No. 22-1055

In the Supreme Court of the United States

LEE ELBAZ, AKA LENA GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's fraud convictions, based on a scheme to defraud that targeted domestic victims using domestic wires, involved an impermissibly extraterritorial application of the federal wire-fraud statute, 18 U.S.C. 1343.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 52 F.4th 593. The order of the district court (Pet. App. 36a-73a) is reported at 332 F. Supp. 3d 960.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2022. On February 9, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 13, 2023. On April 6, 2023, the Chief Justice further extended the time to April 27, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349, and three counts of wire fraud, in violation of 18 U.S.C. 1343. Am. Judgment 1-2. Petitioner was sentenced to 264 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3-4. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-35a.

1. This case involves a multimillion-dollar fraud scheme orchestrated by petitioner and her confederates from Israel. The scheme targeted financially unsophisticated victims around the world, including victims in the United States. Pet. App. 3a; see, *e.g.*, Presentence Investigation Report (PSR) ¶¶ 60-63.

Petitioner's fraud centered on using lies to keep victims on the hook to spend money on purported investments in "binary options." Pet. App. 4a. A binary option is essentially a bet on whether a particular asset, typically a stock or commodity, will increase or decrease in value. *Id.* at 4a & n.2. A binary-option holder earns a profit if her prediction about the asset's change in value is correct; if the prediction is wrong, however, the holder earns no profit and loses her initial investment. *Ibid.*

Petitioner and her co-conspirators facilitated the scheme through several companies that purportedly offered opportunities to invest in binary options. Two foreign companies, BinaryBook and BigOption, marketed the supposed binary options. Pet. App. 5a. Once a customer had responded to an advertisement and made a deposit, an Israeli company, Yukom Communications, became responsible for retention. Petitioner worked at

Yukom in various capacities, including Chief Executive Officer. *Ibid.*

Petitioner and her co-conspirators made fraudulent representations to convince investors to deposit more money and took various steps to prevent withdrawals. See, *e.g.*, Pet. App. 5a; Gov't C.A. Br 6. Then, when investors became too successful, the conspirators manipulated the trading platform to force the investor into losing trades. See, *e.g.*, C.A. Gov't Br. 6; C.A. App. 2182-2183, 2186, 3458-3459, 3462. Virtually every level of the scheme was marked by rampant misrepresentations. Retention agents lied about their experience with financial markets and strategies; their location (frequently telling clients that they were based in London); and even their names. See Gov't C.A. Br. 3-4. The agents also lied about their incentives, informing clients that agents made money only if the clients did so—despite the fact that agents' salaries were based on client deposits, not profits. *Id.* at 4-5. Retention agents also told clients that their funds were safe and that they could expect high returns, even though virtually no clients profited over the long term, and many lost all of their money. *Id.* at 5.

Petitioner hired, trained, and oversaw the retention agents at Yukom, see Gov't C.A. Br. 5, and was in "full control of what was going on" there, C.A. App. 2011. She trained agents on how to lie to clients, including with respect to returns on investment, and she urged agents to follow a script misrepresenting the agents' background and experience. See Gov't C.A. Br. 5. She compared working as a retention agent to working at a casino, where the goal was to get clients "addicted." C.A. App. 1971.

The fraudulent scheme specifically targeted victims in the United States. The co-conspirators established an office in Tel Aviv to focus on retaining victims in the U.S. market. C.A. App. 3149-3151. Retention agents were trained on the operation of U.S. savings and retirement accounts so that if "a client says that they don't have enough money liquid," agents could "convince them to make their savings or pension" available. *Id.* at 2281, 2284-2285. Individual domestic victims lost tens of thousands, and in some cases hundreds of thousands, of dollars. See Gov't C.A. Br. 6-7.

One U.S. victim, who had no prior experience investing in financial markets, was informed that his investments were producing "amazing results," though he ultimately lost all of the more than $30,000 that he invested. C.A. App. 2554-2555, 2563, 2575. Another U.S. victim invested $30,000 with BinaryBook and $49,000 with BigOption. *Id.* at 2957-2959. She was permitted to withdraw $5,000, but otherwise lost her entire investment. *Ibid.* A third U.S. victim invested $140,000 in BinaryBook and got back "not a penny" of that investment. *Id.* at 3119, 3122. A fourth U.S. victim lost more than $150,000 of his investment, much of it drawn from his retirement funds. *Id.* at 3493, 3495-3496, 3503. And a fifth U.S. victim invested approximately $304,000 but recovered "[n]ot one dime" of his investment. *Id.* at 2599, 2601-2602.

In each case, agents communicated by email, telephone, or Skype message with the victim about possible investments, the portfolio's alleged performance, or the victim's credit card information. See, *e.g.*, C.A. App. 2555-2574, 2602, 2605-2618, 2960-2962, 2969-2971, 3120-3122, 3496, 3499-3502; see also *id.* at 2499. Victims also wired money from their bank accounts. See, *e.g.*, *id.* at

2573-2574, 2972-2974. Agents and victims would frequently communicate several times a week. See, *e.g.*, *id.* at 2566, 2569 (victim testimony about speaking with retention agent "approximately six times" during one-month period); *id.* at 2606 (victim testimony about speaking with account manager by phone "three to four times a week"); *id.* at 2964 (victim testimony about speaking with agent by phone "[v]ery frequently," up to "85 or 95 times").

BinaryBook and BigOption ultimately secured net deposits exceeding $100 million. See Pet. App. 3a, 5a; see also C.A. App. 2800; PSR ¶¶ 60-61. Victims in the United States alone lost millions of dollars. See *ibid.*

2. Petitioner was ultimately arrested while vacationing in the United States. Pet. App. 3a; C.A. App. 2786. A federal grand jury in the District of Maryland indicted petitioner on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349, and three counts of substantive wire fraud, in violation of 18 U.S.C. 1343. Indictment 4-15.

The federal wire-fraud statute imposes criminal penalties on anyone who,

> 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.

18 U.S.C. 1343.

The specific substantive wire-fraud counts in the indictment cited three particular alleged wire transmissions, caused by petitioner, in furtherance of the

scheme to defraud: (1) an email from a co-conspirator to a victim based in Maryland regarding bank wire-transfer instructions; (2) a telephone conversation between a co-conspirator and another victim in Maryland; and (3) an email sent to a third victim in Maryland requesting completion of a deposit confirmation form. Indictment 14-15.

Petitioner moved to dismiss the indictment on the theory that the charged offenses were impermissibly extraterritorial. See D. Ct. Doc. 57 (May 16, 2018). The district court denied the motion. Pet. App. 36a-73a. The court observed that the government had made "no claim that the statutes at issue * * * apply extraterritorially," and thus looked to whether those statutes were being applied extraterritorially or domestically. *Id.* at 51a. And because the indictment alleged that petitioner furthered the scheme to defraud domestic victims through wires received by those victims while in the United States, the court found that the indictment alleged a permissible domestic application of the statutes. *Id.* at 51a-52a. The court additionally found that "even if the scheme to defraud," rather than the use of the wires, "were deemed the 'focus' of the offense, conduct relating to the scheme to defraud also occurred in the United States." *Id.* at 55a.

The case proceeded to trial, and petitioner was convicted on all counts. Judgment 1. At sentencing, the district court described petitioner as "one of the masterminds of this scheme" who "had full control of the operation" and "was fully responsible for all of the losses." C.A. App. 6719, 6722. The court observed that petitioner's testimony "showed absolutely no remorse" or "regrets," but instead that she had acted with a "depraved mindset" and "seemed to relish" the "fraudulent

nature of the scheme." *Id.* at 6719. The court also highlighted trial testimony and victim impact statements demonstrating that "countless individuals," including "elderly people, veterans, and others," "were substantially affected by this scheme" through "not just losses of life savings, but suicide attempts, divorces, and the loss of homes." *Id.* at 6717-6718. The court sentenced petitioner to 264 months of imprisonment and ordered her to pay $28 million in restitution. Judgment 3, 6.

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-35a.

The court rejected petitioner's contention that her conviction was impermissibly extraterritorial. Pet. App. 8a-14a. The court concluded that "the wire-fraud statute provides no affirmative directive that overcomes the presumption against extraterritoriality." *Id.* at 9a. But the court joined its "sister circuits" that had addressed the issue in finding that "the focus of the wire-fraud statute is the use of a wire, not the scheme to defraud." *Id.* at 12a-13a. And because the transmissions in this case "were received by victims in Maryland using wires in Maryland," the court found that petitioner's "convictions are all permissible domestic applications" of the statute. *Id.* at 13a.

The court agreed with petitioner, however, that the restitution amount was improperly based in part on foreign losses. Pet. App. 26a. It accordingly remanded to the district court for calculation of a new restitution award. *Id.* at 28a.

ARGUMENT

Petitioner renews her contention (Pet. 23-31) that her convictions under the federal wire-fraud statute, 18 U.S.C. 1343, are impermissibly extraterritorial. The lower courts were correct to reject that contention; the

decision below does not implicate any conflict in the circuits; and this case would be an unsuitable vehicle for further review of the question presented. The petition for a writ of certiorari should be denied.

1. "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. *National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (citations and internal quotation marks omitted). In recent decisions, this Court has articulated a two-step framework for determining the territorial reach of federal law in light of that presumption. See *RJR Nabisco, Inc.* v. *European Cmty.*, 579 U.S. 325, 337 (2016).

As an initial matter, a court should ask "whether the presumption against extraterritoriality has been rebutted" by "a clear, affirmative indication that [the statute] applies extraterritorially." *RJR Nabisco*, 579 U.S. at 337. But if a statute lacks an affirmative indication of extraterritorial effect, then a court should "look[ ] to the statute's 'focus'" to determine whether the case nevertheless "involves a domestic application of the statute." *Ibid.* A statute's focus "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 LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (brackets, citations, and internal quotation marks omitted). "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *RJR Nabisco*, 579 U.S. at 337.

2. The lower courts correctly determined that the application of the wire-fraud statute in this case was

domestic, not extraterritorial. Petitioner's scheme involved wire transmissions to domestic victims located in the United States. Pet. App. 13a. Thus, even assuming that the wire-fraud statute does not apply extraterritorially, because "the conduct relevant to the statute's focus occurred in the United States," "the case involves a permissible domestic application." *RJR Nabisco*, 579 U.S. at 337.*

The statutory text and this Court's precedents show that the statute's focus is the use of the wires in furtherance of a scheme to defraud. The statute reflects a "policy choice" to "free the interstate wires from fraudulent use, irrespective of the object of the fraud." *Pasquantino* v. *United States*, 544 U.S. 349, 370 (2005); see *Skilling* v. *United States*, 561 U.S. 358, 369 n.1 (2010) ("The mail- and wire-fraud statutes criminalize the use of the mails or wires in furtherance of 'any scheme or artifice to defraud.'") (citation omitted).

As the text makes clear, the statute "is not a general fraud statute, but instead criminalizes frauds that specifically involve the misuse of the wires." *United States* v. *Hussain*, 972 F.3d 1138, 1143 (9th Cir. 2020). The statute provides criminal penalties for any person who, "having devised or intending to devise any scheme or artifice to defraud," "transmits or causes to be transmitted by means of wire" any "writings * * * or sounds

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* Petitioner was convicted of both substantive wire fraud under 18 U.S.C. 1343 and conspiracy to commit wire fraud under 18 U.S.C. 1349. Am. Judgment 1. Petitioner does not seek independent review of the court of appeals' determination that her "conspiracy conviction under § 1349 was also a domestic application." Pet. App. 13a; see Pet. i. She instead appears to acknowledge, see Pet. 36 n.12, as she expressly did below, see Pet. App. 14a, that the conspiracy count is domestic so long as the substantive counts are.

for the purpose of executing such scheme or artifice" to defraud. 18 U.S.C. 1343. Thus, it "is the physical act of transmitting the wire communication for the purpose of executing the fraud scheme that creates a punishable offense, not merely 'the existence of a scheme to defraud.'" *United States* v. *Jefferson*, 674 F.3d 332, 367 (4th Cir.), cert. denied, 568 U.S. 1041 (2012).

The longstanding view, which petitioner does not dispute, that each wire transmission in furtherance of a single scheme to defraud may be separately charged and punished reflects that wire-centered focus. See, *e.g.*, *Hussain*, 972 F.3d at 1143 (observing that it "was no matter that both uses of the wires were part of the same overarching scheme to defraud"); see also *Badders* v. *United States*, 240 U.S. 391, 394 (1916) (finding "no doubt that the law may make each putting of a letter into the postoffice a separate offence" for purposes of parallel mail-fraud statute). Because Section 1343 "regulates" each discrete use of a wire, that use forms the statute's focus. *WesternGeco LLC*, 138 S. Ct. at 2138.

3. Petitioner accordingly errs in contending (Pet. 23) that the statute's focus "is on the fraudulent scheme itself." As petitioner acknowledges in a footnote (Pet. 29 n.9), the courts of appeals have uniformly rejected that contention. See *Hussain*, 972 F.3d at 1144 ("We are aware of no court that has agreed with this interpretation."). Instead, every court of appeals to have considered the issue has recognized that Section 1343's focus is "not merely a 'scheme to defraud,' but more precisely *the use of the * * * wires in furtherance of a scheme to defraud*." *Bascuñán* v. *Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019); see Pet. App. 13a; *Hussain*, 972 F.3d at 1145; *United States* v. *McLellan*, 959 F.3d 442, 469 (1st Cir. 2020). That uniform understanding is correct.

a. Petitioner's position is inconsistent with this Court's precedent. In *Morrison* v. *National Australia Bank*, *supra*, for example, the Court reasoned that "Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" 561 U.S. at 266 (quoting 15 U.S.C. 78j(b)). The Court therefore concluded that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Ibid.*

Similarly, in *Abitron Austria GmbH* v. *Hetronic International, Inc.*, 143 S. Ct. 2522 (2023), the Court addressed the extraterritoriality of the Lanham Act, which "prohibit[s] the unauthorized use 'in commerce' of a protected trademark when, among other things, that use 'is likely to cause confusion.'" *Id.* at 2531. The Court reasoned that "[b]ecause Congress has premised liability on a specific action (a particular sort of use in commerce), that specific action would be the conduct relevant to any focus." *Ibid.* "This conduct, to be sure, must create a sufficient risk of confusion," the Court explained, "but confusion is not a separate requirement; rather, it is simply a necessary characteristic of an offending use." *Ibid.*

Similar logic applies here. Like the Exchange Act at issue in *Morrison*, the wire-fraud statute "does not punish deceptive conduct" per se, "but only deceptive conduct" carried out by use of the wires. 561 U.S. at 266. And as with the Lanham Act in *Abitron*, "because Congress deemed a violation of" the wire-fraud statute "to occur each time a" wire "is used in commerce in the way Congress described," the use of the wires is the

"conduct relevant to the [statute's] focus." 143 S. Ct. at 2531.

b. Limiting application of the wire-fraud statute to schemes to defraud that take place within the United States "would effectively immunize offshore fraudsters from mail or wire fraud." *Bascuñán*, 927 F.3d at 121, 123. On petitioner's view, a foreign fraudster could apparently target Americans with impunity so long as she did not set foot in U.S. territory. Given that "this is surely not a statute in which Congress had only 'domestic concerns in mind,'" *Pasquantino*, 544 U.S. at 372 (citation omitted), such a result would be untenable, and petitioner provides no meaningful support for it.

Petitioner notes (Pet. 25) that this Court, in a civil case involving the Racketeer Influenced and Corrupt Organizations Act, described "the scheme to defraud" as the "gravamen" of the mail-fraud statute, and emphasized that the mailing itself need not contain a false statement. *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008). But while an otherwise-lawful mailing would of course be innocuous if not made in furtherance of a fraudulent scheme, it is the furtherance of such a scheme through the use of the mail—or, here, the wires—that is the "conduct relevant to the focus," *Abitron*, 143 S. Ct. at 2531.

Contrary to petitioner's suggestion (Pet. 29), it is not simply the fraudulent scheme that is punished; it is the use of the mail or wires to effectuate that scheme. Just as *Morrison* found the "focus of the Exchange Act" to be "not upon the place where the deception originated, but upon purchases and sales of securities," 561 U.S. at 266, the wire-fraud statute regulates not deception alone, but use of the wires to further it.

4. Petitioner asserts that the circuits are divided on two separate questions: whether the wire-fraud statute applies extraterritorially (Pet. 13-17) and what qualifies as a domestic application of the statute (Pet. 17-23). Neither asserted conflict is implicated here.

a. The question whether the wire-fraud statute applies extraterritorially is not presented in this case. The government's sole argument in this case, and the one with which the lower courts agreed, was that the application of the statute here was domestic. The government has not needed to, and has not, argued that the statute applies extraterritorially. See, *e.g.*, Pet. App. 51a ("There is no claim that the statutes at issue, 18 U.S.C. §§ 1343 and 1349, apply extraterritorially."); Gov't C.A. Br. 9 ("This case involves a permissible domestic application of the wire fraud statute.").

Furthermore, petitioner has no basis for raising this subissue in this case, because the court of appeals did not disagree with her on it. Instead, the decision below—reaching an issue that the government did not address—concluded that the statute does *not* apply extraterritorially. See Pet. App. 9a. But it agreed with the government and the district court that the application here was domestic. See *id.* at 10a-14a. This case therefore would not present the Court with a suitable occasion to decide whether the statute would apply to nondomestic conduct.

In any event, petitioner overstates the tension in the courts of appeals on this question. As petitioner notes (Pet. 16-17), the Second Circuit, like the court of appeals in this case, see Pet. App. 9a-10a, has concluded that the wire-fraud statute's reference to "interstate or foreign commerce," 18 U.S.C. 1343, is insufficient to rebut the presumption against extraterritoriality, *Bascuñán*, 927

F.3d at 121. And the other decisions that she cites (Pet. 13-16) provide a tenuous basis for inferring a conflict.

The Third Circuit's decision in *United States* v. *Georgiou*, 777 F.3d 125, cert. denied, 577 U.S. 954 (2015), framed the issue under consideration as "whether the purchases and sales of securities issued by U.S. companies through U.S. market makers acting as intermediaries for foreign entities constitute 'domestic transactions.'" *Id.* at 130. And it "f[oun]d that these transactions are 'domestic transactions,' and that [the defendant's] conviction was not based upon the improper extraterritorial application of United States law." *Ibid.*

Petitioner notes (Pet. 14) that, in the course of its decision, the Third Circuit cited this Court's observation in *Pasquantino* v. *United States* that the wire-fraud statute "'is surely not a statute in which Congress had only domestic concerns in mind'" to support a statement that "Section 1343 applies extraterritorially." *Georgiou*, 777 F.3d at 137-138 (quoting *Pasquantino*, 544 U.S. at 371-372). But it did not rely on extraterritoriality to decide the case. Instead, the Third Circuit reasoned that the defendant had not shown plain error, because "the record contain[ed] ample evidence that [he] used interstate wires to effect a 'scheme or artifice to defraud,'" where he "regularly used email to direct" a domestic co-conspirator "in the fraud and wired money from a Canadian bank to an undercover FBI agent's account in Pennsylvania." *Id.* at 138 (citation omitted).

Furthermore, in reviewing the jury instructions, the Third Circuit reasoned only that the statutory text "does not expressly require that a verdict be based on *entirely* domestic transactions," but accepted that it does require "that a communication be transmitted through interstate or foreign commerce for the purpose

of executing a scheme to defraud." *Georgiou*, 777 F.3d at 138 (emphasis added). The court also accepted that it would be "impermissibl[e]" to "allow the jury to convict [the defendant] based solely on foreign activity." *Ibid.* It is thus far from clear that the Third Circuit decision differs much, if at all, from the decision below in this case.

The only other decision that petitioner cites on this subissue is a First Circuit decision, *United States* v. *Lyons*, 740 F.3d 702, cert. denied, 573 U.S. 912 (2014), which indicated that a different statute, 18 U.S.C. 1084, can be applied extraterritorially when "communications giving rise to the[ ] convictions ha[ve] at least one participant inside the United States." *Id.* at 718; see Pet. 14-15. But petitioner errs in suggesting (Pet. 14-15) that *Lyons* presages a conflict on the distinct wire-fraud issue here. In a more recent decision, the court of appeals contrasted *Lyons* with the Second Circuit's conclusion that the wire-fraud statute does not apply extraterritorially, and declined to resolve the latter issue, acknowledging that it raises "difficult questions." *McLellan*, 959 F.3d at 468 (upholding conviction as domestic application of wire-fraud statute).

b. Petitioner separately contends that, while the court below purportedly held that the "incidental" or "mere use" of a domestic wire is "alone sufficient" to show a domestic application of the wire-fraud statute, other circuits require "more substantial domestic conduct." Pet. 18-21 (citing *Bascuñán*, 927 F.3d at 123; *United States* v. *Napout*, 963 F.3d 163, 180-181 (2d Cir. 2020); *McLellan*, 959 F.3d at 469-471). But petitioner fails to cite any case "establish[ing] that a scheme"—like this one—"that defrauds U.S. victims through the

use of U.S. wires is not a domestic application of the wire fraud statute." Pet. App. 54a.

In *Bascuñán* v. *Elsaca*, the Second Circuit reasoned (similar to the decision below) that the focus of the wire-fraud statute is the use of the wires, while emphasizing that "the use of the mail or wires must be essential, rather than merely incidental, to the scheme to defraud." 927 F.3d at 122. The court then went on to uphold the conviction of a defendant who "repeatedly used domestic mail or wires to order a New York bank to fraudulently transfer money out of a New York bank account." *Id.* at 123. Similarly, in *United States* v. *Napout*, the Second Circuit found a domestic application of the statute where, "in the relatively straightforward *quid pro quo* transactions underlying these schemes, the *quid* was provided through the use of U.S. wires." 963 F.3d at 181.

The First Circuit has similarly reasoned that the wire-fraud statute's "focus is not the fraud itself but the abuse of the instrumentality in furtherance of a fraud." *McLellan*, 959 F.3d at 469 (citing *Bascuñán*, 927 F.3d at 122). And, noting that it "need not at this stage determine where the precise line is between domestic and foreign activity," it affirmed the conviction because the defendant "sent or received wire communications while in the United States for the purpose of carrying out [the] scheme to defraud," even though "the victim [was] located outside of the United States." *Id.* at 470.

Those decisions are fully consistent with the decision below. Indeed, in commenting that "[i]n a case where a foreign defendant is alleged to have committed wire fraud against a foreign victim, and the use of domestic wires was merely 'incidental' to the overall scheme, additional inquiry may be necessary to ensure a domestic

application of the statute," the First Circuit approvingly cited (*inter alia*) the district court decision in this very case. *McLellan*, 959 F.3d at 470 n.7 (citing *United States* v. *Elbaz*, 332 F. Supp. 3d 960, 974 (D. Md. 2018)). As it evidently recognized, the use of the wires in this case was not "incidental."

Instead, petitioner used domestic wires to target and defraud U.S. victims—conduct that was essential to carrying out the scheme to deprive those U.S. victims of their money (sometimes by wire from the United States) through lies. As the Second Circuit has recognized, "the mail and wire fraud statutes do not give way simply because the alleged fraudster was located outside the United States." *Bascuñán*, 927 F.3d at 123. And the First Circuit cited the district court decision in petitioner's own case for the proposition that it "does not matter if the bulk of the scheme to defraud involves foreign activity because the focus of the wire fraud statute is misuse of U.S. wires to further a fraudulent scheme." *McLellan*, 959 F.3d at 470 (quoting *Elbaz*, 332 F. Supp. 3d at 974) (brackets omitted).

Petitioner's prediction (Pet. 21) that the Fourth Circuit might uphold some future conviction where the use of the wires was in fact merely incidental thus lacks concrete support. The court had no need to consider such a fact pattern here. Indeed, petitioner fails to identify any decision of any circuit that has upheld such a conviction. The Ninth Circuit decision that petitioner cites (Pet. 22) actually determined that the use of the wires at issue in that case could *not* be characterized as merely "'incidental'" because the defendant had "defrauded a domestic victim." *Hussain*, 972 F.3d at 1144 n.2 (quoting *McLellan*, 959 F.3d at 470 n.7). And the Ninth Circuit made clear, more generally, that the "use

of the wires in furtherance of" a scheme to defraud underlying a particular prosecution must include "a sufficient domestic nexus." *Id.* at 1145; see *id.* at 1144 n.2 (concluding that defendant's use of the wires "was a core component of his fraud") (citing *Bascuñán*, 927 F.3d at 122).

5. At all events, this case would be an unsuitable vehicle for reviewing the question presented. Petitioner would not be entitled to relief even if the Court adopted her view that the statute is not extraterritorial and that its focus is solely on the scheme to defraud, rather than the use of the wires in furtherance of it.

As the district court found, this case would involve domestic application of the wire-fraud statute "even if the scheme to defraud were deemed the 'focus' of the offense." Pet. App. 55a. Petitioner's scheme targeted domestic victims using domestic wires. Retention agents were specifically trained to defraud U.S.-based victims; co-conspirators regularly communicated by wire with those victims; and the scheme obtained millions of dollars from those victims. See pp. 4-5, *supra*. In those circumstances, petitioner's suggestion that the scheme was "entirely" foreign, Pet. 29, is untenable, and the convictions would remain valid even under her preferred approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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