No. 20-1129

IN THE

Supreme Court of the United States

SCOTT PHILLIP FLYNN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL") submits this *amicus curiae* brief in support of Scott Phillip Flynn's petition for a writ of certiorari.[1] NYCDL is a not-for-profit professional association of approximately 350 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

NYCDL has a particular interest in this case because NYCDL's core concerns include combatting the unwarranted extension of federal criminal statutes, promoting clear standards for the imposition of criminal liability, and deterring arbitrary enforcement by prosecutors.

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[1] The parties have been provided the required notice and have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or any other person except for *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

SUMMARY OF THE ARGUMENT

The scope of the "defraud clause" of Title 18, United States Code, Section 371 should be limited to cases in which the defendant conspired with others to defraud the United States of money or property, or where there is a nexus between the defendant's actions and a particular administrative proceeding. Either interpretation is consistent with the text of the statute and this Court's interpretation of similar offenses. *See Kelly v. United States,* 140 S. Ct. 1565, 1572–74 (2020); *Marinello v. United States*, 138 S. Ct. 1101, 1109–10 (2018).

Petitioner's prosecution was predicated on the so-called *Klein* conspiracy doctrine, which interprets the defraud clause of Section 371 to prohibit any interference with the operations of the federal government though deceptive conduct. *United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957). The *Klein* conspiracy doctrine is based on an overbroad reading of this Court's precedent, and it only remains in place because this Court has not squarely addressed it. Indeed, the United States Court of Appeals for the Second Circuit, which originated the doctrine, has now recognized that it creates "a common law crime," but felt bound by its precedent and this Court's decisions, which serve as a flawed foundation for *Klein*. *United States v. Coplan*, 703 F.3d 46, 60–62 (2d Cir. 2012). This case offers the Court an opportunity to address these concerns and clarify the

scope of this important aspect of federal conspiracy law.

Narrower construction of the defraud clause is necessary to avoid the constitutional and statutory-interpretation problems created when, as here, a prosecution is predicated on an expansive and indeterminate judicial construction that fails to provide fair notice and presents substantial opportunities for prosecutorial abuse. Under the broad reading of Section 371 applied by the Eighth Circuit and other Circuit Courts of Appeals, virtually any deceptive conduct that might make it marginally more difficult for the IRS or another government agency to fulfill routine tasks could be prosecuted as a felony. It also encourages prosecutorial overreach, particularly in the federal courts in which *amicus*'s members practice.

This Court should grant certiorari and limit the scope of the defraud clause of Section 371 at it has done in the past when faced with statutes that would otherwise be "impermissibly vague." *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 405, 409 (2010); *see also Marinello*, 138 S. Ct. at 1109–10.

ARGUMENT

I. The "*Klein* Conspiracy" Doctrine Warrants Review By This Court.

This Court has repeatedly held that it is a violation of the Due Process Clause to "tak[e] away

someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)); *see, e.g.*, *Skilling*, 561 U.S. at 402–04.

The *Klein* conspiracy doctrine cannot withstand scrutiny under this standard. Ostensibly predicated on this Court's early 20th-century precedents, the *Klein* conspiracy doctrine permits prosecution not only of conventional attempts to "defraud the United States" of money or property (as the statute's plain text suggests), but also "interfere[nce] with or obstruct[ion of] one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). That additional prohibition, however, is nowhere to be found in the text of the statute.

The doctrine's origins lie in overly broad language from this Court's decisions in *Haas v. Henckel*, 216 U.S. 462 (1910), and *Hammerschmidt v. United States* that lower courts have applied to expand federal fraud liability to an unreasonable extent. It results in a common-law offense that is unconstitutionally vague, contrary to basic principles of statutory interpretation, antithetical to separation of powers principles, and inconsistent with this

Court's more recent jurisprudence. The Court should grant certiorari either to preclude use of the defraud clause where the alleged conspiracy does not implicate money or property or to consider a limiting construction that would rein in the potential for prosecutorial abuse of this important statute.

A. *Klein* Was Founded On A Strained Reading Of Section 371 And This Court's Precedent.

When this Court first interpreted the predecessor to Section 371 almost a century and a half ago, it highlighted the centrality of attempts to cheat the United States of a money or property interest in the Court's understanding of the term "defraud." *See United States v. Hirsch*, 100 U.S. 33, 35 (1879) ("The fraud mentioned is any fraud against [the United States]. It may be against the coin, or consist in cheating the government of its land or other property."). Thirty years later, considering a case in which a government statistician conspired to give the defendant confidential information related to grain futures, the Court characterized the defraud clause more expansively. *See Haas*, 216 U.S. at 479. The government in that case seemingly proceeded at least in part on a theory that divulging the confidential reports in question "would deprive these reports of most of their value to the public." *Id.* The Court found this theory satisfied the financial loss requirement, but went on to state that even if it had not, the defraud clause "is broad enough in its terms to include

any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Id.* Because the Court concluded that the government had suffered a financial loss, its statement regarding the scope of the defraud clause, while an apparent endorsement of earlier lower court decisions, was entirely unnecessary to its holding.

Soon afterward, this Court began to question *Haas's* expansive gloss on the defraud clause. In *United States v. Gradwell*, the defendants were charged with conspiring to defraud the United States by bribing voters in two congressional elections. 243 U.S. 476, 478 (1917). The government argued that because it has "the right to honest, free, and fair elections," a conspiracy to bribe voters would be a "denial and defeat of this right, and . . . therefore is a scheme to defraud the United States." *Id.* at 480. In rejecting this theory, the Court stated that "it would be a strained and unreasonable construction to apply [the conspiracy statute], originally a law for the protection of the revenue" to a conspiracy to bribe voters in a congressional election. *Id.* at 485.

A few years later, in *Hammerschmidt v. United States*, the Court again addressed the reach of the defraud clause. The government, citing *Haas's* dictum, argued that an agreement to defy the draft openly could be prosecuted as a "conspiracy to defraud the United States." 265 U.S. at 185–86. The Court rejected that theory and reversed the conviction,

commenting that defrauding the government "means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Id*. at 188. However, because the Court ruled that the open defiance was not fraudulent, it had no cause to speculate about what conduct hypothetically might satisfy the statute. The statement was therefore dictum, yet it became the predicate of the *Klein* doctrine.[2]

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[2] While the Court has commented on its broad interpretation of Section 371 in *Hammerschmidt* from time to time, *see, e.g., McNally v. United States*, 483 U.S. 350, 359 n.8 (1987) (distinguishing mail/wire fraud and fraud under Section 371); *United States v. Johnson*, 383 U.S. 169, 172 & n.3 (1966) (noting petitioner had not questioned the broad scope of defraud clause on certiorari); *United States v. Cohn*, 270 U.S. 339, 346–47 (1926) (distinguishing statute barring fraudulent claims for payment from government from the predecessor to Section 371), it has rarely addressed the scope of Section 371's defraud clause. Those instances have involved application of Section 371 to facts well outside the conspiracies to defraud the IRS that are the core of the *Klein* doctrine. In *Glasser v. United States*, for example, the Court noted in passing that the indictment of the defendants for their role in a Prohibition-era bribery scheme fell within the defraud clause. 315 U.S. 60, 66 (1942) (citing *Hammerschmidt*). In that case, however, the Court did not undertake a detailed review of the proper scope of the defraud clause, and the case ultimately turned on the fairness of the trial and the composition of the jury.

Despite this shaky foundation, in the wake of *Haas* and *Hammerschmidt*, lower courts—prior to this Court's recent case law confining criminal laws to their statutory text—seized upon this Court's broad language to expand liability under Section 371. That process culminated in *United States v. Klein*, in which the Second Circuit, considering a case in which the defendants had been acquitted of tax evasion but convicted under Section 371's defraud clause, held that the latter covers "not only . . . the cheating of the government out of property or money, but 'also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or

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In *Dennis v. United States*, 384 U.S. 855 (1966), the defendants were union leaders who submitted affidavits falsely denying their membership in the Communist party, in order to gain access to the services and facilities of the National Labor Relations Board ("NLRB"). The Court upheld the use of the defraud clause, holding that the scheme in question went beyond the making of false statements in violation of 18 U.S.C. § 1001. *Id*. at 860. Thus, the defendants were not charged with merely impeding or obstructing the government's function, but with having lied to the NLRB to gain access to services and facilities that were not otherwise available to them. *Id.* at 862. While the Court quoted *Haas's* dictum regarding the possible scope of the defraud clause and cited *Hammerschmidt* without discussion, *id*. at 861, it did not address the nature of the interest that was the object of the scheme. *Cf. Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020) (stating that government "employees' services would qualify as an economic loss to a [government entity], sufficient to meet the federal fraud statutes' property requirement"). Ultimately, while the Court found that the union leaders were properly charged with having "defraud[ed]" the government, it reversed on other grounds. *Id*. at 861, 875.

at least by means that are dishonest.'" 247 F.2d at 916 (quoting *Hammerschmidt*, 265 U.S. at 188). Yet, as described in greater detail below, the Second Circuit has now acknowledged that recent decisions by this Court have made continued adherence to *Klein* justifiable only by resorting to the doctrine of *stare decisis*, despite the fact that this Court has never explicitly reviewed the *Klein* doctrine. This call for guidance from the lower courts makes this case a particularly suitable vehicle for review.

B. The *Klein* Conspiracy Doctrine Is Not Supported By The Statutory Text Or Conventional Rules Of Statutory Interpretation.

"[T]he best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). Where Congress does not define a term, as it did not define "defraud" here, if the term has "accumulated settled meaning under the common law, a court must infer . . . that Congress means to incorporate the established meaning of these terms." *Neder v. United States,* 527 U.S. 1, 21 (1999) (quotation marks, modification, and citation omitted).

The rule of lenity acts in concert with this principle of interpretation, and the constitutional concerns described in greater detail below, by ensuring that courts do not effectively create new crimes through expansive interpretations of criminal

statutes. That rule "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). In other words, "the tie must go to the defendant." *Id*.

The *Klein* conspiracy doctrine runs afoul of each of these principles of statutory interpretation.

First and foremost, the statute nowhere refers to "obstruct[ing]" or "interfer[ing] with" the government, let alone administration of the tax code. *Klein*, 247 F.2d at 916. Nor did Congress anywhere define "to defraud," which means that courts must presume the term takes on the prevailing "accumulated settled meaning" at the time the statute was adopted. *Neder*, 527 U.S. at 3 (quotation marks and citation omitted). And as this court has explained, the phrase "to defraud" commonly meant to deprive another of property rights through deceptive means. *See McNally*, 483 U.S. at 358 (citing *Hammerschmidt*, 265 U.S. at 188); *see also Coplan*, 703 F.3d at 59. Similarly, in *Neder*, this Court relied on the traditional meaning of the statutory language to hold that the federal mail and wire fraud statutes required proof of a material misrepresentation as was required to establish fraud at common law. 527 U.S. at 23. The same reasoning applies here: without any indication that Congress meant to criminalize all conduct that would tend to "interfere" with the IRS's administration of the tax code, it must be presumed the statute does not reach

the type of conduct not encompassed in the scope of fraud at common law.[3]

Even if the term "to defraud" were susceptible to broad interpretation, the rule of lenity would require a narrower construction. In *Cleveland v. United States*, the Court considered whether the petitioners, in lying to the State of Louisiana in order to win video poker licenses, had defrauded the state government of "property" in the form of those licenses. 531 U.S. 12, 17–18 (2000). The Court refused to endorse a broad construction of "property" for purposes of the mail and wire fraud statutes, and

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[3] That the predecessor statute to Section 371 was recodified in 1948 does not indicate that Congress intended to adopt the expansive gloss that *Haas and Hammerschmidt* have been read as implementing. That codification was part of a broader recodification of federal criminal statutes in Title 18. *See* Act of June 25, 1948, ch. 645, 62 Stat. 701. With respect to Section 371, that law harmonized two conspiracy provisions previously codified separately. When Congress simply recodifies a statute, the relevant Congressional intent is the intent at the time when the statute originally was passed. *See* 2 U.S.C. § 285b (stating that recodified statutes are intended to "conform[] to the understood policy, intent, and purpose of the Congress in the original enactments [of the statute then recodified]"); *Morissette v. United States*, 342 U.S. 246, 266–67 (1952) (finding, with respect to another statute included in same recodification, "[w]e find no other purpose in the 1948 re-enactment than to collect from scattered sources crimes so kindred as to belong in one category"); *see also* 2B Singer & Singer, *Sutherland on Statutory Construction* § 49.8 (7th ed. 2008) (reenactment canon "does not apply where a legislature paid no attention to [a prior] interpretation during reenactment").

"reject[ed] the Government's theories of property rights not simply because they stray from traditional concepts of property," but also because a contrary reading would "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. The *Klein* conspiracy doctrine constitutes just such an expansion.

Consistent with these principles, almost a decade ago, the United States Court of Appeals for the Second Circuit, the court that initially decided *Klein*, cast doubt on that decision, effectively concluding that it was unsupportable in light of this Court's more recent decisional law, such as *Skilling*. *Coplan*, 703 F.3d at 60–62. In *Coplan*, the Second Circuit analyzed the history of Section 371 and explained that Congress likely intended the word "defraud" to incorporate the common-law definition of that term—namely, "to deprive another of property by dishonest means." *Id*. at 59. Indeed, in *Coplan* the government made no attempt to defend the substantive validity of the *Klein* conspiracy doctrine and "rest[ed] entirely" on a "*stare decisis* defense." *Id*. at 61. The court concluded that "considerable judicial skepticism" was warranted because "the Government appears to implicitly concede that the *Klein* conspiracy doctrine is a common-law crime, created by the courts rather than Congress." *Id.*

Notwithstanding these "infirmities in the history and deployment of the statute" and this

Court's more recent decision in *Skilling*, the Second Circuit relied on the recapitulation of *Haas's* dictum in *Dennis v. United States*, and the weight of its case law to conclude that "such arguments are properly directed to a higher authority." 703 F.3d at 61–62. Thus, the court held that it was "bound to follow the dictates of Supreme Court precedents, no matter how persuasive we find the arguments for breaking loose from the moorings of established judicial norms." *Id.* at 62.

And in this case, while not discussing the *Klein* doctrine in the same detail as the Second Circuit, the Eighth Circuit nevertheless agreed with *Coplan*'s conclusion that this argument must be directed to a "higher authority": this Court. App. 9a. This Court should grant certiorari to address the viability of *Klein* and constrain the unwarranted expansion of the criminal law that it entails.

C. The *Klein* Conspiracy Doctrine Is Unconstitutionally Vague, And By Creating A Common-Law Offense, Violates The Separation Of Powers.

Hammerschmidt's commentary on the scope of the defraud clause, as applied by *Klein*, also has resulted in an unconstitutionally vague statute, necessitating this Court's intervention.

The vagueness doctrine protects due process rights in two complementary ways. First, it ensures that penal statutes have "sufficient definiteness that

ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402 (internal quotation marks and modifications omitted); *see United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Vague laws contravene the first essential of due process of law that statutes must give people of common intelligence fair notice of what the law demands of them.") (quotation marks and citation omitted). Second, the doctrine is intended to avoid a "standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quotation marks and citation omitted); *see Davis*, 139 S. Ct. at 2325.

In the same vein, the vagueness doctrine also preserves "the Constitution's separation of powers and the democratic self-governance it aims to protect," by ensuring that only the elected representatives of Congress determine whether a given act is a crime. *Davis*, 139 S. Ct. at 2325; *see Marinello*, 138 S. Ct. at 1106. That same principle is expressed in this Court's oft-repeated warning that "there are no common-law offenses against the United States." *Gradwell*, 243 U.S. at 485. Rather, because "the power of punishment is vested in the legislative, not in the judicial department," *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.), federal crimes are "solely creatures of statute," *Liparota v. United States*, 471 U.S. 419, 424 (1985).

Klein's broad construction of the defraud clause implicates these constitutional concerns.

First, by permitting any "dishonest" or even "craft[y]" conduct to be swept up in the statute, *Klein* permits federal prosecutors to pursue felony conspiracy charges based on relatively commonplace conduct. For example, it could reach the type of conduct the Court cited in *Marinello* as necessitating constraint on the scope of 26 U.S.C. § 7212(a). It can also be used to attack tax planning strategies or other conduct that, while lawful, complicate the IRS's task of administering the Revenue Code. *See Marinello,* 138 S. Ct. at 1108. This was the precise issue that the Second Circuit found cause for concern in *Coplan*, but felt constrained from addressing based on *stare decisis*. *See* 703 F.3d at 62.

Second, the *Klein* conspiracy doctrine runs afoul of the separation of powers by creating, in essence, a common-law offense. "Federal crimes are defined by Congress, not the court," *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997), and the expansion of the well-understood term "defraud" to any "dishonest" conduct risks criminalizing by judicial fiat acts not foreseen by Congress. Section 371 states only that "defraud[ing] the United States" government is an offense. The term "fraud" has long been understood to require an attempt to obtain money or property through dishonest means. *McNally*, 483 U.S. at 358–60. Indeed, citing *Hammerschmidt*, the Court confirmed that the

heartland of fraud is deprivation of a property right by trick. *Id.* at 358.

The issue in *McNally* was the scope of the mail and wire fraud statutes. In a footnote, however, the Court commented that prior decisions had interpreted Section 371's defraud clause as reaching conduct not implicating money or property, and attributed this broad construction to the federal government's need to protect itself in order to fulfill its mission of "administering itself in the interests of the public." *Id.* at 359 n.8 (quoting *Curley v. United States*, 130 F. 1 (1st Cir. 1904)).

But as the Second Circuit pointed out in *United States v. Coplan*, *McNally's* invocation of a distinction between the scope of a conspiracy to defraud the government and fraud committed against a private person was dictum that "appears to rest on a policy judgment—that, in the nature of things, government interests justify broader protection [than] the interests of private parties—rather than one any principle of statutory interpretation." 703 F.3d at 61; *see also id.* ("The Government thus appears implicitly to concede that the *Klein* conspiracy is a common-law crime, created by the courts rather than by Congress. That fact alone warrants considerable judicial skepticism."). As this Court has repeatedly said, "policy arguments cannot supersede the clear statutory text." *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016); *see Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019)

("[C]ourts aren't free to rewrite clear statutes under the banner of [their] own policy concerns.").

To avoid ending up on this "vagueness shoal," *Skilling*, 561 U.S. at 368, and permitting continued enforcement of a common-law crime in violation of the separation of powers, the defraud clause should be cabined by a narrower interpretation.

D. *Klein* Is Inconsistent With This Court's Recent Precedent.

In the decade since *Coplan*, this Court's jurisprudence has rendered the *Klein* conspiracy doctrine an unjustifiable outlier among federal fraud and obstruction offenses. *Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2482–84, 2486 (2018) (overruling prior decision in part on basis that subsequent developments in First Amendment jurisprudence had rendered it inconsistent with those later cases). Thus, the Court should exercise its "higher authority," *Coplan*, 703 F.3d at 61, to address the viability of *Klein*.

In a litany of recent decisions, this Court has cabined and constrained federal criminal statutes—especially fraud and obstruction statutes. In doing so, the Court has repeatedly applied principles of due process and separation of powers and rigorous statutory interpretation to bar overbroad application of criminal statutes. *See Kelly,* 140 S. Ct. at 1572 (holding wire fraud statute could not extend to schemes with objects not encompassed within the

statutory text); *Marinello*, 138 S. Ct. at 1109 (adopting limiting construction of obstruction statute to require "a 'nexus' between the defendant's conduct and a particular administrative proceeding"); *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (limiting scope of official acts captured by federal bribery statute); *Skilling*, 561 U.S. 408–09 (adopting "limiting construction" of honest services fraud to restrict *actus reus*); *Cleveland v. United States*, 531 U.S. at 26–27 (unanimously holding that mail fraud statute did not extend to an effort to obtain regulatory licenses through fraud).

Like the statutes this Court interpreted in those cases, lower courts have interpreted and applied Section 371 expansively with no clear limiting principles. As noted above, the "words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt*, 265 U.S. at 188); *Coplan*, 703 F.3d at 59; *see also Hirsch*, 100 U.S. at 35. Yet *Klein* went well beyond this definition to attach liability under the defraud clause for all dishonest or obstructive conduct with respect to the government, whether or not deprivation of money or property is its object.

In *Kelly v. United States*, this Court addressed a similar question in the context of the mail and wire fraud statutes. There, the government prosecuted

two former aides to then-Governor Christie of New Jersey on a theory that their decisions to realign traffic lanes for politically motivated reasons constituted a scheme to defraud the government of money or property. Declining to adopt the government's expansive view of money or property for the purposes of the mail and wire fraud statutes, the Court concluded that the defendants' conduct did not violate those laws. *Kelly*, 140 S. Ct. at 1574.

In a succinctly reasoned opinion, the Court found that the mail and wire fraud statutes could not extend to "all acts of dishonesty," *id.* at 1571—which in substance is precisely how *Klein* extends the defraud clause of Section 371. As in *Kelly*, permitting the construction of Section 371 proffered by the government (and adopted by the Eighth Circuit) would criminalize behavior that at worst is dishonest or undertaken for "bad reasons," *id.* at 1573, without being *fraudulent* as that term is properly understood. Indeed, as described above, almost anything that makes the IRS's job more difficult potentially falls within the scope of the *Klein* doctrine, inviting the same prosecutorial overreach of concern in *Kelly*. *Cf. Arthur Andersen LLP v. United States*, 544 U.S. 696, 707 (2005) (noting, in reversing erroneous jury instruction on obstruction/tampering charge, broad range of innocuous conduct captured by the term "impede").

Kelly's holding was properly based on the text of the mail and wire fraud statutes, rather than a

generalized analysis of Congressional intent. 140 S. Ct. at 1571. Its reasoning should also limit prosecutions under the defraud clause of Section 371 even though the statute does not contain the words "money or property."

The mail and wire fraud statutes proscribe "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. §§ 1341, 1343. The disjunctive "or" —between "defraud" and "for obtaining money or property"—could be read to create two distinct offenses: a generalized scheme to defraud, with no specified object, and a scheme to obtain money or property by false pretenses. But, as *Kelly* reaffirmed, this Court has long limited this statutory language to schemes directed at money or property. *See Kelly*, 140 S. Ct. at 1571 (citing *McNally*, 483 U.S. at 358). And that is not because the statute contains the words "money or property."

Rather, in *McNally*, the Court examined the history of the mail fraud statute and noted that while it had initially only criminalized "any scheme or artifice to defraud," the offense described was construed as protecting property rights. 483 U.S. at 356–58. In 1909, Congress amended the statute to include the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id*. at 357. The *McNally* Court, however, held that this amendment did not create a separate offense, but rather reflected

the commonly understood (*i.e.*, common-law) definition of "fraud" as directed at obtaining money or property. *Id.* at 358–60. The same logic applies to Section 371's defraud clause.

E. The Court Should Grant Certiorari To Adopt A Limiting Construction Of Section 371's Defraud Clause.

In situations where statutory text or the dominant construction are susceptible to abuse, this Court does not rely on prosecutorial discretion to safeguard the public. *McDonnell*, 136 S. Ct. at 2372–73 ("[W]e cannot construe a criminal statute on the assumption that the Government will use it responsibly.") (internal quotation marks and citation omitted); *Marinello*, 138 S. Ct. at 1108–09 ("[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor."). Rather, in such cases, "[i]t has long been [this Court's] practice . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction." *Skilling*, 561 U.S. at 405.

Applying this precedent, the Court should trim Section 371 "to its core," *id.* at 404, by applying the same interpretation of "defraud" that it has in other cases. Thus, consistent with the term's meaning at common law, this Court should mandate that

conspiracies to defraud must encompass a scheme to deprive the government of money or a property right by deceitful means. *See McNally*, 483 U.S. at 358; *Coplan*, 703 F.3d at 59.

This result also is required by the rule of lenity. Indeed, in *United States v. Tanner*, the Court rejected the government's argument that Section 371 should be read broadly to reach conspiracies to defraud government contractors as well as government agencies, on the grounds that the rule of lenity did not permit that reading where the plain text did not support it. 483 U.S. 107, 131–32 (1987). As in *Tanner*, the Court should decline to define the *actus reus* of this offense beyond what the statutory text reasonably can sustain.

Even if the Court concludes that the term "defraud" can reasonably be extended to conduct beyond conspiracies to obtain money or property from the government, it should adopt a limiting construction consistent with its ruling in *Marinello*. In that case, the Court considered a challenge by a taxpayer to the broad sweep of Title 26, United States Code, Section 7212(a)'s "omnibus clause," which prohibits "obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]." *Id.*; *see* 138 S. Ct. at 1105. The Court catalogued the ways in which this language would permit expansion of criminal liability to ordinary and innocuous conduct, and ruled that to ensure "deference to the

prerogatives of Congress . . . and that a fair warning should be given to the world . . . of what the law intends to do if a certain line is passed," the statute required a limiting construction to preserve its constitutionality: proof of a "nexus between the defendant's conduct and a particular administrative proceeding." *Id.* at 1106, 1109 (quotation marks and citation omitted). The Court did so mindful of the same common-sense principle applicable here: "Had Congress intended [to criminalize a broader range of behavior], it would have spoken with more clarity than it did." *Id.* at 1108.

In this case, as Petitioner notes, Pet. 28–29, the indictment alleged that the defendant had conspired to "defraud the United States by deceitful and dishonest means by *impeding, impairing, obstructing, and defeating* the lawful governmental functions of the Internal Revenue Service . . . in the ascertainment, computation, assessment, and collection of revenue." App. 45a (emphasis added). The reference to the acts of "obstructing" or "impeding" the IRS mirrors the same language that this Court held to be overly expansive in *Marinello*, necessitating that it be limited to cases where there is a particular proceeding to impede or obstruct.

A similar limiting construction could be applied to Section 371's defraud clause so that the acts underlying the conspiracy must either be directed at defrauding the government out of money or property or, at a minimum, implicate a specific proceeding (*e.g.*,

an examination or investigation) as opposed to the administration of government or the tax code generally. Otherwise, prosecutors who are now limited in their use of Section 7212(a) could, where the conduct at issue involved two or more persons, evade *Marinello* by charging the defendant with a *Klein* conspiracy count under Section 371.

II. The Doctrine Of *Stare Decisis* Does Not Bar Review Of The *Klein* Conspiracy Doctrine.

This Court considers several factors "that should be taken into account in deciding whether to overrule a past decision," including "the quality of [the decision]'s reasoning, the workability of the rule it established, its consistency with other related decisions [and] developments since the decision was handed down, and reliance on the decision." *Janus*, 138 S. Ct. at 2478–79. While it is far from clear that *Hammerschmidt* is binding precedent of this Court on the question presented here, accepting *arguendo* that the Second and Eighth Circuits are correct that *Hammerschmidt* is binding, each of the factors considered in *Janus* favors overruling of that decision.

First, for the reasons described above, *Hammerschmidt*'s reasoning fails to conform to current standards of statutory interpretation and fails basic tests of constitutionality. Second, in establishing no intelligible limits on the scope of the defraud clause, the *Klein* doctrine, which is

predicated on *Hammerschmidt*, fails to establish a workable rule, instead falling upon the "vagueness shoal," *Skilling*, 561 U.S. at 368. Third, the reading of *Hammerschmidt* adopted by the Circuit Courts of Appeals is inconsistent with this Court's subsequent jurisprudence with respect to fraud and obstruction offenses, and has become an unjustified "outlier" and "anomaly," *Janus*, 138 S. Ct. at 2482, 2483. And finally, especially in light of the rule of lenity, there is no valid reliance interest in allowing the government to continue prosecuting people whose conduct does not fall within the statutory text.

* * *

There is no meaningful limitation on Section 371's scope if, as the Eighth Circuit and others have concluded, the defraud clause covers conduct that simply makes the IRS or another federal agency's job harder, irrespective of whether that conduct was intended to deceive or obstruct a specific proceeding or defraud the government of money or property. The Eighth Circuit's decision invites prosecutors to abuse their power and risks exactly the arbitrary enforcement that the vagueness doctrine is designed to prevent, "raising the specter of potentially charging everybody . . . and seeing what sticks and who flips." *Ocasio v. United States*, 136 S. Ct. 1423, 1445 (2016) (Sotomayor, J., dissenting).

At best for the government, Section 371 is a provision "that can linguistically be interpreted to be

either a meat axe or a scalpel." *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). In keeping with principles of due process, statutory interpretation, and the rule of lenity, it "should reasonably be taken to be the latter," *id.*, and thus subject to a limiting construction.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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