No. 16-888

In the Supreme Court of the United States

TODD S. FARHA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly instructed the jury on the mens rea required to prove healthcare fraud.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-109a) is reported at 832 F.3d 1259.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2016. A petition for rehearing was denied on October 18, 2016 (Pet. App. 111a-112a). The petition for a writ of certiorari was filed on January 13, 2017. 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 Middle District of Florida, petitioner was convicted on two counts of healthcare fraud, in violation of 18 U.S.C. 1347 and 2. Pet. App. 4a. He was sentenced to 36 months of imprisonment, to be

followed by two years of supervised release. *Id.* at 5a. The court of appeals affirmed. *Id.* at 1a-109a.

1. a. Petitioner was the Chief Executive Officer (CEO) of WellCare Health Plans, Inc. (WellCare), a publicly held healthcare company headquartered in Tampa, Florida. Pet. App. 2a-3a. Doing business through its two subsidiaries—Staywell Health Plan of Florida, Inc. (Staywell) and HealthEase of Florida, Inc. (HealthEase)—WellCare received money from Florida's Medicaid program for the provision of health-care services, in particular (as relevant to this case) the provision of behavioral-health services. *Id.* at 2a, 6a. Subsidiaries Staywell and HealthEase were health maintenance organizations (HMOs) that sub-contracted with other entities to provide behavioral-health services to covered Medicaid patients. *Id.* at 6a-7a; see *id.* at 14a n.5. Each year, the Florida Agency for Health Care Administration (AHCA) distributed a lump-sum payment to HMOs such as WellCare's subsidiaries to cover the provision of behavioral-health services. *Id.* at 6a-7a. That lump sum, known as a "capitation" or "capitation payment," was based on the number of Medicaid patients the HMO covered, multiplied by a fixed flat rate per patient, and did not depend on the actual cost of treating those patients. *Ibid.*

WellCare made significant profits under that arrangement, particularly with respect to outpatient care. Pet. App. 7a-8a. In 2002, AHCA initiated a pilot program in certain areas of the State that included Tampa and Pensacola. *Ibid.* Under the program, AHCA vastly increased (by 275%) its per-patient Medicaid rate for certain types of outpatient behavioral-health services. *Id.* at 12a. But along with that rate increase, AHCA required that 80% of Medicaid funds allocated

to those services be "expended for the provision of behavioral health care services" (rather than spent on administrative expenses or retained as profit), with any difference refunded to AHCA. *Id.* at 8a-9a (quoting Fla. Stat. § 409.912(4)(b) (2006)). HMOs participating in the pilot program thus could retain no more than 20% of the (higher) capitation payments for "administrative costs, overhead, and profit." *Id.* at 8a. The purpose of that rule—known as the "80/20 rule"—was to ensure that most Medicaid money was spent on patients' medical treatment rather than yielding high profits for HMOs or allowing them to inflate their administrative expenses. *Ibid.* Florida's Medicaid contracts made that understanding explicit beginning in 2004, specifying that the 80/20 requirement applied to "the total amount * * * paid directly or indirectly to behavioral health providers solely for the provision of behavioral health services . . . not including administrative expenses or overhead of the plan." *Id.* at 22a (emphasis omitted).

b. WellCare's executives quickly recognized the implications of both the Medicaid rate increase and the 80/20 rule. Pet. App. 12a. In 2003, petitioner ordered an internal financial analysis, which showed that, after the rate increase, subsidiary HealthEase was spending approximately 30% of its Medicaid capitation payment to reimburse the actual providers of outpatient behavioral-health services and keeping the remaining 70% for administrative expenses or as profits. *Id.* at 11a-12a. Based on that study, WellCare executives projected that the 80/20 rule would require WellCare to refund almost $6.5 million per year to AHCA. *Id.* at 12a. A later analysis of the 15-month period between July 2002 and September 2003 re-

vealed that subsidiary Staywell spent between 23% and 36% (depending how strictly the analysts defined allowable expenses) of its premium on qualifying outpatient behavioral-health expenses. *Ibid.* Applying the 80/20 rule would have required Staywell to refund between $4.8 and $6.3 million to AHCA for that 15-month period. *Ibid.*

Petitioner came up with a solution to that problem: WellCare would create a new subsidiary and automatically pay 85% of the behavioral-health capitation payment to that subsidiary; the subsidiary would then pay the much smaller amounts reflected above to downstream providers and keep the difference instead of refunding it to AHCA. Pet. App. 12a-13a. After petitioner proposed that plan, his subordinates warned him that, while "setting up the corporation is easy," the difficult part would be "creat[ing] a viable organization if we were to be audited" and dealing with "the questions that follow." *Id.* at 14a. But petitioner insisted on speed, stating in an email in September 2003 that, "[g]iven the stakes involved (potentially 400k/Month of giveback), the pace of this project is not acceptable. * * * Why would we delay and increase the amount of our potential giveback?" *Id.* at 13a-14a (emphasis omitted). By the end of the month, the new subsidiary—WellCare Behavioral Health, Inc.—had been incorporated, with petitioner as its CEO. *Id.* at 14a. The next year, petitioner ordered the name of the subsidiary changed from WellCare Behavioral Health to Harmony Behavioral Health, Inc. (Harmony) in order to "put some distance between [the subsidiary] and the WellCare name." *Id.* at 16a-17a.

c. Beginning in 2004, WellCare received 80/20 expense worksheets from AHCA requiring the company

to report the amount of its qualifying outpatient behavioral-health expenditures for the prior year. Pet. App. 17a. The worksheets listed the capitation payment to WellCare and asked WellCare to report its outpatient behavioral-health expenditures; based on those two figures, the worksheet would automatically calculate WellCare's outpatient behavioral-health expenditures as a percentage of its capitation payment and, if the result was less than 80%, the worksheet would calculate the amount of Medicaid money WellCare was required to refund. *Id.* at 9a-10a.

Petitioner put WellCare's Chief Financial Officer (CFO) in charge of the team that would calculate the expenditures figure that WellCare would report to AHCA. Pet. App. 19a, 23a. Members of the team understood that their job was to "find a way not to pay back 10 million dollars * * * find[] a way to make it zero." *Id.* at 19a (brackets in original). Because the first two 80/20 reports covered 2002 and 2003, however, WellCare (and its subsidiaries) had to refund more than $6 million (even after some "very creative" accounting) because Harmony had existed for only a few months at the end of 2003 and therefore had received only a relatively small portion of the annual capitation payment. *Id.* at 19a-21a.

In the years that followed, Harmony received 85% of WellCare's capitation payment for the entire reporting period. Pet. App. 23a. Because WellCare executives had established Harmony for the purpose of avoiding refund payments to AHCA, the executives feared they would be audited. *Ibid.* The financial team was therefore instructed to "come up with a payback" to try to avoid suspicion. *Ibid.* For the year 2004, the team manipulated the portion of the funds

paid by WellCare to Harmony that (purportedly) went towards outpatient (as opposed to inpatient) behavioral-health services. *Id.* at 24a. By falsely reporting the portion of outpatient services, the team could reduce (on paper) the amount of expenditures that qualified under the 80/20 rule. *Ibid.* That strategy allowed the team to generate various refund options, ranging from zero to $1.5 million; WellCare's management ultimately opted to refund $800,000 to AHCA for 2004. *Id.* at 24a-26a.

All of the calculations that yielded the refund were created by the financial team after the fact and had nothing to do with the amounts that WellCare, Staywell, HealthEase, or Harmony had actually spent during the prior year on outpatient behavioral-health services. Pet. App. 24a-25a. WellCare kept its own internal set of books, which showed that in 2004 Staywell and HealthEase spent only $3.2 million (20% of its annual capitation) on outpatient behavioral-health services, far less than the $11.6 million in expenditures it reported to AHCA. *Id.* at 26a-27a. Similarly, for the year 2005, the team undertook complicated financial machinations (*id.* at 27a-35a) to arrive at the desired refund amount of $1 million after the order had come down that "[petitioner] wants to pay back a million." *Id.* at 32a. As petitioner put it: "You have to pay the Gods something." *Ibid.* Thus, for 2005, WellCare refunded $1.4 million to AHCA instead of the $6.9 million that it actually owed based on its own records of outpatient behavioral-health expenditures. *Id.* at 35a. Similarly, for 2006, the team manufactured a refund of $1.1 million by falsely reporting that Staywell and HealthEase spent $28.9 million (77% of WellCare's capitation payment) on providing qualify-

ing outpatient behavioral-health services. *Id.* at 41a. In truth, the subsidiaries had (through Harmony) spent only $17.9 million (48% of the capitation payment) on qualifying services and should have refunded $12.1 million to AHCA rather than $1.1 million. *Ibid.*

d. WellCare never disclosed its accounting methods to AHCA. Pet. App. 46a. Its CFO repeatedly stifled attempts by other WellCare officers to do so (*id.* at 45a-46a, 51a-52a, 53a), maintaining that WellCare's practice of refunding $1 million dollars per year would keep AHCA at bay. *Id.* at 38a ("The system works good for us. We pay them a million dollars. That's enough. They think the system works, and so, that's it.") (brackets omitted). Ultimately, however, AHCA demanded "patient encounter" data to support WellCare's claimed expenditures; in response, WellCare falsely inflated the amounts it had paid for individual patients' treatment. *Id.* at 56a-57a.

2. A grand jury in the Middle District of Florida charged petitioner with conspiring to defraud the United States, in violation of 18 U.S.C. 371; four counts of making false statements relating to healthcare, in violation of 18 U.S.C. 1035 (corresponding to each of WellCare's two subsidiaries for each of the years 2005 and 2006); and four counts of healthcare fraud, in violation of 18 U.S.C. 1347 (also corresponding to each WellCare subsidiary and calendar year). Pet. App. 2a-4a & n.2.

At the close of the evidence, the district court instructed the jury on general requirements applicable to multiple counts and on offense-specific requirements. Pet. App. 135a-137a; see 5/15/13 Tr. 8-36. The court included a general instruction on the definitions of "knowingly" and "willfully," explaining that: "The word

'knowingly' means that an act was done voluntarily and intentionally and not because of a mistake or by accident. The word 'willfully' means that the act was committed voluntarily and purposely with the intent to do something the law forbids, that is, with the bad purpose to disobey or disregard the law." Pet. App. 135a. The court also instructed the jury that, when a defendant's "knowledge of a fact is an essential part of a crime, it is enough that the defendant was aware of a high probability that the fact existed and took deliberate action to avoid learning of the fact unless the defendant actually believed the fact did not exist." *Ibid.* The court also "emphasize[d] that negligence, recklessness, carelessness, or foolishness" are not sufficient to prove knowledge. *Id.* at 136a.

With respect to the charge of healthcare fraud specifically, the district court instructed the jury that the government was required to prove the following: (1) that the defendant "knowingly executed or attempted to execute a scheme or artifice to defraud a healthcare benefit program or to obtain money or property owned by or under the custody or control of a healthcare benefit program by means of false or fraudulent pretenses and representations"; (2) that "the false or fraudulent pretenses and representations related to a material fact"; (3) that the defendant "acted willfully and intended to defraud"; and (4) that the defendant "did so in connection with the delivery of or payment for healthcare benefits, items, or services." Pet. App. 137a. With respect to the first element, relating to "a scheme or artifice to defraud," the court explained that a "statement or representation is false or fraudulent if it is about a material fact that the speaker knows is untrue or makes with deliberate

indifference as to the truth and makes with intent to defraud." *Ibid.* With respect to the "intent to defraud" element, the court instructed that, "'[t]o act with intent to defraud' means to do something with a specific intent to deceive or cheat someone and to deprive someone of money or property." *Id.* at 138a.

The jury convicted petitioner on two counts of health-care fraud relating to the 2006 submissions. Pet. App. 4a. The jury either acquitted petitioner or could not reach a verdict on the remaining counts. *Ibid.*

3. The court of appeals unanimously affirmed. Pet. App. 1a-109a. Addressing the sufficiency of the evidence first, the court found "[a]bundant" evidence that Staywell and HealthEase reported "false and fraudulent * * * expenses" for 2006, *id.* at 62a, and that the "evidence overwhelmingly" showed that petitioner understood WellCare's reporting obligations and "knew" that the expense amounts reported in the "80/20 Worksheets were false." *Id.* at 70a; see *id.* at 73a (the evidence "amply" showed that the 2006 expense reports were "in fact, false" and that petitioner "knew they were, in fact, false"). The court found that petitioner "designed and implemented the scheme specifically to defraud AHCA and ordered his subordinates under his authority to perpetuate the scheme year after year, including [calendar year] 2006." *Id.* at 74a.[1]

[1] Although petitioner has not renewed his challenge to the sufficiency of the evidence, he asserts (Pet. 3) that he had "good reason to believe" that his plan was legal, arguing, *inter alia*, that the company relied in good faith on the advice of its in-house counsel, outside counsel, and a WellCare employee who was a former Florida Medicaid official. Pet. 8. The jury rejected that claim by finding that petitioner acted "willfully," *i.e.*, "with the intent to do something the law forbids, that is, with the bad purpose to disobey or disregard the law." Pet. App. 93a. The court of appeals also

Turning to the jury instructions, the court of appeals rejected petitioner's argument "that the district court erred by instructing the jury that it could convict the defendants under § 1347 upon finding that the defendants made false representations in the [calendar year] 2006 expense reports 'with deliberate indifference as to the truth,'" which, they claimed, permitted the jury to convict based on a finding of recklessness. Pet. App. 95a. The court of appeals explained that the instruction on the intent-to-defraud element of Section 1347 had correctly stated that a "statement or representation is false or fraudulent if it is about a material fact that the speaker knows is untrue or makes with deliberate indifference as to the truth and makes with intent to defraud." *Ibid.* The court of appeals further explained that "[r]epresentations made with deliberate indifference to the truth *and* with intent to defraud" satisfy the scheme-to-defraud element of Section 1347. *Ibid.* It approvingly noted that the district court had based that instruction on the Eleventh Circuit's pattern jury instruction for healthcare fraud, modified (at petitioner's request) to substitute the "stronger phrase" of "deliberate indifference" for

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rejected the claim, describing in detail the evidence against petitioner and his co-defendants. *Id.* at 81a-82a. As the court of appeals explained, WellCare's outside counsel specifically refused to render a legal opinion supporting WellCare's use of Harmony to evade the 80/20 rule, after which the amount of work WellCare directed to the firm "diminished dramatically." *Id.* at 82a. The former Florida Medicaid official, Robert Butler—on whose advice petitioner alleges that he relied—was one of the WellCare officers whose attempts to force WellCare to come clean were thwarted. *Id.* at 47a-50a. And WellCare's in-house general counsel (Thaddeus Bereday) was a defendant in this case. *Id.* at 3a & n.1.

"reckless indifference." *Id.* at 95a-96a (citation omitted); see Gov't C.A. Br. 172.

The court of appeals also held that, in addition to correctly instructing on the intent-to-defraud element, the district court correctly instructed the jury on the *separate* mens rea element requiring that a defendant act "knowingly and willfully" in executing the scheme to defraud. Pet. App. 96a. The district court's instructions, the court of appeals observed, required the government to "prove that the defendants executed a scheme to defraud AHCA 'voluntarily and intentionally' rather than by 'mistake or by accident' and 'with the intent to do something the law forbids.'" *Id.* at 97a.

The court of appeals rejected petitioner's argument that its pattern instruction on Section 1347 conflicts with this Court's decision in *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U.S. 754 (2011), which (petitioner argued) required the government to prove either actual knowledge of falsity or at least willful blindness as to truth or falsity of the submissions to AHCA. Pet. App. 98a-100a. The court of appeals pointed out that, when instructing the jury on the means of finding a defendant's knowledge, the district court correctly included a "willful blindness" instruction that was consistent with *Global-Tech*. *Id.* at 98a-101a. Petitioner, the court of appeals noted, nevertheless claimed that the Eleventh Circuit's pattern instruction on the separate scheme-to-defraud element of healthcare fraud conflicts with *Global-Tech* because it does not use *Global-Tech*'s formulation of actual knowledge or willful blindness, but instead refers to "reckless indifference to the truth and intent to defraud." *Id.* at 98a-99a. The court of appeals noted that the instruction given by the district court referred to "deliberate

indifference," rather than recklessness. *Id.* at 99a-100a. And, in any event, the court of appeals "reject[ed] the claim that *Global-Tech* alone controls this criminal § 1347 fraud case or creates reversible error here." *Id.* at 100a; see *ibid.* ("*Global-Tech* was not a criminal fraud case"); see also *id.* at 100a-101a n.28 (questioning whether *Global-Tech* applies to civil "fraud").

In rejecting petitioner's objection to the fraud instruction, the court of appeals made clear that the concepts of "deliberate indifference" and "recklessness" had little application in this case. Pet. App. 97a-98a. "[T]he trial," the court explained, "proceeded under a theory of actual knowledge rather than deliberate indifference." *Id.* at 97a. "From beginning to end, the government alleged the defendants' knowledge and intent, not mere recklessness. For the jury to convict the defendants without finding that they knew the expense reports were false would be to ignore both the district court's jury instructions and the government's whole theory of the case." *Id.* at 98a.

The court of appeals denied petitioner's petition for rehearing and rehearing en banc. Pet. App. 111a-112a.

4. On November 3, 2016, Justice Thomas denied petitioner's application for a stay of the mandate and for release on bail pending the filing and disposition of a petition for a writ of certiorari.

ARGUMENT

Petitioner contends (Pet. 15-18) that the district court committed reversible error in instructing the jury on the elements required to prove that a defendant engaged in a fraudulent scheme. The court of appeals correctly rejected petitioner's arguments and its decision does not conflict with any decision of this

Court or of any other court of appeals. This case would also be a poor vehicle to address the question presented, because petitioner was convicted on a theory of actual knowledge of falsity, not deliberate indifference to the truth. Further review is therefore unwarranted.

1. Petitioner argues (Pet. 15-24) that the court of appeals' decision affirming the instruction conflicts with *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U.S. 754 (2011), but that contention is based on a misunderstanding of the knowledge element of 18 U.S.C. 1347, to which *Global-Tech* applies, and the scheme-to-defraud element, to which it does not. As the court of appeals correctly concluded, the district court's instruction on the knowledge element of Section 1347 conforms to *Global-Tech*'s requirements, and *Global-Tech* neither addresses nor invalidates the district court's separate instruction on the requirements to show a scheme to defraud.

a. Petitioner was convicted of healthcare fraud, in violation of 18 U.S.C. 1347, which provides criminal penalties for:

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—
>
> > (1) to defraud any health care benefit program; or
> >
> > (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,
>
> in connection with the delivery of or payment for health care benefits, items, or services.

18 U.S.C. 1347(a). To obtain a conviction under Section 1347, the government must therefore prove *both* that a defendant executed or attempted to execute a scheme with a particular mens rea or state of mind ("knowing[] and willful[]") *and* that the scheme had a particular goal (here, "to defraud any health care benefit program * * * in connection with the delivery of or payment for health care benefits, items, or services"). *Ibid.*

The district court instructed the jury that the government could satisfy the mens rea element by proving beyond a reasonable doubt that petitioner "knowingly" and "willfully" executed a scheme to defraud a healthcare program. Pet. App. 135a. The court instructed the jury that an act is committed "knowingly" when the "act was done voluntarily and intentionally and not because of a mistake or by accident." *Ibid.* The court further instructed that an act is done "willfully" when "the act was committed voluntarily and purposely with the intent to do something the law forbids, that is, with the bad purpose to disobey or disregard the law." *Ibid.* The court also included a deliberate-ignorance instruction, explaining that the government can satisfy the "knowledge" element with proof that a defendant "was aware of a high probability that [a] fact existed and took deliberate action to avoid learning of the fact." *Ibid.* The court "emphasize[d]," however, "that negligence, recklessness, carelessness, or foolishness is not enough" to prove knowledge. *Id.* at 136a.

As the court of appeals correctly concluded, those instructions ensured that the jury could not find petitioner guilty unless it found that he "acted voluntarily, intentionally and with the bad purpose to disregard

the law in executing a scheme to defraud." Pet. App. 93a. Petitioner does not challenge those mens rea instructions, which fully conformed to *Global-Tech*'s articulation of the requirements for establishing the knowledge element of an offense based on the alternatives of actual knowledge or deliberate ignorance. See *Global-Tech*, 563 U.S. at 766-770 (describing "the doctrine of willful blindness").

b. Petitioner instead challenges (Pet. 15-24) one aspect of the distinct element requiring proof that the object of the scheme was to defraud a healthcare benefit program by means of false or fraudulent pretenses and representations. The district court instructed the jury that "[a] scheme to defraud includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses and representations relating to a material fact." Pet. App. 137a. The court then stated that a "statement or representation is false or fraudulent if it is about a material fact that the speaker knows is untrue *or makes with deliberate indifference as to the truth* and makes with intent to defraud." *Ibid.* (emphasis added). Petitioner singles out the italicized phrase as conflicting with *Global-Tech*. Petitioner argues (Pet. 16-17)—as do his amici (see Cato Br. 8; NACDL Br. 8)—that the district court's instruction on "deliberate indifference" to the truth of an alleged false statement lowered the mens rea required to prove healthcare fraud from knowing and willful to "reckless." That argument is incorrect.

i. Contrary to petitioner's view, a defendant's knowing and willful participation in a healthcare fraud scheme is a separate element from the scheme-to-defraud element. The scheme to defraud describes

the defendant's plan of action: as the district court explained to the jury, the scheme element embraces "any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses and representations relating to a material fact." Pet. App. 137a. And it must be carried out with a specific mens rea: an "intent to defraud," which the district court accurately described to the jury as "do[ing] something with a specific intent to deceive or cheat someone and to deprive someone of money or property." *Id.* at 138a. The false and fraudulent representations that make up the scheme need not be *known* to be false; rather, it is sufficient if the scheme is based on statements or representations "that the speaker * * * makes with deliberate indifference as to the truth," so long as the government proves that he acted with an intent to defraud. *Id.* at 137a.

That formulation is reflected in the law of nearly every circuit and has been recognized for decades. See, *e.g.*, *United States* v. *Dockray*, 943 F.2d 152, 154 n.2 (1st Cir. 1991) ("A statement or representation is false or fraudulent, within the meaning of [the mail and wire fraud statutes], if known to be untrue, or made with reckless indifference as to the truth or falsity, and made or caused to be made with the intent to deceive.");[2] *United States* v. *Coyle*, 63 F.3d 1239,

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[2] Criminal "recklessness[, which] exists 'when a person disregards a risk of harm of which he is aware,'" *Elonis* v. *United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part) (citations omitted), is equivalent in this context to deliberate indifference. See Model Penal Code § 2.02(2)(c) (1985) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a

1243 (3d Cir. 1995); *United States* v. *Bermes*, 9 Fed. Appx. 207, 209 (4th Cir. 2001) (unpublished); *United States* v. *Dillman*, 15 F.3d 384, 392-393 (5th Cir.), cert. denied, 513 U.S. 866 (1994); *United States* v. *Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013); *United States* v. *Dick*, 744 F.2d 546, 551 (7th Cir. 1984); *United States* v. *Marley*, 549 F.2d 561, 563-564 (8th Cir. 1977); *United States* v. *Lloyd*, 807 F.3d 1128, 1164 (9th Cir. 2015); *United States* v. *Cochran*, 109 F.3d 660, 665 (10th Cir. 1997); *United States* v. *Sawyer*, 799 F.2d 1494, 1501-1502 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987); *United States* v. *Philip Morris USA, Inc.*, 566 F.3d 1095, 1121 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 3501, and 130 S. Ct. 3502 (2010). And its roots extend deep into the common law of fraud. See, *e.g.*, *Cooper* v. *Schlesinger*, 111 U.S. 148, 155 (1884) ("[T]he jury were properly instructed[] that a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule."); *Kimber* v. *Young*, 137 F. 744, 748 (8th Cir. 1905) ("A false statement recklessly made, without knowledge of its truth or falsity, is the equivalent of actual fraud.") (collecting authorities). The same principle was incorporated into the law of mail fraud nearly a century ago. *Corliss* v. *United States*, 7 F.2d 455, 456 (8th Cir. 1925) ("This is a criminal case, and the false representations, in order to come within the statute, must have been knowingly false or made with reckless disregard as to whether they were false or true.").

That formulation makes sense. When a defendant knowingly sets out to execute a fraudulent scheme,

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substantial and unjustifiable risk that the material element exists or will result from his conduct.").

with intent to defraud, in order to deprive victims of money or property, it does not matter whether the defendant is aware that his statements or representations are false or whether he is deliberately or recklessly indifferent with respect to their truth or falsity. Either circumstance exhibits the same danger of deceiving others and reflects the same level of culpability. See *Kimber*, 137 F. at 748 ("The affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false.") (quoting 1 Joseph Story, *Equity Jurisprudence* § 193 (6th ed. 1853)). Accordingly, the district court correctly instructed the jury on the scheme-to-defraud element.

ii. *Global-Tech* does not call into doubt the district court's scheme-to-defraud instruction. *Global-Tech* did not address the requirements for proving a scheme to defraud. And in suggesting that the court of appeals' decision approving the district court's instructions conflicts with *Global-Tech* by refusing to apply it "in [a] criminal case[]" (Pet. 16), petitioner misreads the court of appeals' decision.

In *Global-Tech*, this Court addressed the standard for proving, in a civil case, that a party actively induced infringement of a patent in violation of 35 U.S.C. 271(b). 563 U.S. at 757. The jury in that case had found a violation of Section 271(b) in the absence of proof that the defendant knew about the existence of the patent in question. *Id.* at 759. The Federal Circuit upheld the verdict because it found sufficient evidence to prove that the defendant deliberately disregarded a known risk that the patent existed. *Ibid.* This Court held that proof of a violation of Sec-

tion 271(b) requires proof that a defendant knew of the infringing nature of the relevant acts, not merely proof that the defendant was deliberately indifferent to a known risk that a patent exists. *Id.* at 760-766.

The Court in *Global-Tech* upheld the verdict, however, because it found sufficient evidence that the defendant was willfully blind to the existence of the patent. 563 U.S. at 766-769. In so holding, the Court looked to criminal law to determine when the knowledge requirement could be satisfied with proof of "willful blindness." *Id.* at 766. After surveying willful-blindness cases from various circuits, the Court explained that, although courts of appeals may "articulate the doctrine of willful blindness in slightly different ways," they "all appear to agree on two basic requirements: (1) [t]he defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 769. The Court held that "these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Ibid.*; see *ibid.* ("Under this formulation, a willfully blind defendant * * * can almost be said to have actually known the critical facts.").

Although *Global-Tech* was a civil case, its reliance on general criminal law to articulate the correct standard for deliberate ignorance confirms that that standard applies in civil and criminal contexts. If the court of appeals in this case had refused to apply *Global-Tech* on the ground that this is a criminal case and *Global-Tech* was a civil case, that would have been error, as petitioner suggests (Pet. 16-18).

But that is not what the court of appeals did. The court of appeals rejected petitioner's argument that "*Global-Tech alone* controls this criminal § 1347 *fraud* case" (emphases added), explaining that *Global-Tech* "did not abrogate, conflict with, or preclude the district court from giving" an instruction modeled on the pattern fraud charge in this case. Pet. App. 100a. A deliberate-ignorance instruction is relevant to the knowledge element of a fraud prosecution (or any prosecution involving a knowledge element) because proof of deliberate ignorance is essentially a substitute for proof of actual knowledge. And the district court's deliberate-avoidance instruction was consistent with this Court's discussion of deliberate ignorance in *Global-Tech*. See *id.* at 137a. Petitioner (and his amici) err in arguing that *Global-Tech*'s treatment of a knowledge element (which is common in civil and criminal statutes) also governs the *separate* element of his crime of conviction—a scheme to defraud—which exists throughout criminal fraud statutes. Nothing in this Court's discussion in *Global-Tech* of knowledge more broadly or of deliberate ignorance specifically calls into question the separate proposition—which is well established in the law—that a defendant's conduct is fraudulent when he makes a materially false statement with reckless or deliberate indifference to, or disregard for, its truth or falsity.

iii. Petitioner also briefly asserts (Pet. 23-24) that the knowledge element of the healthcare-fraud statute requires proof not only that a defendant knew he was participating in a scheme to defraud, but also that he knew the falsity of particular representations made as part of the scheme. Petitioner is mistaken.

Section 1347's "knowingly and willfully" requirement applies to a defendant's "execut[ion]" (or attempted execution) of "a scheme or artifice * * * to defraud any health care benefit program." 18 U.S.C. 1347. Speaking of a similarly structured criminal statute, this Court has observed that, "[u]nder the most natural reading of this provision, the word[s] 'knowingly' [and 'willfully'] appl[y] not just to the statute's verbs but also to the object of those verbs." *McFadden* v. *United States*, 135 S. Ct. 2298, 2304 (2015) (construing 21 U.S.C. 841(a)(1)). The object of those verbs in Section 1347 is the scheme to defraud—so the "ordinary meaning" of Section 1347 "thus requires a defendant to know only that" he is executing or attempting to execute a scheme to defraud. *Ibid.*

Nothing in that language suggests that Section 1347's general mens rea requirement extends to each aspect of the fraudulent scheme, as long as a defendant knows that he is executing a scheme to defraud. When a defendant knows that, he "know[s] the facts that make his conduct fit the definition of the offense." *Staples* v. *United States*, 511 U.S. 600, 608 n.3 (1994). As discussed at pp. 16-18, *supra*, courts have long agreed that proof of "fraud" requires proof of a defendant's intent to cheat victims of money or property through representations made with knowledge *or* deliberate or reckless indifference to their truth or falsity. See *Kimber*, 137 F. at 748.[3]

[3] Petitioner also claims (Pet. 22) that "the entire theory on which the government charged and tried this case" required proof that petitioner knew the claims submitted to AHCA were false. That claim does not help petitioner's argument; an assumption by the government that it was required to prove more than was legally

2. The only other court of appeals that has addressed the issue has reached the same conclusion as the court of appeals in this case. In *United States* v. *Dearing*, 504 F.3d 897 (2007) (cited at Pet. App. 96a), the Ninth Circuit explained that an instruction that a defendant must "knowingly and willfully" execute a scheme to defraud a healthcare program relates to one threshold element of the crime—and it is not negated or diluted by a different instruction, "tethered to the 'specific intent to defraud' element" of Section 1347, which the government must "prove *in addition to* the first element." *Id.* at 903; see *id.* at 902-903 (the "phrasing of this additional instruction," which permitted "showing that the defendant knowingly lied with intent to defraud or that he acted with reckless indifference to the truth or falsity of the statements," "did not negate the separate instruction that to convict, the jury had to find that [the defendant] acted 'knowingly and willfully'") (internal quotation marks omitted). And the Ninth Circuit recently rejected an argument substantially similar to the argument petitioner makes, concluding that *Global-Tech*, "which addressed the mens rea of willful blindness," did not cast doubt on an instruction that "a statement is "'false' or 'fraudulent'" if it is about a fact "that the speaker knows is untrue or makes with reckless indifference as to the truth and makes with intent to defraud." *United States* v. *Holden*, 625 Fed. Appx. 316, 319 (2015) (unpublished), cert. denied, 137 S. Ct. 567 (2016); U.S. Br. in Opp. at 6, *Holden* v. *United States*, No. 16-5259 (Oct. 26, 2016) (quoting instruction).

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necessary would not undermine the validity of petitioner's convictions.

Although petitioner asserts (Pet. 18) a circuit conflict, he identifies *no* decision concluding that *Global-Tech* called into question the longstanding principle that a scheme to defraud may be based on a false statement made with deliberate disregard for its truth, coupled with the intent to defraud, *i.e.*, the intent to deceive or cheat the victim out of money or property. The essence of fraud is an intent to obtain something through deception—and knowingly employing false statements with a deliberate disregard for their truth in order to wrong someone in their property rights satisfies that requirement.

Petitioner contends (Pet. 22-23) that the decision of the court of appeals is contrary to its own precedents. But any intracircuit discrepancy that might exist would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioner's further suggestion (Pet. 22 n.9) that the decision below conflicts with the Fourth Circuit's decision in *United States* v. *McLean*, 715 F.3d 129 (2013), also does not support his request for this Court's review. In the course of rejecting a constitutional vagueness challenge, the court in *McLean* noted in dictum that, as applied to that defendant's fraud scheme, Section 1347 required proof that the defendant "knew" the procedures he claimed as medically necessary were in fact unnecessary. *Id.* at 136-137; see *id.* at 137 n.6 (noting evidence of defendant's actual knowledge). The statement—which the court made as part of an as-applied constitutional analysis—did not represent an exhaustive interpretation of the statute. It simply explained how the mens rea requirement, "as applied to" that defendant, alleviated any vagueness concerns. *Id.* at 137. Petitioner, con-

victed based on his intent to defraud and actual knowledge of, or deliberate indifference to, the falsity of his representations, cannot (and does not) raise any vagueness concerns.

3. Not only does the question presented not warrant this Court's review, this case would be an unsuitable vehicle in which to address it. As the court of appeals correctly concluded, petitioner's convictions did not depend on whether the jury could have found that a scheme to defraud was based on deliberate indifference to the falsity of the representations made to AHCA. See Pet. App. 97a-98a. As the court of appeals explained, "[f]rom beginning to end, the government alleged the defendants' knowledge and intent, not mere recklessness," and "proceeded under a theory of actual knowledge" that the expense reports were false. *Ibid.*

The evidence overwhelming established that petitioner knew WellCare's reported expenditures for its covered outpatient behavioral-health services were completely fabricated. The evidence established that petitioner stated "[y]ou have to pay the Gods something" and then decided on a year-to-year basis how much that offering would be. Pet. App. 77a. As the court of appeals summed up, the "evidence overwhelmingly showed the defendants well understood their * * * expense reporting obligations" and that they "knew" that the "expense amounts reported in the 80/20 Worksheets were false." *Id.* at 70a. "From beginning to end," the court of appeals correctly concluded, "the defendants' knowledge of that falsity remained constant." *Ibid.* Thus, any claim of error in the court's scheme-to-defraud instruction would be harmless because, as the court of appeals explained,

the evidence of petitioner's actual knowledge was overwhelming.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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