No. 22-945

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

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The Government embraces a theory of wire fraud so expansive that a business CEO can be criminally liable for any wired payment to the business years after a certification application that had a single falsehood. It does not matter how many times the business has been recertified based on applications with zero falsehoods. It does not matter if the payment was in exchange for legitimate services adequately rendered. It does not matter if the falsehood was immaterial to the services the business provided. And it does not matter whether the wired payment from the Government has any connection to other government payments. The CEO can be convicted of wire fraud and sentenced based on *every* transaction the business had with the certifying agency, no matter how legitimate and no matter how unrelated to and removed from the single falsehood—even, according to the Government, after this Court rejected wire fraud based on the right to control theory. *All* of these are flaws with Jonathan Davis's conviction and sentence here and would not have occurred had he lived in a different circuit. This Court's intervention is needed to clarify the limits to the federal wire fraud statute and to stop the manifest criminal injustice that will continue in circuits like the Fifth absent intervention.

Davis was the founder of an HVAC technician training school, Retail Ready, that had an 89% graduation rate and a 77% job placement rate—both the highest in the state. When it applied for eligibility to receive GI-Bill funds in 2014, its application contained false statements "to state-approving agencies" about Retail Ready's history and accounts

and regarding a pending criminal charge for having passed a bad check. App. 3-4. Because the business had been certified with falsehoods—falsehoods that were not even proven material—for one year, the Government claims that *every* subsequent transaction with the VA was fraudulent, regardless of whether it involved a wire and regardless of whether a student received the education the VA paid for.

No reasonable court would find in a civil suit that Retail Ready's students or the VA lost a dime. They received educations that yielded reasonable expectations for gainful employment. Indeed, the Government's—and the Fifth Circuit's—position is that it is irrelevant that veterans received the benefit of the bargain. The Government says in its BIO at 12: the VA still "was harmed—and thus suffered a loss—when it paid money for education at a school that did not satisfy the applicable requirements." Put another way, the harm was not that veterans did not get an education worthy of the VA's outlay, it was that the VA lost its *right to control* who provided that education. But just a few weeks before the BIO, this Court plainly stated that the right to control theory cannot support a wire fraud conviction in *Ciminelli* v. *United States*, No. 21-1170 (May 11, 2023), slip op. 2.

The purported *actus reus* here—lying on a certification to provide GI-Bill education—simply is too far removed from the wires the Government used for its statutory hook, and it did not defraud or cause a loss to the VA in any event. Yet Davis now faces *20 years* in prison and a $65 million restitution order. Such is the trap that the Government claims Congress laid when it enacted the wire fraud statute. That cannot stand.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit departed from other circuits' law on liability for wire fraud, and the right-to-control theory cannot support the conviction in any event.

The Petition establishes that the Government took a simple case of state criminal law false statements to Texas state agencies in 2014 and blew it up into a specious wire fraud case resulting in a 235-month sentence and a $65 million restitution order to the VA based on seven wires in 2016 and 2017. This stretches what constitutes executing a fraudulent scheme beyond all reasonable limits and directly conflicts with the Government's concession in *Ciminelli*, that "if 'the right to make informed decisions about the disposition of one's assets, without more, were treated as the sort of 'property' giving rise to wire fraud, it would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it.'" No. 22-1170, slip op. 7 (quoting Brief for United States 25–26).

1. The Government relied on Retail Ready's false statements on a certification application in 2014 even though it recertified twice before the wires at issue here occurred. ROA.20266-67; ROA.15177; ROA.15283; ROA.15344. And the Government does not even claim Retail Ready or Davis put *any* false information in the recertification applications. Thus, any alleged fraudulent scheme—a scheme to obtain certification—had come to fruition, had been completed, and did not continue after 2014. The Government and Fifth Circuit's reliance on wires that were executed long after the purported scheme

finished conflicts with the decisions of other circuits. Pet. 18-19.

The Government's distinctions make no difference. It notes that "[e]very case that petitioner cites (Pet. 18-19) involved mailings or wire communications that occurred after the completion of the fraudulent scheme presented to that jury and did not further that scheme." BIO at 8. But that is the primary issue here. Retail Ready itself was not a fraudulent scheme, as the Government concedes, App. 31—it legitimately educated veterans and provided opportunities for employment outside the military. The purportedly fraudulent scheme was lying on the initial application to obtain authorization to receive GI-Bill benefits. And the "scheme" clearly was complete at least when Retail Ready filed its 2015 recertification with no falsities and was recertified.

Under the Government's overbroad definition of "executing" a fraudulent "scheme," the entire cow grazing enterprise in *United States* v. *Hagen*, 917 F.3d 668, 675 (8th Cir. 2019), would have been a "fraudulent scheme," and the Eighth Circuit would not have reversed Hagen's conviction based on the fact that Hagen used the mail to solicit business in the year *after* he fraudulently induced cattle producers to graze their cattle on his pasture. Similarly, in *United States* v. *Takhalov*, 838 F.3d 1168, 1169 (11th Cir. 2016), the bar, or at least the overall modus operandi, would be the fraudulent scheme. Thus, under the Government's definition, the e-mail at issue there would have been for the purpose of executing the fraudulent scheme by attempting to throw AMEX off the trail. But unlike the Fifth Circuit here, the Eleventh Circuit recognized the limited nature of wire fraud in *Takhalov*, *id.* ("To sustain a wire-fraud

conviction, that email must have furthered a fraud scheme[.]"), and that an incident of fraud by an owner of a business does not render an otherwise legitimate enterprise wholly fraudulent.

Thus, under other circuit's precedents, to the extent the Government claims that there was a fraudulent scheme to obtain certification by lying, that scheme was completed at the moment it succeeded in 2014. And even if receiving GI-Bill payments under a falsely-obtained certification is part of a "fraudulent scheme," here that came to fruition only after recertification. The only way to consider transactions in 2016 and 2017 to be executing a fraudulent scheme (and the only way to justify sentencing based on every GI-Bill dollar received) is to consider Retail Ready itself a fraudulent scheme. The Government provides no basis for that position given Retail Ready's track record of educating veterans and those graduates' track record of finding employment.

Indeed, the Government disavowed that concept at sentencing with stunning fluidity as it transitioned among conflicting theories of criminality. After relying on an enterprise theory for liability, argued the business itself was not completely tainted when pursuing a full $72,000,000 forfeiture. When arguing that the case involved "unlawful activities" as opposed to lawful services sold in an "unlawful manner," to obtain a higher yield definition of "proceeds," the Government argued "(1) Davis's relevant conduct was not operating the school, but committing wire fraud; and (2) because wire fraud is an 'unlawful activity,' the [higher yield] definition applies." App. 31-32.

Of course, the Government did not define what actually went into the commission of wire fraud beyond the false statements supporting certification in 2014 and receiving wired payments in 2016 and 2017. All this to get around the fact that there is a crime addressing this conduct that the prosecutors apparently do not like. Congress has determined that making *materially* false statements to the government carries a maximum sentence of five years. 18 U.S.C. § 1001(a). The Government's overbroad reading of the wire fraud statute has turned it into a trap for the unwitting. The Court should grant the Petition to address when a "fraudulent scheme" comes to fruition to correct the government's overreach.

2. In any event, under *Ciminelli*, the Government cannot rely on the falsehoods in the 2014 application, which only went to the government's right to control to which educational outfit GI-Bill funds flowed. In *Ciminelli*, No. 22-1170, slip op. 6-8, the Court held that the right to control theory could not support a wire fraud conviction because (1) it "cannot be squared with the text of the federal fraud statutes," (2) it is "inconsistent with the structure and history of the federal fraud statutes," and (3) it "vastly expands federal jurisdiction without statutory authorization." "The right to control theory thus criminalizes traditionally civil matters and federalizes traditionally state matters." *Id.* at 8.

But that is exactly what happened here. The false statements at issue—accounting and historical information and a lie about a pending criminal matter involving a bad check on an application to a state agency—are irrelevant to whether Retail Ready provided quality HVAC technician training. They are thus irrelevant to whether Retail Ready defrauded

the VA. The information only went to the fitness of the company itself under VA standards. The only theory under which they could be relevant is a right to control theory. As noted in the Fifth Circuit's opinion, the Government claimed that it had the right to direct funds to organizations that fit its metrics for stability. App. 9 ("The evidence showed Davis's misrepresentations to the VA induced the agency to pay millions in GI-Bill benefits to a school ineligible to receive them."). The Government does not even attempt to claim the false statements had anything to do with actually providing the education the VA paid for.

3. The Government attempts to save the conviction by noting passing references to unhappy students—as if there is a business in existence with zero unhappy customers. BIO at 7. In doing so, it parrots a tactic the Court expressly rejected in *Ciminelli*. There, the Government insisted that reversal based on failure of the right to control theory was unnecessary because the Court could "affirm Ciminelli's convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory." *Ciminelli*, No. 21-1170, slip op. 9. The Court declined the Government's invitation "to cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a *different* wire fraud theory in the first instance." *Id*. As the Government noted in its BIO at 13, "[t]his Court is a 'court of review, not of first view.'" (citation omitted). Yet with this argument, the Government oddly asks the Court to go a step farther and "assume not only the function of a court of first view, but also of a jury" by denying the petition. *Ciminelli*, No. 21-1170, slip op. 9.

To be clear, the Government's unhappy students could not possibly support the conviction and sentence here. Those seven incidents could not result in a 235-month sentence and $65 million of restitution. Davis was punished based on every dollar he received from the VA, regardless of whether a student obtained high-paying employment or was happy with Retail Ready.

In any event, the asserted statements cannot possibly amount to fraud. According to the Fifth Circuit, Davis's only purported lie was that students "were told they *would be prepared to* work as technicians making $15-$16 an hour but then struggled to find work." App. 5 (emphasis added). There was no evidence that Davis ever spoke to the students, and even as the Fifth Circuit describes the purported lie, it is obviously not a lie. There was no promise that they would be guaranteed work—only that they would be prepared to work as technicians. Moreover, Retail Ready's state-best 77% percent employment rate—a rate higher than in many other industries, including, for example, the employment rate of many law schools—establishes that its graduates were "prepared" to work. ROA.16945-46. Indeed, six of the seven unhappy students were employed in the HVAC industry. Retail Ready did its job—the Government does not assert that Retail Ready's graduates were *not* prepared to work as technicians.

The Fifth Circuit also noted that "Retail Ready did not disclose how many months of their GI-Bill benefits would be depleted," App. 5, but neither the Government nor the courts have pointed to any duty for VA-approved businesses to affirmatively state how many months of GI-Bill benefits will be depleted under their programs.

Seven out of hundreds of students of Retail Ready had their $131,405.20 in GI-Bill funds (0.2 percent of the restitution) wired to Retail Ready and then complained about Retail Ready. Deeming Retail Ready itself a "fraudulent scheme" engaged in wire fraud based on this alone leaves any school—indeed, any company—subject to the prosecutor's whim.

II. The Fifth Circuit departed from other circuits' law on liability for money laundering.

Doubling down on their abusive overcharging, prosecutors here asserted Davis engaged in money laundering simply by buying things with the proceeds of his business—a home and three cars. As noted in the Petition, the Seventh and Tenth Circuits have held that a defendant must *know* he is using the proceeds of a crime to engage in money laundering. Pet. 23-24 (citing *United States* v. *Dingle*, 862 F.3d 607, 614 (7th Cir. 2017); *United States* v. *Weidner*, 437 F.3d 1023, 1041 (10th Cir. 2006)). The prosecution here presented no evidence Davis knew he was using the proceeds of a crime, and the Fifth Circuit simply accepted his knowledge of the lie on the initial application as such evidence. Even if Davis knew the initial lies were criminal, it is absurd to assume Davis *knew* that the money he ultimately used were proceeds of a crime when, among other things, (1) in 2016 and 2017 the VA was no longer relying on the "criminal" 2014 application, and (2) the "criminal" wires constituted only 0.2 percent of Retail Ready's income, but somehow tainted every cent he received from the VA. To know he was using the proceeds of wire fraud, Davis would have to know that the prosecutors would adopt such an abusive, overbroad view of wire fraud and that the court would agree. Yet

the Government has not identified a single case that supports this expansive view, and that view of sufficient "knowledge" to support a wire fraud conviction is inconsistent with Seventh and Tenth Circuit rulings.

III. The Fifth Circuit departed from other circuits' law on calculating "loss" from a purportedly criminal scheme.

What is more, restitution orders and sentencing rules look to a "loss" by the "victim." *See*, *e.g.*, 18 U.S.C. §§ 3663A, 3664. Here, the purported victim is the VA. The Government and the courts calculated the VA's "loss" as *all* of the tuition Retail Ready received from GI-Bill funds, even though 77% of enrollees graduated *and* gained employment, ROA.16945-46—the whole point of the GI-Bill. Had the VA not paid those funds to Retail Ready, it would have paid them to another HVAC technician school that, statistically, was likely to have *worse* employment outcomes, given Retail Ready's state-best graduation and placement percentages. *Id*. The GI-Bill paid for veterans to receive education for employment outside the military; hundreds of veterans received that education and then engaged in outside employment. That is not a "loss" by any reasonable definition, as recognized by the Third, Sixth, and Ninth Circuits. *See* Pet. 27 (citing *United States* v. *Banks*, 55 F.4th 246, 257 (3d Cir. 2022); *United States* v. *Kirilyuk*, 29 F.4th 1128, 1137 (9th Cir. 2022); *United States* v. *Riccardi*, 989 F.3d 476, 488 (6th Cir. 2021)). Nor was it an "intended loss," given Davis's obvious intent to provide the educational benefits to veterans that the VA paid for.

The Government's and the courts' calculation of "loss"—divorcing the payments from the services rendered—again establishes that Davis's conviction was based on a "right to control" theory. It did not matter that students, and thus the Government, received the benefit of the bargain by paying for vocational education that Retail Ready actually provided. To assert a "loss," the Government relied on the notion that it lost control of *to whom* it paid this benefit through Davis's purported fraud. App. 9; BIO at 11-12. Given that, the Court should, at a minimum, grant, vacate, and remand the case for reconsideration in light of *Ciminelli* v. *United States*, No. 21-1170, slip op. 2 ("the right-to-control theory is not a valid basis for liability under §1343").

This is a classic case of overcharging that elucidates the Government's overbroad use of wire fraud. The Government took a basic case of lying on a government form—a state government form—and used the wire fraud statute to grossly expand the criminal liability and consequences beyond any reasonable application to the conduct. The case presents a perfect vehicle for the Court to rein in prosecutors' abuse of the statute. Prosecutors will continue to charge legitimate business owners with wire fraud and money laundering abusively and seek excessive sentences and restitution orders until this Court clarifies the clear statutory language bounding liability to using the wires to execute a scheme to defraud.

CONCLUSION

For the foregoing reasons, the petition should be granted, and the judgment below should be reversed.

Respectfully submitted,

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