No. 22-1055

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Federal appellate courts have charted three different paths when evaluating whether the wire-fraud statute can be used to prosecute foreign fraud schemes. The Third Circuit has adopted the most expansive view, holding that the statute applies extraterritorially, full stop. The Fourth and Ninth Circuits take almost as extreme a position—that *any* use of a domestic wire allows the government to use the statute to prosecute foreign fraud schemes conducted in a foreign country by foreign actors. The First and Second Circuits have taken a more restrictive view, holding that incidental uses of a domestic wire are not enough—instead, at a minimum the use of domestic wires must be a core component of the foreign scheme.

Courts recognize the circuits' conflicting interpretations, and the government does too—or at least it did when trying to convince courts to adopt the Third Circuit's position. But now, when trying to block this Court's review of this case, the government sings a different tune. It argues that the Third Circuit may not have *really* reached the conclusion that the government has elsewhere insisted it did. *See, e.g.*, U.S. Br. 51-54, *United States v. McLellan*, No. 18-2032 (1st Cir. July 26, 2019); U.S. Br., *United States v. Delgado*, Nos. 17-50919, 20-50669, 2021 WL 1377720, at *33 n.4 (5th Cir. Apr. 2, 2021). The government cannot block certiorari by disagreeing with itself.

The government also suggests that the First and Second Circuits did not *really* establish the rules expressly set forth in their opinions. This argument is hard to take at face value, particularly because the government does not meaningfully engage with the

relevant language in those decisions, which make clear that an incidental use of a domestic wire is insufficient to render prosecution of a foreign fraud scheme a "domestic application" of the statute.

Finally, the government argues that even if Ms. Elbaz is right about the law, she would not prevail anyway, either because the use of a domestic wire was central to the foreign scheme or because the foreign scheme involved other U.S.-directed conduct. This argument is more creative than the first two—but only because this is the first time the government has offered it. This argument provides no reason for this Court to decline to establish a uniform rule to be applied nationwide. If the government preserved these arguments—a very big if—it can offer them on remand.

At bottom, the government cannot seriously dispute that lower courts are divided on the questions presented. And it does not argue that these questions are insufficiently important or recurring to warrant this Court's review. This Court should grant certiorari.

ARGUMENT

I. The government does not meaningfully dispute that the circuits are divided.

The petition describes the three divergent approaches adopted by federal appellate courts regarding the application of the wire-fraud statute (18 U.S.C. § 1343) to prosecute foreign or transnational fraud schemes. Pet. 17-23. On one side of the spectrum is the Third Circuit, which has held unequivocally that "Section 1343 applies extraterritorially." *United States v. Georgiou*, 777

F.3d 125, 137 (2015). In the middle, the Fourth and Ninth Circuits ask only whether the charged conduct involved the use of a domestic wire. *See* Pet. 21-22. On the other end of the spectrum are the First and Second Circuits, which require that the use of a domestic wire be a "core component of the scheme to defraud," *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019), or that domestic conduct satisfy "every essential element" of wire fraud, *United States v. McLellan*, 959 F.3d 442, 469 (1st Cir. 2020).

Courts and commentators have expressly acknowledged the circuit conflict. *E.g.*, *McLellan*, 959 F.3d at 468; *GolTV, Inc. v. Fox Sports Latin Am., Ltd.*, 2018 WL 1393790, at *14 (S.D. Fla. Jan. 26, 2018); *Drummond Co. v. Collingsworth*, 2017 WL 3268907, at *17 (N.D. Ala. Aug. 1, 2017); Pet. 33-34; William Dodge, *Will the Supreme Court Resolve the Circuit Split on the Geographic Scope of Wire Fraud Statute*, Transnational Litig. Blog (Sept. 12, 2023), https://tlblog.org/geographic-scope-of-wire-fraud-statute/. Yet the government incredibly contends (at 8) that this case "does not implicate any conflict in the circuits." The government's arguments are unpersuasive and contradicted by its own arguments in other courts.

a. The government argues (at 13) that whether the wire-fraud statute applies extraterritorially is not presented here because the Fourth Circuit agreed with Ms. Elbaz on this point. Not so. The question was pressed before and expressly reached by the Fourth Circuit, Pet.App.9a, so it is properly before this Court. Moreover, to decide this case on the merits, this Court would either have to adopt the Third Circuit's position that the wire-fraud statute applies extraterritorially, or hold that it applies only

domestically and then reach the further question of whether the statute can be used to prosecute a foreign scheme conducted abroad by foreign actors. *See, e.g.*, *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 143 S. Ct. 2522, 2528 (2023) (describing the "two-step framework" and reaching both steps); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 264-270 (2010). That the Court does not have to *agree* with the Third Circuit's holding to resolve this case does not mean that the question is not properly before this Court. Nor does the fact that courts "may take these steps in any order," *Abitron*, 143 S. Ct. at 418 n.2.

b. The government also suggests (at 14-15) that the Third Circuit did not mean it when it said that "unlike the Securities Exchange Act" at issue in *Morrison*, "Section 1343 applies extraterritorially," *Georgiou*, 777 F.3d at 137, and that the First Circuit's similar decision regarding identical language in the Federal Wire Act, *United States v. Lyons*, 740 F.3d 702 (2014), is irrelevant to this question.

It is difficult to take this argument seriously because the government has repeatedly said *exactly the opposite*, including in *McLellan*, where it asked the First Circuit to follow *Lyons* and *Georgiou* and hold "that Section 1343 applies extraterritorially." U.S. Br. 51-54, *McLellan*, *supra*; *see, e.g.*, U.S. Br., *Delgado*, *supra*, 2021 WL 1377720, at *33 n.4; U.S. Br. 6-10, *United States v. Myrie*, No. 4:14-cr-00133-DLH (D.N.D. June 18, 2015); U.S. Br. 12-14, *United States v. Vassiliev*, No. 14-CR-00341-CRB (N.D. Cal. Apr. 1, 2015). In other words, the government agrees with our view of the legal landscape when trying to convince other courts to follow *Georgiou* on the merits, but disclaims that *Georgiou*'s holding is even a

holding when attempting to block this Court's review. That is no reason to ignore the circuit split. And notably, the government does not suggest that it disagrees with *Georgiou*, much less that it will no longer attempt to convince lower courts to follow that decision.

But there is no need to take petitioner's (or the government's) word for it: numerous courts recognize that the Third Circuit held the wire-fraud statute applies extraterritorially and that this holding conflicts with other circuits' holdings. *See, e.g.*, *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 101 n.14 (D.D.C. 2017); *McLellan*, 959 F.3d at 468; *SEC v. Bio Def. Corp.*, 2019 WL 7578525, at *12 (D. Mass. Sept. 6, 2019), *aff'd sub nom. SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021); *Medimpact Healthcare Sys., Inc. v. IQVIA Inc.*, 2022 WL 6281793, at *25 (S.D. Cal. Oct. 7, 2022).

c. Addressing the two other approaches taken by federal appellate courts, the government suggests (at 15-16) that perhaps the First and Second Circuits' decisions are not so far off from the Fourth and Ninth Circuits'—that any foreign-fraud case involving wires received in the United States might come out the same way in these circuits. The government's speculation is wholly divorced from the rules actually established by those decisions. The Second Circuit could not have been clearer (twice): the use of domestic wires must be "essential … to the scheme to defraud" or a "core component." *Bascuñán*, 927 F.3d at 122; *United States v. Napout*, 963 F.3d 163, 169 (2d Cir. 2020). The First Circuit was equally clear: "domestic conduct" must "satisf[y] every essential element to prove a violation … even if some further

conduct contributing to the violation occurred outside the United States.'" *McLellan*, 959 F.3d at 469 (citations omitted).[1]

The government does not grapple with these tests and how this case or others falling within the Fourth Circuit's rule could satisfy them.[2] Even if it had, the government does not meaningfully dispute that the courts of appeals *do employ different tests*. Although the government tries to minimize the lack of uniformity as mere "tension," Opp. 13, the divergent rules applied by different circuits is precisely why this Court's intervention is necessary.

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[1] The government argues that the First Circuit endorsed the district court's decision here because *McLellan* included that decision in two stringcites following "*see*" signals, 959 F.3d at 470 & n.7. But a glancing stringcite does not override or otherwise narrow the court's requirement that domestic conduct "satisf[y] every essential element," *id.* at 469 (citation omitted). *See United States v. Comstock*, 560 U.S. 126, 152 (2010) (Kennedy, J., concurring in the judgment) (objecting to majority's reliance on case that "only refers to 'means-end rationality' in a parenthetical" because that case "certainly did not import the … rational-basis test into this arena through such a parenthetical").

[2] The government emphasizes that the First and Second Circuits affirmed the defendants' convictions, while ignoring that the facts fell squarely within the rules articulated by those courts—they involved fraud schemes in which U.S. wires were a core component of the fraudulent scheme or involved domestic conduct that satisfied every essential element of the offense. *E.g.*, *McLellan*, 959 F.3d at 470 (court was "deal[ing] with 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*" (emphases added)).

II. The government's preview of its merits arguments only underscores the need for this Court's review.

The government's brief ignores most of the petition's arguments and authorities in favor of circular logic and question-begging conclusions. None of the government's arguments about the holding this Court *should* reach undermines the need to resolve the circuit conflict.

a. The petition and the government's brief both make clear that there are widely divergent opinions—including in this Court's decisions—about the "focus" of the wire-fraud statute and its similarly worded counterparts. *Compare* Pet. 25-27 (citing authorities), *with* Opp. 9-10. The government largely ignores the authorities cited in the petition, as well as the petition's discussion of the wire-fraud statute's text, structure, and history. Pet. 23-31. Indeed, the government briefly addresses only this Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 647 (2008), which referred to "'the scheme to defraud' as the 'gravamen'" of these types of statutes. Rather than engage with this discussion, the government dismisses *Bridge* as irrelevant because it was a civil RICO case, rather than a criminal case. That misses the point—the criminal mail- and wire-fraud statutes are predicate acts for civil RICO cases, which is why *Bridge* grappled with them. *Id.* at 641-642.

Aside from that purported distinction, the government insists without support that the use of a wire is the conduct relevant to the statute's focus. Opp. 12. Put differently, to argue that the focus of the statute should be the use of a wire, the government

first assumes that the focus of the statute is the use of a wire. And despite citing (at 10) *United States v. Jefferson*, 674 F.3d 332 (4th Cir. 2012), the government notably does not defend the Fourth Circuit's reliance on *Jefferson* or its decision to rest its conclusion in part on how venue for wire-fraud prosecutions are determined. *See* Pet. 27-28.

Moreover, even the courts that share the government's view that the focus of the wire-fraud statute is the use of a wire do not all take the view that *any* use of a domestic wire automatically renders the prosecution of foreign defendants acting abroad a "domestic application" of the statute. That is why they require more substantial domestic *conduct*—such as the use of domestic wires as a "core component" of a foreign scheme—before allowing the government to use U.S. law to police fraud committed by foreign defendants acting abroad. As the Second Circuit explained, a contrary holding would allow "the domestic tail" to "wag, as it were, the foreign dog." *Napout*, 963 F.3d at 169. It would turn the extraterritoriality "watchdog" into "nothing more than a muzzled Chihuahua." *Abitron*, 143 S. Ct. at 426.

These holdings do not "immunize" offshore fraudsters. Opp. 12 (citation omitted). Instead, they respect international comity and avoid conflict with the laws of other nations—precisely the principles underlying the presumption against extraterritoriality. Rather than engage with these principles, the government suggests they are inapplicable based on this Court's passing statement in *Pasquantino v. United States*, 544 U.S. 349, 371-72 (2005), that the wire-fraud statute "is surely not a

statute in which Congress had only 'domestic concerns in mind.'" But this dicta was superseded by this Court's subsequent decision in *Morrison*. *See* Pet. 15-16; *see also Eur. Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 141 (2d Cir. 2014), *rev'd and remanded on unrelated grounds,* 579 U.S. 325 (2016).

b. The government also contends that its merits position directly follows from *Morrison* and what it says is this Court's similar decision in *Abitron*. But all of the courts reaching divergent views on the questions presented have purported to apply *Morrison*. *See, e.g.*, Pet.App.8a-10a; *McLellan*, 959 F.3d at 467; *Napout*, 963 F.3d at 178; *Bascuñán*, 927 F.3d at 122-123; *United States v. Hussain*, 972 F.3d 1138, 1142-1145 (9th Cir. 2020); *Georgiou*, 777 F.3d at 133-138. Thus, this contention only highlights the confusion in the lower courts and the need for this Court's review.

c. Finally, the government argues that even if this Court adopts the First or Second Circuit's rule, and even if the scheme to defraud is the focus of the wire-fraud statute, this case would still involve a domestic application of the law. That is because, the government contends, the use of domestic wires here was central, not incidental, and because additional evidence established U.S.-directed conduct. Opp. 16-18. These arguments do not support denying certiorari.

The government did not offer these arguments below, not even in the alternative, and now offers only cursory arguments in its brief in opposition. In both courts below, the government emphasized that all that was required was the use of a domestic wire, irrespective of where the "gravamen of the conduct"

occurred, and irrespective of whether the use of a domestic wire contained any false statement or misrepresentation. C.A.App.173-180; C.A. Br. 17-18. It did not develop any arguments that it could prevail if the scheme to defraud were the focus of the statute, nor did it meaningfully argue that the case would come out the same way if the court rejected the government's proposed rule. Indeed, the government vaguely referenced the Second Circuit's rule only in a footnote, offering only the unreasoned suggestion that the fact that "domestics [sic] victims" were involved somehow inherently establishes that the use of a domestic wire was a "core component" of the foreign scheme. C.A. Br. 17 n.3. That is all.

The government's decision to argue an alternative ground for affirmance that was not pressed or passed upon below provides no reason to deny certiorari. If the government preserved these arguments, they could be considered on remand by lower courts more steeped in the facts once this Court settles on a single uniform test to bind all of the circuits.[3] But these arguments provide no reason to deny review. Again, the government does not dispute that the First and Second Circuits articulate a different legal test than the Fourth Circuit. Its belief that Ms. Elbaz might not

[3] Ms. Elbaz disagrees with the government's characterization of the facts. For example, the government asserts that the co-conspirators "established an office in Tel Aviv to focus on retaining victims in the U.S. market." Opp. 4 (citing C.A.App.3149-3151). The citation simply points to a former Yukom employee's testimony that he had been informed about potential *future* plans to open a call center in Tel Aviv to sell binary options to the U.S. market. But these factual disagreements do not bear on whether the Court should resolve the *legal* questions presented.

prevail under one or both of those tests provides no reason for this Court to decline to decide what test should apply.

III. The government does not dispute that the questions presented are recurring and important, nor give any reason why this case is not a suitable vehicle.

The government does not dispute that the use of the wire- and mail-fraud statutes to prosecute foreign schemes is important and recurring, and prone to repeated and expansive misuse. Nor does it dispute that this Court's review will provide guidance in multiple contexts because the same analysis applies across multiple criminal statutes. Indeed, as noted above, the same analysis applies in civil RICO cases, which only expands the breadth of cases that will benefit from this Court's guidance.

The government also does not dispute that the questions presented were squarely raised and addressed below. The government's only argument regarding the suitability of this case to address the questions presented is a single paragraph suggesting that Ms. Elbaz might lose on the merits even under petitioner's view of the law. Opp. 18. The government's three-sentence explanation offers little in the way of persuasive value. And as noted above, the government's belief that Ms. Elbaz may not prevail under a different test presents an issue for remand or perhaps for the merits stage. It provides no reason for this Court to maintain the confusion and disuniformity that exists among lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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