No. 19-5805

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. The Court should grant certiorari to consider the "right to control" theory of fraud

The Government spends precious little time addressing the 7-4 circuit split over the "right to control" theory of fraud. *See* U.S. Br. 12-14. Instead, it attempts to dodge that question, which it contends is "misplaced" in this case because the Scientists supposedly were not convicted under a "right to control" theory. U.S. Br. 8-9. Put otherwise, the Government contends it properly prosecuted the Scientists under a theory of "garden variety fraud." U.S. Br. 12.

The Government's perspective, however, reflects serious confusion about the consequences of the prosecutor's strategic charging decision before the grand jury, its impact on the meaning of the petit jury's verdict, and the basis for the Eleventh Circuit's affirmance. Properly understood, the only reasonable way to interpret the grand jury's indictment, the petit jury's verdict, and the Eleventh Circuit's affirmance is as reflecting a "right to control" prosecution; indeed, that is the *Maxwell* theory on which the Eleventh Circuit affirmed. *See infra* Argument I.A. Additionally, the Government does not seriously dispute that the "right to control" theory has the lower courts in disarray (*see infra* Argument I.B), does not defend the "right to control" theory as anything other than a legally dubious prosecutorial end-run of *McNally* and its progeny (*see infra id.* I.C), and does not mention the numerous other "right to control" petitions that are pending before this Court (*see infra id.* I.D).

As to sentencing, the Government makes a *Braxton* argument without mentioning that the Sentencing Commission has *already* spoken to rectify the issue, yet courts (including the courts below) have failed to heed its guidance. *See infra id.* II.

A. This was a "right to control" prosecution

From its inception, this was a "right to control" prosecution. In the superseding indictment, the Government never asked the grand jury or the petit jury to determine whether the Scientists defrauded it of a property interest by performing or intending to perform substandard scientific research.[1] *See* Pet. 4 & n.1. Instead, the Government merely asked the grand jury and the petit jury to determine an antecedent question whether, in order to obtain funding to perform that research, the Scientists made material misrepresentations. *See* Pet. 4 & n.1.

That is, throughout the prosecution—including during preliminary hearings, the opening statements, the evidence at trial, the jury instructions, the closing arguments, and the verdict form—the prosecutor made clear that his case had nothing to do with the scientific performance. *See* Pet. 7-10. For instance, during his closing, the prosecutor told the jury that performance was "irrelevant" because ""you *never get to performance*"' because they "'should never have received the awards.'" Pet. 9-10

[1] Indeed, although the Government now contends it was deprived of commercialization, the superseding indictment never mentioned commercialization or alleged the Scientists' performance somehow deprived the agencies of it. Pet. App. H at 1-15; *see also Stirone* v. *United States*, 361 U.S. 212, 219 (1960) (reversing conviction that "might have been" based on evidence of uncharged offense). Moreover, a commercialization theory is impermissibly speculative because the projects were all Phase 1 or Phase 2 (which involve only initial research and exploration of commercial potential), not Phase 3 (which involves actual commercialization). *See* Pet. 31.

(emphasis added). At no time, however, did the prosecutor tell the jury that the performance delivered was substandard. *See* Pet. 10.

And that was for good reason, because it was unlikely he would have been able to prove such a "substandard performance" case. Indeed, the Scientists' research from their SBIR and STTR funded projects continues to be cited extensively—perhaps even by government researchers or agencies—with Dr. Aldissi being cited 2,403 times, and Dr. Bogomolova being cited 680 times. And, had they been forced to defend such a performance case, the Scientists could have "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."[2] Pet. App. K at 3.

On appeal in the Eleventh Circuit, the Government again defended the conviction by citing *United States* v. *Maxwell*, 579 F.3d 1282 (11th Cir. 2009), and it was in express reliance on *Maxwell* that the convictions were affirmed. *See* Pet. 10-12. But, as the petition explained at length (*see* Pet. 14-17), *Maxwell* is a "right to control" case. That is because, without citation to any authority, *Maxwell*—like other "right

[2] Although the Scientists performed the research without the staff and facilities described in their proposals and perhaps in a bathroom (*see* U.S. Br. 6), no lay or expert witness testified that those facts rendered their research scientifically invalid. For example, one of the most famous—and scientifically valid—*nuclear* experiments was performed not in a laboratory, but in a squash court. *See* Alex Wellerstein, *Remembering the Chicago Pile, the World's First Nuclear Reactor*, THE NEW YORKER, Dec. 2, 2017 (describing construction of world's first nuclear reactor during World War II as part of the Manhattan Project). But nobody would contend the performance of the Chicago Pile experiment on a squash court rendered it scientifically invalid.

to control" cases—purported to divorce the property fraud statutes from the necessary property element when it held "financial loss is not at the[ir] core." 579 F.3d at 1302.

In this Court, the Government does not consider whether *Maxwell* was a "right to control" case; indeed, the Government does not even cite *Maxwell* at all. Instead, the Government explains any reliance on such a theory was unnecessary to obtain convictions because the object of the scheme was money. U.S. Br. 9.

This argument, however, once again reflects serious confusion about how the property fraud statutes work. It simply is not property fraud to deceive someone into entering into a transaction and then to deliver what was ultimately promised. The property fraud statutes "do[] not enact as federal law the Ninth Commandment given to Moses on Sinai." *United States* v. *Takhalov*, 827 F.3d 1307 (11th Cir. 2016), *as modified on reh'g*, 838 F.3d 1168 (11th Cir. 2016). Rather, they distinguish between mere deceit and full-blown fraud. *See* Pet. 13. Mere deceit, which the property fraud statutes do not criminalize, is when a supposed victim is deceived to enter into a transaction, yet ultimately receives the financial benefit of the bargain struck (*i.e.*, the goods or services promised). *See id.* Full-blown fraud, which the property fraud statutes do criminalize, is when a victim is deceived to enter into a transaction, but ultimately does not receive the financial benefit of the bargain struck. *See id.*

Here, the Scientists deceived the agencies to award funding to perform scientific research, and the Scientists then delivered high quality scientific research. Ultimately, as appears to be the similar flaw exposed in the Government's theory during oral argument in *Kelly* v. *United States*, No. 18-1059 (S.Ct.), there is a significant

mismatch between what the Government needed to prove (harm to a money or property interest) and what the grand and petit juries actually found (mere deception without such harm). As Justice Alito put it during the *Kelly* argument, "I've never seen a criminal case where we're asked to defer to a jury's finding on something that the jury didn't find." Tr. of Oral Arg. at 43-44; *see also id.* at 30 ("nothing … in the jury instructions suggested that it would be a defense").

As a fallback position in retreat, the Government then repeatedly contends the question concerns the Scientists' regulatory eligibility and performance. U.S. Br. 11-12. This, however, misstates the law and is misdirection from the issues actually decided by the petit jury's verdict. *See supra.*

First of all, by the time the case arrived on appeal, it was too late for the Government to perform its bait-and-switch gambit as to performance. In that regard, it is critical to understand the distinction between evidence sufficient to support a petit jury's verdict and the findings a petit jury necessarily made. *See United States* v. *Feldman*, 936 F.3d 1288, 1322 (11th Cir. 2019) (distinguishing evidence from jury findings and concluding that "because we cannot determine which of the two findings the special verdict reflects, the jury's verdict does not constitute the necessary finding that but for ingestion of a Schedule II substance, the victim would have lived"). The grand jury never charged substandard performance, so by definition the petit jury could not have found substandard performance. *See supra* note 2.

At any rate, the Government cites *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), for the proposition that financial harm is not a requirement of

the property fraud statutes. U.S. Br. 11. This reliance on *Bridge* is misplaced. *Bridge* was a civil RICO case, not a criminal property fraud case, in which one bidder (not a sovereign) sued another competitor. It arose from the reversal of the grant of a bidder's motion to dismiss (the purported victim), not from the grant of a motion to dismiss by the county (a mere third party), and the issue was whether first-party reliance was an element of a RICO claim. *Id.* at 646.

In contrast, this case involves a situation where the roles of competitors and sovereign are reversed. Here, during the charge conference, the prosecutor *expressly conceded* while discussing the fraud instructions that other scientists were not the fraud victims of the Scientists deceptive proposals. Specifically, he stated, "I would acquiesce to changing the word 'someone' to 'government.'" *See* Doc. 378.15 at 68. As such, the jury instructions indicated the only potential victims of the purported fraud were the federal agencies themselves. Doc. 269 at 14-15 (using phrase "United States" to describe the victim instead of open-ended word "someone"). As such, it is clear that the only fraud victim found by the jury was the Government itself, not other researchers. *See Feldman*, 936 F.3d at 1322.

Additionally, as to eligibility, there are two further obvious responses. First, it cannot seriously be disputed that the Scientists were statutorily eligible to submit proposals, because they were scientifically qualified owners of domestic small business concerns. *See* Pet. 7 n.3. Although there was evidence their performance did not track some of the regulatory requirements, such as performing some work abroad or while employed elsewhere, those regulatory violations and breaches do not constitute

property fraud (particularly when there are administrative solutions available, such as suspension, debarment, and termination, to remedy them). *See* Pet. 26 n.11.

Second, even if the Scientists were properly deemed ineligible, that determination still would ask and answer the wrong question. Eligibility has nothing to do with financial harm to the victim; the real question is whether the Scientists intended to deliver and did deliver what they promised to deliver. In other words, proof of ineligibility would merely establish deceit, not financial harm. *See Takhalov*, 827 F.3d at 1314 ("if a defendant lies about something else—*e.g.*, if he says that he is the long-lost cousin of a prospective buyer—then he has not lied about the nature of the bargain, has not 'schemed to defraud,' and cannot be convicted of wire fraud on the basis of that lie alone").[3]

As a fallback position from its misguided reliance on regulatory eligibility (when there is no question the Scientists were statutorily eligible), the Government next contends that the convictions can still be defended due to supposed lack of performance. U.S. Br. 11-12. Putting aside that a breach of contract cannot constitute fraud, in this case, the Government never asked the grand jury or petit jury to make such findings. *See supra*. Such findings therefore cannot be considered to be part of the verdict. *See supra*.

[3] Indeed, the issue of "eligibility" in this case seems closely related to the issue of "authority" in *Kelly*. *See* Tr. of Oral Arg. at 29 ("in this Court, the government is saying, actually, it turns out the hinge between guilt and innocence is whether or not he was authorized and we get the benefit of a sufficiency of the evidence deferential review, even though we told the district court that this issue didn't matter at all").

In short, no matter what machinations or magic words the prosecutors and courts used below, the only way to understand this prosecution properly is as a classic "right to control" prosecution. Specifically, the Government brought this prosecution not because the Scientists intended to abscond with the funds without delivering first rate scientific research, and not because their scientific research actually delivered was substandard. Rather, the Government brought this prosecution because, had the Scientists' proposals been truthful, it would have chosen other scientists to perform the same research. In other words, the Government's ultimate complaint is nothing more than that it lost the "right to control" how to spend its money, which is really just a fancy way of saying it was deceived into entering into transactions where it received the financial benefit of its bargains. *See Takhalov*, 827 F.3d at 1314.

Such a complaint might, of course, be grounds for a false statement prosecution (18 U.S.C. § 1001) or a false claims prosecution (*id.* § 287). But it is not grounds for a property fraud prosecution. *See* Pet. 17 n.7, 26 n.11. And the Government's attempt to evade the "right to control" question in this case only heightens the need to consider it now. If the Court agrees with the Government's gambit here, the consequences may be dire: prosecutors likely would then simply stop being candid about asking for a "right to control" instruction while still arguing in substance that the property involved is the right to control or some variation of that phrase.

B. The "right to control" theory has the lower courts in disarray

It is not until pages 12 to 14 of its brief that the Government finally reaches the 7-4 circuit split on the "right to control" theory. In particular, the Government

contends no circuits have reversed fraud convictions "predicated on a scheme to defraud the government of funding for which the defendant is unqualified or ineligible." U.S. Br. 12. That is incorrect.

First, as previously explained, the Scientists were both highly qualified (*see* Pet. 2-3) and eligible (*see supra* Argument I.A). Second, at least one court has reversed a similar prosecution. For instance, in *United States* v. *Hodge*, the Ninth Circuit reversed a similar fraud prosecution, holding that such circumstances demonstrated not full-blown property fraud, but mere contractual breach. 150 F.3d 1148, 1150 (9th Cir. 1998) (reversing false statement and wire fraud convictions of atomic physicist who certified requests for advances, yet did not complete his work).

In any event, the "right to control" theory has left the lower courts convulsing in disarray, performing all manner of intellectual somersaults, cartwheels, and flips to supply some property interest where none exists. For instance, the Government criticizes "decades-old" precedents from the Third and Seventh Circuits[4] that reject the "right to control" theory because "more recent" cases from those circuits now appear to adopt it. U.S. Br. 12-13 (citing cases).

[4] *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); *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").

First of all, one of those "decades-old" opinions was written by Judge Easterbrook. More importantly, however, at the certiorari stage, this is not a point in the Government's favor. Rather, at best, those cases reflect significant internal confusion within the Third and Seventh Circuits, which conclusively demonstrates just how perplexing the "right to control" theory is and how it chaotically and unacceptably leads to unpredictable and inconsistent resolutions of criminal cases.

Taking a constrictive view, the Government next criticizes decisions from the Sixth and Ninth Circuits as not actually rejecting the "right to control" theory.[5] *See* U.S. Br. 13-14. Specifically, the Government contends those cases are distinguishable because they involved customers who paid full price but lied about what they would do with the seller's products. *Id.* (Perhaps ironically or unintentionally, this is the precise factual scenario approved to convict the defendant in *United States* v. *Binday*, 804 F.3d 558 (2d Cir. 2015), whose petition is now pending. *See infra* note 6.)

This purported distinction is illusory. At bottom, the question in all such cases still involves purported victims who end up doing business with parties they might otherwise have avoided. This Court made clear in *Skilling* v. *United States*, 561 U.S. 358, 400 (2010), however, that fraud statutes like 18 U.S.C. § 1346 exclude "schemes

[5] *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'"); *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").

of non-disclosure and concealment of material information." As an example of such a scheme, this Court cited *United States* v. *Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979), in which a defendant concealed some racetrack owners' identities to induce a sovereign to take favorable action. Here, like the defendant in *Mandel*, the Scientists concealed information to induce agencies to take favorable action to their proposals.

At minimum, then, at least two and perhaps as many as four circuits have rejected the "right to control" theory. The circuit split thus remains square, balanced, deep, and fresh.[6] *See* Pet. 12-19. And it therefore warrants this Court's review.

C. The "right to control" theory is legally dubious and implicates enormous policy concerns

Perhaps most significantly, the Government never actually defends the "right to control" theory, which is legally dubious and conflicts with both this Court's decisions in *McNally*, *Carpenter*, *Cleveland*, *Skilling*, and *Sekhar* and the Rule of Lenity. *See* Pet. 20-24. And, given the prosecutorial mischief that might ensue (and is ensuing) from it, it would also endanger enormous policy and federalism concerns. *See* Pet. 24-27 (describing alarming hypotheticals).

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[6] Indeed, the split is exceedingly fresh at this time, because the Government does not mention the floodgate of "right to control" cases it has now opened, which have already deluged this Court. *E.g.*, *Kelly* v. *United States*, No. 18-1059 (argued Jan. 14, 2020); *Kelerchian* v. *United States*, petition for cert. pending, No. 19-782 (filed Nov. 20, 2019); *Baker* v. *United States*, petition for cert. pending, No. 19-667 (filed Nov. 21, 2019); *Binday* v. *United States*, petition for cert. pending, No. 19-273 (filed Aug. 27, 2019). And more "right to control" cases are already in the pipeline. *E.g.*, *United States* v. *Johnson*, 2019 WL 6834021, at *3 (2d Cir. 2019); *United States* v. *Calderon*, 944 F.3d 72, 88 (2d Cir. 2019); *United States* v. *Blaszczak*, 2019 WL 7289753, at *6 (2d Cir. 2019); *United States* v. *Percoco*, appeal pending, No. 18-3710 (2d Cir.), No. 16-cr-776, 2017 WL 6314146, at *7 (S.D.N.Y. Dec. 11, 2017).

For instance, the Government never disputes the assertion that, if the property fraud statutes permit "right to control" prosecutions, it would have the right not only to prosecute hypothetical defendants like Lockheed Martin and PwC who perform *billions* of dollars of perfect work despite pitching proposals containing material misrepresentations about subcontractors or team members, but also that it would have the right to keep the benefits of such perfect performance while demanding restitution of the entire amount of the funding. *See* Pet. 24-27. That cannot be the law.

D. At minimum, the Court should hold the petition pending its decision in *Kelly* v. *United States* or consider the petition alongside related petitions

At minimum, the Court should hold the petition pending its decision in *Kelly* (which potentially implicates the "right to control" theory and was argued January 14, 2020) or consider it alongside (or consolidated with) other related "right to control" petitions. *See supra* note 6 (listing pending "right to control" petitions and cases).

In particular, many of those other petitions and briefs have persuasively and colorfully demonstrated how the "right to control" theory is rooted in baseless statutory interpretation, incentivizes prosecutorial overreach, and would almost inevitably lead to a parade of horribles. *See, e.g.*, Michael Binday's Amicus Br. 3-21, *Aldissi* v. *United States*, No. 19-5805; Lord Conrad Black & Former Governor Robert F. McDonnell's Amicus Br. 1-14, *Kelly* v. *United States*, No. 18-1059; Pet. 25-36 and Reply Br. 1-13, *Binday* v. *United States*, No. 19-273; Pet. 12-27, *Kelerchian* v. *United States*, No. 19-782; Pet. 11-30, *Baker* v. *United States*, No. 19-667. In deciding whether to grant certiorari, the Court should consider those papers alongside this petition.

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

Raising a *Braxton* argument, the Government contends the 3-3 circuit split regarding loss calculation and restitution warrants no review because the Sentencing Commission can supposedly resolve it. U.S. Br. 14-16. But what the Government has lost sight of—and what the petition had previously explained (*see* Pet. 37 n.20)—is that the Sentencing Commission had *already* spoken about this issue when it previously amended the relevant guideline. Notwithstanding that amendment, three circuits (including the Eleventh Circuit in this case) have ignored the change in law and held fast to their prior decisions rendered under an outdated version of the guidelines. *See* Pet. 35 (describing how those courts' holdings were based on outdated guidelines).

In other words, in *Braxton*, this Court declined to resolve a guidelines interpretation issue "because the Commission has already *undertaken* a proceeding that will eliminate circuit conflict over the meaning of" a guideline. *Braxton* v. *United States*, 500 U.S. 344, 347-49 (1991) (emphasis added). Here, however, the Sentencing Commission has *completed* that proceeding to eliminate conflict, yet the circuit split remains. *Braxton*, therefore, does not justify the denial of this Court's review.[7]

[7] Indeed, despite *Braxton*, this Court has reviewed numerous guidelines cases. *See, e.g.*, *Beckles* v. *United States*, 137 S. Ct. 886, 890 (2017) (considering whether a subsequently amended guideline was subject to void-for-vagueness challenge); *Stinson* v. *United States*, 508 U.S. 36, 38 (1993) (granting certiorari to review holding that commentary was nonbinding); *Dillon* v. *United States*, 130 S. Ct. 2683, 2687 (2010) (reviewing whether *Booker* rendered a guideline nonbinding); *Neal* v. *United States*, 516 U.S. 284, 288 (1996) (granting certiorari to resolve split whether revised guideline governed calculation of LSD weight for statutory purposes); *United States* v. *Watts*, 519 U.S. 148, 152 (1997) (reviewing whether guideline permitted sentencing courts to consider relevant acquitted and under what standard of proof).

As to restitution, the Government misinterprets the word "return" in the Mandatory Victims Restitution Act. *See* U.S. Br. 17-18. Specifically, regardless of the quality of performance, the Government argues the MVRA requires no restitution offset unless the Scientists had returned the money itself. *Id.* But the appropriate definition of the word "return," as used in the MVRA, includes the delivery of goods or services promised. *See* MERRIAM-WEBSTER'S DICTIONARY, *at* https://www.merriam-webster.com/dictionary/return (last visited Jan. 22, 2020) ("to give or perform in return").

At bottom, the Scientists' sentences—including their loss calculations and restitution awards—are deeply problematic. With no such factual findings from the jury, *cf. Hester* v. *United States*, 139 S. Ct. 509, 509 (2019) (Gorsuch, J., dissenting from denial of certiorari) (expressing Sixth Amendment concerns about restitution awards based on judicial factfinding), the sentences treat the Scientists as if they were thieves who absconded with the funds without performing any work rather than as what they actually were: highly qualified and renowned scientists who spent the vast majority of the funds performing and delivering first rate scientific research.

When calculating a guidelines level in white collar cases, loss calculation is by far the most important enhancement to consider. Had the loss been correctly calculated at $0 or the 6% profit, the starting point for the guidelines range could have been as low as 30-37 months, 135-168 months (funded proposals), or 168-210 months (all proposals). Of course, it ordinarily is an automatically reversible procedural error to sentence a defendant without first correctly calculating the guideline range. *Peugh* v. *United States*, 569 U.S. 530, 542 (2013) ("the rule that an incorrect Guidelines

calculation is procedural error ensures that they remain the starting point for every sentencing calculation in the federal system").

For that reason, the Government's argument that the miscalculation made little a difference rings hollow. *See* U.S. Br. 17. For instance, had the starting point been 135-168 months, the roughly 50% downward variance actually awarded easily could have led to a five- or seven-year sentence for each defendant. The miscalculation could also permit future sentencing courts that might rely on the affirmance here to continue miscalculating loss and restitution in white collar cases that involve full performance, which could lead to unwarranted nationwide sentencing disparities.

Finally, there is no reason apparent from this record to infer that, if the sentence were vacated, the district court would not reconsider and lower its sentences had it correctly calculated the guidelines in the first place. This is not a situation like that in *United States* v. *Keene*, 470 F.3d 1347, 1348-49 (11th Cir. 2006), where a guidelines miscalculation was harmless because a district court had "stated on the record" that it would, "using its § 3553(a) authority," impose the same sentence upon a defendant regardless how it determined that disputed guideline issue.

Ultimately, there is no question that there is a 3-3 circuit split regarding whether the calculation of loss and restitution includes an offset for the fair market value of work performed. *See* Pet. 34-35. The Government does not dispute the split's existence, squareness, balance, depth, and freshness, and it is a significant issue that independently warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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