No. 11-343

In the Supreme Court of the United States

MICHAEL SEGAL, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the National Association of Criminal Defense Lawyers (NACDL) is a non-profit association of lawyers who practice criminal law before virtually every state and federal bar in the country.[1] NACDL's more than 12,800 member attorneys and the 35,000 members of its state, local, and international affiliates represent defendants in a wide variety of criminal cases, including in cases brought under

[1] No party's counsel authored any part of this brief, and no person other than NACDL and its counsel made any monetary contribution intended to fund its preparation or submission. Counsel of record for all parties received notice of and consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

the federal fraud statutes at issue in this case. NACDL's members are interested in the resolution of the questions presented in the petition because those questions affect the rights of their current and future clients.

SUMMARY OF ARGUMENT

The Court's review is warranted in this case because the court of appeal's decision wrongly federalizes—and dramatically increases the penalties for violating—a state licensing regime. And it does so under a theory of the federal fraud statutes that broadens those statutes' application beyond the traditional understanding of fraud and beyond the original intendment of the statutes.

The decision below is thus inconsistent with this Court's decision *Cleveland* v. *United States*, 531 U. S. 12 (2000), which held that the fraud statutes do not make it a federal crime to make false statements in pursuit of a state license, and is in considerable tension with a line of this Court's precedents that culminated two Terms ago in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010). Together, these cases constrain the application of the federal fraud statutes in order to maintain balance between the federal government and the States and to ensure that individuals are punished only for behavior that is adequately described by the text of the statutes themselves. The decision below ignores their rules and their warnings in construing the wire fraud statute to encompass the false certification theory that the government pressed in this case, and review is warranted to give the law properly narrow construction.

REASONS THE WRIT SHOULD BE GRANTED

I. TWO CONCERNS HAVE DRIVEN THIS COURT TO ADOPT NARROWING CONSTRUCTIONS OF THE FEDERAL FRAUD STATUTES IN THE PAST

The mail, wire and bank fraud statutes (18 U.S.C. §§1341, 1343 & 1344) are the most commonly invoked federal criminal statutes governing property crimes—with their "simplicity, adaptability, and comfortable familiarity," they are the federal prosecutor's bread and butter.[2] Between 2001 and 2010, some 16,921 mail, wire and bank fraud cases were filed in the federal district courts, an order of magnitude more than the numbers of, *e.g.*, bribery cases (1,232), securities fraud cases (890), and RICO cases (243) filed in the same period.[3] The high number of cases brought under these statutes in itself supports taking review of important questions arising under them because every such question will recur in the daily operation of the Offices of the U.S. Attorneys and of the federal district courts.

In light of their frequent application, two substantive concerns—both of which are raised by the petition—have compelled this Court to answer important

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

[3] Administrative Office of the U.S. Courts, 2010 Annual Report of the Director: Judicial Business of the United States Courts 222 (2011) & 2005 Annual Report of the Director: Judicial Business of the United States Courts 225 (2006).

questions raised under these statutes by adopting narrowing readings of the statutes' provisions.

First, in *Cleveland*, federalism concerns supported the Court's decision that making false certifications in an application for a state license did not fall within the statute. The federal structure, "[b]y denying any one government complete jurisdiction over all the concerns of public life, * * * protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) (Kennedy, J.). Overbroad application of the mail and wire fraud statutes, the Court held in *Cleveland*, would upset this federal-state balance, allowing the federal government to usurp the role of the States in the "exercise of [their] police powers" (*Cleveland*, 531 U. S., at 21 (Ginsburg, J.)) and "subject[ing] to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.*, at 24.

Second, in demanding that these often-invoked statutes be applied to no more behavior than what they clearly prohibit, the Court has repeatedly rejected the government's efforts to apply them creatively and instead held the statutes to their "core" meaning.

A criminal statute must define the "criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 130 S. Ct., at 2927-28. In *McNally* v. *United States*, 483 U. S. 350 (1987), the Court struck down a line of lower court cases allowing prosecution for deprivation of the intangible right to honest services, limiting the statute instead to the property crime to which "the words 'to

defraud' commonly refer." *Id.*, at 358. In *Neder* v. *United States*, 527 U. S. 1 (1999), the Court limited the statute to fraud's "well-settled meaning at common law." *Id.*, at 22. And in *Skilling*, the Court "pared" the "honest services" doctrine, which Congress had codified after it was excised from the case law by *McNally*, "down to its core." *Skilling*, 130 S. Ct., at 2928.

As the section below explains, these two concerns, which call for limiting the scope of federal criminal law to recognize state sovereignty and individual liberty, are raised by the decision below.

II. THE DECISION BELOW WARRANTS REVIEW BECAUSE IT IS INCONSISTENT WITH *CLEVELAND* AND RAISES BOTH FEDERALISM AND VAGUENESS CONCERNS

A. The court of appeals' decision turns "false certification" in pursuit of a state-issued license into a predicate for wire fraud, contravening *Cleveland* and federalizing enforcement of state business licensing

The prosecution's theory of fraud in this case, which the court of appeals adopted, was that petitioner made material false statements to the Illinois insurance regulator that he and his company complied with the Illinois code.

In its brief below defending the continued validity of petitioner's conviction despite this Court's decision in *Skilling*, the government explained that the petitioner's "false statements were made to the IDOI"—the Illinois Department of Insurance—"a regulatory agency that protects the interests of those who do

business with insurance brokers by requiring brokers to obtain a license, and to certify compliance with state laws and regulations as a condition of getting one." Supp. Br. of United States (CA11), at 11.[4] By obtaining a license in this fashion, the government contended, the petitioner was implicitly representing to his customers that he complied with Illinois state law: "The very fact that defendant maintained a current license throughout the period of the scheme assured the customers and carriers that he was in compliance." *Ibid.*

The court of appeals adopted this implicit-assurance theory, holding that the petitioner thereby "fraudulently represented to the insureds and insurance carriers that he would hold the insurance premiums in trust." Pet. App., at 4a.

The problem for the government is that *Cleveland* rejected just this kind of "false certification" theory as a basis for a federal fraud conviction. *Cleveland* overturned the fraud convictions of two defendants who had obtained video poker licenses by lying to the state licensing authority. The Court found that the state had no property interest in the license it was issuing and that therefore no mail fraud charge based

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[4] Petitioner was charged with having made "false material statements to the IDOI for the purpose of influencing the actions of the IDOI . . . to persuade the [IDOI] to renew their licenses, permit their continued operation as producer and registered firm, and to lull the [IDOI] into a false sense that [petitioner and his brokerage] were operating properly according to the Code and the law." Fourth Superseding Indictment, ¶ 5.

on the false certification could stand. *Cleveland*, 531 U. S., at 23.

Significantly, and as noted, the Court's holding turned in part on the fact that the video poker license scheme "establishe[s] a typical regulatory program" in that "[i]t licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization." *Id.*, at 21. That is also true here, where state regulation of insurance and the issuance of brokerage licenses is just as typically a traditional area of state concern. Thus, here as in *Cleveland*, the scheme at issue "resembles other licensing schemes long characterized by this Court as exercises of state police powers." *Ibid*.

This case thus raises the concern that prompted the *Cleveland* Court to read the fraud statute narrowly. Allowing prosecution for false certification there would have required the Court to "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress" and "subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.*, at 24. So too here. In *Cleveland*, state law "unambiguously impose[d] criminal penalties for making false statements on license applications." Similarly, the Illinois regulatory scheme at play here not only imposed penalties but actually enforced its statute against petitioner. See Pet., at 31. And where a state-created licensing regime contains its own statutory enforcement mechanism, Congress must speak clearly or it "will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Cleveland*, 531 U. S., at 24.

In short, the state interest threatened by the decision below is exactly what drove the Court to read the fraud statutes narrowly in *Cleveland*: "the distinctively sovereign authority to impose criminal penalties for violations of the licensing scheme, including making false statements in a license application." *Id.*, at 23 (internal citations omitted).

Of course, the government's theory of this case was slightly different than in the *Cleveland* case; in *Cleveland* the "property" at issue was the state-issued license, while the government's theory here is that the property is the money that the defendant obtained through using that license. But allowing a conviction to stand on the government's new theory would not only make *Cleveland*'s rule a nullity, it would suggest that *Cleveland* itself was wrongly decided on its facts. For the *Cleveland* defendants' ultimate goal was to use the video poker machines to make money. Yet it cannot be correct that the government could have obtained a different result in *Cleveland* if they had merely noted that the petitioner was interested in using his video poker license to make money from customers, and the simple change in theory does nothing to lessen the federalism concerns on which the Court's decision in *Cleveland* rested.

Review is thus warranted to correct the court of appeals' decision altering the delicate balance between federal and state lawmaking and law-enforcement authority. That conclusion is further bolstered by the long line of this Court's cases expressing the need to correctly strike that balance. *Rewis* v. *United States*, 401 U. S. 808 (1971), for example, declined to apply the federal Travel Act to an

in-state gambling operation based on its customers' interstate travel, because the government's position "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." *Id.*, at 812.

All of those concerns resonate in this case, and of particular note is the fact that the punitive consequences that the defendant is facing at the state level are the revocation of his insurance license and a relatively modest fine. See *Segal* v. *Dep't of Ins.*, 938 N.E.2d 192, 196 (Ill. App. Ct. 2010). Indeed, the $1.5 million fine that a state decisionmaker originally imposed was reduced to just $100,000 because that was the maximum fine authorized by the insurance code. *Ibid.* In the federal proceedings, by contrast, petitioner is serving a 10-year prison term and has been ordered to give up his valuable stake in his brokerage and pay forfeiture of an additional $15 million. Pet. App. 2a. It thus appears that federal prosecution here has "transform[ed] [a] relatively minor state offense[] into [a] federal felon[y]."

United States v. *Bass*, 404 U. S. 336 (1971), similarly declined to extend the federal felon-in-possession statute by dispensing with an interstate requirement in some circumstances, noting in reaching its decision that the government's position that the Court was rejecting would "render traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." *Id.*, at 350. And in *Jones* v. *United States*, 529 U. S. 848 (2000), the Court re-

jected the government's attempt to bring federal arson charges in a case involving the burning of a private home. Under the government's theory, "hardly a building in the land would fall outside the federal statute's domain" for the prosecution of arson, which is a "paradigmatic common-law state crime." *Id.*, at 857-58. Justice Stevens, concurring, further noted that the "federal intervention in local law enforcement in [such] a marginal case" caused the defendant to receive "a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years. [This] effectively displace[d] a policy choice made by the State." *Id.*, at 859-60 (Stevens, J., concurring). Those concerns have equal application here.

All of these cases show the recurring recognition that the "federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society' to determine appropriate rules and regulations for different activities." *Bond*, 131 S. Ct., at 2364. The decision of the court of appeals wrongly federalizes the enforcement of a paradigmatic state regulatory regime, depriving the state of the power to determine whether and how to punish those who violate its laws. The Court should take review to fix the balance that the court of appeals' decision throws out of whack, and to reiterate that the federal fraud statutes do not allow prosecution for false certification to state licensing authorities.

B. *McNally*, *Neder* and *Skilling* require limiting the federal fraud statutes to "core" cases of fraud, and the decision of the court of appeals goes beyond that core

The court of appeals' decision also warrants review because the "false certification" theory that is the basis for the conviction here pushes the boundaries of the federal fraud statutes. The court of appeals should not have approved the conviction. It should instead have understood this Court's cases, including the decision two Terms ago in *Skilling*, as instructions to limit federal fraud convictions to "core" applications.

This Court has repeatedly observed that the "common understanding" of the words "to defraud" in the federal fraud statutes is "'wronging one in his property rights by dishonest methods or schemes,' and 'usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally*, 483 U. S., at 358 (quoting *Hammerschmidt* v. *United States*, 265 U. S. 182, 188 (1924)).

When the mail fraud statute was first proposed in 1870, its sponsor stated that it was needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." *McNally*, 483 U. S., at 356 (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Fransworth)). The Court determined that "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *Id*., at 356.

From this relatively small seed grew a tangled vine, as a long line of cases beginning with *Shushan* v. *United States*, 117 F.2d 110 (CA5 1941), approved the invocation of the federal fraud statutes against a growing variety of bad behavior, from bribing officials and stealing elections to appropriating personal information and running a bogus company. *McNally*, 483 U. S., at 363-64 (Stevens, J., dissenting) (outlining the varied convictions garnered through honest services fraud).

McNally stopped this encroaching growth by discarding the "honest services" doctrine that allowed it. The Court did so to avoid a reading of the statute that "leaves its outer boundaries ambiguous." *Id*., at 360. But Congress soon amended the definition of fraud to encompass "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. §1346. And in the following years the circuit courts again approved the fraud statutes' invocation, and specifically the invocation of the "honest services" doctrine, to punish a variety of bad acts—including, in every circuit, various breaches of fiduciary duty.[5]

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[5] See, *e.g.*, *United States* v. *Sawyer*, 85 F.3d 713 (CA1 1996) (insurance lobbyist provided presents to members of state legislature); *United States* v. *Rybicki*, 354 F.3d 124 (CA2 2003) (lawyer paid insurance claim adjusters to expedite claims); *United States* v. *Murphy*, 323 F.3d 102 (CA3 2003) (political party chairman influenced county contracts for kickbacks to chairman's friends); *United States* v. *Harvey*, 532 F.3d 326 (CA4 2008) (U.S. Army employee steered contract to company and received kickbacks); *United States* v. *Brumley*, 116 F.3d 728 (CA5 1997) (handler of compensation claims accepted money from lawyers that appeared before him); *United States* v. *Frost*, 125 F.3d 346 (CA6 1997) (university professor plagiarized dis-

Notably, this case was originally brought—and petitioner was originally convicted—in part under this theory.

Then, just as *McNally* did with mail fraud generally, the *Skilling* Court cut back honest services fraud to kickback and bribery cases: "the doctrine's solid core." *Skilling*, 130 S. Ct., at 2930. This limiting construction has the virtues that it "establishes a uniform national standard, defines honest services with clarity, [and] reaches only seriously culpable conduct" while at the same time "accomplishing Congress's goal of overruling *McNally*." *Id.*, at 2933 (internal citations omitted).

Separately, and between these two cases, the Court decided *Neder* v. *United States*, 527 U. S. 1 (1999), limiting the federal fraud statutes to fraud's "well-settled meaning at common law." *Id.*, at 22. Congress, the Court held, had "incorporate[d] the es-

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sertations in exchange for contracts from students' employers after graduation); *United States* v. *Bloom*, 149 F.3d 649 (CA7 1998) (alderman in his other job as lawyer advised client to use a proxy bidder at a tax scavenger sale to avoid taxes); *United States* v. *Pennington*, 168 F.3d 1060 (CA8 1999) (owner of grocery store received kickbacks from paying consultants to arrange supplier contracts); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923 (CA9 2009) (county commissioner accepted bribes for her vote regarding particular ordinances); *United States* v. *Welch*, 327 F.3d 1081 (CA10 2003) (Olympic bid officials paid bribe to IOC members); *United States* v. *Browne*, 505 F.3d 1229 (CA11 2007) (union official received money from employer whose employees were kept out of the union); *United States* v. *Sun-Diamond Growers of California*, 138 F.3d 961 (CADC 1998) (company's representative contributed illegally to reelection campaign of official through company funds).

tablished meaning of" common-law fraud terms in use at the time of the mail fraud statute's enactment. The particular issue in the case was whether a misrepresentation or omission must be "material" in order to ground a claim of fraud under the statues. In deciding the issue, the Court held that, because the element of materiality was essential to the core concept of fraud, and "the common law could not have conceived of 'fraud'" without it, a showing of materiality was required under the statutes. *Ibid.*

In each of these cases, the Court has required that the federal fraud statutes be read narrowly and in a manner that does not leave its outer boundaries ambiguous. *McNally*, 483 U. S., at 360. That rule of construction should have precluded a conviction here. A number of crucial factors separate this case from the main line of fraud cases:

- in this case, the only theory of misrepresentation was that petitioner lied to the state licensing authority;
- the court of appeals never concluded that the "implied" misrepresentation to customers was material;
- there was no evidence of petitioner's intent to cause harm to anyone;
- there was no harm to anyone as a result of the supposed fraud, as no customer lost insurance coverage and no payment to any insurer was missed;
- the court of appeals' decision implicates not one but two circuit splits on the scope of fraud statutes, and comes out on the broader side of the split each time;

- and finally, the case was submitted to the jury in part on an honest services theory, based on a breach of fiduciary duty, and after *Skilling* the conviction was saved from reversal only by a speculative retrospective analysis of what the jury would have done had *Skilling* been decided before rather than after the verdict.

For all of these reasons, this case bears little resemblance to the "core" of fraud cases, which generally involve "the deprivation of something of value by trick, deceit, chicane or overreaching." *Hammerschmidt*, 265 U. S., at 188. Since here there was no deprivation nor was any victim deceived by petitioner, the facts do not fit the classic description of the crime.

Given this disconnect, review is warranted to fulfill the promise of *McNally*, *Neder*, *Cleveland*, and *Skilling*. The decision below is a dangerous precedent that upsets the federal-state balance and leaves individuals with no way of discerning the contours of the law that governs them. The time is right for this Court to intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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