Nos. 23-5029 and 23-5560

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Respondent-Appellee

v.

FARADAY HOSSEINIPOUR

Petitioner-Appellant

On Appeal from the United States District Court
for the Western District of Kentucky

PETITION FOR REHEARING EN BANC

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FEDERAL RULE OF APPELLATE PROCEDURE 40(b) STATEMENT

In support of rehearing en banc, this proceeding involves questions of exceptional importance. The panel decision also conflicts with Supreme Court and Sixth Circuit precedent.

The legality of pyramid scheme instructions in criminal cases is exceptionally important. No other circuit has published an opinion on the issue. *United States v. Gold Unlimited, Inc.*, 177 F.3d 472 (6th Cir. 1999)("*Gold*"), first confronted the issue and included a suggestion that future "prudent" courts improve its instruction. Judge Moore's concurrence in *Gold* reflects a division in this Court because she concluded that the "court erred in instructing the jury that a pyramid scheme, as the court defined the term, necessarily constitutes a scheme to defraud." *Id.* at 489. This "err[or]" continues to be binding precedent—Judge Nalbandian in his Concurrence here wrote, "Succeeding on [the pyramid scheme] theory was a shortcut of sorts in [the Government's] burden of proof." *United States. v. Maike*, 142 F.4th 367, 379 (6th Cir. 2025). The full Court should address this issue because of its impact throughout the country.

The instructions also violated Supreme Court and Sixth Circuit precedent. The panel's published opinion affirmed the following instruction, which applied to the mail fraud and securities fraud conspiracy counts:

> A "pyramid scheme" is any plan…or other process characterized by the payment by participants of money to the company in return for which

> they receive the right to sell a product and the right to receive in return for recruiting other participants into the program reward which are unrelated to the sale of the product to ultimate users. The structure of a pyramid scheme suggests that the focus is on promoting the sale of interests in the venture rather than the sale of products, where participants earn the right to profits by recruiting other participants, who themselves are interested in recruitment fees rather than products. A pyramid scheme constitutes a scheme to defraud.

(R.554,#5265-66.) The last sentence of this instruction improperly allowed the jury to presume an intent to defraud in violation of *United States v. Feola*, 420 U.S. 671, 686 (1975), and *United States v. Rabinowitz*, 327 F.2d 62, 76–77 (6th Cir. 1964). The second sentence of the instruction resulted from the suggestion in *Gold* that future courts "supplement" the instruction to "reflect the difference between legitimate multi-level marketing and illegal pyramids," but it did the opposite. Moreover, the instruction, described by the panel as "abstruse," violated *Percoco v. United States*, which held fraud instructions "must be defined with the clarity typical of criminal statutes." 598 U.S. 319, 329 (2023). The instructions also included an invalid legal theory (that a program capped at 5,000 that included retail revenue could constitute a pyramid scheme) and violated *Griffin v. United States*, 502 U.S. at 59. (R.554,#5265-66.)

Finally, the panel failed to apply the standard of review to the Government's use of false evidence set forth in *Glossip v. Oklahoma*, which was decided after oral argument. 145 S.Ct. 612 (2025).

BACKGROUND

This trial focused on the claim that the Emperor program of Infinity 2 Global ("I2G"), a multi-level marketing company ("MLM"), was a pyramid scheme. Emperor participants were capped at 5,000, each of whom paid $5,000 for the usage and resale rights of a package of present and future products to earn commissions and for the right to share in profits I2G earned from an overseas, online casino. Emperors who referred users to the casino received commissions based on casino chip transactions. The success of the Emperor program depended on the casino's success, not endless recruiting.

Despite no saturation risk, the Government contended the Emperor program was a pyramid scheme. (R.405,#3087.) Its proposed jury instructions were limited to the Emperor program (R.420), and the final instructions asked whether the Emperor program was a pyramid scheme. (R.554,#5265-68.) The defendants defended against this theory. (R.671,#7618;R.476,#3631.)

In opening, the government made 18 references to "pyramid," and transcripts reference "pyramid" more than 800 times.

Appellant Hosseinipour was not one of the creators of I2G or the Emperor program. She did not devise the plan and was a "low-level" participant. (R.769,#11628.) Anzalone, the Government's star witness, testified that

Hosseinipour would not lie, is a good person, would not deceive, and did not believe she was doing anything improper. (R.511,#4830-31;R.505,#4760-61.)

Hosseinipour, like thousands of IBOs, joined I2G after it started. (R.671,#7704.) She purchased Emperor packages like all the alleged victim witnesses. But knowingly joining the Emperor program does not mean she (or other IBOs) intended to defraud.

In its effort to prove a pyramid scheme, the Government introduced evidence to show the percentage of IBOs who lost money. (R.498,#4163.) Government witness Jerry Reynolds created and maintained I2G's system that tracked financial data. Before trial, the Government instructed him to create certain spreadsheets. (R.498,#4209,4217.) For example, US-Exhibit 101i, named "participant gain-loss," purports to show how many IBOs earned more than they paid to I2G and how many earned less than they paid. (R.498,#4163;R.487,#3876.) A declaration and spreadsheets that Reynolds produced post-trial revealed that commissions had been filtered out of 101i. (R.721-2;Ex.3 to R.721-2.) 101i did not include thousands of commission transactions, which resulted in the exclusion of more than $7 million in earnings by Emperors alone. (Ex.3 to R.721-2.) These Emperor commissions were tracked by Reynolds' system but not included in 101i. 101i shows Emperors earned approximately $1.2 million, but his system actually tracked Emperor earnings of $8.2 million. (Ex.3 to R.721-2.) 101i shows only 579 Emperors earned commissions,

but Reynolds' system actually showed 3,308 unique Emperors by DealerID earned commissions. (*Compare* US-101i *with* Ex.3 to R.722-2.) US-7240, another spreadsheet generated from Reynolds' system, reveals that his system tracked more than $25 million in commissions earned by individuals that were filtered out of 101i. (*Compare* US-7240 *with* US-101i). The Government had Reynolds remove this exculpatory information from 101i.

Reynolds falsely testified that 101i reflected all the gains and losses tracked by his system. (R.498,#4163.) Other witnesses relied on 101i and even the panel twice cited the incorrect 96% loss rate from 101i. *See Maike*, 142 F.4th at 373-75. The Government relied on 96% in opening and closing. (R.485,#3735; R.671,#7724.) A rehearing should be granted to consider these facts in accordance with the standard recently expressed in *Glossip*. 145 S.Ct 612.

ARGUMENT

I. The full court should resolve problems with pyramid scheme instructions.

A. The instructions incorrectly deemed the Emperor Program a scheme to defraud without finding specific intent.

The instructions permitted Hosseinipour's conspiracy convictions without a finding of specific intent to defraud. The panel noted that the fraudulent nature of a pyramid scheme is "implicit—any such scheme is doomed to fail—rather than explicit." *Maike*, 142 F.4th at 375. "Thus—the defendants rightly observe—in the jury's mind, a finding that defendants participated in a pyramid scheme could

substitute for a finding that they participated in a fraudulent scheme." *Id.* The panel also agreed that pyramid scheme definition did not require the jury expressly to find it fraudulent. *Id.* But the panel incorrectly held that the instructions elsewhere required a finding of fraudulent intent.

Unlike in *Gold*, Hosseinipour was charged with conspiracy. Instructions 3 had 2 elements: that two or more defendants agreed with another person to commit mail fraud as defined in Instruction 8 and that Hosseinipour knowingly and voluntarily joined the conspiracy. (R.554,#5259-60.) The district court denied the defendants' request to include a third element: that defendants acted with the intent to defraud. (R.545,#5221; R.692,#9912.) Here, like all IBOs, Hosseinipour knowingly joined I2G; therefore, the critical question was whether she agreed to commit mail fraud as defined by Instruction 8.

Instruction 8 began by correctly articulating the elements of mail fraud. It then defined "scheme to defraud" as a "plan…by which someone intends to deprive another of money…by means of false or fraudulent pretenses." (R.554,#5265.) Then the instruction defined pyramid scheme and directed the jury was a pyramid scheme was a scheme to defraud. (*Id.* at #5265-66.)

The panel held the instructions were duplicative enough to salvage the pyramid scheme definition's missing intent element: "Instruction 8 directed the jury to make a finding as to every component of a scheme to defraud." *Maike*, 142 F.4th

at 376. However, because this was a conspiracy charge, Instruction 3 did not direct the jury to find every component under Instruction 8—the charge at issue required only an agreement to commit mail fraud. (R.554,#5259.) Further, Instruction 8 directed the jury that a pyramid scheme was a "scheme to defraud," which it defined to include intent. (*Id.*#5265-66.) Reading Instruction 8 as written, a finding of a pyramid scheme required a finding of a "scheme to defraud," which was deemed to include intent.

Gold first grappled with this issue on plain error review. There, the defendant devised the scheme, and the Court held it was not plain error to instruct that a pyramid scheme was a scheme to defraud because the jury also had to find that the defendant "knowingly devised" the scheme. *Gold* at 485. Here, Instruction 8 only required "that the defendant knowingly participated in or devised" the pyramid scheme. All IBOs, including Hosseinipour, knowingly participated in I2G. Thus, this element did not cure the error for Hosseinipour.

In the *Gold* concurrence, Judge Moore found that instructing that a pyramid scheme necessarily constituted a scheme to defraud was error. *Gold* at 490. Judge Moore found the error harmless because the jury was required to separately find the defendant acted with the intent to defraud. Hosseinpour did not enjoy this safeguard because the conspiracy instruction contained no such instruction, and Instruction 8 directed that "scheme to defraud" included intent.

Hosseinipour was substantially prejudiced by this error because the Government argued that the defendants "don't have to know the official definition of a pyramid scheme." (R.690,#9369.) In closing, the Government argued that a defendant does not have to know the official definition of pyramid scheme. (R.671,#7689.) The Government argued, "[Did Anzalone know] what is a pyramid scheme[?]… No. Can he still commit the crime? Absolutely." *Id.*

Under the Government's reading of the instructions, Hosseinipour did not have to know what makes a pyramid scheme fraudulent. As the Concurrence noted, "if a jury finds a pyramid scheme, it necessarily finds a scheme to defraud." *Maike*, 142 F.4th at 383. Stated otherwise, "[p]yramid is a surrogate for everything except use of the mails." *Id.* at 383 fn. 2.

Under the instructions, the jury was permitted to convict Hosseinipour without the necessary elements for both conspiracies. The jury instructions eliminated Hosseinipour's primary defense, which was extremely prejudicial.

The full Court should address the ongoing implications of *Gold*. MLMs have an estimated 20 million distributors in the economy. And all MLMs "contain some elements of a pyramid scheme;" "[n]o clear line separates illegal pyramid schemes from legitimate [MLMs]." *Gold* at 475-80. Yet, as the Concurrence here explained, *Gold* holds that "[s]ucceeding on [a pyramid scheme] theory was a shortcut of sorts in its burden of proof." *Maike*, 142 F.4th at 379. There should never be a shortcut for

the burden of proof, especially regarding an industry commonly understood to be legal. This shortcut is especially dangerous for people like Hosseinipour who join an existing MLM. Pyramid schemes are inherently fraudulent because people who join them do not know they are destined to fail. *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 643 (5th Cir. 2016)(en banc). Hosseinipour, like thousands of others, joined I2G, without knowing it was a pyramid scheme. Because the Government claimed that Hosseinipour transitioned between legitimate and unlawful conduct, the need for consideration of her intent was essential. *Feola*, 420 U.S. at 685.

B. The instructions were unconstitutionally vague under *Percoco*.

The panel held, "[f]ederal law does not proscribe pyramid schemes specifically….[T]he definition of a pyramid scheme is abstruse." *Maike*, 142 F.4th at 376. The "abstruse" instruction violated *Percoco*. 143 S.Ct. 1130. *Percoco* held an instruction "must be defined with the clarity typical of criminal statutes and should not be held to reach an illdefined category of circumstances simply because of a smattering of [previous court] decisions." *Id.* at 1137. The Concurrence confirmed "the jury instructions...were too vague....And the Constitution's promise of due process does not tolerate that kind of uncertainty in our laws–especially when criminal sanctions loom." *Id.* at 1139. The Court held that precedent relied on in instructions must define illegal acts "with sufficient definiteness that ordinary people can understand what conduct is prohibited or in a manner that does not encourage

arbitrary and discriminatory enforcement." *Id.* at 1138(internal quotation marks omitted). The Concurrence explained that vague laws "impermissibly hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges..." *Id.* at 1139(internal quotation marks omitted). If no clear line delineates between legal and illegal conduct, the Government cannot convict based on such conduct. *Smith v. Goguen,* 415 U.S. 566, 574 (1974).

The panel noted that pyramid scheme definition is "abstruse." *Maike*, 142 F.4th at 376. Because it is vague, it is unconstitutional under *Percoco*. Moreover, the instructions did not draw reasonably clear lines between what is forbidden and what is not, so reversal is required. *Gold,* 177 F.3d at 475. Since *Gold*, FTC guidance on what makes a pyramid scheme illegal has often changed. (Business Guidance Concerning Multi-Level Marketing, April 2024; FTC Staff Offers Business Guidance Concerning Multi-Level Marketing, January 4, 2018; The Bottom Line about Multi-Level Marketing, October 2009; Staff Advisory Opinion - Pyramid Scheme Analysis, January 14, 2004).

The second sentence in the pyramid scheme instruction was an effort to fulfill *Gold*'s suggestion that "[i]n subsequent cases involving alleged pyramid schemes, prudent district courts might supplement [the definition] to reflect the difference between legitimate [MLMs] and illegal pyramids…." *Gold* at 483. The Court then cited state laws that only prohibit schemes that compensate participants primarily

for recruitment. This inferred a more tolerant standard than the definition used here, which rendered any compensation for recruitment illegal. But the district court took the opposite approach and made the definition even more nebulous. What a company's ***structure suggests*** cannot support a finding of criminal liability. "Structure suggests" does not tell a jury what it needs to find; instead, it instructs the jury to infer guilt because of a company's pyramidal structure. Ordinary people would interpret structure to mean shape. Legitimate MLMs have "structures" that "contain some elements of a pyramid scheme." *Gold* at 480; *see Whole Living, Inc. v. Tolman,* 344 F. Supp. 2d 739, 745 (D. Utah 2004). The Government's expert agreed "[h]aving a pyramid shape in and of itself is not indicative of a pyramid scheme." (R.487,#3901.) The full Court should evaluate this instruction to prevent overreach in charging fraud schemes.

C. The instructions contained a legally erroneous theory.

The Emperor program, as a matter of law, cannot be a pyramid scheme. Because the Government submitted an erroneous legal theory to the jury, the Court should agree to a rehearing. *See Griffin*, 502 U.S. at 59. When "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error," so the Court should reverse the conviction. *Id.* at 59; *Maike*, 142 F.4th at 379. The Concurrence

also acknowledges that a MLM with a capped number of participants likely cannot be a pyramid scheme as a matter of law. *Id.* at 389.

Despite these acknowledgements, the Concurrence focused on the Government's tangential contention that I2G as a whole was a pyramid scheme. But the issue at trial was whether the Emperor program was a pyramid scheme.

The jury instructions limited the relevant scheme to the Emperor program. (R.554,#5263-68.) That is how the Government defined the conspiracy in its proposed jury instructions two weeks before trial. (R.420.) The Government claimed the Emperor program was a pyramid scheme. (*See id.*;R.405,#3087;R.692,#9990.) All the overt acts dealt with Emperor purchases. (R.554,#5263-64.) The defense at trial and Defendants' closing arguments focused on the claim that the Emperor program was a pyramid scheme. (R. 671,#7618;R.476,#3631.)

The fact that the instruction permitted the jury to find that the Emperor program was a pyramid scheme (in addition to the other legal errors set forth above) was devastating to Hosseinipour. A pyramid scheme is inherently fraudulent because it will inevitably fail because of saturation; it can only survive so long as recruiting new members continues and eventually there will be no one left to recruit. The Emperor program was not doomed to fail because of saturation concerns. Rather, the program was capped at 5,000, and participants were entitled to earn a share of profits from the online casino (along with revenue from other products). The 5,000 cap

ensured that the casino profits would not continue to be diluted. The success of the Emperor program was dependent on the success of casino; no one was deceived into believing she could continue to profit from recruiting. Everyone knew the Emperor sales will end at 5,000. Because the jury was permitted to convict on an errant legal theory, the full Court should consider the matter.

II. The panel failed to apply *Glossip* to the *Napue* argument.

After oral argument, the Supreme Court decided *Glossip*, which addressed the proper standard to apply to a *Napue* argument. "To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited or allowed false testimony to go uncorrected." *Glossip*, 145 S. Ct. at 614.

> If the defendant makes that showing, a new trial is warranted so long as the false testimony may have had an effect on the outcome of the trial,—that is, if it in any reasonable likelihood [could] have affected the judgment of the jury….In effect, this materiality standard requires the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Id. at 626-27 (internal quotation marks and citations omitted; brackets in original). The ability to cross examine does not cure a *Napue* violation. "The Due Process Clause imposes 'the responsibility and duty to correct' false testimony on [the prosecution] not on defense counsel." *Glossip*, 145 S. Ct. at 630 (quoting *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959)). The panel failed to apply this standard.

Hosseinipour showed that the Government knowingly submitted and failed to correct false evidence. Keep, the Government's pyramid scheme expert, Agent Sauber, and Jerry Reynolds all testified falsely. Reynolds provided the Government with financial information early in its investigation. Years later, prior to trial, the Government subpoenaed 101i and specified the information it wanted. (R.498,#4217.) The Government sent "specific" subpoenas for "specific documents." (R.681,#8324-25.) The Government met with Reynolds on June 22, 2022. (*Id.*) The next day, Reynolds created 101i. (101i properties showing creation date of June 23, 2022.) By sending a "specific" subpoena for a "specific document," the Government was able to have Reynolds exclude earned commissions from 101i. (R.721-2,#11428-30.) The omission of this data significantly skewed the spreadsheets presented to the jury.

The purpose of 101i was to show the IBOs who earned more than they paid to I2G and the IBOs who paid more to I2G than they earned. In other words, 101i showed the participants with a net gain and the participants with a net loss. 101i indicated that 96% of the IBOS lost money, and this statistic was heavily relied on by the Government at trial.

After trial, Reynolds signed an affidavit that described the Emperor data from his system that was omitted from 101i. (R.721-2,#11430; Ex.3 to R.721-2.) 101i listed 23,770 purchasers and indicated that 21,781 of those purchasers never

received a payment from I2G. According to 101i, approximately 2,000 IBOs, including 579 Emperors, earned commissions.

In his affidavit, Reynolds explained he had the ability to run a report showing all commissions earned as tracked by his system, and he specifically ran a report for commission earned by all Emperors. (R.721-2,#11430.) That report showed that more than 3,300 Emperors received money from I2G. (Ex.3 to R.721-2.) Because of the Government's directive, 101i failed to list approximately 2,700 Emperors who earned money from I2G. For Emperor and non-Emperors, over $25 million in earned commissions were excluded from 101i despite being tracked by Reynolds' system. (*Compare* US-101i *with* US-7240.) 101i grossly altered the real financial results of I2G IBOs.

Reynolds also testified falsely about 101i. In its briefing, the Government argued that Reynolds informed the jury of 101i's deficiencies, which were a result of deficiencies in Reynolds' system. (Gov.Br.56.) The panel repeated this. *United States v. Maike*, No. 22-6114, 2025 WL 1770555, at *6 (6th Cir. June 26, 2025).

But as Reynolds' affidavit makes clear, Reynolds' system tracked substantially more commissions than what was included in 101i, and the jury never heard this information. (R.721-2,#11430;Ex.3 to R.721-2.) Despite this, Reynolds falsely testified that it included "data on all the participants' gains and loss" "that was tracked by [his] system." (R.498,#4163-64.) Reynolds and Keep falsely testify

that 101i reflected to the difference between IBO payments in and payments out. (R.498;#4164;R.487,#3876). As the Government phrased it, "so that shows for every participant in the system how much they gained or lost?," and Keep answered "[c]orrect." (*Id.*). Keep testified that he sorted the 101i by "gains and losses" and determined that 96% of the "20-plus thousand accounts" lost money. (R.487,#3877.)

The 96% loss figure was critical to the Government's case. The panel's opinion cited the loss rate twice. The Government relied on it in its opening and hammered it in closing. (R.485,#3735; R.671,#7691-92.) The district court referred to the data as "gold." (R.681,#8324-25.) 101i, the loss rate, and other false evidence were referenced extensively. (R.485,#3735;R.487,#3876-78,3883,3975,3977-78;R.498,#4163-73;R.671,#7691-92;R.681,#8324-25;R.688,#9049;R.689,#9323; R.690,#9488-89;R.699,#10322;R.701,#10920.)

Based on the *Napue* error, under *Glossip*, the Government must "establish harmlessness beyond a reasonable doubt." The panel failed to apply this standard and rejected the argument for two reasons. First, the panel noted that Reynolds testified that 101i may not have included every payment that I2G made to participants. Reynolds' actual testimony was that 101i showed "participants' gain and loss data that was tracked by [his] system." (R.498,#4164). This was false; 101i excluded over $25 million of commissions tracked by his system. (*Compare* US-101i Column P *with* US-7240 Column J).

Second, the panel held that no due-process violation occurred because "defendants had ample opportunity to cross-examine both Keep and Reynolds about anything that the spreadsheets contained." *Maike*, 2025 WL 1770555, at *6. But a *Napue* violation cannot be cured by cross-examination. *Glossip*, 145 S. Ct. at 631n.10. Like in *Glossip*, the defense had no idea Reynolds excluded information from his system. Moreover, the defense asked Reynolds about whether he had presented all the significant information he had about I2G, and he said to his knowledge he did. (R.498,#4177.) The prosecution had the duty to correct the false evidence, not the defense. *Id.* at 630.

The panel failed to apply the materiality analysis set forth in *Glossip.* Materiality "always requires courts to assess whether []the error complained of[] could have contributed to the verdict….Here, the prosecutor's failure to correct…false testimony is the relevant error, so the Court asks whether a correction could have made a material difference." *Id* at 631. The prosecution's correction of the repeated reliance on Reynolds' false data and related testimony would have made a material difference.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 40(d)(3)(A)and Fed. R. App. 32(a)(5)&(6) because the countable portion thereof contains 3,866 words and was typed in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on August 11, 2025, a copy of the foregoing brief was served upon opposing counsel by electronic filing.

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