No. 19-1087

In the Supreme Court of the United States

CHARLES M. HALLINAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court adequately instructed the jury on the mens rea element of conspiracy to conduct or participate in the conduct of an enterprise's affairs through the collection of unlawful debt, in violation of 18 U.S.C. 1962(d).

2. Whether petitioner is entitled to plain-error relief on his claim that a civil cause of action for damages is not "property" within the meaning of the mail-fraud statute, 18 U.S.C. 1341, and the wire-fraud statute, 18 U.S.C. 1343.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. *Grand Jury Matter #1*, No. 14-gj-631 (June 1, 2015)

United States v. *Hallinan*, No. 16-cr-130-1 (July 6, 2018)

United States Court of Appeals (3d Cir.):

In re: Grand Jury Matter #3, No. 15-2475 (Jan. 27, 2017)

In re: Grand Jury Matter #3, No. 15-3317 (Dec. 28, 2015)

In re: Grand Jury Matter #3, No. 16-1787 (June 23, 2017)

In re: Grand Jury Matter #3, No. 16-4361 (June 23, 2017)

United States v. *Hallinan*, No. 18-2539 (Sept. 6, 2019)

United States v. *Neff*, No. 18-2282 (Sept. 6, 2019)

Supreme Court of the United States:

Neff v. *United States*, No. 19-1127 (Apr. 20, 2020), petition for reh'g filed (May 15, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is not published in the Federal Reporter but is reprinted at 787 Fed. Appx. 81.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2019. A petition for rehearing was denied on November 5, 2019 (Pet. App. 105a-106a). On January 7, 2020, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 4, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of conspiracy under the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d); one count of conspiracy to commit mail fraud, wire fraud, and money laundering, in violation of 18 U.S.C. 371; two counts of mail fraud, in violation of 18 U.S.C. 1341 and 2; three counts of wire fraud, in violation of 18 U.S.C. 1343 and 2; and nine counts of money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) and 2. Judgment 1-2. The district court sentenced petitioner to 168 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-25a.

1. From at least 2007 to 2013, petitioner and his attorney Wheeler Neff conspired to collect unlawful debts arising from usurious payday loans. Pet. App. 2a; Presentence Investigation Report (PSR) ¶¶ 8-10. Payday loans are short-term, high-interest loans that the borrower commonly must repay with his next paycheck or Social Security check. *Ibid.*; see PSR ¶ 18. Most States prohibit or regulate payday loans. Pet. App. 2a-3a. Petitioner and Neff operated a group of companies, the Hallinan Payday Loan Organization, that collected more than $488 million in payday-loan debt from hundreds of thousands of borrowers across the United States. PSR ¶¶ 10, 30 & n.4. Many of those borrowers lived in States whose usury laws made the loans unenforceable. *Ibid.* Petitioner, with help from Neff, used a series of subterfuges designed to evade state laws prohibiting or regulating payday lending. PSR ¶¶ 10-11, 24-30. As relevant here, petitioner paid large fees to

two Indian tribes and Randall Ginger, a self-proclaimed hereditary chief of a Canadian Indian tribe, so that the tribes would, in return, act as false fronts for petitioner's companies. Pet. App. 3a-4a; PSR ¶¶ 11, 27-29. If a State tried to enforce its laws against a payday-lending company in the Hallinan Payday Loan Organization, the tribe would claim that it owned the company and that tribal sovereign immunity precluded the enforcement of state law against that company. PSR ¶¶ 11, 27-29. In practice, petitioner ran the companies, and the tribes had little involvement in their operation. PSR ¶¶ 11, 28.

Petitioner and Neff also participated in a second enterprise, the Rubin Payday Lending Organization, which consisted of businesses owned and operated by petitioner's former business partner Adrian Rubin. Pet. App. 3a-4a; PSR ¶ 12. Like the companies in the Hallinan Payday Lending Organization, the companies in the Rubin Payday Lending Organization collected unlawful debt arising from payday loans. PSR ¶ 12. In 2010 or 2011, Rubin paid petitioner $100,000 in exchange for an introduction to one of the Indian tribes that petitioner used as a false front for his own payday-lending activity. Pet. App. 3a; PSR ¶¶ 14, 34-35. Rubin later agreed to pay the tribe a monthly fee, and the tribe in return agreed to give the appearance that it owned and operated Rubin's companies and to assert sovereign immunity in response to efforts to enforce state laws. PSR ¶ 35.

In 2010, plaintiffs in Indiana filed a class-action lawsuit against Apex 1 Processing, Inc., one of the companies in the Hallinan Payday Loan Organization, alleging violations of various state consumer-credit laws. Pet. App. 3a; PSR ¶¶ 15, 40; Gov't C.A. Br. 35-36. After the

certification of the class in May 2013, petitioner and Neff conspired to deceive the plaintiffs into believing that Apex 1 was owned by Ginger and that the company had few assets that could be used to pay a judgment. Pet. App. 4a-5a; PSR ¶¶ 15, 41-47. Petitioner directed his accountant to file amended tax returns that would identify Ginger as the owner of Apex 1. Pet. App. 4a; PSR ¶ 42. Petitioner also called Ginger and said, "I'll pay you ten grand a month if you will step up to the plate and say that you were the owner of Apex One Processing, and upon the successful conclusion of the lawsuit, I'll give you fifty grand." Pet. App. 4a (citation omitted); PSR ¶ 43. Further, petitioner falsely testified during a deposition in the class action that he had sold the company to Ginger in 2008, that he had left the company shortly thereafter, that the company had gone out of business in 2010, and that he did not pay the company's legal fees. Pet. App. 4a-5a; PSR ¶¶ 46-47. As Neff wrote in an email, the goal of all of those lies was "to avoid any potential questioning . . . as to any deep pockets or responsible party associated with Apex 1." Pet. App. 5a (citation omitted). Ultimately, the class-action plaintiffs, who had sued for more than $13 million, settled the lawsuit for $260,000. Pet. App. 3a, 5a; PSR ¶ 48.

2. A grand jury in the Eastern District of Pennsylvania indicted petitioner and Neff on two counts of RICO conspiracy, in violation of 18 U.S.C. 1962(d); one count of conspiracy to commit mail fraud, wire fraud, and money laundering, in violation of 18 U.S.C. 371; two counts of mail fraud, in violation of 18 U.S.C. 1341 and 2; and three counts of wire fraud, in violation of 18 U.S.C. 1343 and 2. Pet. App. 48a-92a. The grand jury

also indicted petitioner on nine counts of money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) and 2. Pet. App. 93a-94a. As relevant here, the RICO charges rested on petitioner's and Neff's efforts to evade state usury laws by using Indian tribes as false fronts, and the fraud charges rested on petitioner and Neff's efforts to deceive the plaintiffs in the Indiana class-action lawsuit. *Id.* at 2a, 6a.

At the close of trial, the district court rejected petitioner and Neff's request to instruct the jury that, to establish guilt on the RICO conspiracy charges, the government was required to prove that the defendant acted "willfully," and that a defendant acts "willfully" when he commits an act "voluntarily and purposedly, with the specific intent to do something the law forbids; that is to say, with a bad purpose either to disobey or disregard the law." D. Ct. Doc. 289, at 2 (Nov. 3, 2017); see Pet. App. 120a-126a. The court instead instructed the jury that the government was required to prove that the defendant joined the conspiracy "knowing of its objectives to conduct or participate * * * in the conduct of an enterprise's affairs through the collection of unlawful debt, and intending to join with at least one other alleged conspirator to achieve that objective." Pet. App. 121a. The court further instructed the jury that "a defendant must generally know the facts that make his conduct fit into the definition of the charged offense, even if the defendant did not know that those facts gave rise to a crime." *Id.* at 126a.

The district court also instructed the jury that a defendant's good faith would constitute "a complete defense" to the RICO conspiracy charges, because "good faith on the part of a defendant would be inconsistent with his acting with knowledge and intent." 11/20/17 Tr.

59. The court instructed the jury that "a person acts in good faith when he or she has an honestly held belief, opinion or understanding that the goal or objective of the conspiracy was not the collection of unlawful debt, * * * even if the belief, opinion, or understanding turns out to be inaccurate or incorrect." *Ibid.* In providing those instructions, the court clarified that the defendants did not bear the burden of proving that they acted in good faith; rather, the government bore the burden of proving that the defendants acted with knowledge and intent, and good faith would be "inconsistent with" those mental states. *Id.* at 60.

The jury found petitioner and Neff guilty on all counts. Pet. App. 6a. The district court sentenced petitioner to 168 months of imprisonment, to be followed by three years of supervised release. *Id.* at 6a-7a.

3. The court of appeals affirmed in a nonprecedential decision. Pet. App. 1a-25a.

As relevant here, the court of appeals rejected petitioner's and Neff's argument that the district court had been required to give their requested willfulness instruction for the RICO conspiracy counts. Pet. App. 11a. The court of appeals observed that, because "[t]he RICO statute itself is silent on the issue of mens rea," the court was required to "read into the statute * * * that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* at 10a (citations omitted). And the court determined that the RICO conspiracy charges here required proof "only that a defendant knew that the debt collected 'had the characteristics that brought it within the statutory definition' of an unlawful debt." *Ibid.* (quoting *Staples* v. *United States*, 511 U.S. 600, 602 (1994). The court explained that "[a] conviction for conspiring to collect an

unlawful debt does not require willfulness to distinguish innocent from guilty conduct" because "[c]ollecting an unlawful debt * * * necessarily 'falls outside the realm of the "otherwise innocent."'" *Id.* at 11a (citation omitted). The court noted that "[r]easonable people would know that collecting unlawful debt is unlawful" and that "those engaged in the business of debt collection * * * should be aware of the laws that apply to them." *Ibid.*

The court of appeals also rejected petitioner's and Neff's argument that their fraud convictions should be reversed because "an unvested cause of action is not a property right protected by the federal fraud statutes." Pet. App. 13a. Because petitioner and Neff had failed to raise that argument in the district court, the court of appeals reviewed it only for plain error. *Ibid.* The court observed that this Court "has upheld fraud convictions based on schemes to defraud victims of '[t]he right to be paid money,' which 'has long been thought to be a species of property.'" *Id.* at 14a (quoting *Pasquantino* v. *United States*, 544 U.S. 349, 356 (2005)) (brackets in original). The court also observed that this Court has held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Ibid.* (quoting *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)). And in light of those cases, the court determined that "it was not an error—at a minimum, not a clear and obvious plain error—to consider a cause of action to be property protected by the fraud statutes." *Id.* at 14a-15a.

ARGUMENT

Petitioner contends (Pet. 10-25) that the district court's mens rea instruction on the RICO conspiracy counts was deficient and (Pet. 25-32) that he is entitled to plain-error relief on his claim that the federal fraud

statutes cannot apply to his scheme to deceive plaintiffs in a civil action for damages into giving up their cause of action for a small settlement. The court of appeals correctly affirmed petitioner's convictions, and its non-precedential decision does not conflict with any decision of this Court or any other court of appeals. This Court recently denied a petition for a writ of certiorari, filed by petitioner's co-defendant, raising substantially the same questions that petitioner presents here. See *Neff* v. *United States*, No. 19-1127 (Apr. 20, 2020).[*] The Court should follow the same course here.

1. The court of appeals' affirmance of petitioner's convictions for RICO conspiracy does not warrant further review.

a. The RICO Act makes it unlawful for a person associated with an enterprise whose activities affect commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through * * * collection of unlawful debt." 18 U.S.C. 1962(c). The RICO Act also makes it unlawful to conspire to violate that provision. 18 U.S.C. 1962(d). The statute does not expressly address the state of mind with which the defendant must have acted.

As a general matter, this Court "interpret[s] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015) (citation omitted). A court, however, should "read into the statute 'only that *mens rea* which

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[*] After this Court called for a response to the petition for a writ of certiorari in the present case, Neff moved for reconsideration of the denial of a writ of certiorari in his case. See Pet. for Reh'g at 1-6, *Neff*, *supra* (No. 19-1127). That motion remains pending. For the reasons explained herein, it should be denied.

is necessary to separate wrongful conduct from "otherwise innocent conduct."'" *Id.* at 2010 (citation omitted). And in general, a defendant must "know the facts that make his conduct fit the definition of the offense." *Id.* at 2009 (citation omitted). In accordance with "[t]he familiar maxim 'ignorance of the law is no excuse,'" the defendant usually need not "know that his conduct is illegal." *Ibid.*

In this case, the district court instructed the jury that the government was required to prove (among other things) that petitioner knew the fact that made his conduct illegal—*i.e.*, the fact that the conspiracy sought to collect unlawful debts. See D. Ct. Doc. 289, at 2. The court, however, declined to instruct on an additional "willfulness" element that would require not only knowledge *that the debts were unlawful*, but also knowledge that conspiring to collect unlawful debts *violates federal law*. See Pet. App. 120a-126a. As the court of appeals correctly determined, the district court did not err in declining to give that instruction. See *id.* at 10a-11a. It is enough for the government to show that the defendant knows that the debts he is conspiring to collect are unlawful; it need not also show that the defendant also knows that the conspiracy to collect the unlawful debts itself violates the RICO Act. Requiring that latter showing would contradict the "[t]he familiar maxim 'ignorance of the law is no excuse.'" *Elonis*, 135 S. Ct. at 2009. And it is unnecessary to "to separate wrongful conduct from 'otherwise innocent conduct,'" *id.* at 2010 (citation omitted); as the court of appeals observed, "[r]easonable people would know that collecting unlawful debt is unlawful." Pet. App. 11a.

b. In the court of appeals, petitioner argued only that the district court erred by failing to instruct the

jury that it had to find that petitioner knew, not just that the debts themselves were unlawful, but "that collecting unlawful debt is unlawful." Pet. App. 11a. Now, however, he contends (Pet. 18) that the district court failed even to instruct the jury that a guilty verdict required finding that he knew "that the debt [wa]s 'unlawful.'" This Court's ordinary practice "precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner identifies no sound basis for this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to depart from that practice and to address petitioner's factbound contention in the first instance.

In any event, contrary to petitioner's contention, the district court *did* require the government to prove that petitioner knew "that the debt [wa]s 'unlawful.'" In particular, the court instructed the jury that the government was required to prove that petitioner joined each charged conspiracy "knowing of its objectives to conduct or participate * * * in the conduct of an enterprise's affairs through the collection of unlawful debt." Pet. App. 121a. The court also instructed the jury that petitioner would lack the requisite mental state if he had "an honestly held belief, opinion or understanding that the goal or objective of the conspiracy was not the collection of unlawful debt, * * * even if the belief, opinion or understanding turns out to be inaccurate or incorrect." 11/20/17 Tr. 59. Those instructions required the government to prove, not just that petitioner knew that he was participating in the collection of a debt, but that petitioner knew the unlawfulness of the debt.

The instructions that petitioner quotes (Pet. 11-12) do not suggest otherwise. The first instruction directed the jury that a guilty verdict required proof that petitioner knew that "the objective [of the conspiracy] was to conduct or to participate, directly or indirectly, in the conduct of the affairs of an enterprise *through the collection of unlawful debt*." Pet. 11 (emphasis added; citation omitted). The second instruction directed the jury that, if it believed that the government had introduced evidence that petitioner enforced loans with "interest rates that exceeded twice the enforceable rate of interest," the jury could "consider such evidence as evidence that the Defendant agreed to collect unenforceable debt." Pet. 11-12 (citation omitted). The final instruction stated that, in order to prove petitioner's knowledge that the debts were unlawful, the government was not required to prove that petitioner knew the specific "usury rates * * * in the states where the borrowers lived." Pet. 12 (citation omitted).

Indeed, in the court of appeals, petitioner himself acknowledged that the district court's instructions allowed the jury to find him guilty only if the government proved that "he intentionally made loans in excess of state usury laws with full knowledge of what he was doing." Pet. C.A. Br. 4. Even if he may be heard to argue otherwise now, this case involves no legal dispute about whether the RICO Act requires a showing that petitioner knew that the debts being collected were unlawful—the parties agree that it does. The case instead raises a case-specific dispute about whether the district court's instructions adequately conveyed that requirement to the jury. That case-specific dispute about the interpretation of the district court's instructions does not warrant this Court's review. See *United*

States v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

c. Contrary to petitioner's contention (Pet. 13-19, 22-25), the court of appeals' decision does not conflict with any decision of this Court. Petitioner asserts (Pet. 13) that the court of appeals disregarded "this Court's rulings requiring that scienter be read into statutes that are otherwise silent as to the *mens rea* required." But the court of appeals expressly acknowledged that "[w]hen interpreting federal criminal statutes that are silent on the required mental state," courts generally "read into the statute * * * that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." Pet. App. 10a (quoting *Elonis*, 135 S. Ct. at 2010). Petitioner also asserts (Pet. 13) that the court contradicted this Court's cases by "deeming the collection of an unlawful debt a strict liability offense." That assertion, however, rests on the premise that the jury instructions in this case did not require the government to prove that petitioner knew the debts to be unlawful—a premise that is mistaken, for the reasons explained above. See pp. 10-11, *supra*.

Petitioner also errs in arguing (Pet. 19-22) that the decision below creates a circuit conflict regarding the interpretation of the RICO Act. As an initial matter, the decision below is unpublished and nonprecedential, see Pet. App. 2a n.*, and thus cannot create or deepen a circuit conflict. Even putting that point aside, the decision below does not conflict with the three (decades-old) court of appeals decisions that petitioner identifies. Although those decisions use the word "willfully," none of them show that any court of appeals requires proof that

a defendant knew that he was breaking the law by collecting an unlawful debt to support a conviction for RICO conspiracy.

In *United States* v. *Biasucci*, 786 F.2d 504, cert. denied, 479 U.S. 827 (1986), the Second Circuit affirmed a conviction where the district court had instructed the jury that a defendant must act "knowingly, willfully, and unlawfully" in order to be guilty of participating in the collection of an unlawful debt. *Id.* at 512. The Second Circuit determined only that such an instruction was sufficient; it did not hold that the inclusion of the word "willfully" was required. See *ibid.* In addition, the instructions upheld in *Biasucci* explained that the government could satisfy the mens rea requirement by proving that the defendants were aware "of the generally unlawful nature *of the particular loan in question* and also that it was the practice of the lenders to make such loans." *Ibid.* (emphasis added). Those instructions parallel the instructions at petitioner's trial, which allowed the jury to find petitioner guilty only if the government proved that petitioner knew that the debts he conspired to collect were unlawful. See pp. 10-11, *supra*.

In *United States* v. *Aucoin*, 964 F.2d 1492, cert. denied, 506 U.S. 1023 (1992), the Fifth Circuit, in the course of rejecting a claim that Section 1962(c) is unconstitutionally vague, observed that the indictment had charged the defendants with acting "knowingly and willfully" and that the jury instructions had likewise required the government to prove that the defendants acted "knowingly and willfully." *Id.* at 1498. The court also noted that, although the defendants asserted that "they did not believe they were violating the law in collecting their bookmaking winnings," "[t]he jury found

that this was not true." *Ibid.* The Fifth Circuit thus understood the jury instructions in that case to require proof that the defendants knew that they were violating the law by collecting unlawful debt. The court did not, however, hold that Section 1962(c) requires proof of such knowledge, or that a conviction would have been unlawful in the absence of such an instruction.

Finally, in *United States* v. *Pepe*, 747 F.2d 632 (1984), the Eleventh Circuit determined that the district court "properly instructed the jury as to the mental state required for a RICO conviction" by directing the jury that 18 U.S.C. 1962(c) requires proof that the defendant "knowingly *or* willfully collect[ed] an unlawful debt." *Id.* at 676 (emphasis added). That decision does not conflict with the court of appeals' decision in this case that Section 1962(c) does not require proof of willfulness. See Pet. App. 10a-11a.

2. Petitioner's separate challenge (Pet. 25-32) to his fraud convictions likewise does not warrant this Court's review. Petitioner acknowledges (Pet. 25-26) that he failed to raise his current contention—that a cause of action for money damages cannot be "property"—in the district court and that, as a result, any review is only for plain error. Petitioner cannot establish plain error, and the plain-error posture of the case makes it an unsuitable vehicle for delineating the scope of the federal fraud statutes.

a. The fraud statutes at issue in this case prohibit using the mails or interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. This Court has explained that the phrase "scheme or artifice to defraud" encompasses "schemes to deprive [victims]

of their money or property." *Cleveland* v. *United States*, 531 U.S. 12, 18-19 (2000) (citations omitted). The fraud prosecution in this case rested on the theory that the Indiana plaintiffs' claim against Apex 1 for up to $13 million constituted a form of property, and that petitioner used deceit to cause those plaintiffs to give up that claim in return for a settlement of only $260,000. See p. 4, *supra*. Petitioner contends (Pet. 27) that "the government's theory" was improper because "[a] cause of action that has not been reduced to a final judgment has never been considered * * * money or property."

On plain-error review, petitioner bears the burden of showing (among other things) that the error was "clear or obvious." *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1904-1905 (2018) (citation omitted). Petitioner cannot make that showing. This Court recognized in *Pasquantino* v. *United States*, 544 U.S. 349 (2005), for example, that "a right to sue on a debt" is a form of property protected by the fraud statutes. *Id.* at 355-356 (citing 3 William Blackstone, *Commentaries on the Laws of England* 153-155 (1768)). Parties sometimes enter into contracts regarding that form of property. For instance, a plaintiff may enter into a settlement contract in which he gives up a legal claim in return for a sum of money. A plaintiff may sometimes also assign his legal claim to a third party in exchange for money. See *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U.S. 269, 275-278 (2008).

Petitioner's contrary arguments lack merit. Petitioner errs in arguing (Pet. 27) that a cause of action for money damages cannot qualify as money or property because it lacks "transferability" and because the fraudulent scheme in this case did not involve the direct

transfer of the property from the victim to the defendant. Contrary to petitioner's contention, a damages action is indeed transferable; for example, as just noted, a person may assign a legal claim to a third party. See *Sprint*, 554 U.S. at 275-278. Petitioner also errs in arguing that a cause of action for money damages cannot constitute property because it lacks a definite "present value," because its value is "'contingent,'" or because it becomes "fully vested" only when reduced to judgment. Pet. 28-29 (citations omitted). The law has long classified a variety of future interests—such as contingent remainders, executory interests, and possibilities of reverter—as forms of property, even though they are conditional or contingent. See Restatement (First) of Property §§ 153-157 (1936). Finally, petitioner errs in arguing (Pet. 30) that recognizing a cause of action as property would transform every instance of "making a false statement in any litigation" into mail or wire fraud. In this case, petitioner did more than make a false statement in litigation; he engaged in a scheme of deceit with the object of inducing other parties to give up their legal claims for money damages as part of a settlement contract. Most false statements in litigation will not share that object and, thus, would not be fraud.

b. The decision below does not conflict with any decision of this Court or any court of appeals. In particular, contrary to petitioner's suggestion (Pet. 29), the decision below does not conflict with this Court's decision in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, the Court explained that "a cause of action *is* a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 428 (emphasis added). Petitioner errs in asserting (Pet. 29) that, in *Logan*, the Court stated that "[a] typical tort cause of

action, whether based in statute or in the common law, does not provide a claimant with * * * an entitlement" that qualifies as property. The government has found no such statement in the Court's opinion in *Logan*. The government has instead located the statement in *District of Columbia* v. *Beretta U.S.A. Corp.*, No. 2000 CA 428 B, 2006 WL 1892023 (D.C. Super. Ct. May 22, 2006), a case that addresses the meaning of "property" under the Just Compensation Clause rather than under the fraud statutes.

The other decisions on which petitioner relies (Pet. 29) do not addresses the question presented here. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 & n.32 (1978) (declining to decide whether "the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy"); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (considering whether a person's interest in continued employment constitutes property protected by the Due Process Clause); *In re Kane*, 628 F.3d 631, 640-641 (3d Cir. 2010) (considering whether a claim for equitable distribution of marital assets constitutes a legal or equitable interest under the Bankruptcy Code); *Bowers* v. *Whitman*, 671 F.3d 905, 913-914 (9th Cir.) (concluding that the Just Compensation Clause protects only vested property rights and that a cause of action is not a vested right), cert. denied, 568 U.S. 928 (2012).

c. Contrary to petitioner's suggestion (Pet. 25 n.5), this Court's decision in *Kelly* v. *United States*, No. 18-1059, 2020 WL 2200833 (May 7, 2020), does not call the decision below into question. In *Kelly*, the Court held that "[a] run-of-the-mine exercise of regulatory power

cannot count as the taking of property." *Id.* at *5. The Court also held that, in order to support a conviction for fraud, "th[e] property must play more than some bit part in a scheme: It must be an 'object of the fraud.'" *Id.* at *6 (citation omitted). This case involved a deprivation of a cause of action, not an exercise of regulatory power. And the deprivation of the cause of action was the object of the fraud; as the court of appeals observed, "the goal" of petitioner's scheme was to defraud the victims into giving up their cause of action for less than it was worth as part of a settlement. Pet. App. 5a. *Kelly* thus does not suggest that the court of appeals erred in denying plain-error relief here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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