No. 25-__

IN THE SUPREME COURT OF THE UNITED STATES

Tangtang Zhao,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 641 criminalizes theft of a "thing of value of the United States." The Federal Circuits apply different and inconsistent tests to determine whether property is a "thing of value of the United States" once distributed to a private, non-government, third party. As such, Mr. Zhao presents the following:

What standard do juries apply to determine whether property is a "thing of value of the United States" once distributed to a private, non-government, third party?

RELATED PROCEEDINGS

United States v. Tangtang Zhao, No. 1:21-cr-00505-1 (N.D. Ill.) (judgment entered 11/28/2023).

United States v. Tangtang Zhao, No. 23-3366 (7th Cir.) (judgment entered 06/23/2025).

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PETTION FOR A WRIT OF CERTIORARI

Tangtang Zhao, a citizen of the United States, by and through Michael J. Petro, Federal Criminal Defense Attorney, respectfully petitions this court for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The decision by the Seventh Circuit Court of Appeals denying Mr. Zhao's direct appeal is reported as *United States v. Tangtang Zhao*, No. 23-3366, (June 23, 2025*) See also* , 141 F. 4th 833 (7th Cir 2025)

JURISDICTION

The opinion of the court of appeals was entered on June 23, 2025. Mr. Zhao invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a Writ of Certiorari within ninety days of the Seventh Circuit's opinion.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 641 reads as follows:

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

> United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

STATEMENT OF THE CASE

BACKGROUND

Mr. Zhao, is a licensed pharmacist who worked at a Walgreens, a private, non-government, third party in Chicago, during the early months of the COVID-19 vaccine rollout. Mr. Zhao was charged under 18 U.S.C. § 641 with selling a "thing of value of the United States," blank CDC COVID-19 vaccination record cards ("cards"), on eBay between March 25 and

April 11, 2021. The government's theory was that the blank cards were "government property" for the purposes of 18 U.S.C. § 641. The defense maintained that once delivered to Walgreens, the cards were no longer government property and federal jurisdiction did not apply. The jury was instructed that if the government maintained "sufficient supervision and control" over the cards then they were government property for the purposes of 18 U.S.C. § 641.

TRIAL PROOF RELEVANT "SUFFICIENT SUPERVISION AND CONTROL"

Government witnesses acknowledged that: (a) Walgreens was not a federal contractor under the provider agreement at the time of Mr. Zhao's conduct; (b) neither the provider agreement nor the Walgreen's "playbook" said blank cards were government property; (c) the cards were not tracked and lacked barcoding, storage rules, or a system for returns; and (d) CDC first explicitly asserted that blank cards were government property on June 11, 2021, long after Mr. Zhao's alleged conduct. Witnesses also confirmed there was no return policy for unused cards, no requirement to account for blank cards, and no CDC directives on minimizing theft or fraudulent use until after Mr. Zhao's alleged conduct.

JURY NOTE AND INSTRUCTIONS

During deliberations the jury asked: "What defines sufficient supervision and control?" The court replied: "There is no additional definition … That is an issue for you to decide." The court also instructed the jury that "value is established at the time of possession

rather than at the time of the theft," and—separately—that the jury could infer knowledge from possession of "recently … stolen" property. The defense objected that these instructions (i) misstated the law of valuation and (ii) effectively presupposed that a theft occurred, precluding the defense theory that the government abandoned the blank cards.

POST-TRIAL AND APPEAL

The district court denied Mr. Zhao's Rule 29 motion (*See* APPENDIX B - DISTRICT COURT RULE 29 RULING (6/23/2023)) reasoning that various program conditions reflected federal ownership of the cards after they were distributed to Walgreens. On appeal, Mr. Zhao challenged the sufficiency of the evidence under § 641, the district court's refusal to clarify the meaning "sufficient supervision and control" for the jury, and the valuation instruction. The court of appeals affirmed (*See* APPENDIX A - COURT OF APPEALS OPINION(6/23/2025)).

REASONS FOR GRANTING THE WRIT

THE CIRCUITS DISAGREE ON WHAT STANDARD THAT JURORS APPLY TO DETERMINE WHETHER PROPERTY IS A "THING OF VALUE OF THE UNITED STATES" ONCE DISTRIBUTED TO A PRIVATE, NON-GOVERNMENT, THIRD PARTY

18 U.S.C.§ 641 covers theft of a "thing of value of the United States." When the United States' government buys property and then ships them to private, non-government third parties, courts have a number of standards that they employ to determine whether

government property is still government property. In Mr. Zhao's case, the district court instructed the jury that the United States must keep "sufficient supervision and control" over the property to find Mr. Zhao guilty. Unfortunately, the circuits disagree on that instruction. To wit, courts don't ask that question the same way or give juries the same framework for analyzing the evidence.

THERE IS A CIRCUIT SPLIT FOR INTANGIBLE GOODS CASES

Intangible goods cases under 18 U.S.C. § 641 usually involve government loans or grants that are transferred to private parties for use. Like Mr. Zhao, those cases require the government to maintain "sufficient supervision and control" over the money for federal jurisdiction to apply. The best example is the Sixth Circuit uses a clear checklist to determine sufficient supervision and control. In *United States v. Osborne*, 886 F.3d 604 (6th Cir. 2018), the court laid out common-sense factors that show continuing federal ownership after distribution to a private, non-government third party:

> (1) Did the government retain a reversionary interest in the funds?
> (2) Did the government place restrictions on how the funds are used, spent, or maintained?
> (3) Did the government impose internal controls like record keeping requirements, audit requirements, accounting procedures, or reporting requirements?

> (4) Did the government require that it have the right to inspect or access the private entity's records or perform audits?
> (5) Are the funds governed by federal regulations or statute?
> (6) Did the government retain the right to terminate the contract or cut off funding to the private entity?
> (7) When there is a contract between the private entity receiving the federal funds and a third-party receiving funds from a private entity, did the contract have a federal character or subject the third party to federal restrictions?
> *Osborne*, 886 F.3d at 612.

In the end, *Osborne* is a workable, predictable test for a jury to find "sufficient supervision and control."

In contrast, the Seventh Circuit and others apply a looser, less reliable standard. The Seventh Circuit has sometimes said one strong program restriction can be enough to find "sufficient supervision and control" even if there's no reversion clause, no tracking, and no audits. *See United States v. Wheadon*, 794 F.2d 1277, 1284–85 (7th Cir. 1986) (pointing to quarterly reporting, record access, right to terminate, funding cut-offs, approval rights, and inspections. Reversionary right to the funds after distribution "compelling" evidence but not a must). The Ninth Circuit likewise emphasizes control over ultimate things like detailed records and mandatory reporting. *United States v. Johnson*, 596 F.2d 842, 845–46 (9th Cir. 1979). And district courts have noted that lack of

a reversion clause, by itself, doesn't end the inquiry. *See, e.g., United States v. Sheffield*, No. SA:-19-MJ-01450-ESC, Document 13 at 5 (W.D. Tex. 2021).

OTHER CIRCUITS STRESS "CONTROL," BUT THEY WEIGHT THE FACTS DIFFERENTLY

Fifth Circuit. *United States v. Evans*, 572 F.2d 455, 470–72 (5th Cir. 1978) (termination and reversion loom large; "virtually complete" federal supervision); *United States v. Smith,* 596 F.2d 662, 664 (5th Cir. 1979) (funds "in transit" and under substantial federal controls remain federal).

Ninth Circuit. *United States v. Von Stephens*, 774 F.2d 1411, 1413 (9th Cir. 1985) (audits, quarterly reports, onsite reviews, interviewed recipients, examined recipient's bank accounts, and checked employers' rolls for recipients); *United States v. Kranovich*, 401 F.3d 1107, 1113–14 (9th Cir. 2005) (substantial supervision per written agreement and statutes).

D.C. Circuit. *United States v. Milton*, 8 F.3d 39, 43 (D.C. Cir. 1993) (section 641 applies even though a private entity originally paid the money to the government.).

Eleventh Circuit. *United States v. McRee*, 7 F.3d 976, 980 (11th Cir. 1993) (supervision and control test not applicable to an erroneously issued refund check); reaffirming *United States v. Hope*, 901 F.2d 1013, 1019–20 (11th Cir. 1990) (federal controls over community-development funds found where laws and regulations limited use)

On the flip side, when the government's stake in the looks more like a lender's lien and there aren't real controls, courts have said 18 U.S.C. § 641 doesn't

reach the property. See *United States v. Hartec Enterprises*, 967 F.2d 130, 133 (5th Cir. 1992) (the inconsistent interpretations in the courts of 18 U.S.C. § 641 did not provide notice you could be criminally liable for sale of the wire mesh panels).

THE SPLIT IS EVEN SHARPER FOR TANGIBLE GOODS 18 U.S.C. § 641

Tangible goods 18 U.S.C. § 641 cases is where the circuits really diverge really diverge. Some circuits say goods are still "federal" because they're made for or housed with the government or they were tightly supervised up to the point of delivery. *See United States v. Tailan*, 161 F.3d 591, 592 (9th Cir. 1998) (stolen Navy property was kept in a storage trailer secured by a padlock, on a fenced military installation); *United States v. Bess*, 593 F.2d 749, 751–52 (6th Cir. 1979) (abandoned scrap metal on military reservation).

Others tangible goods cases look to how pervasive the government's hand was in the contractor's process. For instance if the federal government supervised the whole production line, the goods can stay federal before delivery. *United States v. Robie*, 166 F.3d 444, 452 (2d Cir. 1999) (Requires "sufficient connection" between the stolen property and the government is required to invoke federal criminal law.). But *Hartec* goes the other way where the "ownership" looks more like a security interest and genuine control is missing. 967 F.2d at 133–34. Courts also restate the title/possession/control formula without telling juries how to apply it to real-world goods. *United States v. Klingler,* 61 F.3d 1234, 1238 (6th Cir.1995)(court lacked subject matter jurisdiction because Klingler

was not an employee or agent and the converted money was only intended for, not owned, by the United States. *United States v. Caseslorente,* 220 F.3d 727, 733 (6th Cir. 2000)(requires a government employee stealing funds intended for the government); *United States v. Lee,* 834 F.3d 145, 154–55 (2d Cir. 2016).

This Case Is A Clean Vehicle

The record here is straightforward. The government's own witnesses acknowledged that, at the time that matters: (1) no contract, rule, or directive labeled the blank cards as federal property; (2) there were no barcodes, inventory rules, return requirements, or audits for those cards; (3) the CDC's first clear ownership claim came months after the charged conduct; and (4) there was no reversion right to the blank cards. When the jury asked what "sufficient supervision and control" means, the court declined to explain. Under Osborne's factors, that missing reversion/audit/accounting trio is powerful—often dispositive—evidence that the items lost any federal character in private hands. The Seventh Circuit's affirmance without a clarifying set of rules can't be squared with the Sixth Circuit's structured approach and invites different outcomes for the set of facts.

FUTURE 18 U.S.C. § 641 JURIES NEED CLEAR INSTRUCTIONS

18 U.S.C. § 641 gets used across countless programs that push federally purchased goods through private channels. Without a uniform, factor-based definition, we leave lay jurors guessing and defendants without fair notice and basic due process protections. That's exactly what *Morissette v. United States,* 342 U.S.

246, 272–73 (1952) warned against which is the stretching 18 U.S.C. § 641 to cover "unwitting conversions" rather than protecting truly federal property with clear lines.

The Court Should Set A Simple, Workable Rule

This Court should grant certiorari to settle the standard and direct lower courts to use objective, ex ante indicators of retained federal control—e.g., reversion/recall; tracking and audits; required approvals; directed beneficiaries and use limits; and termination or claw-back—and to give a plain instruction when those factors are in play. On this record, those indicators were missing, and the jury had no guide. A clear rule now will bring 18 U.S.C. § 641 back to what Congress intended and what *Morissette* counsels: protect federal property while avoiding overbroad criminalization.

CONCLUSION

For the foregoing reasons, Mr. Zhao respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Seventh Circuit Court of Appeals.

DATED September 10, 2025.

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