No. 12-219

In the Supreme Court of the United States

ALFRED SANCHEZ, 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

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QUESTION PRESENTED

Whether a scheme that caused the City of Chicago to award public jobs and salaries to applicants based on materially false representations deprived it of "money or property" within the meaning of the federal mail fraud statute, 18 U.S.C. 1341.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 674 F.3d 696.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2012. On May 23, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 17, 2012, and the petition was filed on August 16, 2012. 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 found guilty of one count of mail fraud, in violation of 18 U.S.C. 1341 (Supp. IV 2011). He was sentenced to

30 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 1-18.

1. During the 1980s and 1990s, petitioner was an active participant in local politics and held various positions in the government of the City of Chicago (City). By 1999, petitioner had become the Commissioner of the Department of Streets and Sanitation. He was also one of the founders and leaders of the Hispanic Democratic Organization (HDO), a campaign organization staffed largely by City employees and those seeking employment with the City. According to the evidence at trial, in petitioner's dual capacity as both a City official and a political operative, he participated in a fraudulent scheme to award City jobs to individuals based on their political work and affiliation. See Pet. App. 2, 4-5.

Petitioner's conduct was in direct violation of a series of orders and consent decrees known as the "*Shakman* decrees." Those decrees enjoined the City from engaging in patronage hiring practices for most positions. To implement the decrees, the City established a multi-step hiring procedure. First, the City publicly posted job vacancies and the required qualifications for applicants. City employees then determined which applicants were qualified for each job, and the eligible applicants were placed on a list for interviews. The interview process was designed to evaluate candidates according to specific hiring criteria without regard to political affiliation, and it included a numerical scoring system for various job-related categories, such as quality of previous experience and communication skills. The candidates with the highest scores received the jobs, and an "official hiring authority" for each City department certified that

political considerations had not entered into hiring decisions. See Pet. App. 2-3.

The Mayor's Office of Intergovernmental Affairs (IGA) served as the City's lobbyist to the City Council and other governments. Although it had no official role in the hiring or promotion process for City jobs, the IGA secured patronage jobs and promotions for City employees who performed campaign work at the IGA's direction. In order to effectuate that scheme, personnel in City departments falsified ratings for IGA-selected applicants by giving them the highest scores for prospective jobs. Department employees also conducted sham interviews to lend an appearance of integrity to the process, even though the hiring decisions had already been made by the IGA. Finally, the departments' official hiring authorities falsely certified that politics had not entered into any of the hiring decisions. See Pet. App. 3-4.

Petitioner participated in every aspect of that scheme. For over a decade during the late 1980s and early 1990s, he ran a branch of the HDO as a campaign organization for the IGA. In the early 1990s, petitioner worked in the Mayor's Office of Inquiry and Information, where he falsified ratings forms, *Shakman* certifications, and interview documentation. In 1999, petitioner became the head of the Department of Streets and Sanitation, where he assisted the IGA in selecting employees based on their previous campaign work for the IGA. Based on that body of evidence at trial, a jury found petitioner guilty of one count of mail fraud, in violation of 18 U.S.C. 1341 (Supp. IV 2011). See Pet. App. 4-7, 9.

2. The court of appeals affirmed. Pet. App. 1-18. As relevant here, the court rejected petitioner's claim that City jobs and salaries are not "money or property" for

purposes of the federal mail fraud statute, 18 U.S.C. 1341 (Supp. IV 2011). Pet. App. 15-16. The court relied on its previous decision in *United States* v. *Sorich*, 523 F.3d 702 (7th Cir. 2008), cert. denied, 555 U.S. 1204 (2009), holding "that jobs are property for purposes of mail fraud." Pet. App. 16 (quoting *Sorich*, 523 F.3d at 713). The court noted that "whether or not jobs are 'property', the money paid for the job (that is, the salary) is 'money'." *Ibid.* According to the court, "[t]he City of Chicago did not get the employees that it wanted to hire and thus was cheated out of money." *Ibid.* Finally, the court held that this Court's decision in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), did not require a different result, because "*Skilling* dealt with honest-services fraud, not traditional mail fraud as is the case here." Pet. App. 16.

ARGUMENT

Petitioner renews his contention (Pet. 6-27) that his scheme to award government jobs to individuals based on their political activities did not deprive the City of Chicago of "money or property" within the meaning of the federal mail fraud statute, 18 U.S.C. 1341 (Supp. IV 2011). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The mail fraud statute, 18 U.S.C. 1341, prohibits using the mails in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The statutory phrase "scheme or artifice to defraud" covers "schemes to deprive [people] of their money or property." *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000) (quoting *McNally* v. *Unit-*

ed States, 483 U.S. 350, 356 (1987)).[1] The "object of the fraud" must "be '[money or] property' in the victim's hands." *Pasquantino* v. *United States*, 544 U.S. 349, 355 (2005) (quoting *Cleveland*, 531 U.S. at 26; brackets in original). Accordingly, the question here is whether, by participating in a scheme to employ municipal workers based on their political activities, petitioner defrauded the City of jobs and attendant salaries that were "money or property" in the City's hands.

The court of appeals correctly answered that question yes, because petitioner's false representations misled the City into parting with both its property (the jobs themselves) and its money (the salaries that the City paid to those workers). As the court of appeals has explained, employment contracts are not importantly different from other types of contracts. See *United States* v. *Sorich*, 523 F.3d 702, 713 (7th Cir. 2008), cert. denied, 555 U.S. 1204 (2009). An employer's right to hire workers to perform agreed-upon services for wages is "immensely valuable," *ibid.*, and the employer's ability to select workers based on particular qualifications (like merit rather than political affiliation) "is an integral part" of the employment right itself, *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991). Moreover, regardless of whether the City's jobs were property, at the least the City was defrauded of the money that it paid in salaries to those workers. See Pet. App. 16 ("The City of Chica-

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[1] The statute's reference to "obtaining money or property by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C. 1341, makes it clear that the statute reaches "false promises and misrepresentations as to the future as well as other frauds involving money or property." *Cleveland*, 531 U.S. at 19 (quoting *McNally*, 483 U.S. at 357).

go did not get the employees that it wanted to hire and thus was cheated out of money.").

For those reasons, other courts of appeals likewise have concluded that government jobs and salaries qualify as "property" or "money" for purposes of the mail and wire fraud statutes. See *United States* v. *Douglas*, 398 F.3d 407, 417-418 (6th Cir. 2005) (job-rigging scheme by union leaders deprived members of the right to compete for skilled trade positions as guaranteed in a collective bargaining agreement, thereby depriving them of "property"); *Granberry*, 908 F.2d at 280 (affirming mail fraud conviction of bus driver who received job based on false statements in his application); *ibid.* ("The School District has been deprived of money in the very elementary sense that its money has gone to a person who would not have received it if all of the facts had been known."); *United States* v. *Doherty*, 867 F.2d 47, 55-56 (1st Cir.) (Breyer, J.) (scheme to illegally obtain, sell, and buy police entrance and promotion examinations violated the mail fraud statute because state was defrauded of the salaries it paid to those who received the jobs and promotions by means of fraudulent pretenses), cert. denied, 492 U.S. 918 (1989).

Of particular relevance here, courts have rejected petitioner's argument (Pet. 16-17) that jobs or wages are not property or money in the government's hands because others would have been hired and paid even in the absence of fraud. See, *e.g.*, *United States* v. *Leahy*, 464 F.3d 773, 788-789 (7th Cir. 2006), cert. denied, 552 U.S. 811 (2007); *Granberry*, 908 F.2d at 280; *Doherty*, 867 F.2d at 60. As those courts have recognized, a scheme like petitioner's violates the mail fraud statute because it deprives the governmental entity of the type of employee that it seeks to hire. See *Gran-*

berry, 908 F.2d at 280 ("What the School District wanted was a competent school-bus driver who was truthful and had not been convicted of a felony, and this is not what it got."); *Doherty*, 867 F.2d at 60 ("Getting jobs by false pretenses falls within the prohibition of [Section] 1341 because it deprived the Commonwealth of control over how its money was spent.") (internal quotation marks and citation omitted). Here, as a result of petitioner's conduct, the City paid for, but did not receive, employees who met its merit-based hiring criteria.

2. Petitioner is incorrect (Pet. 15-27) that the decision below conflicts with any decision of this Court or of any other court of appeals.

a. The decision below is consistent with this Court's decisions in *McNally* and *Skilling*, *supra*. In *McNally*, the Court held that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government," but is instead "limited in scope to the protection of property rights." 483 U.S. at 355, 360; see *ibid.* (observing that, unlike in this case, there was no allegation in *McNally* that the Commonwealth "was defrauded of any money or property" or "was deprived of control over how its money was spent"). The court of appeals did not come to a different conclusion here; it simply concluded that jobs and wages in the hands of a governmental entity are property and money within the meaning of the mail fraud statute. In the wake of *McNally*, Congress enacted 18 U.S.C. 1346, which states that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." This Court in *Skilling* held that Section 1346 reaches bribery and kickback schemes, but that holding is not relevant here for the reason given by the court of appeals: this case

concerns traditional mail fraud, not honest-services fraud. Pet. App. 16.[2]

The decision below is also consistent with this Court's decision in *Cleveland*, *supra*. In *Cleveland*, this Court held that a fraudulent scheme to obtain licenses from a State to operate video poker machines did not deprive the State of money or property. 531 U.S. at 15. The Court reasoned that an unissued license is not "'property' in the government regulator's hands." *Id.* at 20. According to the Court, the State's "core concern" in issuing video poker licenses was "regulatory" rather than economic, *ibid.* (emphasis omitted), and therefore "implicate[d] the Government's role as sovereign, not as property holder," *id.* at 24. By contrast here, petitioner's scheme deprived the City of assets with real economic value, see, *e.g.*, *Sorich*, 523 F.3d at 713, as well as the power to control how its own money was spent. Petitioner's scheme thus affected the government's economic rather than its regulatory interests.

b. Finally, contrary to petitioner's arguments (Pet. 23-27), the decision below is consistent with the decisions of other circuits. Of the decisions cited by petitioner (Pet. 24), in none of those cases was the object of the fraudulent scheme a job or promotion, and in none

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[2] There is no merit to petitioner's suggestion (Pet. 19) that the decision below conflicts with *Carpenter* v. *United States*, 484 U.S. 19 (1987). *Carpenter* held that *McNally*'s rejection of an honest-services theory of fraud liability "did not limit the scope of [Section] 1341 to tangible as distinguished from intangible property rights." *Id.* at 25; see *ibid.* ("Here, the object of the scheme was to take the Journal's confidential business information * * * and its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes."). If anything, *Carpenter* only confirms that petitioner's scheme fell within Section 1341 because it caused the City to make employment decisions and pay wages under false pretenses.

was an employer induced to pay money to someone not otherwise entitled to receive it. See, *e.g.*, *United States* v. *Griffin*, 324 F.3d 330, 353-355 (5th Cir. 2003) (finding after *Cleveland* that unissued low income tax credits, which "have zero intrinsic value" to the state agency that dispenses them, are not property in the state's hands); *United States* v. *Henry*, 29 F.3d 112, 114-115 (3d Cir. 1994) (banks' opportunity to bid on receiving public funds was not a property right); *United States* v. *Evans*, 844 F.2d 36, 37-40 (2d Cir. 1988) (United States government's interest in vetoing sales of domestically made or licensed weapons by one foreign government to another was not a property right for purposes of the fraud statutes); *id.* at 40 (noting that the United States government had asserted no "property interest in the arms," which were "owned by third countries").

Contrary to petitioner's claim (Pet. 25), the two cases on which he places principal reliance do not conflict with the decision below. In *United States* v. *Goodrich*, 871 F.2d 1011 (11th Cir. 1989), the defendants participated in a scheme to bribe several county commissioners in order to influence their zoning decisions. Although the commissioners were paid salaries and expenses to conduct sham meetings, the court held that the county's interest in those salary and expense payments was indistinguishable from the county's interest in receiving the commissioners' honest and faithful services. *Id.* at 1013-1014. Unlike in this case, in *Goodrich* the salary or expense payments had not themselves been procured by fraud; they were merely incidental to a wholly different fraudulent scheme. See *United States* v. *Sutton*, No. 5:08-CR-40, 2009 WL 383400, at *3-*5 (M.D. Ga. Feb. 11, 2009) (explaining why *Goodrich* does not conflict with

cases holding that "fraudulently obtained salaries can constitute 'money or property' under [Section] 1341").

Similarly, in *United States* v. *Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994), cert. denied, 513 U.S. 1084 (1995), a consultant to two local planning boards failed to disclose his personal interest in projects about which he made recommendations. *Id.* at 1211. The court of appeals held that for the consultant's concealed conflict to be material for purposes of mail fraud liability, "the government had to establish that the omission caused (or was intended to cause) actual harm to the village of a pecuniary nature or that the village could have negotiated a better deal for itself if it had not been deceived." *Id.* at 1217 (emphasis omitted). See *United States* v. *Zauber*, 857 F.2d 137, 146 (3d Cir. 1988) (holding that "missed investment opportunit[y]" in connection with a pension fund was not property, where the investment "still returned exactly what the investment agreement called for"), cert. denied, 489 U.S. 1066 (1989). By contrast here, the City was not deprived of information about conflicts of interest; petitioner's misrepresentations deprived it of jobs filled by employees who were hired based on merit rather than political patronage, as well as depriving it of the attendant salaries. The City thus plainly was deprived of property and money, not simply conflict-free services.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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