No. _____

In The

Supreme Court of the United States

JONATHAN DEAN DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is proof of misrepresentations by a defendant in 2014 alone sufficient to establish that wire transfers occurring years later in 2016 and 2017 were "for the purpose of executing" a scheme to defraud in violation of 18 U.S.C. § 1343 or does "wire fraud" require evidence to connect the wires to the fraud?

2. Is proof of misrepresentations by a defendant in 2014 alone sufficient to prove that a defendant "knew" transactions occurring years later in 2016 and 2017 involved proceeds of a crime for purposes of money laundering under 18 U.S.C. § 1957?

3. Is the calculation of the amount of funds received or obtained by a defendant in payment for services rendered alone sufficient to establish a victim's "loss" for purposes of restitution or sentencing?

PARTIES TO THE PROCEEDINGS

Petitioner Jonathan Dean Davis was the defendant in the district court and was the appellant in the court of appeals. Respondent United States of America was the prosecuting party in the district court and was the appellee in the court of appeals.

RELATED PROCEEDINGS

1. *United States v. $4,480,466.16 in Funds Seized From Bank of Am. Account Ending in 2653*, 3:17-CV-2989 (N.D. Tex.)—Civil forfeiture case stayed pending conclusion of criminal case

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jonathan Dean Davis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

Counsel for Petitioner was unable to keep an innocent man out of jail. Watching the judiciary refuse to enforce the Constitution, statutes, and rules of evidence and procedure at every stage was shocking and disheartening. Petitioner understands that the Court has limited time and resources, and this case could be easy to overlook because the court of appeals generated a sloppy opinion involving a no-name defendant with a no-name lawyer. However, this case presents the Court with an opportunity to revive the essentially forgotten "wire" element of wire fraud.

For decades, the Court has attempted to limit prosecutorial expansion of the "scheme to defraud" element of mail and wire fraud. *See*, *e.g.*, *Ciminelli v. United States*, No. 21-1170 (pending); *Kelly v. United States*, 140 S. Ct. 1565 (2020); *Cleveland v. United States*, 531 U.S. 12 (2000); *McNally v. United States*, 483 U.S. 350 (1987). In addition to the "scheme" element, the mail and wire fraud statutes require proof that a defendant used the interstate wires or mail "for the purpose of executing" the scheme. Through inaction, the judiciary has allowed the "wire" element of

wire fraud to be eviscerated, leading to painful and absurd results such as this case.

Petitioner was convicted of wire fraud for seven wire transfers to his business occurring in 2016 and 2017. Petitioner did not make the wire transfers or request the wire transfers. No evidence was presented of fraudulent or illegal conduct by Petitioner in 2016 or 2017, and his business had been reapproved by regulators to receive such payments in 2015, 2016, and 2017 based on applications that were not even alleged to contain misrepresentations. The only evidence of wrongdoing by Petitioner was in 2014 when he submitted applications to state agencies that contained misrepresentations. No one testified that the 2014 applications should have been denied because of the misrepresentations, and the Government presented no evidence connecting the flawed but no longer operative 2014 applications to the wire transfers in 2016 or 2017.

Petitioner contends that a conviction for "wire fraud" requires proof connecting the "wires" to the "fraud." The statute requires the wires be "for the purpose of executing" a scheme to defraud, and there was no evidence of Petitioner's state of mind in 2016 or 2017 or of any wrongful conduct or purpose by Petitioner in those years. A criminal conviction surely cannot be based on a mere "assumption" or speculation that the wires were for a criminal purpose because Petitioner told a lie years earlier. However, the district court and court of appeals disagreed and held that proof of fraudulent conduct and intent in 2014 is alone sufficient.

Everyone has told a lie. Almost everyone has sent an email, received an payment, or otherwise used the interstate wires. If "wire fraud" merely requires proof of a lie followed by the use of the wires without proof that the wire was used "for the purpose of executing" on the lie, then everyone is guilty of wire fraud, and every business owner like Petitioner can be jailed for decades for isolated and inconsequential acts of misconduct.

The Court should dust off its old precedents and breathe life back into the statutory text of 18 U.S.C. § 1343.

OPINIONS BELOW

The opinion of the court of appeals dated November 15, 2022 is reported at 53 F.4th 833. That opinion is included in the Appendix. App. 1–36. The court of appeals denied the petition for rehearing on December 27, 2022 without opinion. App. 54. The judgment of the district court was not reported but is included in the Appendix. App. 37–53.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion and judgment affirming in part and vacating and remanding in part on November 15, 2022. App. 1–36. On December 27, 2022, the court

of appeals denied Petitioner's petition for rehearing. App. 54. Petitioner Jonathan Dean Davis respectfully petitions for a writ of certiorari under and the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND SENTENCING GUIDELINES INVOLVED

Petitioner was convicted of wire fraud pursuant to 18 U.S.C. § 1343, the relevant text of which is:

> 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.

Petitioner was convicted of money laundering pursuant to 18 U.S.C. § 1957, the relevant text of which is:

> Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

Petitioner was ordered to pay $65,200,000 in restitution pursuant to 18 U.S.C. § 3663A. The text of that statute is voluminous and is included in the appendix. *See* App. 58–62.

Petitioner was sentenced to 235 months (19.5 years) of imprisonment based in part on a 24 point sentencing enhancement for a purported "loss" of $72 million pursuant to United States Sentencing Guideline § 2B1.1. That guideline and the official commentary are included in the appendix. *See* App. 63–117.

STATEMENT OF THE CASE

Petitioner owned Retail Ready Career Center, Inc. ("RRCC") which operated a school to train technicians in the heating, ventilation, and air conditioning industry ("HVAC"). Petitioner's innovative approach combined classroom and lab training in an intense six seek program with school days running from 7:30 in the morning until 6:30 in the evening. The school had a graduation rate of 89% and a placement rate of 81.49% in its final audited reporting year and was one of the most successful HVAC training schools in the country.

On November 18, 2020, Petitioner was indicted for seven counts of wire fraud involving wire transfers that occurred in 2016 and 2017. Petitioner had no involvement in the wire transfers. The wire transfers were made by the United States Department of Veterans Affairs ("VA") at the request of the seven veteran students who enrolled (and later graduated) from

RRCC's HVAC training program. RRCC was approved to receive such payments annually by both the Texas Workforce Commission ("TWC") and Texas Veterans Commission ("TVC") in 2014, 2015, 2016, and 2017.

No evidence was presented regarding Petitioner's state of mind in 2015, 2016, or 2017. No evidence was presented regarding wrongful conduct by Petitioner in 2015, 2016, or 2017. Instead, the Government contended and presented evidence that the initial applications in 2014 to the TWC and TVC contained misrepresentations. No regulator testified that RRCC's applications in 2014 (or any other year) should have been denied based on the incorrect information in the applications. Petitioner took the stand and specifically denied any intent to defraud and any involvement with the wire transfers at issue (which were routinely handled by RRCC's staff).

In 2016 and 2017, Petitioner purchased a residence and three vehicles with the profits of RRCC. Petitioner was charged with and convicted of "money laundering" under 18 U.S.C. § 1957 for those purchases. The Government presented no evidence of Petitioner's state of mind in 2016 or 2017. Instead, the Government theorized that, since Petitioner told a lie in 2014, all payments occurring thereafter were "proceeds" of "wire fraud" (again without any proof that any wire was made for "the purpose of executing" a scheme). Similarly, the Government theorized that since Petitioner had told a lie in 2014, he must have known that any money he ever made at any point in time thereafter was "proceeds" of a crime. Petitioner

testified that he had no idea that anyone would view his school which had repeatedly been audited and re-approved for compliance with applicable regulations as a criminal enterprise generating criminal proceeds.

At the close of the Government's case, at the close of all evidence, and after the jury convicted Petitioner, he made a motion for judgment of acquittal on the grounds that there was insufficient evidence to support the seven wire fraud counts and four money laundering counts. Regardless of how the evidence regarding the events of 2014 is weighed, there is no evidence in 2016 or 2017 of a scheme to defraud, intent to defraud, or the use of wires "for the purpose of executing" a scheme to defraud. The seven wires occurred pursuant to TWC and TVC approvals in 2015, 2016, and 2017 for which the Government presented no evidence of misrepresentations. Additionally, there was no evidence that Petitioner knew or believed that any money he spent in 2016 or 2017 was proceeds of a crime. The district court denied those motions for acquittal.

Although the wire transfers for which Petitioner was convicted totaled $131,405.20, Petitioner was sentenced to 235 months (19.5 years) in prison and ordered to pay $65,200,000 in restitution. Again, without any evidence, the Government argued and the district court accepted that a lie told in 2014 meant every dollar paid by the VA to RRCC was somehow a "loss." It did not matter that the promised services were rendered in exchange for the payments, that no connection was established between the lie in 2014 and the

amounts paid by the VA, or that the VA already owed the obligation to pay the amounts on behalf of the veterans regardless of which school they attended.

On appeal, Petitioner argued that, among other things, that there was no evidence that the wires were caused by Petitioner "for the purpose of executing" a scheme to defraud because Petitioner had no involvement with the wires and there was no evidence that Petitioner had any intent to defraud at the time the wires occurred. Petitioner argued that evidence was necessary to prove that Petitioner knew or believed that the money used in 2016 and 2017 was proceeds of a crime in order to be convicted of "money laundering" and that a misrepresentation made years earlier was not alone sufficient to establish the requisite state of mind years later. Petitioner argued that proof that the VA suffered a "loss" requires something more than merely tallying a business's gross receipts. Such arguments were for naught.

The court of appeals held oral argument on October 3, 2022. The court of appeals entered its opinion and judgment on November 15, 2022. *See* App. 1. The court affirmed on all issues except forfeiture, where the court vacated the district court's order and remanded for further proceedings. *See* App. 35–36.

After obtaining an extension, Petitioner timely filed a petition for rehearing on December 13, 2022. On December 27, 2022, the court of appeals denied the petition for rehearing. *See* App. 54.

REASONS FOR GRANTING THE PETITION

A. The Court Should Revive The "Wire" Element Of "Wire Fraud".

1. The court of appeals refused to follow the text of the statute.

It is clear from the text of 18 U.S.C. § 1343 that the use of the "wires" in an offense of wire fraud must be "for the purpose of executing" the scheme to defraud:

> ***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.

In this case, there was no evidence presented at trial upon which the jury could conclude that the seven wire transfers occurring in 2016 or 2017 were "for the purpose of executing" a scheme to defraud or even that a scheme existed in 2016 or 2017. No evidence was introduced by the Government regarding Petitioner's state of mind or conduct in 2016 or 2017.

In order to affirm the conviction, the court of appeals had to rewrite 18 U.S.C. § 1343 to omit the "for the purpose of executing" element. Petitioner argued

that there was no evidence that the purpose of the wires was to execute a scheme to defraud because Petitioner had no involvement at any point in the wire process and the wires were actually sent by the Government. In response, the Fifth Circuit held that:

> This misunderstands the elements of wire fraud. The evidence need not show that Davis *personally* transferred the funds from the VA into Retail Ready's bank accounts. It need show only that he 'transmitted or caused to be transmitted' the relevant communications. App. 8.

To the contrary, it is ***not*** sufficient to show merely that a defendant "transmitted or caused to be transmitted" the wire—the text of the statute requires the wire be caused "for the purpose of executing" a scheme to defraud. *See* 18 U.S.C. § 1343. The court of appeals' restatement of the law omits the very element that Petitioner contends the statute required evidence to prove.

This is not a case where Petitioner asked someone else to make a wire transmission on his behalf or where the acts of someone else could be attributed to Petitioner. The seven wire transfers were made by U.S. Treasury department at the request of the VA on behalf of the seven customers of RRCC. Petitioner never spoke to the seven customers, and no evidence was presented of any wrongdoing by Petitioner in years in which the wires occurred. There is simply no evidence from which a juror could infer that these seven wires occurred "for the purpose of executing" a scheme to

defraud. Contrary to the conclusion of the court of appeals, the fact that Petitioner had no involvement with the wire transfers but was nonetheless convicted of "wire fraud" indicates that something has gone very wrong with the jurisprudence surrounding this statute.

The court of appeals' rejection of the statutory language is found in another paragraph of the opinion where it held:

> Davis argues that the specific intent requirement was not satisfied since the Government has presented no evidence of any intent to defraud in 2016 or 2017, which is when the seven wire transfers occurred. We disagree. The Government presented evidence that Davis "lied to his accountant," and lied about satisfying the two-year requirement—a requirement he knew was essential for TVC approval based on his previous company's denial on that basis and warnings listed on the TVC's application form.[1] Davis's insistence that this only establishes a culpable intent at one point in time, and not years later when the wires occurred, is inapt because his lies led to an ongoing receipt of funds to which he was not entitled. App. 9–10.

This paragraph contains both factual and legal errors. Factually, the court of appeals refused to recognize that no one testified that RRCC was "not entitled" to the funds. Indeed, both regulatory agencies had concluded

[1] These are events that occurred in 2014.

annually that RRCC ***was*** entitled to receive the funds, and no errors or misrepresentations were identified in the applications for 2015, 2016, or 2017. However, even if the court of appeals were correct about the facts, it was still wrong about the law.

Legally, whether Petitioner's "lies led to an ongoing receipt of funds to which he was not entitled" is irrelevant to "wire fraud." The crime of "wire fraud" is not common law "fraudulent inducement" where the events of what actually happened are contrasted with a hypothetical world where the fraud did not occur. *See Neder v. United States*, 527 U.S. 1, 24–25 (1999) ("the Government is correct that the fraud statutes did not incorporate all the elements of common-law fraud. The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes.").[2] The wire fraud statute "does not purport to reach all frauds, but only those limited instances in which the use of the [wires] is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*, 323 U.S. 88, 95 (1944). By looking solely at whether a misrepresentation had been made and by speculating about the consequences of that misrepresentation (which was never considered by the jury), the court of appeals treated the "wire fraud" statute as

[2] Indeed, Petitioner would have benefited greatly if the question facing the jury was whether or not RRCC earned and was entitled to the money it received. The fact that the state regulators did not consider themselves deceived would have been decisive. Instead, the jury was instructed that a misrepresentation could be material even if no one was defrauded.

reaching all frauds. In other words, the court of appeals turned "wire fraud" into "federal fraud" because it failed to look for whether evidence existed to show that the wires were "for the purpose of executing" a scheme to defraud.

As shown below, the court of appeals' refusal to grapple with the text of the statute conflicts with the decisions of this Court and the courts of appeals.

2. Under this Court's precedent, the wires occurring in 2016 and 2017 could not support a wire fraud conviction because any scheme based on the 2014 application had reached "fruition" when subsequent applications were approved.

The Court has never directly addressed the meaning of "for the purpose of executing" a scheme in 18 U.S.C. § 1343, but the Court has addressed the meaning of the same phrase in the mail fraud statute found in 18 U.S.C. § 1341.[3] Even then, the Court has not addressed the meaning of the phrase in the mail fraud statute since 1989. *Schmuck v. United States*, 489 U.S. 705, 710 (1989). It is well past time for the Court to address the requirements for proving the "for the purpose of executing" element of wire fraud.

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[3] *See Carpenter v. United States*, 484 U.S. 19, 25 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.").

Prior to 1989, the Court had tried to prevent prosecutors from using the mail fraud statute to prosecute frauds where the fraudulent communications did not occur in a mailing sent by the criminal defendant. *See Kann v. United States*, 323 U.S. 88 (1944) (holding that mailings occurring after defendant cashed bad checks could not support a mail fraud conviction); *Parr v. United States*, 363 U.S. 370 (1960) (holding that routine mailings used to collect money that was later misappropriated could not support a mail fraud conviction); *United States v. Maze*, 414 U.S. 395 (1974) (holding that an individual who used a stolen credit card for a vacation could not be convicted based on credit card invoices sent in the mail after the trip was concluded).

However, in 1989, the Supreme Court broadened the permissible use of mail fraud statute. In *Schmuck*, the Court addressed a used car distributer that rolled back odometers and then sold the vehicles to retail dealers. *See id*. at 707. The distributer mailed an application to the Wisconsin Department of Transportation to transfer the title to the dealer, and the Supreme Court held that these mailings were "part of the execution of the fraudulent scheme" and that the scheme "did not reach fruition until the retail dealers resold the cars and effected transfers of title." *See id*. at 712. The Court contrasted the distributer's conduct with schemes that had reached fruition prior to the mailings at issue. *See id*. at 713–714 (*citing Kann v. United States*, 323 U.S. 88, 94 (1944) and *United States v. Maze*, 414 U.S. 395 (1974)).

In a dissent, Justice Scalia concluded that the majority had improperly broadened the mail fraud statute:

> The law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only "those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." In other words, it 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 v. United States*, 489 U.S. 705, 722–23 (1989) (Scalia, J., dissenting) (internal citations omitted).

Justice Scalia worried that the loose standard applied by the Court would "create problems for tomorrow. *Id*. at 725. Justice Scalia was correct. Prosecutors have expanded the use of the "wire fraud" and "mail fraud" statutes so far that the court of appeals in this case considered it inconsequential that two years passed between the fraudulent conduct and the use of the wires.

This case presents the Court with an opportunity to revisit *Schmuck* without having to overrule it because this case differs from *Schmuck* in two material ways. **First, the Court has never held that a mail or wire fraud conviction could be upheld where**

the defendant (or at least someone acting on his behalf or at his direction) did not send the wire or mailing at issue. In *Schmuck*, the mailing was made by the defendant while in the three cases overturning convictions that were distinguished by *Schmuck* the mailings were sent by someone else. *See Kann*, 323 U.S. at 94 (check mailed between banks); *Parr*, 363 U.S. at 393 (mailing sent by victims); *Maze*, 414 U.S. at 396 (mailing sent by victims).

The text of 18 U.S.C. § 1343 contemplates that the criminal defendant both creates the scheme to defraud and causes the wire. Following the text and restricting wire fraud prosecutions to instances where the defendant or someone acting at the defendant's direction sends the wire would end absurd cases like this where the *actus reus* of the crime was committed by someone other than the defendant without his knowledge or involvement. If the Court is unwilling to go that far, the Court should at a minimum require that, in instances where the wire is not sent by the defendant, the Government must present evidence that the wire was nonetheless "for the purpose of executing" the scheme to defraud. It should not simply be "assumed" that any wire occurring after a misrepresentation is "for the purpose of executing" a scheme to defraud.

Second, the Court recognized in *Schmuck* that wires occurring after a scheme had reached "fruition" could not be "for the purpose of executing" a scheme to defraud and reaffirmed its prior opinions on that principle of law. *Schmuck*, 489 U.S. at 713–714. The court of appeals in this case failed to follow that principle of

law. Any scheme to obtain approval based on the 2014 application undoubtedly reached "fruition" and conclusion once RRCC was reapproved in subsequent years based on subsequent applications. Wires occurring in 2016 or 2017 in accordance with regulatory approvals in 2015, 2016, and 2017 based on subsequent applications containing no misrepresentations simply cannot be "for the purpose of executing" on misrepresentations in a 2014 application to obtain an approval in that year which was no longer being used at the time of the wires.

The Court could and should revive the text of the wire fraud statute and the temporal limitations consistently present in its prior decisions but largely forgotten and abandoned by the courts of appeals, including the court of appeals in this case. If the Court continues to remain silent, prosecutors will continue to turn minor misrepresentations for which no one was defrauded into life-destroying federal crimes.

3. There are decisions of the other courts of appeals that conflict with the decision of the court of appeals in this case.

Most defendants have given up on efforts to put limits on "wire fraud". Given the lack of interest and concern shown by the Government, district court, and court of appeals, surrender to the almighty and unchallengeable Government may have been more prudent. Counsel for Petitioner certainly would have advised Petitioner differently if he understood that a wire

fraud conviction could be obtained based on a misrepresentation with no connection of any kind to the wires at issue.

Nonetheless, while there are many decisions of the courts of appeals that ignore the text of 18 U.S.C. § 1343 and the limited reach of the wire fraud statute, there are decisions that apply this Court's precedent properly. For instance, the Eighth Circuit vacated convictions for wire and mail fraud for wires and mailings that occurred mere months after the misrepresentations at issue because there was insufficient evidence connecting the misrepresentations with the wires or mail. *See*, *e.g.*, *United States v. Hagen*, 917 F.3d 668, 675 (8th Cir. 2019). The First Circuit vacated a conviction for mail fraud when no evidence was presented as to why the letter was sent. *See United States v. Tavares*, 844 F.3d 46, 61 (1st Cir. 2016). The Eleventh Circuit vacated a conviction for wire fraud when the defendant's e-mail was sent after the decision had already been made by the recipient. *United States v. Takhalov*, 838 F.3d 1168, 1169 (11th Cir. 2016). The Ninth Circuit vacated a conviction for wire fraud where a defendant transferred money by wire for personal use. *United States v. Narum*, 577 Fed. Appx. 689, 691 (9th Cir. 2014) ("We reject 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. 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."). Similarly, the Ninth Circuit vacated a wire

fraud conviction involving wire transfers occurring years after the fraud because no connection to the fraud was established. *United States v. Lazarenko*, 564 F.3d 1026, 1037 (9th Cir. 2009).

No court of appeals has stretched the wire fraud statute as far as the Fifth Circuit did in this case. No court of appeals has held that a wire fraud conviction could be supported by wires occurring after reapprovals by a regulator based on fraud-free applications merely because misrepresentations had occurred years earlier in prior applications. In the words of the Ninth Circuit:

> If the government's theory were correct, then it would be possible for an ordinary fraud to be converted into wire fraud simply by the perpetrator picking up the telephone three years later and asking a friend if he can store some fraudulently-obtained property in his garage before the police execute a search warrant or later taking the proceeds of fraud and transferring them to another bank. The government's theory extends an already broad statute too far. *United States v. Lazarenko*, 564 F.3d 1026, 1037 (9th Cir. 2009).

The Court should intervene to bring stability to the interpretation of the wire fraud statute so that a criminal defendant's life and liberty is not dependent on whether he luckily obtains a three judge panel that happens to care about enforcing the limits of the wire fraud statute.

4. The failure of the courts to restrict the wire fraud statute to its intended scope has devastating consequences for criminal defendants.

Making false statements on government forms is already a crime. Allowing the Government to transform false statement crimes into wire fraud has dire consequences for criminal defendants.

First, the Government has essentially abolished the statute of limitations for fraud. Petitioner did not make any misrepresentations after 2014. He was indicted at the end of 2020. Thus, the five year statute of limitations would normally have expired. *See* 18 U.S.C. § 3282. However, since the wire transfers occurred within the five years preceding the indictment, the statute of limitations did not apply. If the Government does not have to present evidence showing that the wires were for the purpose of executing a fraud but can use the wires to escape the statute of limitations, then a misrepresentation can be prosecuted indefinitely without any statute of limitations—just as it was in this case.

Second, converting false statement crimes into wire fraud radically changes the potential punishment. Under Texas law, submitting a financial statement with material false statements is at most a state jail felony carrying a maximum imprisonment of two years. *See* Tex. Pen. Code §§ 37.101; 12.35. A false statement alone is merely a Class A misdemeanor carrying a maximum imprisonment of one year. *See*

Tex. Pen. Code §§ 37.02, 12.21. The federal false statement law (which is inapplicable in this case because Petitioner made misrepresentations to state agencies and not to the U.S. Government) carries a maximum sentence of five years. *See* 18 U.S.C. § 1001(a). However, the wire fraud statute provides for a sentence of 20 years, which is what happened to Petitioner. *See* 18 U.S.C. § 1343. By mischaracterizing the conduct at issue in this case as "wire fraud," the Government converted a misdemeanor into a life destroying twenty-year sentence. Petitioner is not the only victim of this type of rampant overcharging.

Third, wire fraud, unlike false statements (18 U.S.C. § 1001), serves as a predicate crime for other federal offenses such as money laundering or aggravated identity theft. Thus, charging a false statement as "wire fraud" allows a prosecutor to add a variety of other charges that further increase the potential punishment if a defendant brings the case to trial. Additionally, by adding those other charges, it becomes impossible for a criminal defendant to defend against the actual wire fraud charges because the Government does not need to identify the "wire fraud" underlying the "money laundering" in the indictment, in a bill of particulars, or at any point before trial. Thus, a defendant is forced to defend against thousands of unidentified and unalleged acts of "wire fraud" at trial, and the absence of proof for the specific wire fraud counts for which a defendant is actually charged is easily lost on a jury, as happened here.

Fourth, wire fraud, unlike false statements, allows for forfeiture of a defendant's assets. *See* 18 U.S.C. § 981(a)(1)(C) (allowing for forfeiture for violations of statutes listed in 18 U.S.C. § 1956(c)(7)); 18 U.S.C. § 1956(c)(7)(A) (which incorporates 18 U.S.C. § 1961(1)); 18 U.S.C. § 1961(1) (which lists 18 U.S.C. § 1343). In other words, charging a defendant with wire fraud is more profitable for the Government than charging a defendant more appropriately. Unsurprisingly, the Government chooses to overcharge in order to take a defendant's assets knowing that the judiciary is unlikely to impose any consequences for such overcharging.

Petitioner should not have made misrepresentations in 2014, but he did not commit wire fraud. The charge of "wire fraud" is a powerful and often abused tool of prosecutors. If the Court does not step in to limit the reach of the wire fraud statute, the prosecutors will continue to avoid the safeguards and limitations that Congress has enacted to limit the reach of federal criminal law.

The Court should grant a writ of certiorari to resolve the conflict between the circuits on this important question of federal law and to resolve a conflict with the decisions of this Court. *See* Rule 10(a), (c).

B. If The Court Chooses To Address The Wire Element Of Wire Fraud, It Should Consider Addressing The Knowledge Element Of Money Laundering.

Like any business owner, Petitioner spent a portion of the profits of his business on himself. In 2016 and 2017, he purchased his residence and three vehicles. Petitioner took the stand and testified that at the time of those purchases, he had no idea that anyone would later claim that the funds he used were proceeds of a crime. Indeed, the Government never presented any evidence that RRCC was doing anything illegal or criminal in 2015, 2016, or 2017 or that the funds used in the transactions were tied to any illegal or criminal conduct. Nonetheless, Petitioner was convicted of "money laundering" under 18 U.S.C. § 1957.

That statute provides:

> Whoever, in any of the circumstances set forth in subsection (d), ***knowingly*** engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b). 18 U.S.C. § 1957(a) (emphasis added).

This Court has never addressed the meaning of 18 U.S.C. § 1957. Outside the Fifth Circuit, the other courts of appeal have recognized that the defendant must know that the funds used in the monetary transaction were derived from a crime. *See*, *e.g.*, *United States v. Dingle*, 862 F.3d 607, 614 (7th Cir. 2017) ("for

the money laundering charge, the government had to prove that the defendant knew the transaction involved criminally derived property that was derived from an unlawful activity, here, [mail] fraud."); *United States v. Weidner*, 437 F.3d 1023, 1041 (10th Cir. 2006) ("[t]he knowledge element of the offense requires that the defendant know that the property in question is 'criminally derived' "). The court of appeals in this case purported to recognize that "the knowledge element of money laundering requires the defendant know that the property in question is 'criminally derived.' " App. 13.

Nonetheless, the court of appeals did not require any proof or evidence of Petitioner's knowledge that the funds used were "criminally derived." Instead, the court of appeals held that the evidence that Petitioner lied in 2014 was sufficient to establish his knowledge about the state of affairs in 2016 and 2017. App. 13.

The standard applied by the court of appeals essentially eliminates the "knowledge" requirement. Petitioner made misrepresentations in an application in 2014. His business was not operating under the application in 2016 and 2017 when he purchased his residence and vehicles. Everyone is aware that they have told a lie in the past. Very few people would make the assumption that a lie that is irrelevant to their current situation somehow makes their present day income proceeds of a crime. Such an assumption—and it is an assumption because no evidence was presented of Petitioner's state of mind—should not be sufficient to establish money laundering.

While the money laundering issue alone would not justify the Court taking this case, if the Court is going to address the temporal aspects of wire fraud, the Court ought to also address the temporal aspects of money laundering. In any event, should the Court rule for Petitioner on the wire fraud issues, the money laundering counts would need to be addressed by the court of appeals on remand because the underlying predicate crime supporting the money laundering would be vacated. Accordingly, Petitioner requests that the Court grant a writ of certiorari to address the "knowledge" element of 18 U.S.C. § 1957.

C. The Amount Of Funds Received By A Defendant Is Not A Measure Of "Loss" To A Victim.

RRCC received $72 million in payments from the VA and refunded roughly $7 million for students who initially enrolled but did not complete the program. Using these numbers, Petitioner was ordered to pay the VA $65,200,000 in "restitution" and received a "sentencing enhancement" of 24 points for an "intended loss" of $72,000,000.[4]

The Government never introduced any evidence of a "loss" by the VA, and the VA suffered no "loss." The

[4] Despite Petitioner's objections, a district court and a court of appeals have now concluded that Petitioner intended to defraud the VA of the $7,000,000 that his company refunded to the VA during normal business operations. It is disheartening to see the judiciary so cavalierly deferring to the Government when a man's life and liberty are at stake.

amount that the VA must pay for a particular veteran's education is determined by statutes enacted by Congress. *See*, *e.g.*, 38 U.S.C. Chapter 34. The VA could discharge its obligations to the veteran students by paying for their enrollment at RRCC or paying for their enrollment at some other school. The VA was not harmed and could not suffer a "loss" by paying for a student to attend one school as opposed to another. The VA discharged its obligations to thousands of veterans by paying for their education at RRCC and that was not a "loss" because the VA already had the obligation to pay regardless of whether RRCC ever existed or applied to receive payments from the VA. The VA did not tell RRCC's thousands of graduates "oops, we were defrauded so we still owe each of you veterans education benefits even though we already paid for your education." The VA has provided no refunds or additional benefits to RRCC's graduates. Indeed, if Petitioner were to someday win the lottery and pay the "restitution" amount, the VA would achieve a "windfall" by shifting the obligation to pay for veterans education from itself to the school owner.

The Fifth Circuit's response to this problem was . . . bizarre. Restitution is governed by statute, specifically 18 U.S.C. § 3663A and 18 U.S.C. § 3664. Those statutes look at the amount of the victim's "loss". *See* 18 U.S.C. § 3663A(b)(1). However, the court of appeals justified the district court's restitution order without reference to the applicable statutes. App. 24–25. Instead, the court of appeals relied on commentary to the Sentencing Guidelines. App. 24–25. The

commentary allowed for the loss to be determined based on "the benefits obtained." *See* USSG § 2B1.1 cmt n. 3(F)(ii). No court of appeals had previously suggested or held that the commentary to the sentencing guidelines allows a court to ignore the statutory requirement of proof by preponderance of the evidence of proximate causation of a loss. *See* 18 U.S.C. § 3664(e). Similarly, the court of appeals held that the amount of the "loss" for the sentencing enhancement was "the amount Davis actually received" without any consideration of whether the VA suffered an actual loss (or the amount of such an actual "loss.") App. 27–28.

This Court has never addressed the meaning of the word "loss" in the restitution statutes or in the Sentencing Guidelines, but the courts of appeals have begun pushing back on the Government's untethered view of "loss." The Third Circuit has explicitly rejected the portion of the commentary to section § 2B1.1 of the Sentencing Guidelines that reinterprets "loss" to mean something other than "actual loss" to the victim. *See United States v. Banks*, 55 F.4th 246, 257 (3d Cir. 2022). The Ninth and Sixth Circuits have likewise rejected the commentary to that section which defines "loss" to mean $500 per credit card used. *See United States v. Kirilyuk*, 29 F.4th 1128, 1137 (9th Cir. 2022); *United States v. Riccardi*, 989 F.3d 476, 488 (6th Cir. 2021).

A victim's "loss" cannot be measured solely by looking at a defendant's gross receipts, yet that is all the district court and court of appeals required in this case. Petitioner was not punished based on any measure of harm caused to the VA. Instead, Petitioner was

punished based on the gross revenue of his school—which is merely a measure of the popularity of his school due to its successful track record of training veterans for jobs in the HVAC industry.

The Court should grant a writ of certiorari to resolve the conflict between the circuits on this important question of federal law. *See* Rule 10(a).

CONCLUSION

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

Respectfully submitted,

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