No.

In the Supreme Court of the United States

MAHMOUD ALDISSI AND ANASTASSIA BOGOMOLOVA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ordinarily, mail or wire fraudsters trick victims to part with money or property, then abscond with the loot. But this case is not ordinary. Whenever Dr. Aldissi (a polymer chemist) and Dr. Bogomolova (a molecular biologist) submitted materially deceptive proposals to obtain contracts and grants from federal agencies to research conductive polymers (*i.e.*, plastics that conduct electricity, which have important military and aeronautical applications), they always intended to and did fully perform and deliver their work. As charged and instructed, the verdict never found otherwise.

Generally, schemes to *deceive* victims (which do not harm them because they otherwise receive the financial benefit of their bargains) are different from schemes to *defraud* victims (which do harm them because they are deprived of the financial benefit of their bargains). The former is not mail or wire fraud, whereas the latter is.

Notwithstanding that distinction, the Government did not back off and prosecute Dr. Aldissi and Dr. Bogomolova for false statements (18 U.S.C. § 1001). Instead, the Government prosecuted them for wire fraud (*id.* § 1343), aggravated identity theft (*id.* § 1028A), and falsification of records (*id.* § 1519). The questions presented are:

1. Is a mail or wire fraud conviction based on a sufficient property interest when a victim receives the full financial benefit of its bargain but, through material deceptions, is deprived of only its "right to control" how to spend its money or make informed financial decisions, or is that outside the statutes' scope? (A 7-4 split.)

2. When a defendant deceptively seeks or obtains a contract or grant through a set-aside program, should loss and restitution be calculated as its entire amount, or is there an offset for the fair market value of the work performed? (A 3-3 split.)

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

Petitioners, Dr. Mahmoud Aldissi and Dr. Anastassia Bogomolova, were Defendants-Appellants below.

Respondent, United States of America, was Plaintiff-Appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions **Page(s)**

Statutes **Page(s)**

Sentencing Guidelines **Page(s)**

Regulations **Page(s)**

Other Authorities **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Dr. Mahmoud Aldissi and Dr. Anastassia Bogomolova ("the Scientists"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is available at 758 Fed. App'x 694. Its order denying rehearing *en banc* (Pet. App. F) is unpublished.

JURISDICTION

The court of appeals filed its opinion on December 13, 2018. Pet. App. A. After an extension (*id.* B), Petitioners timely filed a petition for rehearing *en banc* and a petition for panel rehearing on January 31, 2019. Eventually, the petition for rehearing *en banc* was docketed on February 12, 2019. *Id.* C-E. On April 1, 2019, the court of appeals denied rehearing *en banc*. *Id.* F. On June 14, 2019, Justice Thomas granted a 60-day extension until August 29, 2019 (18A1302) to file this petition. Petitioners now invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions are set forth at Appendix O to this petition.

STATEMENT

Mail and wire fraud prosecutions are ubiquitous, but often misunderstood. In the procurement context, the prosecutorial recipe tends to be simple: ordinarily, the would-be fraudsters trick victims into parting with money or property, then abscond with the loot. But this case is not ordinary. Here, the Scientists always intended to and did fully perform and deliver their work. The prosecutor expressly declined to

charge or argue a fraudulent performance theory, and the jury was not so instructed and made no such finding on a special verdict form. As such, the evidence and the verdict can be understood only in the context of a fraudulent inducement theory. The question then becomes more esoteric: if the agencies were required to spend their money on these research projects anyways (they were), and if the agencies received the ultimate work product or scientific research for which they had bargained (they did), then of what possible property interest could they have been deprived?

The answer to that question involves the viability of something called the "right to control" theory of mail and wire fraud, which has left the regional courts of appeal in disarray, with all but one taking a side. According to seven circuits, the "right to control" how to spend money or make economic decisions is itself a property interest, the deprivation of which the fraud statutes criminalize. On the other hand, four other circuits have rejected the "right to control" theory as too ethereal.

Relatedly, the courts of appeal (and some district courts) are also split over how to calculate loss and restitution when a defendant deceptively seeks or obtains funding through a set-aside program, yet performs the work. Three circuits calculate loss and restitution as the funding's entire amount, regardless of the fair market value of work delivered. But three other circuits subtract from the loss and restitution calculation an offset for the fair market value of any work performed.

A. The charges

Dr. Aldissi was a world-renowned polymer chemist who obtained more than 25 patents, published more than 100 peer-reviewed articles, earned a Ph.D. equivalent

from the University of Limoges in France, did postdoctoral work on conductive polymers at the University of Pennsylvania, and worked at Los Alamos National Laboratory for a Nobel laureate. Pet. App. I at 3. Similarly, his wife, Dr. Bogomolova, was a highly esteemed molecular biologist who earned her Ph.D. in molecular biology from the Engelhardt Institute of Molecular Biology in Russia. *Id.* Together, the Scientists devoted their careers to researching conductive polymers (*i.e.*, plastics that conduct electricity), which have important military and aeronautical applications. *Id.*

Through their small businesses, the Scientists submitted research proposals for contracts and grants in response to federal agencies' solicitations under the Small Business Innovation Research ("SBIR") and Small Business Technology Transfer ("STTR") initiatives. *See* 15 U.S.C. § 638. Between 1997 and 2011, the Scientists obtained 44 SBIR or STTR contracts or grants collectively worth approximately $10.5 million. Pet. App. A at 2. They had applied for $24,522,386 in total. *Id.* at 30.

As the trial unequivocally showed, the Scientists always intended to and did fully perform the research required by each contract and grant on time and within budget. Pet. App. I at 13. Moreover, the agencies always promptly paid all invoices, accepted the Scientists' deliverables as highly satisfactory, and reported that, even if the agencies were to resolicit proposals for the same research, they would still select the Scientists' proposals. *Id.* Additionally, the Scientists published many of their research projects in peer-reviewed scientific journals. *Id.*

Notwithstanding the Scientists' impressive credentials, accomplishments, and full performance, a grand jury returned a 15-count superseding indictment against

them for one count of conspiracy to commit wire fraud (18 U.S.C. § 1349), seven counts of wire fraud (*id.* § 1343), five counts of aggravated identity theft (*id.* § 1028A), and two counts of falsification of records (*id.* § 1519). Pet. App. H at 1-11. Notably, the original indictment's wire fraud charges had asserted both fraudulent inducement and fraudulent performance theories. *Id.* at 4. But the superseding indictment removed the fraudulent performance theories and asserted fraudulent inducement alone. *Id.* at 5-6 (removing ¶¶ *i*, *k*, and *m* from original indictment).[1] Indeed, that indictment did not even mention commercialization, never mind allege that the Scientists' performance of their work somehow deprived the agencies of it. *Id.* at 1-15.

B. The trial

The 18-day jury trial primarily involved the Scientists' materially deceptive proposals for contracts and grants in response to agencies' SBIR and STTR solicitations and their subsequent federal investigations. *See* Pet. App. A at 3.

1. The SBIR and STTR programs

Eleven federal agencies (the EPA, NASA, NSF, and the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, and Transportation) participate in the SBIR and STTR programs. Pet. App. I at 8. Each year, they award small businesses approximately $2.5 billion.

The SBIR program requires all agencies with budgets over $100 million to set aside 2.9 percent to SBIR research. *Id.* Its purpose is to "stimulate research and

[1] In other words, the prosecutor made a conscious, strategic choice to prosecute only the Scientists' provision of materially deceptive information to fraudulently *induce* each agency to award the contract or grant. He did not, therefore, prosecute them for delivering (or intending to deliver) substandard or fraudulent *performance*.

innovation, to make sure that small businesses have the opportunity to participate in research with federal dollars, to encourage participation by women and those in socially and economically disadvantaged groups, and also to encourage the private sector to piggyback on the federal research and try to commercialize that federal research."[2] *Id.* at 8-9. SBIR awards are made directly to small businesses. *Id.* at 9.

The STTR program is "similar," but instead it governs all agencies with budgets over $1 billion. *Id.* Those agencies must set aside 0.4 percent to STTR research. *Id.* STTR awards are also made directly to small businesses, but unlike SBIR awards, they require partnerships with research institutions. *Id.*

SBIR and STTR awards have three phases. *Id.* Phase 1 involves "initial research on a given topical area to show that agency what [the small business] can do in moving forward through other phases in the program." *Id.* In other words, it is "just sort of scratching the surface." *Id.* When an agency solicits Phase 1 proposals, the process is highly competitive: it may receive many proposals and can make numerous awards. *Id.* Phase 1 awards normally do not exceed $100,000 or $150,000 for 6 months. *Id.* Phase 1 awards are typically on a fixed-price basis. *See id.*

Phase 2 continues the research efforts initiated in Phase 1. *Id.* at 10. Funding depends on results achieved in Phase 1, scientific and technical merit, and

[2] The panel wrongly stated the SBIR and STTR programs' "primary purpose is to stimulate small businesses in the United States to commercialize research and market products." Pet. App. A at 11. The point of the programs is not to *commercialize* previously developed technology, but rather to *innovate* new technology, which may later be commercialized. *See* Pet. App. D at 3-6 (explaining role of commercialization).

commercial potential. *Id.* Only Phase 1 awardees are eligible for Phase 2 awards. *Id.* Phase 2 awards normally do not exceed $1,000,000 for two years' work. *Id.*

Phase 3 involves commercialization. *Id.* The SBIR program does not fund Phase 3 projects. *Id.* None of the Scientists' proposals involved Phase 3. *Id.*

Per 15 U.S.C. § 638 and § 662(5), eligibility for Phase 1 or Phase 2 awards is limited to small business concerns; similarly, regulations require principal investigators to be primarily employed with a small business concern when awarded and while researching the proposed project, and (absent written permission) the research must be performed domestically. *Id.* Phase 1 applicants must honestly disclose detailed descriptions of their physical facilities' availability, location, and instrumentation. *Id.*

Applicants must certify all information in proposals was "true and correct as of the date of this submission" and acknowledge potential administrative, civil, and criminal sanctions, including crimes for which the Scientists were not prosecuted, such as false statement (18 U.S.C. § 1001) or false claims (*id.* § 287). Pet. App. I at 11. These certifications typically did not acknowledge potential criminal exposure for wire fraud. *Id.* The truthfulness of all information in proposals was material. *Id.*

While performing research, awardees had to submit monthly reports to be evaluated by technical monitors and a final voucher. *Id.* "[A]t the end of the day," agencies were "looking to get performance." *Id.*

2. The material deceptions

Taking the facts in the light most favorable to the verdict, each of the Scientists' funded proposals were deceptive in one or more of the following ways: (1) forging

letters of support using cut and paste methods and Photoshop; (2) misrepresenting their access to lab space (including facility and square footage), equipment, and physical address; (3) falsely listing inflated price quotes from consultants and subcontractors they did not intend to use and, in fact, did not use; (4) misrepresenting Dr. Aldissi's eligibility to serve as principal investigator;[3] (5) inflating their companies' number of employees; and (6) mischaracterizing their relationships with research institutions and commercial partners. Pet. App. A at 6. Additionally, these deceptions were material: without them, the agencies would not have funded the Scientists' proposals. *Id.* Instead, the agencies would have funded other scientists. *Id.*

3. The charged fraudulent inducement theory and the uncharged fraudulent performance theory

The prosecutor's strategic decision to charge the Scientists only with fraudulent inducement, not fraudulent performance, had significant ramifications at trial. Based on the superseding indictment, the Scientists had prepared a trial defense that

[3] The panel bizarrely and baselessly asserted the Scientists had admitted "they were not eligible for *any* of the contracts or grants for which they applied." Pet. App. A at 2 (emphasis added). Not so. Rather, they merely admitted the evidence was sufficient for a reasonable jury to conclude each application contained one or more, but not all, categories of materially deceptive misrepresentations. *See id.* I at 12, D (Pet. Panel Reh'g) at 8-9. In reality, under any reasonable construction of the evidence, the Scientists were eligible per 13 C.F.R. §§ 121.701-705 for all the contracts and grants because they operated small businesses that met the eligibility requirements to apply for SBIR and STTR awards. *See id.* I at 49 ("the Scientists' small businesses were certainly 'eligible' to submit proposals in response to solicitations for SBIR and STTR awards"). The only contracts or grants for which the Scientists even theoretically could have been ineligible were those during which Dr. Aldissi was out of the country and employed fulltime elsewhere. *Id.* at 50 ("even if *Maxwell* did criminalize those eligibility misrepresentations, it would apply only to the specific awards and proposals for which Dr. Aldissi was ineligible"); *see also infra* note 21. More specifically, Dr. Aldissi's putative ineligibility could have applied at most only to Count 6.

took their full performance as undisputed. But when the Scientists began presenting their performance defense to the jury through cross-examination, the prosecutor complained to the district judge that the focus on performance was "absurd" because "I said from day one it isn't relevant."[4] Pet. App. K at 3.

But, the Scientists riposted, the prosecutor was trying to belatedly amend or vary the indictment. *See id.* For instance, Dr. Bogomolova complained the prosecutor had sandbagged her at trial: "we should have been put on notice of [fraudulent performance], because we could put on a stream of scientists from all over the planet talking about how everything that they did on every single one of these contracts is absolutely done, it's documented, it's valid science, it's good science, it's cited." *Id.* Later, she explained why the case was about only "fraud in the inducement": "When we read the superseding indictment, what we're talking about are false certifications, these false letters of support, material reliance by the government, and then the awarding of the contracts. There is nothing about performance or anything else." *Id.*

4. The jury instructions, closing arguments, and verdict

At the charge conference, the Scientists again sought to pursue their performance defense by requesting a conjunctive instruction that intent to defraud "is the specific intent to deceive or cheat the United States usually for personal gain *by*

[4] Indeed, the prosecutor had consistently taken that position since the first status conference. Pet. App. K at 3-4 ("I don't think the nature of the science matters at all. It's just a lie to get money."). Moreover, the prosecutor had notice since then that the Scientists would present a performance defense. *Id.* at 4 (Dr. Aldissi's counsel arguing agencies "got everything they bargained for," so this was "not, in like many defense contract cases or fraud cases, where the government bargains for one thing and they get something which is substandard or completely different").

intending to cause a financial loss to the United States." Pet. App. A at 14 (emphasis added). The district court denied that request. *Id.* at 14-15.

Instead, the district court decided to give a disjunctive instruction that "permitted the jury to find specific intent to harm if the Scientists acted for personal gain *or* to harm the United States." *Id.* (emphasis in original). As such, the district court never instructed the jury to determine whether the Scientists' performance was fraudulent, nor did the jury receive any such special verdict form. Pet. App. K at 6.

Consistent with his charging decision, the prosecutor confined his closing to fraudulent inducement, not fraudulent performance. *See* Pet. App. I at 14 ("I was listening to" the prosecutor, but "I never heard him say the word 'performance'").

In his closing, Dr. Aldissi's counsel analogized the case to a roofer who misrepresented his references and use of consultants, but did a great job. Pet. App. I at 18-19. That was not wire fraud "because the job as promised was delivered," the "payment made was for the work done," and "both sides got what they bargained for." *Id.* at 19. Here, the Scientists never intended "to cause damage or to injure" because they delivered as promised, "[n]ot only satisfactory, but beyond satisfactory." *Id.*

Similarly, Dr. Bogomolova's counsel reiterated there was no "grand scheme to cheat and take from the [agencies] property and money without the intent to perform." *Id.* Instead, the "intent was always to perform. They did perform…. They performed on time and within budgets." *Id.*

In rebuttal, the prosecutor argued the jury should ignore the Scientists' performance defense as "irrelevant" because "you never get to performance because they

should never have received the awards." *Id.* He further contended the reliance on a performance defense was "flat out wrong" because "the government did not get what it paid for," such as "eligible" principal investigators. *Id.* Instead, the agencies "paid for consultants and subcontractors and facilities that didn't exist and key personnel who weren't actually involved." *Id.* In making that argument, however, the prosecutor never contended the Scientists had not fully performed their scientific research. *Id.*

Ultimately, a jury found the Scientists guilty of all charges. Pet. App. A at 3.

C. The sentencing

At sentencing, the district court overruled the Scientists' objections to (1) a 22-level enhancement under U.S.S.G. § 2B1.1 for an intended loss of $24,522,386 (which included funded and unfunded proposals) and (2) the amount of restitution. *Id.* I at 7, 26. The guideline range was 324-405 months for wire fraud and record falsification, 24 months consecutive for aggravated identify theft, and 1-3 years of supervised release. *Id.* Varying downward on the prosecutor's recommendation, the district court sentenced Dr. Aldissi to 180 months' imprisonment and Dr. Bogomolova to 156 months' imprisonment; it also ordered both to pay $10,654,969 in restitution. *Id.*

D. The appeal

On appeal, the Scientists acknowledged a reasonable jury could have concluded the Scientists' proposals contained numerous material deceptions. *See supra* Statement B.2. Nevertheless, the Scientists argued the wire fraud's property-deprivation evidence was insufficient, the failure to give the conjunctive wire fraud instruction was an abuse of discretion, the loss calculation was incorrect, and the restitution

award was a windfall. Pet. App. I at 31-51 (fraud), 52-54 (instruction), 60-61 (loss), 63-64 (restitution).

On wire fraud, the Scientists argued that neither the "right to control" theory nor the Eleventh Circuit's prior adoption of it in *United States* v. *Maxwell*, 579 F.3d 1282 (11th Cir. 2009), could provide a sufficient property interest upon which to base the wire fraud convictions. *See* Pet. App. I at 31-48. That was because *Maxwell* and the "right to control" theory were inconsistent with an unbroken line of this Court's precedents and the Rule of Lenity. *See id.* at 33-46. Indeed, the Scientists had argued *Maxwell* had been undermined to the point of abrogation by this Court's decisions, so it either no longer constituted the prior panel precedent or should be reconsidered *en banc*. *See id.* at 50-51.

Relatedly, the Scientists further argued that the disjunctive wire fraud instruction was incorrect because it improperly allowed the jury to convict "based on a finding that the Scientists were acting solely for their own economic benefit rather than with an intent to harm the [federal agencies]." Pet. App. K at 13. In other words, whereas a conjunctive instruction would have required the jury to find intent to harm the federal agencies, the disjunctive instruction "invited the jury to convict the Scientists for engaging in a scheme to deceive rather than a scheme to defraud." *Id.*

The Scientists also argued the district court had miscalculated loss and restitution. For loss, the Scientists argued the total value of the funded and unfunded contracts and grants ($24,522,386) should have been offset by the fair market value of the research they performed or intended to perform. *See* Pet. App. I at 60-61. For

restitution, the Scientists argued the agencies had already received the financial benefit of their bargains, so any additional restitution would either give the agencies a windfall or unconstitutionally punish the Scientists. *See id.* at 63-64.

At oral argument, the Scientists amplified their concern about the Government's belated reliance on fraudulent performance and commercialization theories:

> [It's] sort of like a Marie Antoinette argument where they're on the one hand saying, well, we don't want to have this evidentiary burden of proof ([*i.e.*,] proving beyond a reasonable doubt that [the Scientists] didn't perform [good scientific research]), but we want the benefit of [the court and jury] concluding that they didn't perform, and we also want to deprive the defendants of notice that that's what they must defend at the trial.

Audio of oral argument (Mar. 21, 2018) at 6:59-7:29.

Concluding it was bound by its decision in *Maxwell*, the panel affirmed. Pet. App. A at 10-12 & n.1 (fraud), 13-16 (instruction), 31-38 (loss), 38-39 (restitution). But it did not consider whether *Maxwell*'s holding—which had implicitly decided the "right to control" issue despite citing no supporting authority—contradicted this Court's decisions. *Id.* at 10 n.1. Additionally, in affirming, the panel may not have fully appreciated the significance of the prosecutor's charging decision and the distinction between fraudulent inducement and fraudulent performance. *See id.*

REASONS FOR GRANTING THE PETITION

This petition presents two mature circuit splits that are square (not attenuated), balanced (not lopsided), deep (not shallow), and fresh (not stale). The first involves the "right to control" theory of wire fraud (a 7-4 split), and the second involves calculation of loss and restitution when government funding is deceptively obtained, but work is delivered (a 3-3 split). Certiorari should be granted to consider both splits.

I. A mature 7-4 circuit split exists whether a scheme to deprive a victim of the "right to control" how to spend money or to make informed economic decisions is a sufficient property interest for fraud

Contrary to popular misconception, the fraud statutes do not criminalize every deception transmitted through mail or wires.[5] Rather, they "forbid[] only schemes to *defraud,* not schemes to do other wicked things, *e.g.,* schemes to lie, trick, or otherwise deceive." *United States* v. *Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016) (emphasis in original), *as modified on reh'g*, 838 F.3d 1168, 1170 (11th Cir. 2016) (reversing additional convictions for insufficient evidence despite plausible uncharged theories).

The difference between mere deceit and full-blown fraud "is that deceiving does not always involve harming another person; defrauding does." *Id.* That is, "to *defraud*, one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all." *Id.* at 1312 (emphases in original). As such, if a defendant "merely 'induce[d] [the victim] to enter into [a] transaction' that he otherwise would have avoided," but the victim nevertheless received the benefit of his bargain—*i.e.*, suffered no harm to a monetary or property interest, which is to say a *financial* interest—that would be "'insufficient' to show wire fraud." *Id.* at 1310; *see also id.* at 1313 (discussing hypothetical examples of mere deceit versus full-blown fraud).

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[5] *Cf.* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 (1981) ("when in doubt, charge mail fraud"); Jed S. Rakoff, *The Federal Mail Fraud Statute (pt. 1)*, 18 DUQ. L. REV. 771, 771 (1980) (prosecutor referred to mail fraud as "our Stradivarius, our Colt 45, our Louisville Slugger … and our true love"); Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993) (mail fraud is a prosecutor's "hydrogen bomb[] on stealth aircraft").

A. Seven circuits have adopted the "right to control" theory of fraud, whereas four circuits have rejected it

Despite this rather straightforward distinction between mere deceit and full-blown fraud, a mature 7-4 circuit split has erupted over whether the deprivation of a victim's "right to control" how to spend its money or to make informed economic decisions, considered alone, is a sufficient property interest upon which a fraud conviction—as opposed to a false statement or false claims conviction—can stand.

On one hand, the majority rule of the Second, Fourth, Fifth, Eighth, Tenth, Eleventh, and D.C. Circuits permits "right to control" fraud prosecutions:

- **Second Circuit:** *United States* v. *Binday*, 804 F.3d 558, 570 (2d Cir. 2015) ("a cognizable harm occurs where the defendant's scheme 'den[ies] the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions'"), *cert. denied*, 136 S. Ct. 2487 (2016);

- **Fourth Circuit:** *United States* v. *Gray*, 405 F.3d 227, 234 (4th Cir.) ("the mail fraud and wire fraud statutes cover fraudulent schemes to deprive victims of their rights to control the disposition of their own assets"), *cert. denied*, 546 U.S. 912 (2005);

- **Fifth Circuit:** *United States* v. *Fagan*, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987) ("there is sufficient evidence that the scheme here was one to deprive Texoma of its property rights, *viz*: its control over its money, as it parted with its rental payments on the basis of a false premise"), *cert. denied*, 484 U.S. 1005 (1988);

- **Eighth Circuit:** *United States* v. *Shyres*, 898 F.2d 647, 652 (8th Cir.) ("the right to control spending constitutes a property right"), *cert. denied*, 498 U.S. 821 (1990);

- **Tenth Circuit:** *United States* v. *Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003) ("the intangible right to control one's property is a property interest within the purview of the mail and wire fraud statutes");

- **Eleventh Circuit:** *Maxwell*, 579 F.3d at 1302-03 (implicitly adopting the "right to control" theory because loss involved agencies' right to control to whom they awarded construction contracts, not substandard performance);

- **D.C. Circuit:** *United States* v. *Madeoy*, 912 F.2d 1486, 1492 (D.C. Cir. 1990) ("An FHA insurance commitment, by which the Government promises to pay the lender if the borrower defaults on the loan, is a 'property interest,' not an 'intangible right' under *McNally* and *Carpenter*, because it involves the Government's 'control over how its money [is] spent.'"), *cert. denied*, 498 U.S. 1105 (1991).

In contrast, the minority rule of the Third, Sixth, Seventh, and Ninth Circuits has rejected the "right to control" theory and forbids such fraud prosecutions:[6]

- **Third Circuit:** *United States* v. *Zauber*, 857 F.2d 137, 147 (3d Cir. 1988) (rejecting "right to control" theory because it is "too amorphous to constitute a violation of the mail fraud statute as it is currently written"), *cert. denied*, 489 U.S. 1066 (1989);

- **Sixth Circuit:** *United States* v. *Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (Sutton, J.) (fraud "is 'limited in scope to the protection of *property rights*,' and the ethereal right to accurate information doesn't fit that description," so it cannot "plausibly be said that the right to accurate information amounts to an interest that 'has long been recognized as property'");

- **Seventh Circuit:** *United States* v. *Walters*, 997 F.2d 1219, 1226 n.3 (7th Cir. 1993) (Easterbrook, J.) (reversing fraud conviction against sports agent who signed college athletes while still under scholarship, which was premised in part on a theory that "the universities lost (and Walters gained) the 'right to control' who received the scholarships," because it was "an intangible rights theory once removed—weaker even than the position rejected in [previous cases] because Walters was not the universities' fiduciary");

- **Ninth Circuit:** *United States* v. *Bruchhausen*, 977 F.2d 464, 468 (9th Cir. 1992) ("the manufacturer may have an interest in assuring that its products are not ultimately shipped in violation of law, but that interest in the disposition of goods it no longer owns is not easily characterized as property").

The Eleventh Circuit's decision in *Maxwell*—which predates *Sekhar* and *Skilling* and does not cite *McNally*, *Cleveland*, or *Carpenter* (*see infra* Reasons I.B)—

[6] The First Circuit has not yet weighed in on the "right to control" circuit split, but previously it suggested in dictum that bank fraud is proven when a defendant "depriv[ed] a bank of the right to control its assets by depriving it of the information needed to make discretionary economic decisions." *United States* v. *Kenrick*, 221 F.3d 19, 27 n.5 (1st Cir. 2000), *abrogated by Loughrin* v. *United States*, 573 U.S. 351 (2014).

illustrates some of the problems with the majority rule's adoption of the "right to control" theory. There, the defendant had argued "he did not deprive the County or the United States of money or property, because, in the end, [they] received the electrical work they sought." 579 F.3d at 1302. But *Maxwell* rejected that argument. *Id.* Instead, it held, "financial loss is not at the core of these mail and wire frauds," because "the penal statutes also seek to punish the intent to obtain money or property from a victim by means of fraud and deceit." *Id.*

To buttress that holding—made without citation to any authority—*Maxwell* explained, "[r]egardless of the quality or cost of the work completed," the "money used to pay [the defendant's company] under those contracts was set aside by the County and the national sovereign to pay only [small and disadvantaged] electrical subcontractors that were actually performing commercially useful functions." *Id.* at 1302-03. But one of the defendant's companies was not disadvantaged, and the other performed no commercially useful function. *Id.* at 1303. As such, the defendant's "elaborate scheme" "obtained construction contracts and substantial payments … for which it was not eligible." *Id.* The defendant thus "defrauded both sovereigns" because they "were free to prescribe the rules of this contracting process," whereas he "was not free to dishonestly circumvent the worthy purpose of the set-aside programs." *Id.*

But cases like *Maxwell*, which apply the majority rule, have it backwards. Not only is financial loss at the core of the fraud statutes—it is in fact the *only* thing they address. Indeed, *Maxwell*'s holding and the majority rule contradict a long line of this Court's precedent, including the Rule of Lenity, which originates from the Fifth

Amendment's Due Process Clause. *See* U.S. Const. amend. V. As such, they are on the wrong side of the mature 7-4 circuit split. At bottom, the issue is whether mere procurement *deception*—as opposed to full-blown procurement *fraud*—should be charged as mail or wire fraud (which provides for a 20-year maximum plus two-year aggravated identity theft stacking) or an 18 U.S.C. § 1001 false statement (which is limited to a 5-year maximum without aggravated identity theft stacking).[7]

In this case, applying *Maxwell*, which had implicitly adopted the "right to control" theory, the panel ruled that, because the Scientists should not have obtained SBIR and STTR funding (due to their materially deceptive applications), regardless of the quality of their performance, they deprived the agencies of the end benefit of their bargain: "the chance for eligible small businesses to commercialize their research and bring an actual product or service to the market." Pet. App. A at 12.

Alas, that reliance on the majority rule was wrong, because only the minority rule is faithful to this Court's precedent. It alone acknowledges the limited scope of the fraud statutes. In contrast, the majority rule criminalizes conduct that this Court has repeatedly explained falls outside the scope of the fraud statutes.

It helps to consider the reasoning of what appears to be the earliest case expressly adopting the "right to control" theory (in 1987, just after this Court decided *McNally*), *see Fagan*, 821 F.2d at 1010 n.6, with the reasoning of the most recent

[7] § 1001 already covers mere deception. But fraud is deception *plus* a resulting deprivation of property. *See id.* §§ 1341, 1343. Calling the "right to control" alone a property right would turn any deception (particularly one under § 1001) into fraud. It cannot be that Congress intended to limit § 1001 to deceit communicated in person, whereas doing it by mail or wire deserves four times the sentence, plus stacking.

cases doubling down on it (in 2015), *see Binday*, 804 F.3d at 570, and rejecting it (in 2014), *see Sadler*, 750 F.3d at 591.

Fagan involved fraud convictions arising from a kickback scheme. 821 F.2d at 1005. The defendant owned two companies that leased boats to offshore drilling companies. *Id.* He negotiated a kickback deal wherein he paid an oil executive kickbacks for each boat leased, which got him convicted of wire fraud. *Id.* On appeal, the defendant argued the oil company was not defrauded "because he absorbed the costs of the kickbacks himself, and his leasing rates remained competitive." *Id.* at 1009. But the Fifth Circuit affirmed. *Id.* at 1008-11. In its prior precedent, which had predated this Court's decision in *McNally* by six years (*see infra* Reasons I.B), the Fifth Circuit had held fraud is proven when an employee fails to disclose to his employer "economically material information" that the employee had reason to believe "'would lead a reasonable employer to change its business conduct.'" *Id.* at 1009 (citation omitted). *Fagan* extended that holding beyond employment. *Id.* But a critical part of that extension was *Fagan*'s conclusion that the oil company had suffered collateral economic harm: *i.e.*, had it known of the kickbacks, it could have negotiated a better deal by capturing the amount of the kickback. *Id.* at 1010. Additionally, *Fagan* wrongly asserted, "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value," *id.* at 1010 (citation and punctuation omitted), even though that shibboleth fails to distinguish deceit from fraud. Finally, despite conceding its opinion was prepared "prior to" *McNally*'s issuance, it held that watershed decision did not change the result. *See id.* at 1010 n.6.

Binday involved a factually intricate scheme to conceal that insurance policies would be sold to third-party investors. 804 F.3d at 569-80. Without citing this Court's *McNally* precedents (*see infra* Reasons I.B), the Second Circuit held fast to its "right to control" line of decisions. *Id.* at 570. Indeed, *Binday* claimed there was a "fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes." *Id.* Nevertheless, *Binday* affirmed the fraud convictions and sentences. *Id.* at 601.

Sadler involved a pill mill operator who lied to a pharmaceutical distributor to get opiates, but paid full freight. Vacating, the Sixth Circuit's Judge Sutton correctly held the "right to control" doctrine did not survive this Court's recent *McNally* progeny cases because the fraud statute "is 'limited in scope to the protection of *property rights*,' and the ethereal right to accurate information doesn't fit that description." 750 F.3d at 591 (quoting *McNally*, 483 U.S. at 360). As *Sadler* explained, it cannot "plausibly be said that the right to accurate information amounts to an interest that 'has long been recognized as property.'" *Id.* (quoting *Cleveland*, 531 U.S. at 23).

Fagan, *Binday*, and *Sadler* demonstrate how the "right to control" theory is based on a pre-*McNally* original sin, has evolved to become even more entrenched and unmoored from *McNally* and its progeny's holdings that fraud is confined to property interests, and demonstrates how the courts of appeals desperately need guidance to resolve their inconsistent resolutions over the course of almost three decades.

B. Notwithstanding the 7-4 circuit split, this Court has substantially narrowed the scope of the fraud statutes and the solely financial interests they protect

Since 1987, this Court has repeatedly and substantially narrowed the scope of the fraud statutes and the solely *financial* interests they protect in *McNally* v. *United States*, 483 U.S. 350 (1987), *Carpenter* v. *United States*, 484 U.S. 19 (1987), *Cleveland* v. *United States*, 531 U.S. 12 (2000), *Skilling* v. *United States*, 561 U.S. 358 (2010), and *Sekhar* v. *United States*, 133 S. Ct. 2720 (2013).

McNally reversed wire fraud convictions based on defrauding Kentucky citizens of their intangible right to honest and impartial government. 483 U.S. at 356. In doing so, *McNally* limited the reach of the fraud statutes to "property rights," not "intangible right[s]." *Id.* Nevertheless, *McNally* expressly left open the question whether the right to control spending itself could be a property right. *Id.* at 360. After *McNally*, although the fraud statutes should be "interpreted broadly insofar as property rights are concerned," it is clear they have no "more extensive reach." *Id.* at 356 (citing *Durland* v. *United States*, 161 U.S. 306, 312-13 (1896)).

Carpenter confirmed mere "ethereal" interests, such as a "contractual right" to "honest and faithful service," do not "fall within the protection of" the fraud statutes. 484 U.S. at 25. Nevertheless, in affirming fraud convictions based on a scheme to trade securities on a newspaper's nonpublic, confidential information (*i.e.*, its intellectual property), *Carpenter* made clear the fraud statutes protected property interests whether they were tangible or intangible. *Id.* at 25 ("*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.").

Cleveland held the fraud statutes do not protect a sovereign's regulatory interest to issue licenses, because that interest is not property in the hands of the victim. 531 U.S. at 15 (reversing fraud conviction for materially false statements made in an application for a state license to operate video poker machines). That is, Louisiana's poker machine licenses were not property because it "does not suffice" that "the object of the fraud may become property in the recipient's hands"; rather, "for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Id.* Additionally, the interest in issuing licenses was not a property right because "the State's core concern is *regulatory*." *Id.* at 20 (emphasis in original). Indeed, *Cleveland* rejected an argument that the State's "right to control" the issuance, renewal, and revocation of video poker licenses was a protected property interest. *Id.* at 23-24.

Skilling held a victim's loss of money or property must supply the defendant's gain, with one the mirror image of the other. In response to *McNally*, Congress had enacted § 1346 and redefined a "'scheme or artifice to defraud'" to "include[] a scheme or artifice to deprive another of the intangible right of honest services." *Skilling*, in turn, held § 1346's phrase "honest services" prohibited only "fraudulent schemes to deprive another of honest services through bribes or kickbacks." 561 U.S. at 404. Confined to those "core" applications, § 1346 was not unconstitutionally vague. *Id.* at 409.

Sekhar indicates a victim's deprivation does not qualify as property protected by the fraud statutes unless it was transferable. 133 S. Ct. at 2726 (reversing Hobbs Act convictions because attempt to extort a general counsel to reverse his internal, nonbinding recommendation against investing in a fund was not a protected property

interest). The common-law meaning of obtaining property requires "'not only the deprivation but also the acquisition of property.'" *Id.* at 2725 (citation omitted). "The property extorted must therefore be *transferable*—that is, capable of passing from one person to another." *Id.* (emphasis in original).

In sum, *McNally* says the fraud statutes protect property rights, but not other intangible rights. *Carpenter* says the fraud statutes protect property rights whether they are tangible or intangible. *Cleveland* says the fraud statutes do not protect a regulatory interest to issue licenses, because that is not property in a victim's hands. *Skilling* says a victim's loss of money or property must supply the defendant's gain, with one the mirror image of the other. And *Sekhar* says a victim's deprivation does not qualify as property protected by the fraud statutes unless it was transferable.

C. The majority rule is wrong because the "right to control" spending or make informed economic decisions is not property

This Court should grant certiorari, adopt the minority rule, and reject the majority rule's adoption of the "right to control" theory once and for all. The majority rule is poorly reasoned, incompatible with the *McNally-Carpenter-Cleveland-Skilling-Sekhar* rubric (as discussed in greater depth in Appendix I at 33-41), contrary to the Rule of Lenity, and dangerous to enormous policy and federalism concerns.

1. The majority rule is legally dubious

The agencies' "right to control" spending and make informed economic decisions—to achieve an ethereal end goal of commercializing research via eligible small businesses (Pet. App. A at 12)—falls outside typical property rights, such as rights to possess, exclude, transfer, seek legal or equitable remedies (*e.g.*, actions to eject, for

trespass, for damages, for injunction), and so forth.[8] *See United States* v. *Craft*, 535 U.S. 274, 278-79 (2002) (whether the sticks amongst a "'bundle of sticks'" can "qualify as 'property' for purposes of [a federal statute] is a question of federal law"). For example, agencies cannot: exclude or enjoin researchers from conducting unfunded research because they could still proceed with other funds; prevent such researchers from obtaining intellectual property rights to the fruits of their research; or transfer their "right to control" spending to other sovereigns or private entities, etc.

More specifically, the "right to control" is not tangible property under *McNally*. It does not qualify under *Carpenter* or *Cleveland* because it is not intangible property in the victims' hands (*i.e.*, the agencies). It also is not transferable under *Cleveland* or *Sekhar*. Instead, the "right to control" is merely a regulatory aspect of the agencies' "sovereign right to exclude applicants deemed unsuitable." *Cleveland*, 531 U.S. at 24. Finally, because it would not qualify as honest services fraud under *Skilling* (because it involves neither bribery nor kickbacks), it cannot be repackaged as property fraud.

The "right to control" theory is also incompatible with the Rule of Lenity, *see Rewis* v. *United States,* 401 U.S. 808, 812 (1971), and separation of powers. That is because it impermissibly rewrites the federal fraud statutes, which require *both* a

[8] Indeed, the "right to control" theory seems cut from the same shabby cloth as fraud prosecutions for mere puffery or deceptions unintended to harm victims, which have long been universally forbidden. *E.g.*, *Takhalov*, 827 F.3d at 1313 (mere deceit is not fraud); *United States* v. *Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (mere deceit is not fraud unless it is "coupled with a contemplated harm to the victim" that "affect[s] the very nature of the bargain itself"); *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1179-82 (2d Cir. 1970) ("solicitation of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain" is not fraud).

material misrepresentation, *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013), *and* that the defendant obtain transferable property from the victim, *McNally*, 483 U.S. at 356-57. But if the "right to control" spending or make informed economic decisions were itself property, then establishing the deception element would automatically (and impermissibly) establish the property element as well. That, however, is not the law. *E.g.*, *United States* v. *Novak*, 443 F.3d 150, 159 (2d Cir. 2015) (reversing wire fraud convictions despite material deceptions because "contractors received all they bargained for, and Novak's conduct did not affect an essential element of those bargains"). And that danger would be particularly present here, because *all* representations in the proposals were deemed material.[9] *See supra* Statement B.1.

2. The majority rule implicates enormous policy concerns

Left unchained, the "right to control" theory could allow a parade of horribles to ensue. For example, suppose a partner at a major consulting firm (say, PwC) pitched an $11 billion flat fee to modernize a federal agency's program for delivering

[9] It is critical to understand the materiality and property elements are different. Materiality is a *quantitative* element that considers a specific misrepresentation and weighs its importance to the transaction. *See Neder* v. *United States*, 527 U.S. 1, 20-25 (1999) (fraud requires materiality); *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (materiality is natural tendency to influence decisionmaker's decision). In contrast, the property element is a *qualitative* element that has nothing to do with a specific misrepresentation or its quantitative importance; instead, it considers what precise type of interest (property or something else) was gained by a defendant's overall scheme. *See supra* Reasons I.B (discussing *McNally*, *Carpenter*, *Cleveland*, *Skilling*, and *Sekhar*). In other words, unlike materiality, the property element is a substantive limitation on the fraud statutes' scope and the types of schemes they reach. *See id.* Collapsing the materiality and property elements together would unsettle decades of precedent from this Court and the courts of appeals. *E.g.*, *id.*; *Takhalov*, 827 F.3d at 1310; *Novak*, 443 F.3d at 159; *Starr*, 816 F.2d at 98.

services (say, the Department of Veterans Affairs), but her pitch contained a material misrepresentation about the participation of one of her team members. Or suppose a senior executive at a major military aircraft manufacturer (say, Lockheed Martin) pitched a deal to the Air Force to build 141 of its F-35 jets for the tidy sum of $11.5 billion, but her pitch contained a material misrepresentation about her use of a subcontractor. And suppose further that, although those misrepresentations were material, PwC and Lockheed Martin always intended to and did deliver perfect service. Would the Department of Veterans Affairs or the Air Force be the victim of wire fraud (and, if a court determined the special government benefits rule applied, also be entitled to keep everything delivered along with restitution of the *entire* amount of the contract regardless of the perfect quality of performance, *see infra* Reasons II)?[10]

If the "right to control" theory were viable, the answer would be an unqualified yes, and the only bulwarks guarding such individuals or entities from up to 20 years' imprisonment on mail or wire fraud charges would be prosecutorial discretion and jury nullification. But that provides little comfort. *Cf. McDonnell* v. *United States*, 136 S. Ct. 2355, 2372 (2016) (rejecting government's "expansive interpretation" of honest services fraud because "nearly anything a public official accepts … counts as a *quid*," and "nearly anything a public official does … counts as a *quo*"); *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1926 (2017) (rejecting immigration statute's "proposed

[10] These hypotheticals are inspired by real government contracts or proposals. *See* Mike Stone, *Lockheed agrees to cut price for new F-35 fighter jets: Pentagon*, REUTERS, Sept. 28, 2018; Mohana Ravindranath, *Tech firms vie for $11 billion military healthcare contract as deadline looms*, WASH. POST, Oct. 19, 2014.

limitation" as "a *deus ex machina*—rationalized only by calling it 'necessary,' and serving only to get the Government out of a tight interpretive spot"). Prosecutorial discretion occasionally malfunctions. *E.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1078-91 (2015) (federal fish prosecution); *Bond* v. *United States*, 134 S. Ct. 2077, 2085 (2014) (Chemical Weapons Convention Implementation Act prosecution of jilted wife who attempted to injure her husband's lover by placing household chemicals on a doorknob, a mailbox, and the woman's car door). And there is "'no right'" to jury nullification. *Standefer* v. *United States*, 447 U.S. 10, 22 (1980) (citation omitted).

Relatedly, the "right to control" theory also raises federalism concerns, *see, e.g.*, *Sadler*, 750 F.3d at 591 ("[l]ightly equating deceptions with property deprivation … would occupy a field of criminal jurisdiction long covered by the States"), and creates illogical distortions in government contract law and administrative law.[11]

[11] For instance, under the doctrine of substantial completion, it is highly unlikely the agencies could have proven breach of contract against the Scientists. *See, e.g.*, *Kinetic Builder's Inc.* v. *Peters*, 226 F.3d 1307, 1315-16 (Fed. Cir. 2000). And in any case, the remedy would have been limited to the difference between what was promised and what was delivered. *See id.* But remarkably, the "right to control" theory made it far easier to prosecute the Scientists for wire fraud (and thereby obtain full restitution of all contracts and grants no matter how perfect their work was).

And injecting the "right to control" theory into the extraordinarily complex regulations that govern federal research procurement contracts elevates mere regulatory violations to full-blown fraud. *Cf. Cheek* v. *United States*, 498 U.S. 192, 614 (1991) (Scalia, J., concurring) ("To impose in addition *criminal* penalties for misinterpretation of such a complex body of [tax] law is a startling innovation indeed."). That is particularly alarming when (1) creative investigators and prosecutors often discover regulatory violations long after performance has been successfully delivered, and (2) there are far more suitable criminal charges (such as false statement, 18 U.S.C. § 1001, or false claims, *id.* § 287) and administrative remedies (such as suspension, debarment, and termination of awards) available to correct mere regulatory violations. *E.g.*, 2 C.F.R. § 180.700 (suspension); *id.* § 180.800(b) (debarment).

Finally, the continued viability of the "right to control" theory would portend significant consequences for the asymmetrical balance of power in plea negotiations.[12] *See Maslenjak*, 137 S. Ct. at 1927 (rejecting government's interpretation that "would give prosecutors nearly limitless leverage"). Almost by definition, that asymmetry would be even more pronounced when, as here, the defendants are not Fortune 100 enterprises that rake in billions of dollars each year, but rather are just middle class, small businesses owners. Ultimately, potential exposure to the fraud statutes' enhanced penalties could coerce many defendants—including *innocent* defendants who might be of comparatively limited means—to enter into unfair plea agreements.

D. Applying the minority rule here, there was no scheme to defraud

Under the minority rule, the Scientists would have committed no scheme to defraud. First, the agencies received the financial benefit of their bargains (*i.e.*, scientific research in exchange for money) while losing nothing more than their "right to control" which scientists to fund. Second, neither a belated fraudulent performance theory nor a foiled commercialization theory can rescue the verdict.

1. The agencies received the financial benefit of their bargains while losing only their "right to control" which scientists to fund

Without the "right to control" theory, it becomes clear there was no "scheme to defraud" because the Scientists always intended to and did fully perform (*i.e.*, deliver)

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[12] *See also* Adeel Bashir, *Fish Jokes Aside… Yates Hints at the Court's View of Prosecutorial Discretion*, 30 CRIM. JUST., Fall 2015, at 18, 18-20 (discussing questions various justices asked at recent oral arguments, including *Yates*, *Bond*, and *Maslenjak*, expressing serious concerns about prosecutors' expansive statutory interpretations and their deleterious effect on defendants' plea negotiations).

the research. *See supra* Statement B.3. And the Government never charged or asserted otherwise. *See supra* Statement A, B.3, B.4. That means upon delivery of the Scientists' research, the agencies received the full financial benefit of their bargains; that is, they lost nothing more than their "right to control" which scientists to fund (which is not itself a property interest) and suffered no financial harm (because the deprivation of the SBIR and STTR programs' ethereal end goals are not protected property interests under the *McNally-Carpenter-Cleveland-Skilling-Sekhar* rubric). In sum, the Government failed to prove specific intent to harm or harm itself (*i.e.*, the deprivation of any *property* interest).[13]

Rather, a nonfinancial harm to any ultimate ethereal commercialization goal would be no different from the nonfinancial harm a hypothetical businessman in *Takhalov* would have suffered from being deceived into buying a woman a drink.[14] Notwithstanding his future hopes how the evening might unfold or his reasons for

[13] For instance, the fact that the Scientists manufactured fake subcontractor quotes did not result in any financial harm or specific intent to harm, because the agencies still agreed to pay that contract price on a fixed-price basis and received the full benefit of that bargain. *E.g.*, *Takhalov*, 827 F.3d at 1310. Likewise, the forgeries and misrepresentations about facilities, equipment, employees, and relationships with educational institutions and commercial partners, though material, did not prevent the agencies from receiving the financial benefit of their bargains, because that is not what the superseding indictment charged. And misrepresentations about eligibility (which could have applied only to Count 6) did not cause financial harm. What matters is the final output, not how the contractor gets there. *See supra* Reasons I.C.2; *see also* Pet. App. K at 8 n.3 ("either the work product is good or it is not").

[14] Recently, a concurrence has questioned *Takhalov*'s reasoning and precedential force. *United States* v. *Feldman*, __ F.3d __, 2019 WL 3419304, at *13-20 (11th Cir. July 30, 2019) (William H. Pryor Jr., J., concurring). But, as explained here, it conflates the concept of materiality with the concept of property interests as they pertain to the financial benefit of a bargain. *See id.*

entering into the transaction, because he received his drink and had the opportunity to purchase a drink for the woman, it matters not if that interaction ended before a real relationship blossomed. 827 F.3d at 1313. So too here.

To understand why, it is imperative to understand the agencies were going to spend their money to fund their research solicitations whether or not the Scientists submitted research proposals, because that is precisely what the SBIR and STTR programs required them to do. Pet. App. I at 47. Relatedly, "at the end of the day," agencies were "looking to get performance." *Id.* Finally, the superseding indictment alleged, and the Government conceded at trial, that the only conceivable wire fraud victims were the agencies themselves, not other researchers. *Id.*

Of course, taking the facts in the light most favorable to the verdict, the Scientists' proposals were materially deceptive. Had they absconded with the funds, they surely would have committed fraud. But because they always intended to and did fully perform, they had no specific intent to financially harm and visited no financial harm upon the United States; ultimately, the agencies received the financial benefit of their bargains, which included license-free access to technical data (*i.e.*, intellectual property)—which the agencies *still* possess. *E.g.*, 48 C.F.R. § 52.227-20(d)(1). The government now claims the rights to keep their research, to be reimbursed for every nickel it paid them for exploiting their work, and to imprison them despite never pursuing charges over any supposed qualms about their work's scientific quality.

2. Neither a belated fraudulent performance theory nor a foiled commercialization theory could rescue the verdict

Finally, at least two reasons show why the wire fraud convictions cannot rest on belated bait-and-switch claims of fraudulent performance, not fraudulent inducement, or on speculation that supposedly poor performance deprived the agencies of some almost incalculable chance that other researchers would have commercialized.[15]

First, resting the fraud convictions on fraudulent performance or foiled commercialization grounds would improperly vary or amend the superseding indictment, which had expressly removed all performance charges. *E.g.*, *Russell* v. *United States*, 369 U.S. 749, 770 (1962) ("an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form"); *Stirone* v. *United States*, 361 U.S. 212, 219 (1960) (reversing Hobbs Act conviction because it "might have been" based on evidence of obstructed steel exports, an element of an offense not alleged in the indictment, which unconstitutionally "broadened" the indictment); *accord United States* v. *Miller*, 471 U.S. 130, 139 (1985) (describing *Stirone*). That concern is especially apropos here because nothing—not the charges, not the prosecutor's argument, not the jury instructions, not the verdict form—required the jury to make any finding whatsoever regarding fraudulent performance. *See, e.g.*, *McNally*, 483

[15] Recall that the Scientists had raised precisely those complaints about the prosecutor's belated bait-and-switch theories at trial and on appeal. *See supra* Statement B.3, D. Moreover, SBIR and STTR contracts and grants in Phases 1 and 2 that lead to actual commercialization are rare. *See* National Academies of Sciences, Engineering, and Medicine, *STTR: An Assessment of the Small Business Technology Transfer Program*, https://www.ncbi.nlm.nih.gov/books/NBK338714/ ("the conversion rate to Phase III was 4 percent") (visited Aug. 29, 2019).

U.S. at 360 ("It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance…. Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent."). Yet the verdict cannot now be defended except as improperly based on this uncharged theory. *See Stirone*, 361 U.S. at 219.

Second, an uncharged fraudulent performance theory (about which the prosecutor never argued and the jury was never instructed or required to address by the verdict form) that other researchers would have commercialized would still be "mere speculation and conjecture" that cannot ever support a jury verdict. *E.g.*, *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333, 344 (1933). Indeed, it is doubly speculative here, because the Scientists' contracts were all Phase 1 or Phase 2 (which involve only initial research and exploration of commercial potential), not Phase 3 (which involves actual commercialization). Pet. App. I at 10, K at 9; *see also supra* note 15.

E. This case presents a perfect vehicle to consider the viability of the "right to control" theory

This Court often grants certiorari when, like here, a circuit split is square (not attenuated), balanced (not lopsided), deep (not shallow), and fresh (not stale). *See* Sup. Ct. R. 10 (certiorari may be granted when federal appellate decisions "conflict with" each other "on the same important matter"); EUGENE GRESSMAN & KENNETH S. GELLER, SUPREME COURT PRACTICE 243, 245-49 (9th ed. 2007) ("a square and irreconcilable conflict … *ordinarily* should be enough to secure review, assuming that the underlying question has substantial practical importance" (emphasis in original)). Additionally, when the outcome of a case depends, as here, on "a point expressly

reserved or left undecided in prior Supreme Court opinions," those considerations are amplified. GRESSMAN & GELLER, *supra*, at 253 (collecting authorities).

This case presents a perfect vehicle to decide the "right to control" issue. First, *McNally expressly* left this issue open. 483 U.S. at 360 (jury was not charged to decide whether "the Commonwealth was deprived of control over how its money was spent"). Second, the split is square (not attenuated) because the "right to control" theory's viability has been either implicitly or explicitly determinative in all cases in the split. *See supra* Reasons I.A (collecting cases). Third, the split is deep (not shallow) because all but one of the regional courts of appeal has addressed it, balanced (not lopsided) because it is 7-4, and fresh (not stale) because the oldest case is from 1988, the newest is from 2015, and the issue is obviously recurring. *Id.*; *see also Clay* v. *United States*, 537 U.S. 522, 524 (2003) (granting certiorari to resolve split over "narrow but recurring question"). Fourth, statistics back up this conflict's national importance and recurring nature.[16] Fifth, although this case presents the same "right to control" issue that was recently presented in Paul Clement's petition in *Binday* v. *United States*, No. 15-1140 (S. Ct.), it arrives here in a factually cleaner vehicle.[17]

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[16] In fiscal year 2017, federal prosecutors throughout the nation filed 2,670 white collar prosecutions (the vast majority of which involved various fraud charges) against 3,675 defendants (the majority of whom were found guilty). *See* Department of Justice, *United States Attorneys' Annual Statistics Report Fiscal Year 2017*, p.14, https://www.justice.gov/usao/page/file/1081801/download (visited Aug. 29, 2019).

[17] In *Binday*, the Solicitor General opposed certiorari because, *inter alia*, the verdict was defensible on alternative fact-bound grounds (*i.e.*, because in addition to depriving those defendants of the "right to control" information, those defendants also had caused the victims to suffer an economic loss). *See, e.g.*, U.S. Br. 15-21, *Binday* v. *United States*, No. 15-1140 (S. Ct.). Here, however, due to the prosecutor's charging decision to prosecute only fraudulent inducement, not fraudulent performance, his

Summary

The mature circuit split regarding the "right to control" theory is square (not attenuated), balanced (not lopsided), deep (not shallow), and fresh (not stale). It also addresses a recurring issue of national importance. The "right to control" theory is incompatible with this Court's precedent, and this case presents a perfect vehicle to consider it. Because the Eleventh Circuit applied its prior panel precedent in *Maxwell*, which had implicitly adopted the unsound "right to control" theory, the panel necessarily reached the wrong results with respect to the Scientists' sufficiency and jury instruction arguments. This Court should grant certiorari to consider the viability of the "right to control" theory of fraud once and for all.

II. In procurement deception cases, there is a mature 3-3 circuit split about how to calculate loss and restitution

This Court should also consider the 3-3 circuit split that has erupted about the calculation of loss and restitution: when a defendant deceptively obtains a contract or grant through a set-aside program, is it the entire amount, or does it include an offset for the fair market value of work performed? The holding below misread the loss calculation and restitution guidelines, had significant implications for the Scientists' sentences, and undermined the congressional statutory concerns the guidelines were meant to address.

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failure to argue fraudulent performance, and the absence of a fraudulent-performance instruction or special verdict form, there is no other way to understand the verdict than as based on the "right to control" theory. *See* Pet. App. I at 2-7 (arguing jury verdict's output cannot exceed its inputs). Additionally, it is perhaps notable that certiorari was denied in *Binday* before Justice Gorsuch and Justice Kavanaugh joined this Court.

A. When a defendant deceptively seeks or obtains a contract or grant through a set-aside program, three circuits calculate loss and restitution as its entire amount, but three other circuits include an offset for the fair market value of the work performed

Loss calculation is an enhancement, not a base offense level, that is supposed to measure only the "pecuniary harm" to victims. U.S.S.G. § 2B1.1 cmt. 3(A)(i) (2014). The issue is whether to apply the ordinary loss calculation rule that permit offsets, *id.* cmt. 3(E)(i) (loss "'shall be reduced by ... the fair market value of ... the services rendered ... to the victim before the offense was detected'"), or the special government benefits rule that forbids offsets, *id.* cmt. 3(A), (F)(ii) (loss is "not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses"). Similarly, although "largely the same" as loss, restitution without offsets "confers a windfall." *United States* v. *Cavallo*, 790 F.3d 1202, 1239-40 (11th Cir. 2015).

In dictum, *Maxwell* had adopted the special government benefits rule and forbade offsets, *see* 579 F.3d at 1305-07 (holding loss calculation based on 6% profit was not clear error, but stating in dictum that loss could have been calculated as entire amount of contract), and the panel treated *Maxwell*'s dictum as holding. Nevertheless, in procurement deception cases, a 3-3 circuit split has erupted over this question.

The Fourth, Seventh, and Eleventh Circuits forbid offsets:

- **Fourth Circuit:** *United States* v. *Bros. Constr. Co. of Ohio*, 219 F.3d 300, 317-18 (4th Cir.) (affirming loss calculation of entire sum initially earmarked for disadvantaged business enterprise that did not receive it, even though another disadvantaged business enterprise ultimately performed the work at no additional cost to the government), *cert. denied*, 531 U.S. 1037 (2000);
- **Seventh Circuit:** *United States* v. *Leahy*, 464 F.3d 773, 789-90 (7th Cir. 2006) (loss calculation that allowed offset for work performed was "too low,"

but affirming because government had not cross-appealed), *cert. denied*, 552 U.S. 811 (2007);

- **Eleventh Circuit:** *Maxwell*, 579 F.3d at 1305-07 ("both the CSBE and DBE programs are Government Benefits Programs under § 2B1.1," so "the appropriate amount of loss here should have been the entire value" of the contracts "diverted to the unintended recipient").[18]

But, distinguishing those circuits' opinions as relying on outdated versions of the sentencing guidelines, the Third, Fifth, and Ninth Circuits permit offsets:

- **Third Circuit:** *United States* v. *Nagle*, 803 F.3d 167, 181-83 (3d Cir. 2015) ("regardless of which application note is used, the District Court should calculate the amount of loss under § 2B1.1 by taking the face value of the contracts and subtracting the fair market value of the services rendered under those contracts"), *cert. denied*, 136 S. Ct. 1238 (2016);

- **Fifth Circuit:** *United States* v. *Harris*, 821 F.3d 589, 601-04 (5th Cir. 2016) (rejecting application of special government benefits rule because, *inter alia*, the "difference between the contract price and the fair market value of services rendered properly focuses the loss inquiry on the pecuniary impact on victims," "reflects the contracting agencies' losses under their respective contracts," and "reflects a 'realistic, economic approach'");

- **Ninth Circuit:** *United States* v. *Martin*, 796 F.3d 1101, 1109 (9th Cir. 2015) ("government benefits rule does not apply" when a defendant's construction company "successfully performed the contracts" because the "examples given—loans, grants, and entitlement program payments—confirm that this comment deals with unilateral government assistance, such as food stamps, not a fee-for-service business deal").

Even district courts have entered the fray.[19] This confusion cries out for clarity.

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[18] *But see United States* v. *Near*, 708 Fed. App'x 590, 602-04 (11th Cir. 2017) (government suffered no loss because *Maxwell* applies only when unintended recipient receives funds, not when intended recipient uses funds for unintended purposes).

[19] *Compare United States* v. *Crummy*, 249 F. Supp. 3d 475, 482-87 (D.D.C. 2017) (offsetting loss), *and United States* v. *Evans Landscaping, Inc.*, 2019 WL 3459343, at *2-3 (S.D. Ohio July 31, 2019) (same), *with United States* v. *Singh*, 195 F. Supp. 3d 25, 29-33 (D.D.C. 2016) (not offsetting loss); *see also* GRESSMAN & GELLER, *supra*, at 256-57 (conflict between courts of appeals and district courts does not "alone" justify grant of certiorari, but "tend[s] to reinforce" other bases for review,

B. Whether to include an offset in calculating loss and restitution had significant implications for the Scientists' sentences

The loss and restitution calculations had significant implications here. With offsets, because the Scientists performed the work, the loss and restitution calculations could have been as little as $0 or perhaps the contract price minus the fair market value of research delivered. Alternatively, loss could have been the "reasonably foreseeable administrative costs … of repeating or correcting the procurement action affected, plus any increased costs to procure the … service involved that was reasonably foreseeable," U.S.S.G. § 2B1.1 cmt. 3(A)(v)(II) (2014), or the average profits for these types of contracts (*i.e.*, 6%). *Maxwell*, 579 F.3d at 1305-07 (affirming loss calculated based on 6% profit as not clear error where government did not cross-appeal).

Put in more concrete terms, if loss were $0 (because the Scientists' full performance offset all *financial* harms), the offense level would have decreased 22 levels from 41 to 19, and the sentencing range for the wire fraud and record falsification counts would have been 30-37 months (plus 24 consecutive months for the aggravated identity theft counts). *See* U.S.S.G. §§ 2B1.1(b)(1), 5A (2014). If loss were $639,298.14 (6% profit of funded contracts or grants) or $1,471,343.16 (6% profit of all contracts or grants, whether funded or unfunded), the offense level would have decreased either by 8 levels to 33 or by 6 levels to 35, and the range would have been either 135-168 or 168-210 months (plus 24 consecutive months for the aggravated identity theft counts). *See id.* Indeed, other courts have calculated loss in those alternative ways in

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such as the "widespread importance of the question" and the "confusing and differing judicial responses" to it (collecting authorities)).

procurement and SBIR and STTR cases. *E.g.*, Doc. 238 at 6, *United States* v. *Anghaie*, No. 1:09-cr-37 (N.D. Fla. Nov. 29, 2011) (using "6 percent profit they received from the contract disbursements" as "conservative yet reasonable estimate of the defendants' gain"); *see also infra* note 21 (collecting cases).

In reality, however, loss was calculated at $24,522,386 (which included funded and unfunded proposals). Pet. App. A at 30. Thus, the guideline range was 324-405 months for the wire fraud and record falsification counts, plus 24 consecutive months for the aggravated identity theft counts. *Id.* at 29. In other words, had loss been properly calculated (and setting aside the 24 consecutive months for aggravated identity theft), instead of facing an initial guideline range of 324-405 months, the Scientists could have faced initial ranges of 30-37 months, 135-168 months, or 168-210 months (plus 24 consecutive months). Given its loss calculation, the district court ordered restitution in the identical amount, and the Eleventh Circuit affirmed "for the same reasons" as it affirmed the wire fraud convictions. *Id.* at 39.

C. This case is a perfect vehicle to resolve this split

This case presents a perfect vehicle to resolve this split because the loss calculation and restitution award implicate their respective congressional statutes.[20]

[20] Indeed, the Eleventh Circuit doubled down on its holding in *Maxwell* when it denied rehearing *en banc*. Pet. App. D (Pet. Reh'g *En Banc*) at i, 16-19, F. Also, the varying interpretations of both the loss calculation guideline and the restitution guideline directly implicate their respective statutes. *E.g.*, *Stinson* v. *United States*, 508 U.S. 36, 40 (1993) (granting certiorari where courts of appeals "have taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines"); *United States* v. *Watts*, 519 U.S. 148, 149 (1997) (granting, vacating, and remanding where "the panels' holdings conflict with the clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions"). For

The statute that governs sentencing considerations (and to which the guidelines loss calculation is necessarily subsumed) is 18 U.S.C. § 3553. The "parsimony" or "Goldilocks" principle of § 3553(a)(2), *United States* v. *Irey*, 612 F.3d 1160, 1196-97 (11th Cir. 2010) (*en banc*), commands courts to impose sentences that are "sufficient, but not greater than necessary" to be proportional to the offense and to provide specific and general deterrence, incapacitation, and rehabilitation. Sentencing courts must also consider six other factors. *See id.* § 3553(a)(1)-(7). One of those factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6). The disparity about which subsection (a)(6) is concerned is "nationwide." *United States* v. *Candia*, 454 F.3d 468, 476 (5th Cir. 2006).

For those reasons, it is critical to understand that a loss calculation enhancement in fraud cases can be a "tail which wags the dog" unlike virtually any other sentencing concept. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986). That is, when calculating a fraud offense level, the loss has the potential to be the most important input by far. *E.g.*, *United States* v. *Olis*, 429 F.3d 540, 545 (5th Cir. 2005) ("The most significant determinant of Olis's sentence is the guidelines loss calculation.").

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that reason, the issue presented here is unlike those cases that present nothing more than conflicting interpretations of the sentencing guidelines. *E.g.*, *Braxton* v. *United States*, 500 U.S. 344, 347-49 (1991) ("[w]e choose not to resolve the first question presented in the current case, because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2, and because the specific controversy before us can be decided on other grounds").

Every version of the sentencing manual since 1987 has had some version of U.S.S.G. § 2B1.1's loss calculation enhancement. Originally, in 1987, any loss greater than $5,000,000 would enhance the overall offense calculation by 13 levels. *See* U.S.S.G. § 2B1.1(b)(1)(N) (1987). In 2014, the applicable manual in this appeal, any offense over $400,000,000 would lead to a 30-level enhancement. *Id.* § 2B1.1(b)(1)(P) (2014). The district court, of course, imposed a 22-level enhancement on the Scientists because it calculated loss at more than $20,000,000. *Id.* § 2B1.1(b)(1)(L) (2014).

Here, an offset in loss calculation potentially meant the difference between a 30-37 month guidelines sentence and a 324-405 month guidelines sentence. *See supra* Reasons II.B. Thus, had the Scientists been sentenced in the Third, Fifth, or Ninth Circuits, their guidelines range (*i.e.*, starting point) could have been 90% lower. In other words, the loss calculation split is of national importance and letting it continue to fester would be intolerable because it is directly responsible for national sentencing disparities in fraud cases, contrary to Congress' express directive in § 3553(a)(6).

Relatedly, the Mandatory Victims Restitution Act provides any restitution award "shall" include an offset for "the value (as of the date the property is returned) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1). Here, however, the court of appeals interpreted the restitution guideline, U.S.S.G. § 5E1.1(a)(1) (2014), as not permitting any offset. *See* Pet. App. A at 39. Again, that error is of national importance and contrary to Congress' express directive in § 3663A(b)(1). Permitting it to go on would be intolerable, particularly when it has enormous consequences for those who enter into large contracts. *See supra* Reasons I.C.2.

Summary

A clear 3-3 split has erupted over loss-calculation and restitution offsets for the fair market value of work delivered. The split continues to persist, its existence implicates important national concerns, and this case is a perfect vehicle to address it.[21]

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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[21] It bears emphasis that the Scientists' sentences and restitution award are not only incorrect, but horribly unjust. First, the special government benefits rule (which mentions "grants," but not "contracts") was imposed, even though 90% of the Scientists' funding came from contracts, not grants. Second, in applying *Maxwell*, the lower courts seriously misapprehended the Scientists' SBIR and STTR eligibility. In reality, their companies were always eligible small business enterprises within the meaning of the statutory scheme (*see supra* note 3), and the concealment of Dr. Aldissi's temporary employment with a university in France while briefly on sabbatical was merely a regulatory violation. Third, other eligible researchers who committed similar procurement deceptions received far lighter sentences. *E.g.*, *United States* v. *Ding*, 756 Fed. App'x 126, 129 (3d Cir. 2018) (noting imposition of 366-day sentence, a fine of only $3,000, and restitution of only $72,000 despite $700,000 in total funding "because most of the funds advanced in the grant actually were used to develop the sensor"); *Near*, 708 Fed. App'x at 595, 602-05 (affirming government's appeal of 4-month sentence without restitution where district court had found "government agencies got the full benefit of their bargains" and "could not show any loss").