No. 19-667

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

REPLY BRIEF FOR PETITIONER

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In January, at oral argument in *Kelly v. United States*, Justice Kagan pressed the government on the "obtain property" element of fraud. "[T]he statute clearly says that a scheme of deception has to—the object of it has to be to obtain property. So can we talk about that for a minute? Because if I look at this, and I'm an ordinary juror, I'm thinking . . . the object of this deception was not to obtain property."[1] Justice Alito similarly noted that "property isn't obtained when it is simply wasted."[2]

Those are exactly the right questions to ask, as they go to the heart of fraud. Deception alone is not fraud, and wasting property is not fraud. Fraud requires that the object of the deceptive scheme is to *obtain money or property* from another.

That is exactly the question that *should have* been put to the jury in this case, but it was not. Petitioner repeatedly requested that, in order to find him guilty of fraud, the jury should be required to find that he had an intent to obtain money or property from the victims. But the government vehemently opposed any such requirement—precisely because it knew it would be difficult to prove given the evidence in this case. The district court agreed with the government, and it consequently instructed the jury that merely deceiving investors, without any intent to obtain property from

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[1] *Kelly v. United States*, No. 18-1059, Tr. of Oral Arg. 58 (Jan. 14, 2020).

[2] *Id*. at 10.

them, is sufficient to constitute both wire fraud and securities fraud.

In *Kelly*, this Court may re-affirm the core requirement that formed the premise of Justice Kagan's question: the object of a fraudulent scheme must be an intent to obtain money or property. The jury in this case never made such a finding, because it was not required to do so. At a minimum, therefore, this petition should be held pending the result in *Kelly*.

And if this Court decides *Kelly* on other grounds independent of the obtain property requirement, this case merits independent review.

1. The government does not contest the importance of the question presented. The fraud statutes are among the most frequently charged in the entire federal criminal code. The scope of the obtain property element is a matter of great import for many cases.

Nor does the government attempt to defend the odd position taken by the court below. The Fifth Circuit, like some other circuits, held that the phrase "obtain property" has a different meaning in the fraud statutes than it does in other statutes, such as the Hobbs Act and the forfeiture statute. Interpreting those statutes, this Court has held that the words "obtain property" must be given their ordinary meaning, which is the same as their common-law meaning. To "obtain" something means to "get or acquire" it. *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017). Obtaining property therefore requires "requires that the victim 'part with' his property . . . and that the

[defendant] 'gain possession' of it." *Sekhar v. United States*, 570 U.S. 729, 734 (2013).

The Fifth Circuit below held that the ordinary and common-law definition somehow does not apply to the fraud statute. Instead, it held that for the fraud statutes, anything that "affects" property rights is sufficient.[3] The Fifth Circuit offered nothing in the way of statutory interpretation to defend that enormously broad conception. It simply relied on other circuit cases, particularly *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004), which adopted expansive definitions.

The government offers no defense of that position. The government does not deny that the phrase "obtain property" should be given its ordinary and common-law meaning. The government does not deny that the phrase "obtain property" should have the same meaning in the fraud statutes that it does in other federal criminal statutes. The government does not appear to disagree with the merits of petitioner's legal arguments. Instead, the government attempts to change the subject.

2. In an almost comical attempt to create a straw man, the government artfully re-frames the question presented. It characterizes petitioner's argument as suggesting that fraud requires a showing that a

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[3] *But see Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404-05 (2003) (holding that acts of "interference and disruption" of property is not itself a crime unless the defendant sought to "obtain" the property).

"specific property interest was directly transferred to him." BIO at I. The adjective and adverb in that sentence are creatures of the government's own imagination.

Petitioner has never argued that fraud requires a "direct" transfer. Obviously, money and property can travel *indirectly* from victim to fraudster through intermediaries—such as banks, the postal service, and so on. Petitioner's proposed jury instructions did not require any showing that property transferred "directly." Nor did petitioner's proposed instructions require a showing of a "specific property interest" (whatever that means) was directly transferred. Fraud does not require a hand-to-hand transfer of tangible personal property from victim to fraudster. What it does require—what this Court has said it requires—is an intent to acquire some money or property that the victim gives up.

Straw men aside, petitioner's argument is simple. The object of a fraudulent scheme must be to obtain property from the victim. That is what the fraud statutes say, that is what this Court's cases say—and that is what jury instructions should say.

3. The government argues that this case is not a good vehicle to address the legal question because petitioner probably would have been found guilty even if the jury had been properly instructed. Citing this Court's decision in *Neder*, it notes the failure to instruct on an element of an offense can be harmless, and

it suggests that the error here was likely harmless. BIO at 7-8.

But in *Neder*, this Court held that "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," a reviewing court should not find the error harmless. *Neder v. United States*, 527 U.S. 1, 19 (1999). In this case, petitioner did contest the omitted element—indeed, the core of his defense was that he did not intend to obtain property from ArthroCare investors. To the contrary, he was attempting to protect ArthroCare investors from attacks by short sellers. His defense was supported by substantial evidence in the record. The problem was that, under the instructions that were given, the jury would have found petitioner guilty even if it believed his defense.

The government's harmlessness argument is disingenuous in another sense. At trial, the government vehemently opposed a jury instruction on obtaining property. It fought for a much looser definition of fraud, which it needed to ensure conviction. Having won that critical battle at trial, the government now contends that it was much ado about nothing. If that were true—if the case were so clear—the government would not have objected in the first place.

But regardless, whether the error was harmless does not alter the importance of legal question presented. That question is worth addressing even if this Court, or a lower court on remand, ultimately determined that the error was harmless.

4. The government also argues that this case is not a good vehicle to address the question presented, because it involves counts under both 18 U.S.C. § 1343 and § 1348. And the government now argues that the two statutes are "not identical," so it would be awkward for this Court to address both at once. BIO at 11.

That argument is contradicted by the government's own arguments below. At all stages of trial, the government treated the two statutes as being identical in all relevant respects. The charging language was identical in relevant respects. And the government requested and received jury instructions that were also identical in all relevant respects. App. 41-44. In the entire multi-year course of litigation, the government has never previously suggested that § 1343 and § 1348 have different property elements.

Regardless, even if the government's newfound distinction is correct, it does not make this case a poor vehicle. To the contrary, precisely because this case presents charges under both statutes, this Court could consider two closely related statutes at once rather than *seriatim*. Or, alternatively, this Court could simply grant certiorari and limit its consideration to arguments about the scope of § 1343, the wire fraud statute. Petitioner was convicted of seven wire fraud counts, and those counts constituted the bulk of the government's case at trial.[4]

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[4] The government's suggestion that the Fifth Circuit "understood" petitioner's argument as applying "only" to § 1343 is absurd. Petitioner repeatedly and explicitly addressed both

5. Petitioner requested that the jury be required to find that he sought to obtain money or property. He requested that those terms be defined in accordance with this Court's cases. He therefore argued that the instructions should require a finding that he sought to acquire some money or property that the victims gave up.

The government vigorously opposed that request. It successfully fought for a much easier path to a guilty verdict. Its instructions, accepted by the district court, simply required a finding that petitioner had deceived investors. Those instructions were affirmed by the district court and Fifth Circuit below on the theory that any deceptive conduct that affects property rights constitutes fraud.

Petitioner and the government have thus presented vastly different interpretations of the fraud statute. The courts below agreed with the government. This Court should grant certiorari to determine which

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statutes. His opening brief below, framed the question presented as: "Whether the federal fraud statutes, 18 U.S.C. §§ 1343 and 1348, require a defendant to attempt to obtain money or property from the victims of the fraud." *United States v. Baker*, No. 17-51034, Appellant's Opening Brief, 2018 WL 2722744 at *3; *see also id*. at *42 ("Section 1343 and 1348, however, also have an additional element that must be proven for liability—those statutes require that the defendant 'obtain money or property' from the victim.").

That the Fifth Circuit's analysis focused on § 1343, and did not separately address § 1348, is simply a reflection of the fact that *both parties* treated the two statutes as identical throughout this case.

interpretation is correct. Or, if this Court settles that question in *Kelly*, it should remand this case for reconsideration.

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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