No. A-_____

In The

Supreme Court of the United States

LEE ELBAZ, A/K/A LENA GREEN,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Supreme Court Rule 13.5, applicant Lee Elbaz respectfully requests a 45-day extension of time, until April 13, 2023, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Fourth Circuit issued its amended opinion in this case on November 3, 2022. The court of appeals denied Ms. Elbaz's petition for rehearing en banc on November 29, 2022.[1]

[1] The Fourth Circuit's November 29, 2022 order denying en banc rehearing is attached to this motion as Exhibit A. The Fourth Circuit's November 3, 2022 amended opinion is attached as Exhibit B.

Unless extended, the time for filing a petition for a writ of certiorari will expire on February 27, 2023 (a Monday). This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. This case is about whether the domestic wire-fraud statute, 18 U.S.C. § 1343, can be applied to conduct occurring as part of an extraterritorial scheme. The domestic wire-fraud statute prohibits fraudulent schemes that use domestic wire, radio, or television communications. The questions presented are whether (i) the statute applies extraterritorially and (2) if it does not, whether the "focus" of the domestic wire-fraud statute can be defined as the use of a wire, and not the scheme to defraud, such that this domestic statute can be applied to fraudulent schemes that occurred almost entirely extraterritorially so long as the scheme involved at least one domestic wire, radio, or television communication.

2. The courts of appeals are split as to whether the domestic wire-fraud statute, 18 U.S.C. § 1343, applies extraterritorially in light of its reference to "interstate or foreign commerce." It is a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) (internal quotation marks omitted). And as this Court has "repeatedly held," a "general reference to foreign commerce" in a statute "does not defeat the presumption against extraterritoriality." *Id.* at 263. Despite these well-established principles, the First and Third Circuits have held that the Federal Wire

Act (18 U.S.C. § 1084, which governs the use of wires in placing bets) and the domestic wire-fraud statute (which looks at the use of wires in general fraud schemes) apply extraterritorially in light of similar "in interstate or foreign commerce" language in both statutes. Meanwhile, the Second, Fourth, and Eleventh Circuits have reached the opposite conclusion.

a. The Third Circuit concluded that the domestic wire-fraud statute "applies extraterritorially" because the "explicit statutory language indicates that it punishes frauds executed in interstate or foreign commerce, and is surely not a statute in which Congress has only domestic concerns in mind." *United States v. Georgiou*, 777 F.3d 125, 137–38 (3d Cir. 2015) (quoting *Pasquantino v. United States*, 544 U.S. 349, 371–72 (2005)) (internal quotation marks omitted). When faced with similar language in the Federal Wire Act, 18 U.S.C. § 1084, the First Circuit concluded that it applied extraterritorially because "it explicitly applies to transmissions between the United States and a foreign country." *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014); *but see United States v. McLellan*, 959 F.3d 442, 467 (1st Cir. 2020) (declining to address whether domestic wire-fraud statute applies extraterritorially because underlying facts "suffice to establish a domestic application of § 1343"). As numerous courts have recognized, the First and Third Circuits' interpretation of the common language in these statutes represents one side of a clear circuit "split." *Medimpact Healthcare Sys. v. IQVIA Inc.*, No. 19-cv-1865, 2022 WL 6281793, at *25 (S.D. Cal. Oct. 7, 2022) (grouping First and Third Circuits together); *accord United States v. McLellan*, No. 16-cr-10094, 2018 WL 1083030, at

*3 (D. Mass. Feb. 27, 2018); *GoITV, Inc. v. Fox Sports Latin Am., Ltd.*, No. 16-24431-CIV, 2018 WL 1393790, at *14 (S.D. Fla. Jan. 26, 2018); *Drummond Co. v. Collingsworth*, No. 2:15-cv-506, 2017 WL 3268907, at *17 (N.D. Ala. Aug. 1, 2017); *Absolute Activist Value Master Fund Ltd. v. Devine*, 233 F. Supp. 3d 1297, 1324 (M.D. Fla. 2017).

b. On the other side of the split, the Second, Fourth, and Eleventh Circuits have concluded that this statutory language does not defeat the presumption against extraterritoriality. Addressing the domestic wire-fraud statute specifically, the Second Circuit has held that the statute "do[es] not indicate an extraterritorial reach." *Bascuñán v. Elsaca*, 927 F.3d 108, 121 (2d Cir. 2019). The Fourth Circuit has reached the same conclusion, given that "[n]owhere within the wire-fraud statute did Congress clearly indicate that it applied to foreign conduct." *United States v. Elbaz*, 52 F.4th 593, 602 (4th Cir. 2022). The Eleventh Circuit has also reached the same conclusion, albeit in an unpublished decision. *See Skillern v. United States*, 2021 WL 3047004, at *8 (11th Cir. Apr. 16, 2021).

3. If a statute does not apply extraterritorially, courts consider "whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.'" *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337 (2016). Although most courts to consider the issue have held that the focus of the wire-fraud statute is the mere use of a domestic wire, the courts of appeals significantly differ in the test they apply in making this determination.

a. The Second Circuit has made clear that "in order for incidental domestic wire transmissions not to haul essentially foreign allegedly fraudulent behavior into American courts, 'the use of the wires must be essential, rather than merely incidental, to the scheme to defraud.'" *United States v. Napout*, 963 F.3d 163, 179 (2d Cir. 2020) (quoting *Bascuñán*, 927 F.3d at 122) (internal alteration omitted). In other words, not only must the defendant use wires in the United States, but also the use of those wires must be a "core component of the scheme to defraud." *Bascuñán*, 927 F.3d at 122; *see also Napout*, 963 F.3d at 180.

b. The other courts to consider this issue, including the court below, have charted a different course. Despite citing *Bascuñán*, the First Circuit affirmed a defendant's conviction where the district court instructed the jury that the "wire communication need not be 'essential to the scheme'" and only that it "must have been made for the purpose of carrying out the scheme." *McLellan*, 959 F.3d at 469–70. Following the First Circuit, the Fourth Circuit requires only that transmissions "in furtherance of the scheme" occur domestically, *Elbaz*, 52 F.4th at 604; *see also Skillern*, 2021 WL 3047004, at *8 (concluding that mail- and wire-fraud statutes focused on transmittal), and the Ninth Circuit likewise requires only that the use of domestic wires have a "sufficient domestic nexus," *United States v. Hussain*, 972 F.3d 1138, 1145 (9th Cir. 2020).

4. This case squarely presents two questions that have divided the courts of appeals.

a. Ms. Elbaz worked in Israel for Yukom Communications, a company based in Israel. Ex. B. at 5. Yukom's agents created a fraudulent scheme involving "binary options," all-or-nothing options in which purchasers bet on the price of an asset at a specific time. *Id.* at 4. Purchasers who incorrectly bet on an asset's price lost their investment, but purchasers who bet correctly profited by a fixed amount. *Id.*

As part of this scheme, two foreign companies marketed the binary-option investments. *Id.* at 5. When customers responded to these advertisements, an agent from a different company would contact them and persuade them to deposit at least $250. *Id.* After customers made this deposit, agents from Yukom made fraudulent representations to retain these customers so that the customers would deposit more money and refrain from withdrawing their money. *Id.*

Although Yukom's scheme netted over $100 million in deposits worldwide, Ms. Elbaz was prosecuted for only three incidental domestic wire transmissions that occurred in Maryland—two emails and one phone call. *Id.* Even though Ms. Elbaz's conduct largely occurred overseas, she was indicted for conspiracy to commit wire fraud and for three substantive wire-fraud counts. *Id.* at 6. Ms. Elbaz was convicted and sentenced to 264 months in prison and three years of supervised release. *Id.* at 7. The district court also ordered Ms. Elbaz to pay $28 million in restitution. *Id.*

b. Ms. Elbaz appealed, arguing, among other things, that the domestic wire-fraud statute was improperly applied because the fraudulent scheme largely occurred outside of the United States. *Id.* Although the Fourth Circuit concluded

that the domestic wire-fraud statute does not apply extraterritorially, *id.* at 8–9, the court held that it was properly applied to Ms. Elbaz because the statute focused on the use of wire communications, not the fraudulent scheme, *id.* at 10–11. Because the communications used wires in Maryland, the court reasoned, Ms. Elbaz's convictions were permissible domestic applications of the wire-fraud statute. *Id.* at 12.

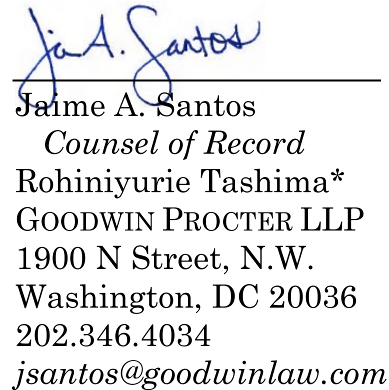
5. Applicant respectfully requests a 45-day extension of time to file her petition for a writ of certiorari from the Fourth Circuit's decision until and including April 13, 2023. An extension of time is warranted because the undersigned counsel from Goodwin Procter LLP were recently retained, on a pro bono basis, to assist with preparing a petition for a writ of certiorari in this matter. An extension of time is therefore warranted to allow Ms. Elbaz's new counsel to familiarize themselves with the record and the relevant law and to prepare and file the petition. An extension is particularly warranted because counsel have been heavily engaged with other matters, including a brief in the Seventh Circuit due on January 30, 2023; a motion to dismiss in the U.S. District Court for the District of Massachusetts due on January 31, 2023; a brief in the Fourth Circuit due on February 13, 2023; a brief in the Federal Circuit due on February 13, 2023; a brief in the Ninth Circuit due on February 13, 2023; a brief in the Eleventh Circuit due on February 13, 2023; a brief in the Federal Circuit due on March 6, 2023; a brief in the Fourth Circuit due on March 6, 2023; and a brief in the Eleventh Circuit due on April 5, 2023. Counsel of Record will also be traveling outside of the country February 15-22, 2023.

The government will not suffer any prejudice from the requested extension.

Wherefore, applicant respectfully requests that the Court extend the time to file a petition for a writ of certiorari to April 13, 2023.

February 7, 2023

Respectfully submitted,



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