No. _____

IN THE

Supreme Court of the United States

KYLE MELKONIAN,
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

HECTOR A. DOPICO
INTERIM FEDERAL PUBLIC DEFENDER
ANSHU BUDHRANI
Counsel of Record
ASSISTANT FEDERAL PUBLIC DEFENDER
150 West Flagler Street
Suite 1700
Miami, FL 33130
305-530-7000
Anshu_Budhrani@fd.org

Counsel for Petitioner

April 4, 2024

QUESTION PRESENTED

The federal theft-of-government-property statute lays out two distinct offenses in two separate paragraphs, punishing the initial theft of government property and subsequent receipt of already-stolen government property. *See* 18 U.S.C. § 641.

The question presented is whether the Eleventh Circuit's conflation of 18 U.S.C. § 641's two distinct offenses runs afoul of the plain text of the statute, its application by every other circuit court that has addressed the issue, as well as this Court's precedents.

PARTIES TO THE PROCEEDING

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. Melkonian*, No. 1:21-cr-20414-DPG (S.D. Fla.) (Judgment entered Oct. 24, 2022).
- *United States v. Melkonian*, No. 22-13543 (11th Cir. Nov. 8, 2023), *reh'g denied*, DE 50 (Jan. 5, 2024).

There are no other related proceedings within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IN THE

Supreme Court of the United States

KYLE MELKONIAN,
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

Kyle Melkonian ("Petitioner") respectfully seeks 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 2023 WL 7391695 (11th Cir. Nov. 8, 2023).

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 issued its decision on November 8, 2023 (App. A), and Petitioner timely moved for rehearing on November 29, 2023. The Eleventh Circuit denied rehearing on January 5, 2024 (App. B.), making Petitioner's petition due on or before April 4, 2024. This petition is timely filed.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 641

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

INTRODUCTION

The theft-of-federal-property statute—18 U.S.C. § 641—makes it a crime to embezzle, steal purloin, or knowingly convert federal property, and to receive, conceal, or retain the same, "knowing it to have been embezzled, stolen, purloined, or converted." 18 U.S.C. § 641. This petition presents a question concerning the two

separate offenses § 641 delineates—the latter requiring receipt, concealment, or retention of already-stolen federal property—and the Eleventh Circuit's collapsing of them into one amalgamated offense that defies the plain language of the statute and this Court's precedents.

Petitioner Kyle Melkonian was convicted of one count of receiving, concealing, and retaining his deceased father's Social Security benefits, knowing the money to have previously been stolen, purloined, and converted. Petitioner, in proceeding to a stipulated bench trial, maintained that the government could never satisfy the elements of § 641's second paragraph—which punishes the receipt, concealment, or retention of already-stolen government property—because doing so under the facts alleged would require the court to find that he simultaneously stole and received from himself his deceased father's Social Security benefits. The government, however, persisted on this novel theory and obtained a conviction, and the Eleventh Circuit affirmed. In so affirming, the Eleventh Circuit approved of the government's novel argument—that Petitioner knew the improperly-deposited funds were stolen from the government immediately upon deposit into his father's bank account, where he contemporaneously received them. He was, per the government, the individual who both stole and received what he stole from himself in one simultaneous action. In adopting the government's theory, the Eleventh Circuit broadened the scope of § 641's reach far beyond what Congress explicitly intended, and in a manner that allows the government to circumvent applicable statutes of limitations.

This petition that follows satisfies all the criteria for this Court's review. First and foremost, the Eleventh Circuit, in affirming Petitioner's conviction on the above facts and the government's novel theory, has created a circuit split. Every other circuit to address these facts has done so under § 641's first paragraph, because that is where such a prosecution belongs. This expansion of § 641's second paragraph to encapsulate a simultaneous stealing and receipt is unheard of and in direct opposition to the plain language and structure of the statute. This expansion of an already widely-used statute cannot stand, especially when it directly contravenes Congress's intent.

The Court should grant certiorari and reverse.

STATEMENT OF THE CASE

I. Factual Background

The parties agreed to the following factual stipulations:

> 1. KYLE MELKONIAN (the "Defendant") hereby acknowledges and voluntarily stipulates and agrees to the following facts set forth below:
>
> 2. Title 2 retirement benefits are funds owned by the United States federal government, administered by the Social Security Administration (SSA), and paid by the United States Department of Treasury to certain eligible individuals.
>
> 3. The Defendant's father, an individual with initials P.M., lawfully started receiving Title 2 retirement benefits from SSA in July 1992 after applying for these benefits at age 65.
>
> 4. P.M. resided in Miami-Dade County, in the Southern District of Florida, from the date he received

these Title 2 benefits until his death on October 15, 2006, in Miami Beach, Florida, at the age of 79.

5. P.M. was survived by his three adult children, including the Defendant. The Defendant did not notify SSA of P.M.'s death.

6. A Title 2 recipient's entitlement to receive retirement benefits from SSA legally ceases in the month of his or her death. P.M.'s entitlement to receive Title 2 retirement benefits ceased in October 2006. Beginning November 1, 2006, SSA did not owe P.M. Title 2 retirement benefits.

7. The defendant was not entitled to receive, retain, or use P.M.'s Title 2 retirement benefits after P.M.'s death.

8. The Defendant and P.M. lived together at 230 NW 143rd Street in Miami, Florida (the "Residence") from November 2000 through the date of P.M.'s death. The Defendant continued to live at the Residence through present day.

9. P.M. owned the Residence until June 8, 1992, when he transferred title to the Residence to the Defendant by warranty deed filed in the Miami-Dade public record.

10. From at least January of 2001 to May of 2020, the landline phone number associated with the Residence was 305-688-3686.

11. P.M. had a checking account in Miami, Florida located at American Bank ending in 0837 ("the American Bank Account"), which he opened in November 2000. P.M. was the sole owner and authorized signer on the American Bank Account.

12. P.M.'s Title 2 retirement benefits were directly deposited by SSA into the American Bank Account since November 2000. P.M.'s Title 2 retirement benefits were visibly marked on the American Bank Account statements as deposits from "SSA TREAS 310 - XX SOC SEC."

13. The Defendant knew P.M.'s Title 2 retirement benefits were deposited by SSA into the American Bank Account and that these benefits were paid to P.M. by an agency of the United States of America.

14. The Defendant knew that he had no lawful authority to access the American Bank Account or to receive, retain, or use any of the Title 2 retirement benefits deposited by SSA into that account after P.M.'s death.

15. Because SSA did not receive notice of P.M.'s death, SSA continued to deposit Title 2 retirement benefits for P.M. into the American Bank Account from on or about November 3, 2006 through on or about January 3, 2020 in the total amount of $286,944.

16. The SSA made the following deposits of Title 2 retirement benefits into the American Bank Account after P.M.' s death:

Approximate Payment Date	Number of Payments	Net Payment Amount Monthly	Totals
11/3/2006 - 12/3/2006	2	$1533	$3066
I /3/2007-12/3/2007	12	$1581	$18972
1 /3/2008-12/3/2008	12	$1617	$19404
1/3/2009-12/3/2011	36	$1716	$61776
1/3/2012-12/3/2012	12	$1828	$21936
1/3/2013-12/3/2013	12	$1845	$22140
1/3/2014-12/3/2014	12	$1856	$22272
1/3/2015-12/3/2015	12	$1963	$23556
1/3/2016-12/3/2016	12	$1917	$23004

1/3/2017-12/3/2017	12	$1892	$22704
1/3/2018-12/3/2018	12	$1908	$22896
1/3/2-2019-12/3/2019	12	$1938	$23256
1/3/2020	1	$1962	$1962

17. The Defendant knew the above deposits were improperly made by SSA and that these Title 2 retirement benefits should have ceased at the time of his father's death.

18. The Defendant knowingly and willfully kept his father's death concealed from SSA so that SSA continued to deposit the Title 2 retirement benefits into the American Bank Account so that he could receive, retain, and use these funds for his benefit.

19. After P.M.'s death, the Defendant continually unlawfully accessed the American Bank Account online using after P.M.'s death using IP address 65.6.207.159, which was the IP address assigned to the Residence under his deceased father's AT&T account.

20. The Defendant knew that each time he unlawfully accessed the American Bank Account after November 1, 2006, that he was not entitled to receive, retain or use the Title 2 retirement benefits deposited into that account. The Defendant also knew the Title 2 retirement benefits deposited into American Bank account by SSA were wrongfully paid benefits which should have ceased at the time of P.M.'s death.

21. The Defendant used the Title 2 retirement benefits deposited in the American Bank Account after November 1, 2006, to pay his own bills at the Residence, including Florida Power & Light, AT&T, and Direct TV after P.M.'s death.

22. The Defendant also used the benefits deposited by SSA in American Bank account to pay his

Chase Bank credit card account ending in 5540, which was previously designated by numbers ending in 8664, 9781, and 5258. This credit card account was jointly titled in the Defendant's and P.M.'s name.

23. The Defendant used the Chase credit cards after P.M.' s death for personal purchases from Amazon, Pay Pal, and a variety of other retailers in Miami-Dade County and elsewhere.

24. In addition to the American Bank Account, P.M. had a bank account at J.P. Morgan Chase Bank ending in 2570 ("Chase Account") that he opened on March 18, 2003. P.M. was the sole owner and authorized signer on this account. The Defendant knew that he did not have lawful authority to access the Chase Account.

25. The Defendant had a recurring check issued every three months in P.M.'s name from the American Bank Account and automatically deposited in the Chase Bank account. The checks were issued in amounts between $1,500 to $2,000.

26. Once the checks were deposited in the Chase Account, the Defendant withdrew the Title 2 retirement benefits in cash from the account at various ATMs located in Miami-Dade County for his own use and gain. On January 3, 2021, an ATM camera captured the Defendant withdrawing Title 2 retirement benefits from the Chase Account.

27. From 2011 to 2020, the Defendant received multiple written correspondences sent to his Residence from SSA. These correspondences were addressed to P.M and contained information about his Title 2 retirement benefits referencing P .M.' s receipt of Title 2 retirement benefits.

28. On or about November 21, 2019, the Defendant received one of these letters from SSA addressed to P.M. advising that Lisa Rossi, an SSA technical expert employee, would call P.M. on December 2, 2019. The letter stated that the purpose of the call was to

speak with P.M. about the correct payment of Title 2 retirement benefits.

29. On or about December 2, 2019, Lisa Rossi called the landline number ending in 3686 at the Defendant's Residence.

30. The Defendant answered Lisa Rossi's call impersonating his deceased father, P.M, and falsely claimed that P.M. was alive. The Defendant provided his deceased father's personal information and claimed that he was currently living with his son "Kyle." The Defendant denied receiving any prior letters from SSA.

31. The Defendant knowingly and willfully misrepresented himself as P.M. to intentionally conceal his father's death from SSA so that he could continue to retain his deceased father's Title 2 retirement benefits.

32. After the telephone call with Ms. Rossi, the Defendant received follow-up letters from SSA dated December 13, 2019, and December 16, 2019, requesting P.M. appear in-person at a local SSA field office. The Defendant did not respond or appear at the field office.

33. On February 11, 2020, agents from SSA's Office of Inspector General (OIG) knocked on the door of the Residence and asked to speak to P.M. The Defendant answered the door and advised agents that his father could not speak with them and instructed them to leave the property.

34. SSA terminated P.M.'s Title 2 retirement benefit payments in February of 2020 after receiving confirmation of his death and a copy of his death certificate from the State of Florida.

35. On April 22, 2020, the United States Treasury reclaimed the remaining funds in the American Bank Account, which was a total of $2,784.03.

36. By signing this stipulation, Defendant acknowledges the truth of the facts set forth above and that he understands this stipulation will be used against him at

> trial and any subsequent proceeding. The Defendant further acknowledges that a factual basis exists for the stipulation.

(Dist. Ct. Dkt. No. 37.)

II. Procedural History

On August 4, 2021, a federal grand jury sitting in the Southern District of Florida returned a one-count indictment against Petitioner, charging him with receiving, concealing, and retaining his father's social security benefits, knowing the money to have been stolen, purloined, and converted, in violation of 18 U.S.C. § 641. (Dist. Ct. Dkt. No. 3.)

Petitioner elected to proceed to a bench trial. In anticipation of trial, the parties entered into certain factual stipulations. (Dist. Ct. Dkt. No. 37.) The stipulated bench trial commenced on June 17, 2022 and lasted two days. ((Dist. Ct. Dkt. No. 39; (Dist. Ct. Dkt. No. 42.) The government rested on the factual stipulations and did not introduce any further evidence at trial. (Dist. Ct. Dkt. No. 76 at 7.) Petitioner than moved under Fed. R. Crim. P. 29 for a judgment of acquittal, which the district court denied. (Dist. Ct. Dkt. No. 76 at 8, 30.) Petitioner then renewed his motion for a judgment of acquittal at the close of all of the evidence, which the district court indicated it would deny. (Dist. Ct. Dkt. No. 76 at 31, 38.) The court did, however, allow the parties to submit written briefing on the issues raised and discussed at trial prior to closing arguments. (Dist. Ct. Dkt. No. 76 at 39.) Petitioner filed a motion to reconsider the district court's denial of his motion for judgment of

acquittal, which the government opposed. (Dist. Ct. Dkt. No. 40; Dist. Ct. Dkt. No. 41.)

The district court, after hearing further argument, denied Petitioner's motion and adjudged him guilty. (Dist. Ct. Dkt. No. 77 at 39; Dist. Ct. Dkt. No. 45.) In so denying the motion, however, the district court did note that the "issues raised by [Petitioner] are interesting, and it is a novel legal issue," which will most likely need to be resolved by the court of appeals. (Dist. Ct. Dkt. No. 77 at 40–41.)

Petitioner appealed his conviction to the Eleventh Circuit, and in an unpublished per curiam opinion, a three-judge panel of the Eleventh Circuit affirmed Petitioner's conviction, conflating the two paragraphs of § 641. While the panel recognized longstanding precedent dictating that "a defendant cannot be convicted under § 641 for both stealing government property and receiving the same property," App. A at 3a, it then affirmed a conviction under § 641's second paragraph involving a contemporaneous stealing and receipt of the same government property. In so affirming, the panel reasoned that Petitioner "knew the improperly deposited funds, induced by his continued wrongdoing, were stolen from the government upon deposit into [his father's] American Bank account." App. A at 3a. But such a holding requires what § 641 expressly prohibits in both structure and plain language—a contemporaneous stealing and receipt of the same property, which writes out of § 641's second paragraph the requirement that the defendant receive the funds knowing them "to have been" stolen at some previous moment in time. 18 U.S.C. § 641.Petitioner moved for rehearing, which the court denied. *See* App. B.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Conflation of § 641's Separate Offenses—Which Prohibits the Stealing of Government Property and the Receipt of Already-Stolen Government Property "Knowing It to Have Been" Stolen —Is Wholly Inconsistent With the Statute's Structure and Plain Language

The Eleventh Circuit's collapsing of 18 U.S.C. § 641 into one super offense that encompasses a simultaneous stealing of government property and receipt of that same already-stolen property creates a circuit split where none existed before. The court below affirmed Petitioner's conviction for receiving stolen government property when the government's evidence demonstrated a simultaneous stealing and receipt of the same property. That decision is out of line with every other circuit court to address § 641, as well as with the plain language of the statute and this Court's very clear precedent. This case is an ideal vehicle to resolve this conflict and reaffirm § 641's proper structure and reach.

A. Section 641's Structure and Plain Text Illuminate the Absurdity of the Eleventh Circuit's Holding

Petitioner was adjudicated guilty—after a bench trial—of violating the second paragraph of 18 U.S.C. § 641, which prohibits the receipt, concealment, or retention of property belonging to the United States, "knowing it to *have been* embezzled, stolen, purloined, or converted." 18 U.S.C. § 641 (emphasis added). The government chose to charge him under the second paragraph of § 641, which penalizes the receipt, concealment, or retention of previously-stolen property—not the stealing itself, which

is penalized separately under § 641's first paragraph. It did so presumably to avoid a statute of limitations issue.

But because the government made that choice, the Eleventh Circuit, in affirming Petitioner's conviction, had to twist itself into a logical impossibility, utilizing reasoning that conflates both paragraphs of § 641 and fails to account for the plain language and structure of the statute. The court's holding cannot be squared with the plain text of the statute.

The second paragraph of § 641 prohibits the receipt, concealment, or retention of money belonging to the United States "with intent to convert it to [one's] own use or gain, knowing it to *have been* embezzled, stolen, purloined or converted." 18 U.S.C. § 641 (emphasis added). That is, the "proscribed act,"—the receipt, concealment, or retention of the money with intent to convert it to one's own use or gain—is "in the present tense," while the reference to the money's status as stolen or converted—knowing it to have been stolen or converted—is in the perfect tense, "denoting an act that has been completed." *Barrett v. United States*, 423 U.S. 212, 216–17 (1976). Congress's use of both the present tense and the perfect tense is significant here. *See id.* at 217 ("Congress knew the significance and meaning of the language it employed."). The clauses cover different periods of time and are not coterminous.

"Consistent with normal usage, [courts] have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010) (citing *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"); *Gwaltney of*

Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option"); *Barrett*, 423 U.S. at 216 (observing that Congress used the present perfect tense to "denot[e] an act that has been completed")).

Here, Congress used the perfect tense—*have been*—to describe what was required of the object being received, concealed, or retained—here, the Social Security benefits. That is, the benefits needed to have been previously stolen or converted. *See Barrett*, 423 U.S. at 216 (indicating that verbs in the perfect tense—which use the words "have" or "has"—"denot[e] an act that has been completed at some point in the past"); *see also* Bryan A. Garner, Garner's Modern English Usage 896–97 (4th Ed. 2016) (noting that the perfect tense denotes "an action having been completed at some indefinite time in the past"); *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) ("Congress's use of the present perfect tense—'has . . been admitted'—is significant here. The present perfect tense refers to . . . a time in the indefinite past") (quotation marks omitted); The Chicago Manual of Style § 5.132 (17th ed. 2017) (making clear that the present-perfect tense refers to "a time in the indefinite past").

Congress's choice of verb tense in the second paragraph of § 641 is directly adverse to the Eleventh Circuit's holding. It cannot be that the funds were simultaneously stolen and received by Petitioner because Congress's use of the perfect tense requires that the benefits have been stolen or converted in the past, prior to their receipt. *See* William Strunk Jr. & E.B. White, The Elements of Style 31

(4th ed. 2000) (noting that "antecedent action" is expressed by the perfect tense). Petitioner cannot have simultaneously stolen the benefits and received them from himself. The plain language of the statute simply does not allow such an argument.

B. The Eleventh Circuit's Melding of § 641's Two Offenses into One Contemporaneous Offense Directly Conflicts with This Court's Holdings and Longstanding Principles of Common Law

This Court has noted that in prohibiting the receipt of stolen property, "Congress was trying to reach a new group of wrongdoers, not multiply the offense of the robbers themselves." *Milanovich v. United States*, 365 U.S. 551, 554 (1961) (quotation marks omitted). That is, the provision of § 641 that makes the receipt of stolen property an offense came into the law later than the provision relating to robbery. *Id.* So, from its inception through its evolution, the two paragraphs of § 641 were meant to punish entirely separate conduct—separated both by action taken and the passage of time. This is so because "[i]t is hornbook law that a thief cannot be charged with committing two offenses—that is, stealing and receiving the goods he has stolen." *Milanovich*, 365 U.S. at 558 (Frankfurter, J., dissenting). "[A] man who takes property does not at the same time give himself the property he has taken." *Id.*

But that is precisely what the Eleventh Circuit approved of here. The conduct charged—Petitioner's alleged stealing and simultaneous receipt of his father's social security checks—is a legal impossibility. It depends upon a simultaneous or contemporaneous stealing and receipt, which is antithetical to the plain language of § 641 and its overall structure, because "a man who takes property does not at the same time give himself the property he has taken." *Id.*

In *Milanovich*, this Court vacated both the larceny and receiving counts and remanded for a new trial with jury instructions making clear that "a guilty verdict could be returned upon either count but not both." *Id.* at 554–55. That is, this Court made clear that a defendant can be convicted of either larceny or receiving, "but not of both." *Id.* at 555. Precisely so here. It defies logic, longstanding principles of common law, and the plain language of § 641 to collapse its two paragraphs to allow for a conviction reliant upon a simultaneous stealing and receipt.

C. The Eleventh Circuit's Holding Here Creates a Circuit Split Because It Allows for Prosecution on a Theory Not Previously Advanced Because of Its Outright Conflict With the Statute's Plain Language

Every other case of Social Security fraud of the sort alleged here has been charged under § 641's first paragraph—either as stealing or embezzling. *See, e.g.*, *United States v. Smith*, 373 F.3d 561 (4th Cir. 2004); *United States v. Brunell*, 320 F. Supp. 3d 246 (D. Mass. 2018). This is so because the core of the crime is the stealing of social security funds to which one is not entitled—mainly in the form of continuing to passively receive the funds without every informing the Social Security Administration of the passing of the intended payee.

But, in order to circumvent a five-year statute of limitations here, which indisputably applies to § 641's first paragraph, the government got creative and charged Petitioner under § 641's second paragraph, which, in the Eleventh Circuit, is analyzed as a continuing offense. Thus, the statute of limitations did not begin to run here until Social Security's mistake was uncovered and its payments stopped. In order to fit Petitioner's conduct under § 641's second paragraph, however, the

government had to propound a novel theory, which the Eleventh Circuit adopted. In so doing, the Eleventh Circuit has stranded itself on an island, out of line with the plain language and structure of the statute and with every other court to address this factual scenario.

II. The Question Presented Is Important

1. Section 641 has far-reaching applications, beyond the Social Security context. Because it prohibits the theft or misuse of federal government "thing[s] of value"—a broad, as-yet undefined term—its application is broad. But even when honing in on the Social Security context, its proper application has far-reaching consequences. For example, schemes involving the fraudulent receipt of Social Security benefits are both pervasive and, due to their difficulty to detect, costly to the government. William Admussen, *Passive Embezzlement Schemes As Continuing Offenses*, 86 U. CHI. L. REV. 1397, 1438 & n.25 (2019). In 2015, for example, the Office of the Inspector General for the Social Security Administration closed 529 cases of individuals fraudulently receiving their deceased relatives' benefits, which is similar to what occurred here. *See id.* at 1438 & n.26.

2. Additionally, what the Eleventh Circuit approved of here has far-reaching consequences for all theft-related offenses that punish both the stealing and receipt of already-stolen goods. This is so because the Eleventh Circuit's approval of the government's charging decision here allows the government to circumvent statutes of limitations. Here, the government charged Petitioner under § 641's second paragraph instead of the first paragraph—the paragraph it has always used when

prosecuting such an offense—because it was bumping up against a five-year statute of limitations.

The current default federal criminal statute of limitations provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a). In the Eleventh Circuit, while paragraph one of § 641 is a determinate offense, paragraph two is considered a continuing offense, whereby the statute of limitations commences running on the date of the last act that furthers the crime. *See United States v. Maher*, 955 F.3d 880, 885 (11th Cir. 2020). Thus, in order to hold Petitioner accountable for all social security funds erroneously deposited, the government had to turn his offense into a continuing offense, which required the court to find a simultaneous stealing and receipt. That is, because the conduct spanned over a decade, the government urged, and the Eleventh Circuit adopted, a reading of § 641 that is incompatible with the plain language of the statute as well as with the applicable statute of limitations, which exists precisely to limit exposure to criminal prosecution following an allegedly illegal act.

As such, the question presented is one of great public importance, not only because of the far and wide-reaching applications of § 641, but also because of the far and wide-reaching implications of allowing the government to charge its way around statutes of limitations in this manner. This Court's intervention is required

III. This Petition Is an Ideal Vehicle

This case presents the perfect opportunity for the Court to clarify the application of § 641, and especially the distinction Congress intended between its two paragraphs. The last time the Court substantively addressed § 641 was in 1961, over sixty years ago. The statute's use has only expanded since then, and this Court's guidance is required.

Procedurally, the question is squarely presented here. And factually, this case is ideal because the lower court's erroneous denial of Petitioner's motion for a judgment of acquittal resulted in error that merits reversal.

Both in the district court and on appeal, Petitioner challenged the validity of his conviction under § 641's second paragraph. The district court denied his motion for a judgment of acquittal, but not before noting that the "issues raised by [Petitioner] are interesting, and it is a novel legal issue," which will most likely need to be resolved by the court of appeals. (Dist. Ct. Dkt. No. 77 at 40–41.) He raised the same issue before the Eleventh Circuit, and, when denied, raised the issue again in a petition for rehearing. *See* App. A and App. B.

Factually, too, this case is an ideal vehicle because of the significance of the erroneously denied motion for a judgment of acquittal. The motion is case dispositive. That is, if this Court reverses the Eleventh Circuit, Petitioner's conviction must be vacated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HECTOR A. DOPICO
INTERIM FEDERAL PUBLIC DEFENDER

By: /s/ *Anshu Budhrani*
Anshu Budhrani
Assistant Federal Public Defender
Counsel of Record
150 West Flagler Street
Suite 1700
Miami, FL 33130
(305) 530-7000
Anshu_Budhrani@fd.org

Counsel for Petitioner

Miami, Florida
April 4, 2024