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NO. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**  
\_\_\_\_ TERM, 20\_\_\_\_

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MICHAEL ALAN WELKER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether a husband's actions in deceiving his wife regarding marital property constitutes federal mail and wire fraud?

## **PARTIES TO THE PROCEEDINGS**

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

### **DIRECTLY RELATED PROCEEDINGS**

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa and the United States Court of Appeals for the Eighth Circuit:

*United States v. Welker*, 4:20-cr-00162-SMR-001, (S.D. Iowa) (criminal proceedings) judgment entered January 6, 2022.

*United States v. Welker*, 22-1096 (8th Cir.) (direct criminal appeal), judgment entered July 27, 2023.

*United States v. Welker*, 22-1096 (8th Cir.) (direct criminal appeal), Order denying petition for rehearing en banc and rehearing by the panel entered September 14, 2023.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Michael Welker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

### **OPINIONS BELOW**

The Eighth Circuit's published opinion in Mr. Welker's case is available at 75 F.4th 820 and is reproduced in the appendix to this petition at Pet. App. p. 13.

### **JURISDICTION**

The Eighth Circuit entered judgment in Mr. Welker's case on July 27, 2023, Pet. App. p. 19, and denied Mr. Welker's petition for rehearing *en banc* on September 14, 2023. Pet. App. p. 21. This Court granted an extension request to file a petition for writ of certiorari.

This Court has jurisdiction over these cases under 28 U.S.C. § 1254(1).

### **RELEVANT STATUTORY PROVISIONS**

#### **18 U.S.C. § 1341**

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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or

such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

### **18 U.S.C. § 1343**

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. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

## STATEMENT OF THE CASE

### A. Introduction

Through the years, federal prosecutors have attempted to prosecute a wide variety of behavior within the mail and wire fraud statutes. *See, e.g., Skilling v. United States*, 561 U.S. 358, 400-01, 407-10 (2010) (collecting examples). This Court has consistently rejected those expansive interpretations, restricting mail and wire fraud to schemes to obtain money or property, and stating, “If Congress desires to go further, it must speak more clearly than it has.” *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). The Court has also been clear that federal wire and mail fraud statutes should not be used to enforce prosecutors or courts sense “of moral uprightness, of fundamental honesty, fair play and right dealing . . . .” *Skilling*, 561 U.S. at 418 (Scalia, J., concurring) (quoting *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967)).

With this background, just last term, this Court held that the “right-to-control” theory is an invalid basis for liability under federal fraud statutes. *Ciminelli v. United States*, 598 U.S. 306, 309 (2023). In *Ciminelli*, “the Government relied solely on the theory that the scheme defrauded [the alleged victim] of its right to control its assets.” 598 U.S. at 310 n.1. In Mr. Welker’s case, the prosecution, as to R.W., relied exclusively on this theory as well. R. Doc. 48 (acknowledging in response to Mr. Welker’s motion to dismiss that legally the funds could be considered marital property but arguing that R.W. was deprived of the “right to exercise control over how one’s money is spent.”).

*Ciminelli* rejected the right-to-control theory because it was an improper attempt to expand the federal wire and mail fraud statutes beyond criminalizing schemes to deprive people of traditional property interests. The Eighth Circuit in Mr. Welker's case should have done the same. Mr. Welker's case is the latest attempt to use federal fraud statutes to prosecute conduct outside the bounds of the federal wire and mail fraud statutes.

This Court should grant certiorari, as the Eighth Circuit's decision is inconsistent with this Court's precedent.

**B. Mr. Welker misleads his wife about the extent of insurance policy payouts deposited in their joint bank account.**

Mr. Welker and R.W. were married. R. Doc. 2. R.W. had a bank account at Wells Fargo Bank. *Id.* at p. 1. R.W. and Mr. Welker had a joint bank account at Bankers Trust. *Id.*

In September 2014, R.W. obtained a \$500,000 life insurance policy from Transamerica. *Id.* Welker was the writing agent for the policy. *Id.* R.W. paid the insurance premiums for the Transamerica policy from her Wells Fargo bank account. *Id.* at 2.

Also in September 2014, Mr. Welker submitted a life insurance application in R.W.'s name to National Life insurance. *Id.* R.W. had no knowledge of this application. *Id.* National Life approved the application in November 2014. *Id.*

In February 2015, R.W. requested a critical illness accelerated benefit from her Transamerica policy. R. Doc. 2, p. 2. Mr. Welker told R.W. the payout would be

\$47,428. *Id.* This was untrue. *Id.* Transamerica mailed a check for \$96,166.57 on August 10, 2015. *Id.* The check was deposited in Mr. Welker and R.W.’s Bankers Trust joint account. *Id.* From that account, two checks were written: (1) a check to R.W. for \$47,428, and (2) a check to “The Groundskeeper,” Welker’s small business, for \$47,250. *Id.*

On June 5, 2015, a similar request for an accelerated payout was submitted to National Life. *Id.* On September 23, 2015, National Life wired \$173,050 to the Bankers Trust joint account. *Id.* The next day, the funds were used to purchase a cashier’s check to R.W. for \$170,015. *Id.* That cashier’s check was exchanged for two cashier’s checks: (1) a check to “The Groundskeeper” for \$138,000, and (2) a check to Scottrade for \$32,000. *Id.*

In 201[8], R.W. and Mr. Welker divorced. *Id.* at p. 3. Years after the divorce was finalized, R.W. learned of the true nature of the disbursements.

### **C. Welker is federally indicted for mail fraud and wire fraud.**

Based upon this discovery, on September 16, 2020, Mr. Welker was indicted on one count of mail fraud, in violation of 18 U.S.C. § 1341, and one count of wire fraud, in violation of 18 U.S.C. § 1343. R. Doc. 2. The basis for the two counts was the National Life policy. *Id.*

The indictment detailed the alleged “scheme and artifice to defraud.” *Id.* Overall, the indictment alleged that from August 2014 to September 24, 2015, Mr. Welker “knowingly devised, intended to devise, and participated in a scheme and

artifice to defraud R.W. and National Life, and to obtain money from R.W. and National Life by means of materially false and fraudulent pretenses, representations, and promises, and by intentional concealment of material facts.” *Id.* The indictment continued:

It was part of the scheme that [Mr. Welker] falsely represented to R.W. that Transamerica paid out \$47,428 on her life insurance policy, when, in reality, Transamerica paid R.W. \$96,166.57.

It was further part of the scheme that [Mr. Welker] concealed from R.W. that he paid himself \$47,250 from R.W.’s Transamerica life insurance policy.

It was further part of the scheme that [Mr. Welker] applied for a National Life insurance policy on behalf of R.W., without her knowledge or consent.

It was further part of the scheme that [Mr. Welker] told R.W. she needed to complete a second health physical for Transamerica, when, in fact, the second health physical was for the National Life insurance policy of which R.W. had no knowledge.

It was further part of the scheme that [Mr. Welker] forged R.W.’s signatures on National Life insurance documents and misrepresented to R.W. what the National Life insurance documents were to induce R.W. to sign the documents, without her knowledge of the National Life insurance policy.

It was further part of the scheme that [Mr. Welker] submitted an accelerated benefit claim to National Life, on behalf of R.W., without R.W.’s knowledge or consent.

It was further part of the scheme that [Mr. Welker] took the funds from National Life, intended for R.W., for his own use and failed to tell R.W. about the funds.

R. Doc. 2, pp. 3-4.

**D. Mr. Welker files a motion to dismiss the indictment for failure to state a claim.**

Mr. Welker moved to dismiss the indictment. R. Doc. 35. He noted that the wire and mail fraud statutes required a scheme to deprive someone of money or property. *Id.* Mr. Welker argued that, because under Iowa law, the insurance payouts were marital property, he did not deprive his then wife of anything of value. *Id.* Instead, Mr. Welker asserted the indictment alleged he turned marital property into marital property, which is not fraud. *Id.* Alternatively, Mr. Welker argued that National Life insurance company was not defrauded, as it paid out a benefit when it was allowed under the policy.

The prosecution resisted. R. Doc. 48. The prosecution asserted that Mr. Welker “exploited and benefitted from his wife’s cancer diagnosis” and “devised a scheme to defraud his wife out of money.” *Id.* The prosecution acknowledged that legally the funds could be considered marital property, but, argued that R.W. was deprived of the “right to exercise control over how one’s money is spent.” *Id.* The response did not state how National Life was allegedly defrauded out of money. *Id.*

In his reply, Mr. Welker noted that the prosecution abandoned any argument that National Life was defrauded. R. Doc. 49, p. 1. Mr. Welker maintained that the payout was marital property. *Id.* He also asserted that the prosecution’s “intangible property” theory was not valid under the case law. *Id.*

The district court denied the motion to dismiss by written order. R. Doc. 50; Pet. App. p. 2. First, the court found it was unnecessary to show actual loss or harm to the alleged victims. R. Doc. 50; Pet. App. p. 5. The court determined that the question of joint marital property was not appropriate for a motion to dismiss:

The Transamerica Policy and National Life Policy belonged to R.W. and she retained the right to change her beneficiary whenever she chose. If she did so, it is possible that the insurance policy would have been joint property and a divorce decree would have determined an answer to that question and divided the policy—along with the rest of the marital property—accordingly. . . . But that is a fact question reserved for the factfinder, not a cause to dismiss the Indictment.

R. Doc. 50; Pet. App. pp. 5-6. Further, the court noted that the indictment alleged Welker deprived R.W. of her right to use property, and this was sufficient. R. Doc. 50; Pet. App. p. 6.

The court also found that the indictment established a scheme to defraud National Life. R. Doc. 50; Pet. App. p. 6. The extent of the court's ruling is as follows:

Concerning the intent to defraud National Life, Defendant had the design to defraud the company when he submitted forged documents with the object of inducing the company into entering into an insurance contract so he could receive the proceeds and conceal them from R.W. The Indictment alleges sufficient facts to satisfy the burden at this stage.

R. Doc. 50; Pet. App. p. 6.

#### **E. Mr. Welker enters a conditional guilty plea.**

Mr. Welker entered a conditional guilty plea to the wire fraud count. R. Doc. 65. As part of the plea, Mr. Welker preserved the right to challenge the court's denial

of his motion in dismiss on appeal. R. Doc. 65, p. 10. The case proceeded to sentencing. The district court ultimately sentenced Mr. Welker to a five-year term of probation. R. Doc. 95; Pet. App. p. 8.

#### **F. Mr. Welker appeals, and the Eighth Circuit Court of Appeals affirms.**

Mr. Welker appealed the denial of his motion to dismiss. While his appeal was pending, the Supreme Court decided *Ciminelli v. United States*, 598 U.S. 306 (2023), which held that the right-to-control theory was an invalid basis to support a federal wire or mail fraud conviction. Mr. Welker asserted that *Ciminelli* foreclosed the government's theory of prosecution in his case.

The Circuit rejected Mr. Welker's arguments and affirmed the denial of his motion to dismiss. *United States v. Welker*, 75 F.4th 820 (8th Cir. 2023). The Circuit's decision did not reference *Ciminelli* whatsoever. Instead, the Court held that the indictment's allegation that Mr. Welker deceived his wife about the extent of the insurance payout money was sufficient to plead federal fraud. 75 F.4th at 823.

The Court acknowledged that the parties agreed the funds were legally marital property. *Id.* at 823 n.5. The Court then held that this was irrelevant, because even if Mr. Welker's actions might not be actionable under state law as an unlawful deprivation of property, his actions would still constitute federal wire fraud. *Id.* at 823. Further, the Court noted that under Iowa law, it was a crime to damage or destroy marital property. *Id.* (citing *State v. Zeien*, 505 N.W.2d 498 (Iowa 1993)).

## REASONS FOR GRANTING THE WRIT

### I. The Eighth Circuit’s holding that Mr. Welker’s actions in deceiving his wife constituted federal mail and wire fraud is inconsistent with Supreme Court precedent.

“The mail and wire fraud statutes at issue here prohibit the use of interstate mail or wire facilities to effect ‘any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.’” *United States v. Hansmeier*, 988 F.3d 428, 436 (8th Cir. 2021) (quoting 18 U.S.C. §§ 1341, 1343). This Court recently reiterated that the wire fraud and mail fraud statutes do not criminalize “all acts of dishonesty.” *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020). Instead, to establish wire or mail fraud, the goal of the fraud must be to obtain “money or property.” *Id.* The “object of the fraud” must be causing “loss to the victim.” *Id.* at 1573. “[T]he federal fraud statutes criminalize only schemes to deprive people of traditional property interests.” *Ciminelli v. United States*, 598 U.S. 306, 309 (2023).

Mr. Welker’s position is straight forward—if he legally had equal rights to the funds, as the parties agreed, how could he have deprived another of the property?<sup>1</sup> If the funds were marital property, who did he *take* the money from? According to the indictment, the marital funds were deposited in their joint bank account. If he had an equal right to the funds, how could he be defrauding another out of their property?

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<sup>1</sup> See Iowa Code § 598.21(5); *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997).

The only wrong is that Mr. Welker deceived his wife about the amount of their assets, depriving her of an opportunity to object to how Mr. Welker used the funds or voice an opinion in how to use the marital funds. This is simply the right-to-control theory, which this Court just rejected in *Ciminelli v. United States*, 598 U.S. 306 (2023). In *Ciminelli*, the defendant was convicted of wire fraud based upon contracts his construction company won. The contracts were part of a large-scale development project in New York, administered by the nonprofit Fort Schuyler Management Corporation. The evidence established that the defendant paid off a lobbyist, who then paid off a Fort Schuyler board member, to ensure that Fort Schuyler would develop metrics for bidding that would make it virtually guaranteed that the defendant's company would win the construction bids. The prosecution's theory was that the defendant's actions deprived Fort Schuyler of "potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Id.* at 308.

This Court unanimously rejected this theory of prosecution. The Court again reaffirmed that fraud statutes are "limited in scope to the protection of property rights." *Id.* at 314. These "property rights" do not include "the right to control [one's] assets." *Id.* The Court noted the right-to-control theory "treats mere information as the protected interest, [and therefore] almost any deceptive act could be criminal." *Ciminelli*, 598 U.S. at 315. The Eighth Circuit in Mr. Welker's case erred in not

treating *Ciminelli* as controlling to the issue presented and refusing to dismiss his case.

Of course, this is not to say that Mr. Welker’s actions were not wrong, and R.W. was not entitled to relief in some other fashion. But Mr. Welker’s deceptive actions toward his wife were not a federal crime. Instead, as *Ciminelli* confirmed, this kind of “deceptive action[]” is “traditionally left to state contract and tort law.” *Id.* at 315. Prosecuting this type of conduct as federal fraud is “in flat contradiction with [the Court’s] caution that, ‘[a]bsent [a] clear statement by Congress,’ courts should ‘not read the mail [and wire] fraud statute[s] to place under federal superintendence a vast array of conduct traditionally policed by the states.’” *Ciminelli*, 598 U.S. at 315-16 (quoting *Cleveland v. United States*, 531 U.S. 12, 27 (2000)) (alterations in original). For example, one potential remedy under these circumstances was to argue during divorce proceedings that any mismanagement of marital funds entitled R.W. to an unequal disbursement of marital assets, *In re Marriage of Kimbro*, 826 N.W.2d 696, 700-01 (Iowa 2013). Not federal charges.

Finally, the Eighth Circuit’s reliance on Iowa’s case law on destruction of marital property is misplaced. Mr. Welker’s indictment does not allege any destruction or damage of marital property. That a spouse cannot intentionally damage marital property does not mean a spouse cannot use marital property.

As a final note, the Eighth Circuit did not reach whether Mr. Welker’s actions as alleged towards National Life Insurance could constitute federal wire or mail

fraud. It cannot, as National Life Insurance received “the full economic benefit of its bargain.” *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015). “[E]ven if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims ‘received exactly what they paid for.’” *United States v. Takharov*, 827 F.3d 1307, 1314 (11th Cir. 2016) (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)). Mr. Welker’s indictment does not allege otherwise.

In fact, when presented with Mr. Welker’s conduct, National Life asserted that it acted as required under the enforceable contract. R. Doc. 35, Def. Ex. G. As the district court acknowledged, National Life “appear[ed] to disavow any further interest in the matter.” R. Doc. 50; Pet. App. p. 5. Therefore, the indictment does not allege a scheme to defraud National Life.

## **CONCLUSION**

“A conclusion that someone is a scoundrel . . . is not enough for criminal liability.” *United States v. Donoho*, 76 F.4th 588, 602 (7th Cir. 2023) (Easterbrook, J., concurring) (citing *Ciminelli*, 598 U.S. 306 (2023)). The Eighth Circuit’s decision has opened the floodgates to allow spouses to seek relief from federal prosecutors when angered or wronged by how their spouse has used marital funds. The prosecution against Mr. Welker is the latest attempt by federal prosecutors to improperly expand the scope of federal wire and mail fraud statutes. “[C]ourts are [not] free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby let in

through the back door the very prosecution theory that the Supreme Court tossed out the front.” *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988).

For the reasons stated herein, Mr. Welker respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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