No. 21-

IN THE

Supreme Court of the United States

JAMES GATTO, AKA JIM,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL S. SCHACHTER
Counsel of Record
CASEY E. DONNELLY
JORDAN D. REISCH
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000
mschachter@willkie.com

Counsel for Petitioner

306257

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1343—the federal wire fraud statute—requires the Government to prove, consistent with Section 1343's statutory text, that the "object" of the alleged wire fraud scheme was to "obtain" money or property from the victim?

2. Whether this Court's conclusion in United States v. Kelly, 140 S. Ct. 1565, that "incidental" harms, even where foreseeable, do not violate 18 U.S.C. § 1343 was merely dicta, such that a jury need not be informed before deliberations that such harms fall outside the bounds of the statute?

3. Whether a "right to control" athletic scholarship decisions constitutes "property" protected by 18 U.S.C. § 1343?

PARTIES TO THE PROCEEDING

Petitioner James Gatto was a defendant-appellant in the court of appeals.

Respondent United States of America was appellee in the court of appeals.

Respondents Merl Code and Christian Dawkins were defendants-appellants in the court of appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States of America v. James Gatto, Merl Code, Christian Dawkins, Nos. 19-0783; 19-0786; 19-0788 (2d Cir.), consolidated judgment entered on January 15, 2021; and

United States of America v. James Gatto, Merl Code, Christian Dawkins, No. 17-CR-0686 (LAK) (S.D.N.Y.), amended judgment as to Mr. Gatto entered on June 17, 2019.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

STATUTES

Cited Authorities

OTHER AUTHORITIES

INTRODUCTION

Time and again, including in last term's unanimous opinion in United States v. Kelly, 140 S. Ct. 1565 (2020), this Court has cautioned federal prosecutors that 18 U.S.C. § 1343—the federal wire fraud statute—is to be narrowly construed and not employed as a general policing mechanism to "enforce [a prosecutor's] view of integrity." Id. at 1574. If the instant case is any indication, the Court's repeated warnings appear to be falling on deaf ears. Here, prosecutors in the Southern District of New York went so far as to decide, without any input from Congress, that it shall now be a federal crime, punishable by up to twenty years in prison, to violate the rules of a private, voluntary association, the National Collegiate Athletic Association (the "NCAA").

Petitioner James Gatto, an employee of Adidas, the sports apparel company, was charged with federal wire fraud because he arranged for money to be provided from Adidas to the families of talented high school basketball players to help recruit those athletes to play basketball at three Adidas-sponsored Universities. In other words, in this fraud case, the Universities were both the intended beneficiaries of Gatto's conduct—because the Universities could, and did, make tens of millions of dollars from a successful season of men's basketball—but also, conversely, the supposed victims of Gatto's purported crime.

The payments arranged by Gatto were not themselves illegal: it is not against the law to offer a financial incentive to a family to persuade them to send their son or daughter to a particular college. They were "unlawful" only under

the "bylaws" of the NCAA and ordinarily, the punishment for such NCAA rule-breaking was—at least until federal prosecutors decided to intervene—paltry, with an athlete required to sit out a few games and, potentially, a fne waged against the team. Why federal prosecutors suddenly determined, decades after the NCAA was established, that the enforcement of NCAA rules was a matter for the United States Department of Justice, and that NCAA rule-breaking constituted conduct meriting prison time, is a question that has remained unanswered throughout this proceeding.

What is clear, however, is that the jury considering Gatto's conduct was not properly instructed. In an attempt to wedge NCAA rule-breaking into the rubric of federal wire fraud, the Government came up with two alternative theories of criminality. The Government frst claimed that Gatto paid the families of the athletes for the purpose of defrauding the Universities out of their "right to control" scholarship decisions. Alternatively, the Government contended that Gatto arranged the payments to the families in order to deprive the Universities out of the athletic scholarships that the Universities had awarded to the athletes. According to the Government, the Universities awarded the scholarships to the athletes believing that the athletes were eligible for play under the NCAA's rules, when in fact the payments had rendered the athletes ineligible to compete for at least a few games.

Under this Court's Section 1343 precedent, neither theory is viable. As its text makes plain, Section 1343 prohibits schemes to "obtai[n] money or property" by means of "false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. The Government's frst

theory of liability, premised on the contention that Gatto's objective was to deprive the Universities of their "right to control" athletic scholarship decisions fails because the "right" to make a decision about the allocation of scholarships is not itself "money" or "property" and, as this Court has repeatedly held, Section 1343 protects only money or property, not other "intangible rights."

The Government's other theory—that Gatto defrauded the Universities by depriving them of athletic scholarships—was upheld by the panel below, but at the expense of creating a definitive split amongst the Circuits as to what constitutes a crime under Section 1343. Indeed, if the decision below is permitted to stand, federal prosecutors, in one of the most active Circuits in the country, will be freed from having to prove one of Section 1343's most basic requirements, that is, that the "object" of the fraudulent scheme be to "obtain" money or property from the victim. The Second Circuit affirmed jury instructions that erased this statutory requirement, thereby permitting defendants charged in New York, Connecticut and Vermont to be convicted of federal wire fraud so long as their conduct results in a "deprivation" of money or property to a victim, even where they did not seek to "obtain" anything at all. Perhaps tellingly, the panel below did not bother to explain how it justified the elimination of an element that has been expressly included in the statutory text for more than a hundred years.

Moreover, in order to uphold the Government's theory that a defendant can violate Section 1343 even where he does not seek to "obtain" any money or property from the victim, the Second Circuit was forced to split with the Seventh Circuit, which has taken the opposite position and

held that the wire fraud statute "only" reaches schemes to "obtain money or other property from the victim." United States v. Walters, 997 F.2d 1219, 1225-27 (7th Cir. 1993). In the Seventh Circuit, the fact that a scheme may have had the effect of "depriving" a victim of money or property is not enough to trigger Section 1343 liability, as Section 1343's language plainly states that only schemes to "obtain money or property" are proscribed.

Indeed, the Seventh Circuit's decision in Walters is meaningful here not only because it is right on the law, but also because the exact legal theory presented here—that the Universities were defrauded when they awarded athletic scholarships to athletes who could be found ineligible for competition—was considered and rejected by the Seventh Circuit as falling beyond the bounds of the federal fraud statutes. At a minimum, Walters raises significant due process concerns about the Government's charging decisions in this case.

Walters involved a sports agent who was charged with mail fraud after he paid cash to college football players, in contravention of NCAA rules, in order to recruit them to sign with his agency. The prosecutors pursuing the case alleged that the agent had defrauded the colleges that the football players attended because those colleges had awarded scholarships to the athletes believing they were eligible for play under NCAA rules, when, in fact, the athletes had been rendered ineligible by virtue of the payments. But, in a unanimous opinion authored by Judge Frank Easterbrook, the Seventh Circuit threw out the agent's convictions, holding that his conduct did not violate the federal fraud statutes because he had not schemed to "obtain" money or property from the colleges attended

by the football players. While the colleges may have lost a scholarship as a result of the payments made by the agent, they did not lose the scholarship to the agent, who intended to profit by representing the athletes in their future professional careers. Id. at 1227.

Had Gatto's jury been properly instructed, consistent with the law as required by the Seventh Circuit, Gatto would have been acquitted because, as in Walters, there was not a single piece of evidence suggesting that Gatto's objective in paying the athletes' families was to "obtain" athletic scholarships (or any other money or property) from the Universities. Rather, Gatto arranged for the payments because he wanted to see the Universities' basketball teams excel. Because it is beyond dispute that there is a fundamental unfairness at work when the criminality of identical conduct depends on whether it is federal prosecutors in Chicago or New York that happen to be bringing the charges, this Court should grant certiorari and resolve the conflict amongst the Circuits as to Section 1343's elements.

This case calls for review by this Court for other reasons as well. In choosing to charge Gatto with federal wire fraud, the prosecutors who brought this case appear to have missed the critical distinction that Section 1343 draws between lawful and unlawful conduct. As this Court explicitly recognized last term in Kelly, there is a stark difference between intended harms, which violate Section 1343, and "incidental" harms, which do not. 140 S. Ct. at 1573-74. The possibility that the NCAA would discover the payments from Adidas and thereafter deem "ineligible" the athletes whose families had been paid is precisely the type of "incidental," if foreseeable, injury that this Court

has found to be outside the reach of Section 1343: after all, Gatto had no desire to see the athletes at issue sitting on the sidelines. To the contrary, the whole point of the payments was to get the players on the court, winning games for the Universities.

There is every reason to believe that the jury could have, and would have, appreciated the line between incidental and intentional injury, had the jurors been informed that the law distinguishes between the two. But, despite Gatto's explicit request that the jury be informed that "incidental" harms are not enough to violate Section 1343, the district court refused to give that instruction and the Second Circuit affirmed that omission. Indeed, even after this Court issued Kelly, which was unmistakable in its holding that where the Government proves only "incidental" harm, Section 1343 does not apply, the Second Circuit still refused to acknowledge that a defendant has a right to a jury that has been instructed on that important limitation. It should go without saying that our judicial system simply does not work if this Court's dictates can be freely ignored by the nation's judiciary. That is especially true in matters of criminal law, where a person's very liberty hangs in the balance. This Court should grant certiorari in order to rectify the errors below.

OPINION BELOW

The Second Circuit's opinion is published at 986 F.3d 104. (Pet.App.1-87). The district court did not issue a written opinion concerning the rejection of the proposed jury instructions at issue in this appeal, but its order denying Gatto's motion to dismiss is published at 295 F. Supp. 3d 336 (S.D.N.Y. 2018) and, at least to the first

question presented, partially describes its view of Section 1343's elements. (Pet.App.92-119).

JURISDICTION

On January 15, 2021, the Second Circuit issued a divided opinion, with Judge Gerard E. Lynch dissenting in part, and entered judgment. (Pet.App.1-87). Rehearing was denied on March 5, 2021. (Pet.App.120). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On March 19, 2020, this Court ordered that the deadline for fling any petition for writ of certiorari be extended to 150 days from the date of the lower court judgment, order denying review, or order denying a timely petition for rehearing. On July 19, 2021, while this Court rescinded the order of March 19, 2020, it further ordered that for any case, as here, in which lower court judgment was issued prior to July 19, 2021, the deadline to fle for a writ of certiorari remains extended to 150 days from the date of the judgment or order.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions—18 U.S.C. § 1343 and 18 U.S.C. § 1349—are reproduced in the appendix to this petition. (Pet.App.121-22).

STATEMENT

1. College basketball in the United States is administered by the NCAA, a private, voluntary association of American universities. (C.A.App.232-33.) NCAA "amateurism" rules prevent college basketball players from receiving any "pay" in connection with

their athletic talents, beyond an athletic scholarship to college. (C.A.App.780-81; C.A.App.914; C.A.App.241-42.) With limited exceptions, schools are also precluded, under NCAA "recruiting" rules, from providing any "inducements," including "cash," to prospective recruits or their families. (C.A.App.829). The NCAA also precludes college athletes and prospective college athletes from earning money through employment opportunities in the private sector, such as with Adidas, which otherwise might be interested in hiring these athletes for commercials, photo shoots, special appearances and the like. (C.A.App.789). A violation of these rules threatens an athlete's "eligibility" to compete in NCAA-sponsored athletic events. (C.A.App.241-42.)

2. Universities frequently enter into paid "sponsorship" agreements with major shoe companies, namely Nike, Adidas, and Under Armour, in which the shoe companies pay the schools for the right to provide branded apparel and uniforms to the schools' athletic teams. (C.A.App.272; C.A.App.303-05.) As paid sponsors, the shoe companies are considered "representatives" of the universities they sponsor and thus a university can be penalized if its corporate sponsor provides any "benefit" to prospective athletic recruits. (C.A.App.812; C.A.App.829.) Specifically, where an athlete is deemed ineligible because of benefits provided by a college's corporate sponsor, the NCAA's Reinstatement Guidelines permit an athlete's eligibility to be "reinstated" after a maximum withholding condition of 30%, meaning that, at worst, the athlete could be prohibited from participating in approximately 30% of the regular season, which is about nine games. (C.A.App.1826).

3. Gatto, a 50 year-old married father of two teenagers, began working for Adidas when he was 23 years old. (C.A.App.1185.) Gatto worked in Adidas's Portland, Oregon office, in its basketball marketing department. (C.A.App.336-37.) One of Gatto's job responsibilities was to support the colleges that Adidas sponsored. (C.A.App.306.)

4. At trial, the jury learned that there was fierce competition among Division I universities to recruit the most talented high school basketball players. The evidence also demonstrated that college basketball coaches often expected the corporate sponsors of their programs, like Adidas, to "help" recruit players. (See, e.g., C.A.App.314; C.A.App.328; C.A.App.1181; C.A.App.547-576). The jury learned that this recruiting "help" from Adidas, Nike and Under Armour often came in the form of payments to the families of talented athletes. (C.A.App.608-610, C.A.App.462-68.)

5. The charges in this case—one count alleging a violation of Section 1349 for conspiracy to commit wire fraud, as well as two counts of substantive wire fraud under Section 1343—arose in connection with payments made by Adidas, and facilitated by Gatto, to the families of four high school athletes in connection with their respective recruitment to North Carolina State University, the University of Kansas and the University of Louisville (together, the "Universities"), each of which is sponsored by Adidas. As described above, the Government's case was premised on the theory that Gatto had schemed to defraud the Universities out of (i) athletic scholarships; or (ii) their intangible "right to control" athletic scholarship decisions. (C.A.App.50; C.A.App.429-30.)

6. At the time when the payments were made, each of the athletes had already received scholarship offers from the Universities, but the athletes' family members nevertheless sought payment from Adidas in connection with the athletes' recruitment. (C.A.App.207, C.A.App.280-83, C.A.App.316, C.A.App.321-22).

7. If the NCAA had discovered the payments, the recruits whose families had received money might have been deemed ineligible for competition, meaning that the school would have "wasted" an athletic scholarship on a player who could not play for at least some of the basketball season. But, it was undisputed by the Government that this potential ineligibility determination was, at most, an unintended repercussion that Gatto had no desire to see inflicted on an Adidas-sponsored basketball team.

8. At trial, the evidence demonstrated that Gatto's goal in facilitating the payments from Adidas to the families of the athletes was to help the Universities secure some of the most highly sought after basketball recruits in the country. As explained by Government cooperator T.J. Gassnola, Gatto was "trying to help" the Adidas-sponsored Universities recruit talented players, who would hopefully play well for the Universities' basketball teams and lead the schools to athletic success. (Tr. 973:4-8 (D.Ct.Dkt.255 at 16).)

9. Gatto asked for, but the district court refused to give, an instruction informing the jury that it could not convict unless it found that Gatto schemed to "obtain" money or property from the Universities. (C.A.App.1205-06.) While the Second Circuit found no error in the district court's omission of this element, its decision on this point is,

frankly, perplexing. The panel found no error in the jury instructions, after determining that Gatto was not entitled to an instruction stating that a defendant "must personally obtain property from the victim to be convicted of wire fraud." (Pet.App.35 (emphasis added).) But, Gatto did not ask the district court to inform the jury that he needed to "personally" obtain property from the Universities to be convicted; rather, he simply asked that the jury be informed that deception does not amount to a violation of Section 1343 unless the defendant's object was to "obtain" property—for himself or for someone else. Although Gatto explained, in his petition for rehearing, that the panel appeared to have misunderstood the instruction that Gatto had sought, the Second Circuit denied Gatto's request for rehearing without any explanation or clarifcation as to why it believed the instruction, as actually proposed by Gatto, was an incorrect statement of law. (Pet.App.120).

11. Gatto also asked for an instruction that explained to the jury that the Government needed to prove that the alleged "money or property deprivation" to the Universities was "a goal of [Gatto's] plot, not just an inadvertent consequence of it." (C.A.App.1210-11; C.A.App.1351-56.) The district court refused to give any such instruction. Although Gatto raised this instructional failure in his appeal and even directed the panel to this Court's confrmation, in Kelly, that "incidental" harms do not implicate Section 1343, see 140 S. Ct. at 1573-74, the panel's decision was completely silent with regard to this signifcant error in the instructions. The Second Circuit chose not to provide any rationale as to why, even after this Court's clear holding in Kelly, it found no error in a jury charge that did not inform the jury that "incidental" harms do not implicate Section 1343.

12. Finally, both the district court and the Second Circuit panel below concluded that a "right to control" athletic scholarship decisions constitutes "property" protected by Section 1343. In so finding, the Second Circuit simply cited to its own precedent—which has never been endorsed by this Court—holding that "depriving a victim of potentially valuable economic information. . .prevents the victim from exercising its right to control its property and can therefore support a wire fraud conviction." (Pet.App.39).

13. On March 5, 2021, the Second Circuit denied Gatto's petition for rehearing. (Pet.App.120). On April 30, 2021, the Second Circuit stayed its mandate, after determining that Gatto's "petition [for certiorari] would present a substantial question" for this Court and that there was "good cause" for a stay. United States of America v. James Gatto, No. 19-0783, Dkt. 197 (2d Cir.); Fed. R. App. Proc. 41(d)(1).

REASONS FOR GRANTING THE PETITION

In his partial dissent from the majority opinion, Judge Lynch of the Second Circuit questioned whether a "wise" prosecutor would have wasted valuable law enforcement resources to bring this case. (Pet.App.85.) Indeed, the media frenzy that accompanied the release of the indictment against Gatto was fueled in large part by the fact that it is a matter of public record that Division I universities have racked up thousands of NCAA violations over the last few decades, by providing so-called "impermissible benefts" to high school athletes to persuade them to attend schools with fagship athletic programs. See Robert A. McCormick & Amy Christian

McCormick, Myth of the Student Athlete: The College Athlete As Employee, 81 WASH. L. REV. 71, 110, n.160 (2006); see also Report, Rice Commission on College Basketball, reproduced at C.A.App.1514, 1531 (conclusion by investigative committee established by the NCAA Board of Governors and chaired by former United States Secretary of State Condoleezza Rice, that the provision of "impermissible benefts" to talented recruits had "been part of landscape of pre-professional basketball for many years," with no intervention or concern from anyone in law enforcement and a tepid response even from the NCAA.) What made headlines was not the novelty of Gatto's conduct, but the Government's claim that it constituted a federal crime.

But, in fact, Gatto's conduct did not constitute a violation of Section 1343 and his convictions can only be understood as the result of a troubling jury charge that misled the jurors about the applicable law. Given federal prosecutors' predilection for using the wire and mail fraud statutes—which have famously been termed a prosecutor's "Stradivarius, [his] Colt 45, [his] Louisville Slugger, [his] Cuisinart. . .and [his] true love"[1]— this Court should grant certiorari and rectify the errors below.

1. Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 DUQ. L. REV. 771, 771 (1980).

A. The Second Circuit's Determination That Conviction Under Section 1343 Does Not Require A Jury To Find That The Objective of the Fraudulent Scheme Was to "Obtain" Money or Property Created a Split With the Seventh Circuit, Which Has Held the Opposite, and Therefore Review by This Court Is Warranted.

The text of the wire fraud statute provides that schemes to "obtai[n] money or property by means of false or fraudulent pretenses, representations, or promises" are unlawful. 18 U.S.C. § 1343 (emphasis added). Yet, when Gatto asked that the jury be instructed as follows, his request was denied:

> In addition to proving that a representation was false or fraudulent and related to a material fact, the Government must also prove that the purpose of the alleged scheme to defraud the Universities was to obtain money or property from these Universities.

(C.A.App.1205-06.) The district court refused to give Gatto's requested instruction because it disagreed that Section 1343 requires a defendant to have schemed to "obtain" money or property from the victim and instead informed the jury that a scheme to "deprive" the Universities of money or property was sufficient. (C.A.App.387 (overruling Gatto's request for an "obtaining" instruction); C.A.Sp.App.18-19 (District Court: "The question is not whether defendants are alleged to have obtained money or property from the [U]niversities, but whether they are alleged to have conspired to deprive the [U]niversities of money or tangible or intangible property.") (emphasis

added); accord Pet.App.89 (instructing the jury that it could find the first element of wire fraud satisfied if it concluded that the "scheme contemplated depriving the victim . . . of money or property.")). The panel decision found no error in the district court's omission of Section 1343's "obtaining" element.

But, in finding no error in the district court's charge, the Second Circuit explicitly parted ways with the interpretation of Section 1343 set forth by the Seventh Circuit in Walters.[2] As described above, in Walters, the defendant, a sports agent named Norby Walters, participated in a scheme to induce college football players to sign contracts promising to retain Walters should the players turn professional. 997 F.2d at 1221. While NCAA rules prevent college athletes from signing with agents, Walters provided the students with cash, cars, and other valuables to persuade them to sign. Id. The Government

2. The Second Circuit's decision is not only at odds with the law of the Seventh Circuit, but also the law of numerous other Circuits that have come to the same conclusion as Judge Easterbrook in Walters and found that the mail and wire fraud statutes proscribe only fraudulent schemes to "obtain money or property" from the victim. See United States v. Baldinger, 838 F.2d 176, 180 (6th Cir. 1988) (dismissing mail fraud indictment because the statute only "reach[es] schemes that have as their goal the transfer of something of economic value to the defendant"); United States v. Takhalov, 827 F.3d 1307, 1313 (11th Cir. 2016) (wire fraud only includes schemes "to obtain, by deceptive means, something to which the defendant is not entitled"); see also Center For Immigration Studies v. Cohen, 410 F. Supp. 3d 183, at n. 2 (D.D.C. 2019) (explaining that although the D.C. Circuit has not yet "ruled" on the question of whether Section 1343 requires the Government to prove that the defendant intended "to obtain money or property" from the scheme, "the circuit courts currently stand divided" on the issue).

charged Walters with mail fraud, alleging that Walters had defrauded the universities that the football players attended by "causing the universities to pay scholarship funds to athletes who had become ineligible as a result of the agency contracts." Id. The Government argued that the object of Walters's scheme was to "deprive" the universities of "money or property" because, had the improper benefts been discovered, the universities "would have stopped [giving] their scholarships [to the athletes], thus saving money." Id. at 1224.

The Seventh Circuit reversed Walters's convictions. One ground for reversal, which Judge Easterbrook characterized as a "deep[] problem" for the Government, was that Walters's scheme was not devised to "obtain" money or property from the universities, the purported victims. Id. at 1224. The prosecutors pursuing the case against Walters argued, as have the prosecutors here, that there is no "obtaining" requirement in the statute, but rather that "it is enough that the victim lose." Id. (describing the prosecutors' position that what the "schemer hopes to gain plays no role in the defnition of [a mail fraud] offense."). In deciding the issue, the Seventh Circuit acknowledged that "[n]one of the Supreme Court's mail fraud cases deal[] with a scheme in which the defendant neither obtained nor tried to obtain the victim's property." Id. at 1225. Nevertheless Judge Easterbrook reasoned, based on a textual analysis, that the "scheme or artifce to defraud" clause and the "obtaining money or property" clause of the statute must be read together. Id. at 1227. The Seventh Circuit therefore held that "only a scheme to obtain money or other property from the victim" violates the mail and wire fraud statutes. Id. (emphasis added.) On the other hand, a "deprivation" to

the victim "is a necessary, but not a sufficient, condition of [wire] fraud." Id.

Indeed, Judge Easterbrook, in Walters, presented a hypothetical that demonstrates why a scheme to "obtain" money or property is a required element of wire fraud and why a scheme to "deprive" a victim of money or property is insufficient to violate the statute. Id. at 1224. Consider, suggested Judge Easterbrook, a scenario in which Person A sends Person B an invitation to a surprise party for their mutual friend, Person C. Id. Person B drives his car to the location specified in the invitation. Id. But, "there is no party; the address is a vacant lot; B is the butt of a joke." Id. Judge Easterbrook noted that if the law was as the prosecutors in Walters had urged, and a "deprivation" of money or property was sufficient to make out a wire fraud violation, the prankster could be criminally prosecuted, given that (i) the invitation was sent by mail; (ii) Person B was "out of pocket" the cost of gasoline; and (iii) there was a material misrepresentation about the existence of the party. Id. Contrary to the expansive view encouraged by the Justice Department, the Seventh Circuit found that the practical joker could not be prosecuted because he had not schemed to "obtain" money or property from Person B, the victim. Id.

While the Second Circuit below summarily dismissed the Seventh Circuit's decision in Walters by claiming that it was not "persuaded by the out-of-circuit" decision, see Pet.App.37, in fact, it is the Seventh Circuit, not the Second Circuit, that has correctly interpreted Section 1343. Bedrock principles of statutory interpretation govern here and confirm that Section 1343 reaches only schemes to "obtain" money or property from the victim

and thus, that the jury considering Gatto's conduct should have been instructed accordingly. When "interpreting a statute, a court should always turn first to one, cardinal canon before all others," namely, that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992); Neder v. United States, 527 U.S. 1, 20, 23 (1999) (in considering the elements of a statute, the court must "first look to the text of the statute[] at issue to discern whether [it] require[s] [the disputed element]"). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." Connecticut Nat'l Bank, 503 U.S. at 254.

It is hard to come up with a persuasive argument that the text of Section 1343 is ambiguous. As this Court explained in Kelly, a defendant violates Section 1343 "only if an object of [his] dishonesty was to obtain the [victim's] money or property," exactly as the statute's text provides. 140 S. Ct. at 1568; id. at 1572 ("fraudulent schemes violate [§ 1343] only when, again, they are 'for obtaining money or property'") (emphasis added); 1574 (the "property fraud statutes…bar only schemes for obtaining property") (emphasis added); see also Carpenter v. United States, 484 U.S. 19, 25 (1987) (after this Court's decision in McNally v. United States, 483 U.S. 350 (1987), the requirement that the defendant "obtain…money or property from the [victim]" is a "necessary element" of wire fraud).[3]

3. In fact, in Kelly, this Court cited approvingly to Walters, and specifically, to the "practical joke" analogy advanced by Judge Easterbrook when he described why schemes to "deprive" a victim of money or property do not violate the mail and wire fraud statutes, but schemes to "obtain" money or property from the victim do. See 140 S. Ct. at 1573, n.2.

The verb "obtain" does not have multiple meanings. Rather, the word "obtain," both today and in 1909, when that word was added to the mail fraud statute, see Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130, means "[t]o get hold of by effort; to gain possession of; to procure; to acquire, in any way." See WEBSTER'S NEW INTERNATIONAL DICTIONARY 1485 (1917); see BLACK'S LAW DICTIONARY 1297 (2019) ("to bring into one's own possession; to procure, esp[ecially] through effort."). Indeed, this Court confirmed this point when it decided Loughrin v. United States and explained that the phrase "to obtain" in the bank fraud statute, 18 U.S.C. § 1344(2), requires the Government to prove that the "defendant intended to obtain" money or property from the victimized financial institution, exactly as the plain language of the statute suggests. 573 U.S. 351, 356 (2014); see also Honeycutt v. United States, 137 S. Ct. 1626, 1632-33 (2017) (utilizing plain meaning canon of construction to interpret "obtain" both today and when the forfeiture statute was passed and concluding that "obtain" means "to come into possession of" or to "get or acquire.").

To be sure, many of this Court's cases also speak of a "deprivation" to the victim. See, e.g., Cleveland v. United States, 531 U.S. 12, 18-19 (2000) (explaining the Court's conclusion that the "original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."). But, that is because, as this Court explained in Skilling v. United States, in almost all cases, "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." 561 U.S. 358, 400 (2010) (contrasting "money or property" frauds under § 1343 with "honest services" frauds under § 1346). In other words, in a proper wire fraud prosecution, the "deprivation" to the victim is the

property "obtained" by the defendant. Hence, the words can be, and are, used interchangeably. But this Court has never held that a scheme in which the defendant neither obtained, nor tried to obtain, the victim's property, is actionable under Section 1343. The Second Circuit's conclusion that such a scheme falls under Section 1343's auspices is both contrary to the statutory text and lacks support in the more than one hundred years of this Court's precedents concerning the mail and wire fraud statutes.

Circuit splits, especially on issues of federal criminal law, pose serious due process concerns, as ordinary citizens have no ability to assess "which circuit has the better approach." Trevor W. Morrison, Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes, 74 S. Cal. L. Rev. 455, 495 (2001); see also United States v. Lanier, 520 U.S. 259, 269 (1997) (recognizing that "disparate decisions in various Circuits might leave the law [so] insufficiently certain even on a point widely considered" that a defendant would not have adequate warning that his conduct was criminal). This Court should grant certiorari and clarify, for the benefit of both the lower courts and prosecutors looking to test the boundaries of the federal fraud statutes, that Section 1343 means what it says and proscribes only schemes intended to "obtain" money or property from the victim.

B. The Second Circuit's Determination That A Jury Does Not Need To Be Instructed That Harm Resulting As An "Incidental Byproduct" or "Inadvertent Consequence" of a Defendant's Conduct Is Insufficient to Implicate Section 1343 Contradicts This Court's Precedent and Therefore Review by This Court Is Warranted.

In Kelly, this Court found that interference with property cannot support a Section 1343 conviction if it is the "incidental byproduct" of the alleged scheme. Rather, that interference must be the scheme's "objective." 140 S. Ct. at 1573-74. Kelly involved a scheme to realign lanes on the George Washington Bridge in order to impose political retribution on the mayor of Fort Lee, New Jersey. Id. at 1568-70. The defendants developed a "cover story" that the lane realignment was part of a "traffic study" and Port Authority employees spent time collecting data on traffic conditions and serving as toll collectors. Id.

The Government contended that defendants had committed wire fraud against the Port Authority because their lane-closing scheme wasted the time and labor of the Port Authority's employees. Id. at 1572. This Court held, however, that this waste of Port Authority resources was not enough to violate Section 1343 because the "object" of defendants' scheme was "never to get the employees' labor," but rather to "impede access from Fort Lee to the George Washington Bridge." Id. at 1573-74. In other words, the wasted employee labor was "an incidental," if foreseeable, "byproduct" of the defendants' scheme to cause political retribution. Id. This Court confirmed that unless the "aim" of defendants' scheme was to obtain the employees' labor, the defendants "could not have violated the…wire fraud [statute]." Id. at 1574.

Kelly thus provides that losses that occur "incidentally" as a "byproduct" of a defendant's actions—such as, in this case, scholarship funds awarded to a recruit later deemed ineligible to compete—are insufficient to implicate Section 1343. Id. Kelly also proves that the district court erred when it rejected Gatto's proposed instruction, which would have made this very point: "The [G]overnment cannot satisfy its burden on this element by merely demonstrating that the defendant you are considering participated in the scheme with some knowledge or recognition of its capacity to cause harm or deprivation to the Universities. Instead, the [G]overnment must prove that the defendant acted with the specific purpose of causing some financial harm or property loss to the Universities. The money or property deprivation must be a goal of the plot, not just an inadvertent consequence of it." (C.A.App.1210-11; C.A.App.1351-56 (emphasis added).)

In this case, the financial aid awarded to the athletes was entirely "incidental" to Gatto's goal: ensuring that the athletes committed to play basketball for the Universities that Adidas sponsored. It was of no moment to Gatto whether the athletes received an athletic scholarship, took out student loans, convinced a wealthy relative to pay their tuition, or even used the monies provided by Adidas to pay for college—so long as the athletes would end up playing basketball for the Universities. In fact, for every athlete where Gatto facilitated payments to the family, the Universities had already offered scholarships to the athlete before Gatto became involved. Put differently, Gatto could not possibly have had the goal of causing the Universities to do something they had already decided to do. There was indeed no evidence—none whatsoever—that Gatto gave a moment's consideration to whether a

basketball player received a scholarship. There were no emails, text messages, or conversations in which Gatto said one word about any scholarships, or suggested that his object was to obtain them. And although the panel noted that the "scheme depended on the Universities awarding ineligible student-athletes athletic based aid," see Pet.App.17 (emphasis added), that contention is both factually incorrect and legally irrelevant.

Moreover, even if the recruits did need financial aid in order to attend the Universities, that fact does not magically convert "financial aid" for those students into the "goal" of Gatto's conduct. Indeed, in Kelly, this Court accepted that the defendants' scheme could not have succeeded without the labor of the Port Authority employees, but still found that the use of that labor was "incidental" to defendants' ultimate objective of creating a political headache for the mayor of Fort Lee. See 140 S. Ct. at 1573-74 (even if "all of this work [by Port Authority employees] was 'needed' to realize the final plan—to accomplish what [defendants] were trying to do with the Bridge. . .it would make no difference" under Section 1343 because "the cost of the employee hours spent on implementing [defendants'] plan was its incidental byproduct" and a "property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.").

As Kelly demonstrates, the distinction between foreseeable harms imposed on a victim as a "byproduct" of the defendant's actions, and harm that is purposefully inflicted on the victim, serves as the line between lawful and unlawful conduct. There is no justification for the district court's failure to draw that important distinction

for the jury. The panel's conclusion that there was no defect in the instructions is clear error that warrants review by this Court. Indeed, granting certiorari will give this Court an opportunity to reiterate, to the lower courts, that the decision in Kelly was not simply advisory, but rather constitutes binding precedent that both the judiciary and federal prosecutors are required to respect.

C. The Second Circuit's Determination That The Universities' "Right to Control" Athletic Scholarship Decisions Constitutes Property Protected By Section 1343 Is Inconsistent With This Court's Precedent and Therefore Review by This Court Is Warranted.

Finally, this case raises the important question of whether a "right to control" money or property is itself a cognizable property right protected by Section 1343. Below, Gatto consistently objected to the Government's "right to control" theory of Section 1343 liability and argued that the "ability to make an informed economic decision" is not property and the wire fraud statute only reaches schemes to defraud a victim of "money or property." (C.A.App.1300-1305.) The Second Circuit, however, upheld the Government's "right to control" theory, on the basis that its own precedents have permitted the Government to bring "right to control" cases. (Pet.App.41).

The concept that the mail and wire fraud statutes protect a person's "ability to make an informed economic decision" is a product of Second Circuit case law, from the pre-McNally era, in which "intangible rights" of all manner and means, were seen as falling within the auspices of the mail and wire fraud statutes. See, e.g.,

United States v. Rodolitz, 786 F.2d 77, 80-81 (2d Cir. 1986) (pre-McNally decision, utilizing right to control intangible right theory); see also United States v. Handakas, 286 F.3d 92, 102 (2d Cir. 2002) (surveying the pre-McNally line of mail and wire fraud cases prosecuted under the "intangible rights" doctrine).

But, in 1987, this Court decided McNally and "stopped the development of the intangible-rights doctrine in its tracks." Skilling, 561 U.S. at 401. McNally rejected the argument that the mail fraud statute reached the "intangible right" to "good government" and held that the mail fraud statute only protects people from schemes to defraud them out of "money or property." 483 U.S. at 355. In the term immediately following McNally, this Court sought to clarify what it had meant by "money or property" in McNally. Carpenter v. United States confirmed that although "intangible rights" generally did not fall within the purview of the statute, an intangible "property" interest could. 484 U.S. at 25-27 (emphasis added). In Carpenter, this Court found that the "confidential business information" of the Wall Street Journal constituted a property interest because that information was the newspaper's "stock in trade," meaning, the asset it used to generate revenue. Id. at 26.

Carpenter's holding is sensible, because the confidential business information appropriated by the defendant had independent economic value to the Wall Street Journal. An intangible asset is property when it is "transferable—that is, capable of passing from one person to another" or capable of being "exercised, transferred, or sold." Sekhar v. United States, 570 U.S. 729, 732 (2013) (emphasis in original). In this case, however, the Universities' "ability

to make an informed economic decision" about athletic scholarships is not property, because it is not an interest that holds any independent economic value. Indeed, the witness called on behalf of the University of Louisville testified that Louisville does not even consider the awarding of a scholarship to be a "business decision." (C.A.App.172).

This Court's dicta strongly suggests that the "right to control" theory falls beyond the reach of Section 1343. See, e.g., Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 402 (2003) ("We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets.") (emphasis added.) In Kelly, this Court cast further doubt on the validity of the theory. 140 S. Ct. at 1569-73. In Kelly, the Government claimed that the Port Authority's "control" over the Bridge's lane allocation was "property," such that defendants' scheme to "commandeer" that right violated Section 1343. Id. at 1569. This Court squarely rejected the Government's argument, after explaining that the right to "control" access to the Bridge was not "property." Id. at 1572-73. While defendants had "exercised" for themselves the Port Authority's "regulatory rights of allocation, exclusion, and control," such rights were not "property" protected by Section 1343. Id.

In other words, this Court's decision in Kelly is entirely consistent with this Court's earlier holding in Sekhar v. United States, which held that an intangible asset is property when it is "transferable—that is, capable of passing from one person to another" or capable of being

"exercised, transferred, or sold." 570 U.S. at 732, 734, 736 (emphasis in original). A university's "right to control" scholarship decisions is not an asset that is capable of being "exercised, transferred, or sold," see id., and for that reason, Gatto should never have been indicted on a "right to control" theory of Section 1343 liability.

This Court, as it has so many times before, should grant certiorari to reiterate that Section 1343's boundaries are well-defined and cannot be expanded to suit the whims of prosecutors looking to enforce their own sense of ethics via federal criminal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 2, 2021

Respectfully submitted,

MICHAEL S. SCHACHTER
Counsel of Record
CASEY E. DONNELLY
JORDAN D. REISCH
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000
mschachter@willkie.com

Counsel for Petitioner