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 UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DEMETRA LAMBROS
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an intent to cause harm is an element of mail or wire fraud under 18 U.S.C. 1341 and 1343.

2. Whether the mail and wire fraud statutes apply only to fraudulent schemes in which the person the scheme seeks to deceive is the same person the scheme seeks to deprive of money or property.

3. Whether petitioner's scheme to deprive victims of money violated the mail and wire fraud statutes, where petitioner's fiduciary duty to hold their money in trust derived from state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued:

In the Supreme Court of the United States

No. 11-343

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 UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 644 F.3d 364. An earlier opinion of the court of appeals (Pet. App. 11a-33a) is reported at 495 F.3d 826.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2011. A petition for rehearing was denied on June 9, 2011 (Pet. App. 9a-10a). On September 2, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 16, 2011, 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 Northern District of Illinois, petitioner was convicted on 14 counts of mail or wire fraud, in violation of 18 U.S.C. 1341, 1343, and 1346; one count of racketeering, in violation of 18 U.S.C. 1962(c); three counts of misappropriating insurance funds, in violation of 18 U.S.C. 1033(b)(1); and one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Petitioner was sentenced to 121 months of imprisonment and was ordered to pay $841,527.96 in restitution and to forfeit $30 million. The court of appeals affirmed the conviction and order of restitution but remanded for reconsideration of the forfeiture amount. Pet. App. 11a-33a. This Court denied certiorari. *Segal* v. *United States*, 553 U.S. 1006 (2008).

On remand, the district court found that petitioner had personally received $15 million in racketeering proceeds, and it issued an amended judgment reflecting that new forfeiture amount. Pet. App. 2a. The court of appeals affirmed the amended forfeiture order but remanded to permit the district court to consider resentencing petitioner in the event that his sentence was based on an honest-services theory of fraud, in violation of *Skilling* v. *United States*, 130 S. Ct. 2896 (2010). Pet. App. 1a-7a.

1. Petitioner owned the Near North Insurance Brokerage (NNIB) in Illinois. Pet. App. 11a-12a. From 1990-2002, petitioner engaged in a wide-ranging and multi-faceted fraud involving NNIB. The first aspect of the scheme involved his misuse of a premium fund trust account (PFTA). *Id.* at 12a. Under state law, all insurance premiums were to be deposited into the PFTA and

held in a fiduciary capacity, for the benefit of both the insureds and the carriers, until the carriers demanded the premiums. *Ibid*. Non-premium money (such as commissions, interests, and credits) could be withdrawn from the PFTA, but brokers such as NNIB could not use PFTAs as operating accounts, and they were required to maintain PFTAs in trust with sufficient funds to pay premiums. A broker's licence could be suspended or revoked if he failed to maintain a PFTA. *Ibid*.

Although NNIB had both a PFTA and an operating account, the latter was maintained with a zero balance, and all monies were deposited into the PFTA. Funds were transferred from the PFTA into the operating account to pay expenses, but all remaining monies were transferred back to the PFTA each day. Pet. App. 12a. Throughout the 1990s, petitioner used PFTA funds to expand his business: he bought insurance brokerages in New York, California, Texas, and Florida, as well as a finance company, a fire-suppression device manufacturer, a title company, and a software maker. *Id.* at 13a; 1/29/07 Gov't C.A. Br. 3. Most of those companies lost money, and petitioner made regular wire transfers from the PFTA to keep them solvent. Pet. App. 13a. At the end of 1989, the PFTA was over $7 million out of trust, and in 1995, the deficit was $10 million. In August 2001, the PFTA was $30 million short. *Ibid*.

Petitioner knew that he was converting PFTA money for unauthorized purposes because his auditors repeatedly told him so and because he personally approved virtually all expenditures. Pet. App. 13a; 1/29/07 Gov't C.A. Br. 6-10. Two different accounting firms documented PFTA's monthly and annual shortfalls and informed petitioner that what he was doing was illegal. *Ibid*. When petitioner failed to alter his practices, they both resigned. Pet. App. 13a. In April 2001, NNIB's chief financial officer outlined a management plan aimed at bringing NNIB into compliance with the law. The plan called for selling affiliates that were losing money, segregating PFTA funds, and obtaining an outside audit. The plan also proposed placing NNIB under the control of an executive committee that would report to petitioner but act without his approval. *Id.* at 13a-14a. Petitioner rejected the plan. *Id.* at 14a.

In May 2001, petitioner hired a financial consultant to evaluate NNIB's prospects of raising capital by attracting new investors. Soon thereafter, an anonymous letter was sent to the Illinois Department of Insurance (IDOI) reporting the deficit in petitioner's PFTA. Pet. App. 14a. At that point, the deficit stood at $24 million, even after petitioner had put $10 million from a mortgage on his home into the account. The situation was corrected when the consultant secured loans from outside sources for NNIB. *Ibid.*

In another aspect of petitioner's fraud, petitioner had NNIB employees write personal checks to political candidates, and he then reimbursed them with NNIB funds. Pet. App. 15a. He also provided discounts, ranging from 25%-100%, on insurance premiums for political figures and other influential people. *Ibid.*; 1/29/07 Gov't C.A. Br. 14-15. In 1999 alone, the discounts cost NNIB $250,000. Gov't C.A. Br. 15. The practice was illegal because the difference was made up to the carriers from the PFTA. *Ibid.* After the IDOI received the anonymous tip about petitioner's misuse of the PFTA, Illinois Governor George Ryan called its director to say that he hoped things would go well for NNIB. Pet. App. 15a. Ryan was informed that the IDOI would not investigate

NNIB because doing so would jeopardize a $20 million investment petitioner had pending. *Ibid.*

Another aspect of petitioner's fraud involved writing off NNIB's customers' credits. After a credit owed to a customer had been carried on the books for a certain period of time without being demanded, the credit was taken off the ledger. Pet. App. 16a. Petitioner personally approved the write-offs, and account executives were trained not to notify customers that they were owed credits. *Ibid.*

In addition, petitioner took thousands of dollars weekly for his personal use from a petty-cash fund replenished out of the PFTA. Pet. App. 14a; 1/29/07 Gov't C.A. Br. 13-14. (The employee in NNIB's accounting department who facilitated those payments by placing the money in an envelope for petitioner ultimately pleaded guilty to embezzlement for his part in the transactions. Pet. App. 14a.) In 1999-2001, NNIB paid $36,000 of petitioner's personal credit-card bills, and NNIB employees also performed personal services for petitioner and his family. During those years, petitioner had $667,000 in unreported income for the value of those services. *Id.* at 14a-15a.

Finally, in early 2001, the Chicago Transit Authority (CTA) needed insurance for a large reconstruction project. NNIB was awarded the contract, which specified that no commissions were to be paid to the broker. Pet. App. 15a. Before the contract was signed, however, and unbeknownst to the CTA, petitioner arranged to have one of NNIB's subsidiaries broker some of the coverages and earn a $370,000 commission. *Ibid.*

2. A grand jury in the Northern District of Illinois returned a 28-count indictment charging petitioner and NNIB with, among other things, a scheme to defraud

and to obtain money and things of value by misappropriating and misusing funds from the PFTA, from credits due to customers, and from inflated and fraudulently obtained premium payments—all by creating the false appearance that payments to NNIB would be held in trust for the benefit of customers and insurance carriers, that credits due customers would be refunded to them, and that the customers would receive honest services. Fourth Superseding Indictment 7-14; see Pet. App. 19a. The jury found petitioner guilty on charges of mail and wire fraud, racketeering, false statements, misappropriating insurance funds, and conspiracy to impede the Internal Revenue Service. *Id.* at 1a-2a.

The district court denied petitioner's motion for a judgment of acquittal on all counts except those alleging false statements to the IDOI under 18 U.S.C. 1033(a)(1). *United States* v. *Segal*, No. 1:02-CR-112, 2004 WL 2931331 (N.D. Ill. Dec. 13, 2004).[1] In upholding the jury's verdict on the fraud counts, the court found that the evidence was "simply overwhelming and more than sufficient to permit a reasonable jury to find the charged scheme to defraud beyond a reasonable doubt." *Id.* at *2. The court further found that petitioner's use of corporate money to pay for his personal expenses defrauded the United States through the filing of false tax returns. *Id.* at *3.

The district court also denied petitioner's motion for a new trial. As relevant here, the court rejected petitioner's contention that because state law afforded coverage for insurance carriers even if a broker did not pay

[1] In granting the motion on those counts, the court found that the insurance license applications petitioner presented to the agency were not "financial reports or documents" within the meaning of the statute. 2004 WL 2931331, at * 4.

customers' premiums, the government had improperly argued and introduced evidence that petitioner's abuse of the PFTA subjected consumers to a risk of loss. 2004 WL 2931331, at *5 n.12. That provision of state law, the court held, did not "eliminate[] the possibility that one of NNIB's customers would suffer a loss as a result of [petitioner's] abuse of the PFTA." *Ibid.* The court also rejected petitioner's claim that the jury should have been instructed that it could consider an absence of loss as proof that petitioner lacked an intent to defraud. *Id.* at *8. The court noted that petitioner had elicited testimony from numerous witnesses that NNIB paid all the premiums owed to the insurance carriers and that he stressed that evidence in closing argument. *Ibid.* Because the jury was instructed to consider "all the evidence in the case," the court found that it was not further obliged to highlight petitioner's evidence in its instructions. *Ibid.*

The district court found that the foreseeable loss attributable to petitioner's fraud was "in excess of $30 million," and it observed that "this was a straight theft" from the PFTA; that despite repeated warnings, petitioner "repeatedly refused to replenish the [PFTA funds] he had taken"; that petitioner "never secured the money he took from the [PFTA] with any collateral and, therefore, placed it at risk"; and that petitioner never secured any loans to replenish the PFTA with his own assets. 1/3/06 Tr. 9-10 (Sent. Tr.); see *id.* at 71 ("This was a rip-off of trust fund money.").

Petitioner's advisory Sentencing Guidelines range was 235-293 months of imprisonment, Sent. Tr. 13, but the court departed downward because, in its view, the loss calculation did not reflect "economic reality." *Id.* at 14, 16. The court stated that although petitioner "placed over $30 million at risk" by misusing the PFTA, that misconduct did not result in loss to his clients. *Id.* at 14-15. The court instead based the loss calculations on what it found to be the actual loss to petitioner's victims, consisting of the credit write-offs ("which were stolen at [petitioner's] direction"), the CTA fraud, and the loss to the government of tax revenue, all of which added up to between $1 and $2.5 million. *Id.* at 14-15. The court thus declined to count any of the PFTA fraud in petitioner's Guidelines calculations, even though petitioner only repaid the misappropriated funds after he knew his fraud had been detected. The court sentenced petitioner to 121 months of imprisonment and ordered him to pay $841,527 in restitution and to forfeit $30 million. Sent. Tr. 75-77.

3. The court of appeals affirmed petitioner's convictions and the restitution order. Pet. App. 11a-33a. Like the district court, it rejected petitioner's claim that the evidence proved not one but three different schemes (the misappropriation of PFTA funds, the writing off of customer credits, and the CTA fraud), concluding "that the fraudulent acts were all part of a single scheme." *Id.* at 19a-20a. The court also rejected petitioner's argument that his misuse of the PFTA was only "improper borrowing" that did not "actually harm anyone or benefit" petitioner. *Ibid.*; see also *id.* at 22a (petitioner "knowingly and intentionally misused the PFTA for his own very significant private gain"). Moreover, the court explained, the "[w]ithholding of credits directly deprived customers of money they were owed"; the proceeds of the CTA fraud were "commingled in the PFTA and used for a variety of unauthorized purposes"; and "[p]olitical contributions and premium discounts to influential peo-

ple provided [petitioner] with cover to prevent discovery of his financial shenanigans." *Id.* at 20a.

The court of appeals also rejected petitioner's claim that the jury could have found him guilty of honest-services fraud based on his violations of Illinois insurance law. Pet. App. 20a-23a. The court noted that while state laws "are useful for defining the scope of fiduciary duties," the jury was specifically instructed that a violation of state law was not enough to find petitioner guilty, and the jury was required to find that the government proved every element of the "particular charged federal offense." *Id.* at 21a-23a.

The court of appeals also upheld the $841,527 restitution order, which included monies owed to customers whose credits petitioner had written off. Pet. App. 25a. As for the forfeiture order, the court found that petitioner "stole" $30 million from the PFTA, and it rejected petitioner's claim that the money was not subject to forfeiture because he had paid it back. *Id.* at 30a-32a ("We have trouble seeing why paying the money back means that [petitioner] did not take it in the first place."); see also *id.* at 32a ("More importantly, [petitioner] did not personally pay it back. He paid it back by borrowing from Firemen's Insurance and AIG in loans, primarily secured by assets of the company."). Nevertheless, the court held that because the enterprise itself would be forfeited, the district court should have determined "how much of the $30 million was poured back into the enterprise and how much went to benefit [petitioner] personally" in order to avoid double billing. *Ibid.* It remanded for the district court to make that determination. *Ibid.*

This Court denied certiorari. *Segal* v. *United States*, 553 U.S. 1006 (2008).

4. On remand, the district court found that petitioner had personally received $15 million, and it issued an amended judgment reflecting that forfeiture amount. Pet. App. 2a.

5. Both the government and petitioner appealed. While those appeals were pending, this Court decided *Skilling*, in which it held that the honest-services component of the mail-fraud statute criminalizes only schemes involving bribes and kickbacks. 130 S. Ct. at 2930. Because petitioner's indictment charged, and the jury was instructed on, both a money-or-property and an honest-services theory of fraud—and because petitioner was not involved in either a bribery or kickback scheme—the court of appeals found error under *Skilling*. Pet. App. 3a. It found that the error was harmless beyond a reasonable doubt, however, because both the indictment and verdict also rested on a valid money-or-property theory. *Id.* at 3a-5a ("[E]ven if the jury concluded that there was an honest services violation, that violation had to be premised on money/property fraud. That is, to the extent [petitioner] was depriving others of his honest services, it was because he was taking their money."). In reaching that conclusion, the court noted that "any honest services violation had to be based on the PFTA," and it observed that petitioner committed "monetary fraud" when he "fraudulently represented to the insureds and insurance carriers that he would hold the insurance premiums in trust, but instead took the money on a shopping spree." *Id.* at 4a.

The court of appeals rejected petitioner's argument that his crime had no victim, observing that "the jury instructions specifically name[d] 'insurance carriers and/or customers' as the victims." Pet. App. 5a. The court also held that it did not matter whether a victim actually suffered loss—"[l]oss is not required to prove fraud, whether monetary or otherwise"—and it similarly rejected petitioner's claim that this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), required a showing that he specifically intended to cause injury. Pet. App. 5a-6a.

The court affirmed the $15 million forfeiture order but remanded to the district court to consider resentencing petitioner to the extent that his sentence was based on an honest-services theory of fraud, in violation of *Skilling*. Pet. App. 6a-7a.

ARGUMENT

Petitioner argues (Pet. 8-32) that an "intent to cause harm" is an element of mail and wire fraud, that a mail or wire fraud conviction cannot rest on a misrepresentation directed at a person other than the intended victim, and that petitioner's fraud convictions were improperly based on his violation of a state regulation. Petitioner did not preserve those arguments below, and they lack merit in any event. The judgment of the court of appeals is correct, and, although petitioner has identified disagreement among the courts of appeals with respect to some of the issues he raises, he has not shown that any court would have resolved this case differently. Moreover, the claims advanced in the petition pertain to only one aspect of petitioner's multi-faceted fraud scheme, so that even if he were to prevail on all of his claims, his conviction and sentence would be unaffected. Further review is not warranted.

1. Petitioner argues (Pet. 8-18) that the jury was improperly instructed on the requisite intent under the mail and wire fraud statutes and that this Court should grant review to resolve a circuit conflict on whether an

"intent to harm" is an element of mail and wire fraud. Petitioner forfeited that claim by failing to raise it in his first appeal in 2007 or his petition for a writ of certiorari in 2008. Instead, petitioner raised the claim for the first time in a supplemental brief in his second appeal. See 9/9/10 Pet. Supp. C.A. Br. As the court of appeals has correctly observed, however, "[a] party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal." *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996).

In any event, petitioner's claim lacks merit and does not warrant this Court's review. Although petitioner has identified some disagreement among the courts of appeals, this case is not an appropriate one in which to resolve it because petitioner cannot show that he would prevail under the approach taken by any circuit.

a. The mail and wire fraud statutes make it a crime to use the mail or a wire communication to execute "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. Those provisions "prohibit[] the 'scheme to defraud,' rather than the completed fraud," *Neder* v. *United States*, 527 U.S. 1, 25 (1999), and require intentional, fraudulent conduct, see *McNally* v. *United States*, 483 U.S. 350, 357-358 (1987). In this case, the jury was instructed that a "scheme to defraud" must be "intended to deceive or cheat another, or to obtain money or property by means of materially false pretenses, representations, promises or omissions, or cause the potential loss of money or property to another." Pet. App. 39a. The jury was further instructed that an "intent to defraud" requires that "the acts charged were done knowingly, with intent to deceive or cheat various insurance carriers and/or customers of [NNIB] in order to cause the gain of money or property" to petitioner. *Ibid.*; see *id.* at 40a ("In order to prove a scheme to defraud, the government does not have to prove that [petitioner] contemplated actual or foreseeable harm to the victims of the scheme.").

Those instructions correctly described the elements of mail and wire fraud. By their terms, the statutes make no mention of contemplated harm, and nothing in the statutory texts or this Court's precedents requires engrafting a separate "intent to harm" element onto the already-existing requirement of fraudulent (*i.e.*, deceptive) intent to obtain money or property. See *United States* v. *O'Hagan*, 521 U.S. 642, 653-654 (1997) (recognizing that the touchstone of "fraud" is "deception"); see also *United States* v. *Kenrick*, 221 F.3d 19, 27 (1st Cir.) (en banc) (explaining that the "language [of the analogous bank fraud statute] boils down to a prohibition on schemes to obtain money or other property * * * by specified means of deception," and that "[n]othing in the language * * * indicates that 'intent to harm' is required"), cert. denied, 531 U.S. 961 (2000). In *McNally*, this Court defined a "scheme to defraud" as "'usually signify[ing] the deprivation of something of value by trick, deceit, chicane or overreaching.'" 483 U.S. at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). And in *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987), the Court stated that Section 1343 encompasses "any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises."[2]

[2] Contrary to petitioner's contention (Pet. 15-17), *Neder* does not suggest that an intention to harm is an element of the fraud statutes.

In accordance with those cases, the majority of courts of appeals that have addressed the issue have held, in accord with the court below, that an "intent to harm" is not an element of mail or wire fraud. See, *e.g.*, *United States* v. *Hickey*, 580 F.3d 922, 930-931 (9th Cir. 2009) (neither loss nor "an intent to cause loss" is an element of mail fraud), cert. denied, 130 S. Ct. 2115 (2010); accord *United States* v. *Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003); *United States* v. *Judd*, 889 F.2d 1410, 1414 (5th Cir. 1989), cert. denied, 494 U.S. 1036 (1990); *United States* v. *Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987); see also *United States* v. *Treadwell*, 593 F.3d 990, 998 n.7 (9th Cir.) (noting that the pattern mail and wire fraud jury instructions in the First, Sixth, Eighth and Eleventh Circuits define an "intent to defraud" as the "intent to deceive or cheat 'for the purpose of *either* causing some financial loss to another *or* bringing about some financial gain to oneself,'" and observing that "[t]he disjunctive terms * * * indicate that these circuits do not interpret 'intent to defraud' * * * to require the intent to cause a loss"), cert. denied, 131 S. Ct. 488 (2010).

b. Petitioner observes (Pet. 9-12, 15) the Second and Sixth Circuits have stated that, in a mail or wire fraud case, the government must prove that a defendant intended to cause his victims harm. But those courts have

---

Even assuming, as petitioner urges, that Congress used the phrase "scheme or artifice to defraud" in accordance with its common-law meaning (see *Neder*, 527 U.S. at 20-23), "common-law fraud has no additional 'intent to harm' requirement." *Kenrick*, 221 F.3d at 28. Nor can any such requirement be drawn from the reliance or damages elements of common-law fraud because, as this Court has explained, those elements "plainly have no place in the federal fraud statutes." *Neder*, 527 U.S. at 25.

also held that an "[i]ntent to harm * * * can be inferred from exposure to potential loss" and that where a defendant intentionally denies his victim information pertinent to an assessment of the risk involved in an economic decision, he evinces the requisite intent. *United States* v. *Karro*, 257 F.3d 112, 118 (2d Cir. 2001) (quoting *United States* v. *Chandler*, 98 F.3d 711, 716 (2d Cir. 1996)); see *United States* v. *Daniel*, 329 F.3d 480, 488 (6th Cir. 2003) ("It is sufficient that the defendant by material misrepresentations intends the victim to accept a substantial risk that otherwise would not have been taken."); *United States* v. *Rossomando*, 144 F.3d 197, 200-201 (2d Cir. 1998) (defendant intends to inflict harm on a bank where, through his false representations, he "deprive[s] the bank of the ability to determine the actual level of credit risk and to determine for itself on the basis of accurate information whether, and at what price, to extend credit"). As the Ninth Circuit has also held, a victim is harmed when, as a result of a defendant's deception, he is deprived "of the opportunity to weigh the true benefits and risks of [a] transaction." *Treadwell*, 593 F.3d at 997-998.

Thus, even under the test applied by the Second and Sixth Circuits, petitioner could not prevail in this case because the evidence showed an intention to harm as understood by those courts. Petitioner placed millions of dollars of his customers' and the insurance carriers' money at risk while falsely representing that he was keeping their money in trust. See, *e.g.*, Pet. App. 4a; *United States* v. *Segal*, 339 F. Supp. 2d 1039, 1045 (N.D. Ill. 2004) (noting the "magnitude" of the risk of loss to which petitioner exposed his victims, and observing that petitioner "continually reaped immense economic benefits from his fraudulent conduct * * * while simultaneously exposing others to substantial risks"); Sent. Tr. 9-10, 14 (petitioner placed over $30 million at risk and never secured the money he took from the PFTA with any collateral).[3]

That petitioner may have believed that his victims would suffer no loss is of no moment, for as all courts agree (and as petitioner acknowledges, Pet. 12-13), even a temporary deprivation of money or property procured through deceit suffices. See, *e.g.*, *Rossomando*, 144 F.3d at 201 ("[W]here some immediate loss to the victim is contemplated by a defendant, the fact that the defendant believes (rightly or wrongly) that he will 'ultimately' be able to work things out so that the victim suffers no loss is no excuse."); *Daniel*, 329 F.3d at 488 (rejecting argument that a short-term deprivation of money in hopes of benefitting victims in the long term does not constitute fraud; "neither law nor policy supports this approach, which would have the jury look beyond [defen-

---

[3] Relying on *United States* v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), petitioner asserts (Pet. 12) that "[t]he Eighth Circuit has also held that intent to harm is required in the honest services fraud context." The Eighth Circuit has subsequently clarified, however, that the fraud statutes do not require a separate "intent to harm" jury instruction, and it has approved an instruction similar to that given here—namely, that "[t]o act with intent to defraud means to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss or loss of property or property rights, loss of an intangible right to honest services to another, *or* bringing about some financial gain to one's self or another to the detriment of a third party." *United States* v. *Ervasti*, 201 F.3d 1029, 1035 (2000) (emphasis added). In any event, *Jain* involved an honest-services violation in which the government limited its argument to "undisclosed breaches of a health care professional's fiduciary duty to his clients." 93 F.3d at 442 (noting that the violation alleged was based on "undisclosed, unethical referral fees"). That form of honest-services violation no longer exists after *Skilling*.

dant's] bad conduct to his overall motives"); see also *Hickey*, 580 F.3d at 931 (even if defendant "genuinely believed his investment scheme would be profitable and would result in gains for his investors, he would still be guilty of * * * mail fraud if he knowingly lied to investors about the risks associated with his plan"); *United States* v. *Hamilton*, 499 F.3d 734, 736 (7th Cir. 2007) ("If you embezzle from your employer you are not excused just because you had an honest intention of replacing the money, maybe with interest * * * . You imposed a risk of loss * * * and that is harm enough to trigger criminal liability."), cert. denied, 552 U.S. 1129 (2008).

Moreover, as the lower courts found, the evidence showed that petitioner intended to deprive his victims of money, if only temporarily, when he took their money out of the PFTA for his own enrichment: he spent more than $30 million of the money in an effort to expand his fortune, to give politicians and other influential people sweetheart insurance policies, to underwrite his personal credit-card bills, and to pay for personal services for himself and his family—all in repeated disregard of the many advisors who told him that he was breaking the law. Indeed, the court of appeals determined that petitioner "stole" millions from the PFTA, Pet. App. 30a, and that instead of holding the money in trust, he "took the money on a shopping spree," *id.* at 4a; see *ibid.* (jury necessarily concluded that petitioner "*was taking* [his victims'] *money*"). The district court, too, similarly found that "this was a straight theft" and a "rip-off" of the trust money. Sent. Tr. 9-10, 71; 11/30/05 Forfeiture Sent. Order 2 (evidence showed that "the premium funds actually embezzled, misappropriated, and fraudulently converted were continuously used to fund operations of the enterprise, pay prior premiums, provide funds for new investments at [petitioner's] direction and provide cash and other personal benefits to [petitioner] and members of his family"); *Segal*, 339 F. Supp. 2d at 1045 (petitioner "used special fiduciary funds as his personal, unlimited bank account").[4]

At bottom, petitioner's claim principally amounts to a disagreement with those findings. See Pet. 13 ("[T]here was no evidence that [petitioner] intended even a *temporary* deprivation of money or property of any victim."); *ibid.* (petitioner "temporarily deprived only his company and [NNIB's] trust account of funds," and the PFTA "cannot be the victim"). That factbound claim does not warrant this Court's review.

2. Petitioner also contends (Pet. 19-24) that this Court's review is needed to resolve a conflict of authority about whether the victim of a fraudulent scheme must be the same person whom the scheme deceived. That claim, too, has been forfeited because petitioner did not raise it in the district court, in his first appeal, or in his first petition for a writ of certiorari. Moreover, the court of appeals did not decide the issue petitioner raises because it determined that, in this case, the persons petitioner deprived of money were the same ones he deceived. Pet. App. 4a (petitioner "fraudulently represented to the insureds and insurance carriers" (*i.e.*,

---

[4] Contrary to petitioner's repeated representation, see Pet. 6, 9, 17, the district court did not find that "there [wa]s no evidence [petitioner] intended to defraud either the insurance clients or the insurance companies by his illegal use of the PFTA." The statement petitioner quotes comes from the Presentence Investigation Report (at 22), and there is no indication that the district court adopted it. In fact, although the court adjusted petitioner's Guidelines calculation because it found that his theft from the PFTA did not end up causing actual loss to his victims, the court flatly rejected any suggestion that petitioner's conduct was, for that reason, not fraudulent. See Sent. Tr. 20-21,72.

his victims) that "he would hold the insurance premiums in trust" when, in fact, he was "*taking the money*"). Although petitioner disagrees with that characterization of the evidence (Pet. 8, 19-20), that factbound dispute does not warrant this Court's review.

In any event, petitioner's claim lacks merit. As noted, the mail and wire fraud statutes require a "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. Nothing in the statutory text suggests that a scheme to defraud must seek to deceive the same person whose money or property is the object of the scheme. Indeed, because the "gravamen" of the offense "is the scheme to defraud," it can be established even for unsuccessful schemes in which "no one relied on any misrepresentation." *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647, 648 (2008). Accordingly, several courts of appeals have correctly concluded that the statutes are not limited to schemes in which "the party deprived of money or property [is] the same party who is actually deceived" and, in particular, that a fraud may be shown when a defendant makes misstatements to a government regulatory agency whose role "is to protect the monetary interests of others" as part of the defendant's scheme to "get at the protected funds." *United States* v. *Christopher*, 142 F.3d 46, 54 (1st Cir.), cert. denied, 525 U.S. 1054 (1998); accord *United States* v. *McMillan*, 600 F.3d 434, 449 (5th Cir.), cert. denied, 131 S. Ct. 504 (2010); *United States* v. *Blumeyer*, 114 F.3d 758, 768 (8th Cir.), cert. denied, 522 U.S. 938 (1997); *United States* v. *Kennedy*, 64 F.3d 1465, 1476 (10th Cir. 1995), cert. denied, 532 U.S. 943 (2001). As one court has put it: "The mail fraud statute * * * defines a fraudulent *scheme*, rather than a particular false statement, as the crime. * * * A scheme that injures D by making false statements through the mail to E is mail fraud." *Phoenix Bond & Indem. Co.* v. *Bridge*, 477 F.3d 928, 932 (7th Cir. 2007), aff'd, 553 U.S. 639 (2008).

Petitioner asserts (Pet. 21-24) that his misrepresentations to the IDOI would not establish a scheme to defraud his customers and insurance carriers under the law of the First and Ninth Circuits. He is mistaken. In *Christopher*, the First Circuit rejected the claim, advanced by petitioner (Pet. 21), that *McEvoy Travel Bureau, Inc.* v. *Heritage Travel, Inc.*, 904 F.2d 786, 794 (1st Cir.), cert. denied, 498 U.S. 992 (1990), adopted the so-called "convergence theory" requiring that the victim of a fraudulent scheme be the same person who was deceived. The court explained that the issue in *McEvoy* was not whether there was a scheme to defraud but whether a misrepresentation to a regulatory agency actually caused a loss to another party. See *Christopher*, 142 F.3d at 53. The court in *Christopher* went on to hold that the fraud statutes do not require "that the person deceived be the same person deprived of the money or property by the fraud," and that where it is "the role of a government regulator * * * to protect the monetary interests of others, a scheme to mislead the regulator in order to get at the protected funds will effect 'property rights.'" *Id.* at 54.[5]

[5] The court similarly rejected the argument that its decision in *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996) (see Pet. 21) adopted the convergence theory in the honest-services context. *Christopher*, 142 F.3d at 53. Petitioner's reliance (Pet. 21) on *United States* v. *Evans*, 844 F.2d 36 (2d Cir. 1988), is also unavailing, as the court in *Evans* explicitly declined to decide the issue. See *id.* at 39-40 (stating that it "may be the correct view" that "the deceived party must

As petitioner notes (Pet. 21-22), the Ninth Circuit in *United States* v. *Lew*, 875 F.2d 219, 221 (1989), stated that the government must prove that a mail fraud defendant intended "to obtain money or property from the one who is deceived." More recently, however, the Ninth Circuit upheld a mail fraud conviction in circumstances where "there were no specific false statements made to" the victim of the fraud because there was other evidence that the defendants "were engaged in a scheme to defraud" the victim. *United States* v. *Ali*, 620 F.3d 1062, 1071 (2010), cert. denied, 132 S. Ct. 370 (2011); see *id.* at 1070 (because defendants' scheme was to defraud the victim, they "need not have made a misrepresentation directly to [the victim] in order to be guilty of mail and wire fraud"). The court explained that "there are alternative routes to a mail fraud conviction" and one possible route is "proof of a scheme or artifice to defraud, which may or may not involve any specific false statements." *Id.* at 1071 (quoting *United States* v. *Munoz*, 233 F.3d 1117, 1131 (9th Cir. 2000)).

In light of the interpretation of *Lew* set out in *Ali*, it is not clear that the Ninth Circuit, were it confronted with these facts, would resolve the case in petitioner's favor. Significantly, the court in *Lew* did not hold that misrepresentations to a regulatory agency cannot deprive other identifiable victims of money or property. The defendant in *Lew* was an immigration attorney who submitted false forms to the Department of Labor on behalf of clients. See 875 F.2d at 220. Because the clients paid Lew fees and did not receive in return valid certifications from the Department of Labor, the gov-

lose some money or property" but concluding that "the case before us today does not require us to decide this general question").

ernment alleged that the clients were the victims of Lew's fraud. The Ninth Circuit reversed Lew's convictions because there was no evidence that Lew's clients had been deceived by Lew. *Id.* at 221-222. Rather, the evidence suggested that they may have been parties to the deception. See *id.* at 220, 223-224. *Lew* thus establishes that a mail fraud conviction cannot be sustained in the absence of proof that the alleged victim was not in fact a culpable participant in the fraud. It does not establish that one cannot be convicted of mail fraud based on misrepresentations to a regulatory agency that—as in this case—served to deprive identifiable victims of money or property.[6]

3. Petitioner also contends (Pet. 24-32) that his conviction for money-or-property fraud is predicated on a

[6] Petitioner's factbound argument that his victims' loss was not "fairly attributable to [his] misrepresentations" (Pet. 23) is also meritless. As this Court has made clear, the mail and wire fraud statutes "prohibit[] the 'scheme to defraud,'" not a "completed fraud," *Neder*, 527 U.S. at 25, so the offense can be established "even if no one relied on any misrepresentation." *Bridge*, 553 U.S. at 648; see also *Neder*, 527 U.S. at 24-25 (fraud statutes do not require proof that the victim was damaged by the defendant's misconduct). In any event, petitioner's factual premise is incorrect. The government presented evidence that any revelation that the PFTA was out of trust would jeopardize NNIB's status as a going concern. For example, the director of the IDOI testified that NNIB was required to have a license, and that maintenance of the license required representations concerning the accuracy of its books and records. 4/19/04 Tr. 3090. The government's theory—that petitioner would lose his license, his business, and his ability to continue to reap the benefits of his misuse of the PFTA if he told the truth in his license-renewal applications—was supported by the evidence. Although petitioner asserts (Pet. 23) that IDOI's inaction demonstrates that the license-renewal process was immaterial, the inaction in fact reflected political pressure from petitioner. See Pet. App. 15a, 20a.

state-law violation—his failure to maintain the PFTA funds in trust, as required by Illinois law—and that such a violation cannot provide the basis for a federal mail or wire fraud conviction. Petitioner has not previously asserted that claim at any stage of this case. Instead, in his initial appeal, petitioner contended that his conviction for honest-services fraud was wrongly predicated on his violation of a fiduciary duty as defined by Illinois insurance law. Pet. App. 20a-23a. The court of appeals rejected that claim. *Ibid.* In so doing, it also rejected his argument that "state law is always irrelevant in determining the scope of a fiduciary duty" for purposes of the honest-services statute, and it noted that the jury instructions correctly directed the jury to consider Illinois law "only to determine the nature of [petitioner's] legal and fiduciary duties." *Id.* at 21a, 23a.

But that is a very different claim from the one petitioner makes here for the first time: that a state property right cannot form the basis of a money-or-property fraud conviction. Because it is "a court of review, not of first view," this Court does not ordinarily review issues that were neither pressed nor passed upon in the court of appeals. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Petitioner provides no reason to depart from that practice here.

Moreover, in a ruling that is pertinent to petitioner's current claim, the court of appeals determined, in petitioner's first appeal, that his conviction was not based on any violation of state law, as the jury was specifically instructed that he was "not charged * * * with any state crimes or any violations of state regulations" and that a mail or wire fraud conviction could not rest upon a violation of Illinois law or insurance regulations. Pet. App. 22a-23a. Indeed, the instructions stated that "[t]o find [petitioner] guilty of the charged federal offenses, it is not enough to find that [he] violated Illinois law or the Illinois Insurance Regulations," adding that "[e]ven if you believe that [petitioner] violated [state law], you should return a verdict of not guilty if you also believe that the government has not proven every element of the particular charged federal offense * * * beyond a reasonable doubt." *Id.* at 57a.

Contrary to petitioner's assertion (Pet. 28-30), this case therefore does not implicate the rule of *Jerome* v. *United States*, 318 U.S. 101, 104 (1943), that "in the absence of a plain indication to the contrary," this Court normally assumes that Congress does "not mak[e] the application of [a] federal act dependent on state law." *Jerome* addressed whether a federal criminal proscription against entering a bank "with intent to commit * * * any felony" applied to entry into a federal bank with intent to commit an offense that constituted a felony under state but not under federal law. *Id.* at 101-102. Reviewing the language and history of the relevant federal statute, the Court concluded that the phrase "any felony" did not provide a clear indication that Congress intended to encompass state-law offenses. *Id.* at 104-108.[7] Here, in contrast, the jury was specifi-

[7] Accord *Taylor* v. *United States*, 495 U.S. 575, 590-592 (1990) ("burglary" for purposes of 18 U.S.C. 924(e) does not depend on the definition adopted by the state of conviction); *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43-44 (1989) (Congress did not intend the meaning of "domicile" under the Indian Child Welfare Act to depend on state law); *NLRB* v. *Natural Gas Util. Dist.*, 402 U.S. 600, 602-603 (1971) (federal, not state, law determines whether an entity created under state law is a "political subdivision" of the state for purposes of the National Labor Relations Act); *NLRB* v. *Hearst Publ'ns, Inc.*, 322 U.S. 111, 123-124 (1944) (rejecting argument that the term "employee" under the Wagner Act should be defined by state

cally instructed that petitioner's federal convictions could not be predicated on state-law offenses, and the court of appeals (in the first decision) found that they were not predicated on any state-law offenses.

Of course, "the question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law." *Cleveland* v. *United States*, 531 U.S. 12, 25 n.4 (2000) (citations and alteration omitted). This case presents no difficulty on that score, however, for as the court of appeals explained, petitioner deprived his victims of money, which is the core interest protected by the mail and wire fraud statutes. Pet. App. 6a. That state law may have helped inform the fiduciary duties petitioner owed to his victims does not mean, as petitioner contends, that state law defined the "property" or "property right" at issue. In fact, state law did not provide or alter any understanding as to what may (or may not) constitute "money" or "property" for purposes of the federal statutes. State law may have prescribed petitioner's obligations (*i.e.*, not to appropriate his customers' and the carriers' trust money for his own purposes), but it was still "money" that petitioner took. See, *e.g.*, *Bridge*, 553 U.S. at 647-650 (defendant deprived his competitors of property within the meaning of the mail and wire fraud statutes when he devised a scheme to violate a county rule limiting the number of bidders who could bid for liens); *Carpenter*, 484 U.S. at 26, 27-28 (finding that "[c]onfidential business information" is "property," and separately citing state law as a source of an employee's "fiduciary obligation to protect confidential information").

---

law); *United States* v. *Turley*, 352 U.S. 407, 411 (1957) (same regarding the meaning of "stolen" as used in the National Motor Vehicle Theft Act).

For that reason, petitioner errs in suggesting (Pet. 30-32) that this case raises the federalism concerns identified in *Cleveland*. Unlike the state licenses at issue in that case—in which the government's interest was "purely regulatory," 531 U.S. at 22-23—the victims' interest here—their money—plainly falls within the scope of the statutes. See *Pasquantino* v. *United States*, 544 U.S. 349, 355 (2005) (the "'object of the fraud'" must "'be '[money or] property' in the victim's hands'") (quoting *Cleveland*, 531 U.S. at 26) (brackets in original).

Petitioner's invocation of *Skilling* (Pet. 26-27) is similarly misplaced. As he notes, *Skilling* "establishe[d] a uniform national standard" for bribery and kickback schemes under the honest-services statute, 18 U.S.C. 1346. 130 S. Ct. at 2933. But that is entirely consistent with the principle that petitioner's victims' money constituted "money or property" as a matter of federal law under Sections 1341 and 1343. As petitioner also points out (Pet. 27), *Skilling* characterized traditional fraud cases as ones "in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." 130 S. Ct. at 2926. But contrary to petitioner's claim, such symmetry is present in this case, because petitioner's gains were the money supplied by his customers and the insurance carriers.

4. Even if the questions presented otherwise warranted review, this case would be an inappropriate vehicle for considering them because petitioner's abuse of the PFTA—the only aspect of his scheme at issue in any of the claims asserted in his petition—was not the sum total of his fraud. As the court of appeals explained, petitioner "directly deprived customers of money" through his illegal credit-withholding scheme and also through the commissions he fraudulently secured from

the CTA. Pet. App. 20a; see also *Segal*, 2004 WL 2931331, at *1 n.3 ("Deliberately writing off credits that are owed to customers qualifies as fraudulent conduct."); Sent. Tr. 76 ("[Y]ou completely ripped off the public * * * with regard to what occurred at the CTA."). Moreover, in sentencing petitioner, the district court discounted the entire PFTA fraud and calculated petitioner's advisory Guidelines range exclusively on the basis of the actual loss petitioner caused by means of the credit write-offs, the CTA fraud, and the loss to the government of tax revenues due to his use of corporate money to pay for his personal expenses. Sent. Tr. 14-15. Thus, the only aspect of petitioner's fraud for which he was held accountable was that which resulted in concrete and direct losses to his victims—and in which he intended to, and did in fact, deprive them of money. In that aspect of the fraud, the victims who lost money were the same people who were deceived. Moreover, that aspect of petitioner's conviction had nothing to do with any state-law duty. Accordingly, even if petitioner were to prevail on all of the issues raised in his petition, his conviction and sentence would be unaffected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

DEMETRA LAMBROS
Attorney

FEBRUARY 2012