No. 19-5805

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IN THE SUPREME COURT OF THE UNITED STATES

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MAHMOUD ALDISSI AND ANASTASSIA BOGOMOLOVA, PETITIONERS

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioners committed wire fraud, in violation of 18 U.S.C. 1343, when they schemed to secure millions of dollars in funding by misrepresenting their eligibility for two federal programs.

2. Whether the district court permissibly calculated the loss attributable to petitioners for purposes of their Guidelines calculation and the amount of restitution.

ADDITIONAL PROCEEDINGS BELOW

United States District Court (M.D. Fla.):

United States v. Aldissi, No. 14-cr-217 (Sept. 14, 2015)

United States v. Bogomolova, No. 14-cr-217 (Sept. 14, 2015)

United States Court of Appeals (11th Cir.):

United States v. Aldissi, No. 15-14193 (Dec. 13, 2018)

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is not printed in the Federal Reporter but is reprinted at 758 Fed. Appx. 694.

## JURISDICTION

The judgment of the court of appeals was entered on December 13, 2018. A petition for rehearing was denied on April 1, 2019 (Pet. App. F1). On June 14, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 29, 2019, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349; seven counts of wire fraud, in violation of 18 U.S.C. 1343; five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A; and two counts of falsification of records involving federal investigations, in violation of 18 U.S.C. 1519. Pet. App. A3. The district court sentenced petitioner Aldissi to 180 months of imprisonment, to be followed by three years of supervised release, Aldissi Judgment 2-3, and it sentenced petitioner Bogomolova to 156 months of imprisonment, to be followed by three years of supervised release, Bogomolova Judgment 2-3. Petitioners were also ordered to pay $10,654,969 in restitution. Pet. App. A4. The court of appeals affirmed. Id. at A1-A48.

1. Petitioners are a married couple who schemed to secure millions of dollars from the federal government by submitting materially false research proposals for funding under the Small Business Innovation Research (SBIR) program and Small Business Technology Program (STTR). Pet. App. A2-A3.

Congress established both the SBIR and the STTR programs in order to assist small businesses "with the expense of researching and developing innovative technology 'in order to maintain and

strengthen the competitive free enterprise system and the national economy.'" Pet. App. A4 (quoting 15 U.S.C. 638(a)). The programs do not fund "research merely for the sake of research." Id. at A11. Rather, the "main goal" is "commercialization." Id. at A4. And because the programs seek to "fund eligible proposals of small businesses to bring products to the market," id. at A34, receiving SBIR and STTR funds involves a "highly competitive process" under which research proposals are carefully evaluated for "eligibility" and "scored" for merit. Id. at A5. A small business may not submit a proposal or request a payment without certifying that it is providing true information. Ibid.

Between 1997 and 2011, petitioners applied for over $24 million in SBIR and STTR contracts and grants. Pet. App. A2. It is uncontested that their proposals were materially false in multiple ways. Id. at A6. Petitioners "lied about their facilities, equipment, subcontractors, employees, and eligibility; forged endorsements from respected scientists and industry specialists; and thereafter submitted falsified business records to officials investigating the fraud." Id. at A2; see id. at A6.

For example, in August 2009, Aldissi submitted a proposal to the National Aeronautics and Space Administration (NASA) for a project involving a system for generating potable water in space. Pet. App. J21 (Gov't. C.A. Br. 9). Aldissi designated himself as the primary investigator and listed Bogomolova as the senior staff scientist. Ibid. He claimed to have assembled a team including

professors from Louisiana State University and the University of Florida and a staff of four full-time employees. Ibid. He also claimed to have a "fully equipped 2500-square-foot laboratory," and additional access to lab space at the University of South Florida and at the universities of his team members. Ibid. (citations omitted). And he attached letters and an email from experts praising the project and agreeing to assist with research and commercialization. Id. at J21-J22 (Gov't. C.A. Br. 9-10).

On the basis of those assertions and testimonials, NASA awarded petitioners $99,999. Pet. App. J24 (Gov't. C.A. Br. 12). But all of the assertions were lies: Aldissi was ineligible to serve as a principal investigator; petitioners had no support from the named professors; and they had no full-time staff. Id. at J22-J24 (Gov't. C.A. Br. 10-12). They also had no access to a 2500-square-foot-laboratory. Id. at J22 (Gov't. C.A. Br. 10). The address Aldissi provided for the laboratory was for his home, which contained no laboratory at all. Ibid. Nor did petitioners have the ability to use laboratory space at Lousiana State University or the other schools. Id. at J22-J23 (Gov't. C.A. Br. 10-11). And the letters and emails of support from experts were forgeries. Id. at J22 (Gov't C.A. Br. 10).

Petitioners submitted numerous other fraudulent proposals, many of which were similarly successful in inducing government agencies to fund proposals that they otherwise "would not have funded." Pet. App. A6. In total, Aldissi and Bogomolova defrauded

government agencies out of $10,654,969 that were "earmarked for small businesses." Id. at A38. And when investigators contacted Bogomolova to request information and documents concerning some of the awards, Bogomolova attempted to cover the fraud through a fake joint venture agreement, fabricated time sheets, and a falsified letter describing fictional laboratory access. Id. at J32-J34 (Gov't. C.A. Br. 20-22).

2. A federal grand jury in the Middle District of Florida returned a superseding indictment charging petitioners with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349; seven counts of wire fraud, in violation of 18 U.S.C. 1343; five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A; and two counts of falsification of records involving federal investigations, in violation of 18 U.S.C. 1519. Pet. App. H1-H11 (Superseding Indictment 1-11).

At trial, the government presented evidence that petitioners acknowledge was sufficient to establish that they submitted proposals for government funding that contained "material" falsehoods. Pet. App. A6; see Pet. 7-8. That is, "without [the deceptions], the agencies would not have funded [petitioners'] proposals." Pet. App. A6. Petitioners' primary defense was that their conduct should not qualify as fraud because they actually performed research and submitted results that were accepted by the agencies and published by scientific journals. See, e.g., 2/27/15 Tr. 125-126, 219-222. The government's evidence established,

however, that the research was not undertaken with the professors, staff, or facilities petitioners had described in their proposals, see Pet. App. A2, and in fact may sometimes have been performed in the bathroom of petitioners' home, id. at J43 (Gov't. C.A. Br. 31).

The jury found petitioners guilty on all counts. Aldissi Judgment 1; Bogomolova Judgment 1. The district court sentenced Aldissi to 180 months of imprisonment, to be followed by three years of supervised release, Aldissi Judgment 2-3, and it sentenced Bogomolova to 156 months of imprisonment, to be followed by three years of supervised release, Bogomolova Judgment 2-3. Petitioners were also ordered to pay $10,654,969 in restitution. Pet. App. A4.

The district court calculated petitioners' Sentencing Guidelines ranges based on a $24.5 million intended loss, which included both the $10.6 million in awards petitioners had received and the nearly $14 million in additional funds they unsuccessfully sought. Pet. App. A30-A31. The court also determined that restitution in the amount of $10.6 million was appropriate, rejecting petitioners' argument that no quantifiable loss existed because they performed the research. Id. at A30-A32.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A48.

As relevant here, the court of appeals rejected petitioners' argument that the evidence was insufficient to convict them of

wire fraud or wire-fraud conspiracy. Pet. App. A7-A13. The court found the premise of that argument -- the assertion that "the government received exactly what it paid for" because petitioners "performed (or, more precisely, contend they performed)" scientific research -- to be "without merit." Id. at A10. The court explained that the government was not "fund[ing] research merely for the sake of research," but that the funding was instead designed "to stimulate small businesses in the United States to commercialize research and market products." Id. at A11. The court accordingly determined that petitioners' false statements "deprived the United States not only of the money that should have been awarded to other researchers, but also of what it was actually paying for -- the chance for eligible small businesses to commercialize their research and bring an actual product or service to the market." Id. at A12. And the court also determined that the jury instructions had adequately focused the jury on that theory of fraud, observing that the jury was instructed that a "scheme to defraud includes any plan or course of action intended to deceive or cheat the United States out of money or property by using false or fraudulent pretenses, representations, or promises." Id. at A15 n.3 (emphasis added; citation omitted). Further, petitioners had not argued that any instruction "actually given * * * was an incorrect statement of the law." Id. at A16.

The court of appeals also rejected petitioners' challenges to the loss amount calculated at sentencing. The court found no clear

error in the Probation Office's calculation of an intended loss amount of $24,522,386 for purposes of the advisory Sentencing Guidelines, which included both funded and unfunded falsified proposals, observing that the loss calculation includes intended loss, see Sentencing Guidelines § 2B1.1, comment. (n.3(A))(2014). Pet. App. A31-A38. And it found no clear error in the $10.6 million restitution, explaining that petitioners' objection that "the agencies received the benefit of their bargain" "fail[ed] for the same reasons as the arguments on the sufficiency of the wire fraud convictions and the calculation of the loss," and emphasizing that the government "did not get what it bargained for." Id. at A39.

ARGUMENT

Petitioners contend that (1) insufficient evidence supports their wire-fraud convictions (Pet. 13-33) and (2) the loss calculation for purposes of sentencing should have been offset for the fair market value of the work petitioners performed (Pet. 33-40). The court of appeals correctly rejected those arguments; its decision does not conflict with any decision of this Court, and neither question presents a circuit conflict that warrants this Court's review.

1. Petitioners first contend (Pet. 13-33) that the court of appeals erred in upholding their wire-fraud convictions under a "right to control" property theory. But petitioners were not

convicted under a "right to control" theory, and their objections to such a theory are accordingly misplaced.

a. The wire-fraud statute prohibits using an interstate wire communication in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343. Petitioners assert (Pet. 1-2; 16-17; 27-29) that their convictions for violating and conspiring to violate that prohibition rest solely on a theory that they deprived the government of its "right to control" money or property, and that no actual money or property fraud occurred. That assertion is incorrect.

This case does not involve any "right to control" theory. That phrase appears nowhere in the indictment, the jury instructions, or the court of appeals' opinion. That is because the object of petitioners' scheme was money, not a "right to control." The indictment charged petitioners with participating in a scheme to defraud federal agencies by obtaining money by means of false or fraudulent pretenses. Pet. App. H7 (Superseding Indictment 7). The jury received a standard fraud instruction that a "'scheme to defraud' includes any plan or course of action intended to deceive or cheat the United States out of money or property by using false or fraudulent pretenses, representations, or promises" and that "the 'intent to defraud' is the specific intent to deceive or cheat the United States, usually for personal

financial gain or to cause financial loss to the United States." D. Ct. Doc. 269, at 14-15 (Mar. 20, 2015)(emphasis added). And the court of appeals found that the convictions should be upheld because petitioners' "deceptions deprived the United States" of both the "money that should have been awarded to other researchers" and "what it was actually paying for -- the chance for eligible small businesses to commercialize their research and bring" the product of their research to market. Pet. App. A12.

Petitioners nonetheless assert (Pet. 17; 27-28 & n.13) that their convictions cannot have been based on a scheme to defraud the government of money because they performed research in exchange for the funds they fraudulently obtained. They suggest (ibid.) that their performance shows that they did not inflict -- and never intended to inflict -- a "financial loss" on the government. And they further suggest (ibid.) that "financial loss" or "intended financial loss" is necessary for any fraud conviction. Petitioners are mistaken for at least two reasons.

First, petitioners err in asserting that they cannot be convicted of fraud if they did not intend to inflict a financial loss on the United States. The fraud statutes proscribe schemes for "obtaining money or property" through deceit. 18 U.S.C. 1343. They do not additionally require a "financial loss" or "intended financial loss" by the victim. This Court has explained that the common law requirement of "'damages' plainly ha[s] no place in the federal fraud statutes" because those statutes "prohibit[] the

'scheme to defraud' rather than the completed fraud." Neder v. United States, 527 U.S. 1, 25 (1999). And this Court's decision in Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008), confirms that the fraud statutes cover schemes like this one, where fraudsters use deceit to obtain money or property for which they are otherwise ineligible. In Bridge, the Court held that a false representation to secure an extra bid in a county's property tax lien auction was an "act which is indictable as mail fraud," id. at 648 (internal quotation marks omitted), even though petitioners paid for the liens they obtained, id. at 644, and even though it was likely that only the disappointed bidders -- and not the deceived county itself -- suffered a loss from the scheme, id. at 658. The conduct here -- lying about eligibility to obtain money or property that others validly seek -- is closely analogous.

Second, even if the fraud statutes did impose an unwritten loss requirement, the court of appeals held that petitioners did inflict a loss on the United States. Pet. App. A12, A37-A38. Petitioners "denied" the United States the "benefit of [its] bargain" by depriving federal agencies of the ability to "award money to eligible deserving small businesses that could realistically bring a product to commercialization." Id. at A37. The government was paying for more than simply research; the SBIR and STTR programs did not "fund research merely for the sake of research." Id. at A11. And even if research was all that the government wanted, petitioners did not perform the research they

promised: They "lied about" the "facilities, equipment" and personnel their research involved. Id. at A2.

b. Because petitioners were convicted for engaging in a scheme to defraud the government of its money, they are wrong to assert (Pet. 14-15) that this case implicates an alleged conflict regarding a "right to control" theory. Other circuits have rejected attempts "to squeeze" similar schemes into a category that might implicate that theory, recognizing that schemes to defraud the government of money under analogous programs should be affirmed as garden variety fraud. United States v. Leahy, 464 F.3d 773, 787 (7th Cir. 2006), cert denied, 552 U.S. 811 (2007); see also, e.g., United States v. Brothers Constr. Co. of Ohio, Inc., 219 F.3d 300, 312-313 (4th Cir.), cert. denied 537 U.S. 1037 (2000). Indeed, petitioners do not point to any circuits that have reversed a fraud conviction predicated on a scheme to defraud the government of funding for which the defendant is unqualified or ineligible.

Moreover, even accepting petitioners' erroneous claim that they were convicted for depriving the government of the intangible "right to control" how its money is spent, petitioners have not pointed to any circuits that foreclose fraud convictions under that theory. They cite decades-old precedents from the Third and Seventh Circuits that allegedly do so. See Pet. 15 (citing United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), cert. denied, 489 U.S. 1066 (1989), and United States v. Walters, 997 F.2d 1219

(7th Cir. 1993)). But the Third Circuit's more recent cases have explained that Zauber did not "categorically reject[] the contention that the 'right to control' one's property is itself a property interest." United States v. Al Hedaithy, 392 F.3d 580, 601 (2004), cert. denied, 544 U.S. 978 (2005); see id. at 603. And Seventh Circuit cases post-dating Walters have explicitly recognized a "right to control" theory. See, e.g., Sorich v. United States, 709 F.3d 670, 675-676 (2013), cert. denied, 571 U.S. 1131 (2014).

Petitioners also assert that the Sixth and Ninth Circuits have rejected the "right to control" theory. Pet. 15 (citing United States v. Sadler, 750 F.3d 585 (6th Cir. 2014), and United States v. Bruchhausen, 977 F.2d 464 (9th Cir. 1992)). But the cases they cite involve customers who lied to sellers about what they planned to do with the products they purchased. Sadler, 750 F.3d at 590-591 (false assurances that opiate purchases would be used for low income patients); Bruchhausen, 977 F.2d at 466-468 (false assurances that purchased equipment would not be sent to the Soviet Bloc). The Sixth and Ninth Circuits have held that such deception does not constitute fraud because a seller has no "property" interest in "accurate information" about the intended use of its products, Sadler, 750 F.3d at 591 (citation omitted), or "in the disposition of goods it no longer owns," Bruchhausen, 977 F.2d at 468. Those holdings do not suggest that a scheme like

petitioners' scheme here, which involved eligibility for a federal funding program, is nonfraudulent.

Nor do the Sixth and Ninth Circuit precedents otherwise conflict with the decision below. Both courts emphasized that the sellers in those cases received "full price" for their goods. Sadler, 750 F.3d at 590; see Bruchhausen, 977 F.2d at 467. Here, in contrast, the United States did not receive what it "was actually paying for." Pet. App. A12. Indeed, the Ninth Circuit has affirmed convictions for wire fraud on facts comparable to those presented here, where the defendant's "lies were material to the government's decision to admit her for participation" in a funding program for which she was not qualified. United States v. Martin, 612 Fed. Appx 449, 450 (2015); see United States v. Martin, 796 F.3d 1101, 1103 & n.1 (2015) (concurrently filed opinion further describing facts).

2. Petitioners separately contend (Pet. 2; 33-40) that certiorari is warranted to review the district court's calculation of loss and restitution. They contend that when a defendant deceptively seeks or obtains funding through a set-aside program "yet performs the work," Pet. 2, three circuits calculate loss and restitution as the entire amount of the funding, while three other circuits subtract the fair market value of any work performed. Petitioners' sentencing-related challenges do not warrant this Court's review

a. In petitioners' case, the court of appeals determined that the district court did not commit any clear error in calculating the loss amount under the Sentencing Guidelines as the total amount of grant money obtained by petitioners, plus the grant money they intended to receive through other fraudulent applications that were not funded. Pet. App. A34-A38. The court of appeals reasoned that the calculation was consistent with the Guidelines' statement that, for cases involving "government benefits" programs, the loss must be "not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses." Sentencing Guidelines §2B1.1 comment. (n.3(F)(ii))(2014); see Pet. App. A33-A34.

Petitioners cite (Pet. 34-45) cases in which other courts of appeals have concluded that government contracts awarded through an affirmative action program are not "government benefits" for purposes of the Guidelines commentary. Pet. 35 (citing United States v. Harris, 821 F.3d 589, 603-604 (5th Cir. 2016), and Martin, 796 F.3d at 1109). And they cite (ibid.) a Third Circuit case in which the court determined that the loss calculation should include an offset for the fair market value of the services rendered. See United States v. Nagle, 803 F.3d 167, 181-183 (2015) (relying on Application Note 3(E)(i), which states that "[l]oss shall be reduced by * * * the fair market value of the property returned and the services rendered, by the defendant * * * to

the victim before the offense was detected"), cert. denied 136 S. Ct. 1238 (2016).

Any division of authority on that Guidelines-application issue, however, does not warrant this Court's review. This Court typically leaves issues of Guidelines application to the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts, and * * * mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991); see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."); Buford v. United States, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity is necessary, the Commission can provide it."). Because the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error in their interpretation, this Court ordinarily will not review decisions interpreting and applying the Guidelines. See Braxton, 500 U.S. at 347-349. Petitioners offer no reason to depart from that longstanding practice here.

Moreover, petitioners contend (Pet. 36-37) that a correct application of the Guidelines would have changed their advisory Guidelines range from 324-405 months for wire fraud to either 30-37 months for wire fraud if the government's loss was zero

dollars, 135-168 months if the government's loss had been calculated as a standard six percent profit on funded contracts, or 168-210 months if the government's loss had been calculated as a standard six percent profit on funded and non-funded contracts. But petitioners already received sentences significantly below their Guidelines range. Aldissi received 156 months for the wire-fraud counts; and Bogomolova received 132 months for the wire-fraud counts. Aldissi Judgment 2; Bogomolova Judgment 2. Accordingly, each of them already received a sentence for their wire-fraud convictions that was within or below the Guidelines range for a loss calculation based on a standard six percent profit for the contracts that were actually funded.

b. With respect to restitution, petitioners incorrectly contend (Pet. 37) that "the district court ordered restitution in the identical amount" to its loss calculation. The district court in fact ordered restitution in the amount of $10,654,969, which reflected only the money that petitioners actually obtained from the government under their fraudulent scheme. Pet. App. A38-A39. The court of appeals determined that the amount received by petitioners was a proper amount of restitution because they were ineligible to receive that money. Id. at A39. Although petitioners fold the restitution order into their argument on loss calculation under the Guidelines, they identify neither any independent error in the restitution award nor any decision of another circuit that would require a different amount of

restitution on the facts of this case. As petitioners note (Pet. 39), the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, provides that a restitution order that requires the return of property should include an offset for "the value * * * of any part of the property that is returned." 18 U.S.C. 3663A(b)(1)(B)(ii). But petitioners did not return any portion of the grant money they received. Petitioners' challenge to the specific amount of restitution ordered on the facts of this case does not warrant review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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