No. _____

IN THE

Supreme Court of the United States

OYEYEMI OWAGBORIAYE,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The wire fraud statute—18 U.S.C. § 1343—criminalizes the use of a wire "for the purpose of executing" a scheme to defraud. This Court has interpreted the contours of the phrase "for the purpose of executing" a number of times in the distant past, and its intervention is once again required today. The Eleventh Circuit has interpreted the phrase in a manner that untethers it from the other elements of wire fraud, sanctioning the use of the wire fraud statute for a wire transaction made to distribute funds amongst alleged coconspirators, even after the alleged scheme to defraud has come to fruition. Such an expansion of the reach of the wire fraud statute is inconsistent with the statute's express language, this Court's prior cases applying the statute's requirement that wires be "for the purpose of executing" a fraudulent scheme, and decisions out of the Eighth, Ninth, and Tenth Circuit Courts of Appeal.

The question presented is:

1. Whether a wire transfer merely distributing funds amongst alleged accomplices is "for the purpose of executing" a fraudulent scheme, as contemplated by 18 U.S.C. § 1343.

PARTIES TO THE PROCEEDINGS

The case caption contains the names of all parties to the proceedings.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States v. Owagboriaye*, No. 1:18-cr-20361-KMW (S.D. Fla.) (Judgment entered Mar. 5, 2020).
- *United States v. Owagboriaye*, No. 20-11018 (11th Cir. Mar. 29, 2022).

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

No: _____

OYEYEMI OWAGBORIAYE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Oyeyemi Owagboriaye ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion (App. A) is unreported, and available at 2022 WL 906926 (11th Cir. Mar. 29, 2022).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Eleventh Circuit entered judgment on March 29, 2022. Petitioner timely filed a motion to extend time to file his petition for a writ of certiorari, which the Court granted. Petitioner's petition is now due on or before July 27, 2022. Thus, the petition is timely filed.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1343. Fraud by Wire, Radio, or Television

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.

INTRODUCTION

"The adequate degree of relationship between a [wire] which occurs during the life of a scheme and the scheme is of course not a matter susceptible of geometric determination." *Parr v. United States*, 363 U.S. 370, 397 (1960) (Frankfurter, J., dissenting). Justice Scalia noted as much before concluding: "All the more reason to adhere as closely as possible to past cases . . . . [W]e have not done that today, and thus create problems for tomorrow." *Schmuck v. United States*, 489 U.S. 705, 725 (1989) (Scalia, J., dissenting). Tomorrow has arrived, and this Court's intervention is required to right the Eleventh Circuit's wrong.

The Eleventh Circuit adopted the government's overbroad (and incorrect) reading of the wire fraud statute, holding that a wire transfer distributing funds from one alleged accomplice to another must be for the purpose of executing the alleged scheme to defraud because a scheme to defraud can only ever reach fruition when everyone involved gets paid. Such a holding misreads this Court's prior decisions and gives an unambiguous federal criminal statute a wildly expansive reading. Such a reading completely untethers the wire transfer itself from the requirement that such transfer be *for the purpose of executing* the scheme to defraud. In so holding, the Eleventh Circuit departed from this Court's prior precedents, and created a conflict with the Eighth, Ninth, and Tenth Circuit Courts of Appeal. As such, this Court's intervention is required to clarify the scope and reach of the wire fraud statute and its requirements, and resolve a growing circuit split.

STATEMENT OF THE CASE

I. Factual Background

This case stems from an alleged fraud perpetrated upon Nigerian company Zone 4 Energy, Ltd. ("Zone 4") (referred to as "Company A" in the indictments). Zone 4 sold, distributed, and marketed petroleum products, and was in desperate need of additional financing. (Dist. Ct. Dkt. No. 216 at 42, 49.) In its quest for financing, Zone 4 was introduced to Vincent Zubero, president of the Consortium for International Development ("CID"). (Dist. Ct. Dkt. No. 216 at 49–50.) Zone 4 and Zubero began discussing Zone 4's financing needs, and came to a preliminary agreement, sometime in July 2014, regarding the terms of a future credit agreement.

(Dist. Ct. Dkt. No. 216 at 50.) In this preliminary agreement, the parties agreed to a total loan amount of $45 million, to be distributed to Zone 4 in three tranches—or installments—of $15 million each. (Dist. Ct. Dkt. No. 216 at 52; Gov't Ex. 4.) Upon further discussion, the tranche amounts changed to an initial distribution of $20 million, followed by $15 million, followed by $5 million. (Dist. Ct. Dkt. No. 216 at 53.) Zone 4 indicated that it needed the first tranche of funds within 30 to 45 days, "preferably sooner," so that it could pay off other financial obligations. (Dist. Ct. Dkt. No. 216 at 53.)

In exchange for the first tranche of $20 million, Zubero requested that Zone 4 provide a 10% equity contribution, or $2,000,000, in advance of the disbursement. (Dist. Ct. Dkt. No. 216 at 53–54.) Zone 4 agreed, but specifically requested that its equity contribution be held in an escrow account with both Zubero and Zone 4 as signatories. (Dist. Ct. Dkt. No. 216 at 54.) Zone 4 wanted to ensure that "money would not leave the account until both signatories [had] appended their signatures." (Dist. Ct. Dkt. No. 216 at 54.) It was important to Zone 4 that its "equity contribution would be safe, [and] would only go out when the lender also provide[d] the [remaining] 90 percent." (Dist. Ct. Dkt. No. 216 at 55.)

After hashing out the terms of the loan, Zone 4 travelled to Miami, Florida, in August 2014, to meet with Zubero, sign and notarize the credit agreement, and open the escrow account. (Dist. Ct. Dkt. No. 216 at 55, 59–60.) Their first meeting was at the hotel Zone 4's representatives were staying in, and their second meeting was at an address Zubero represented to be his office. (Dist. Ct. Dkt. No. 216 at 60–61.) In

fact, Zubero did not have an office in Miami; the Miami address included on his materials was a residential address. (Dist. Ct. Dkt. No. 216 at 63, 93–94.) At their second meeting, Zubero gave a PowerPoint presentation detailing CID's prior successful financing deals, including several transactions that "matched" exactly what Zone 4 was seeking. (Dist. Ct. Dkt. No. 216 at 63–64.) Zubero represented to Zone 4 that the "first tranche of the loan . . . was as good as ready and was coming from lenders out of the UK," and that his colleague, Luis Mane, was already in London communicating with the lenders. (Dist. Ct. Dkt. No. 216 at 64, 95–96.)

Having met Zubero in person and learned about his company and prior successful deals, Zone 4 and Zubero signed the credit agreement, dated August 8, 2014, for a total loan amount of $45 million, with a first loan tranche of $20 million. (Dist. Ct. Dkt. No. 216 at 57; Dist. Ct. Dkt. No. 150-2, Gov't Ex. 2.) Zone 4 also agreed to pay Zubero a $100,000 fee, directly into Zubero's bank account, to compensate him for sourcing lenders for the loan. (Dist. Ct. Dkt. No. 216 at 58; Dist. Ct. Dkt. No. 150-2, Gov't Ex. 2.) That money was refundable to Zone 4, however, if Zubero failed to perform under the terms of the agreement. (Dist. Ct. Dkt. No. 216 at 58.) As previously agreed, the credit agreement reiterated that Zone 4's $2,000,000 equity contribution would be held in an escrow account, not to be touched until the issuance of the first loan tranche. (Dist. Ct. Dkt. No. 150-2, Gov't Ex. 2.) Additionally, the entire equity amount was refundable to Zone 4 in the event that Zubero failed to procure the loan. (Dist. Ct. Dkt. No. 150-2, Gov't Ex. 2.)

As noted, a "primary objective" of the trip was to open the above-described escrow account, to which Zone 4 would be a signatory. (Dist. Ct. Dkt. No. 216 at 55–56.) Zone 4 and Zubero went to a JP Morgan bank together to open such an account on August 19, 2014. (Dist. Ct. Dkt. No. 216 at 65.) What Zone 4 did not know, however, was that Zubero had already opened a regular business checking account in CID's name on August 15, 2014, to which Zone 4 was added as an additional signatory. (Dist. Ct. Dkt. No. 216 at 66–67.) The account was not an escrow account. (Dist. Ct. Dkt. No. 216 at 137.) The last four digits of the account were 8610. (Dist. Ct. Dkt. No. 216 at 66.)

At this point, all that was left to be done was for Zone 4 to send Zubero the $2,000,000 equity contribution plus the $100,000 fee, which Zone 4 felt "[v]ery comfortable" doing, given the credit agreement it had just signed as well as the escrow account it believed it had just opened. (Dist. Ct. Dkt. No. 216 at 67.) Therefore, on September 2, 2014, Zone 4 wired $2,000,000 to a bank account with the last four digits 8610—the supposed escrow account. (Dist. Ct. Dkt. No. 216 at 68.) Zone 4 had also wired $100,000 directly to Zubero's CID operating account—ending in 6070—as payment of his fee, on August 21, 2014. (Dist. Ct. Dkt. No. 216 at 142; Dist. Ct. Dkt. No. 153-12, Gov't Ex. 74.)

The minute Zone 4's money hit Zubero's bank accounts, though, Zubero started transferring it out of the account and distributing it, in direct contravention of the terms of the credit agreement he had entered into with Zone 4. (Dist. Ct. Dkt. No. 216 at 145–47; Dist. Ct. Dkt. No. 153-12, Gov't Ex. 74.) By September 11, 2014, none

of Zone 4's $100,000 remained in CID's operating account. (Dist. Ct. Dkt. No. 216 at 147.) Similarly, by September 11, 2014, almost all of Zone 4's $2,000,000 equity contribution had been wired out of the dual-signatory account ending in 8610, and into accounts for which Zubero was the sole signatory. (Dist. Ct. Dkt. No. 216 at 150.) Zubero then went on a spending spree, transferring money from his personal accounts to numerous other individuals, as well as spending the money on himself. (Dist. Ct. Dkt. No. 216 at 151; Dist. Ct. Dkt. No. 153-12, Gov't Ex. 74.) On October 3, 2014, Zubero transferred $835,588 to a business account owned by Petitioner. (Dist. Ct. Dkt. No. 216 at 152.) The wire transfer referenced the purchase of a number of Peterbilt dump trucks. (Dist. Ct. Dkt. No. 216 at 153–54.) Petitioner then proceeded to spend that money. (Dist. Ct. Dkt. No. 151-17, Gov't Ex. 36; Dist. Ct. Dkt. No. 217 at 8–11; Dist. Ct. Dkt. No. 153-10, Gov't Ex. 71.)

Petitioner's name never once came up in the course of Zone 4's dealings with Zubero. (Dist. Ct. Dkt. No. 216 at 70–71.) Zone 4 had no idea who Petitioner was until the commencement of the instant proceedings.

Zubero had his own preexisting relationships with the various individuals to whom he had distributed funds, including Petitioner. Prior to Zone 4's transfer of funds to Zubero, Zubero's communications with Petitioner were sparse: a wire transfer in the amount of $8,500 from Zubero to Petitioner in March 2014; a brief visit to Miami by Petitioner sometime in April 2014; and a check dated August 4, 2014 for $2,000 from Zubero to Petitioner. (Dist. Ct. Dkt. No. 216 at 143; Dist. Ct. Dkt. No. 217 at 61, 62; Dist. Ct. Dkt. No. 216 at 144.) Then, on September 2, 2014,

Zubero emailed Petitioner, to say: "Please call me a.s.a.p., it is very important." (Dist. Ct. Dkt. No. 152-3, Gov't Ex. 44.) Finally, on the morning of September 8, 2014, Petitioner emailed Zubero, to say: "I will have some of the paper works today call me asap." (Dist. Ct. Dkt. No. 152-4, Gov't Ex. 45.)

As time passed, Zone 4 started inquiring about the first loan tranche. Zone 4 reached out to Zubero multiple times in November and December of 2014, and each time, Zubero responded with excuses for the delay. (Dist. Ct. Dkt. No. 216 at 69–74.) These communications were between Zone 4 and Zubero, and did not include Petitioner. Zubero had his own separate email communications with Petitioner in November and December 2014, wherein he asked Petitioner questions regarding funding for a "Nigerian borrower," and regarding the $835,000 he had transferred to Petitioner. (Dist. Ct. Dkt. No. 153-8, Gov't Ex. 65; Dist. Ct. Dkt. No. 154-7, Gov't Ex. 95.) These communications between Zubero and Petitioner were never communicated to Zone 4. Zubero and Petitioner also exchanged a number of unrelated bank documents, which were also never communicated to Zone 4.

Soon after Zone 4 had wired the money to Zubero, it started to doubt Zubero's intentions. (Dist. Ct. Dkt. No. 216 at 70.) Unsurprisingly, Zubero never did provide Zone 4 with the funding it had been promised. (Dist. Ct. Dkt. No. 216 at 75.)

II. Procedural History

On May 3, 2018, a federal grand jury sitting in the Southern District of Florida returned a four-count indictment against Petitioner and Vincent Zubero, charging them with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 (Count

1), and wire fraud, in violation of 18 U.S.C. §§ 1343 and 2 (Counts 2, 3, and 4). (Dist. Ct. Dkt. No. 3.)

Petitioner moved to dismiss Count 4 of the indictment for failure to state an offense. (Dist. Ct. Dkt. No. 52.) After a hearing, the district court denied the motion. (Dist. Ct. Dkt. No. 84 at 30.) The court characterized the issues raised as "interesting," and ones that it would "have to be particularly vigilant about" throughout the proceedings. (Dist. Ct. Dkt. No. 84 at 27, 28.)

Just prior to trial, a superseding indictment was returned, charging Petitioner with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 (Count 1), and one count of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2 (Count 2). (Dist. Ct. Dkt. No. 107.) The single remaining wire fraud count related to a wire transaction dated October 3, 2014, transferring $835,588 from Zubero to Petitioner. (Dist. Ct. Dkt. No. 107 at 6.)

On August 19, 2019, Petitioner proceeded to trial. (Dist. Ct. Dkt. No. 132.) At the close of the government's case, and then again at the close of all of the evidence, Petitioner moved under Fed. R. Crim. P. 29 for a judgment of acquittal on Counts 1 and 2, addressing the insufficiency of the evidence as to both counts. (Dist. Ct. Dkt. No. 218 at 61, 125.) The district court reserved ruling on the motion and renewed motion. (Dist. Ct. Dkt. No. 218 at 76, 125.) The jury subsequently returned a verdict finding Petitioner not guilty of conspiracy to commit wire fraud (Count 1), and guilty of wire fraud (Count 2). (Dist. Ct. Dkt. No. 147).

Petitioner filed a number of post-trial motions, including a supplement to his pending motion for judgment of acquittal as to Count 2, as well as a motion for a new trial. (Dist. Ct. Dkt. No. 165; Dist. Ct. Dkt. No. 166.) The district court held a hearing on both motions before denying them at Petitioner's sentencing hearing. (Dist. Ct. Dkt. No. 222; Dist. Ct. Dkt. No. 209 at 3.). The district court then sentenced Petitioner to a term of imprisonment of 24 months for Count 2, followed by a three-year-term of supervised release. (Dist. Ct. Dkt. No. 209 at 25; Dist. Ct. Dkt. No. 200.) Petitioner timely filed a notice of appeal. (Dist. Ct. Dkt. No. 201).

On appeal, Petitioner challenged his Count 2 conviction for substantive wire fraud, arguing that the transfer of funds from Zubero's bank account into his own bank account was not wire fraud because the wire transfer was not made in furtherance of the scheme to defraud—that is, the scheme to defraud had completed when Zone 4 transferred funds to Zubero and he received the funds irrevocably. (Pet. C.A. Br. at 44–54.) The government disagreed, broadly reading the wire fraud statute to encompass the distribution of an accomplice's proceeds. (Gov't C.A. Br. at 13 ("A critical step of the scheme for was [Petitioner] to get his cut, which is what the charged wire accomplished.").)

After holding oral argument, the Eleventh Circuit—in a per curiam opinion—affirmed Petitioner's wire-fraud conviction. (App. A.)

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Affirmance of Petitioner's Wire Fraud Conviction on the Theory That a Distribution of Funds Amongst Alleged Accomplices Constitutes Wire Fraud Broadens the Reach of the Wire Fraud Statute Beyond its Plain Text and This Court's Precedents, and Creates a Circuit Split Amongst the Federal Courts

From the very start of this case, Petitioner has consistently asserted that his actions, as a matter of law, could not constitute wire fraud, because the charged wire transfer of funds from Zubero's bank account to Petitioner's bank account occurred after the alleged scheme to defraud had completed, and did nothing to further the alleged scheme. In affirming Petitioner's wire fraud conviction, however, the Eleventh Circuit expanded the reach of the wire fraud statute well beyond what its text or this Court's precedents support. And, in so doing, the Eleventh Circuit created a direct circuit conflict with the Eighth, Ninth, and Tenth Circuits.

Section 1343 makes it unlawful to devise a scheme to defraud and then use a wire "*for the purpose of executing* such scheme." 18 U.S.C. § 1343 (emphasis added). That means that, generally, the wire must be sent "*prior* to the scheme's completion." *United States v. Lane*, 474 U.S. 438, 453 (1986) (emphasis added). And, as this Court noted in *Kann v. United States*, the fraud completes—or "reache[s] fruition"—when "[t]he persons intended to receive the money had received it irrevocably." 323 U.S. 88, 94 (1944).

Here, the alleged scheme was described as follows by the government in its closing argument:

> The scheme in this case was for [Petitioner][,] Zubero[,] and their other partners in crime to lure the victim into sending

> an advance fee, the $2.1 million, in exchange for the false promise of a $20,000,000 loan. And the false promise that their money would stay safe in an escrow account. All the while they were spending the victim's money for their own personal use. So, that's the scheme.

(Dist. Ct. Dkt. No. 219:19.) It was revealed at trial that Zone 4 wired the advance fee of $2.1 million to Zubero in two installments: $99,940.50 on August 21, 2014 and $1,999,985 on September 2, 2014. (Dist. Ct. Dkt. No. 216:142, 145.) The first transfer of $99,940.50—the "facility and transmission fee"—was wired to a bank account ending in 6070, of which Zubero was the sole signatory. (Dist. Ct. Dkt. No. 216:135–36, 142.) That account—CID's "operating account"—was closed on September 11, 2014. (Dist. Ct. Dkt. No. 216:147.) Any money remaining in that account as of September 11, 2014 was transferred to a bank account ending in 6977, of which Zubero was also the sole signatory. (Dist. Ct. Dkt. No. 216:147–48.)

The second transfer of $1,999,985—the "equity contribution/security"—was wired to a bank account ending in 8610, of which both Zubero and a representative from Zone 4 were signatories. (Dist. Ct. Dkt. No. 216:145.) But subsequently, on September 8, 2014 and September 11, 2014, that money was wired into accounts for which Zubero was the sole signatory—$50,000 to a bank account ending in 6070, $1,100,000 to a bank account ending in 5689, and $839,995 to a bank account ending in 2223. (Dist. Ct. Dkt. No. 216:149–50; Dist. Ct. Dkt. No. 153-12.)

That is, by September 11, 2014, Zone 4's money was inaccessible by Zone 4, having been transferred into accounts solely controlled by Zubero, in direct contravention of the agreement reached between Zubero and Zone 4. The alleged

scheme had thus come to "fruition." *Kann*, 323 U.S. at 94. Zubero's "false and fraudulent" statements and representations had succeeded in convincing Zone 4 to send him $2.1 million, which he then secreted away, out of Zone 4's reach. The persons intended to receive the money—Zubero and Petitioner, as principal[1]—"had received it irrevocably." *Id.* Any further transfers out of Zubero's bank accounts—including his wire transfer to Petitioner on October 3, 2014 of $835,588—did nothing to further the alleged scheme to defraud.

The Eleventh Circuit, however, adopted the government's incorrect reading of the law in affirming Petitioner's conviction for wire fraud. That is, the Eleventh Circuit agreed with the government that a distribution of gains among alleged accomplices is in furtherance of a scheme to defraud. (*See* Gov't C.A. Br. at 39.) Per the government, Zubero's October 3, 2014 wire transfer of $835,588 to Petitioner was in furtherance of the alleged scheme to defraud because a scheme to defraud only reaches fruition when everyone gets paid. (*See id.*)

Notwithstanding the fact that Petitioner received his proceeds of the alleged fraud the minute Zubero did—because Petitioner was charged as a principal—the Eleventh Circuit stretched the reach of the wire fraud statute beyond recognition

[1] Petitioner was originally charged as principal with three counts of substantive wire fraud—the August 21, 2014 wire transfer of $99,940.50 from Zone 4 to Zubero's CID bank account; the September 2, 2014 wire transfer of $1,999,985 from Zone 4 to Zubero's CID bank account; and the October 3, 2014 wire transfer of $835,588 from Zubero's CID bank account to Petitioner's bank account. When the government superseded the indictment, however, it chose to proceed to trial only as to one of the above three wire transfers: the October 3, 2014 transfer from Zubero's CID bank account to Petitioner's bank account. (*Compare* Dist. Ct. Dkt. No. 3 *with* Dist. Ct. Dkt. No. 107.)

when it agreed with the government's incorrect assertion that the offense of wire fraud encompasses the mere movement of money—a distribution of funds—from one account to another. The Eleventh Circuit did so in contravention of the wire fraud statute's express terms, this Court's prior caselaw interpreting the mail and wire fraud statutes, and its sister circuits' contrary holdings.

As this Court has previously noted, the mail and wire fraud statutes do not "establish a general federal remedy against fraudulent conduct, with use of the mails [and wires] as the jurisdictional hook," *Schmuck*, 489 U.S. at 722–23 (Scalia, J., dissenting),[2] but instead reach "only those limited instances in which the use of the mails [and wires] [are] a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann*, 323 U.S. at 95. Justice Scalia further explicated:

> [I]t is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur—nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud.

Schmuck, 489 U.S. at 723 (Scalia, J., dissenting). To uphold the Eleventh Circuit's holding in this case would be to condone exactly what Justice Scalia warned against. The charged wire transfer of funds on October 3, 2014 from Zubero's bank account into Petitioner's bank account may be something else—perhaps money laundering or receipt of stolen goods—but it is *not* wire fraud.

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[2] "The mail and wire fraud statutes share the same language," and courts "apply the same analysis to both sets of offenses." *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

The Eighth, Ninth, and Tenth Circuits all held as much when they confronted circumstances similar to those confronted by the Eleventh Circuit here. Most recently, the Eighth Circuit, in *United States v. Garbacz*, reaffirmed that "a criminal's use of misappropriated cash, whether he spends it or places it into his bank account, is not part of the scheme used to obtain it." 33 F.4th 459, 467 (8th Cir. 2022). There, the defendant, a priest, stole from the cash-offering collections of several parishes. He would steal the cash, deposit it into his credit-union account, and then wire money from the credit-union account to pay balances on his credit card. *Garbacz*, 33 F.4th at 464–65. The Eighth Circuit held that the wire transfers from the credit-union account to pay off credit cards could not be wire fraud because the transfers "were not essential to the perpetuation of [the defendant's] scheme . . . those purchases themselves were not part of the fraud." *Id.* at 468.

In so holding, the Eighth Circuit directly referenced *United States v. Redcorn*, 528 F.3d 727 (10th Cir. 2008), upon which Petitioner also relied in his briefing and argument before the Eleventh Circuit. In *Redcorn*, the defendants—officers of an insurance company—were alleged to have diverted customers' premium payments from the insurance company's account to an account that they controlled, but that was still in the insurance company's name. *Redcorn*, 528 F.3d at 731–32. The defendants then withdrew the money from the account they controlled, deposited the funds briefly in their own private bank accounts, and then shifted the funds to personal investment accounts with a broker in Florida. *Id.* at 732. The four wire

fraud counts with which the defendants were charged stemmed from their transfers to the brokerage accounts in Florida. *Id.* at 737.

The defendants argued that they should have been acquitted of the wire fraud charges because there was no evidence that the charged transfers—from their private bank accounts to their out-of-state investment accounts—were "for the purpose of executing [a] scheme or artifice" to "defraud." *Id.* at 738 (quoting 18 U.S.C. § 1343). The Tenth Circuit agreed: "Once the defendants deposited the funds into their personal bank accounts, they had accomplished their crime and the funds were available for their personal use." *Id.* at 739. The Tenth Circuit reasoned that "at some point, the fraudulent scheme must be complete, and the perpetrators' subsequent enjoyment of its fruits . . . is not an essential part of the scheme." *Id.* (internal quotation marks omitted). That is, "[w]ithout a closer connection to the mechanism of their fraud, what they did with the stolen money afterward cannot itself relate to an essential part of the scheme." *Id.* (internal quotation marks omitted); *accord United States v. Narum*, 577 F. App'x 689 (9th Cir. 2014) (holding that once funds were transferred into the defendant's personal bank account, any subsequent use of the wires "was not in furtherance of [the] scheme to defraud," thereby rejecting the government's contention "that a wire fraud conviction may be based on any wire transfer taking place during the time period encompassed by the scheme to defraud," and reaffirming that wire fraud "requires a use of the wires *in furtherance* of a scheme to defraud, not merely a use of the wires *during* a scheme to defraud").

The Eleventh Circuit's acceptance of the government's argument here—that a scheme to defraud must encompass all distributions of funds amongst alleged participants—broadens the wire fraud statute beyond recognition, and wholly untethers the actual wire transfer from the scheme to defraud itself, thereby accepting what three other circuits have rejected. This Court's intervention is required to correct the "problem[ ]" Justice Scalia foresaw in his dissent in *Schmuck*. *Schmuck*, 489 U.S. at 725 (Scalia, J., dissenting). That is, to clarify the scope and reach of the wire fraud statute before it is further stretched beyond recognition.

II. The Question Presented Is Exceptionally Important

The Eleventh Circuit's holding here expands the reach of the wire fraud statute beyond the limits intended by Congress. "Congress could have drafted the [wire] fraud statute so as to require only that the [wires] be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the [wires] be 'for the purpose of executing such scheme.'" *United States v. Maze*, 414 U.S. 395, 405 (1974). Such a tethering of the two elements is what makes the crime a federal offense, "leaving all other cases to be dealt with by appropriate state law." *Kann*, 323 U.S. at 95.

Here, however, the Eleventh Circuit, in accepting that wire fraud encompasses a distribution of proceeds amongst alleged accomplices, completely untethered what Congress intended to remain strongly bound, broadening the reach and scope of the wire fraud statute beyond what was ever intended. The Court "should not struggle to uphold poorly drawn counts. To do so only encourages more federal prosecution in

fields that are essentially local." *United States v. Sampson*, 371 U.S. 75, 83 (1962) (Douglas, J., dissenting).

Because the Eleventh Circuit's holding creates a split amongst the circuits—a division that can only be expected to deepen as more mail and wire fraud prosecutions are filed, the question presented is one of great public importance with far reaching implications that warrants review by this Court.

III. This Is an Ideal Vehicle

This case presents the perfect opportunity for the Court to clarify its wire fraud jurisprudence. Procedurally, the question is squarely presented here. And factually, this case is ideal because the lower court's erroneous denial of Petitioner's many motions regarding the substantive wire fraud count resulted in a conviction that must be vacated.

Both in the district court and on appeal, Petitioner challenged his conviction for substantive wire fraud. The district court denied the many challenges he made—in a motion to dismiss as well as multiple motions for judgment of acquittal pursuant to Fed. R. Crim. P. 29—though noting its confusion as to whether a transfer of funds from Zubero to Petitioner really constituted wire fraud. (Dist. Ct. Dkt. Nos. 84:26–30; 218:61, 76, 125; 165.) On appeal, Petitioner once again challenged his wire fraud conviction. The Eleventh Circuit, after oral argument, and relying on the government's incorrect reading of the wire fraud statute, brushed off Petitioner's arguments, and affirmed Petitioner's conviction. (App. A at 1a.)

Factually, too, this case is an ideal vehicle because of the significance of the erroneously denied motions. If this Court reverses the Eleventh Circuit, Petitioner's conviction must be vacated.

Whether the wire fraud statute can be stretched to cover the conduct charged in this case is starkly presented here. Granting this petition would afford the Court an opportunity to definitively clarify what the wire fraud statute means by its requirement that the wire be "for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343. As it stands right now, the Eleventh Circuit has taken the position that any distribution of funds among alleged accomplices—a mere movement of money—is wire fraud, however untethered from the scheme to defraud such transfer may be, in direct conflict with holdings from the Eighth, Ninth, and Tenth Circuits. That just cannot be.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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