NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2021

JOHN D. GLENN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Third Circuit's overbroad interpretation of what is a "mortgage lending business," a definitional term added by the Fraud Enforcement and Recovery Act of 2009 to be used to interpret, *inter alia*, the bank fraud statute, requires this Court's intervention.

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

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Petitioner John D. Glenn, Jr. respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The Third Circuit's opinion was not reported and can be found at 846 Fed.Appx. 110 (3d Cir. March 9, 2021). Pet. App. 2-5. A petition for rehearing was denied on August 4, 2021. Pet. App. 1.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on August 29, 2018. The Third Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and issued its unpublished opinion on March 9, 2021. The Third Circuit denied rehearing on August 4, 2021. Pursuant to Supreme Court Rule 13.3, the Petition was due to be filed within 90 days of denial of rehearing and Justice Alito granted a motion to extend the time of filing until December 2, 2021. *See* Appl. No. 21A79. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The definition of bank fraud, found in 18 U.S.C. § 1344, provides penalties for:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice-
>
> (1) To defraud a financial institution; or
>
> (2) To obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of, a financial institution,

by means of false or fraudulent pretenses, representation, or promises.

A "financial institution" is defined, in relevant part, in 18 U.S.C. § 20 as:

> (10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.

The definition of a mortgage lending business is set forth in 18 U.S.C. § 27 as "an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce."

Subsection 10 of 18 U.S.C. § 20 and 18 U.S.C. § 27 were both added by the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (May 20, 2009).

STATEMENT OF THE CASE

This case asks the Court to hold that the Third Circuit's expansive definition of "mortgage lending business" exceeds the bounds of 18 U.S.C. § 27 as created by the Fraud Enforcement and Recovery Act of 2009 ("FERA"). The FERA should not be construed to protect venture capital firms from basic fraudulent transactions, nor in cases where the venture capital firm did not engage in a mortgage lending transaction with the defendant .

PROCEEDINGS BELOW

Petitioner John D. Glenn, Jr. was charged in a three-count indictment with: conspiring to commit bank fraud, in violation of 18 U.S.C. § 1349 (Count One); and bank fraud, in violation of 18 U.S.C. § 1344 (Counts Two and Three). The indictment alleged that Mr. Glenn and a separately charged co-conspirator who owned a title company attempted to secure money from three venture capital firms, Oroton Equities, Stout Street Capital, and National Capital Management in connection with a property in Bryn Mawr, Pennsylvania. Stout Street and National Capital gave Mr. Glenn a traditional mortgage loan, that is, their loans of $480,000 and $550,000, respectively, were intended to hold an interest in the Bryn Mawr property. Oroton Equities considered an arbitrage transaction, specifically a short-term bridge loan, with Mr. Glenn in relation to the Bryn Mawr property, but ultimately did not proceed with the deal. Mr. Glenn received 11 ½ percent of the proceeds from the two consummated loans, $120,000, and the co-conspirator took the rest, $910,000. Neither defendant put any of the money towards purchase of the Bryn Mawr property.

The companies with whom the loans were negotiated were neither banks nor traditional lenders but the government argued that each qualified as a "mortgage lending business." The proof that each company was a mortgage lending business was primarily that the government read the statutory definition in 18 U.S.C. § 27 and each financier-witness agreed that his firm met this definition. Mr. Glenn was convicted on all counts and the District Court sentenced him to 168 months

imprisonment.

On appeal to the Third Circuit, Mr. Glenn raised two issues. First, the District Court committed plain error in omitting an essential element of the offense, that the jury had to find that the financiers were mortgage lending businesses. Instead, the District Court simply told the jury they were. Second, the conspiracy conviction required reversal because the government charged a multi-object conspiracy, and there were not valid legal grounds for all of the objects, specifically that Oroton Equities was a mortgage lending business.

The Third Circuit (McKee, Porter, and Fisher, JJ.), in a not-precedential opinion authored by Judge Fisher, affirmed the convictions. Although the panel agreed that the District Court had plainly erred in omitting an element of the offense, it found there was not a reasonable probability that this failure affected the outcome. The panel relied on *United States v. Fattah*, 914 F.3d 112, 183 (3d Cir. 2019) and *United States v. Springer*, 866 F.3d 949, 953 (8th Cir. 2017) to broadly interpret the term "mortgage lending business." Specifically, the panel explained that bank fraud can be in connection with a "mortgage lending business" even if the financier does not have a large volume of mortgage business or transactions or engages in such business "even for a brief time," and that the fraud need not occur "in connection with the same transaction that places the entity within the definition of [a] financial institution." Pet. Appx. 3 (*United States v. Glenn*, 846 Fed. Appx. 110, 113 & nn. 15 & 20 (3d Cir. 2021)). As for the objection to the conspiracy conviction, the Third Circuit considered this as a sufficiency objection. Under a

deferential standard of review, the Court found sufficient evidence that Oroton Equities qualified as a mortgage lending business, again because of that Court's broad statutory interpretation that neither a mortgage fraud in the instant case nor a large volume of mortgage business was necessary to bring a financier within the statute's protections. Pet. Appx. 3 (846 Fed. Appx. at 114).

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's protection of venture capitalist firms from common fraud is beyond the scope of new definitions Congress added to various fraud statutes by the Fraud Enforcement and Recovery Act of 2009.

Congress passed the FERA in response to the need for increased accountability for mortgage lending businesses not directly regulated or insured by the federal government. This legislation was passed in the wake of "most serious economic crisis since the Great Depression," the housing crash of 2008. Before the crash, these unregulated "mortgage lending businesses" were responsible for nearly half of all "higher-priced, first-lien mortgages in America." Accordingly, these unregulated businesses had a huge impact on the "health of the banking system and the overall economy." The new definitions added to the bank fraud and related statutes was thus intended to protect consumers. *See* Report of Senate Judiciary Committee, S. Rep. 111-10, 2009 WL 787872, 2009 U.S.C.C.A.N. 430, 434-35 (May 6, 2009). The Court below ignored this context to decide that the instant small, basic fraud against venture capital firms should come under the federal bank fraud

statute, relying on its recent decision in *United States v. Fattah*, 914 F.3d 112, 183 (3d Cir. 2019) and the Eighth Circuit's decision in *United States v. Springer*, 866 F.3d 949, 953 (8th Cir. 2017).

The *Fattah Court* had looked at Fattah's financial dealing with the Credit Union Mortgage Association (CUMA), a for-profit company which was owned by 48 credit unions and served small credit unions that did not have the infrastructure or in-house expertise to handle mortgage loans themselves. CUMA provided soup to nuts mortgage services: loan origination, processing, underwriting, closing, and selling mortgages in a secondary market. In jurisdictions in which CUMA was licensed, CUMA generally held the mortgage for two to 30 days, and was thus the mortgagee, until it sold the mortgage either to a partner credit union or on the secondary market. 914 F.3d at 183. The Third Circuit held CUMA to be a "mortgage lending business" because it provided a full spectrum of services from loan origination, processing, underwriting, closing, through selling mortgages in a secondary market, even where the transactions at issue were not mortgages. *Fattah* adopted the reasoning of *Springer*, in which the Eighth Circuit found sufficient evidence that GMAC was in the "mortgage lending business" because there was testimony that "it had made hundreds or thousands of loans secured by mortgages in 2010 and 2011 in states all across the country," 866 F.3d at 953. Although GMAC did not own the specific loan at issue in that case, the Eighth Circuit determined that testimony established that GMAC's activities affected interstate commerce. *Id.*

This case lowers the bar even further for what discrete deal might bring a

fraudulent transaction within the bank fraud statute as amended by the FERA. In this case, the evidence was sparse about how the financiers were in the "mortgage lending business." "Mortgage lending business," as defined in the statute, is a legal term of art: "an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce." 18 U.S.C. § 27. The majority of proof below that each of the financiers met this legal definition was that they said they met it. But to construe that the statute permits organizations to fit into the definition regardless of their actions in a specific case – (re)financing debt secured by an interest in real estate – unmoors the statute from its context. This Court should intervene and deploy some common sense to constrain it.

Yates v. United States, 574 U.S. 528 (2015), offers an exemplary model. "To prevent federal authorities from confirming that he had harvested undersized fish" in federal waters, Yates "ordered a crew member to toss the suspect catch into the sea." *Id.* at 531. Yates was convicted of knowingly destroying a "tangible object" in violation of 18 U.S.C. § 1519. Although a fish "is no doubt an object that is tangible," a plurality of this Court determined this did not end the inquiry. *See id.* at 532. Because Section 1519 "was enacted as part of the Sarbanes-Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation," to count the tangible object "fish" as a "tangible object" "would cut § 1519 loose from its financial-fraud

mooring." *Id.* "Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover-ups," the plurality construed "tangible object" to include only items that can be "used to record or preserve information." *Id.*

This case compels a similar analysis. Mindful that in the FERA, Congress trained its attention on sophisticated financial arrangements that functioned to defraud consumers, this Court should not construe "mortgage lending business" to criminalize simple frauds committed to obtain moneys from venture capital firms. As in *Yates*, "[w]hether a statutory term is unambiguous … does not turn solely on dictionary definitions of its component words." 574 U.S. at 537. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997) (citations omitted). In *Yates*, this Court "reject[ed] the Government's unrestrained reading," in favor of a "contextual reading." *Id.* at 536 (plurality opinion of Ginsburg, J.); *see id.* at 549 (Alito, J., concurring in judgment) (using "traditional tools of statutory construction" to reach result).

More generally, expansive readings that impose liability for actions not delineated by the FERA's definition of "mortgage lending business" cannot be reconciled with due process doctrines of vagueness and overbreadth, or canons of construction *See, e.g.*, *Yates,* 574 U.S. at 536 (applying lenity and the *ejusdem generis* rules to limit the statute's reach to offenses highly unrelated to the context

of the statute's creation). This same interpretive principle was applied in *Johnson v. United States* - a case involving a federal-law definition that covered varying state-law regimes - to hold that a battery statute that criminalized essentially all unwanted touching was not categorically a "violent felony" because, notwithstanding the broad definition Congress gave to that term, it nonetheless called out for some limitations. *See* 559 U.S. 133, 140 (2010); *Bond v. United States,* 572 U.S. 844, 848-51 (2014) (statute imposing criminal penalties for possessing and using a chemical weapon, which implemented a chemical weapons treaty, did not reach "unremarkable local offense" perpetrated by defendant, even though she "'knowingly' 'use[d]' a 'chemical weapon'" as required by the text of the definition); *Lopez v. Gonzales,* 549 U.S. 47, 53-55 (2006) (rejecting government's argument that state felony conviction for drug possession, treated as a misdemeanor under federal law, qualified as an "illicit trafficking" predicate under the INA because doing so is "incoheren[t] with any commonsense conception of 'illicit trafficking,' the term ultimately being defined," and the "everyday understanding of 'trafficking' should count for a lot").

The panel below did little to understand the FERA's statutory addition, instead simply stating that the statute did not require certain circumstances (not present in the instant case) before imposing liability. The panel thus eschewed its duty to fairly interpret and meaningfully analyze the FERA's text and context, in conflict with decisions of this Court. As this Court has recently and repeatedly made clear, "[t]he people who come before [the courts] are entitled, as well, to have

independent judges exhaust 'all the textual and structural clues' bearing on [the statute's] meaning." *Niz-Chavez v. Garland,* 141 S. Ct. 1474, 1480 (2021) (quoting *Wis. Cent. Ltd. v. United States,* 138 S. Ct. 2067, 2074 (2018)). The Court "start[s] where [it] always do[es]: with the text of the statute." *Van Buren v. United States,* 141 S. Ct. 1648, 1654 (2021). And as a starting point, "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, A MATTER OF INTERPRETATION 23 (1997). To be sure, there may be instances when "the meaning of a word cannot be determined in isolation," *Deal v. United States*, 508 U.S. 129, 132 (1993), or when dictionary definitions alone are "not dispositive," *Yates*, 574 U.S. at 538 (plurality opinion); *see also* Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855, 859 (2020) ("[T]extualism isn't a mechanical exercise, but rather one involving a sophisticated understanding of language as it's actually used in context.").

II. The legal question presented is important.

The question raised herein, because it implicates criminal defendants' liberty and decades of incarceration, is a matter of exceptional importance which warrants granting the petition, even if the circuits, to date, are uniform in holding that the FERA amendments extension of the definition of a "financial institution" to include a "mortgage lending businesses" should be interpreted broadly. This Court has not hesitated to address important questions of law even when circuits were uniform.

See e.g., Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 505-06 (2007) (granting certiorari despite absence of circuit split in light of "unusual importance of the underlying issue"); *see also Rehaif v. United States*, 139 S. Ct. 2191 (2019). This Court should grant this petition to address these important questions of statutory interpretation, on which decades of incarceration hinge, and cabin the ambit of the FERA amendments.

Accordingly, this Court should grant certiorari pursuant to Supreme Court Rule 10(c) which provides for review on certiorari if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court[.]"

III. This case presents an ideal vehicle to resolve this question.

This case is an ideal vehicle to address the issue because its presents the broadest interpretation yet of the FERA's reach. Oroton Equities, one of the venture capitalist firms here, did not contemplate engaging in a mortgage transaction but instead was guaranteed the transfer of funds. There was no evidence below about the mortgage division of Oroton Equities, which was not involved in the contemplated transaction. Thus, unlike in the Third Circuit's analysis of the Credit Union Mortgage Association in *Fattah* or the Eighth Circuit's analysis of GMAC in *Springer*, there was simply no proof of the volume or scope of Oroton's mortgage business. There was little other than the venture capital firm confirming it conformed to this legal definition to establish that it should qualify as a mortgage

lending business bringing the defendant's fraud under the scope of the bank fraud statute. Given that the FERA was enacted to enable the government to prosecute wide-scale abuse in the financial sector, any frauds committed against the companies below should not be considered bank fraud against a "mortgage lending business." The panel below erred in its statutory analysis, overextending the scope of the FERA.

CONCLUSION

Given the exceptional importance of the legal question presented, this Court should grant the instant petition.

Respectfully submitted,

s/ *Alison Brill*

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Dated: November 23, 2021