Nos. 22-6114, 23-5563

United States Court of Appeals
for the
Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

RICHARD G. MAIKE,
Defendant – Appellant.

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

No. 4:17-cr-00012-1, Hon. Gregory N. Stivers

APPELLANT RICHARD MAIKE'S PETITION FOR REHEARING EN BANC

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STATEMENT IN SUPPORT OF REHEARING EN BANC

Richard Maike requests rehearing en banc because the panel opinion conflicts with published opinions from this Court and is inconsistent with United States Supreme Court precedent that requires a jury to find criminal intent in order to find the elements of mail fraud. *See* Fed. R. App. P. 35(b)(1)(A).

The panel in this case upheld jury instructions that permitted the jury to find the elements of mail fraud without concluding that Maike had intent to defraud. Here's how: The instructions defined a "pyramid scheme" without including any mens rea element whatsoever and then informed the jury that "[a] pyramid scheme ***constitutes a scheme or artifice to defraud*** for purposes of this instruction." R. 554 at PageID#5265-66 (emphasis added). The instructions correctly defined "scheme to defraud" so as to include "any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* at PageID#5265. But the strict-liability definition of pyramid scheme provided the jury with a way to find a scheme to defraud (*i.e.*, a scheme in which the defendant *intended* to defraud)—*without* actually finding that the defendant had any intent to defraud at all.

The panel (Kethledge, Nalbandian, McKeague) understood this, writing:

> 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. And the court's definition of a pyramid scheme, as noted above, did not require the jury expressly to find that it was fraudulent."

Attachment A at 9 (emphasis added).

But the panel nevertheless upheld the instructions, holding that the instruction in fact "directed the jury to make a finding as to every component of a scheme to defraud"—even though the instructions permitted a finding of a strict-liability pyramid scheme to establish, without more, a scheme to defraud. *Id.* at 10.

Judge Kethledge expressed substantial concern about the jury instructions at oral argument. Oral Arg. Tr. 43:57-44:38. And Judge Nalbandian penned a 20-page concurrence, in large part ruminating on various implications of the instructions. Attachment A at 15-34. Ultimately, the panel upheld the instructions on the grounds that, when "considered as a whole," they "were duplicative enough to require the jury to consider" intent. Attachment A at 9. But, as set forth in the Argument below, they were not. *See infra* at 6-7.

This was a precedent-setting error because prosecutors may now rely on the panel opinion to use strict-liability definitions (like this pyramid-scheme definition) as a surrogate for a scheme to defraud. That flies in the face of Circuit and Supreme Court precedent requiring a finding of specific intent for mail fraud.

And this was an error of exceptional importance both broadly speaking (because it impacts mail-fraud and mail-fraud conspiracy prosecutions across the board) and in the specific context of multilevel marketing (because participants in multilevel marketing programs—of which there are many millions nationwide—are

now left to wonder whether such participation could suffice to find them guilty of having committed fraud).

Maike thus respectfully submits that rehearing by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

ARGUMENT

I. THE PANEL OPINION CONFLICTS WITH CIRCUIT AND SUPREME COURT PRECEDENT BECAUSE IT UPHELD JURY INSTRUCTIONS THAT ALLOW A FINDING OF MAIL FRAUD WITHOUT ANY FINDING OF CRIMINAL INTENT.

The panel in this case upheld jury instructions that permitted the jury to find the elements of mail fraud without concluding that Maike had intent to defraud.

As background, the primary charge here for all three defendants was conspiracy (under 18 U.S.C. § 371) to commit mail fraud (under 18 U.S.C. § 1341). The instruction on mail fraud included three salient parts: a definition of "scheme to defraud," a definition of "pyramid scheme," and the four enumerated elements of "mail fraud." R. 554 at PageID#5265-66.

Paragraph (2)(A) correctly defined a "scheme to defraud":

> A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

Paragraph 2(B) incorrectly defined a "pyramid scheme":

> A "pyramid scheme" is any plan, program, device, scheme, 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 rewards 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 or artifice to defraud for purposes of this instruction***.

R. 554 at PageID#5265-66 (emphasis added). The district court's language in the pyramid-scheme instruction omitted all reference to intent. Instead, the "structure" of a program suffices to deem it a pyramid scheme and, thus, a scheme to defraud—even though a scheme to defraud ordinarily (as correctly defined above) requires *intent* to defraud.

This all matters because the pyramid scheme ultimately served as a surrogate for the first *three* of the four elements of mail fraud as set forth in the enumerated elements of mail fraud in the instruction:

> (1) As the term "mail fraud" is used in Instruction No.3, it has four elements:
>
> (A) First, that the defendant knowingly participated in or devised a scheme to defraud in order to deprive another of money or property, that is through the sale of Emperor positions in Infinity 2 Global or i2g;
>
> (B) Second, that the scheme included a material misrepresentation or concealment of a material fact;
>
> (C) Third, that the defendant had the intent to defraud; and
>
> (D) Fourth, that the defendant used the mail or caused another to use the mail in furtherance of the scheme.

R. 554 at PageID#5265. These elements track the Sixth Circuit Pattern Jury Instruction (§ 10.01) on the elements of mail fraud. The problem is that when the jury found a pyramid scheme under Paragraph 2(B), it thereby found a scheme to defraud under Paragraph 2(A)—which, in turn, covered every element of the mail-fraud instruction except for use of the mails (an element that was not in dispute). The instruction thus permitted a finding of mail fraud without a finding of intent.

A. The panel opinion commits a precedent-setting error.

The panel held, in analysis devoid of any legal citation at all, that the "scheme to defraud" instruction was "duplicative" of the elements of mail fraud rather than a *surrogate* for the first three elements. Attachment A at 10-11. The panel wrote:

> And here the relevant instructions, considered as a whole, were duplicative enough to require the jury to consider that question.
>
> As an initial matter, the offense of conviction was conspiracy to commit mail fraud; and so (as discussed above) what the jury needed to find was that the defendants voluntarily *agreed* to commit the crime of mail fraud, not that they actually committed it. (Evidence that they committed that crime, rather, was proof that they had agreed to commit it.)
>
> Meanwhile, to reiterate, the court instructed the jury that a "'scheme to defraud' includes [i] any plan or course of action [ii] by which someone intends to deprive another of money or property [iii] by means of false or fraudulent pretenses, representations, or promises." (Brackets added.) Hence that instruction had three components. The first component—the existence of a plan or scheme—was likewise part of the court's definition of a pyramid scheme (as "any plan, program, device," etc.). Instruction 8(2)(B), Pg. ID 5265. That aspect of the pyramid-scheme instruction thus did not lead the jury astray. Meanwhile, the second component of the "scheme to defraud" instruction—that the scheme be one "[ii] by which someone intends to deprive another of money or property"—was more than covered by another part of Instruction 8, namely subpart (1)(C). That subpart required "that the defendant had the intent to defraud" when he participated in the scheme. And the third component—that the scheme employed "false or fraudulent pretenses, representations, or promises"—is covered by subpart (1)(B) of Instruction 8, which required that "the scheme included a material misrepresentation or concealment of a material fact[.]"

> Even if the jury found a pyramid scheme, therefore, the court's Instruction 8 directed the jury to make a finding as to every component of a scheme to defraud.

In short, the panel concluded that the definitions of "scheme to defraud" and "pyramid scheme" did not matter because the elements of mail fraud were provided anyhow. *See id.* Strikingly, however, the panel opinion never grappled with the defense argument that the finding a pyramid scheme *obviated* the need for the jury to find the three elements of mail fraud set forth in Paragraphs (1)(A), (1)(B), and (1)(C) of the mail fraud instruction.

The panel opinion was erroneous because it contradicts well-established Circuit precedent that requires intent to defraud as an element of mail fraud. *See, e.g.*, *United States v. Daniel*, 329 F.3d 480, 485-86 (6th Cir. 2003); *United States v. Desantis*, 134 F.3d 760, 764-65 (6th Cir. 1998); *cf. also United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016) (Thapar, J.) ("The wire-fraud statute, 18 U.S.C. § 1343 does not enact as federal law the Ninth Commandment given to Moses on Sinai. For § 1343 forbids only schemes to *defraud*, not schemes to do other wicked things, *e.g.*, schemes to lie, trick, or otherwise deceive."), *modified in part on panel reh'g*, 838 F.3d 1168. It likewise contradicts similar teachings of the Supreme Court. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 25 (1999).

Ultimately, the panel creates precedent that sanctions strict-liability surrogates for elements of crimes that otherwise require criminal intent.

B. The error is of exceptional importance.

At oral argument, the panel appeared to recognize the importance of this issue, devoting substantial time to it. Consider this excerpt of Judge Kethledge's discussion with counsel for the government:

> **Kethledge, J.**: What's going on with all these instructions[, where] the defense and apparently the government both want some more [...] specific reference to intent regarding fraud but we don't get that, and it's sort of, well, if you were in a pyramid scheme, that's gonna just cover all the elements of fraud? I mean[,] do you think these instructions were fine? Or, are they harmless in your view or something?
>
> **Government:** We think these instructions were fine, Your Honor.
>
> **Kethledge, J.**: Correct?
>
> **Government:** Yes.

Oral Arg. Tr. 43:57-44:38.

The danger in leaving the panel opinion in place is that there is now no check, in future prosecutions, upon jury instructions that provide surrogates for elements of fraud crimes. This is particularly important because of the lack of definition in the mail- and wire-fraud statutes themselves. *See, e.g.*, *United States v. Steffen*, 687 F.3d 1104, 1113 (8th Cir. 2012) ("The term 'scheme to defraud' . . . is not capable of precise definition."). Even outside the context of pyramid schemes, there are other categories of schemes with colloquial names: *Ponzi* schemes, bait and switch, pump and dump, and so on. The panel opinion blasts wide the door for prosecutors to elicit

strict-liability definitions of these apparent subsets of criminal schemes, just as happened here. Given that over 5000 federal defendants are sentenced on fraud charges each year, this is an error of exceptional importance. *See* United States Sentencing Commission, 2024 Annual Report, https://www.ussc.gov/about/annual-report-2024, at 12.

There is also now great uncertainty *within* the context of pyramid schemes. Millions of Americans participate in multilevel marketing programs. The crux of this case was whether Appellants' company (I2G) was a (lawful) multilevel marketing company or an (unlawful) pyramid scheme. *See* Attachment A at 2 ("By way of background, this case is about a fraudulent scheme, specifically a pyramid scheme."). The panel opinion cited Amway as an example of a "legitimate business arrangement." *Id.* (citing *In re Amway Corp.*, 93 F.T.C. 618 (1979)). Judge Nalbandian, in his thoughtful 20-page concurring opinion, even called Amway "the best example of a legal MLM implementing effective anti-pyramiding policies." Attachment A at 28 n.4. But the panel opinion makes precedent that potentially imperils any participant in multilevel marketing: any jury charged with the instruction at issue here would be able to find such a participant guilty of mail fraud simply by virtue of concluding that the multilevel marketing program was a pyramid scheme (meaning that it was thus a scheme to defraud, meaning that the first three elements of mail fraud were satisfied), so long as the participant had used the mails.

Judge Nalbandian correctly pegged this as a "shortcut of sorts in [the government's] burden of proof"—one that Sixth Circuit and Supreme Court precedent do not support, and one that should not remain precedent for the future. Attachment A at 15.

CONCLUSION

For the foregoing reasons, Maike respectfully asks this Court to grant rehearing en banc.

Date: August 11, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 35(b)(2)(A) because the countable portion thereof contains 2205 words and was typed in 14-point Times New Roman font.

Respectfully submitted,

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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.

Respectfully submitted,

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