No. 19-1404

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Christopher Rad,

Petitioner,

v.

Attorney General, United States of America,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals

REPLY BRIEF OF GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC AS COURT-APPOINTED AMICUS CURIAE

Bradley Girard
D.C. Bar No. 1033743
Brian Wolfman
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

Counsel for Amicus

June 24, 2020

TABLE OF CONTENTS

Page(s)

Table of Authorities ii

Argument 1

I. Convictions under Paragraphs 1037(a)(3) and (4) of the CAN-SPAM Act do not categorically involve fraud or deceit. 1

II. The Government failed to carry its burden of proving that Rad's offenses resulted in actual victim losses exceeding $10,000. 7

Conclusion 12

Certificate of Compliance .....

Certificate of Service .....

TABLE OF AUTHORITIES

Cases **Page(s)**

Alaka v. Att'y Gen.,
456 F.3d 88 (3d Cir. 2006) 8, 9

Araujo v. N.J. Transit Rail Ops.,
708 F.3d 152 (3d Cir. 2013) 11

Fan Wang v. Att'y Gen.,
898 F.3d 341 (3d Cir. 2018) 9, 10

In re G-1 Holdings, Inc.,
385 F.3d 313 (3d Cir. 2004) 11

Kawashima v. Holder,
565 U.S. 478 (2012) 2

Leslie v. Att'y Gen.,
611 F.3d 171 (3d Cir. 2010) 12

Nijhawan v. Holder,
557 U.S. 29 (2009) 8, 9

Singh v. Att'y Gen.,
677 F.3d 503 (3d Cir. 2012) 3, 11

United States v. Kilbride,
584 F.3d 1240 (9th Cir. 2009) 4, 5, 6

United States v. Twombly,
475 F. Supp. 2d 1019 (S.D. Cal. 2007) 3, 4

Valansi v. Ashcroft,
278 F.3d 203 (3d Cir. 2002) 1, 2

Statutes

8 U.S.C. § 1101(a)(43)(M)(i) 7, 8

15 U.S.C. § 7701(a) 6, 7

18 U.S.C. § 1037(a)(3) 1, 3, 4

18 U.S.C. § 1037(a)(4) 1, 3, 4

18 U.S.C. § 1037(d)(2) 5

ARGUMENT

In response to this Court's questions, Amicus provided two, independent reasons why Petitioner Christopher Rad's convictions under the CAN-SPAM Act are not aggravated felonies under the Immigration and Nationality Act (INA): *first*, violations of CAN-SPAM Act Paragraphs 1037(a)(3) and (4) do not categorically involve fraud or deceit, and *second*, the Government failed to show by clear-and-convincing evidence that Rad's conviction caused over $10,000 in victim losses. The Government's contrary arguments rely on misunderstandings of the law and should be rejected.[1]

I. Convictions under Paragraphs 1037(a)(3) and (4) of the CAN-SPAM Act do not categorically involve fraud or deceit.

A. As our opening brief explains (at 20), this Court has held that fraud and deceit require conduct that intentionally misleads someone to believe something false. *See Valansi v. Ashcroft*, 278 F.3d 203, 209 (3d Cir. 2002).

In light of that definition, under the Government's own reasoning, the CAN-SPAM Act does not categorically involve fraud or deceit. Responding to our explanation that the Ninth Circuit upheld a CAN-SPAM Act conviction for actions that did not cause the victims to believe anything false, the Government maintains that material falsification under the CAN-SPAM Act "does *not* require proof that the recipient actually believed the false header or registration information to be true." Govt. Supp. Br. 25 (emphasis added). That's *our* point. We agree that material falsification under the

[1] Amicus and the Government agree that the categorical approach applies to Paragraphs 1037(a)(3) and (4) and that this Court (not the BIA) should resolve that question. We therefore rely on our opening brief on those issues.

CAN-SPAM Act does not require belief in something false. But because fraud and deceit *do* require belief in something false, *see Valansi*, 278 F.3d at 209, a conviction under the CAN-SPAM Act cannot categorically be fraudulent or deceitful. That should end the inquiry.[2]

The Government briefly acknowledges this Court's definition in *Valansi* but does not apply it. Instead, relying on *Kawashima*'s statement that deceit means "the act or process of deceiving (as by falsification, concealment, or cheating)," *Kawashima v. Holder*, 565 U.S. 478, 484 (2012), the Government concludes that *any* act of concealment or falsification is deceitful. *See* Govt. Supp. Br. 11-13. But the Government's reading of *Kawashima* is logically flawed. *Kawashima*'s definition does not conflict with *Valansi*'s uncontroversial requirement of belief in something false. Instead, *Kawashima* outlines ways that one might accomplish deceit, which can include concealment or falsification. *See* 565 U.S. at 484. And just because concealment or falsification *can* be deceiving, does not mean that they *must* be deceiving. For example, a definition of murder, parallel to *Kawashima*'s discussion of deceit, might state "the act or process of killing another person (as by stabbing or shooting)." Under the Government's reasoning, any stabbing or shooting would be considered murder, even if no one was killed. That can't be. And

[2] The Government (at 12) faults Amicus for contending, based on this Court's and the Supreme Court's decisions, that fraud and deceit are interchangeable terms. *See* Am. Opening Br. 20. But after raising the point, the Government then drops it, giving no explanation of how any purported difference between the two terms might affect the analysis or result here. In any event, both terms require belief in something false, and that is the similarity between the terms that we rely on.

for the same reason, under *Kawashima*'s definition of deceit, concealment is not *categorically* deceitful.

The Government also argues in passing that, under *Singh v. Attorney General*, 677 F.3d 503, 509 (3d Cir. 2012), a mere false statement, made knowingly, is deceitful. Govt. Supp. Br. 18-19. *Singh* says nothing of the sort. The language that the Government quotes is a shorthand reference to a rule in the Second Circuit, taken out of context, that addresses whether the elements of "knowingly making a false statement" in a bankruptcy proceeding under penalty of perjury are sufficient to satisfy the definition of fraud and deceit. *See Singh*, 677 F.3d at 505-06, 508-09. *Singh*'s context-specific analysis cannot be read to define any and all false statements as categorically deceitful. *See id.* at 509.

B. The Government contends that because the CAN-SPAM Act requires a mens rea higher than "general criminal intent," it necessarily requires fraud or deception. Govt. Supp. Br. 15 (quoting *United States v. Twombly*, 475 F. Supp. 2d 1019, 1025 (S.D. Cal. 2007)). But that contention lacks support in the statute's text. The CAN-SPAM Act requires that a person "knowingly … materially falsif[y]" and "intentionally initiate[] the transmission of" false header or registration information. 18 U.S.C. § 1037(a)(3), (4). The Government is correct that these mens rea requirements protect innocent people (Govt. Supp. Br. 24) and exclude nonmaterial errors (*id.* at 18). But they say nothing at all about fraud or deception. Like for the cryptocurrency engineer who "knowingly" falsifies an email header to keep his identity secret and "initiate[s] the transmission" of commercial emails, *see* Am. Opening Br. 23, the mens rea requirements can be satisfied without any fraud or deception.

Finding no support in the statutory language, the Government relies on a lone district-court decision, *Twombly*, 475 F. Supp. 2d at 1025, to support its argument that mens rea under the CAN-SPAM Act requires deception. *See* Govt. Supp. Br. 15. But *Twombly* did not hinge on deception as necessary to a finding of mens rea. 475 F. Supp. 2d at 1025. In *Twombly*, the court denied the defendants' motion to dismiss their criminal indictments for insufficiently alleging mens rea, finding that the statute's two mens rea requirements—"knowingly materially falsify[ing]" and "intentionally" disseminating that falsified information—were both adequately alleged. *Id.* True, *Twombly* also stated offhandedly that a defendant must "know he is being deceptive," mistakenly equating deceit with knowing and intentional material falsification. *Id.* But *Twombly* was simply a criminal prosecution under the CAN-SPAM Act, and it was not focused on the definition of deceit, as a court must be when it determines whether a violation of the CAN-SPAM Act is invariably fraudulent or deceitful under the INA. *Id.*

If *Twombly* could be read as straying beyond resolution of the motion before it and opining that all violations of Paragraphs 1037(a)(3) and (4) involve deceit, it would be wrong. As shown in *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009), a defendant can have the requisite mens rea regardless of the deceptiveness of their criminal acts. There, the defendants were convicted under Paragraphs 1037(a)(3) and (4) for "intentionally causing" the header and registration information "to be different" in a way that diminished a recipient's ability to contact or identify the defendants. *Id.* at 1257. The Ninth Circuit did not rely on deception in upholding the conviction. *See id.* And as our opening brief explains (at 28), that makes sense: To use the facts in *Kilbride*, no reasonable recipient of the offending emails would have been deceived into thinking

that they had sent themselves pornography, yet the senders of those emails were criminally liable under the CAN-SPAM Act. *Id.*

C. The Government also argues that because the CAN-SPAM Act requires material falsification, a violation of the Act must be fraudulent or deceitful. Here too the Government misreads the statutory language. An email is materially falsified if it is altered or concealed in a way that "would impair the ability of a recipient of the message … to identify, locate, or respond" to the sender. 18 U.S.C. § 1037(d)(2). And impair "merely means to decrease." *Kilbride*, 584 F.3d at 1258.

Accordingly, and as our opening brief shows (at 21-25), the CAN-SPAM Act's broad definition of material falsification covers a considerable range of privacy-seeking commercial conduct that would make it more difficult to identify or locate a sender, but would not defraud or deceive potential customers.

In response, the Government argues that so long as email recipients "can still interact" with email senders, there is no material falsification. Govt. Supp. Br. 24. But that is not what the statute says. The statute is written in the disjunctive, so a decrease in the ability to "identify" *or* "locate" a sender is material falsification, even if it is possible to "respond" to (that is, "interact" with) the sender. *See* 18 U.S.C. § 1037(d)(2).

Despite our examples of privacy-seeking activities covered by the statutory text, the Government implies that these concerns are imaginary because people who violate the CAN-SPAM Act must not be selling legitimate products. According to the Government, "legitimate senders of commercial emails … actually want their recipients to be able to respond or find them because those recipients are potential customers of their services or products." Govt. Supp. Br. 24.

That argument misses the mark. The CAN-SPAM Act is aimed not at stopping the dissemination of *products*, but at certain forms of *promotion*. Regardless of what is being sold, if a sender materially falsifies email information to sell a product, the Act prohibits it, even if the recipient is happy to buy the product. *Kilbride* proves as much. Like Rad, the defendants in *Kilbride* were middlemen. 584 F.3d at 1244. They made a commission each time someone purchased a membership to a pornographic website. *Id.* The websites themselves were legal, as was selling memberships to those sites. What was illegal was sending out millions of emails to promote those memberships without providing a way for the recipients or the ISPs to stop the emails. So even if every single recipient in *Kilbride* had been happy to receive the email and subsequently purchased a membership to the websites (as many did), the senders still would have violated the CAN-SPAM Act. But there could be no argument that the senders deceived anyone into believing something that was not true.

The convictions in *Kilbride*—including their absence of fraud or deception—aligned with the purposes of the CAN-SPAM Act. The CAN-SPAM Act was intended to stem the tide of unsolicited commercial emails that, at the time of the Act's passage, made up 50% of all email traffic, fraudulent or not. 15 U.S.C. § 7701(a)(2)-(3). Akin to the nuisances of robocalls or commercial faxes, indiscriminate promoters could play a numbers game, sending out millions upon millions of emails for practically no cost, making a profit if even a miniscule number of recipients became customers. Like in *Kilbride*, many recipients who had no interest in these products were not deceived or defrauded, but they still had to waste significant time sifting through unwanted emails. *See* 15 U.S.C. § 7701(a)(3)-(4).

To reiterate: the CAN-SPAM Act covers fraudulent and deceitful email promotions. *See* Am. Opening Br. 22-23; 15 U.S.C. § 7701(a)(2). But because the Act sweeps considerably more broadly, a violation of it is not categorically fraudulent or deceitful.

II. The Government failed to carry its burden of proving that Rad's offenses resulted in actual victim losses exceeding $10,000.

The Government's argument that it proved $10,000 in victim losses by clear-and-convincing evidence is also wrong. Section 1101(a)(43)(M)(i)'s text does not allow gain to be used as a measure of loss. Am. Opening Br. 31-32. But even if it did, a sentencing court's calculation of loss—made under the permissive sentencing guidelines—cannot be taken at face value. Instead, the Government must make a heightened showing of loss by clear-and-convincing evidence, which requires showing an actual loss tied to the crime of conviction, that the loss is indeterminable, that the alleged victims did not get something of value, and that the offenders gain was tied to the crime of conviction. As our opening brief demonstrates (at 35-48), the Government did not show any of these things.

The Government makes three independent errors in response. First, the Government fails to answer the threshold question: whether Section 1101(a)(43)(M)(i) allows for consideration of gain at all. Second, the Government misstates this Court's rules for determining what losses can be considered under the case-specific approach. Third, the Government treats the heightened clear-and-convincing-evidence standard used in removal proceedings as if it were the lower, preponderance-of-the-evidence standard used at sentencing.

A. For the reasons explained in our opening brief (at 31-32), Section 1101(a)(43)(M)(i)'s text does not allow using gain as a proxy for loss. The Government refuses to answer this threshold question and so never confronts the text. Instead, the Government concludes that this Court "need not decide" the question because, in its view, Rad clearly caused more than $10,000 in losses. Govt. Supp. Br. 36-37. But that begs the question. Either the Government must show some *actual* losses tied to *actual* victims (a showing that is impossible on this record), or the Government must explain why relying on Rad's gains is appropriate even though the statute says nothing about using gain as a proxy for loss. The Government does neither. Put simply, the Government asks this Court to skip the threshold question but then premises its entire argument on a resolution of that question in its favor. Assuming the conclusion cannot be allowed to substitute for genuine analysis.

B. Even setting aside the threshold question, the Government ignores or misapplies this Court's standards regarding whether Rad's alleged role in securities fraud can be considered in calculating victim loss. It is true that the question of victim loss requires a "circumstance-specific approach." Govt. Supp. Br. 27-28; *see Nijhawan v. Holder*, 557 U.S. 29, 42 (2009). But in the Government's view, because the facts vary "from case to case," the rules that our opening brief identified for how those facts should be evaluated under the circumstance-specific approach are "rigid formulaic inquiries" that this Court is free to ignore. Govt. Supp. Br. 28. Not so.

This Court has held that losses from charged, but acquitted or dismissed conduct cannot be considered, *even when* those losses were caused by conduct that was "part of a common scheme or plan as the offense of conviction." *Alaka v. Att'y Gen.*, 456 F.3d

88, 106-108 (3d Cir. 2006); *see* Am. Opening Br. 38. All that may be considered are losses from convicted or uncharged (but "undeniably tethered") conduct. *See Fan Wang v. Att'y Gen.*, 898 F.3d 341, 350-51 (3d Cir. 2018); Am. Opening Br. 38. So losses from the alleged securities fraud for which Rad was charged but not convicted cannot be considered.

The Government ignores this limit. Although the Government grudgingly recognizes that "it does not appear that Rad was convicted of conspiracy to commit securities fraud," it nevertheless insists that the Court can consider the underlying alleged securities-fraud scheme. Govt. Supp. Br. 31. But the Government already tried and failed to convince a jury of Rad's part in an alleged securities fraud. Though the Government wishes otherwise, this Court cannot now effectively come to the opposite conclusion. *See Alaka*, 456 F.3d at 106.

The Government attempts to justify its departure from this Court's decisions by creating a new standard. It argues that because Rad's charged-but-unconvicted *alleged* conduct and Rad's convicted spamming were "part of a causal chain," any losses from the unconvicted alleged conduct can be considered. Govt. Supp. Br. 32 (quoting *Fan Wang*, 898 F.3d at 351). But *Fan Wang*, which the Government cites for this rule, did not rely on a "causal chain." 898 F.3d at 351. Instead, *Fan Wang* held that losses from *uncharged* conduct were "undeniably tethered" to the crime of conviction because the uncharged conduct—which a jury did not rule on—"plainly describe[d] 'the specific way in which [the] offender committed the crime on [this] specific occasion.'" *Id.* (quoting *Nijhawan*, 557 U.S. at 34). Put another way, in *Fan Wang*, the losses tied to the uncharged conduct could be considered because the charged conduct was not possible

without the uncharged conduct. *See id.* Nothing analogous occurred here because the convicted conduct (spamming) *was* possible without the unconvicted conduct (the purported securities fraud). There can be no argument that the alleged securities fraud was "the specific way" that Rad violated the CAN-SPAM Act "on [this] specific occasion." *See id.*

C. The Government's argument fails for another, independent reason: The Government did not satisfy the heightened clear-and-convincing-evidence standard that it must meet in removal proceedings. The Government attempts to satisfy this burden simply by concluding that the "sentencing-related evidence" was sufficient. Govt. Supp. Br. 34-35. Yet the Government fails to point to any specific evidence of loss caused by Rad's spam emails. It does not name a single victim, point to a single cent lost by any email recipient, or even name a stock that was promoted via email and then fell in price.

The Government seems to rest on the sentencing court's adoption of the presentence report's conclusion that because a certain amount of money was in Rad's bank account, Rad caused that amount in losses. The Government does not explain how these sentencing materials, which needed to satisfy only a lower, preponderance-of-the-evidence burden of proof, meet the heightened clear-and-convincing burden of proof for removal. *See* Am. Opening Br. 33-34. Nor does the Government acknowledge that under the lower burden, a sentencing court can consider a broader universe of losses—including intended losses and losses tied to acquitted conduct—which cannot be considered in removal proceedings. *See id.* at 34-35. In short, to adopt the Government's position would be to do away with the differences between sentencing

and removal proceedings, which, this Court has observed, are as different as "apples and oranges," *Fan Wang*, 898 F.3d at 351 n.18 (quoting *Singh v. Att'y Gen.*, 677 F.3d 503, 511 (3d Cir. 2012)).

Instead of pointing to any actual evidence, the Government argues that "[i]t is also reasonably clear from the record that Rad would not have been able to reap such significant gains … if the stock-promotion spamming scheme had not actually victimized individuals through the loss of some of their investments." Govt. Supp. Br. 31. Indeed, the Government contends that "there is no logical way" that Rad could have gained without causing losses. If what the Government means is that spam stock-promotion emails *necessarily* result in financial losses, that is simply not true. As we have explained, there's nothing about mass promotion of stocks via email that is necessarily a scam—email recipients who purchase and later sell stocks might *make* money. *See* Am. Opening Br. 40. And even if email recipients do not make money, CAN-SPAM Act violations often do not result in any financial harm. *Id.* at 36-37.

If what the Government means is that its conclusion is "reasonably clear" just because the sentencing court said so, that's wrong too. As already explained, the Government cannot satisfy its evidentiary burden by parroting the conclusion of the sentencing court. It must meet the "heavy burden," *In re G-1 Holdings, Inc.*, 385 F.3d 313, 318 (3d Cir. 2004), of showing that the loss was "highly probable," *see Araujo v. N.J. Transit Rail Ops.*, 708 F.3d 152, 159 (3d Cir. 2013).

CONCLUSION

In light of "the grave consequences of removal," *Leslie v. Att'y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010), the Government here bore the heavy burden of showing that a crime that categorically involves fraud or deceit caused over $10,000 in victim losses. Because the Government failed to make that showing, the judgment of the BIA should be reversed.

Respectfully submitted,[*]

s/Bradley Girard
Bradley Girard
D.C. Bar No. 1033743
Brian Wolfman
GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave. NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

Counsel for Amicus

June 24, 2020

[*] Counsel gratefully acknowledge the work of Jace Jenican, a Georgetown Law student who assisted in researching and writing this brief.

CERTIFICATE OF COMPLIANCE

1. Amicus has been informed by the Clerk's Office that this brief should comply with the word limit set in Federal Rule of Appellate Procedure 32(a)(7)(B). In accordance with Rule 32(g), I certify that this brief: (i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 3,178 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and (ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016, set in Garamond font in 14 point type.

2. In accordance with Local Rule 28.3(d), I certify that I am a member of the bar of the Third Circuit in good standing.

3. In accordance with Local Rule 31.1(c), I certify that (i) this brief has been scanned for viruses using McAfee Security Scan Plus, and is free of viruses; and (ii) when paper copies are required by this Court, the paper copies will be identical to the electronic version of the brief filed via CM/ECF.

s/ Bradley Girard
Bradley Girard
Counsel for Amicus

CERTIFICATE OF SERVICE

I certify that on June 24, 2020 this brief was filed using the Court's CM/ECF system. Counsel for the United States Attorney General is a registered CM/ECF user and will be served electronically via that system. Petitioner Christopher Rad will be served a physical copy of the brief at:

Christopher Rad
Pike County Correctional Facility
175 Pike County Blvd.
Lords Valley, PA 18428

s/ Bradley Girard
Bradley Girard
Counsel for Amicus