No. 11-343

In the Supreme Court of the United States

MICHAEL SEGAL,

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not dispute that the petition presents important and recurring issues regarding the reach of the amorphous and widely used mail and wire fraud statutes. And for all the talk about "looting" and "theft," the government cannot deny that, even under its theories, the identical conduct could not be federally prosecuted—indeed, would not be criminal at all—if NNIB were located in Iowa, Wisconsin, or any of the two dozen or so States that do not require PFTAs.

Instead, the government tries to generate "vehicle" problems to discourage review. But the purported waivers that the government claims merely reflect the fact that these issues did not become germane until *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), knocked out the honest-services rationale on which the case was tried and the convictions affirmed. And the government's contention that Michael Segal's conviction and sentence were unaffected by the issues presented finds no support in the record—particularly given that the court of appeals was conducting harmless-error review. These phantom obstacles should not preclude review of the significant questions here presented.

In straining to repackage as monetary fraud conduct that had been tried as honest-services fraud, the court of appeals dispensed with virtually every element of common law fraud, including the basic requirement of a material misrepresentation to the victim. Based on what the government tried as "a fiduciary accounting fraud," Segal has been sentenced to over ten years imprisonment and massive forfei-

tures. This result stretches the federal fraud statutes past the breaking point.

A. The Petition Raises Important Questions Of Law On Which The Lower Courts Are Divided.

1. The government concedes that the Circuits are divided on the first question presented: whether intent to harm is a required element of mail/wire fraud. Opp. 14. It does not dispute that the affirmance of Segal's conviction expressly rested on the conclusion that the fraud statutes do not require "a specific intent to cause injury." Pet. App. 5a. Nonetheless, the government opposes review on the theory that Segal would have been convicted even in those circuits that require such a showing. It contends that in both the Second and Sixth Circuits, "a temporary deprivation of money or property procured through deceit" suffices to establish the requisite intent to harm. Opp. 15-16. The suggestion that Segal's conviction would stand under the law of those circuits is unsupported by any evidence—and certainly not evidence that can satisfy the harmless-error standard applicable here.

First, the government cannot point to any deprivation "procured through deceit." It relies on cases holding that intent to harm may be shown when the defendant "'*by material misrepresentations* intends the victim to accept a substantial risk that otherwise would not have been taken.'" Opp. 15 (emphasis added) (quoting *United States* v. *Daniel*, 329 F.3d 480, 488 (6th Cir. 2003)). Here, as discussed in connection with issue two (at 4-7, *infra*), there were no misrepresentations to the alleged victims.

Second, Segal's putative victims did not suffer even a temporary deprivation of money or property, as there was no finding by the court or the jury that policyholders or carriers held any money or property interest in the PFTA funds. See *Cleveland* v. *United States*, 531 U.S. 12, 15 (2000) ("It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim."). The government cites only the district court's findings that Segal "stole" money *from the PFTA*—not from any policyholder or carrier. Opp. 17. And the government quotes the Seventh Circuit as affirming that Segal "*was taking* [his victims'] *money*" (*ibid.*), when in fact the Seventh Circuit said only that he was taking "*the money*," without assigning ownership to either policyholders or carriers.[1]

Finally, as the Second Circuit has held, the harm contemplated by a scheme to defraud "must affect the very nature of the bargain itself." *United States* v. *Novak*, 443 F.3d 150, 159 (2d Cir. 2006) (internal quotation marks omitted). Here, there was no evidence that maintenance of the PFTA was material to any customer or carrier (indeed, the district court found it immaterial even to the IDI). Tr. 5687, 5706. On the contrary, the evidence showed that customers and carriers got everything they bargained for. See

[1] A PFTA is not a traditional trust account. Illinois law permits comingling of premium and other funds in the PFTA, and authorizes brokers to withdraw certain funds from the PFTA. 50 Ill. Admin. Code § 3113.40(f). Whether and to what extent policyholders and carriers have an ownership interest in the PFTA funds before they come due to the carrier is unsettled.

Pet. 13 (citing record).[2] Under these circumstances, the government cannot plausibly contend that all circuits would have found the instructional error harmless beyond a reasonable doubt.

2. The government also opposes review on the indirect misrepresentation issue, contending that the court of appeals did not resolve the issue in this case. The issue is nonetheless properly teed up because it was already Seventh Circuit law that a mail fraud conviction may rest on a misrepresentation to the IDI and not the putative fraud victim.[3] See *United States* v. *Cosentino*, 869 F.2d 301, 307 (7th Cir. 1989). And the only misrepresentation alleged or proven here was a statement to the IDI, in a license renewal application, that NNIB was complying with the PFTA requirement. Accordingly, the question whether a mail/wire fraud conviction may rest on a misrepresentation to a third party rather than the victim is squarely presented here.

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[2] The government disputes our reliance on the PSR's finding of "no evidence [Segal] intended to defraud either the insurance clients or the insurance companies." PSR 22; see Opp. 18 n.4. But because the government did not object to this finding, it is deemed admitted. See *United States* v. *Hooks*, 551 F.3d 1205, 1217 (10th Cir. 2009); *United States* v. *Bunkley*, 398 F. App'x 523, 531 (11th Cir. 2010) (per curiam). Moreover, the trial court considered and expressly rejected other findings in the PSR, Sent. Tr. 7, but did not reject this one; it was therefore implicitly adopted.

[3] The government inappropriately reformulates the question to presume the existence of a fraudulent scheme; however, the question presented is *whether there is a scheme to defraud at all* without a material misrepresentation or false pretence directed at the alleged victim.

The government shamelessly seeks to avoid this issue by invoking the court of appeals' statement that petitioner "fraudulently represented to the insureds and insurance carriers" that "he would hold the premiums in trust" (Pet. App. 4a; Opp. 18-19). But as the government must well know, the record is *utterly devoid of any evidence supporting this assertion*. Certainly the government offers no specifics as to when, how, or to whom such representations were made. Indeed, it cites nothing whatever to support the assertion, nor did the court of appeals in its opinion or the government in its appellate briefing. What the government argued instead was that the alleged misstatement to the IDI amounted *indirectly* to a misrepresentation to policyholders and carriers by enabling NNIB to maintain its brokerage license, which in turn implied that NNIB was properly maintaining its PFTA. See Pet. 19-20. This directly supports the centrality of the indirect-misrepresentation issue.

At least two circuits have held that such an attenuated relationship between the misrepresentation and the intended harm cannot support a mail or wire fraud charge. See *McEvoy Travel Bureau, Inc.* v. *Heritage Travel, Inc.*, 904 F.2d 786, 794 (1st Cir. 1990); *United States* v. *Lew*, 875 F.2d 219, 221 (9th Cir. 1989); see also *United States* v. *Frost*, 125 F.3d 346, 354 (6th Cir. 1997) (noting circuit conflict on this issue).

The government acknowledges the conflict with *Lew*, but asserts that after *United States* v. *Ali*, 620 F.3d 1062 (9th Cir. 2010), cert. denied, 132 S. Ct. 370 (2011), "it is not clear" that the Ninth Circuit would have reversed here. Opp. 21. This suggestion is baseless. *Ali* expressly reaffirmed *Lew*'s central

holding, that "for mail fraud, 'the intent must be to obtain money or property from the one who is deceived.'" 620 F.3d at 1070 (quoting *Lew*, 875 F.2d at 221). Accordingly, the court held that where defendants' conduct was "part of an overall scheme to defraud Microsoft, in which they made misrepresentations to Microsoft," their convictions were properly affirmed. *Id.* at 1071. Here, in contrast, the government has identified no misrepresentations to the purported victims of the scheme; thus, Segal's conviction could not stand in the Ninth Circuit.

The government is also incorrect that *United States* v. *Christopher*, 142 F.3d 46 (1st Cir. 1998), eliminated the conflict with the First Circuit's decision in *McEvoy*; instead, it underscores the abiding confusion among the circuits. *Christopher* reaffirmed *McEvoy*'s holding that no fraud occurred where "'the only parties deceived—[the regulators]—were not deprived of money or property.'" *Id.* at 53 (alteration in original) (quoting *McEvoy*, 904 F.2d at 794). But it framed the issue as one of causation: "the deception must in fact cause the loss." *Ibid.* This formulation does not advance the government's position. There was no finding of causation here. On the contrary, the district court expressly found no evidence that "the license renewal applications had any potential influence on any state official." Order on Mot. for J. of Acquittal (Dkt. No. 471), at 9. This finding refutes any causal connection between the statements to IDI and the alleged misappropriations from the PFTA.[4] The government's effort to dispense, out-

[4] It also undercuts the government's theory that misleading a regulator—and thereby impeding its protective function—may support a mail fraud prosecution even absent a misrepresentation directed at the victim.

side the honest-services context, with any causative misrepresentation (Opp. 19) is untenable.

3. The third question presented is, in essence, whether a mail/wire fraud conviction may be predicated on conduct that violated Illinois law but would have been perfectly lawful in many other States. The government's principal response is a *non sequitur*. It observes that the jury was instructed that a violation of state law, standing alone, could not support a conviction; there were other elements that also had to be found. Opp. 23-24. But the fact that a violation of state law was not alone *sufficient* for conviction is immaterial; the relevant point is that it plainly was *necessary*. The crux of Segal's offense, as the Seventh Circuit described it, was that "[h]e failed to maintain the PFTA by taking out the funds that were supposed to go to the insurance carriers." Pet. App. 4a. (Never mind that they *did* go to the carriers when payment was due.)

The untenable effect of this approach is to criminalize Segal's conduct in those States—and only those States—that impose PFTA rules, which nearly half of all States do not. See Pet. 25. Such a result contravenes this Court's admonition that application of a federal statute should not be "dependent on state law," unless clearly so stated by Congress. *Jerome* v. *United States*, 318 U.S. 101, 104 (1943); see also *Cleveland* v. *United States*, 531 U.S. 12, 25 n.4 (2000) ("The question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law." (alteration and internal quotation marks omitted)).

B. The Government's Asserted Obstacles To Review Are Illusory.

The government interposes alleged procedural obstacles to review of the substantial questions presented. These obstacles are illusory.

1. The government argues that Segal forfeited each issue presented by failing to raise it in his initial appeal. Opp. 12, 18, 23. Significantly, the court of appeals did not find a forfeiture when the government raised this objection below (Gov't Supp. Br. 13), instead ruling on the merits. See Pet. App. 5a-6a. And indeed there was no waiver.

Segal had no reason to raise the present issues in his original appeal. His trial and first appeal focused on the government's honest-services theory; the current issues came to the forefront only by virtue of this Court's decision in *Skilling*, which occurred while the second appeal was pending. In such circumstances, there is no waiver. See, *e.g., United States* v. *Castellanos*, 608 F.3d 1010, 1019 (8th Cir. 2010) ("Although parties should present alternative arguments whenever sound strategy dictates, [a party] * * * [i]s not required to anticipate every possible outcome on appeal and formulate a responsive argument for each alternative."); *United States* v. *Lee*, 358 F.3d 315, 324 (5th Cir. 2004) ("[W]hether a [party] waived an issue for consideration at resentencing [depends on] whether the party had [sufficient] incentive to raise th[at] issue in the prior proceedings." (internal quotation marks omitted)); *Robinson* v. *Johnson*, 313 F.3d 128, 141 n.5 (3d Cir. 2002) ("[T]he principle that a party who failed to raise an argument in its initial appeal is held to have waived its right to raise that argument on remand or on a second appeal * * * must be limited to issues appro-

priate to be raised on appeal."). Here, the questions presented became significant only after the focus turned to whether the required elements of money/property fraud existed—and thus to whether submission of the honest-services theory was harmless.

The first question—whether an intent to harm is required—makes sense only in the context of money/property fraud, as the very *meaning* of intent to harm is intent to deprive another of money or property. See Pet. 13-14 (citing cases). The government acknowledges as much in contending that this element is satisfied by the fact that Segal purportedly placed customers' and carriers' money at risk. See Opp. 15-16. At trial, in contrast, the government's position was that the deprivation at issue was the breach of a fiduciary duty. Tr. 5706.

The second question—whether a misrepresentation to the victim is required—was similarly not germane to the honest-services theory on which the conviction was predicated and that was the focus of the initial appeal. The prosecution expressly told the jury that it was *not* attempting to prove a misrepresentation directed at any victim, because no such proof was needed in "a fiduciary accounting fraud case." Tr. 5687.

As to the third question, Segal has objected all along to the use of state law to define his obligations under the federal mail and wire fraud statutes. Initially, Segal's argument appropriately focused on the use of state law to supply a fiduciary duty, because the government's position was that the loss at issue was the deprivation of a fiduciary duty. The Seventh Circuit rejected Segal's argument. Pet. App. 20a-23a. Post-*Skilling*, when the Seventh Circuit de-

termined that this fiduciary breach also amounted to a money/property fraud, Segal renewed his objection, contending that state law could no more appropriately supply a money or property right under the federal fraud statutes. The government's waiver argument slices too finely what is substantively a single argument: that state law, especially idiosyncratic state law, cannot give content to a federal statute.

2. The government argues that review is also unwarranted because Segal's alleged abuse of the PFTA "was not the sum total of his fraud." Opp. 26-27. But the Seventh Circuit's harmless error holding rested *only* on the purported PFTA fraud. The court reasoned that any honest-services violation necessarily was premised on a finding that Segal "failed to maintain the PFTA by taking out funds that were supposed to go to the insurance carriers," which amounted equally to "a monetary fraud." Pet. App. 4a. Although the court of appeals may have found evidence (in its prior opinion) that other unlawful conduct occurred, see Opp. 26-27 (quoting Seventh Circuit's pre-*Skilling* opinion), none of that conduct was the basis of its harmless-error finding.

Indeed, the government's position stands harmless-error analysis on its head. The brief in opposition catalogues a spectrum of other purported misconduct, including improper political contributions, discounts to political figures, write-offs of customer credits, use of petty cash for personal expenses, and acceptance of a prohibited commission from the Chicago Transit Authority (CTA). Opp. 4-5. It is impossible to discern from the jury's general verdict, however, whether or to what extent Segal's mail and wire fraud convictions rested on any of these theories—some of which could support only the invalid

honest-services variety of fraud—or whether it would have convicted on the RICO count with the PFTA out of the case. These potential alternative bases for the jury's verdict make the Seventh Circuit's harmless error finding less—not more—defensible.

In any event, even if the government could demonstrate that the PFTA fraud had no effect on Segal's conviction, it plainly influenced his sentence. See, e.g., Sent. Tr. 9 (Dkt. No. 1622-1) (characterizing Segal's conduct, for purposes of loss calculation, as "a straight theft from the premium fund trust account"); *id.* at 71 (characterizing Segal's crime as "a rip-off of trust fund money"); *id.* at 72 (calling Segal "an emperor of an insurance agency with no premium fund trust account"). In addition, it affected the forfeiture amount. Segal was ordered to forfeit his entire interest in NNIB, which he had built into a billion-dollar business providing jobs to over 900 people, in addition to a $15 million cash forfeiture. This far exceeds any proceeds plausibly associated with the credit write-off and CTA allegations. See *id.* at 15 (finding combined loss from credit write-off, tax, and CTA allegations to total between $1 million and $2.5 million). The government's contention that no part of Segal's 121-month sentence and $15 million forfeiture was attributable to the purported misappropriation of $30 million in PFTA funds is simply unbelievable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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