No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL R. HANSMEIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Both the mail fraud statute, 18 U.S.C. § 1341, and wire fraud statute, § 1343, proscribe any scheme to defraud in connection with specified modes of communication. The statutes incorporate elements of common law fraud, including materiality of falsehood. The common-law concept of materiality involves a falsehood that goes to the essence of the bargain at issue.

The question presented by the petition is:

Under the mail fraud and wire fraud statutes, does an actionable scheme to defraud require, as an aspect of materiality, a falsehood which goes to the essence or nature of the transaction at issue?

LIST OF PARTIES

All parties appear in the caption on the cover page of this Petition.

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Petitioner Paul Hansmeier respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion below is published as *United States v. Hansmeier*, 988 F.3d 428 (8th Cir. 2021), and is reprinted in the Appendix to this Petition. (App. 1-11).

JURISDICTION

The Eighth Circuit Court of Appeals issued its decision on February 10, 2021. (App. 1). By order dated March 19, 2020, this Court extended the deadline for filing of a petition for certiorari "to 150 days from the date of the lower court judgment." Hence, this Petition is timely. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This petition involves the federal mail and wire fraud statutes, codified in Title 18 of the United States Code at Chapter 63, and fully reprinted in the Appendix. (App. D). Relevant excerpts follow:

18 U.S.C. § 1341
Frauds and swindles

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 * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier * * * shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343
Fraud by wire, radio, or television

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.

INTRODUCTION

This Petition asks the Court to resolve a split among the lower courts on an important question about the meaning of the materiality element of federal mail fraud and wire fraud. Specifically, whether the materiality element of those offenses requires proof that the falsehood at issue goes to the "nature" or "essence"

of the bargain. The answer to this question will have broad implications with respect to federal criminal law and its reach, as discussed below.

STATEMENT OF THE CASE

1. The question presented here seeks this Court's review of federal statutes defining criminal offenses commonly known as mail fraud, 18 U.S.C. § 1341, and wire fraud, § 1343. (App. 22-23). Each proscribes any "scheme or artifice to defraud" in connection with specified modes of communication. *Id.* "The gravamen of the offense is the scheme to defraud." *Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 647 (2008).

2. The statutory phrase "scheme to defraud" incorporates elements of its common-law fraud analogue. *Neder v. United States,* 527 U.S. 1, 21-25 (1999). As pertinent here, this Court has held that the mail fraud and wire fraud statutes incorporate the common-law requirement of "materiality of falsehood." *Id.* at 25. In general, the common law deemed a falsehood material if it had "a natural tendency to influence, or [was] capable of influencing, the decision-making body to which it was addressed." *Id.* at 16 (cleaned up). Put differently, a material falsehood was one that "went to the very essence of the bargain" at issue, so as to "induce action by a complaining party." *Univ. Health Servs., Inc. v. United States,* 136 S. Ct. 1989, 2003 n.5 (2016).

3. In the case at hand, Petitioner was an attorney who represented clients in private civil litigation, typically matters involving the federal Copyright Act. (App. 5). The principal litigation strategy involved monitoring the activities of

file-sharing websites, commonly used for the purpose of unlawful sharing of copyright-protected works in digitized form. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 918-28 (2005). These private investigative activities would reveal the Internet Protocol Address (IP Address) — *i.e.,* the numerical label assigned by an internet service provider (ISP) company to a given subscriber — used to download the copyright-protected items, in this case pornographic videos. (App. 5). However, such private investigation could not reveal the identity of the subscriber associated with the IP Address; that would require obtaining subscriber information from the ISP company. (App. 5).

4. Hence, Petitioner filed civil lawsuits in federal district courts, alleging copyright infringement on the part of unnamed and putative downloader-tortfeasors. (App. 5). This having been done, the rules of civil procedure permitted Petitioner to apply for subpoenas to serve on ISP companies, in order to obtain subscriber information associated with offending IP Addresses, *i.e.,* identification of the putative tortfeasors. (App. 5). Petitioner then used the identification information to direct communications to putative tortfeasors, stating the circumstantial case for the recipient's civil liability under the Copyright Act and offering to resolve the matter in exchange for a financial sum. (App. 5). In many cases, the recipient agreed to the proposed settlement proposal in lieu of further civil litigation. (App. 5).

5. After a time, rather than waiting for other infringers to upload the copyright-protected items to the file-sharing website, Petitioner began uploading

the items through agents. (App. 5). Petitioner then monitored file-sharing websites in the above manner. (App. 5).

6. Still later, Petitioner formed business entities for the purpose of conducting the above civil enforcement operations, entities that created and/or acquired copyright-protected works, and a private law firm to conduct the above litigation. (App. 5-6). Petitioner then filed initial discovery lawsuits and applied for subpoenas as above, without revealing to the issuing courts his own role in uploading the copyright-protected works or the details of his interest in the litigation. (App. 5-6).

7. Eventually, litigants and subpoena-issuing courts became aware of Petitioner's role in uploading the copyright-protected files and of his stake in the litigation. (App. 6). When courts inquired, Petitioner issued denials and presented false information concerning the uploading and his interest in the litigation. (App. 6). This led to court-imposed sanctions and professional discipline. (App. 6). In the last stages of the enterprise, Petitioner filed no-merit claims in state courts, but still for the sole purpose of obtaining identification of putative tortfeasors for the purpose of directing settlement communications. (App. 6). Once again, sanctions and professional discipline followed. (App. 6).

8. Based upon the above allegations, the government charged Petitioner with mail fraud, 18 U.S.C. § 1341, and wire fraud, § 1343, as well as conspiracy to commit said offenses. (App. 4). Petitioner brought a motion to dismiss the

indictment's fraud charges for failure to state a legally-viable theory of the charged offense, under Fed. R. Crim. P. 12(b)(3)(B)(v). (App. 15-17).

9 The magistrate judge below recommended the motion be denied, reasoning that the above misrepresentations and omissions directed to subpoena-issuing courts satisfied the materiality requirement of the mail and wire fraud statutes. (App. 20). This, even though it was acknowledged that the subpoena-issuing courts were not the allegedly defrauded parties, were not the scheme's victims, who were rather the putative tortfeasors who received settlement communications based upon the information obtained through the subpoenas. (App. 20).

10. Over objection, the district court judge adopted the recommendation of the magistrate judge and denied the motion to dismiss. (App. 12-14). The district court rejected the objection that putative tortfeasors who paid settlement amounts could not be deemed to have been defrauded based upon the above misrepresentations and omissions to subpoena-issuing courts:

> [Petitioner] objects that the people who paid out settlement fees were not defrauded because they knew that they did download the file as accused in the letters sent by [Petitioner] and his associates, and they willingly decided to settle the case rather than face litigation. This objection fails because . . . explicit misrepresentations made directly to the victims are not a necessary element of mail or wire fraud.

(App. 13).

11. Petitioner entered a conditional guilty plea under Fed. R. Crim. P. 11(a)(2), reserving the right to appeal the district court's ruling on the motion to dismiss. The Eighth Circuit Court of Appeals affirmed, holding that Petitioner's

misrepresentations and omissions to courts — with the explicit goal of identifying putative tortfeasors for settlement-proposal communications alleging meritorious civil causes of action — qualified as an actionable "scheme to defraud" under the mail and wire fraud statutes. (App. 8-9).

12. The charging document alleged that, in applying to courts for subpoena authority to identify settlement recipients, Petitioner failed to disclose: (a) that he had directed agents to make the copyright-protected works available on file-sharing websites in the first place; and (b) that the copyright holders were entities that Petitioner had created and controlled. (App. 8). The court of appeals held the omissions met the materiality requirement under the mail and wire fraud statutes, focusing on the non-victim courts.

> Had the courts known that [Petitioner] intentionally posted the films on websites used for illegal file sharing or that the [defendants] were in fact the personal beneficiaries of their clients' copyright claims, they would have treated the subpoena requests with far greater skepticism—indeed, the indictment alleges that [Petitioner] faced dismissals of [his] lawsuits and sanctions when the extent of their involvement eventually came to light. [] And the courts' skepticism about [Petitioner's] level of personal involvement and financial interest in the litigation would have been likely even if, as [Petitioner] argues, their claims did involve actionable copyright infringement.

(App. 8-9).

13. The "indictment makes clear that the purpose of [Petitioner's] concealment was to induce the courts to act, in the form of granting [his] subpoena requests." (App. 9). This alone, held the court of appeals, was sufficient to sustain the mail and wire fraud criminal charges at issue here. (App. 8-9). According to the Eighth Circuit, it makes no difference that the claims against the putative

tortfeasors and consequent settlement proposal communications "did involve actionable copyright infringement," as Petitioner argued and supported below. (App. 9). Hence, the Eighth Circuit upheld the conviction under the mail and wire fraud statutes.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully requests that the Court accept review of the question presented, because: (1) the question has generated conflicting authority among lower courts; (2) the question is important, with a weighty impact upon the administration of criminal justice; and (3) this case presents an apt vehicle by which to resolve the question.

1. The question has generated a divide among lower courts.

This Court confirmed that the mail fraud and wire fraud statutes incorporate select common-law elements of fraud, including "materiality of falsehood." *Neder v. United States,* 527 U.S. 1, 25 (1999). However, this Court has not addressed whether this statutory context further maintains the common-law materiality principle that requires that the falsehood in question pertain to the "essence of the bargain" or transaction at issue, so as to so as to "induce action by a complaining party." *Univ. Health Servs., Inc. v. United States,* 136 S. Ct. 1989, 2003 n.5 (2016). This is the question presented by this petition, which: (A) remains an open question under this Court's precedents; and (B) has generated inter-circuit splits of authority.

a. There exists an open question whether the mail and wire fraud statutes require a material falsehood that goes to the "essence" or "nature" of the transaction at issue.

The federal mail fraud and wire fraud statutes proscribe any "scheme of artifice to defraud" in connection with their specified modes of communication. 18 U.S.C. § 1341 & § 1343. Under each statute, the "gravamen of the offense is the scheme to defraud." *Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 647 (2008).

This Court held that that the term "scheme to defraud" incorporates facets of the analogous term fraud as defined under the common law, particularly including the traditional requirement to show a "falsehood" that is "material." *Neder,* 527 U.S. at 21-25. However, the Court has also held that the statutes do not incorporate other common-law requirements, including reliance and damages. *Id.* at 24-25.

The original version of the mail fraud statute was enacted in 1872. *Id.* at 22. Accordingly, in determining the common-law contours of materiality under the mail and wire fraud statutes, this Court has drawn upon the prevailing judicial decisions from that time period, *e.g., Smith v. Richards,* 13 Pet. 26, 10 L.Ed. 42 (1839), as well as modern compilations of the common law, *e.g.,* Restatement (Second) of Torts (1977). 527 U.S. at 22; *see also, e.g., Univ. Health Servs., Inc. v. United States,* 136 S. Ct. 1989, 2002-03 (2016) (identical approach interpreting the False Claims Act).

The meaning of materiality depends upon the legal and factual context of the particular case. *United States v. Gaudin,* 515 U.S. 506, 512 (1995). In the context of statements to governmental agencies the term "material" means a false

statement that "has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder,* 527 U.S. at 16 (cleaned up); *accord Kungys v. United States,* 485 U.S. 759, 770 & 771-72 (1988). For private actors, the term generally refers to something a "reasonable [actor] would consider [] important in deciding" how to proceed with some commercial transaction. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *accord* Restatement (Second) of Torts § 538(2)(a) (1977) (A matter is material if a "reasonable [person] would attach importance to its existence or nonexistence in determining [] choice of action in the transaction in question.").

Beyond this, the common law rule is that a falsehood is material only if it goes "to the very essence of the bargain" at issue. *Univ. Health Servs., Inc.,* 136 S. Ct. at 2003 n.5 (quoting *Junius Constr. Co. v. Cohen,* 257 N.Y. 393, 400, 178 N.E. 672, 674 (1931) (Cardozo, J.)); *see also Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 457 (2006) (noting common-law requirement for "some direct relation between the injury asserted and the injurious conduct alleged"). At present, whether the mail and wire fraud statutes incorporate this otherwise-recognized aspect of materiality is an open question. This unresolved question has generated conflicting approaches among the circuit courts.

b. The circuit courts have adopted conflicting approaches to the question presented.

The circuit courts are divided into two camps: (i) those that hold a scheme to defraud under the mail and wire fraud statutes requires a falsehood that goes to the "essence" or "nature" of the transaction at issue; and (ii) those that hold the scheme

to defraud may be sustained even when the falsehood in question pertains to a matter which is collateral to the transaction at issue. These competing approaches are outlined below.

(i). Falsehood must go to essence of the bargain

In construing the materiality element of the mail and wire fraud statutes, a number of circuits require a showing that the alleged falsehood goes to at an "essential element" or "nature" of the bargain at issue, unlike the court below.

(a). Second Circuit

Consistent with the principles announced by this Court above, the Second Circuit Court of Appeals holds that a criminal prosecution under those provisions "need not allege the victims of the fraud were in fact injured." *United States v. Shellef,* 507 F.3d 82, 107 (2d Cir. 2007). However, the Second Circuit *does* require "that the defendant contemplated actual harm that would befall victims due to his deception in order to meet the scheme to defraud prong" of the statutes. *Id.* (cleaned up). Thus, to sustain a conviction under the mail fraud statute, the Second Circuit requires proof of "schemes that depend for their completion on a misrepresentation of an essential element of the bargain." *Id.* at 108.

Case outcomes from the circuit are illustrative. In *United States v. Regent Office Supply Co.,* for example, the defendant office supply company employed sales agents to cold-call prospective customers, very often telling falsehoods such as "the agent had been referred to the customer by a friend of the customer" or "the agent was a doctor, or other professional person, who had stationery to be disposed of," or the like. 421 F.2d 1174, 1176 (2d Cir. 1970). The evidence showed that the

falsehoods were made for the purpose of gaining access to customer decision-makers, and those customers who did decide to make an order received agreed-upon goods at the agreed-upon price. *Id.* at 1176-77. Under these facts, the company was charged with and convicted of mail fraud. *Id.* at 1177.

The Second Circuit reversed, holding that to be prosecuted under the mail fraud statutes, a scheme to defraud requires "evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful." *Id.* at 1182. The above falsehoods that gained access to customer decision-makers did not qualify, held the court of appeals, because "the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him." *Id.*

Similarly, in *United State v. Starr,* a private mail-processing company was charged with a scheme to defraud its customers, even though the customers' mailings were accepted and delivered precisely according to contractual specifications. 816 F.2d 94, 95-96 (2d Cir. 1987). The wrinkle was, the mail-processing company then deceived the United States Postal Service into sending the mailings at lower rates, thus decreasing its costs and consequently increasing its profits. *Id.* The company principals were convicted of mail fraud vis-à-vis customers, but the Second Circuit again reversed, on the above principle that the "harm contemplated must affect the very nature of the bargain itself." *Id.* at 98. The above facts did not qualify vis-à-vis the customers, held the court of appeals,

because there was no "discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered."[1] *Id.*

As a final example, the Second Circuit encountered a situation where a wholesaler and retailer entered into an agreement, under which the retailer purchased products from the wholesaler for re-sale within a sales territory. *United States v. Shellef,* 507 F.3d 82, 90-93 (2d Cir. 2007). The retailer sold outside the territory, and was charged with mail fraud on the charged theory that retailer had "induced" wholesaler to "sell additional amounts" of product to retailer, which "it would not have sold had it known that [retailer] in fact intended to sell the product" outside the sales territory. *Id.* at 108-09. The Second Circuit determined this theory deficient under the above principles, again because the misrepresentation neither went to the "nature of the bargain" nor had "relevance to the object of the contract." *Id.* at 109.

The common thread joining all of these decisions is the common-law definition of materiality, which requires more than some collateral falsehood used somewhere to introduce a transaction proposal. *See, e.g.,* Prosser and Keeton on the Law of Torts § 108, p. 753 (5th ed. 1984) (misstatements which "so far unrelated to anything of real importance in the transaction" or "entirely collateral to a contract" fail the materiality requirement at common law) (cited in this Court's *Neder*

[1] As a concurring opinion correctly pointed out, a mail fraud conviction likely would have been sustained had the government charged the defendants with a "scheme to defraud" the postal service rather than the company's customers. *Starr,* 816 F.2d at 101-02.

decision). Rather, under the Second Circuit's conception of materiality, the falsehood in question must go to some essential element or the nature of the bargain at issue.

(b). Eleventh Circuit

Other circuits concur. The Eleventh Circuit Court of Appeals adopted an identical governing principle in its mail fraud and wire fraud case law:

> [A] "scheme to defraud," as that phrase is used in the wire-fraud statute, refers only to those schemes in which a defendant lies about the nature of the bargain itself.

United States v. Takhalov, 827 F.3d 1307, 1313 (11th Cir. 2016). Hence in the Eleventh Circuit, as in the Second and Sixth, a person is liable under those statutes for lying about the characteristics of the good being sold, such as representing a gemstone to be a diamond when in fact it is made of artificial materials. *Id.* at 1314. But a person would not be liable for lying about some matter which is collateral to the bargain at issue, such as claiming that he is a long-lost relative of the prospective buyer. *Id.*

In *Takhalov,* the proprietors of night clubs contracted with agents to have them lure tourists into the establishments and encourage the purchase of wares within. 827 F.3d at 1310-11. Neither proprietors nor agents revealed the relationship to the tourists, and on this basis the proprietors were charged with wire fraud. *Id.* at 1310-12. The Eleventh Circuit adopted the principles espoused by the Second Circuit above, *id.* at 1314-15, and held that a scheme to defraud under the wire fraud statute "refers only to those schemes in which a defendant lies

about the nature of the bargain itself." *Id.* at 1313. Thus, the defendant-proprietors were entitled to a jury instruction that there could be no conviction for failing to disclose the financial arrangement between club proprietors and agents alone; for this was mere deceit to introduce a transaction proposal, and not an "essential element" going to the "nature of the bargain" at issue, *i.e.,* whether the tourists received precisely the drinks and other items as mutually agreed. *Id.* at 1315-16.

(c). Sixth Circuit

Similarly, the Sixth Circuit holds that the mail fraud statute does not impose liability upon a fiduciary who merely fails to disclose a conflict of interest to the beneficiary. *United States v. Frost,* 125 F.3d 346, 361-62 (6th Cir. 1997). Relying upon the above principles developed by the Second Circuit concerning the nature of the alleged bargain, the Sixth Circuit refused to countenance a mail fraud conviction due to the mere omission alone, where the evidence showed that the contract was performed adequately at a fair price. *Id.* Under such circumstances, the same result would arise even if the complainant were to testify that he would not have entered the contract knowing about the omitted conflict based solely on general principles. *Id.* If the omission fails to "inflict a tangible injury" upon the complainant—that is if it does not go to the nature of the bargain at issue—then a mail fraud conviction cannot be sustained.

(ii). Falsehood may be collateral to bargain

(a). Eighth Circuit

In contrast to the above, in this and other cases, the Eighth Circuit Court of Appeals permits liability under the mail fraud and wire fraud statutes even where the falsehood does not induce the transaction at issue, but rather is collateral to it. For instance, in *United States v. Blumeyer,* the Eighth Circuit held the requisite scheme to defraud may exist even when the falsehoods at issue were not directed to customers who lost money in the transaction at issue; but rather that liability could accrue merely for making "false representations to a regulatory agency in order to forestall regulatory action that threatens to impede" the transaction(s). 114 F.3d 758, 768 (8th Cir. 1997). The court of appeals acknowledged this to be a "difficult question," subject to inter-circuit splits of authority. *Id.* at 767-68.

Further, in the case at hand, the Eighth Circuit expanded upon the original principle quite broadly. The court of appeals below acknowledged that Petitioner's falsehoods were to subpoena-issuing courts, not to the alleged victim putative tortfeasors. (App. 8). It acknowledged that the purpose of the falsehoods was to identify putative tortfeasors, not to trick them. (App. 8-9). It even assumed that the putative tortfeasors did in fact commit downloading in violation of federal law, giving rise to a colorable civil action which could very well convince a putative tortfeasor to enter into a settlement agreement. (App. 8-9).

And yet, the court of appeals held these facts could sustain liability under the mail fraud and wire fraud statutes. (App. 9). It is enough that Petitioner directed

falsehoods to subpoena-issuing courts "with the purpose of convincing those courts to grant [] discovery requests," and "with the ultimate object of obtaining settlement payments from alleged infringers [] identified through those discovery requests." (App. 9). The Eighth Circuit does not follow the rule of the Second, Eleventh and Sixth Circuits, *i.e.,* that mail fraud and wire fraud statutes requires a falsehood that goes to the "essence" or "nature" of the ultimate transaction at issue. Under the Eighth Circuit doctrine, it does not matter whether the ultimate object transaction, here the litigation settlements, were for fair value and separate from any falsehoods. (App. 9).

(b). Fifth Circuit

Similarly, the Fifth Circuit Court of Appeals holds that "deception of regulatory agencies" for purposes of continuing operations in violation of governmental requirements "is a cognizable mail fraud offense." *United States v. McMillan,* 600 F.3d 434, 450 (5th Cir. 2010). Hence, under the rule of the Fifth Circuit, the mail fraud statute proscribes the act of:

> operating [a Health Maintenance Organization (HMO)] in violation of statutory requirements, only to have the HMO end up in liquidation with unpaid claims . . ..

Id. The legal principle at work is identical to that articulated in the Eighth Circuit's *Blumeyer* decision, described above; and indeed the Fifth Circuit explicitly relied upon the Eighth Circuit's decision to reach its holding. *McMillan*, 600 F.3d at 450.

Here again the governing principle is that, to state a cognizable offense under the mail fraud and wire fraud statutes, the falsehood at issue need not go to the essence of the bargain, there the HMO's contracts with insureds and medical providers. *Id.* at 443 & 450. Rather, in the Fifth Circuit as in the Eighth, any "deception to regulatory agencies" may be deemed material within the mail or wire fraud statute, where the deception merely allows the actor to continue operations and thereby "keep collecting premiums and fees" from insureds and providers. *Id.* at 449-50. A deception which does not go to the essence of the bargain at issue (contracts between HMO and insureds and medical providers), but rather to the collateral issue of whether the HMO met regulatory requirements, can sustain a fraud conviction.

(c). Seventh Circuit

Last, the Seventh Circuit Court of Appeals has stated an identical rule to that above, *i.e.,* the mail fraud statute is violated where an insurer misleads a regulatory agency for the purposes of forestalling anticipated governmental action. *United States v. Cosentino,* 869 F.2d 301, 307 (7th Cir. 1989). Specifically:

> [I]n misleading the Department of Insurance, the scheme permitted the agency to remain in business past the point it would have had the Department been aware of the defendants' activities . . ..

Id. Once again, the governing principle is that the deception need not go to transaction at issue (a contract between insurer and insured). Rather, the mail and wire fraud statutes are violated when the deception is to a third-party regulator and has only a collateral relation to that transaction.

2. The question is important, with a weighty impact upon the administration of criminal justice.

Standing alone, the inter-circuit split outlined above justifies this Court's review of the question presented. S. Ct. R. 10(a). Beyond this, the question involves principles that are both important and recurring in federal criminal law. As noted above, the mail fraud and wire fraud statutes contain language — proscribing any scheme to defraud without explicitly defining the term — which is capable of expansive construction. Over the course of many decades since the mail fraud statute was originally enacted in 1872, prosecutors and other litigants have harnessed its broad language in all manner of factual scenarios that depart significantly from fraud as the term was understood at common law.

This Court has repeatedly responded by imposing limiting principles upon the reach of the mail fraud and wire fraud statutes, consistent with evident congressional intent that neither stray too far from common-law fraud upon which they are based. Hence, this Court has held that the statutes reach only those schemes aimed at depriving another of actual property rights, not claims of harm stemming from amorphous "standards of disclosure and good government." *McNally v. United States,* 483 U.S. 350, 360 (1987). Nor governmental prerogatives in the issuing body's hands (and therefore with no tangible value prior to issuance), such as licenses. *Cleveland v. United States*, 531 U.S. 12, 26-27 (2000). And as mentioned previously, this Court has held the statutes are limited by the incorporated common-law requirement that there be "materiality of falsehood." *Neder v. United States,* 527 U.S. 1, 25 (1999). *See also, United States v. Skilling*,

561 U.S. 358, 407 (2011) (limiting honest services fraud to cases involving bribery or kickbacks).

Despite these and other limiting principles announced by the Court, litigants have periodically sought to re-expand the scope of the mail fraud and wire fraud statutes. *See, e.g., Kelly v. United States,* 140 S. Ct. 1565, 1571-72 (2020) (holding that fraudulent schemes only violate federal criminal law if they are for obtaining money or property, and that altering a regulatory choice is not property). In some such cases, this Court has been called upon to reinforce the limitations previously set. *Id.* at 1574. A contrary result, this Court has acknowledged, would allow prosecutions of, for example "every lie a state or local official tells" in making a decision, thereby imposing a "sweeping expansion of federal criminal jurisdiction." *Id.*

The question presented here carries the same stakes, if not higher. If, as the Eighth Circuit holds in the decision below, the materiality requirement is satisfied by any falsehood with any tenuous connection to the transaction at issue, so long as it is material to someone, somewhere, this would greatly expand the scope of the mail fraud and wire fraud statutes, and therefore the reach of federal criminal jurisdiction into everyday life.

Numerous examples come to mind, drawn from the caselaw discussed above. A civil litigant who obtains discovery by means of some omission, and only much later enters into a fair settlement agreement with a party-opponent. *See supra* § 1.b(ii)(a). A police officer who makes an omission on a search warrant application,

which ultimately results in stipulated civil forfeiture of the target's money and property. *See supra* § 1.b(ii)(a). A salesperson who fibs to a prospective customer over the phone in hopes of starting a conversation, which ultimately leads to a sale for fair value. *See supra* § 1.b(i)(a).

And these are only the examples that can be directly drawn from the case law above. History shows that creative prosecutors and litigants will stretch the concept to innumerable situations, even when the falsehood is many steps removed from the ultimate transaction.

3. This case presents an apt vehicle by which to review the question.

Fundamentally, Petitioner's motion to dismiss the fraud counts of the indictment in this case would succeed in the Second, Sixth, and Eleventh Circuits, and would not in the Fifth, Seventh, and Eighth. This petition thus presents a compelling case for this Court to review the question presented, *i.e.,* whether the mail and wire fraud statutes require a falsehood that goes to the "essence" or "nature" of the transaction at issue as an aspect of materiality. But the present case extends the reach of the federal criminal fraud statutes into the realm of meritorious civil litigation. This in turn implicates the constitutional rights of citizens to petition courts. *See Calif. Motor Trans. Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972).

Here, the Eighth Circuit assumed that Petitioner's settlement-proposal letters to putative tortfeasors were based upon a meritorious and colorable civil claim for damages for copyright infringement, and nonetheless upheld the criminal

charges against Petitioner under the mail fraud and wire fraud statutes. Not because the settlement proposal letters tricked the recipients, but rather because the Petitioner's falsehoods to courts permitted him to contact the putative tortfeasors in the first instance. Whatever can be said about this result, it certainly goes far beyond the common law's concept of actionable fraud. *See, e.g.,* Prosser and Keeton on the Law of Torts § 108, p. 753 (5th ed. 1984) (cited in this Court's *Neder* decision) (misstatements which "so far unrelated to anything of real importance in the transaction" or "entirely collateral to a contract" fail the materiality requirement at common law).

The Eighth Circuit's decision therefore invites prosecutions under the mail fraud and wire fraud statutes for a wide range of conduct that would not be deemed material at common law, because it did go to the "essence" or "nature" of the transaction at issue, in this case the decision to enter a civil settlement agreement. As already shown, the governing principle is the subject of a split of authority among the circuit courts. This is an important question, the resolution of which will either restrict or greatly expand the scope of the federal mail and wire fraud statutes.

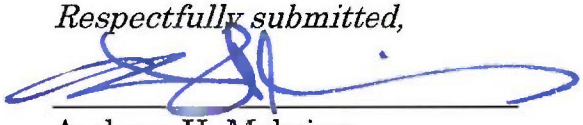
The case at hand presents the issue cleanly and clearly. Petitioner respectfully requests the Court to grant this petition to resolve the split of circuit authority as to this important question of federal criminal law.

CONCLUSION

For all these reasons, Petitioner respectfully asks the Court to grant this Petition for a Writ of Certiorari.

Dated: July 7, 2021

Respectfully submitted,



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