No. 13-1083

# In The Supreme Court of the United States

MINTRA RAGOONATH,

*Petitioner*,

–v–

ERIC HOLDER, JR., U.S. Attorney General and MARC J. MOORE, Field Office Director, Department of Homeland Security Enforcement and Removal Operations, Miami Field Office,

*Respondents.*

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**On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals**

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI


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## ARGUMENT

The circuit courts of appeal are split in their interpretation of 18 U.S.C. § 656. The Court should thus grant certiorari to ensure uniformity and remedy the unequal application of a federal criminal statute.

### 1. Respondent Concedes a Split in the Circuits as to Whether 18 U.S.C. § 656 Is Divisible as to Mental State.

Respondent concedes that there is a split in the circuits as to the mental state required for a conviction pursuant to 18 U.S.C. § 656. Opposition Brief ("Opp.Br.") at 5. This split, the parties agree, results in a difference in opinion among the circuits as to whether analysis of the section (for both immigration and criminal cases) takes on a categorical versus a modified categorical approach. (Opp.Br.5) ("There is a potential disagreement in the courts of appeals about whether a conviction under Section 656 will always involve fraud or deceit, or whether that must be established, with respect to each particular conviction, pursuant to the modified categorical approach.") Indeed, Respondent articulates the split (as did Petitioner) by citing to the three circuit courts of appeal that disagree with the Eleventh. (Opp.Br.7-8) ("[B]ecause some convictions under Section 656 could rest on an intent to injure a bank, and that intent could conceivably mean the offense does not always involve fraud or deceit, the Second, Third, and Ninth Circuit decisions

cited by petitioner each undertook a case-specific inquiry to determine whether a particular proceeding culminating in a conviction under Section 656 had required the government to establish fraud or deceit. *See Akinsade v. Holder,* 678 F.3d 138, 145-148 (2d Cir. 2012))."

The Court does not have to look further than Respondent's brief to justify hearing this case on certiorari. Respondent juxtaposes the disparate treatment a non-citizen receives in the various circuits. (Opp.Br.8) The Respondent articulates that Petitioner's offense is automatically a crime involving fraud and deceit no matter what, simply because her criminal case was prosecuted in the Eleventh Circuit. (Opp.Br.9) This is in contrast to the treatment a defendant (or non-citizen facing removal) receives in the Second, Third and Ninth Circuits, wherein the provision is interpreted as having two alternative, mental states. In these jurisdictions, the immigration adjudicator will review the documents of record from a modified categorical standpoint to determine whether the same conviction involved the intent to defraud, as opposed to the intent to injure.

Indeed, the only difference between the parties' positions is that the unfair treatment (which carries over into the criminal law context as well) troubles the Petitioner, whereas Respondent is apparently unconcerned by the unequal application of a federal criminal law statute. In three circuit courts of appeal, a criminal defendant has access to an offense that involves the alternative elements of the intent to

injure, rather than defraud.[1] In the Eleventh Circuit, the intent to injure is merged with the intent to defraud, forming one element out of two and carrying potentially devastating consequences.

Because of this uneven interpretation of federal law, an individual who is prosecuted under 18 U.S.C. § 656—even if convicted in the Eleventh Circuit and some time later arrested by ICE in the Ninth, Second, or Third Circuits can argue that her crime of conviction does not necessarily involve fraud, and is entitled to a hearing that will take a modified categorical view of the conviction. However an individual like Ms. Ragoonath—who may have been convicted of 18 U.S.C. § 656 anywhere in the country—but who has the misfortune of being arrested by ICE in the Eleventh Circuit, is not entitled to any hearing at all, but is immediately classified as an aggravated felon subject to automatic deportation through the expedited removal process. Put another way, if Ms. Ragoonath had relocated to New York following her conviction in Florida, she would not be subject to expedited removal and would have an opportunity for a full and fair hearing before an immigration judge, which would take into account all the documents of the criminal court record of conviction.

Respondent claims Ragoonath would be deportable in any jurisdiction because her conviction for Section 656 necessarily involves fraud and deceit.

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[1] *See Akinsade v. Holder,* 678 F.3d 138 (2d Cir. 2012); *Valansi v. Ashcroft,* 278 F.3d 203 (3d Cir. 2002); *Carlos-Blaza v. Holder,* 611 F.3d 583 (9th Cir. 2010);

(Opp.Br.9) This supposition may or may not be true, but herein represents the quandary. In the Eleventh Circuit, the intent to injure and the intent to defraud merge into deceit. In the other circuits, the two distinct mental states remain constant as alternatives. It is not clear whether in subsequent removal (or administrative) proceedings conducted in one of the other circuits, the Eleventh Circuit's interpretation would be observed, or whether the "new" circuit's case law on divisibility would rule the day. In other words, if an individual convicted of Section 656 in New York relocates to Florida, and is encountered by ICE in Miami, will ICE honor the divisibility interpretation followed in the Second Circuit and adopt a modified categorical approach in proceedings before a judge, or expeditiously remove the sojourner pursuant to Eleventh Circuit's case law?

Thus with this one statement, Respondent succinctly makes Petitioner's point: courts within the Eleventh Circuit prosecute a different crime than those in other jurisdictions. The Eleventh Circuit does not acknowledge the two distinct *mens reae.* To highlight the point, Akinsade's conviction was entitled embezzlement. Valansi's conviction was entitled embezzlement. Section 656 should not be one offense in Florida, yet another in New York and New Jersey. Considering the number of defendants who are prosecuted for this crime, the disparate impact is untenable.[2]

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[2] According to *trac.syr.edu* there have been 86 convictions for violation of 18 U.S.C. § 656 thus far in fiscal year 2014. (The Transactional Records Access Clearinghouse (TRAC) is a data

Certiorari is required to resolve the split in circuit interpretation of the same statute because whether Section 656 is divisible (requiring a modified categorical analysis) or not divisible (categorically a fraud or deceit crime) clearly results in vastly different treatment of both criminal defendants and non-citizens facing removal.

### 2. Petitioner Was Convicted of Section 656; the Means of Committing the Offense Is Not Relevant to the Issue of Divisibility.

Respondent argues the nature of Petitioner's conviction in an attempt to convince the Court that this case is not the vehicle to correct the circuit split. Respondent argues that Petitioner was convicted of "embezzlement" which is categorically a crime involving fraud or deceit—in the Eleventh Circuit. This circular argument leaves no way out of the quagmire that is Section 656.

Section 656 is commonly referred to as "embezzlement." A title or name does not determine the elements of the crime and it is a diversionary tactic to place so much emphasis on semantics. In her argument before the court of appeals, Ragoonath may have referred alternatively to Section 656, or the name embezzlement, but specifically did not concede that embezzlement was a means inherent to her offense. Similarly, Ragoonath today does not concede that she was convicted of per se "embezzlement" because the record is unclear and this case never made it to a front-line adjudicator

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gathering, data research and data distribution organization at Syracuse University).

(there was no hearing before an immigration judge.) Indeed, the charging document lists all potential means that she could have committed: "embezzle, abstract, purloin and misapply . . . " A.R. at 61. It would be highly unusual for a court clerk to list all means in a court judgment.[3] In the petition for rehearing, Petitioner specifically argued that the statute was divisible in terms of both the minimum elements of the offense conduct and the required mental state. Petition for Rehearing at 16-17.

It is not relevant whether Ragoonath was convicted of embezzlement, misapplication, or a general violation of Section 656 without clarification of the specific offense. The crux of the petition for writ of certiorari is the division among the circuits regarding the mental state involved: intent to defraud versus intent to injure. The mental state is a distinct element from the offense conduct and must be established regardless of whether a defendant is prosecuted for purloin, abstract, misapply, or embezzle. To illustrate, the conviction in *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001) was labeled "misapplication." The convictions in *Valansi* and *Akinsade* were labeled "embezzlement." Thus to dally over whether Petitioner was convicted of misapplication, embezzlement, purloin, or abstraction avoids the real issue: the fact that

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[3] Respondent correctly notes that the complete record of conviction is not in the Administrative Record. (Opp.Br.9) One of the glaring problems with this case is that Petitioner was not afforded a immigration court hearing before an impartial judge to determine what, in fact, she had been convicted of, and in turn, whether said offense qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).

circuits outside the Eleventh view Section 656 a divisible statute in terms of mental state.

Contrary to the Eleventh Circuit's view, the intent to injure is an alternative element to intent to defraud and intent to deceive. *See United States v. Angelos,* 763 F.2d 859, 861 (7th Cir. 1985), *United States v. Docherty,* 468 F.2d 989, 985 (2d Cir. 1972).

### 3. The Respondent Fails to Address the Problem with Disparate Impact of Similarly Situated Defendants and Non-Citizens.

Focusing on whether the unclear administrative record involves "embezzlement" or some other means of violating Section 656 allows the Respondent to detract from the real problem of a circuit split as to interpretation of the essential elements. The Respondent fails to address Petitioner's arguments at pages 10 through 13 of her brief. The Respondent similarly fails to address the same problem as highlighted by Amicus.

A careful reading of Respondent's reply brief illustrates the problem with disparate interpretation of 18 U.S.C. § 656 and demonstrates the need for the Court's review and resolution, not only for Petitioner Ragoonath, but for criminal defendants throughout the country, and especially those facing potential removal for this crime.

## CONCLUSION

Therefore, for the reasons stated in the Petition for Writ of Certiorari and Reply Brief, this Court should grant certiorari.

Respectfully Submitted,

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