No. 16-888

IN THE
Supreme Court of the United States

TODD S. FARHA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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In sustaining Farha's convictions, the Eleventh Circuit reaffirmed that, "in a health care fraud case such as this, 'the defendant must be shown to have known that the claims submitted were, in fact, false.'" Pet. App. 95a. As the petition explains (at 6-11)—and the government nowhere disputes—Farha's trial turned largely on whether that element was proven. The evidence showed that Farha had reason to believe WellCare's interpretation of the 80/20 statute was permissible, and that evidence persuaded the jury to acquit Farha of false statements—an offense for which it was correctly required to find knowledge of falsity under a standard consistent with *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754 (2011).

As to healthcare fraud, however, the jury was allowed to convict by finding that Farha was "deliberately indifferent" to the truth or falsity of the submissions. In affirming, the Eleventh Circuit "agreed" with Farha that "the government must prove [a healthcare-fraud] defendant's knowledge of falsity." Pet. App. 95a. But it reasoned that such "knowledge can be proven in more than one way," including by a combination of "deliberate indifference to the truth" and "intent to defraud." *Id.* The court therefore held that the instruction as given was "a permissible and acceptable way to prove knowledge of falsity." Pet. App. 100a.

Abandoning that rationale (which it advanced below), the government now agrees with Farha that, under *Global-Tech*, a knowledge element cannot be satisfied by proof of deliberate indifference. Opp. 13, 19-20. It nonetheless tries to defend the convictions on the theory—rejected below—that healthcare fraud does not require knowledge of falsity. Thus, whereas the Eleventh Circuit held that (1) healthcare fraud requires knowledge of falsity, but (2) it can be proven by deliberate indifference, the government argues that the court's error in the latter proposition does not warrant review because the former was also erroneous.

Even if the government were correct about the elements of healthcare fraud—and it is not—its two-wrongs-make-a-right theory is no basis to deny certiorari. (If anything, the government's assertion that the Eleventh Circuit misconstrued the elements of healthcare fraud, in conflict with other decisions, only heightens the need for review.) The judgment below rests on the premise that proof of deliberate indifference is a "permissible and acceptable way to prove knowledge" in a criminal case. Pet. App. 100a. That holding conflicts with *Global-Tech*. And the govern-

ment has already relied on the decision below to defend criminal jury instructions against *Global-Tech* challenge outside the fraud context. The Court should grant plenary review, summarily reverse, or—at a minimum—vacate and remand in light of the government's repudiation of the rationale on which it prevailed below.

I. THE DECISION BELOW CONFLICTS WITH *GLOBAL-TECH*

1. The Eleventh Circuit held that the government can satisfy "the knowledge requirement in § 1347 cases"—namely, the burden to prove "the defendant's knowledge of falsity"—by showing that the defendant made representations "with deliberate indifference to the truth and with intent to defraud." Pet. App. 95a (emphasis omitted).

As the petition explains (at 15-19), that holding conflicts with *Global-Tech* and decisions applying it in criminal cases. Relying on criminal-law precedents, *Global-Tech* held that a statutory knowledge requirement cannot be satisfied by proof of deliberate indifference. The Eleventh Circuit's holding that *Global-Tech* does not apply here, on the theory that it was "a civil patent-infringement case" rather than "a criminal fraud case," Pet. App. 100a, fails to respect the logic of this Court's decision.

Below, the government urged precisely this untenable distinction. It dismissed *Global-Tech* as concerning "actual knowledge of patent infringement" and argued that the Eleventh Circuit had limited it "to one specific area of intellectual property law." Pet. App. 119a, 124a; *see* Resp. C.A. Br. 172, 174. Now, however, the government recognizes (at 19) that "[a]lthough *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." And it accepts (at 13) that "*Global-Tech* applies" to "the knowledge element of" the healthcare-fraud statute.

2. The government nevertheless argues that certiorari should be denied because the Eleventh Circuit assertedly *also* erred by reaffirming its repeated holdings that a healthcare-fraud "'defendant must be shown to have known that the claims submitted were, in fact, false.'" Pet. App. 95a (quoting *United States* v. *Vernon*, 723 F.3d 1234, 1273 (11th Cir. 2013)); *see United States* v. *Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015); *United States* v. *Medina*, 485 F.3d 1291, 1297 (11th Cir. 2007). Contrary to those holdings, the government argues "it does not matter whether the defendant is aware that his statements or representations are false." Opp. 17-18; *see id.* at 16 ("The false and fraudulent representations that make up the scheme need not be *known* to be false[.]").

Despite the petition's focus on this point (at 22-23), the government never acknowledges that its position conflicts with settled Eleventh Circuit law. It gestures toward the problem only obliquely, asserting (at 23) that "any intracircuit discrepancy that might exist would not warrant this Court's review." But there is no "intracircuit discrepancy." The opinion below does not conflict with *Medina*, *Sosa*, or *Vernon*; it reaffirms those opinions. The conflict is with *Global-Tech* and decisions applying it.

That conflict persists whether or not the government is correct about the elements of healthcare fraud. Convictions in the Eleventh Circuit can now be based on the theory that deliberate indifference is an "ac-

ceptable way to prove knowledge." Pet. App. 100a. Indeed, despite its position here, the government has relied on the opinion below to argue—in another Eleventh Circuit criminal case, outside the fraud context—that *Global-Tech* did not "'abrogate, conflict with, or preclude the district court'" from giving a challenged jury instruction because *Global-Tech* was "'a civil patent-infringement case.'" U.S. Br., *United States* v. *Heredia*, 2017 WL 610397, at *35 n.4 (11th Cir. Feb. 13, 2017).

The government's inability to defend the Eleventh Circuit's holding—while continuing to advance it in that circuit—is reason enough to grant plenary review or summarily reverse.

3. At the least, the Court should vacate the judgment and remand in light of the government's position. "[A] GVR order is … potentially appropriate" when "intervening developments"—including "confessions of error or other positions newly taken by the Solicitor General"—"reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). That criterion is satisfied here.[1]

[1] The Court has regularly issued GVR orders on the basis of positions taken by the government at the certiorari stage, including where the government urged that the petition be denied. *See, e.g.*, *Russell* v. *United States*, 134 S. Ct. 1872 (2014) (mem.); *Ajoku* v. *United States*, 134 S. Ct. 1872 (2014) (mem.); *Ford Motor Co.* v. *United States*, 134 S. Ct. 510 (2013) (per curiam).

The government has now repudiated the central premise of the Eleventh Circuit's instructional-error analysis. There is a "reasonable probability" that, if advised of the government's current position, the Eleventh Circuit "would reject" that premise, *Lawrence*, 516 U.S. at 167. And "such a redetermination" would likely "determine the ultimate outcome of the litigation," *id.*, because the Eleventh Circuit has repeatedly rejected the only remaining basis on which the government attempts to defend the jury instruction—including in this case. The government argued below that knowing falsehoods are not an element of healthcare fraud, Resp. C.A. Br. 89-90, 100-102, 176, but the Eleventh Circuit held otherwise, Pet. App. 95a.

It is profoundly unfair for the government to obtain a conviction and affirmance on a theory it later disavows, only to urge the denial of certiorari on a theory the lower court rejected. Due process requires at least allowing the Eleventh Circuit to consider this case in light of the government's concession that a knowledge element of a criminal offense cannot be satisfied by proof of deliberate indifference.

II. THE GOVERNMENT'S ALTERNATIVE DEFENSE OF THE CONVICTIONS IS UNPERSUASIVE

Even if it were relevant, the government's position that healthcare fraud does not require knowledge of falsity is wrong.

1. The government cites cases (at 16-17) for the proposition that "[t]he false and fraudulent representations that make up [a fraudulent] scheme need not be *known* to be false." But none of those cases involved the healthcare-fraud statute. Nearly all involved mail

fraud, wire fraud, or both.[2] As the petition explains (at 19-20, 23-24), the text of the healthcare-fraud statute meaningfully differs.

The mail- and wire-fraud statutes criminalize the use of certain means of communication to advance "any scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343. In construing those statutes, courts have invoked the concept of "reckless indifference" to a statement's truth or falsity—although the government's cases disagree about how "reckless indifference" is relevant.[3] Neither statute, however, mentions the defendant's knowledge (aside from § 1341's reference to the defendant's "knowing[]" use of the mail).

By contrast, the healthcare-fraud statute imposes criminal liability on "[w]hoever *knowingly and willfully executes*, or attempts to execute," a fraud. 18 U.S.C. § 1347(a) (emphasis added). This express knowledge

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[2] The sole exception—aside from common-law cases (Opp. 17)—is *United States* v. *Dillman*, 15 F.3d 384 (5th Cir. 1994), a bank-fraud case. But the challenge to the instruction there was that it "did not require the jury to find that the defendants acted with specific *intent*." *Id.* at 392 (emphasis added). The statute's knowledge requirement was not at issue; indeed, "the 'reckless indifference' language in the instruction" was irrelevant. *Id.* at 392-393.

[3] Some cases say the actus reus of *falsity* is proven if a statement is made with reckless indifference to its truth and intent to defraud. *United States* v. *Dockray*, 943 F.2d 152, 154 n.2 (1st Cir. 1991). Others treat recklessness as evidence of intent to defraud. *E.g.*, *United States* v. *Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995); *United States* v. *Bermes*, 9 F. App'x 207, 209 (4th Cir. 2001); *United States* v. *Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013); *United States* v. *Philip Morris USA Inc.*, 566 F.3d 1095, 1121 (D.C. Cir. 2009). Others treat recklessness as tantamount to knowledge, contrary to *Global-Tech*. *United States* v. *Marley*, 549 F.2d 561, 563-564 (8th Cir. 1977).

requirement, absent from the mail- and wire-fraud statutes, demands more than deliberate indifference. None of the government's cases disagrees with the Eleventh Circuit's construction of *this* statute to require proof the defendant knew "'the claims submitted were … false,'" Pet. App. 95a.

2. The government argues (at 21) that § 1347's "knowingly and willfully" language "'requires a defendant to know only that' he is executing or attempting to execute a scheme to defraud." It cites *McFadden* v. *United States*, 135 S. Ct. 2298 (2015), for the proposition that an adverb—such as "'knowingly'"—"applies not just to the statute's verbs but also to the object of those verbs." *Id.* at 2304.

But the government ignores what *McFadden* takes for granted: The adverb "knowingly" also modifies the relevant verb, in this case "execute." A defendant cannot be convicted of "knowingly … execut[ing]" a fraud if he does not know the facts that make his conduct the execution of a fraud—*i.e.*, a prosecutable act that completes a fraud offense, *United States* v. *De La Mata*, 266 F.3d 1275, 1287-1288 (11th Cir. 2001). Here, for example, the charged execution—the conduct in which Farha was alleged to have "knowingly and willfully engage[d]"—was the "[s]ubmission of false and fraudulent … behavioral health care services expenditure information." C.A. App. 1 ¶ 32. Farha could not be convicted of "knowingly and willfully engag[ing] in the … submission of false and fraudulent" reports if he did not know the reports were false.[4]

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[4] The government asserts (at 21-22 n.3) that "an assumption by the government that it was required to prove more than was legally necessary would not undermine the validity of petitioner's convictions." But the Court has left that question open even in the

In *McFadden* itself, the Court interpreted a provision "mak[ing] it 'unlawful … knowingly or intentionally … to manufacture, distribute, or dispense … a controlled substance'" to require the defendant's knowledge "that the substance he is dealing with is" a controlled substance. 135 S. Ct. at 2303-2304 (second ellipsis in original). Suggesting Farha could have "knowingly and willfully engage[d] in the … submission of false and fraudulent" reports without knowing they were false is as strange as suggesting a defendant could "knowingly or intentionally" distribute a controlled substance without knowing it is a controlled substance.

The government's interpretation also flouts the "usual presumption that a defendant must know the facts that make his conduct illegal." *Staples* v. *United States*, 511 U.S. 600, 619 (1994). If WellCare's reports were true, there was no fraud. Allowing Farha to be convicted without knowledge of falsity would violate the rule that a statutory "mental state requirement must … apply" to "'the crucial element separating legal innocence from wrongful conduct.'" *Elonis* v. *United States*, 135 S. Ct. 2001, 2011 (2015).

United States v. *Dearing*, 504 F.3d 897 (9th Cir. 2007), does not support the government. It holds that a proper "'knowingly and willfully'" instruction was not tainted by a separate instruction allowing the jury to infer *intent to defraud* from the defendant's "'reckless indifference to the truth or falsity of the statements'" at issue. *Id.* at 902-903. Even if reckless indifference can

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more prosecution-friendly context of sufficiency review. *Musacchio* v. *United States*, 136 S. Ct. 709, 715 n.2 (2016). At any rate, the charge that Farha knowingly made false submissions was "legally necessary" under circuit law and the facts of the case.

show intent to defraud, *see supra* note 3, it cannot show the defendant "knowingly execute[d]" a fraud.

The government is therefore incorrect to argue it was not required to prove knowledge of falsity, even if that were relevant to the question presented. But if the Court perceives any relevant ambiguity on this point, that is no reason to deny certiorari. The Court could resolve the government's challenge to Eleventh Circuit law simply by reformulating the question presented to encompass it. *See, e.g.*, Shapiro et al., *Supreme Court Practice* § 6.25(h) (10th ed. 2013).

III. THE GOVERNMENT'S HARMLESS-ERROR ARGUMENT IS WAIVED AND DEMONSTRABLY INCORRECT

Finally, the government argues (at 24-25) that this petition is a poor vehicle for considering the question presented, on the theory that Farha's convictions did not turn on the deliberate-indifference instruction. But the government waived this argument below, for good reason: Rarely is it so easily refuted.[5]

As the petition explains (at 27-28), the jury convicted Farha of healthcare fraud while acquitting him of false statements for the same submissions. The only explanation is that the jury was rightly instructed not to convict Farha of false statements unless he knew or was willfully blind to the falsity of the statements—but was wrongly allowed to convict him of fraud on a finding of deliberate indifference. The government offers no alternative explanation. Thus, not only was the in-

[5] The government's waived harmlessness argument is at any rate no impediment to plenary review or summary reversal on the question presented. *See Neder* v. *United States*, 527 U.S. 1, 25 (1999) ("normal practice where the court below has not yet passed on the harmlessness of any error" is to "remand" for that analysis).

structional error not harmless "'beyond a reasonable doubt,'" as required by *Neder* v. *United States*, 527 U.S. 1, 15 (1999); it was dispositive.

The government recites evidence that in its view demonstrates Farha's knowledge of falsity. But the jury rejected the government's interpretation of that evidence when it acquitted Farha of false statements, and the government mischaracterizes even the Eleventh Circuit's description of the evidence. The language on which the government relies appears in the Eleventh Circuit's analysis of sufficiency, Pet. App. 70a, 77a, not in any discussion of harmlessness. That the evidence was sufficient does not establish harmlessness beyond a reasonable doubt.[6]

The government also contends (at 24) that its "'theory'" at trial rested on "'the defendants' knowledge and intent, not mere recklessness.'" But a jury's finding of the elements necessary to a conviction cannot be inferred from "the 'prosecutorial theory of the case.'" *Descamps* v. *United States*, 133 S. Ct. 2276, 2286-2287 (2013). And although the government's theory was that Farha knew the reports for which he was convicted were false, Farha argued that he had nothing to do with those reports: He was not consulted about them, did not sign them, and was not even advised of their submission until after the fact. *See* Farha C.A. Br. 9-12. The jury's verdicts indicate that it rejected the government's theory but was erroneously allowed to treat Farha's lack of involvement as evidence of "deliberate indifference" sufficient to support a conviction.

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[6] Even with the improper instruction, this was a close case. Deliberations spanned nearly a month. The jury acquitted Farha on most charges. And it reached a verdict only after an *Allen* charge.

The government ultimately does not dispute that the truth or falsity of WellCare's CY 2006 submissions turned on the validity of WellCare's interpretation of ambiguous legal requirements. AHCA was aware of the ambiguity but chose not to clarify it. Pet. 7-8. And there was extensive evidence that Farha reasonably believed WellCare's approach was permissible. Pet. 8-10. From that evidence, the jury could have found that Farha did not *know* WellCare's interpretation was incorrect, and did not willfully blind himself to such knowledge, even if—as a busy non-lawyer CEO, who sought to achieve the most advantageous permissible outcome—he was "deliberately indifferent" to the proper interpretation of the 80/20 requirement. Indeed, the verdicts indicate that is *exactly* what the jury found. Such a finding is insufficient to convict Farha of healthcare fraud.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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