IN THE

Supreme Court of the United States

LEE ELBAZ, A/K/A/ LENA GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The wire-fraud statute, 18 U.S.C. § 1343, prohibits fraudulent schemes that use wire, radio, or television communications in interstate or foreign commerce. This case concerns whether the wire-fraud statute can be applied to foreign conduct by foreign actors as part of a foreign scheme.

The questions presented are:

1. Does § 1343 apply extraterritorially, as at least the Third Circuit has held, or is it limited to domestic applications, as the Second, Fourth, and Eleventh Circuits have held?

2. If the wire-fraud statute is limited to domestic applications, can it be applied to foreign conduct by foreign actors as part of a foreign scheme so long as the scheme involves an incidental domestic wire transmission, as the Fourth and Ninth Circuits have concluded, or must the scheme involve substantial domestic conduct, such as the use of domestic wires as an essential component of the fraudulent scheme, as the First and Second Circuits have held?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

U.S. District Court for the District of Maryland:

United States v. Lee Elbaz, No. 8:18-cr-00157-TDC, (D. Md.) (Dec. 19, 2019)

U.S. Court of Appeals for the Fourth Circuit:

United States v. Lee Elbaz, No. 20-4019 (4th Cir.) (Nov. 3, 2022), *reh'g denied* (Nov. 29, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lee Elbaz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

Ms. Elbaz is an Israeli citizen who lived and worked in Israel for an Israeli company that provided services to two other foreign companies. She was indicted in the United States for participating in a binary-options fraud scheme and sentenced to 22 years in prison for wire fraud under 18 U.S.C. § 1343. Prosecutors did not allege that she (or anyone else involved) stepped foot inside the United States—they charged her for participating in a foreign fraud scheme devised and conducted abroad entirely by foreign actors.

The Fourth Circuit held that Ms. Elbaz's prosecution was a "domestic application" of § 1343 because the foreign fraud scheme involved three wire communications received by individuals in Maryland—two emails and a phone call sent by Yukom agents (not Ms. Elbaz). Prosecutors did not allege that the U.S. wires themselves contained false statements, that they were a core component of the foreign scheme, or that Ms. Elbaz was even involved in transmitting them. The court nonetheless held that Ms. Elbaz's conviction did not violate principles of extraterritoriality, reasoning that any use of a wire received in the United States as part of a foreign scheme conducted abroad by foreign actors is sufficient for a "domestic application" of the wire-fraud statute.

The circuits are sharply divided about whether a foreign fraud scheme conducted abroad by foreign actors can be prosecuted under the wire-fraud statute. The Third Circuit holds that the wire-fraud statute applies extraterritorially full stop—a position rejected by at least three other courts of appeals that would have sustained Ms. Elbaz's conviction.

Among courts that limit the wire-fraud statute to domestic applications, the circuits disagree about what *is* a domestic application of the statute and whether the mere use of a wire received in the United States qualifies. The Fourth and Ninth Circuits agree that any use of a domestic wire makes prosecution of a foreign fraud scheme a "domestic application" of U.S. law.

The Second Circuit, in contrast, holds that the mere fact that a domestic wire was used is not alone sufficient to haul foreign actors engaging in a foreign scheme through foreign conduct into U.S. courts. Instead, "more substantial domestic conduct is required, such as the use of domestic wires as a "core component of the scheme to defraud." *Bascuñán v. Elsaca*, 927 F.3d 108, 112 (2d Cir. 2019); *see also United States v. Napout*, 963 F.3d 163, 169 (2d Cir. 2020). As the court explained, this requirement "ensures that the domestic tail not wag, as it were, the foreign dog." *Napout*, 963 F.3d at 169. The First Circuit's test is likewise more stringent than the Fourth and Ninth Circuits': "A statute is applied domestically '[i]f domestic conduct satisfies every essential element to prove a violation … even if some further conduct contributing to the violation occurred outside the United States.'" *United States v. McLellan*, 959 F.3d 442, 469 (2020) (citations

omitted). Thus, while Ms. Elbaz's conviction would have been sustained in the Third and Ninth Circuits (and was sustained by the Fourth Circuit), it would not have been tenable in the First and Second Circuits.

These entrenched circuit splits are not going away. These issues aren't going away either, given the extensive use of the wire-fraud statute to target all manner of financial dealings across the globe. And the confusion among the courts of appeals is not limited to wire-fraud prosecutions—other statutes, including the mail-fraud statute, 18 U.S.C. § 1341, and the Federal Wire Act, *id.* § 1084, use similar language and are therefore interpreted in the same way.

The executive branch does not have the authority to police financial frauds around the world. Other countries have their *own* laws governing financial dealings like binary-options that occur within their borders. If the incidental use of a wire received in the United States is all that is necessary to prosecute a foreign scheme conducted abroad by foreign actors, then the presumption against extraterritoriality would be precisely the "craven watchdog" that this Court warned against in *Morrison v. National Australia Bank Ltd.,* 561 U.S. 247, 255 (2010). This Court should grant certiorari and reverse.

OPINIONS BELOW

The Fourth Circuit's opinion following panel rehearing (Pet.App.1a-35a) is reported at 52 F.4th

593.[1] The district court's opinion (Pet.App.36a-73a) is reported at 332 F. Supp. 3d 960.

JURISDICTION

The court of appeals entered judgment on November 3, 2022, after panel rehearing. The court denied rehearing en banc on November 29, 2022. On February 9, 2023, the Chief Justice extended the time to file a petition for a writ of certiorari until April 13, 2023. On April 6, 2023, the Chief Justice further extended the time to file this petition until April 27, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire-fraud statute, 18 U.S.C. § 1343, provides in relevant part that:

> 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.

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[1] The panel's opinion following panel rehearing was an amended version of its original decision (published at 39 F.4th 214). The changes are unrelated to the questions presented here.

The federal attempt and conspiracy statute, 18 U.S.C. § 1349, provides that:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

A. Ms. Elbaz works for a foreign company that provides services to two other foreign companies and participates in a foreign binary-options scheme.

Ms. Elbaz worked in Israel for an Israel-based company, Yukom Communications, that participated in a foreign fraud scheme related to binary-option investments. Pet.App.5a, 37a. A binary option is essentially a bet in which purchasers speculate on the price of an asset (*e.g.*, stock in a company) at a certain date and time. Pet.App.4a. For example, one might pay $100 for a binary-option contract that promises a 50% return if the stock price of Company X is above $30 per share at 5:00pm the next day. If the stock price is $35 at that time, she earns $150; if the stock price is $29.50, she earns nothing and loses her $100 investment

As part of this scheme, two foreign companies, BinaryBook and BigOption, marketed binary-option investments. Pet.App.5a. When a customer responded to their advertisements, an agent from a different company would try to persuade the customer to deposit at least $250. Pet.App.5a. If the customer agreed to make this deposit, responsibility for

retaining the customer transferred to Ms. Elbaz's employer, Yukom, which provided sales, marketing, and customer-retention services for BinaryBook and BigOption.

Yukom agents made fraudulent representations so that customers would deposit more money or refrain from withdrawing their money. Pet.App.5a. They used fake names and misrepresented their location, education, work experience, compensation incentives, and investment performance. Pet.App.5a. Ms. Elbaz was not alleged to have been a kingpin of the binary-options scheme. Indeed, even though her title at one point was CEO of Yukom, Pet.App.5a, the district court noted that Ms. Elbaz neither "own[ed] the scheme" nor "profit[ed] from [it] in the same way as others, such as the owners of Yukom," C.A.App.6723-24. Instead, she "effectively received a salary or at least the equivalent of one and did not share in any way a substantial portion of the money that was made through the scheme the way someone such as an equity partner would have." *Id.*

Yukom and its partners made over $100 million in deposits from customers worldwide through their scheme, but only three domestic wire transmissions are at issue in this case—two emails and one phone call from Yukom agents (not Ms. Elbaz) to individuals in Maryland. Pet.App.5a. One email was sent by a retention agent providing bank wire transfer instructions. C.A.App.69. Another was sent by a member of the Yukom Compliance Department regarding a deposit confirmation. C.A.App.69. The phone call was made by a retention agent who introduced herself over the phone. C.A.App.2567.

B. Ms. Elbaz is convicted of wire fraud under U.S. law and sentenced to 22 years in prison.

Ms. Elbaz's conduct occurred entirely overseas—she worked for a foreign company that provided marketing and retention services to two other foreign companies as part of a foreign scheme. Ms. Elbaz was not alleged to have violated the laws of Israel, where her conduct occurred—to the contrary, the district court "referenced the possibility that [Ms.] Elbaz's conduct was legal under Israeli law but never decided whether it was." Pet.App.24a n.14. And none of the three incidental uses of a U.S. wire was alleged to have included fraudulent statements or been a core component of the scheme to defraud. Nonetheless, Ms. Elbaz was indicted under U.S. law for conspiracy to commit wire fraud and for three substantive wire-fraud counts, based on the two emails and one phone call made by Yukom agents to customers in Maryland. Pet.App.6a.

1. Ms. Elbaz moved to dismiss the indictment, arguing that the wire-fraud statute did not apply because her conduct occurred extraterritorially. Pet.App.6a. The district court agreed that the wire-fraud statute did not apply extraterritorially but denied Ms. Elbaz's motion, reasoning that the charged wire frauds were domestic applications of the statute because they involved the use of domestic wires and domestic victims. Pet.App.6a.

2. At trial, Ms. Elbaz intended to call four Israeli witnesses, including Yukom's owner, to testify in her defense. Pet.App.6a; C.A.App.6723. The witnesses were planning to testify that Ms. Elbaz emphasized the importance of being honest with customers and actually terminated employees who made

misrepresentations. C.A.App.6829-13-14. But a week before the witnesses' foreign depositions, they were dissuaded from testifying by U.S. prosecutors, who informed them that they were under indictment, instructed them that they have "the right not to subject [themselves] to examination during a deposition," and cautioned that they may want to reconsider whether they still wished to testify in Ms. Elbaz's case. C.A.App.720-29; *see also* Pet.App.6a, 16a; C.A.App.885-886.[2] Unsurprisingly, all four witnesses suddenly refused to testify without use immunity, which the government refused to provide and the district court declined to order. Pet.App.6a, 16a.

Even though Ms. Elbaz went to trial without her key defense witnesses, the jury deadlocked twice. *See* C.A.App.4621, 4625. The district court encouraged the jury to continue deliberating. The next day, a juror disclosed that he had overheard a conversation about Ms. Elbaz's case while standing in line at CVS. Pet.App.6a-7a. He said that overhearing this conversation made him question whether Ms. Elbaz should be acquitted as he had initially thought based on the trial evidence. Pet.App.6a-7a. Although the juror had deliberated with other jurors after being influenced by this conversation, the court did not declare a mistrial. Pet.App.7a. The court instead sat an alternator juror, and the reconstituted jury convicted Ms. Elbaz on all counts. Pet.App.7a.

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[2] For three of the witnesses, their counsel heard from the United States directly; the fourth learned the same information from the other witnesses. C.A.App.885-886.

4. The district court sentenced Ms. Elbaz to 264 months in prison, three years of supervised release, and $28 million in restitution. Pet.App.7a. In calculating both the guideline-range for Ms. Elbaz's sentence and the restitution amount, the district court included foreign victims' losses. Pet.App.22a-23a & n.13.

C. The Fourth Circuit holds that foreign conduct by foreign actors engaged in a foreign scheme can be prosecuted under U.S. law so long as a U.S. wire is used.

Ms. Elbaz appealed to the Fourth Circuit. Pet.App.3a, 7a-8a, 22a. The Fourth Circuit agreed that the wire-fraud statute does not apply extraterritorially, Pet.App.9a, but held that Ms. Elbaz's conviction was a "permissible domestic application" of the statute. Pet.App.13a. Even though the fraudulent scheme was devised and acted upon abroad, the court held that a conviction for a foreign fraudulent scheme "must stand" where it involved any domestic wire transmission. Pet.App.13a. In reaching that conclusion, the court relied on a prior Fourth Circuit decision addressing how venue is determined. Pet.App.12a (citing *United States v. Jefferson*, 674 F.3d 332, 367 (4th Cir. 2012)).

In *Jefferson*, the court held that the appropriate venue for a wire-fraud violation is the place where a wire transmission is sent or received, not where the scheme (there, a kidnapping) is devised or carried out. 674 F.3d at 366, 369. Because "venue must be narrowly construed," the court had previously held that venue exists only where the "conduct elements" of a crime took place." *Id.* at 365. Applying that rule

(and "legal principles applicable to issues of double jeopardy") to a wire-fraud claim, the court in *Jefferson* observed that while a "scheme to defraud is clearly an essential element" to a wire-fraud claim, it is not a "*conduct* element" of such a claim, because the successful execution of or participation in the scheme is irrelevant and multiple wire transmissions are independently actionable. *Id.* at 366-368.

Whether to apply U.S. law to conduct abroad implicates comity and foreign-relations concerns and not venue or double-jeopardy considerations. The Fourth Circuit nevertheless applied its venue holding to Ms. Elbaz's case, citing *Jefferson* as precedent compelling the conclusion "that the focus of the wire-fraud statute is the use of a wire, not the scheme to defraud." Pet.App.12a. The court went on to hold that Ms. "Elbaz's conviction must stand" as a "domestic application" of U.S. law because it included two emails and one phone call received in Maryland. Pet.App.13a.

The Fourth Circuit also upheld the district court's decision declining to compel the government to grant use immunity to Ms. Elbaz's witnesses, Pet.App.15a-17a, as well as the district court's decision not to declare a mistrial after a juror was influenced by an out-of-court conversation, Pet.App.17a-21a. With respect to Ms. Elbaz's sentence, the Fourth Circuit noted that "the district court might have erred when it considered losses by foreign victims when setting its initial sentencing range," but it held that any error was harmless because the district court said that "'it would have imposed the same sentence based on its analysis' of the § 3553(a) factors 'even if it had reached different conclusions on any or all of the contested

Guidelines enhancements.'" Pet.App.24a-25a (citation omitted). At the same time, however, the court concluded that the "substantive wire-fraud counts cannot support restitution for foreign losses" because "[t]hose counts involved individual U.S. victims" and "only those domestic victims can receive restitution." Pet.App.26a. The court accordingly vacated the restitution amount and remanded for recalculation. Pet.App.24a, 28a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit affirmed Ms. Elbaz's conviction and 22-year prison sentence for being a foreign participant in a foreign fraud scheme that included three incidental uses of domestic wires. That decision exacerbates two existing circuit splits: (1) whether the wire-fraud statute applies extraterritorially; and (2) whether an incidental use of U.S. wires is alone sufficient to render prosecution of a foreign scheme a "domestic application" of U.S. law, or whether more substantial domestic conduct is required—such as conduct in the United States or the use of domestic wires as a core component of the fraudulent foreign scheme.

The Court should grant certiorari and resolve these conflicts without delay. The Fourth Circuit's decision is wrong—foreign conduct by foreign actors as part of a foreign scheme is not a domestic application of U.S. law simply because an isolated incidental use of a U.S. wire occurs. The presumption against extraterritoriality prohibits the wire-fraud statute from extraterritorially covering this conduct. The questions presented are also important—the wire-fraud statute and its mail-fraud twin (which

contains similar relevant language and is interpreted in the same way) have increasingly been used to criminalize an almost unimaginably broad range of conduct under federal law. Further overapplication of these statutes to cover *foreign* conduct by *foreign* actors would effectively make the United States a global law enforcement officer over financial transactions—precisely what the presumption against extraterritoriality is supposed to prevent. And this case presents an excellent vehicle to address these important and recurring issues: it cleanly presents both questions, which have already been addressed by numerous circuits in reasoned decisions to aid this Court's review.

I. This Court should grant certiorari to resolve two circuit conflicts about the application of the wire-fraud statute to foreign fraud schemes.

"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 Austl. Bank Ltd.,* 561 U.S. 247, 255 (2010) (citation omitted). The presumption against extraterritoriality "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries"—countries that have their own laws governing the conduct of those acting within their borders. *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335-336 (2016). Thus, courts examine extraterritoriality through a lens shaped by "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States,* 507 U.S. 197, 204 n.5 (1993).

Under this Court's "two-step framework for analyzing extraterritoriality issues," courts consider "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco*, 579 U.S. at 337. If not, the question becomes "whether the case involves a domestic application of the statute." *Id.*

The courts of appeals cannot agree on either step when evaluating applications of the wire-fraud statute to foreign fraud schemes. The circuits are split first about the initial step—whether the statute applies extraterritorially. They are also split about the second step—whether the use of a domestic wire alone is sufficient to prosecute foreign fraud schemes conducted abroad by foreign actors as a "domestic application" of the statute, or whether more substantial domestic conduct is required.

A. The circuits are split on whether the wire-fraud statute applies extraterritorially.

One violates the wire-fraud statute if, having devised or intending to devise a scheme to defraud by means of false pretenses or representations, she causes the transmission of a "wire, radio, or television communication in interstate or foreign commerce" for the purpose of executing that scheme. 18 U.S.C. § 1343. The circuits are split about whether the statute's reference to "interstate or foreign commerce" defeats the presumption against extraterritoriality.

1. This Court explained in *Morrison* that a "general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality." 561 U.S. at

263. Nonetheless, the First and Third Circuits subsequently held that fraud statutes with identical "in interstate or foreign commerce" language—§ 1343, which looks at the use of wires in general fraud schemes, and the Federal Wire Act, 18 U.S.C. § 1084, which governs the use of wires in placing bets—apply extraterritorially in light of that language.

The Third Circuit concluded that the 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 had 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)) (quotation marks omitted). The court noted that the wire-fraud statute's "only jurisdictional requirement is that a communication be transmitted through interstate or foreign commerce for the purpose of executing a scheme to defraud." *Id*. at 138.

When faced with identical language in the Federal Wire Act, 18 U.S.C. § 1084,[3] the First Circuit concluded that the statute applies extraterritorially because "it explicitly applies to transmissions between the United States and a foreign country"—expressly referencing § 1343 and the "interstate or foreign commerce" language that the two statutes share. *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir.

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[3] *Compare* 18 U.S.C. § 1084 ("Whoever … uses a wire communication facility *for the transmission in interstate or foreign commerce* ...." (emphasis added)), *with id.* § 1343 ("Whoever … transmits or causes *to be transmitted* by means of wire, radio, or television communication *in interstate or foreign commerce* ...." (emphases added)).

2014). Although the court in *Lyons* analogized to the wire-fraud statute, the First Circuit subsequently skipped over the first step of the extraterritorial analysis in a wire-fraud case, though it acknowledged the circuit split on the issue and its own prior decision in *Lyons*. *United States v. McLellan*, 959 F.3d 442, 468 (2020).

b. In concluding that these statutes applied extraterritorially, both courts relied heavily on dicta from *Pasquantino v. United States*, 544 U.S. 349 (2005)—a case this Court decided before its landmark extraterritoriality decision in *Morrison*. In *Pasquantino*, this Court addressed comments by a dissenting Justice that the majority's interpretation of the wire-fraud statute would give the statute "extraterritorial effect." *Id.* at 371. The Court held that its interpretation did no such thing—it simply punished a scheme "execute[d] … inside the United States." *Id.* That scheme involved defendants who, *acting in New York*, used U.S. wires to order liquor over the phone from discount stores in Maryland and then hired people to drive the liquor into Canada to avoid Canada's liquor taxes. *Id.* In other words: a transnational smuggling operation conducted from inside the United States. The Court then noted in passing that, "[i]n any event, the wire fraud statute punishes frauds executed 'in interstate or foreign commerce,' so this is surely not a statute in which Congress had only 'domestic concerns in mind.'" *Id.* at 371-72 (citations omitted).

That passing reference was superseded by this Court's subsequent square holding that a "general reference to foreign commerce in the definition of 'interstate commerce' does *not* defeat the presumption

against extraterritoriality." *Morrison*, 561 U.S. at 263 (emphasis added); *see also RJR Nabisco*, 579 U.S. at 353 ("[E]ven statutes … that expressly refer to '*foreign* commerce' do not apply abroad." (quoting *Morrison*, 561 U.S. at 262-63)).

Even after *Morrison*, however, the First and Third Circuits relied on *Pasquantino* to conclude that the Federal Wire Act and wire-fraud statute apply extraterritorially—with the Third Circuit omitting *Morrison*'s discussion of statutes that contain a "general reference to foreign commerce" in its discussion titled "*Morrison* and Extraterritoriality," *Georgiou*, 777 F.3d at 133, and the First Circuit not mentioning *Morrison* anywhere in its decision, *Lyons*, 740 F.3d at 718.

2. The Second, Fourth, and Eleventh Circuits have squarely held that the wire-fraud statute does not apply extraterritorially.

The Second Circuit has repeatedly addressed this issue, citing *Morrison* and holding that the "interstate or foreign commerce" language in the wire-fraud statute and its fraternal twin, the mail-fraud statute,[4] "do[es] not indicate an extraterritorial reach." *Bascuñán v. Elsaca*, 927 F.3d 108, 121 (2d Cir. 2019) (citing *Eur. Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 141 (2d Cir. 2014), *reversed on other grounds*, 579 U.S. 325 (2016)). Notably, the Second Circuit had reached the opposite conclusion before *Morrison*, holding that in the wire-fraud statute, "Congress acted to close the

[4] *See* 18 U.S.C. § 1341. Because the relevant language in the mail-fraud statute is essentially identical to the wire-fraud statute, "courts analyze them the same way." *United States v. Schwartz*, 924 F.2d 410, 416 (2d Cir. 1991).

loophole that limited prosecution to cases in which the fraudulent transmission occurred between two states, and explicitly extended the coverage of § 1343 to foreign communications." *United States v. Kim*, 246 F.3d 186, 188-89 (2d Cir. 2001) (quoting H.R. Rep. No. 2385, 84th Cong., 2d Sess. 1 (1956)). In contrast to the First and Third Circuits, however, the Second Circuit recognized the significant change that *Morrison* had effected. *Eur. Cmty.* 764 F.3d at 141 (citing *Morrison* and rejecting contrary language in *Pasquantino* as dicta).

The Fourth Circuit in this case joined the Second Circuit in holding that, post-*Morrison*, the wire-fraud statute's "one reference to 'foreign commerce' … is not enough to rebut the presumption" against extraterritoriality. Pet.App.9a-10a. The Eleventh Circuit has taken a similar approach in an unpublished opinion. *See Skillern v. United States*, No. 20-13380-H, 2021 WL 3047004, at *7-8 (11th Cir. Apr. 16, 2021).

Given this entrenched disagreement, it is inevitable that the Court will have to resolve this question. This case presents an excellent opportunity to do so.

B. The circuits are further divided about when a foreign fraud scheme can be prosecuted as a "domestic application" of the wire-fraud statute.

The courts of appeals also disagree on the second part of the extraterritoriality test—whether and when a foreign fraud scheme can be prosecuted as a "domestic application" of the statute. In particular, they disagree about whether the mere use of a

domestic wire is alone sufficient to constitute a domestic application of the statute, or whether more substantial domestic conduct is required when a foreign fraud scheme is at issue.

1. Two circuits hold that, in light of extraterritoriality principles, the wire-fraud statute cannot be applied domestically to foreign fraud schemes unless the domestic conduct effectuating the scheme is substantial. This Court recognized in *Morrison* that not *any* foreign conduct touching the United States can be prosecuted as a domestic application of U.S. law: "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the Territory of the United States." 561 U.S. at 266. And "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* Accordingly, the two circuits on this side of the split require more than an incidental use of a domestic wire.

The Second Circuit has twice made clear that, although the use of a domestic wire is an element of the offense in wire-fraud cases, the mere fact that a domestic wire was used is not alone sufficient to haul foreign actors engaging in a foreign scheme through foreign conduct into U.S. courts. Instead, more substantial domestic conduct is required, such as the use of domestic wires as a "core component of the scheme to defraud." *Bascuñán*, 927 F.3d at 112; *see also United States v. Napout*, 963 F.3d 163, 179 (2d Cir. 2020) ("[I]n 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.'" (quoting *Bascuñán*). As the court explained, this requirement "ensures that the domestic tail not wag, as it were, the foreign dog." *Napout*, 963 F.3d at 179.

In *Bascuñán*, for example, the court emphasized that "events … merely incidental to the [violation of a statute] do not have primacy for the purposes of the extraterritoriality analysis." 927 F.3d at 112 (quoting *WesternGeco LLC v. ION Geophysical Corp.*, 138 S.Ct. 2129, 2138 (2018)). It also emphasized that "a defendant's location is relevant to whether the regulated conduct was domestic." *Id.* But it held that the wire-fraud statute could properly be applied (as a domestic application of the law) to the defendants' foreign fraud scheme because domestic wires were used in a manner that was not only fraudulent but central to the entire functioning of the scheme—a "core component of the scheme to defraud." *Id.* Among other things, the "sole purpose" of the fraudulent scheme was to generate sham fees, and that purpose was effectuated by using domestic wires to fraudulently authorize U.S. institutions to transfer money outside of the United States. *Id.* at 112-113; *see also id.* at 123 ("[T]he repeated use of domestic mail and wires to fraudulently order a domestic bank to transfer millions out of a domestic account was a core component of the scheme to defraud."). Likewise in *Napout*, the transmission of domestic wires "was central to the alleged schemes" that involved bribing FIFA officials to provide exclusive media rights to

certain sports media and marketing companies. 963 F.3d at 169.[5]

In contrast, the Second Circuit rejected wire-fraud claims as improper extraterritorial applications where all that was alleged was a minimal use of domestic wires and the core "activities involved in the alleged scheme" all occurred abroad. *See Petroleos Mexicanos v. SK Eng'g & Constr. Co.*, 572 F. App'x 60, 61 (2d Cir. 2014).

The First Circuit took a similar approach in *United States v. McLellan*, 959 F.3d 442 (2020). There, the court established a clear test for determining whether a prosecution under the wire-fraud statute is a domestic or extraterritorial application of the law: "A statute is applied domestically '[i]f domestic conduct satisfies every essential element to prove a violation ... even if some further conduct contributing to the violation occurred outside the United States.'" *Id.* at 469 (citing *Eur. Cmty.*, 764 F.3d at 142; *RJR Nabisco*, 579 U.S. at 337). Under this test, a mere use of a domestic wire—*one* element of a wire-fraud violation—would not be enough.

Indeed, the court rejected the proposition that "one stray domestic wire" could have led to the defendant's

[5] The defendants in *Napout* were convicted of honest services wire fraud under 18 U.S.C. § 1346. 963 F.3d at 180. But because "[h]onest services wire fraud is included as a type of wire fraud prohibited under § 1343," the court concluded that "it is § 1343, not § 1346, whose 'focus' [it] must look to in step two of the [extraterritoriality] analysis." *Id.* (alteration and quotation marks omitted).

conviction *Id.* at 469.[6] The court concluded that this argument ignored the indictment and the record—the case involved "an instance where a domestic defendant sent or received communications on behalf of a domestic corporation through domestic wires in a scheme that was in part implemented domestically." *Id.* at 470. Given those facts, the court held, the jury could only have convicted the defendant after finding "that McLellan abused a domestic instrumentality while in the United States," and so the court's instruction to the jury at least "substantially covered" a domestic application of the wire-fraud statute. *Id.* at 470.[7]

2. The Fourth and Ninth Circuits have charted a different course. These courts look only to whether a domestic wire has been used—if so, the wire-fraud statute is being applied domestically, even when prosecuting a foreign scheme conducted abroad by foreign actors.

Here, for example, Ms. Elbaz was prosecuted for participating in a foreign scheme involving three

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[6] This argument by the defendant was based on an instruction given to the jury that "the wire communication need not be 'essential to the scheme.'" 959 F.3d at 469.

[7] To obtain reversal based on an erroneous jury instruction, a defendant must not only show that her "proffered instruction" was substantively correct but also that it was "not substantially covered by the charge as rendered" and that its omission "seriously impaired the defendant's ability to present his defense." *McLellan*, 959 F.3d at 467. The First Circuit did not resolve whether the district court's instructions were optimal but rather concluded that no prejudicial error occurred because the record and jury instructions "sufficiently ensured a domestic application of the wire fraud statute" to domestic conduct by a domestic defendant. *Id.* at 470.

foreign companies in which the scheme was devised and operated abroad, Pet.App.3a—the government's criminal claims were premised entirely on three incidental uses of domestic wires that were not even alleged to have been fraudulent. Under the "core component" test articulated by the Second Circuit or the "every essential element" test articulated by the First Circuit, the government's prosecution would not have constituted a "domestic application" of the wire-fraud statute. But to the Fourth Circuit, all that mattered was that the three incidental wires transmitted by Yukom agents were received using Maryland wires. Pet.App.13a.

The Ninth Circuit has taken a similar approach. *See United States v. Hussain*, 972 F.3d 1138 (9th Cir. 2020). Like the Fourth Circuit, the Ninth Circuit examined only whether the charged conduct involved the use of a domestic wire—what it referred to as the "focus" of the wire-fraud statute. *Id.* at 1143-1144. The court did not examine whether the use of a domestic wire was a core component of the scheme, or whether every element of the offense involved domestic conduct, as the Second and First Circuit tests require. Instead, the court held, "[s]ince each count of wire fraud involved the use of a domestic wire, each conviction is a domestic application of the statute." *Id.* at 1145.

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There are clear and discernible circuit splits at both steps of the extraterritoriality inquiry with respect to the wire-fraud statute. This Court should grant the petition to resolve these conflicts and ensure that whether a foreign defendant can be haled into U.S. court and sentenced to decades of imprisonment

does not turn on the jurisdiction in which she is indicted.

II. The decision below is wrong.

"United States law governs domestically but does not rule the world." *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115 (2013) (citation omitted). Much like the United States, other countries have their own laws, which may "differ[] from ours as to what constitutes fraud." *Morrison*, 561 U.S. at 269 (discussing anti-fraud provision of Securities Exchange Act). Indeed, the district court acknowledged that Ms. Elbaz's conduct may have been entirely lawful under the laws of Israel, where she worked and resided. Pet.App.24a n.14. The presumption against extraterritoriality "protect[s] against" these types of "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 569 U.S. at 115 (citation omitted).

The Fourth Circuit's decision evades this "longstanding principle." *Morrison*, 561 U.S. at 255. The court incorrectly concluded that the "focus" of the wire-fraud statute is the use of a domestic wire, and thus the use of a domestic wire is all that is necessary for prosecution of a wholly foreign scheme to constitute a domestic application of the wire-fraud statute. But the text and structure of the wire-fraud statute make clear that its focus is on the fraudulent scheme itself. And even if the use of a domestic wire is the focus of the wire-fraud statute, the Fourth Circuit was incorrect in holding that that U.S. contact alone renders the prosecution of a foreign scheme by foreign actors engaged in foreign conduct a "domestic application" of U.S. law.

The Fourth Circuit's decision effectively turns the United States into a global law enforcement officer over foreign financial crimes—all that is necessary is for the scheme to touch one person in the United States or travel through one U.S. wire. That is contrary to this Court's admonition in *Morrison* that the presumption against extraterritoriality is an important watchdog that does not "retreat[] to its kennel whenever *some* domestic activity is involved in the case." 561 U.S. at 266. Under the Fourth Circuit's decision (and the identical approach taken by the Ninth Circuit), the watchdog abandons its post altogether based on the mere incidental use of a domestic wire—extraordinarily minimal U.S. contact.

1. The Fourth Circuit's conclusion was based on its characterization of the "focus" of the wire-fraud statute as being the use of domestic wires. That was incorrect. The wire- and mail-fraud statutes are focused on preventing fraudulent conduct. The statute prohibits the use of domestic wires in interstate or foreign commerce in effectuating a scheme to defraud in order to bring the violation within the purview of federal criminal law. But that does not change the fundamental nature of the offense.

The "focus of a statute is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate." *WesternGeco*, 138 S.Ct. at 2137 (quotation marks and alterations omitted). The focus of the wire- and mail-fraud statutes is the fraudulent scheme itself. These statutes have the following elements: (1) the defendant must "devise[] or intend[] to devise any scheme or artifice to defraud"; (2) the defendant

must use or "cause[] to" be used the postal service, mail depository, or a "wire, radio, or television communication"; and (3) in the case of wire-fraud violations, the wire must be "in interstate or foreign commerce." 18 U.S.C. §§ 1341, 1343; *see also* Pet.App.at 10a-11a.[8] This Court has repeatedly referred to the "gravamen" of these offenses as being "the scheme to defraud," not the use of mail or wires. *Bridge v. Phoenix Bond & Indemn. Co.*, 553 U.S. 639, 647 (2008). Indeed, the Court specifically noted that a mere "mailing that is *incident* to an essential part of the scheme satisfies the mailing element," even if the use of mail does not itself involve any fraud. *Id.* (citation omitted); *accord Schmuck v. United States*, 489 U.S. 705, 710 (1989); *see also Morrison*, 561 U.S. at 271-272 ("Section 1343 prohibits 'any scheme or artifice to defraud,'—*fraud simpliciter*, without any requirement that it be 'in connection with' any particular transaction or event.").

The statutes' history confirms this reading. The wire-fraud statute was premised on the mail-fraud statute, which was originally enacted in 1872. *See Skilling v. United States*, 561 U.S. 358, 399 (2010). The sponsor of the mail-fraud statute "stated, in apparent reference to the antifraud provision, that measures were needed 'to prevent the frauds which are mostly gotten up in the large cities … by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country.'" *McNally v. United States*, 483 U.S. 350, 356

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[8] As noted previously, because the wire- and mail-fraud statutes "use the same relevant language, [courts] analyze them the same way." *Schwartz*, 924 F.2d at 416; *accord United States v. Miller*, 953 F.3d 1095, 1102 (9th Cir. 2020).

(1987) (ellipses in original) (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)). Accordingly, the "original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *Id.*; Jed S. Rakoff, *The Federal Mail Fraud Statute*, 18 Duquesne L. Rev. 771, 780 (1980) ("[T]here existed a perceived need for federal intervention to dispel widespread fraud."). That is why this Court has not only downplayed the mailings requirement of the mail-fraud statute but also declared that "the use of the mails need not be an essential element of the scheme." *Schmuck*, 489 U.S. at 710. Instead, "[i]t is sufficient for the mailing to be 'incident to an essential part of the scheme' or 'a step in [the] plot.'" *Id.* at 710-711 (second alteration in original) (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)).

Because the wire-fraud statute was "intended merely to establish for radio a parallel provision now in the law for fraud by mail," S. Rep. No. 82-44, at 14 (1951), its reference to the use of a wire too is a mere "step in the plot." And "events [that are] merely incidental to the [liability] … do not have 'primacy' for purposes of the extraterritoriality analysis." *WesternGeco*, 138 S.Ct. at 2138 (quoting *Morrison*, 561 U.S. at 267). The focus of the wire-fraud statute consequently must be the scheme to defraud, not the use of a wire.

Before the government began attempting to use a mere domestic-wire or -mail contact as the domestic hook to prosecute a wholly foreign fraud scheme, many courts of appeals echoed this Court's characterization of these statutes as focusing on the

scheme to defraud, with the use of domestic mail or wires simply being the mechanism for bringing frauds within the purview of federal criminal law. *See, e.g.*, *United States v. Brien*, 617 F.2d 299, 307 (1st Cir. 1980) ("[T]he mail and wire fraud statutes focus on the scheme, not on the implementation of it."); *United States v. Amrep Corp.*, 545 F.2d 797, 800 (2d Cir. 1976) ("The gravamen of the charges against the defendants was the existence of a scheme to defraud. The use of the mails in connection with this scheme brings it within the purview of 18 U.S.C. s 1341 and 15 U.S.C. s 1703(a) and gives the federal courts jurisdiction over the alleged offenses."); *Curtis v. L. Offs. of David M. Bushman, Esq.*, 443 F. App'x 582, 584 (2d Cir. 2011) ("The gravamen of the offense is the scheme to defraud, and any mailing that is incident to an essential part of the scheme satisfies the mailing element …." (citations omitted)); *accord United States v. Swenson*, 25 F.4th 309, 317 (5th Cir. 2022); *United States v. Kidd*, 963 F.3d 742, 749 (8th Cir. 2020).

In reaching a contrary conclusion here, the Fourth Circuit erroneously relied on its prior decision in a case determining the appropriate venue to charge a wire-fraud claim. *See Jefferson*, 674 F.3d 332. But the court provided no explanation for why a venue determination is relevant to the extraterritoriality inquiry. It is not—the two inquiries are entirely different and animated by different principles and concerns.

The court's venue analysis in *Jefferson* was not an attempt to evaluate the focus or gravamen of the wire-fraud statute. Instead, the court was attempting to examine solely the essential physical "conduct" elements of the statute to determine where those

elements occurred. *Id.* at 365-366. Because the use of a wire was the essential "conduct" element, and the element of devising or intending a scheme to defraud—while "clearly an essential element"—was not, the court's venue analysis focused solely on where wires were transmitted or received. *Id.* at 367.

Moreover, that determination was animated by concerns about double jeopardy and the principle that "venue must be narrowly construed," hence the need to narrow the inquiry solely to physical conduct elements. *Id.* at 365; *see also United States v. Han*, 280 F. Supp. 3d 144, 151 (D.D.C. 2017) (explaining that without this "limiting principle," "a defendant who devised a scheme to defraud while driving across the country could be prosecuted in virtually any venue through which he passed" (quotation marks omitted)).

The extraterritoriality inquiry bears no resemblance to the venue inquiry. The extraterritoriality question concerns the "focus" of the statute and whether the domestic conduct is relevant to that focus, *WesternGeco*, 138 S.Ct. at 2137; it does not concern whether the physical "conduct" elements of a statute occurred in one U.S. venue versus another, *Jefferson*, 674 F.3d at 365. And the need for substantial domestic conduct before the United States can use U.S. criminal laws to prosecute foreign actors in a foreign scheme is animated not by the Double Jeopardy Clause or the principle that venue must be construed narrowly, *id.* at 365-367, but rather from principles of comity, conflict with the laws of other

nations, and avoiding international discord. *RJR Nabisco*, 579 U.S. at 335.[9]

The proper reading of the mail- and wire-fraud statutes compels the conclusion that their focus is preventing and criminalizing fraudulent schemes, not the use of mail or wires, which may be incidental to the schemes rather than a core component of them. The Fourth Circuit's contrary conclusion is wrong and should be reversed.

2. Even if the Fourth Circuit were correct that the use of a wire is the focus of the wire-fraud statute, the decision below would still be wrong because it improperly truncated the extraterritoriality inquiry at the mere instance of a domestic wire contact. Under the Fourth Circuit's decision, *any* use of a domestic wire is sufficient to prosecute a foreign scheme conducted entirely abroad by foreign actors as a "domestic application" of U.S. law, no matter how infrequent or insignificant the domestic wire is to the fraudulent scheme. Pet.App.13a.

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[9] Other circuits have likewise erroneously concluded that the "focus" of the wire-fraud statute is the use of wires rather than the fraudulent scheme. But those decisions ignored this Court's precedents discussed above and applied precedents involving inapt legal inquiries that are not founded on the principles underlying the presumption against extraterritoriality. *Hussain*, for example, erroneously premised its conclusion primarily on a prior Ninth Circuit decision evaluating whether multiple counts for wire-fraud arising from the same fraudulent scheme violate the Double Jeopardy Clause—an analysis that bears no resemblance to extraterritoriality inquiry. 972 F.3d at 1143 (citing *United States v. Garlick*, 240 F.3d 789, 798 (9th Cir. 2001); *United States v. Alston*, 609 F.2d 531, 536 (D.C. Cir. 1979)). And it wholly ignored this Court's precedents describing the gravamen of the mail- and wire-fraud statutes.

This approach is wrong for the reasons the Second Circuit provided in *Bascuñán*, which took a fundamentally different "approach to the domestic-conduct question." 927 F.3d at 122. As the court there explained, this Court's precedents require courts to be "mindful that 'events … merely incidental to the [violation of a statute]' do not have 'primacy for the purposes of the extraterritoriality analysis.'" *Id.* (quoting *WesternGeco*, 138 S.Ct. at 2138). If *any* involvement of "domestic activity" in a foreign scheme could render prosecution of that scheme a domestic application of U.S. law, then "the presumption of extraterritorial application would be a craven watchdog indeed." *Id.* (quoting *Morrison*, 561 U.S. at 266. "For this reason," the court held, "the use of the mail or wires must be essential, rather than merely incidental, to the scheme to defraud." *Id.*

Allowing the wire-fraud statute to apply to schemes that use even just one U.S. wire circumvents the presumption against extraterritoriality. Accordingly, even if a focus of the wire-fraud statute is the use of a wire, that use must substantially further the fraudulent scheme and "touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 569 U.S. at 124-125. The Fourth Circuit's decision does not apply these principles: the government prosecuted Ms. Elbaz, a foreign defendant, for foreign conduct engaged in as part of a foreign scheme solely because of three incidental wire contacts with the United States sent by Yukom agents. Indeed, the government emphasized that it did not need to show that Ms. Elbaz was personally involved in the transmission of the U.S. wires, or even that the wires

contained false statements. C.A.App.173-174 (citing *Jefferson*, 674 F.3d at 366). Under the Second Circuit's approach, this prosecution would constitute a foreign application of U.S. law, but under the Fourth Circuit's erroneous approach, it was deemed a domestic application.

III. This case provides an excellent vehicle to address the recurring and important questions presented.

As demonstrated by the many cases in which extraterritoriality issues have been litigated in recent years, the questions presented recur frequently, numerous circuits have provided different answers, and there will be no uniform answer until this Court provides one. And given that federal fraud statutes contain similar language and are therefore interpreted in the same way, the impact of the circuit splits reach far beyond prosecutions of § 1343. This case provides an excellent vehicle for resolving both conflicts and giving much-needed clarity to lower courts.

1. Wire-fraud prosecutions have exploded in recent years. In 2021 alone, the federal government prosecuted approximately 4,571 cases involving fraud, theft, or embezzlement. This category of offenses constituted 8% of the total criminal caseload in federal courts that year. U.S. Sentencing Commission, *Fiscal Year 2021: Overview of Federal Criminal Cases*, at 5 (Apr. 2022).

Because the "expansive glosses on the … wire fraud statute[] have led to [its] liberal use by federal prosecutors," the wire-fraud statute has "long provided prosecutors with a means by which to

salvage a modest, but dubious, victory from investigations that essentially proved unfruitful." *United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) (citation omitted). Indeed, "it is possible to put together broad language from courts' opinions on several different points so as to stretch the reach of the mail and wire fraud statutes far beyond where they should go." *Id.* at 355. But this "broad language of the mail and wire fraud statutes are both their blessing and their curse" and can be used 'to prosecute kinds of behavior that … cannot reasonably be expected by the instigators to form the basis of a federal felony." *United States v. Czubinski*, 106 F.3d 1069, 1079 (1st Cir. 1997).

As the "'first line of defense' against virtually every new area of fraud to develop in the United States in the past century," the wire-fraud statute is prone to repeated and "expansive" use. *See* Rakoff, *supra*, at 772; *see also* Paul Larkin & John-Michael Seibler, *Time to Prune the Tree, Part 2*, The Heritage Foundation (Oct. 19, 2016), https://www.heritage.org/crime-and-justice/report/time-prune-the-tree-part-2-the-need-reassess-the-federal-fraud-laws#_ftnref34 (mail- and wire-fraud statutes "cover every crime that the federal government should bother to prosecute."); *see also* Brian Walsh & Tiffany Joslyn, *The Fraud Enforcement and Recovery Act (S. 386)*, The Heritage Foundation (Mar. 4, 2009), https://www.heritage.org/report/the-fraud-enforcement-and-recovery-act-s-386-criminalizing-our-way-out-the-financial-crisis ("[F]ederal law enforcement's two most popular criminal offenses for prosecuting fraud—the federal mail and wire fraud statutes—are so exceedingly broad they cover an almost unimaginable range of financial wrongdoing.").

The mail- and wire-fraud statutes' use is so expansive that "[a]mong prosecutors, a well-known maxim says 'when in doubt, charge mail fraud.'" John C. Coffee, Jr., *From Tort to Crime*, 19 Am. Crim. L. Rev. 117, 126 (1981). This "exercise of arbitrary power" can "leav[e] the people in the dark about what the law demands and allow[] prosecutors and courts to make it up." *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (discussing vague laws). In short, "a ubiquitous criminal law becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant." Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, In the Name of Justice 43, 44 (Timothy Lynch ed., 2009). This expansion is even more troubling when applying U.S. laws to individuals acting abroad: even if U.S. residents could be charged with having constructive knowledge of the entire corpus of U.S. criminal law, *no one* can be expected to know every statute enacted by every government worldwide, much less understand which statutes could be used to prosecute someone based on her conduct in her home country.

District courts accordingly have been confronted with a plethora of wire-fraud cases because of this expansive use and, given the numerous circuit conflicts, have reached inconsistent decisions. *Compare Yordanov v. Milusnic*, 250 F. Supp. 3d 540, 548 (C.D. Cal. 2017) (§ 1343 applies extraterritorially); *GolTV, Inc. v. Fox Sports Latin Am., Ltd.*, No. 16-24431-civ, 2018 WL 1393790, at *14 (S.D. Fla. Jan. 26, 2018) (same); *Drummond Co. v. Collingsworth*, No. 2:15-cv-506, 2017 WL 3268907, at *17 (N.D. Ala. 2017) (same), *with United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1132 (N.D. Cal.

2015) (wire-fraud statute does not apply extraterritorially because it offers no "clear indication of extraterritorial intent"); *Nuevos Destinos LLC v. Peck*, No. 3:19-cv-45, 2019 WL 6481441, at *19–20 (D.N.D. Dec. 2, 2019) (same); *see also United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 102 (D.D.C. 2017) ("[T]he focus of the wire fraud statute is the scheme to defraud—or more precisely, a scheme to defraud that involves the use of U.S. wires.").

In short, given how frequently the government invokes the wire-fraud statute, this Court's clear guidance about the statute's application to foreign schemes is badly needed by courts, prosecutors, defense attorneys, and defendants.

Moreover, the confusion and uncertainty surrounding the wire-fraud statute's application is not limited to wire fraud. Because courts frequently apply the same analysis across federal fraud statutes, this Court's resolution of the questions presented will provide much-needed guidance in other contexts. *See, e.g.*, *Pasquantino*, 544 U.S. at 355 n.2 ("[W]e have construed identical language in the wire and mail fraud statutes *in pari materia*."); *United States v. Mullins*, 613 F.3d 1273, 1281 n.2 (10th Cir. 2010) (Gorsuch, J.) ("[I]nterpretations of the mail fraud statute are, of course, authoritative on questions of wire fraud."); *Lyons*, 740 F.3d at 718 (interpreting Federal Wire Act and analogizing to wire-fraud statute); *see supra* pp. 14 & n.3, 16 & n.4.

2. This Court need not wait for further percolation. Numerous courts of appeals have considered both questions and reached divergent views in reasoned decisions that will aid this Court's review. Moreover,

further percolation of these questions is stifled by the fact that the questions presented have already been addressed by the Second Circuit, where most financial-crimes cases are brought. *See El Camino Res., LTD v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 902 (W.D. Mich. 2010) ("[T]he Second Circuit and district courts in the City of New York[] have had the most occasion to examine claims against banks and other financial organizations alleging the aiding and abetting of fraud …."); Chris Prentice et al., *Bankman-Fried Charges Showcase U.S. Prosecutor's Growing Role in Crypto Enforcement*, 27 Consumer Fin. Serv. Law Rep. 22 (Jan. 24, 2023) ("SDNY [prosecutors] ha[v]e long been known as one of the most muscular enforcers of financial crimes …."). Indeed, when resolving these questions in *Bascuñán*, the Second Circuit noted that district courts within the circuit were "not of one mind on the focus of" the mail- and wire-fraud statutes. 927 F.3d at 113 n.17 (citing three district-court decisions with an *e.g.* citation).[10] That percolation ceased, however, when the Second Circuit weighed in.

3. This case presents a clean vehicle for resolving both splits. The questions presented were raised below and squarely addressed by both the district court and the Fourth Circuit, and the Fourth Circuit affirmed Ms. Elbaz's erroneously imposed conviction

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[10] Indeed, before *Bascuñán* at least two district courts within the Second Circuit had squarely held that the "focus" of the mail- and wire-fraud statutes is the scheme to defraud, not the use of a wire or mail. *See United States v. Gasperini*, No. 16-cr-441, 2017 WL 2399693, at *7-8 (E.D.N.Y. June 1, 2017); *Elsevier, Inc. v. Grossman*, 199 F. Supp. 3d 768, 781 (S.D.N.Y. 2016), *order clarified*, 2016 WL 7077037 (S.D.N.Y. Dec. 2, 2016).

in total.[11] This case thus provides the Court with the opportunity to resolve not just one circuit split but two.[12]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[11] The court remanded only for a recalculation of restitution—a ruling not at issue in this petition—leaving no further factual development regarding the issues presented in this case. Moreover, if this Court reverses, no restitution would be awarded, therefore leaving *no* need for further proceedings at all.

[12] If this Court agrees that the wire-fraud statute was impermissibly applied to Ms. Elbaz, her conviction for conspiracy to commit wire fraud should also be vacated.