No. _______

IN THE
SUPREME COURT OF THE UNITED STATES

MOTTY MIZRAHI,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Four different sentencing guidelines – the ones for Basic Economic Offenses (§ 2B1.1), Tax Fraud (§ 2T1.1), Aiding and Abetting Tax Frauds (§ 2T1.4), and Smuggling Offenses (§ 2T4.1) – include an identical enhancement for defendants who employed "sophisticated means" to commit or conceal the crime. The circuits are split over whether a district court's application of a guideline enhancement to a specific set of facts is reviewed deferentially or de novo and, equally, but along different lines, over the standard to apply when reviewing a district court's application of the sophisticated means enhancement to undisputed facts.

The question presented is:

Whether a district court's application of a guidelines enhancement to undisputed facts – such as the "sophisticated means" enhancement – is a question of fact reviewed for clear error, a discretionary judgment call reviewed only for abuse of discretion or, instead, a mixed question of law and fact subject to de novo review.

PARTIES TO THE PROCEEDINGS

The caption of the case on the cover page contains the names of all the parties. Petitioner Motty Mizrahi was the defendant in the district court and appellant in the Ninth Circuit. The United Sates of America was the plaintiff in the district court and the appellee in the Ninth Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Motty Mizrahi*, No. 23-4399 (9th Cir. Jan. 6, 2026)

- *United States v. Motty Mizrahi*, No. 2:19-cr-00415 (C.D. Cal. Dec. 18, 2023)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Motty Mizrahi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Motty Mizrahi was sentenced to seven years in federal prison for investment fraud. The district court enhanced his offense score by two levels, increasing his Guidelines range by approximately 17 months, for having employed "sophisticated means," U.S.S.G. § 2B1.1(b)(10)(C), which is the most frequently applied enhancement in fraud and tax cases, and which appears in four separate guidelines. The factors it cited were inherent in the underlying crime – that Mizrahi made material misrepresentations and that he put some very important ones in writing – and that he made significant efforts to compensate many of his victims for their losses, facts the Sentencing Guidelines classify as mitigating, not aggravating.

Whether those facts warranted the enhancement is precisely the type of legal question appellate courts should resolve independently. Here, they did not. But the lower court, bound by its en banc decision in *United States v. Gasca-Ruiz*, 852 F.3d 1167 (9th Cir. 2017) (en banc), reviewed only for abuse of discretion and affirmed without independently evaluating whether

Mizrahi's conduct actually satisfied the enhancement's legal standard. The circuits are divided over the standard of review for guidelines application questions generally, and further divided – along different lines – on the standard applicable to sophisticated means determinations specifically, disagreeing over whether a district court's decision should be reviewed for clear error, abuse of discretion or de novo. This Court should resolve the conflict and, because the record does not support the enhancement, reverse.

OPINIONS BELOW

The Ninth Circuit's memorandum decision affirming Mr. Mizrahi's appeal is unpublished and unofficially reported at 2025 WL 2794490 (9th Cir. Oct. 1, 2025). App. 1a. The district court's sentencing decision is unreported. App. 11a.

JURISDICTION

The Court of Appeals entered judgment affirming Mr. Mizrahi's appeal on October 1, 2025. App. 1a. A timely petition for rehearing was denied January 6, 2026. App. 10a. No other judgment issued. On March 30, 2026, Justice Kagan extended the time to file a petition for certiorari until May 6, 2026. On April 27, 2026, Justice Kagan further extended the time to file a petition for certiorari to June 5, 2026. This petition is timely filed before that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND SENTENCING GUIDELINES INVOLVED

The Fifth Amendment to the United States Constitution provides in part that "No person shall ... be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 3742(e) provides:

> (e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence–
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
>
> * * * * *
>
> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and . . . shall give due deference to the district court's application of the guidelines to the facts.

U.S.S.G. § 2B1.1(b)(10) provides:

> If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means

> and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

The Sentencing Commission's Commentary to U.S.S.G. § 2B1.1 provides:

> 9. Application of Subsection (b)(10). . . .
>
> * * * * *
>
> (B) Sophisticated Means Enhancement under Subsection (b)(10)(C). For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

STATEMENT OF THE CASE

Motty Mizrahi began investing in the stock market in his late 30's and, as luck would have it, initially earned significant returns with his small investments. Believing he could enrich his family, his community and himself if he could put together a larger investment pool to invest from, he solicited contributions from others in the small, tight-knit, orthodox Jewish community in the Los Angeles area that his family had been a member of for years. C.R. 227, at 2, 17; PSR ¶17. To help persuade people to trust his investing judgment, Mizrahi falsely told community members that he was a professional money manager, license broker, or CPA. He also misrepresented the investment tools he had access to, falsely representing that he had access to insurance-hedging options and strategies that presented no risk of loss while simultaneously providing guaranteed returns of 2-3% on a monthly basis.

Over the course of seven years, Mr. Mizrahi collected roughly $7 million from family, friends, and community members. C.R. 224.1. As promised, he invested the money in the stock market. But there was no magic money machine. His luck in earlier investments was not repeated. He lost at least half, possibly more, of the monies entrusted to him as he made ever-riskier investments trying to recoup the losses. C.R. 227, Ex. E at 13. Despite having promised the investors that he would only be compensated through a portion of the profits he earned for them, with the losses, he converted approximately $450,000, or roughly 5% of the funds collected, to his personal accounts over the seven-year period. PSR ¶19.h.

The scheme came crashing down when he slow-walked redemption requests, spurring a run on the investment pool. Before the pool entirely collapsed, Mr. Mizrahi made partial redemptions to former clients, including by redirecting new proceeds received by the fund. One of his investors, Erez Yehezkilof, secured his contributions with a lien on the home of one Mizahi's family members. PSR ¶40. When Mizrahi couldn't redeem all Yehezkilof's investments, Mizrahi's brother negotiated a settlement agreement representing that "investment funds . . . were never lost."[1]. PSR ¶46. Before he was arrested, Mr. Mizrahi had refunded to investors over half the funds he had collected from them. C.R. 224.1.

He was indicted on six counts of wire fraud to which he pled guilty without a plea agreement.[2] C.R. 1, 112, 113. Over defense counsel's objection, the district court enhanced Mr. Mizrahi's sentence for having carried out the investment fraud using "sophisticated means," explaining:

> Mr. Mizrahi held himself out to investors as a sophisticated money manager, licensed broker, and CPA. He falsely represented to over 40 investors that he employed sophisticated equity and equity option trading strategies and those strategies were risk-free and secure.
>
> He falsely represented that the investors were guaranteed monthly returns of 2 to 3 percent. He supported his false representations with a written prospectus that falsely stated the historical rates of return.
>
> He repeatedly showed investors fake E*TRADE account statements with inflated account balances when in reality their money was lost.
>
> He engaged in a transaction with Mr. Yehezkilof to conceal that he lost his and the other investors' money, and he made lulling payments to investors to conceal his fraud and loss of their money.

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1. In the course of his employment as the part-time bookkeeper for a private Jewish high school, Mr. Mizrahi used his position to embezzle over $500,000 that he also used to compensate the victims of his investment fraud.

2. He was also indicted for aggravated identity theft on the theory that, by entering *his* name onto checks pre-signed by his employer, he committed an act of aggravated identity theft. He pled guilty to that charge too but unsuccessfully sought to withdraw that plea after this Court's decision in *Dubin v. United States*, 599 U.S. 110 (2023).

App. 16a-17a.

By including the 2-point sophisticated means adjustment, Mr. Mizrahi's sentencing range went from 63-78 months to 78-97 months. The probation officer recommended a below-guidelines sentence of 60 months; the Government recommended 78 months. C.R. 208 at 2; 224. The district court ultimately sentenced him to 84 months on the investment fraud, six months more than even the Government sought. C.R. 234.

In an en banc decision, the Ninth Circuit declared that "a district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion." *Gasca-Ruiz*, 852 F.3d at 1170. On appeal to the three-judge panel, Mizrahi contended the district court misapplied the legal standard governing the sophisticated means enhancement, arguing the misapplication of a legal standard constituted an abuse of discretion regardless of the deference owed the underlying factual findings. The panel affirmed, concluding the district court "neither clearly erred nor abused its discretion in finding that Mizrahi used sophisticated means." App. 7a-8a.

The Ninth Circuit upheld the district court's conclusion, reasoning:

> He held himself out . . . as a sophisticated money manager well enough to deceive nearly three dozen investors[3] out of millions of

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[3] As the district court noted, over 40 people invested with Mizrahi. Not all of them lost money.

> dollars. Mizrahi misrepresented being a licensed broker or certified public accountant, to encourage members of his community to invest with him. He also assured clients that the funds remained in cash but leveraged small amounts using sophisticated option and insurance-hedging strategies. He created a prospectus showing false historical returns and fake account statements with inflated balances. To do this persuasively during a seven-year period required sophistication. Further, Mizrahi lulled investors not to alert authorities, which also requires sophisticated means.

App. 7a.

The panel did not separately address the standard of review that governed its decision. In his petition for rehearing with suggestion for rehearing en banc, Mizrahi argued that the propriety of the sophisticated means enhancement should have been reviewed de novo either as not foreclosed by *Gasca-Ruiz* or because *Gasca-Ruiz* was itself in conflict with how the majority of circuits review guidelines application issues. The Ninth Circuit denied rehearing without comment. App. 10a.

REASONS FOR GRANTING REVIEW

I. This Court Has Not Resolved How Appellate Courts Should Review Guidelines Application Decisions

1. U.S.S.G. § 2B1.1(b)(10) provides for an upwards adjustment:

> If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or *(C) the offense otherwise involved sophisticated means.*

U.S.S.G. § 2B1.1(b)(10) (emphasis added).

In the commentary, the Sentencing Commission defined "sophisticated means" as "*especially complex or especially intricate* offense conduct pertaining to the execution or concealment of an offense." U.S.S.G. § 2B1.1, cmt. 9(B) (emphasis added). The commentary offers examples that echo the structural complexity of subsections (A) and (B): in a telemarketing scheme, "locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction" and, more generally, "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts" ordinarily reflect "sophisticated means." U.S.S.G. § 2B1.1, cmt. 9(B).

The appellate courts have added an interpretive gloss that whether a defendant's actions are "especially complex or especially intricate" is evaluated when "compared to the usual fraud offense," *United States v. Horob*, 735 F.3d 866, 872 (9th Cir. 2013), requiring that the defendant's actions reflect "a greater level of planning or concealment than a typical fraud of its kind." *United States v. Pacheco-Martinez*, 791 F.3d 171, 179 (1st Cir. 2015), quoting *United States v. Knox*, 624 F.3d 865, 870-72 (7th Cir. 2010); accord *United States v. Jennings*, 711 F.3d 1144, 1147 (9th Cir. 2013) (sophisticated means requires showing "a greater level of planning or concealment than the usual [] case").

Whether a defendant's actions are deemed "sophisticated" can have a significant impact on a defendant's sentence. The enhancement adds 2 levels to a defendant's base offense level and establishes a minimum offense level of 12, ensuring the defendant falls in at least Zone C of the Sentencing Table. U.S.S.G. § 2B1.1(b)(10). In more serious cases, the 2-level addition can mean years of additional imprisonment. But even at the margins, "additional time behind bars is not some theoretical or mathematical concept." *Rosales-Mireles v. United States*, 585 U.S. 219, 139 (2018) (internal quotations omitted). Rather, "*any* amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual." *Id.*, (internal quotations omitted), quoting *Glover v. United States*, 531 U.S. 198, 203 (2001).

2. 18 U.S.C. § 3742 authorizes a defendant's appeal based on an "incorrect application" of the Guidelines. 18 U.S.C. § 3742(b)(2). In subdivision (e), however, which this Court severed and excised in *United States v. Booker*, 543 U.S. 220, 260 (2005), the Sentencing Reform Act had required appellate courts to "give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e).

This Court's only foray into the proper standard of review for guidelines application issues observed that while § 3742(e) directs appellate courts to "give due deference to the district court's application of the guidelines to the facts," *Buford v. United States*, 532 U.S. 59, 63 (2001), "the deference that is due depends on the nature of the question presented." *Id.*, quoting *Koon v. United States*, 518 U.S. 81, 98 (1996). *Buford* ultimately held that a district judge's determination that a defendant suffered "at least two prior [qualifying] felony convictions," U.S.S.G. § 4B1.1, that were not "related," U.S.S.G. § 4B1.2(c) & cmt. 3, was subject to "deferential review." *Buford*, 532 U.S. at 60-61.

The Court reasoned that local district judges were "likely to be more familiar with trial and sentencing practices in general, including consolidation procedures" as well as "which procedures the relevant state or federal courts typically follow" and because the resolution would "depend[] heavily upon an understanding of the significance of case-specific details," *id.*, at 60, 64-65. Rather than announce a categorical standard governing all such questions, the Court observed that whether two prior convictions were "related" was not "readily resolved by reference to general legal principles and standards" and also "not a generally recurring, purely legal matter, such as interpreting a set of legal words, say, those of an individual guideline," but rather "a minor, detailed, interstitial question of sentencing law, buried in a judicial interpretation of an application note to a Sentencing Guideline." *Id.*, at 65. The Court also emphasized that the myriad permutations that could arise would "provide only minimal help when other courts consider other procedural circumstances, other state systems, and other crimes." *Id.*, at 66.

Booker's excision of § 3742(e) eliminated the statutory basis for deferential review, but it did not resolve what standard should replace it and the appellate courts have not come to a uniform or consistent conclusion.

II. The Federal Courts of Appeal Are Split Over the Proper Standard of Review Governing Whether the Facts Are Sufficient to Support a Guideline Enhancement

The Ninth Circuit, the court below, has held that "as a general rule, a district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion." *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). Although recognizing that *Buford* addressed the standard of review only "one guideline-application decision in particular," the en banc court opined that its analysis "extends in our view to guideline-application decisions more generally." *Gasca-Ruiz*, 852 F.3d at 1173.

Similarly, the Third and Tenth Circuits maintain that § 3742(e) requires them to "give *due deference* to the district court's application of the guidelines to the facts." *United States v. Rodriguez*, 40 F.4th 117, 120 (3d Cir. 2022); *United States v. Brooks*, 128 F.4th 1369, 1372 (10th Cir. 2025). While continuing to review deferentially, they have never attempted to account for this Court's explanation in *Buford* that deference was a product of the specific context nor reckoned with *Booker*'s later holding that § 3742(e) standard of review provisions "must be severed and excised." *Booker*, 543 U.S. at 260. In these jurisdictions, review is only for abuse of discretion. *Rodriguez*, 40 F.4th at 120; *United States v. Ansberry*, 976 F.3d 1108, 1115-16 (10th Cir. 2020).

By contrast, however, most courts since *Booker* treat challenges to the application of a guideline to a concrete set of facts as a mixed question of law and fact that is reviewed de novo. *United States v. Ouellette*, 985 F.3d 107, 110 (1st Cir. 2021); *United States v. McKenzie*, 13 F.4th 223, 240 (2d Cir. 2021); United *States v. Elboghdady*, 117 F.4th 224, 235 (4th Cir. 2024); *United States v. Day*, 117 F.4th 622, 625 (5th Cir. 2024); *United States v. Shehadeh*, 127 F.4th 1058, 1064 (7th Cir. 2025); *United States v. Sorensen*, 148 F.4th 992, 998 (8th Cir. 2025); *United States v. Blanco*, 102 F.4th 1153, 1165 (11th Cir.), *cert. denied*, 145 S.Ct. 774 (2024).

Sixth Circuit panels recognize that the law in that circuit is "murky" and "unsettled," *United States v. Florence*, 150 F.4th 773, 780 (6th Cir. 2025); *United States v. Green*, 167 F.4th 832, 846 (6th Cir. 2026), though some panels opine that "due deference" should govern a district court's "application of a Guidelines enhancement to the facts." *United States v. Willis*, 162 F.4th 739, 742 (6th Cir. 2025). At least one panel, however, has concluded that where its review "only involves interpreting the Guidelines and applying them to uncontested facts," and "comparing accepted facts in the case before us with the facts of various precedents," its review was de novo. *United States v. Tripplet*, 112 F.4th 428, 432 (6th Cir. 2024) (citations omitted).

Not only do the circuits disagree over the standard of review for general guidelines application questions, but they also disagree over how to review applications of the sophisticated means enhancement in a way that does not track that split. Rather, the split over sophisticated means applications is independent, further compounding the circuits' inconsistency rather than just mirroring it.

Rather than the abuse of discretion standard it applies to guidelines application questions generally, the Third Circuit applies the even more deferential clear error standard to sophisticated means determinations specifically. *United States v. Fountain*, 792 F.3d 310, 318 (3d Cir. 2015). The Fourth, Fifth and Seventh Circuits similarly treat a district court's application of the sophisticated means enhancement to a particular set of facts as a finding of fact reviewed only for clear error. *United States v. Adepoju*, 756 F.3d 250, 256 (4th Cir. 2014) ("Whether a defendant's conduct involved sophisticated means is an essentially factual inquiry, thus we review for clear error."); *United States v. Spalding*, 894 F.3d 173, 190 (5th Cir. 2018) ("We review for clear error the district court's factual finding that the defendants used sophisticated means to conceal their offenses."); *United States v. Sykes*, 774 F.3d 1145, 1152 (7th Cir. 2014).

In an early published case, the Eighth Circuit conducted "de novo review [of] whether the district court correctly applied the guidelines when it determined those facts constitute sophisticated means." *United States v. Hart*, 324 F.3d 575, 579 (8th Cir. 2003). A subsequent panel, however, criticized *Hart* as inconsistent with not-yet-excised § 3742(e), *United States v. Anderson*, 349 F.3d 568, 570 n.1 (8th Cir. 2003), and the Eighth Circuit has thereafter consistently reviewed application of the sophisticated means enhancement only for clear error. *E.g. United States v. Mitchell*, 914 F.3d 581, 586 (8th Cir. 2019).

In contrast, the Second Circuit's commitment to "review de novo the application of the Guidelines to the facts," *McKenzie*, 13 F.4th at 240, applies with equal force to sophisticated means determinations. In *United States v. Guldi*, 141 F.4th 435 (2d Cir. 2025), after finding no clear error in the district court's factual findings, the Second Circuit nonetheless reversed, when concluding the district court "erred as a matter of law" because "there is nothing sophisticated" about his conduct. *Id.*, at 452-53. The Second Circuit has taken this approach since before *Booker*. *United States v. Lewis*, 93 F.3d 1075, 1079 (2d Cir. 1996).

III. The Appropriate Standard of Review for Evaluating Guidelines Applications and the Sophisticated Means Enhancement Specifically Are Questions of Nationwide Importance Worthy of this Court's Review

The federal courts impose sentences on over 60,000 criminal defendants every year, an average of over 250 every single workday throughout the 12 judicial circuits with criminal jurisdiction. U.S.S.C., ANNUAL REPORT 4, 13 (2025) available at, *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2025/2025-Annual-Report.pdf*. Whether a defendant will be forced to serve an illegal sentence may depend entirely on the circuit where his case is filed. Not because the substantive legal standard is different. But because the circuits disagree on whether the question is one that the appellate courts can review and correct or must defer to the district court's decision as if it were a fact. That disagreement directly undermines Congress's express goal of avoiding unwarranted sentencing disparities. 18 U.S.C. § 3553(a)(6).

The federal circuit courts receive 10,000 to 12,000 criminal appeals per year, FEDERAL JUDICIAL CASELOAD STATISTICS 2025, available at *https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2025*, roughly two-thirds of which result from guilty pleas, John Scalia, *Bureau of Justice Statistics, Federal Criminal Appeals, 1999 with Trends 1985-99*, at 1 (Apr.

2001); Nancy King, et al., *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 227-30 (2015). When 98% of criminal defendants have pled guilty, the only issues cognizable on those appeals will be challenges to the plea proceedings and sentencing issues.

Standardizing the review of the sophisticated means enhancement is particularly important. Outside of the specific offense characteristics for amount of loss (and number of victims in fraud offenses), the "sophisticated means" enhancement is *the most frequently* invoked reason for enhancing a fraud defendant's sentence. U.S.S.C., USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS FY 2024, 25-28 available at, *https://www.ussc-.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2024/Ch2_GuidelineFY24.pdf*. Not only is sophisticated means an enhancement for fraud and theft defendants, but the tax fraud and international smuggling guidelines contain an identically-defined enhancement and near-identical commentary. U.S.S.G. § 2T1.1(b)(2) & cmt. 5; § 2T1.4 & cmt. 3; § 2T3.1(b)(1) & cmt. 2. The enhancement thus appears in four different guidelines. And, no different from its parallel in the fraud guideline, sophisticated means is the most common enhancement in tax and smuggling cases as well. U.S.S.C., USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS FY 2024, 185-86, 195. In short, "sophisticated means" is one of the most frequently applied enhancement in the white collar sentencing context, applied to over 800 defendants ever year.

However, as the Fourth Circuit has recently observed, "dictionary definitions fail to clarify what the term, 'sophisticated means,'" means and "no relevant statutes or regulations [or Guidelines] define the phrase" or its components, leaving courts with "'no single right answer' to the meaning of [sophisticated means] based on its plain reading." *United States v. Sanders*, 146 F.4th 372, 380 (4th Cir. 2025), *cert. denied*, 223 L.Ed.2d 524 (2026) (internal quotations omitted).

Without a uniform standard to review governing applications of the guidelines generally and the sophisticated means enhancement in particular, the appellate courts will never authoritatively define what qualifies as "sophisticated," leaving the law undeveloped and amorphous. Without guidance, district courts will be left adrift to rely on their own personal predilections. What qualifies as sophisticated will be as varied as the idiosyncratic assumptions of the nearly 1,100 district judges hearing criminal cases throughout the United States, ADMINISTRATIVE OFFICE OF COURTS, JUDICIAL BUSINESS 2025, STATUS OF ARTICLE III JUDGESHIPS – JUDICIAL BUSINESS Table 10 (2025), available at *https://www.uscourts.gov/data-news/reports/statistical-reports/judicial-business-united-states-courts/judicial-business-2025/status-article-iii-judgeships-judicial-business-*

2025, directly at odds with Congress's stated goal of "avoid[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Booker*, 543 U.S. at 259-60, 264.

In *United States v. Hess*, 106 F.4th 1011 (10th Cir. 2024), for example, the district court erroneously applied the enhancement "not because [the defendant's] conduct was sophisticated," but based on moral outrage over a fraud that deceived grieving relatives and desecrated the remains of their departed loved ones. *Id.*, at 1036. Those factors, while legitimately aggravating under § 3553(a), had no bearing on whether the defendant's actions were especially complex or intricate. *Id.*

It should not be surprising, then, that one finds cases where the sophisticated means enhancement was applied to one co-defendant but not another with no explanation for why one was deserving and the other not, *e.g.*, *United States v. Foley*, 783 F.3d 7, 26 n.15 (1st Cir. 2015), or that the enhancement was apparently never even contemplated for a defendant who perpetrated her fraud not only by generating false financial statements but by staging live laboratory demonstrations for investors where blood samples were secretly replaced and third-party devices would run fabricated results while the company's own machine performed a null protocol, *United States v. Holmes*, 163 F.4th 547, 557-59 (9th Cir. 2025). The risk of arbitrary sentencing is not shouldered by defendants alone. Deferential review not only shields unjustified applications of the enhancement from reversal but it also impedes the Government's ability to correct sentences based on a sentencing range that should have been higher.

The question is deserving of prompt review because, two decades after this Court decided *Booker*, the lower courts are still in disarray as to what standard of review should apply. The First, Sixth and Tenth Circuits are emblematic of the problem. Despite formally adopting de novo (First) or deferential (Tenth) review, panels do not predictably apply that standard to the sophisticated means enhancement, but instead veer toward their opposite. *United States v. Jiménez*, 946 F.3d 8, 15 (1st Cir. 2019) (embracing de novo review but opining only that district court "reasonably found" enhancement based on "solid" evidentiary foundation); *Hess*, 106 F.4th at 1036-37 (despite nominally endorsing deferential review, independently analyzing whether means were sophisticated); *United States v. Stegman*, 873 F.3d 1215, 1237-40 (10th Cir. 2017) (same). After two decades, Sixth Circuit panels still declare their standard "unsettled" and "murky," and panels continue to apply various different standards.

This conflict will not resolve itself without the Court's intervention. The circuits embracing deferential review have steadfastly maintained that position since the implementation of the Sentencing Reform Act of 1984 even after *Booker* excised the very statutory provision that originally justified it.

The circuits that nominally embrace de novo review do not consistently apply it to the sophisticated means enhancement. The Sixth Circuit has been unable to resolve its internal disagreement for over two decades. The split shows no signs of abating. Only this Court can resolve it.

IV. Mr. Mizrahi's Case is a Good Vehicle for Resolving The Split

1. The district court applied the sophisticated means enhancement over Mizrahi's objection. Without addressing Mizrahi's contention that the district court's ruling was premised on an error of law, the Panel opined only that "the district court neither clearly erred nor abused its discretion in finding Mizrahi used sophisticated means." App. 7a-8a.

2. Whether a defendant used "sophisticated means" in furtherance of a crime is properly reviewed de novo. This Court has repeatedly said that "[w]hether the historical facts found satisfy the legal test chosen is a so-called 'mixed question' of law and fact." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 228 (2020) (internal quotations omitted), citing *U.S. Bank N.A. v. Vill. at Lakeridge, LLC,* 583 U.S. 387, 394 (2018). "Mixed questions are not all alike." *U.S. Bank N.A.*, 583 U.S. at 395-96. Instead, "the standard of review for a mixed question [] depends [] on whether answering it entails primarily legal or factual work." *U.S. Bank N.A.*, 583 U.S. at 396.

Here, with no dictionary definition or authoritative legal construction, *Sanders*, 146 F.4th at 380, whether a defendant's actions qualify as "sophisticated" requires the reviewing court to make a value judgment about the facts. Once the district court has decided what actions the defendant did or did not carry out, determining whether they are "sophisticated" does not require the reviewing court "to 'marshal and weigh evidence' and 'make credibility judgments.'" *Bufkin v. Collins*, 604 U.S. 369, 382 (2025).

Determining whether a set of actions qualifies as "sophisticated" or especially complex or intricate in relation to the crime of conviction will guide future courts in applying or declining to apply the enhancement. "When applying the law involves developing legal principles for use in future cases, appellate courts typically review the decision de novo." *Bufkin,* 604 U.S. at 382. That this may entail some grappling factual details does not meaningfully distinguish it from other mixed questions of law and fact. "A mixed question that requires close engagement with the facts is still a mixed question, and it is therefore a 'question of law.'" *Wilkinson v. Garland*, 601 U.S. 209, 222 (2024) (brackets omitted).

3. Notwithstanding the contrary circuit court authority, whether a defendant employed "sophisticated means" is not a question of fact relegated to clear error review. This Court has clarified that fact questions are

generally limited to "what [this Court has] called 'basic' or 'historical' fact – addressing questions of who did what, when or where, how or why." *U.S. Bank N.A.,* 583 U.S. at 394. The Court has not expanded the definition of fact beyond issues whose "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor." *Thompson v. Keohane*, 516 U.S. 99, 111 (1995). Whether acts are "sophisticated" is not an issue of "basic, primary, or historical fact" nor one that calls for the trial court's assessment of credibility or demeanor. Whether a crime was carried out through "sophisticated means" requires a judicial assessment of whether the actions satisfy the legal standard announced in the Guideline, its commentary, or the judicial glosses expounding on both.[4]

Nor is this the type of mixed question that appellate courts are ill-suited to expound on. Distinguishing between a run of the mill fraud and fraud accomplished by "sophisticated means" involves distinguishing between ordinary deception and concealment and those actions "that represent more 'sophisticated' [deception and] concealment." *United States v. Montano*, 250 F.3d 709, 715 (9th Cir. 2001). Appellate judges are no less capable of making such assessments than are district judges and indeed may bring a broader

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4. This Court has recently granted certiorari to determine the level of deference courts should give to commentary in the Sentencing Guidelines. *Beaird v. United States,* No. 25-5343, 2026 WL 1052007 (U.S. Apr. 20, 2026) (granting cert.).

perspective from reviewing a wider variety of cases from throughout the circuit they oversee.

Unlike *Buford*, which called on district judges to apply their expertise and familiarity with the customs and practices of local state and federal courts to decide whether cases decided the same day without formal consolidation were "related," district courts have no "institutional advantage" in evaluating whether the undisputed actions of a defendant are "especially complex or especially intricate" or otherwise "sophisticated." Rather, the question posed to the appellate court called on it to "expound on the law, particularly by amplifying or elaborating on a broad legal standard." *U.S. Bank N.A.*, 583 U.S. at 396. In such circumstances, i.e., "when applying the law involves developing auxiliary legal principles of use in other cases[,] appellate courts should typically review a decision de novo." *Id.*

4. The circuits rationalized their continuation of deferential review through various analytical errors.

a. The Fifth Circuit, for example, embraced the deferential clear error standard for reviewing sophisticated means determinations a decade before *Booker*, *United States v. Charroux*, 3 F.3d 827, 836 (5th Cir. 1993), and simply never reconsidered the issue afterwards, *Spalding*, 894 F.3d at 190. The Fifth Circuit announced that it would review sophisticated means conclusions for clear error because clear error was the standard for reviewing "the sentencing court's findings of fact." *Charroux*, 3 F.3d at 836, citing *United States v. Shell*, 972 F.2d 548, 550 (5th Cir.1992) ("For purposes of the [sentencing] guidelines, the sentencing court's findings of fact are reviewed under the 'clearly erroneous standard.'"). But the court never grappled with whether the conclusion of sophisticated means was a question of fact. As explained above, it is not.

b. The Eleventh Circuit settled on clear error standard in *United States v. Barakat*, 130 F.3d 1448 (11th Cir. 1997) because this Court had held in *Koon,* that guidelines departures should be reviewed for an abuse of discretion. *Barakat*, 130 F.3d at 1456. But *Koon* was not concerned with a district court's guidelines calculations. *Koon*, 518 U.S. at 88-89. Instead, *Koon* was focused on the standard of review that governed when a district judge departed from a sentencing range that had been properly calculated, a fundamentally different question from whether the range itself was correctly calculated in the first instance.

Koon started from the recognition that, before the Sentencing Reform Act, "sentencing judges enjoyed broad discretion in determining whether and how long an offender should be incarcerated" and that the Act "did not eliminate all of the district judge's discretion." *Koon*, 518 U.S. at 92. Indeed, Congress "manifest[ed] an intent that district courts retain much of their traditional sentencing discretion" and "did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Koon*, 518 U.S. at 97. Although it implemented a system of "limited appellate jurisdiction to review federal sentences," *Koon* held "A district court's decision to depart from the Guidelines, by contrast, will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." *Koon*, 518 U.S. at 98.

Although *Koon* referenced the *Booker*-excised § 3742(e) and its provision that appellate courts "give due deference to the district court's application of the guidelines to the facts," the courts that justify their deferential review squarely on this statement overlook not only the now-discretionary nature of the guidelines (which were considered mandatory when *Koon* was decided), but also *Koon*'s immediately-following caveat that "[t]he deference that is due depends on the nature of the question presented." *Koon*, 518 U.S. at 98.

Significantly, *Koon* itself was careful to distinguish legal questions from the departure decisions it subjected to deferential review. The Court expressly stated that "whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point," adding that "a district court by definition abuses its discretion when it makes an error of law."

Koon, 518 U.S. at 100. *Barakat* relied on *Koon*'s departure framework while ignoring this caveat, treating the application of the sophisticated means enhancement as "essentially a factual issue" without explanation. *Barakat*, 130 F.3d at 1456. That characterization borrowed *Koon*'s deferential conclusion without engaging *Koon*'s own acknowledgment that legal questions embedded in the sentencing analysis are reviewed without deference.

Rather than reflect "the traditional exercise of discretion by a sentencing court," the Guidelines are "the framework for sentencing and anchor the district court's discretion," that judges "*must* begin their analysis with and remain cognizant of [] throughout the sentencing process." *Molina-Martinez v. United States*, 578 U.S. 189, 198-99 (2016) (emphasis original; internal quotations omitted). In contrast to the virtually unreviewable discretion inherent in ultimate sentencing determinations, "[a] district court that improperly calculates a defendant's Guidelines range . . . has committed a significant procedural error." *Id.*, at 199 (internal quotations omitted).

In short, determining whether the district court properly calculated the guidelines and determining whether the district court properly varied from the guidelines and the degree to which it did so are fundamentally different questions and do not invariably call for the same standard of review.

c. A different type of analytical error misled the Fourth Circuit into adopting a clear error standard. Like the Eleventh Circuit's *Barakat* decision, the Fourth Circuit simply declared without analysis that "[w]hether a defendant's conduct involved sophisticated means is an essentially factual inquiry." *Adepoju*, 756 F.3d at 256. However, it also cited as justification the fact that prior panels – *United States v. Hughes*, 401 F.3d 540, 557 (4th Cir. 2005) and *United States v. Daughtrey*, 874 F.2d 213 (4th Cir. 1989) – had reviewed the "minimal planning" and "minor participant" enhancements for clear error. Regardless of whether *Daughtrey* and *Hughes* were correct in their treatment of the enhancements before them,[5] by simply transporting the standard of review from one enhancement to another, the *Adepoju* court overlooked that *Buford*'s "guideline-specific logic would suggest that courts should decide this standard-of-review question (de novo or deferential?) guideline-by-guideline." *United States v. Thomas*, 933 F.3d 605, 609 (6th Cir. 2019).

And, ultimately, unlike enhancements that focus on delineating the steps a defendant undertook before carrying out a crime or their role vis-a-vis others in the scheme, the sophisticated means enhancement directs courts to evaluate the defendant's conduct against a legal standard set forth in the Guidelines and their commentary as elaborated by the courts.

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5. Notably, *Hughes* simply declared the question factual without analysis, providing no support for concluding that sophisticated means was necessarily factual. And *Daughtrey* relied on § 3742(e)'s due-deference provision before *Booker* was decided. Whatever persuasive value *Daughtrey* had as precedent for deferential review was undermined by *Booker*'s excision of § 3742(e).

d. The Ninth Circuit in its controlling decision of *Gasca-Ruiz* made a parallel error, transplanting *Buford*'s guideline-specific rationale into a general rule without examining whether *Buford*'s institutional-advantage reasoning applied to all guidelines applications questions generally.

5. De novo review would have changed the result in Mizrahi's appeal.

a. The district judge premised the sophisticated means enhancement on four factors. Because none of the cited factors reflects the kind of especially complex or intricate conduct the enhancement requires, a panel conducting de novo review would have come to a different conclusion and found substantive grounds to reverse Mizrahi's sentence.

First, the sentencing judge highlighted Mizrahi's false representations about his credentials, his experience, the investment tools he had access to, their risks and guaranteed returns. In short, the sentencing judge recited the run of the mill aspects one finds in a typical investment fraud. There is nothing "sophisticated" about having lied about his experience, guaranteed returns, or the safety of the investments. Fraud – by definition – involves deception. 18 U.S.C. §§ 1341, 1343.

That these misrepresentations were central to inducing contributions doesn't make them sophisticated. Every successful investment fraud requires victims to trust the fraudster with their money which, in turn, requires convincing them he is trustworthy and his investments are sound. Misrepresenting one's credentials and the safety of one's investments do not exacerbate the severity of a typical investment fraud. They are typical of any investment fraud. The significance of the lies goes to their materiality. Materiality is already an element of the crime itself; it is not a measure of its complexity or sophistication. If these types of falsehoods made a fraud "sophisticated," the enhancement would have to apply to *every* investment fraud.

Second, it matters not that these representations were incorporated into written documents, whether it was described as a prospectus or other financial report. First of all, it's quite debatable whether, in an era where Adobe Photoshop was readily available even before the proliferation of AI tools, fabricated financial statements could properly be characterized as especially complex or intricate at all, let alone conduct more complex than what occurs in the typical investment fraud. But, more importantly, a prospectus and financial materials would be present in *any* investment scheme. And rare will be the fraud case where the prospectus and financials are not misleading and contain misrepresentations. The absence of brokerage statements, or circulation of true statements accurately reflecting that the money had been lost, would be a telltale sign that the investment was fraudulent. But fraud "is by nature self-concealing – its success depends on its being hidden from the victim." *United States v. Kontny*, 238 F.3d 815, 820 (7th Cir. 2001).

Third, the district court emphasized the fact that Mizrahi denied having lost investors' money when he entered into a settlement with Yehezkilof. Once again, the only thing the sentencing court relied upon was that Mizrahi failed to own up to having committed fraud. Rare is the fraudster who admits his fraud before being hauled into court. Courts have long recognized that "direct evidence of intent to defraud is rare" precisely because fraud defendants do not typically acknowledge their fraudulent actions or intent. *E.g. United States v. Lundberg*, 990 F.3d 1087, 1095 (7th Cir. 2021). Other jurists have found it "self-evident" that "virtually *all* criminal actors," including fraud defendants, seek "not only to accomplish their criminal goals, but also to escape detection and liability for these misdeeds." *United States v. Tanke*, 743 F.3d 1296, 1310 (9th Cir. 2014) (Wallace, J., concurring). To aggravate Mizrahi's sentence for concealing his fraud and his losses is to enhance his sentence for conduct inseparable from the fraud itself.

Moreover, even focusing on the settlement itself, the district court's finding overlooks that *Yehezkilof*, not Mizrahi, insisted on having a lien on Mizrahi's sister's home to protect his investment and *Yehezkilof*, not Mizrahi, demanded the settlement agreement before agreeing to relinquish his lien on it. The district judge's focus on the Yehezkilof settlement illustrates the problem caused by deferential review: the enhancement was imposed on Mizrahi but *not on his brother who drafted the agreement denying any losses*, which is precisely the kind of arbitrary disparity that de novo review ought to prevent.

Finally, the district court found that, as the investment pool was falling apart, he "made lulling payments." This is the most perplexing of the factors cited and one on which district courts could *particularly* benefit from authoritative guidance. Mizrahi paid redemptions to investors in response to their demands for repayment. There is nothing sophisticated about placating unhappy clients by making partial restitution. In this case, his acts were nothing more than typical attempts to placate dissatisfied customers,[6] all of whom he knew on a personal level. Moreover, by positing that a defendant who makes partial restitution for losses is "more blameworthy and deserving of greater punishment," *Hess*, 106 F.4th at 1036, the district court's finding necessarily translates to the anomalous conclusion that Mr. Mizrahi's actions

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6. The Panel cited *United States v. Lane*, 474 U.S. 438 (1986) as authority that "Mizrahi lulled investors not to alert authorities, which also requires sophisticated means." Putting aside that the alleged "lulling" was merely paying investor-requested redemptions, *Lane* pre-dated Guideline sentencing, did not address sentencing at all, let alone the guidelines enhancement, and affirms only that lulling is part of the fraudulent conduct, not that it is especially complex or sophisticated. *Id.*, at 451-52 & n.16.

would have been *less* reprehensible had he simply ignored his investors' complaints and offered them nothing. Indeed, the Sentencing Commission expressly instructs otherwise in declaring that voluntary restitution is a *mitigating*, not aggravating, factor. U.S.S.G. § 2B1.1, cmt. 3(E). The Sentencing Commission cannot have intended that a fraud defendant's voluntary payments to his victims be simultaneously mitigating for purposes of the loss calculation in § 2B1.1(b)(1) & cmt. 3(E) while also aggravating for purposes of the sophistication enhancement in § 2B1.1(b)(10).

Significantly, the enhancement is supposed to "target criminals who engage in *complicated* criminal activity because their actions are considered more blameworthy and deserving of greater punishment than a perpetrator of a simple version of the crime." *Hess*, 106 F.4th at 1036 (emphasis original and omitted in part; internal quotations omitted); *Lewis*, 93 F.3d at 1080 ("the provision targets conduct that is more complex, demonstrates greater intricacy, or demonstrates greater planning than a routine [fraud] case"); *Guldi*, 141 F.4th at 452 (sophisticated means should be tethered to "a ruse worthy of an enhanced sentence"). Although citing factors connected to Mizrahi's crime, the district court identified no factor that made it more blameworthy or deserving of punishment than any other investment fraud.

b. Applying de novo review would have made a difference in the outcome of Mr. Mizrahi's appeal. There were no layered corporate shells or offshore accounts, no complex financial instruments or structures hiding assets, no sophisticated technology or encryption, international transfers or money laundering, and no elaborate systems. There was no magic show like what the defendants pulled off in *Holmes*, 163 F.4th at 557-59. And, most importantly, *there was nothing even remotely comparable.*

The district court made no attempt to address whether Mizrahi's actions were even the slightest bit complex or intricate, U.S.S.G. § 2B1.1(b)(10), cmt. 9(B), nor atypical when "compared to the usual fraud offense." *Horob*, 735 F.3d at 872. Nor did the Ninth Circuit panel below which, instead of treating "sophisticated means" as a term of art, dismissed it as a casual question to be answered in the vernacular: because Mizrahi falsely represented himself as "a sophisticated money manager" and did so "well enough to deceive" many who knew him, the Panel assumed his having done so "persuasively during a seven-year period required sophistication."

None of these factors refers to any level of complexity, intricacy, or how Mizrahi's fraud was carried out when "compared to the usual fraud" or in ways not "inherent" in the crime itself. The district court, and court of appeal, entirely bypassed "the conceptually difficult task of separating out those concealment activities that represent more 'sophisticated' concealment." *Montano*, 250 F.3d at 715.

Nor can "success" be a polestar for whether a fraud was carried out by sophisticated means or the enhancement would apply in almost every case. Rare is the federal fraud prosecution that does not involve multiple victims who lost substantial sums over the course of years. U.S.S.C., QUICK FACTS: SECURITIES AND INVESTMENT FRAUD (Sept. 2025), *https://www.ussc.gov/-research/quick-facts*. Rather than "complex," let alone "especially complex," false representations are inherent in fraud and misrepresenting one's background or expertise is no different. That he did so successfully adds nothing; fewer than 10% of investment frauds fail to generate at least $250,000; over 20% generate over $9,500,000. U.S.S.C., QUICK FACTS: SECURITIES AND INVESTMENT FRAUD (Sept. 2025). Sophisticated "means" focuses on the *means* used; it "does not . . . turn on the scheme's likelihood of success," *Jennings*, 711 F.3d at 1147, which is captured in the loss table. Nor is duration a proxy for sophistication; in this case, especially, where it more likely resulted from the investors' close personal connection with Mizrahi and his family rather than any elaborate efforts by him.

c. This issue was peculiarly suited to de novo review. Mr. Mizrahi did not dispute having made the fraudulent representations or marketing materials, he simply denied that doing so was "especially complex or especially intricate" and therefore "sophisticated." Although questioning whether the payments he made to investors seeking redemptions should be deemed "lulling" payments, he did not deny voluntarily making partial restitution for the victims' losses and, again, simply challenged whether those actions made him more culpable and deserving of a sentencing enhancement for "sophisticated" actions. And nothing he did resembled or reflected the level of complexity of shell companies or multi-jurisdictional operations the Commission highlighted as exemplary of what it was targeting.

A sentencing judge – or an appellate judge – asking herself "What makes this investment fraud different from all other investment frauds?" would most likely conclude "Nothing."

To Mizrahi, however, the practical consequences of the trial court's finding were not "nothing." When the district court was faced with a guideline range of 78-97 months, it imposed 84 months, six months above the low end of that range. The court said nothing suggesting it would have imposed the same sentence had it applied the correct range of 63-78 months. This Court has repeatedly affirmed that an erroneous guidelines calculation ordinarily suffices to demonstrate a reasonable probability of a different outcome. *Molina-Martinez,* 578 U.S. at 198-99; *Rosales-Mireles,* 585 U.S. at 139. Nothing in the record rebuts that presumption. Had the district court correctly calculated a range of 63-78 months, a sentence of 84 months would have exceeded the top end of that range, a result the record does not support.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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