual property. Other circuits, including the Fifth Circuit in this case, have continued to evade those cases with creative conceptions of what constitutes "property." They have held that fraud only requires some conduct that affects a

property interest, loosely construed. This Court should grant certiorari to resolve this conflict.

E. At A Minimum, This Court Should Hold This Petition In Abeyance Pending The Outcome of *Kelly v. United States*.

For the reasons given above, this case is worthy of independent review on its own merits. In the alternative, at a minimum, petitioner requests that this Court hold his petition pending the outcome of *Kelly v. United States*, No. 18-1059, the "Bridgegate" case. This case and *Kelly* present overlapping legal issues.

For starters, the Fifth Circuit's ruling in this case and the Third Circuit's ruling in *Kelly* were both based on the same case law. In rejecting petitioner's arguments regarding the obtain property element, the Fifth Circuit below relied primarily on the Third Circuit's 2004 ruling in *Hedaithy*. Indeed, it block-quoted three full paragraphs from *Hedaithy*. App. 30-31. It stated that *Hedaithy* contained a "persuasive rejection of the argument that Baker advances." App. 31.

Hedaithy also formed the basis of the Third Circuit's ruling in *Kelly*. In *Kelly*, the defendants initially argued that "the charges should be dismissed because they did not 'obtain' money or property," but the trial court rejected the argument, relying on *Hedaithy*. *United States v. Baroni (and Kelly)*, 909 F.3d 550, 564 (3d Cir. 2018). In affirming the convictions, the Third Circuit likewise relied on *Hedaithy*, its touchstone

defining the scope of the federal fraud statutes. *See id.* at 567 & n.9.

The lower courts' rationales in the two cases are also strikingly similar. In this case, petitioner argued that he did not obtain or seek to obtain property from ArthroCare investors. The Fifth Circuit rejected that argument. It held that even if Baker did not obtain property from victims, he nonetheless "affected the victims' property rights." App. 31.

Similarly, in *Kelly*, the defendants argued that, in their scheme to create gridlock on the George Washington Bridge, they did not obtain or seek to obtain any property from the Port Authority, the purported victim of the fraud. The Third Circuit rejected that argument. It held that even if the defendants did not obtain transferable property from the Port Authority, they nonetheless deprived the Port Authority of a "property interest" by interfering with its "right to control" the bridge. 909 F.3d at 567.[5]

In their merits briefing to this Court, the *Kelly* defendants have persuasively shown the error of the Third Circuit's rationale. Obtaining property is an element of the offense, and "[s]imply put, depriving or obtaining property was, by all accounts, never the object of the 'scheme.'" *Kelly v. United States*, No. 18-1059, Brief of Petitioner at 42; *see also id.*, Brief of Respondent

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[5] The pending cert petition in *Aldissi v. United States*, No. 19-5805, also presents related issues about whether this "right to control" doctrine can be reconciled with the "obtain property" language in the wire fraud statute.

William Baroni at 32 ("And while the official invariably causes public money or property to be used in making or executing a decision, he does not thereby obtain it or deprive his agency of it."). The *Kelly* defendants have persuasively shown how the circuit courts' broad conceptions of property have undermined this Court's case law.

Those arguments apply with equal force to this case. The Fifth Circuit's rationale here is afflicted by the same conceptual flaws. It is not enough to "affect" property rights or "interfere" with property rights. The federal fraud statutes prohibit *obtaining property*. In neither *Kelly* nor this case did the defendants obtain property from the victim. If this Court agrees with the defendants' arguments in *Kelly*, this Court's opinion will thoroughly undermine the Fifth Circuit's rationale in this case.

Consequently, even if this Court does not grant certiorari outright in this case, petitioner requests that it hold the petition in abeyance pending the outcome in *Kelly*. Once *Kelly* is decided, this Court could then determine whether to grant certiorari and order full briefing, or grant, vacate and remand the case.

CONCLUSION

For the foregoing reasons, the petition should be granted. Alternatively, the petition should be held pending the Court's disposition of *Kelly v. United States*, No. 18-1059.

Respectfully submitted,

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