No. 13-744

In the Supreme Court of the United States

JOHN NATALE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court plainly erred by failing to instruct the jury that 18 U.S.C. 1035, which prohibits "knowingly and willfully" making a materially false statement in a matter involving a health care benefit program, requires proof that the defendant made the false statement with specific intent to deceive.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 719 F.3d 719.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2013. A petition for rehearing and rehearing en banc was denied on July 23, 2013 (Pet. App. 52a). On October 11, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 20, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of two counts of making false state-

ments in a matter involving a health care benefit program, in violation of 18 U.S.C. 1035. He was sentenced to ten months of imprisonment, to be followed by one year of supervised release. 9/20/12 Am. Judgment 2, 5. The court of appeals affirmed. Pet. App. 1a-51a.

1. Petitioner is a vascular surgeon who specializes in treating aortic aneurysms. Pet. App. 2a. An aortic aneurysm is a condition in which the walls of the aorta, the main artery leading from the heart to the rest of the body, become dangerously weak. *Id.* at 2a-4a. Vascular surgeons treat the condition by replacing the weakened portion of the aorta with a synthetic graft. *Id.* at 5a.

The type of graft used and the complexity of the necessary surgery depend on the location of the aneurysm. A "tube graft" attaches to the aorta at both ends, while a "bifurcation graft" attaches to the lower portion of the aorta at one end and splits into two branches connecting with the iliac arteries at the other. Pet. App. 5a-6a. Aneurysms near the renal arteries leading to the kidneys are particularly difficult to repair because the surgeon must sever the renal arteries from the aorta, implant the graft, and then reattach the renal arteries to the graft. *Id.* at 6a. Because of this added complexity, surgeries to repair aneurysms near the renal arteries are reimbursed at a higher rate by the federal Medicare program. *Ibid.*

This case arose out of an investigation that began when another doctor treating one of petitioner's former surgical patients noticed a discrepancy in the patient's medical records. Petitioner's operative report indicated that he had performed the more complicated aneurysm repair involving the renal arteries

and that he had used a bifurcation graft. Pet. App. 11a. But the patient's CT scan revealed that petitioner had actually performed a simpler repair using a tube graft. *Id.* at 1a-2a, 11a. The doctor reported the discrepancy to petitioner's hospital, and the resulting investigation uncovered similar inaccuracies in petitioner's operative reports for other patients. *Id.* at 11a. The investigation also revealed that petitioner had billed Medicare for the more expensive procedures described in his reports rather than the simpler procedures he had actually performed. *Id.* at 8a-10a. The inaccurate reports were not themselves submitted to Medicare, but were among the documents that would have been subject to review if Medicare had audited petitioner's billing practices. *Id.* at 10a-11a.

2. A federal grand jury in the Northern District of Illinois indicted petitioner on two counts of health care fraud, in violation of 18 U.S.C. 1347; one count of mail fraud, in violation of 18 U.S.C. 1341; and two counts of making false statements in a matter involving a health care benefit program, in violation of 18 U.S.C. 1035. Pet. App. 6a. The false statement counts alleged that petitioner's operative reports falsely described his surgeries. *Ibid.*

Section 1035 makes it a crime, "in any matter involving a health care benefit program, knowingly and willfully * * * [to] make[] any materially false, fictitious, or fraudulent statements or representations * * * in connection with the delivery of or payment for health care benefits, items, or services." 18 U.S.C. 1035(a)(2). The district court instructed the jury that to convict petitioner on the Section 1035 counts, the government had to prove beyond a reasonable doubt that (1) petitioner "made a false, fictitious, or fraudu-

lent statement or representation"; (2) "the statement or representation was material"; (3) "the statement or representation was made knowingly and willfully"; and (4) the statement was made "in connection with the delivery of or payment for healthcare benefits, items, or services." Pet. App. 21a n.4. The court further instructed that "[a] statement or representation is false or fictitious if untrue when made and then known to be untrue by the person making it" and that "[a] statement is fraudulent if known to be untrue and made or caused to be made with intent to deceive." *Id.* at 22a n.4. Finally, the court instructed that "[a]n act is done willfully if done voluntarily and intentionally and with intent to do something the law forbids." *Ibid.* In response to the court's questions, petitioner's counsel stated that he had "no problem" with any of these instructions. *Id.* at 14a-15a.

The jury acquitted petitioner of the fraud charges but convicted on the Section 1035 counts. Pet. App. 14a. The district court sentenced him to two concurrent terms of ten months of imprisonment, to be followed by two concurrent terms of one year of supervised release. 9/20/12 Am. Judgment 2, 5.

3. The court of appeals affirmed. Pet. App. 1a-51a. The court began by observing that petitioner had arguably waived any challenge to the district court's jury instructions because his counsel "affirmatively expressed having no problem with [each] proposed instruction" related to the Section 1035 charges. *Id.* at 14a. Under Seventh Circuit precedent, such an expression of approval constitutes a waiver precluding even plain-error review on appeal. *Id.* at 16a-17a (collecting cases). The court suggested that where, as here, a potential waiver is reflected in "a simple 'no' or

'no objection,'" it might be appropriate to "more closely examine whether the defendant has truly waived his challenge" before precluding appellate review. *Id.* at 18a. But the court did not need to resolve that question in this case because it concluded that petitioner could not prevail even under the plain-error standard that applies when a litigant merely forfeits an objection rather than waiving it. *Id.* at 18a-19a.

As relevant here, the court of appeals rejected petitioner's claim that the district court plainly erred by failing to instruct the jury that Section 1035 requires proof of "specific intent to deceive." Pet. App. 37a. The court noted that although many analogous statutes are expressly limited to false statements made with "intent to deceive" or a similar mental state, "nothing in the text of [Section] 1035 explicitly requires that the defendant make a false statement with intent to deceive." *Ibid.* The court also relied on this Court's explanation in interpreting 18 U.S.C. 1001, which uses similar language to prohibit making false statements in a matter within federal jurisdiction, that nothing in the statute even "suggest[s] any additional element of intent, such as a requirement that false statements be [made] . . . 'with intent to deceive the Federal Government.'" Pet. App. 37a-38a (brackets in original) (quoting *United States* v. *Yermian*, 468 U.S. 63, 69 (1984)).

The court of appeals acknowledged that a minority of circuits "have imposed a specific intent requirement" in the context of Section 1001. Pet. App. 40a & n.12. But the court declined to follow those decisions because an intent-to-deceive requirement is inconsistent with the text of Sections 1001 and 1035 and with this Court's decision in *Yermian*. *Id.* at 40a-41a.

The court also noted that its interpretation of Section 1035 was reinforced by 18 U.S.C. 1347, which prohibits health care fraud and carries a more severe penalty than Section 1035's prohibition on false statements related to health care matters. Pet. App. 42a-43a. The court observed that the fraud offense defined in Section 1347 requires "a specific intent to deceive or mislead" and reasoned that, if Section 1035 also required intent to deceive, "the two statutes would criminalize essentially the same conduct." *Ibid.* The court thus found no error in the district court's failure to require the jury to find that petitioner acted with specific intent to deceive, much less plain error warranting reversal. *Id.* at 44a.

ARGUMENT

Petitioner renews his claim (Pet. 14-23) that the district court should have instructed the jury that Section 1035 required the government to prove that he acted with specific intent to deceive. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision by this Court or any appellate decision interpreting Section 1035. A minority of the courts of appeals have held that the materially identical language of 18 U.S.C. 1001 requires proof of intent to deceive. But this case would be a poor vehicle for resolving the disagreement about the interpretation of Section 1001 because petitioner's counsel affirmatively approved the district court's jury instructions. That approval constituted a waiver precluding appellate review—or, at a minimum, rendered petitioner's claim reviewable only for

plain error. In either case, further review by this Court is unwarranted.[1]

1. The court of appeals correctly held that Section 1035 does not require proof that the defendant made the charged false statement with specific intent to deceive.

a. Section 1035 prohibits "knowingly and willfully" making "materially false, fictitious, or fraudulent statements" in a matter involving a health care benefit program. The district court instructed the jury that a "fraudulent" statement is one made with "intent to deceive," but that a statement is "false or fictitious" so long as it is "untrue when made and then known to be untrue by the person making it." Pet. App. 22a n.4. Petitioner contends (Pet. 14-23) that the district court should have instructed the jury that specific intent to deceive is a prerequisite for any violation of Section 1035, not merely one involving a "fraudulent" statement.

As the court of appeals observed, nothing in the text of Section 1035 requires proof that a defendant charged with making a false statement made the statement with specific intent to deceive. Pet. App. 37a. Numerous other statutes, in contrast, prohibit only false statements made with "intent to deceive," *e.g.*, 18 U.S.C. 513(a), 1005, 1006, 1033(a)(1), 1861,

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[1] Two other pending petitions raise a different question about the degree of mens rea required by Section 1035: whether the requirement that the defendant make the false statement "willfully" requires proof that the defendant knew that his conduct was unlawful. See *Ajoku* v. *United States*, petition for cert. pending, No. 13-7264 (filed Nov. 5, 2013); *Russell* v. *United States*, petition for cert. pending, No. 13-7357 (filed Nov. 11, 2013). The government filed briefs in opposition in *Ajoku* and *Russell* on March 10, 2014.

2073, or "for the purpose of influencing" some decisionmaker, *e.g.*, 15 U.S.C. 714m(a); 18 U.S.C. 1014, 1026. Petitioner's proposed interpretation fails to give effect to Congress's decision to use different language in Section 1035. But as this Court has explained, when an element is omitted from a criminal statute despite its presence in analogous provisions, "Congress' silence * * * speaks volumes." *United States* v. *Shabani*, 513 U.S. 10, 14 (1994).

This Court's decision in *United States* v. *Yermian*, 468 U.S. 63 (1984), further confirms that Section 1035 does not require proof of specific intent to deceive. *Yermian* addressed 18 U.S.C. 1001, which prohibits making false statements in a matter within the jurisdiction of the federal government using language materially identical to the relevant portions of Section 1035. Indeed, the text of Section 1035 appears to have been drawn from Section 1001.[2] In *Yermian*, the Court held that Section 1001 does not require proof that the defendant made the false statement with actual knowledge of federal jurisdiction. 468 U.S. at 75. In reaching that conclusion, the Court noted that Section 1001's predecessor had covered only false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States," but that this specific-intent requirement had been deliberately omitted

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[2] Section 1035 was enacted in 1996 and its relevant text is essentially identical to the version of Section 1001 that was then in effect. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 244, 110 Stat. 2017; see also 18 U.S.C. 1001 (1994). The legislative history of Section 1035 confirms that the statute was drafted against the backdrop of Section 1001. See H.R. Conf. Rep. No. 736, 104th Cong., 2d Sess. 257 (1996).

when the statute was amended in 1934. *Id.* at 70-73 (citation omitted). As amended, Section 1001 "[n]oticeably lack[s] * * * any requirement that the prohibited conduct be undertaken with specific intent *to deceive* the Federal Government." *Id.* at 73. Congress's decision to borrow the same language to prohibit false statements in health care matters confirms that Section 1035, like Section 1001, does not require specific intent to deceive.

b. Petitioner's principal argument for an intent-to-deceive requirement (Pet. 14-20) is that a defendant cannot "willfully" make a false statement unless he acts with specific intent to deceive. Petitioner claims (Pet. 14) that the court of appeals' decision "reads the word 'willfully' right out of the statute" and contravenes Congress's intent to require something more than a knowing falsehood to sustain a conviction under Section 1035. Petitioner's amici likewise assert that the decision below "virtually wrote *mens rea* out of the statute." Association of Am. Physicians & Surgeons Amicus Br. 6.

All of these arguments rest on the premise that without an intent-to-deceive requirement, Section 1035 would criminalize any knowingly false statement made in a matter involving a health care benefit program. But that premise is incorrect. As the district court instructed the jury in this case, the government must prove not only that the defendant made the false statement "knowingly," but also that he acted "willfully." Pet. App. 21a n.4. And as the district court further instructed, "[a]n act is done willfully if done voluntarily and intentionally *and with intent to do something the law forbids*." *Id.* at 22a n.4 (emphasis added). The jury thus could not have returned a guilty

verdict unless the government proved beyond a reasonable doubt that petitioner made the charged false statements with knowledge that his conduct was unlawful.

The district court's instruction on the meaning of "willfully" accords with the ordinary meaning of that term in the criminal context. As this Court has explained, "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Bryan* v. *United States*, 524 U.S. 184, 191-192 (1998) (quoting *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994)); accord *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 n.9 (2007); *Dixon* v. *United States*, 548 U.S. 1, 5 (2006); *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion); *United States* v. *Murdock*, 290 U.S. 389, 394 (1933). Applying this customary understanding in the context of Section 1035 gives independent meaning to the statutory term "willfully." It also renders groundless petitioner's fear (Pet. 24) that "honest mistakes in medical records" could subject doctors to "felony conviction and punishment." Requiring proof that the defendant had "knowledge that the [charged] conduct [wa]s unlawful" ensures that Section 1035 will not "ensnar[e] individuals engaged in apparently innocent conduct" or those "who might inadvertently violate the law." *Bryan*, 524 U.S. at 194-196 & n.23.

Petitioner identifies no sound reason why the term "willfully" in Section 1035 should be interpreted to require proof of specific intent to deceive in addition to or instead of proof that the defendant acted with knowledge that his conduct was unlawful. Petitioner does not cite any case in which this Court has inter-

preted the term "willfully" to require proof of intent to deceive. And to the extent it sheds any light on the issue, the legislative history on which petitioner relies (Pet. 18-20) confirms that Section 1035's "willfully" element was intended to require knowledge of unlawfulness rather than specific intent to deceive. See 142 Cong. Rec. S9524 (daily ed. Aug. 2, 1996) (statement of Sen. Hatch) (stating that the addition of the "willfully" element ensures that "criminal liability will be imposed only on an individual who knows of a legal duty and, intentionally, violates that duty").

c. The courts of appeals are divided over whether Section 1001 requires proof that the defendant knew his conduct was unlawful.[3] But as the government recently explained in response to two petitions for certiorari presenting that question in the context of

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[3] The Third Circuit has held that the "willfully" element in Section 1001 requires proof that the defendant had "knowledge of the general unlawfulness of the conduct at issue," *United States* v. *Starnes*, 583 F.3d 196, 211-212 (2009), and the Second Circuit seems to have adopted the same view, see *United States* v. *Whab*, 355 F.3d 155, 160, cert. denied, 541 U.S. 1004 (2004); *United States* v. *Bakhtiari*, 913 F.2d 1053, 1060 n.1 (1990), cert. denied, 499 U.S. 924 (1991). See also *United States* v. *Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (same). The First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits, in contrast, have held that the government need only prove that the defendant deliberately made the statement with knowledge that it was false. See *United States* v. *Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006); *United States* v. *Daughtry*, 48 F.3d 829, 831-832 (4th Cir.), vacated on other grounds, 516 U.S. 984 (1995), reinstated in relevant part, 91 F.3d 675 (1996); *United States* v. *Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990); *United States* v. *Hildebrandt*, 961 F.2d 116, 118 (8th Cir.), cert. denied, 506 U.S. 878 (1992); *United States* v. *Tatoyan*, 474 F.3d 1174, 1182 (9th Cir. 2007); *Walker* v. *United States*, 192 F.2d 47, 49-50 (10th Cir. 1951)

Section 1035, it is now the view of the United States that the "willfully" element of Sections 1001 and 1035 requires proof that the defendant made a false statement with knowledge that his conduct was unlawful. See Br. in Opp. at 11-15, *Ajoku* v. *United States*, No. 13-7264 (Mar. 10, 2014); Br. in Opp. at 7-11, *Russell* v. *United States*, No. 13-7357 (Mar. 10, 2014). And in any event, the circuit conflict on this issue is not implicated in this case because the district court instructed the jury that it had to find that petitioner acted "with intent to do something the law forbids." Pet. App. 22a n.4.[4]

2. Petitioner contends (Pet. 10-14) that the courts of appeals are divided over whether Sections 1001 and 1035 require proof that the defendant acted with specific intent to deceive. No conflict exists on this question in the context of Section 1035. And although the courts of appeals have reached differing results regarding the proper interpretation of Section 1001, petitioner exaggerates the extent of the disagreement.

a. Petitioner contends (Pet. 10-11) that the Fourth and Sixth Circuits have held that Section 1035 requires proof of specific intent to deceive. Neither of

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[4] The Seventh Circuit has not resolved the question whether Sections 1001 and 1035 require proof of knowledge of unlawfulness, see *United States* v. *Brandt*, 546 F.3d 912, 916 (2008), and in light of the district court's instructions it had no occasion to address that issue in this case. Petitioner asserts that "the Seventh Circuit held below that a conviction under Section 1035 requires 'nothing more than that the defendant knew that his statement was false when he made it.'" Pet. 16 (quoting Pet. App. 40a n.12). But the quoted text is an excerpt from the First Circuit's decision in *United States* v. *Riccio*, 529 F.3d 40, 46-47 (2008), which the decision below quoted only in a parenthetical and without endorsing the quoted statement. Pet. App. 40a n.12.

the decisions on which he relies supports that characterization. In *United States* v. *McLean*, 715 F.3d 129, 140 (4th Cir. 2013), the court did state, in evaluating the sufficiency of the evidence in a Section 1035 case, that "[t]he specific intent to defraud may be inferred from the totality of the circumstances, and need not be proven by direct evidence." But the court referred to "intent to *defraud*" rather than "intent to *deceive*," and it did not hold that the government is required to prove specific intent to defraud in every Section 1035 case—a position that even petitioner does not defend. To the contrary, in *McLean* itself the court concluded that the evidence was sufficient to sustain a conviction because a rational jury could have concluded that the defendant's "misrepresentations were intentional." *Id.* at 141. It did not require proof that he acted with specific intent to defraud (or deceive). See *ibid.*

Petitioner's reliance on *United States* v. *Hunt*, 521 F.3d 636 (6th Cir. 2008), cert. denied, 556 U.S. 1221 (2009), is equally misplaced. In that case, the Sixth Circuit affirmed a conviction for violating Section 1035 without mentioning an intent-to-deceive requirement. Petitioner appears to contend (Pet. 11) that the court implicitly recognized such a requirement when it noted that the evidence would have allowed the jury to conclude that the defendant made the false statement "in order to obtain payment from [an insurer] for services he did not perform." *Hunt*, 521 F.3d at 648. But that statement addressed the statutory requirement that the false statement be made "in connection with the delivery of or payment for health care benefits, items, or services," 18 U.S.C. 1035, not the required mental state. See 521 F.3d at 648.

b. Although no square conflict exists over the presence of an intent-to-deceive requirement in Section 1035, the courts of appeals have reached different conclusions on this question in the context of 18 U.S.C. 1001. Most circuits have "rejected the argument that [Section] 1001 requires 'an intent to deceive.'" *United States* v. *Riccio*, 529 F.3d 40, 47 (1st Cir. 2008) (quoting *United States* v. *Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006)); see also, *e.g.*, *United States* v. *Leo*, 941 F.2d 181, 200 (3d Cir. 1991); *United States* v. *Sparks*, 67 F.3d 1145, 1152 (4th Cir. 1995); *United States* v. *Hildebrandt*, 961 F.2d 116, 118-119 (8th Cir.), cert. denied, 506 U.S. 878 (1992); *United States* v. *Vaughn*, 797 F.2d 1485, 1490 (9th Cir. 1986); *Walker* v. *United States*, 192 F.2d 47, 49 (10th Cir. 1951).

The Fifth, Sixth, and Eleventh Circuits, in contrast, interpret Section 1001 to require "[p]roof that the defendant ha[d] the specific intent to deceive." *United States* v. *Dothard*, 666 F.2d 498, 503 (11th Cir. 1982); see also, *e.g.*, *United States* v. *Geisen*, 612 F.3d 471, 487 (6th Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011); *United States* v. *Shah*, 44 F.3d 285, 289 (5th Cir. 1995). Petitioner contends (Pet. 11) that the Second Circuit adopted the same approach in *United States* v. *Mandanici*, 205 F.3d 519, cert denied, 531 U.S. 879 (2000), and 536 U.S. 961 (2002). But the portion of the court's opinion on which petitioner relies is a footnote quoting the jury instructions given by the district court. See *id.* at 526 n.12. The court of appeals did not discuss the intent-to-deceive instruction, much less endorse it—to the contrary, the issue before the court was an entirely unrelated question

about Section 1001's materiality requirement. See *ibid.*[5]

3. This case would be a poor vehicle for resolving the disagreement over the proper interpretation of Section 1001 because petitioner's counsel "affirmatively expressed having no problem" with the relevant jury instructions. Pet. App. 14a. That approval waived petitioner's right to challenge the instructions on appeal—or, at a minimum, rendered his claim reviewable only for plain error.

a. As the court of appeals explained, past Seventh Circuit cases have held that an "affirmative statement[] as simple as 'no objection' or 'no problem'" in response to a question about the acceptability of a proposed jury instruction constitutes a waiver precluding appellate review. Pet. App. 16a-17a; see, *e.g.*, *United States* v. *O'Connor*, 656 F.3d 630, 644 (7th Cir. 2011) ("no objection"), cert. denied, 132 S. Ct. 2373 (2012), *United States* v. *Griffin*, 493 F.3d 856, 863 (7th Cir. 2007) (same); *United States* v. *Anifowoshe*, 307 F.3d 643, 650 (7th Cir. 2002) (counsel confirmed that "the instructions were given without objection"). Under these precedents, counsel's statement that he had "no problem" with the jury instructions at issue here waived petitioner's right to object, thereby barring even plain-error review on appeal. See *United States* v. *Olano*, 507 U.S. 725, 733-734 (1993) (explaining that unlike a mere forfeiture, an affirmative

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[5] Petitioner also relies (Pet. 11) on the Federal Circuit's unpublished decision in *Satornino* v. *Department of Veterans Affairs*, No. 94-3471, 1994 WL 567013 (Oct. 14, 1994). But that case involved a personnel action rather than a criminal prosecution, and is not binding precedent in any event. See Fed. Cir. R. 32.1(d).

"waiver * * * extinguish[es] an 'error' under Rule 52(b)").

The court of appeals left open the possibility of modifying this waiver rule or exercising its discretion to overlook a waiver in an appropriate case. Pet. App. 18a-20a. The court did not need to resolve those issues here because it concluded that petitioner could not prevail even if his claims were reviewed for plain error. *Id.* at 19a. But this unresolved waiver question makes this case an unsuitable vehicle for further review: even if this Court concluded that the district court's jury instructions constituted plain error, petitioner could not obtain relief on remand unless the court of appeals overruled circuit precedent on waiver or exercised its discretion to overlook petitioner's waiver in this case.

b. Even setting aside the waiver issue, this case would be a poor vehicle for determining the proper interpretation of Section 1035 because—as petitioner concedes in a footnote (Pet. 14 n.4)—his claim is at most reviewable only for plain error. To prevail under that standard, a defendant must show (1) "error or defect" (2) that is "clear or obvious," and (3) that "'affected the outcome of the district court proceedings.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting *Olano*, 507 U.S. at 732-734). If the defendant does so, a "court of appeals has the discretion to remedy the error" if it "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Ibid.* (quoting *Olano*, 507 U.S. at 736) (emphasis omitted).

Petitioner contends (Pet. 14 n.4) that this Court should limit its review to the first prong of this inquiry—whether there was error at all—and remand to

allow the court of appeals to consider the other plain-error requirements if it adopts his preferred construction of Section 1035. But petitioner identifies no sound reason for this Court to ignore the conceded plain-error posture of his claim, and he cannot make the showing required to obtain relief under the demanding plain-error standard. As demonstrated above, see pp. 7-12, *supra*, the district court's failure to require the jury to find that petitioner acted with specific intent to deceive was not error at all. At a minimum, an instruction that was in accord with the decisions of a majority of circuits that have considered the question certainly was not "clear or obvious" error. *Puckett*, 556 U.S. at 135; cf. *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (finding no plain error where there was no controlling case law and circuits were split), cert. denied, 549 U.S. 911 (2006); see also *Henderson* v. *United States*, 133 S. Ct. 1121, 1130 (2013) ("The Rule's requirement that an error be 'plain' means that lower court decisions that are questionable but not *plainly* wrong (at time of trial or at time of appeal) fall outside the Rule's scope.").

Moreover, the district court instructed the jury that it could not convict unless it found beyond a reasonable doubt both that petitioner knew the charged statements were false and that he made those statements "with intent to do something the law forbids." Pet. App. 22a n.4. It is difficult to see how the jury could have found that petitioner made knowingly false statements with awareness that his actions violated the law unless it also concluded that he intended those

false statements to deceive.[6] Accordingly, even if petitioner could demonstrate that the omission of an intent-to-deceive instruction constituted clear error, he could not establish that the error "affected the outcome of the district court proceedings" or undermined "the fairness, integrity or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135 (quoting *Olano*, 507 U.S. at 734, 736).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2014

[6] In addressing another issue, the court of appeals suggested that the jury may have acquitted petitioner of the fraud charges because it found that he "lacked the specific intent to deceive." Pet. App. 36a. But the court did not explain how the jury could have made such a finding while also concluding that petitioner acted with knowledge that his false statements were unlawful.