No. 20-1129

In the Supreme Court of the United States

SCOTT PHILLIP FLYNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
DAVID A. HUBBERT
Acting Assistant Attorney General
S. ROBERT LYONS
KATIE BAGLEY
JOSEPH B. SYVERSON
GREGORY VICTOR DAVIS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner understood the nature of his offense when he pleaded guilty to conspiring to defraud the United States in violation of 18 U.S.C. 371.

2. Whether a charge of conspiring to defraud the United States in violation of 18 U.S.C. 371 is void for vagueness absent a requirement that the government prove a nexus between a defendant's conduct and a particular administrative proceeding.

3. Whether a district court is required to hold a separate jury trial to determine the amount of restitution where a criminal defendant has stipulated to a range of financial loss caused by his unlawful conduct and the court-determined restitution figure is within that amount.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Minn.):

United States v. *Flynn*, No. 16-cr-347 (Jan. 24, 2019)

United States Court of Appeals (8th Cir.):

United States v. *Flynn*, No. 19-1263 (Aug. 13, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 969 F.3d 873.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2020. A petition for rehearing was denied on September 17, 2020 (Pet. App. 39a). The petition for a writ of certiorari was filed on February 11, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Minnesota to one count of conspiring to defraud the United States in violation of 18 U.S.C. 371, and one count of filing a false tax return

in violation of 26 U.S.C. 7206(1). Judgment 1. Petitioner sought to withdraw his pleas before sentencing; the district court denied his motion. Pet. App. 1a-2a. The court sentenced petitioner to 87 months in prison, to be followed by two years of supervised release, and ordered him to pay approximately $5.4 million in restitution. *Id.* at 2a; Judgment 2-3, 6. The court of appeals affirmed. Pet. App. 1a-15a.

1. Petitioner assisted with two reverse-merger transactions in 2006 and 2008, and was compensated with shares in the two resulting public companies. Pet. App. 2a. With a co-conspirator's help, he transferred millions of those shares to Australian nominees, who placed the shares in United States brokerage accounts that petitioner controlled. *Id.* at 2a-3a. Between 2006 and 2014, petitioner used those accounts to sell stock for approximately $15 million, which he transferred to Australian bank accounts that he controlled. *Id.* at 3a. All $15 million in sales was income to petitioner, but he reported none of it on his federal tax returns. *Ibid.* Petitioner was charged with conspiring to defraud the United States in violation of 18 U.S.C. 371; tax evasion in violation of 26 U.S.C. 7201; and five counts of filing false tax returns in violation of 26 U.S.C. 7206(1). Pet. App. 17a, 40a-63a.

One week before trial, petitioner entered into an agreement to plead guilty to the conspiracy charge and one of the false-tax-return counts. Pet. App. 17a, 64a-71a. In the agreement, petitioner stipulated that he failed to report $15 million of income, that the Internal Revenue Service (IRS) could assess tax on the unreported income, that such tax liability was between $3.5 million and $9.5 million, and that the district court could order him to pay restitution to the IRS. *Id.* at 13a n.5,

14a, 65a, 67a-68a, 71a. At the June 2018 plea hearing, petitioner told the district court that he had discussed his case with his lawyers and was satisfied with their representation. *Id.* at 3a; Plea Tr. 5. Petitioner also acknowledged that he understood the rights, including the constitutional rights, that he was waiving by pleading guilty. Pet. App. 3a; Plea Tr. 3-11.

The district court discussed with petitioner the charges to which he would be pleading guilty. Pet. App. 3a; Plea Tr. 11-13. The court repeated the indictment language that charged petitioner with conspiring "to defraud the United States by deceitful and dishonest means by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service * * * in the ascertainment, computation, assessment, and collection of revenue, that is, United States income taxes of defendant * * * and the other members of the Flynn Group." Plea Tr. 11-12; see Pet. App. 5a-6a. The court observed that the indictment included "a number of means and a lengthy description," which the court indicated it understood petitioner had "gone over with [his] attorneys." Plea Tr. 12. Through counsel, petitioner then waived "any further reading of the overt acts or the conspiracy charge." *Ibid.* The district court reviewed the plea agreement with petitioner, confirming that he understood each provision. *Id.* at 13-20.

The district court then reviewed the plea agreement's factual basis, with the government asking petitioner questions about "the facts * * * right off the plea agreement." Plea Tr. 22-27. Petitioner confirmed and elaborated on those facts, testifying under oath that he was working with a named co-conspirator when the co-conspirator recruited the nominees, that he and the

co-conspirator controlled the Australian nominees' brokerage accounts and Australian bank accounts, and that he and the co-conspirator caused the Australian nominees to sell shares of stock that were held in the brokerage accounts and transfer the proceeds to the Australian bank accounts that petitioner controlled. *Ibid.*

After that colloquy, the district court asked petitioner whether he wanted the court "to accept [his] plea agreement knowing that that's final on the issue of whether or not [he would] have a trial." Plea Tr. 27-28. Petitioner agreed. *Id.* at 28. The court then accepted the agreement. *Ibid.*

2. On December 11, 2018, nine days before sentencing, petitioner (through new counsel) moved to withdraw his guilty pleas. Pet. App. 3a; D. Ct. Docs. 109-118. Petitioner disavowed the plea agreement and his sworn testimony, asserting his innocence. Pet. App. 3a. For the first time, six months after pleading guilty, petitioner claimed that he had not been fully informed of the charges against him. *Id.* at 19a-21a. Citing *Marinello* v. *United States*, 138 S. Ct. 1101 (2018), petitioner also newly claimed that the Section 371 conspiracy count omitted a required element: a "nexus" to a particular administrative proceeding. Pet. App. 30a-32a.

The district court denied petitioner's motion. Pet. App. 16a-35a. The court recounted the plea hearing and found that the "record provides ample evidence that the Court informed [petitioner] of the nature of the charges and that [petitioner] understood the law in relation to the facts." *Id.* at 21a. The court rejected petitioner's contention that Federal Rule of Criminal Procedure Rule 11(b)(1)(G) required the court to orally list all the elements of the offenses to which petitioner had pleaded guilty. *Ibid.* The court similarly rejected petitioner's

argument that his guilty pleas lacked a sufficient factual basis. *Id.* at 25a-29a. And the court noted that *Marinello* had been decided months before petitioner's plea, but addressed and rejected petitioner's argument for a "nexus" requirement on the merits. *Id.* at 31a-33a.

The district court also identified "[a]lternative [b]ases" to deny petitioner's motion. Pet. App. 33a-34a (emphasis omitted). The court found that petitioner's motion was brought for purposes of delay, characterizing his motion as an "apparent effort to prolong the inevitable." *Id.* at 33a. The court also pointed to the "substantial prejudice" that "[t]he [g]overnment would suffer * * * if [petitioner] were allowed to retract his plea," including fading witnesses' memories and the "considerable" labor and expenses it would again incur after having already spent more than three months preparing for the originally scheduled trial before petitioner's "tardy" decision to plead guilty. *Id.* at 33a-34a.

Eight days before the rescheduled sentencing, petitioner filed a motion seeking a jury trial on the question of restitution. D. Ct. Doc. 133 (Jan. 15, 2019). The district court denied the motion. Pet. App. 37a. The court sentenced petitioner to 87 months of imprisonment and ordered him to pay $5.4 million in restitution. *Id.* at 2a.

3. The court of appeals affirmed. Pet. App. 1a-15a. As relevant here, it first rejected petitioner's renewed argument that he should have been allowed to withdraw his plea. *Id.* at 4a-5a. The court of appeals observed that the elements of the Section 371 offense were identified in the indictment, which was read in part aloud by the district court at the plea hearing. *Id.* at 6a. The court of appeals also found that petitioner understood how the law applied to the facts of the case and that the district court had ensured that petitioner understood

the charge and had discussed it with his attorneys. *Id.* at 5a. The court of appeals additionally found a sufficient factual basis for petitioner's guilty plea to conspiring to defraud the United States. *Id.* at 7a-9a. It rejected petitioner's argument that *Marinello* added a "nexus" element to the defraud component of 18 U.S.C. 371, observing that the statutory language at issue in *Marinello* differed significantly from the language in Section 371, whose "broad scope" had been established in "long-lived Supreme Court decisions." *Id.* at 8a-9a (citation and internal quotation marks omitted).

The court of appeals similarly found no merit in petitioner's void-for-vagueness challenge to his Section 371 conviction. Pet. App. 10a-12a. The court noted the government's argument that this claim was not presented to the district court and should be reviewed only for plain error, but declined to address the standard of review because petitioner's "argument fails under any standard." *Id.* at 10a n.3. The court explained that a claim of unconstitutional vagueness failed as applied to petitioner's conduct because he "stipulated to specifically intending to defraud the Government" in his plea agreement. *Id.* at 11a.

The court of appeals also rejected petitioner's argument that he was entitled to a jury trial to determine the amount of restitution. Pet. App. 12a-13a. The court moreover noted that "because [petitioner] admitted to owing between $3.5 million and $9.5 million in restitution, any hypothetical Sixth Amendment right to a jury trial would not be violated in this case" by the $5.4 million restitution order. *Id.* at 13a n.5.

ARGUMENT

Petitioner renews his claims that he should have been permitted to withdraw his guilty plea on the charge

of conspiring to defraud the United States under 18 U.S.C. 371, asserting (1) that the district court was required, and failed, to state the elements of that offense on the record at the plea hearing (Pet. 9-20), and (2) that the indictment on this charge improperly omitted an implicit "nexus" element (Pet. 20-30). Petitioner also renews his contention (Pet. 30-34) that the district court erred by not conducting a jury trial to determine the amount of restitution. The court of appeals correctly rejected those contentions, and this case would in any event be a poor vehicle for addressing any of them. No further review is warranted.

1. Petitioner's contention (Pet. 9-20) that his guilty plea to defrauding the United States under Section 371 is invalid because the district court did not recite the elements of that crime on the record lacks merit and does not warrant further review.[1]

a. When a defendant pleads guilty, "Rule 11 of the Federal Rules of Criminal Procedure requires a judge to address [the] defendant * * * to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant." *United States* v. *Vonn*, 535 U.S. 55, 62 (2002). The court must "inform the defendant of, and determine that the defendant understands, * * * the nature of each charge to which the defendant is pleading." Fed. R. Crim. P. 11(b)(1)(G). This Rule "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary" and "to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness

[1] Although in district court petitioner attempted to withdraw his pleas on both the conspiracy and false-tax-return counts, he seeks this Court's review of only his conspiracy plea. See Pet. i.

determination." *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). Rule 11(h) provides that "[a] variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights." Fed. R. Crim. P. 11(h).

Rule 11 does not require on-the-record recitation of the elements of the charges. "The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant." Fed. R. Crim. P. 11 advisory committee's note (1974 Amendments). "In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants." *Ibid.* But the fact that doing so is appropriate in some cases does not make it necessary in all cases. And this Court has "never held that the judge must [herself] explain the elements of each charge to the defendant on the record" in order to satisfy due process. *Bradshaw* v. *Stumpf*, 545 U.S. 175, 183 (2005).

Instead, "the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel," *Stumpf*, 545 U.S. at 183, as may the corresponding requirements of Rule 11. And where the defendant has been provided a copy of his indictment, that fact, "standing alone, give[s] rise to a presumption that the defendant was informed of the nature of the charge against him." *Bousley* v. *United States*, 523 U.S. 614, 618 (1998). Accordingly, consistent with Rule 11's plain language and this Court's decisions, the courts of appeals have long declined to establish a "simple or me-

chanical rule as to how a court should determine defendant's understanding of the charge." 1A Charles Alan Wright et al., *Federal Practice and Procedure* § 178 (5th ed. 2020) (collecting cases).

b. The court of appeals correctly found that the record here establishes petitioner's understanding of the nature of the charge under Section 371, *i.e.*, his own conspiracy to defraud the IRS in its efforts to assess and collect taxes. The district court began the plea hearing by ensuring that petitioner knew that he could "take a timeout" if anything confused him, as well as asking questions to make sure petitioner was unimpaired in his "ability to think clearly" while pleading guilty. Plea. Tr. 3-7. The court verified that petitioner had the plea agreement in front of him while reviewing it, explaining the two counts in the indictment to which petitioner would be agreeing to plead guilty. *Id.* at 3, 11-13. And with respect to the conspiracy charge, the court specifically told petitioner that he was alleged to have: unlawfully and knowingly agreed with others to defraud the United States by deceitful and dishonest means; participated in this fraud with his father and others; and agreed with others to impair the lawful functions of the IRS in the assessment and collection of revenue, including income taxes owed by petitioner and other members of the conspiracy. Pet. App. 3a; Plea Tr. 11-12.

While the district court did not explicitly label them as such, the indictment's allegations described the elements of the offense: that an agreement to defraud the United States existed, that petitioner joined the conspiracy knowingly, and that numerous overt acts were committed in furtherance of the conspiracy. Pet. App.

45a-56a.[2] The court read the first two allegations aloud in open court. *Id.* at 21a-22a. The court then noted that the indictment continued on to detail "a number of means and a lengthy description of that," but after the court indicated its understanding that petitioner had reviewed those descriptions with counsel, petitioner's counsel "waive[d] any further reading of the overt acts or the conspiracy charge." *Id.* at 22a. Additionally, petitioner reaffirmed the facts in the plea agreement and added additional details describing how he committed the offense. *Id.* at 27a. And as the court noted, petitioner was intelligent and capable of understanding sophisticated concepts and transactions. *Id.* at 25a.

Given the many indications in the record that petitioner understood the nature of the conspiracy-to-defraud charge to which he pleaded guilty, the court of appeals correctly affirmed the district court's refusal to permit him to withdraw his plea. In particular, petitioner has identified nothing that would overcome the "presumption that the defendant was informed of the nature of the charge against him" where he has received a copy of his indictment, *Bousely*, 523 U.S. at 618.

c. Contrary to petitioner's contentions (Pet. 13-20), neither the court of appeals here nor other courts have created hard-and-fast rules—let alone conflicting ones—regarding the means by which district courts must ensure that defendants understand the nature of the charges to which they are pleading guilty. Although the

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[2] Contrary to petitioner's assertion (Pet. 12-13), the court of appeals did not disregard a substantive difference between the circuits on the elements of a conspiracy to defraud the United States. The court stated that "[a]lthough the circuits subdivide the crime into different elements, * * * in substance, each of the[] cases [petitioner cited] describes the same crime." Pet. App. 6a.

courts of appeals vary somewhat in their articulations of the Rule 11 inquiry, in substance, they have uniformly employed a flexible, case-specific approach to determine whether a particular defendant understood the nature of the charge. See Wright § 178. This approach ensures compliance with Rule 11(b)(1)(G) and due-process principles "without flyspecking on the appellate level." *United States* v. *Wilson*, 81 F.3d 1300, 1307-1308 (4th Cir. 1996).[3] There is no split in authority requiring this Court's intervention.

Petitioner errs in asserting (Pet. 13-15) that four circuits have adopted a categorical rule that Rule 11(b)(1)(G) invariably requires district courts to explain individual elements of a charged offense in open court. Rather, these courts recognize that the adequacy of the Rule 11 colloquy depends on the particular facts and circumstances of the case. The Seventh Circuit explicitly applies a "totality of the circumstances approach" when "determin[ing] whether the defendant fully understands the nature of the charge to which he is admitting guilt." *United States* v. *Fernandez*, 205 F.3d 1020, 1025 (2000) (looking to multiple factors, including "the defendant's level of intelligence" and "the evidence proffered by the government"). The Ninth and Second Circuits conduct similarly case-specific inquiries. See *United States* v. *Kamer*, 781 F.2d 1380, 1384 (9th Cir.) (recognizing that "the sufficiency of any particular [Rule 11] colloquy between the judge and the defendant

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[3] Although petitioner frames his first question presented in terms of the Due Process Clause's application to plea colloquies, his argument focuses on Rule 11's requirements and cases addressing those requirements. Compare Pet. i with Pet. 9-20. And he presents no argument that, in the circumstances here, compliance with Rule 11 would be insufficient to provide due process.

as to the nature of the charges will vary from case to case, depending on the peculiar facts of each situation") (citation and internal quotation marks omitted), cert. denied, 479 U.S. 819 (1986); *United States* v. *Lloyd*, 901 F.3d 111, 120 (2d Cir. 2018) (explaining that "courts are not required to follow any particular formula in satisfying their obligation" under Rule 11(b)(1)(G) (internal quotation marks omitted)), cert. denied, 140 S. Ct. 55 (2019). And even though the Tenth Circuit indicated that "[i]n *most cases*, * * * a district court must recite the elements of the offense," it continued on to explain that the "minimum" required under Rule 11 is that the "district court ensure the defendant understands the 'essential' elements of the offense to which he pleads guilty," without specifying any precise means district courts must employ to that end. *United States* v. *Carillo*, 860 F.3d 1293, 1302 (2017) (emphasis added).[4]

Petitioner is similarly incorrect (Pet. 17-18) that other circuits have established a categorical rule that a district court need *never* explain the elements of an offense to satisfy Rule 11. As petitioner acknowledges (Pet. 17), the Third, Eleventh, and D.C. Circuits employ

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[4] Nor do the other cases petitioner cites from these courts establish the rigid rule petitioner attributes to them. The Seventh Circuit applied a totality-of-the-circumstances test in *United States* v. *Fard*, 775 F.3d 939, 944-946 (2015), and *United States* v. *Pineda-Buenaventura*, 622 F.3d 761, 770-771 (2010). Similarly, the Ninth Circuit examined a variety of factors rather than establishing a bright-line rule in *United States* v. *Pena*, 314 F.3d 1152, 1156 (2003) (finding a Rule 11 procedure inadequate where the *only* explanation of the offense was a statement at the beginning of the change-of-plea hearing that defendant was pleading guilty to a charge of possession with intent to distribute, and even the prosecutor "did not mention the elements of the offense or the facts that supported a guilty plea").

a totality-of-the-circumstances approach. Those courts have recognized that—consistent with its plain language—"Rule 11 does not specify that a district court must list the elements of an offense." *United States* v. *Presendieu*, 880 F.3d 1228, 1238 (11th Cir. 2018); see *In re Sealed Case*, 283 F.3d 349, 354 (D.C. Cir.), cert. denied, 537 U.S. 891 (2002); *United States* v. *Cefaratti*, 221 F.3d 502, 508 (3d Cir. 2000). But they have not ruled out that individual cases may require open-court identification of a charge's elements by some means. To the contrary, they have emphasized the absence of a "rigid formula," recognizing that "the Rule 11 colloquy may be done in different ways depending on various factors," so long as the court "ensure[s], one way or another, that the defendant knows and understands the nature of the offenses to which he or she is pleading guilty." *Presendieu*, 880 F.3d at 1238-1239 (internal quotation marks omitted); see *In re Sealed Case*, 283 F.3d at 354 (district court must ensure defendant understands the nature of the charge, but "need not, *in every case*, specially isolate each element") (emphasis added)).

Finally, petitioner errs (Pet. 18-19) in asserting that the Eighth Circuit here joined the First Circuit in adopting a "bright-line rule" that nothing more than reading the indictment is ever required to satisfy Rule 11. Like all other courts of appeals, the First Circuit looks to each case's particular facts and circumstances to assess compliance with Rule 11. See *United States* v. *Díaz-Concepción*, 860 F.3d 32, 36-37 (2017) ("Rule 11 does not require a court to employ a specific script or set of magic words.") (brackets, citation, and internal quotation marks omitted). And like the D.C. Circuit, the First Circuit has left open the possibility that even

if not always required, a discussion of a charge's elements may be necessary to comply with Rule 11 in some instances. See *ibid.* (observing that Rule 11 "certainly does not require the court to explain the technical intricacies of the charges, *including, in most cases,* the charges' component elements" (emphasis added; citation and internal quotation marks omitted)). Consistent with other courts of appeals, the Eighth Circuit here "assess[ed] whether [petitioner] understood the nature of the charges by examining the totality of the circumstances." Pet. App. 5a. The court found that petitioner understood the nature of the charges because "[t]he district court read aloud the relevant counts of his indictment, ensured he understood and had discussed those counts with his attorneys, he was satisfied with his attorneys, and he had discussed the rights he was waiving 'at some length' with them." *Ibid.*; see also *id.* at 7a-9a (finding that the factual basis for petitioner's offenses—established through his plea agreement and change-of-plea colloquy—was "clear" and "robust"). Petitioner does not identify any circuit that would have found the colloquy here deficient.

d. In any event, this case would be a poor vehicle for reconsidering the standards for assessing whether a defendant understands the nature of an offense when pleading guilty. Even if Rule 11(b)(1)(G) did require the district court to expressly label and read all the elements of the conspiracy offense, any failure to comply with such a requirement would be harmless here, where the court read from or referred to the portion of the indictment containing those elements and the facts that petitioner admitted established that he committed the offense. See Pet. App. 21a-24a; Plea Tr. 11-13, 22-28. In such circumstances, the constitutional requirement

that a defendant understand the nature of the charges to which he pleads guilty was plainly satisfied, regardless of any technical noncompliance with Rule 11. See *Stumpf*, 545 U.S. at 183 (explaining that "the constitutional prerequisites of a valid plea may be satisfied" absent a reading of the elements of each charge); see also *Vonn*, 535 U.S. at 72 n.9 (collecting lower courts' holdings that "a Rule 11 violation that is harmless under Rule 11(h) does not rise to the level of a 'fair and just reason' for withdrawing a guilty plea").

Moreover, the record here reflects independent bases for the district court's denial of petitioner's eve-of-sentencing motion to withdraw his guilty plea. The court found that the motion was brought for purposes of delay and that granting it would "substantial[ly] prejudice" the government. Pet. App. 33a-34a; see *United States* v. *Norvell*, 729 F.3d 788, 792 (8th Cir. 2013) (explaining that "[e]ven if * * * a fair and just reason exists" to withdraw a plea, "before granting the motion a court must consider" other factors, including prejudice to the government) (citation omitted; brackets in original), cert. denied, 571 U.S. 1224 (2014). The court of appeals found it unnecessary to reach those alternative grounds urged by the government on appeal. See Pet. App. 10a, Gov't C.A. Br. 56-58. Petitioner does not argue that those fact-bound and discretionary determinations precluding relief warrant this Court's review.

2. Citing this Court's construction of a different statute in *Marinello* v. *United States*, 138 S. Ct. 1101 (2018), petitioner separately contends (Pet. 20-30) that Section 371's prohibition on defrauding the United States is unconstitutionally vague and that this Court should therefore engraft onto it a requirement that the

government demonstrate that a defendant's actions have a nexus to a particular administrative proceeding. That contention cannot be squared with this Court's well-settled interpretation of Section 371. In any event, this case would be an unsuitable vehicle for considering this question, given that petitioner raised it belatedly and only in part.

a. Section 371 makes it a crime to "conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." 18 U.S.C. 371. The "defraud clause" of the statute has a long history, and as this Court explained when analyzing Section 371's predecessor, it includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of [g]overnment." *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910). And the Court reaffirmed in *Hammerschmidt* v. *United States*, 265 U.S. 182 (1924), that the provision covers fraudulent conduct undertaken with a "purpose and effect to defeat a lawful function of the [g]overnment and injure others," so long as it involves "fraud." *Id.* at 187-188. "To conspire to defraud the United States," the Court explained, "means primarily to cheat the [g]overnment out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Id.* at 188.

Subsequent decisions of this Court have repeatedly recognized and reaffirmed the construction of the conspiracy statute's defraud clause adopted in *Haas* and *Hammerschmidt*. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 66 (1942) ("The indictment charges that the

United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a 'defrauding' within the meaning of [Section] 37 of the Criminal Code." (citation omitted)); *McNally* v. *United States*, 483 U.S. 350, 359 n.8 (1987) (explaining that *Haas* and *Glasser* "held that § 371 reaches conspiracies other than those directed at property interests"). Defraud-clause conspiracies are sometimes referred to as "*Klein* conspiracies," see *United States* v. *Klein*, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958), after a Second Circuit case that simply quotes and applies the longstanding rule adopted by this Court in *Hammerschmidt* in the context of a conspiracy directed at the IRS. *Id.* at 916.

b. Petitioner does not dispute that his conviction is valid under the rule set forth in *Haas*, *Hammerschmidt*, and other precedents of this Court. He nevertheless suggests that this Court should grant certiorari and overturn over a century of well-established law, contending (Pet. 20-25) that the Court's longstanding construction of the defraud clause renders it unconstitutionally vague. That contention lacks merit, and this Court has previously declined to entertain similar arguments. See *Coplan* v. *United States*, 571 U.S. 819 (2013) (No. 12-1299). It should follow the same course here.[5]

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[5] Amicus New York Council of Defense Lawyers asserts (Amicus Br. 17-20) that *Kelly* v. *United States*, 140 S. Ct. 1565 (2020), warrants certiorari here despite the denial in *Coplan*. In *Kelly*, however, this Court merely applied its holding in *McNally*, 483 U.S. 350 (1987), to a new set of facts, concluding that the federal wire-fraud statute "prohibits only deceptive 'schemes to deprive [the victim of] money or property,'" not schemes to influence a state's exercise of its regulatory power. *Kelly*, 140 S. Ct. at 1571-1572 (quoting *McNally*, 483 U.S. at 360) (brackets in original).

As a threshold matter, revisiting this issue "would ill serve the goals of stability and predictability that the doctrine of statutory *stare decisis* aims to ensure." *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 699 (2011) (citation and internal quotation marks omitted). As this Court has frequently recognized, "*stare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what [the Court has] done." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (citation and internal quotation marks omitted). And petitioner's attempt to relitigate this Court's early twentieth-century precedents is misplaced given that Congress long ago adopted the definition that those precedents provided.

Congress codified the current conspiracy statute in 1948, see Act of June 24, 1948, ch. 645, 62 Stat. 701 (enacting 18 U.S.C. 371), by which time this Court's interpretation of the phrase "defraud the United States in any manner or for any purpose" was already well-established. See *Haas*, 216 U.S. at 479-480; *Hammerschmidt*, 265 U.S. at 187-188; *Glasser*, 315 U.S. at 66. By incorporating that language into Section 371, Congress manifested its intent to incorporate the preexisting definition provided by this Court's decisions. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Congress made no relevant change; if anything, it broadened the language of Section 371—which prohibits conspiring "to defraud the United States, *or any agency thereof* in any manner or for any purpose," 18 U.S.C. 371 (emphasis added)—since *Haas* was decided. See *Haas*, 216 U.S. at 479 (quoting Rev. Stat. § 5440

(1901), which did not then specifically refer to agencies). And Congress's adoption of this Court's definition of the defraud clause refutes petitioner's contentions that a defraud-clause conspiracy is a "court-created," "common law crime," rendered void by the principles this Court applied in *United States* v. *Davis*, 139 S. Ct. 2319 (2019). Pet. 20-24 (emphasis omitted).

Petitioner acknowledges (Pet. 22) that this Court long ago limited the scope of Section 371's defraud clause in *Hammerschmidt* by requiring proof of "deceit, craft or trickery, or * * * means that are dishonest," 265 U.S. at 188, but asserts that the statute nonetheless suffers from an "overbreadth problem" on the theory that a jury asked to find such deception will simply apply its own "ethical standards." Pet. 22-23 (citation and internal quotation marks omitted). But petitioner identifies no reason why juries would be competent to determine whether a defendant acted with deceit in the context of "theft, fraud, or perjury," but not Section 371. Pet. 23 (citation omitted). Petitioner also suggests (Pet. 24-25) that the defraud clause is vague because the courts of appeals cannot agree on its elements. But, as the court of appeals explained, those alleged disagreements reflect nothing more than how "the circuits subdivide the crime"; they do not indicate any substantive disagreement, let alone render the statute unconstitutionally vague.[6] Pet. App. 6a. Petitioner otherwise of-

[6] Petitioner briefly asserts (Pet. 25) that the courts of appeals disagree on the *mens rea* necessary to prove a conspiracy to defraud the United States in the context of a tax case. But petitioner cites a portion of a case discussing a conspiracy to commit the substantive offense of tax evasion, not a defraud-clause conspiracy. See

fers no substantial argument that this Court's construction of Section 371's defraud clause to bar the deceptive obstruction of governmental operations is beyond what "ordinary people can understand," *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Nor does petitioner identify any decision in which this Court has found its *own* interpretation of a statute to create vagueness concerns.

c. Petitioner also urges (Pet. 26-30) this Court to abandon its longstanding interpretation of Section 371 in favor of requiring a *Marinello*-type "nexus" between the charged conduct and a specific administrative proceeding. That suggestion lacks merit.

To begin, the necessary premise of this argument—that Section 371 is vague or overbroad—is incorrect, as explained above. Section 371 does not require the addition of an atextual limitation to "[s]ave" it, obviating petitioner's request to disturb a century of precedent by extending *Marinello* to this context. Pet. 26 (emphasis omitted). But even assuming petitioner had presented a sound reason for this Court to reexamine its construction of Section 371, *Marinello* does not support engrafting the "nexus" requirement found in different statutory language in Title 26 onto conspiracies to defraud the United States under Title 18. In *Marinello*, the Court examined the "Omnibus Clause" in 26 U.S.C. 7212(a), a tax provision, which proscribes "corruptly or by force or threats of force * * * obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of" the Tax Code. 26 U.S.C. 7212(a). This Court construed the phrase "due administration of [the Tax Code]," to "refer[] to specific interference with targeted governmental tax-related proceedings, such as

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United States v. *Coplan*, 703 F.3d 46, 66 (2d Cir. 2012), cert. denied, 571 U.S. 819 (2013).

a particular investigation or audit," not "routine administrative procedures" like tax-return processing. 138 S. Ct. at 1104 (first set of bracketed language in original).

This Court located Section 7212(a)'s nexus requirement in that provision's language, context, and legislative history—none of which apply to Section 371. The Court reasoned that although "administration" could be read literally to refer to every administrative act of the IRS, "the whole phrase—the due administration of the Tax Code—is best viewed * * * as referring to only some of those acts or to some separable parts of an institution or business." *Marinello*, 138 S. Ct. at 1106. That phrase has no analogue in Section 371's prohibition on defrauding federal agencies. The Court in *Marinello* emphasized that "statutory context confirms that [due administration of the Tax Code] refers to specific, targeted acts of administration," because it served as a "catchall" for the obstructive conduct set forth elsewhere in Section 7212 "refer[ring] to corrupt or forceful actions taken against individual identifiable persons or property." *Id.* at 1106-1107. Section 371 does not share those features, nor does it mirror the "similarly worded criminal statute" prohibiting obstruction of justice, 18 U.S.C. 1503(a), whose limitation to specific judicial proceedings this Court found instructive in *Marinello*. 138 S. Ct. at 1105-1106 (discussing *United States* v. *Aguilar*, 515 U.S. 593 (1995)). And this Court's review of Section 7212's legislative history, which focused on protecting IRS agents, is equally inapposite here. See *Marinello*, 138 S. Ct. at 1107. Indeed, Section 371's statutory history manifests Congress's intent to codify this Court's longstanding interpretation of its language as a broad prohibition against deceptive obstruction of government functions. See p. 18-19, *supra*.

Accordingly, every court of appeals to consider the issue has recognized that *Marinello* does not apply to conspiracies to defraud the United States under Section 371. See *United States* v. *Herman*, No. 19-50830, 2021 WL 1811843, at *12-*13 (5th Cir. May 6, 2021) (explaining that *Marinello* "lives in a separate vein of law" and did not "did not address, cite, or analogize to 18 U.S.C. § 371 or *Hammerschmidt* and its progeny"); *United States* v. *Atilla*, 966 F.3d 118, 131 (2d Cir. 2020) ("*Marinello* is * * * wholly unrelated to § 371's defraud clause"); see also *United States* v. *Parlato*, No. 15-CR-149, 2019 WL 988450, *2 (W.D.N.Y. Mar. 1, 2019) (observing that "the language and scope of the statutes are different," and "declin[ing] to apply *Marinello* to a statute it did not consider").

d. Even if the longstanding and uniform interpretation of Section 371 warranted reconsideration, this case would be an unsuitable vehicle for it.

First, although (belatedly) petitioner urged the district court to extend *Marinello*'s nexus requirement to Section 371's defraud clause, he did not contend that this provision was void for vagueness. See D. Ct. Doc. 116, at 10-14. Accordingly, that challenge would be reviewed only for plain error. See Fed. R. Crim. P. 52(b). To prevail, petitioner would have to show (1) an error (2) that is "clear or obvious, rather than subject to reasonable dispute"; (3) that the error "affected [his] substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) that "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (brackets, citation, and internal quotation marks omitted). Petitioner cannot demonstrate that application of

this Court's century-old precedent was "clear or obvious" error or otherwise make the required showing.

Second, the court of appeals did not need to reach the question of whether the defraud clause is void for vagueness in some applications because it found that Section 371's defraud clause was not vague as applied to conduct that petitioner admitted. See Pet. App. 11a-12a (noting that petitioner "stipulated to specifically intending to defraud the Government," and citing *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010)). That fact-bound determination does not warrant further review. And were this Court to consider a challenge to Section 371, it should await "thorough lower court opinions to guide [its] analysis of the merits." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012).

Third, if this Court were to consider a void-for-vagueness challenge to Section 371, it should await a case in which that argument is more clearly outcome-determinative. Petitioner raised this point only in his motion to withdraw his guilty plea. And that motion, as explained above, was denied on the independent grounds that the motion was brought for purposes of delay and that granting the motion would prejudice the government. See p. 15, *supra*. Those fact-bound and discretionary determinations that petitioner is not entitled to relief do not merit this Court's review.

3. Finally, petitioner contends (Pet. 30-34) that the district court was constitutionally obliged to submit the calculation of restitution to a jury. As petitioner acknowledges (Pet. 31), every court of appeals to consider the question has determined that the imposition of restitution does not implicate *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). This Court has recently and repeatedly denied petitions for a writ of certiorari seeking review

of whether *Apprendi* and *Southern Union Co.* v. *United States*, 567 U.S. 343, 360 (2012), apply to restitution.[7] The same result is warranted here, particularly given that petitioner admitted in his plea to the amount of loss he caused.

a. In *Apprendi*, this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. This Court extended that rule to criminal fines in *Southern Union*. The court of appeals here correctly refused to extend these decisions to the determination of restitution in this case.

The restitution order here, entered under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A, does not increase petitioner's punishment. The MVRA requires that restitution be ordered "in the full amount of each victim's losses," rather than prescribing a maximum amount that may be ordered. 18 U.S.C. 3664(f)(1)(A). The MVRA thus establishes an indeterminate framework designed to compensate victims, not punish offenders. See, *e.g.*, *United States* v. *Day*, 700 F.3d 713, 732 (4th Cir. 2012) (explaining that "the amount of restitution that a court may order is * * * indeterminate and varies based on the amount of damage and injury caused by the offense"), cert. denied, 569 U.S. 959 (2013); *United States* v. *Hunter*, 618 F.3d 1062, 1064 (9th Cir. 2010) (noting that "[t]he purpose of

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[7] See, *e.g.*, *Budagova* v. *United States*, 140 S. Ct. 161 (2019) (No. 18-8938); *Hester* v. *United States*, 139 S. Ct. 509 (2019) (No. 17-9082); *Petras* v. *United States*, 139 S. Ct. 373 (2018) (No. 17-8462); *Fontana* v. *United States*, 138 S. Ct. 1022 (2018) (No. 17-7300); *Alvarez* v. *United States*, 137 S. Ct. 1389 (2017) (No. 16-8060).

restitution under the MVRA" is not punishment, but rather to "make the victim[] whole again" (citation and internal quotation marks omitted; second set of bracket in original). Thus, when a sentencing court determines the amount of the victim's loss, it "is merely giving definite shape to the restitution penalty [that is] born out of the conviction," not "imposing a punishment beyond that authorized by jury-found or admitted facts" or "transform[ing] a defendant's punishment into something more severe." *United States* v. *Leahy*, 438 F.3d 328, 337-338 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006).

Contrary to petitioner's assertion (Pet. 30-31), this Court's conclusion in *Southern Union* that *Apprendi* applies to criminal fines—which are "undeniably" imposed as criminal penalties in order to punish illegal conduct—does not change the analysis. *Southern Union*, 567 U.S. at 350; see *id.* at 360. *Southern Union* did not address restitution, which has compensatory purposes that fines lack, and which is imposed pursuant to an indeterminate scheme that lacks a statutory maximum. See *id.* at 353 (reaffirming that there cannot "be an *Apprendi* violation where no maximum is prescribed"). Nor does *United States* v. *Haymond*, 139 S. Ct. 2369 (2019), require that "restitution * * * be afforded the same treatment as other criminal penalties." Pet. 32-33. The Court there addressed an unusual provision requiring the imposition of a five-year mandatory-minimum prison term upon a determination by a judge, under the preponderance of the evidence standard, that a defendant on supervised release committed certain offenses. *Haymond*, 139 S. Ct. at 2373-2375, 2384-2385 (plurality opinion). The view that this provision is

"more like punishment for a new offense" than "ordinary revocation" for the original crime, *id.* at 2386 (Breyer, J., concurring), does not apply to restitution regimes like the MVRA.

b. In any event, even if applicable to restitution calculations, *Apprendi* would make no difference in this case. Petitioner stipulated in his plea agreement that his offenses caused a tax loss of up to $9.5 million—considerably more than the $5.4 million the district court ordered in restitution. Pet. App. 68a, 71a. In light of petitioner's explicit admission, the court of appeals correctly recognized that "any hypothetical Sixth Amendment right to a jury trial would not be violated in this case." *Id.* at 13a n.5; see *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (explaining that "the 'statutory maximum' for *Apprendi* purposes" is that which "a judge may impose" based on "facts reflected in the jury verdict or admitted by the defendant") (emphasis omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
DAVID A. HUBBERT
Acting Assistant Attorney General
S. ROBERT LYONS
KATIE BAGLEY
JOSEPH B. SYVERSON
GREGORY VICTOR DAVIS
Attorneys

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