No. 21-1169

In the Supreme Court of the United States

ALAIN KALOYEROS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition makes no attempt to address the fair-warning and federalism problems that plague the right-to-control theory of wire fraud—the same principles that have led this Court to consistently reject other intangible-rights add-ons to the plain terms "money or property."[1] *See* Pet. 18-19 (discussing *McNally v. United States*, 483 U.S. 350 (1987), and *Skilling v. United States*, 561 U.S. 358 (2010)); Pet. 25-26 (discussing *Cleveland v. United States*, 351 U.S. 12 (2000); *McDonnell v. United States*, 136 S. Ct. 2355 (2016), and *Kelly v. United States*, 140 S.Ct. 1565 (2020)).

Nor does the Brief in Opposition grapple with the central statutory interpretation question: whether the right to control use of assets is "property." *Compare* Pet. 21-23, Ciminelli Pet. 14-17, and Aiello Pet. 28-32 *with* BIO 21-22. The government offers only glib assertions that: (i) "the term "property' includes 'intangible property rights'"; (ii) the district court's instruction that "'[p]roperty' includes 'intangible interests such as the right to control the use of one's assets" was correct; and (iii) if an interest is "economic," it "is a form of property covered by the wire-fraud statute." BIO 21, 22. The cases cited hardly support those sweeping propositions. *Carpenter v. United*

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[1] Kaloyeros's conviction and petition concern only the right-to-control theory, addressed in Argument 2 of the Brief in Opposition (BIO 20-30). His conviction did not involve any allegation of bribery or kickback, or any charge of honest-services fraud.

States' recognition that a newspaper's confidential information has long been recognized as property, 484 U.S. 19, 26 (1987), did not establish that all "intangible property rights" fall within the wire fraud statute, any more than *Pasquantino v. United States*' recognition that Canada's right to collect tax revenue is a traditionally recognized property right, 544 U.S. 349, 355-57 (2005), established that therefore any "economic interest" is covered "property."[2]

Rather than engaging with the right-to-control theory's deep flaws and the principles that guide this Court's property-fraud jurisprudence, the government tries to lump this petition in with a string of previously denied petitions, declare the cases "similar," and urge "[t]he same result." BIO 21. It begins with a facile premise: if an interest is "economic," it qualifies as "property." BIO 22.

With that setup, the government hangs all its weight on two baseless contentions: that the jury here was required to find the scheme contemplated "tangible economic harm," BIO 23, and that it actually "found that petitioners' scheme ... caused tangible economic harm to Fort Schuyler." BIO 22. These two contentions are the principal or sole basis for nearly every one of the government's arguments: that there is no circuit split, BIO 27-28; that there is no conflict with this Court's precedents, BIO 25-26; that the Second Circuit's decision raises no federalism or due

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[2] *Dickman v. Commissioner*'s holding that an interest-free loan is a taxable gift under the Tax Code (465 U.S. 330, 333-39 (1984)), BIO 22, has nothing to do with the wire fraud statute.

process concerns, BIO 26; and that this case would be a poor vehicle, BIO 28-30.

But the jury instruction contention is misleading, and the claim that the jury found actual tangible economic harm is flat wrong. The government's focus on the term "tangible economic harm" in one sentence of the jury instructions (BIO 10, 11, 23-24) omits that both the instructions and the Second Circuit's opinion defined that term to necessarily be satisfied by deprivation of the disputed information alone. And there was no jury finding that the scheme "caused tangible economic harm to Fort Schuyler." BIO 22. The jury returned no special findings, and it was specifically instructed it could convict *without* finding that Fort Schuyler actually suffered any loss.

The testimony on which the government bases its claim of actual economic harm—that two non-bidding developers had "typically lower" fees, Aiello Pet. App. 64a n.8 (cited BIO 22); BIO 29—was admitted only for a limited purpose. The Brief in Opposition omits that at trial the prosecutors disavowed, and the trial court did not allow, the use to which the government now tries to put that testimony—to argue that another developer could have performed these contracts better or for less money. In summation, the prosecutor admitted that the government could not show those developers could have built these projects for less.

Aside from these unsupported contentions, the government offers no serious response to any of the grounds for certiorari set out in the Petition.

ARGUMENT

I. This case depends exclusively on the right-to-control theory, with no requirement of pecuniary harm

The government begins with the breezy suggestion that this Court has "recently and repeatedly denied certiorari petitions raising similar claims" about the right-to-control theory, and this case is no different. BIO 21.[3]

But there is a dispositive difference: in the cases the government cites, the objects of the frauds were money or property (traditionally understood). As the Solicitor General explained in those cases, two were not charged as right-to-control fraud; others were based on both traditional money-or-property *and* right-to-control theories; and in the remaining two cases the schemes deprived their victims of money or pecuniary value. *See* Ciminelli Pet. 34-35.

None of those cases involved what is presented here: a conviction based *solely* on the right-to-control theory, based only on deprivation of information about the contracting process, with no accusation the defendants sought to deprive the victim of money or tangible property.

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[3] The government inflates its list by citing separate petitions by co-defendants in the same case, *see* Br. for U.S. in Opp., *Binday v. United States*, 2016 WL 2766151, *14 (May 13, 2016) (responding jointly to petitions by Binday, No. 15-1140, Kergil (No. 19-273), and Resnick (No. 15-8582)), as well as successive petitions filed at different case stages by Binday (Nos. 15-1140 and 19-278) and Viloski (Nos. 14-472 and 16-508).

The indictment here charged only a scheme "to defraud Fort Schuyler of its right to control its assets," by concealing that the RFPs were tailored. C.A. App. 951-55, ¶¶ 22, 24, 26. As the government told the trial court: "the property interest at issue was Fort Schuyler's right to control its own assets. That right was taken away from the corporation by the defendants, who made misrepresentations and omissions that deprived Fort Schuyler of material information that would have affected its decision-making." C.A. App. 845. The prosecution did not charge any intended or actual harm to any money or property other than the right to control.

II. The jury was not required to find contemplated pecuniary harm

The government's central contention is that the jury instructions required proof that the scheme "contemplated 'tangible economic harm.'" BIO 23. But it omits that the instructions went on to define that term in such a way that the nominal "tangible economic harm" requirement would be "proven" by deprivation of the disputed information itself.

The government focuses on a sentence stating the government would fail to meet its burden if it did not prove "that Fort Schuyler was ... exposed to tangible economic harm." Aiello Pet. App. 88a (quoted in BIO 10, 23). The next sentence, not quoted in the BIO, states: "In this regard, economic harm is not limited to monetary loss." *Id.* Thus, despite the ordinary meaning of "tangible economic harm," the jury was instructed the harm need not be pecuniary.

The instruction continued, "Instead, tangible economic harm *has been proven* if the government has

proven that the scheme, if successful, would have created an *economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received*." *Id.* (emphasis added).

The Brief in Opposition quotes only the latter italicized portion. *See* BIO 10, 23. It omits the "has been proven" clause, which re-defined "tangible economic harm" (Pet. App. 30a), reducing what the government actually had to prove. To convict, the government did not have to prove "tangible economic harm" in those words' ordinary meaning. Instead, it only had to show an economic discrepancy between *what Fort Schuyler expected and what it received*.

What sort of discrepancy qualifies? The instruction's earlier statement furnished an answer: the information withheld. "The victim's right to control the use of its assets"—which was already defined to be property—"*is injured* when *it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets*." Aiello Pet. App. 87a-88a (emphasis added); *see* Pet. App. 28a, 29a.[4] Thus, if Fort Schuyler reasonably anticipated that information, and did not receive it, that "injur[y]" was enough.

The prosecutor told the jury the withheld information was enough to convict, because whether the RFP process had been fair and competitive was

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[4] The point was confirmed by the court's "intent to defraud" instruction, which required not intent to cause Fort Schuyler tangible economic harm, but only intent to "caus[e] Fort Schuyler to enter into a transaction without potentially valuable economic information." Aiello Pet. App. 89a.

"[s]omething Fort Schuyler or a victim would want to know when spending millions of dollars." C.A. App. 1472 (Tr.2514-15). The Second Circuit's opinion went even further, ruling that the omission deprived Fort Schuyler of "an essential element of the bargain"—even though it was not a term of the contracts. Pet. App. 22a-23a.

The opinion confirms that under Second Circuit right-to-control law, the deprivation of information necessary "to make an informed economic decision" is sufficient to convict:

> A 'cognizable harm occurs where the defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions.' ... In a right-to-control case, 'it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss—it suffices that a defendant intend that his misrepresentations induce a counter-party to enter a transaction without the relevant facts necessary to make an informed economic decision.'

Id. (quoting *United States v. Binday*, 804 F.3d 558, 570, 579 (2d Cir. 2015)). If the withheld information "deprived the victim of the ability to make an informed economic decision," *id.,* then the Second Circuit *defines* that non-disclosure to be the required "tangible economic harm," whether or not pecuniary loss can or does result.

This is not an outlier case where the Second Circuit misstated or misapplied its rule of law. The rule above is well established. *See* Pet. App. 17a-18a, 22a-23a, 28a-30a. Indeed, in *United States v. Finazzo*, the

court ruled that "[d]epriving a victim of 'potentially valuable' information *necessarily* creates a risk of tangible economic harm." 850 F.3d 94, 111 (2d Cir. 2017).

Thus, contrary to the government's claim, the jury instructions' reference to "tangible economic harm" added no independent requirement for conviction beyond withholding the information itself.

III. The jury did not find actual pecuniary harm

The government's claim that the jury "found that petitioners' scheme ... caused tangible economic harm to Fort Schuyler" (BIO 22) is inaccurate. The jury returned no such finding. On the contrary, it was specifically instructed that it need *not* find "that Fort Schuyler actually suffered any pecuniary loss." Aiello Pet. App. 88a.

The government's claim that the jury found actual harm is based on testimony, admitted for a limited purpose, that two non-bidding companies had "typically lower" fees. *See* BIO 22, 29. But the Brief in Opposition omits that at trial the government disavowed, and the trial court did not allow, admitting that testimony to show those companies could or would have performed these contracts more cheaply. *See* C.A. App. 1001 (Tr. 138-39, 142), A1003 (Tr. 147), 1260 (Tr. 1362-64), 1291 (Tr. 1485). In fact, those witnesses were not familiar with the contracts at issue, and had no basis to say what a reasonable fee for those contracts would have been. *See, e.g.*, C.A. App. 1291 (Tr. 1485), 1311-13 (Tr. 1567-68, 1570-75). Contrary to the government's current claim that other companies "could have provided better

rates or superior services," BIO 22; *see also* BIO 26, the prosecutor admitted in closing: "I can't tell you that those companies would have charged less than ... [LPCiminelli and COR]." C.A. App. 1473 (Tr. 2518).

This misstatement goes even beyond the claim the jury found actual harm (BIO 22). The Brief in Opposition also tries to alter the theory of prosecution, claiming the same testimony "showed that petitioners' scheme contemplated the deprivation of Fort Schuyler's money, not just ... its right to control assets." BIO 29. That claim is flatly contrary to the trial record.

To be clear: the theory that the scheme was aimed at obtaining money from Fort Schuyler was never in the case. It was not charged in the indictment, *see supra* at 5, or to the jury, Pet. 10; Aiello Pet. App. 87a-88a. As in *McNally*, "[i]t was not charged that in the absence of the alleged scheme [Fort Schuyler] would have paid a lower [price] or secured better [buildings]." 483 U.S. at 360 (paraphrased). On the contrary, the prosecution disavowed that was its theory, and the trial court prohibited the defense from putting on any evidence about the price or quality of the projects or whether Fort Schuyler got the benefit of its bargain, ruling those issues were irrelevant in a right-to-control case. *See* C.A. App. 1292 (Tr. 1491), 997 (Tr. 123-25), 999 (Tr. 132); *see also supra* at 8.

The government nevertheless tries to cast its "deprivation of money" claim as an alternative ground for the judgment. BIO 30. But a theory not charged in the indictment or presented to the jury can never be a basis for affirmance. *Chiarella v.*

United States, 445 U.S. 222, 236 (1980); *Russell v. United States*, 369 U.S. 749, 760-61, 766, 771 (1962).

IV. The government's unfounded contentions constitute nearly the entire basis of the Brief in Opposition

The government's unfounded contentions permeate the Brief in Opposition. They are not mere factual disputes beneath this Court's attention, as the government suggests (BIO 30). Instead, they constitute the basis for nearly every one of the government's arguments opposing certiorari.

The government's flawed reliance on the term "tangible economic harm" in the jury instructions, for instance, is the principal or entire basis of its arguments that:

- the right-to-control convictions were based on deprivation of information alone, without contemplated or actual economic harm, *compare* BIO 22-23 *with* Pet. 10;

- the right-to-control theory does not conflict with *McNally*, *compare* BIO 26 *with* Pet. 18-21[5];

- the decision below does not conflict with *United States v. Yates*, 16 F.4th 256 (9th Cir. 2021), which rejected the "ethereal right to accurate information" and "the right to make

[5] The instruction that the jury could convict only if the scheme "contemplated depriving Fort Schuyler of money or property" (BIO 26) adds nothing. It merely begs the question: whether the right to control *is* "property" under the statute.

an informed business decision" as property under the fraud statutes, *compare* BIO 27-28 *with* Pet. 16-17; and

- this case presents a poor vehicle for review, BIO 29.

Similarly, the government's unfounded contention that the jury found actual tangible economic harm to Fort Schuyler is the principal or entire basis of its contentions that:

- the decision below does not conflict with this Court's decisions in *Cleveland* and *Kelly* that the wire fraud statute protects only against schemes aimed at money or property, and that the intangible right to control assets is not an interest "long recognized as property," *compare* BIO 25-26 *with* Pet. 21-23; and

- the theory that the scheme deprived Fort Schuyler of money, not merely the right to control assets, could be an alternative ground for judgment (despite appearing nowhere in the opinion below). *See* BIO 29; *but see supra* at 9-10.

The government's few remaining arguments are thin and unpersuasive.

As already discussed, this Court's inclusion of one intangible form of property under the statute does not mean all intangible interests carrying a similar label are covered. *See supra* at 2 (rebutting government's use of *Carpenter* ("intangible property rights") and *Pasquantino* ("economic interest")). The question is whether the intangible interest issue is one "long

recognized as property," "as that term is ordinarily employed." Pet. 21 (quoting *Carpenter*, 484 U.S. at 25, and *Pasquantino*, 544 U.S. at 356). The government ignores that question. BIO 21-22.

Importantly, *Carpenter*'s statement that the newspaper was "deprived of its right to exclusive use of the information," 484 U.S. at 26 (quoted, BIO 24), does not sweep into the statute every kind of intangible interest like the right to exclude. In *Carpenter*, the confidential news at issue—the newspaper's stock in trade—was itself property, 484 U.S. at 426, which could be misappropriated, and thus fell easily within the property rights protected under *McNally*. *Id.* at 427. The same is not true of more ethereal interests such as the right to control or exclude. *See* Aiello Pet. 29-30; Ciminelli Pet. 14-17.

Finally, the government dismisses this Court's holdings that property must be "transferable" in order to be "obtained," because those precedents concerned a different statute (the Hobbs Act) that contained two additional words ("from another"). BIO 25. That difference hardly upends this Court's reasoning in *Scheidler v. NOW*, 537 U.S. 393 (2003), and *Sekhar v. United States*, 570 U.S. 729 (2013).

The Hobbs Act and the wire fraud statute contain functionally identical prohibitions: obtaining property, or scheming to obtain it, by illegal means. Pet. 24. The words "from another" in the Hobbs Act do not change the analysis: anyone who "obtains" property does not possess it at the start, and thus must obtain it from some other entity. Questions about from whom, or about "congruence" between who loses and who gains, BIO 24-25, do not alter the requirement that "obtaining" property still requires transferring

it, from its previous possessor to the obtainor. Such transfer is not possible for the right to control assets, or the right to make an informed decision. Pet. 24-25 (discussing *Scheidler* and *Sekhar*).

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted,

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