No. 21-169

In the Supreme Court of the United States

JAMES GATTO, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in declining to give petitioner's proposed additional instruction on the meaning of a "scheme * * * for obtaining money or property" under 18 U.S.C. 1343.

2. Whether the district court erred in declining to adopt the particular instruction requested by petitioner on the issue of the object of the scheme.

3. Whether the district court erred in instructing the jury that a scheme that could cause or did cause tangible economic harm by denying the victim information necessary to make an informed economic decision can support a conviction for wire fraud, in violation of Section 1343.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 986 F.3d 104.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a-48a) was entered on January 15, 2021. A petition for rehearing was denied on March 5, 2021 (Pet. App. 120a). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on August 2,

2021. 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 Southern District of New York, petitioner was convicted on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349, and two counts of wire fraud, in violation of 18 U.S.C. 2 and 1343. Judgment 1. The district court sentenced petitioner to nine months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-48a.

1. Petitioner is the former director of global sports marketing for basketball for the sports-apparel company Adidas. Pet. App. 6a. In that role, petitioner oversaw Adidas's relationship with universities that Adidas sponsored, including North Carolina State University (N.C. State), the University of Kansas (Kansas), and the University of Louisville (Louisville) (collectively, "the universities"). *Id.* at 3a, 6a. Pursuant to the sponsorship agreements, Adidas paid the universities for the right to provide their sports teams with Adidas apparel, which student-athletes were required to wear during games and at practice. *Id.* at 5a.

The universities are members of the National Collegiate Athletic Association (NCAA), a private organization that oversees collegiate sports in America and promulgates rules that its member universities must follow. Pet. App. 5a. At the time petitioner worked for Adidas, NCAA rules required student-athletes to be and remain amateurs to be eligible to compete at their schools. *Ibid.* As a result, with limited exceptions, the athletes and their families could not accept payments for playing or agreeing to play their sport. *Ibid.* NCAA

rules allowed universities to offer scholarships to a limited number of student-athletes to cover tuition, room and board. *Ibid.* But they generally foreclosed athletic eligibility for someone who received, or whose family received, payments in connection with his athletic performance either as a college athlete or as a high-school recruit. *Ibid.*

Every NCAA member university was obligated to certify that its prospective student-athletes were compliant with those rules and thus eligible to compete. Pet. App. 7a. The universities therefore required all their recruits to sign paperwork attesting to their awareness of and compliance with the NCAA rules and, specifically, that they had not leveraged their "athletics skill (directly or indirectly) for pay in any form in that sport." *Ibid.* (citation omitted). A recruit's university scholarship was contingent on his certifying his eligibility, and the universities would not award scholarships to recruits who were ineligible to compete. *Ibid.*

Petitioner and his co-conspirators, including two Adidas consultants and an aspiring sports agent, engaged in a scheme to pay the families of top-tier high-school basketball recruits to induce those players to enroll at specific universities. Pet. App. 2a. The payments rendered the recruits ineligible under the NCAA rules. *Ibid.* The players would therefore not be permitted to play in games upon discovery of the payments, and the universities would be subject to prospective and retrospective penalties for playing ineligible players. *Id.* at 6a. Petitioner therefore sought to conceal the payments—referred to by petitioner and his co-conspirators as "Black Ops" payments—by falsifying Adidas invoices to make it appear as though the payments were going to youth basketball teams affiliated

with the Amateur Athletic Union (AAU), when in fact the money was being funneled through AAU teams to the recruits' families. Gov't C.A. Br. 10; see Pet. App. 6a.

Along with his co-conspirators, petitioner made the disguised payments to the families of three basketball prospects to secure the players' commitments to playing for Adidas-sponsored universities: Dennis Smith, Jr; Billy Preston; and Brian Bowen, Jr. Gov't C.A. Br. 12, 19, 21; Pet. App. 7a-9a. In 2015, petitioner and his co-conspirators paid Smith's family $40,000 to ensure that Smith would enroll at N.C. State. Pet. App. 7a. Smith formally committed to playing at N.C. State less than two weeks after his family received the payment. *Id.* at 7a-8a; Gov't C.A. Br. 19-20. In 2016, petitioner and his co-defendants paid Preston's family $50,000 to ensure that Preston, who had informally committed to play for Kansas, would stop taking illicit payments from other sources. Pet. App. 8a. And in 2017, petitioner and his co-conspirators agreed to pay Bowen's family $100,000 to entice Bowen to attend and play for Louisville. *Ibid.* Bowen committed to Louisville the day after his family finalized the payment agreement with Adidas. Gov't C.A. Br. 14.

Despite those illicit payments, Smith, Preston and his mother, and Bowen and his mother all signed forms certifying that the students were compliant with the NCAA eligibility rules, and therefore eligible for athletic scholarships. Pet. App. 7a-9a; see Gov't C.A. Br. 14, 24. Smith played one season at N.C. State before being selected as the ninth overall pick in the 2017 NBA Draft. Pet. App. 8a. Preston never played for Kansas because his ineligibility was discovered before he could do so. *Ibid.* And Louisville withheld Bowen from

competition after the details of petitioner's scheme came to light. *Id.* at 9a.

2. A grand jury in the United States District Court for the Southern District of New York indicted petitioner and two co-defendants (one of the Adidas consultants and the aspiring sports agent, who are respondents here) for conspiring to commit wire fraud, in violation of 18 U.S.C. 1349, and two counts of wire fraud, in violation of 18 U.S.C. 2 and 1343. Superseding Indictment 1-34. Under Section 1343, a defendant commits wire fraud if he employs a wire communication in the course of devising "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.

The superseding indictment charged the defendants for the role that they played in making cash payments to the families of Smith, Preston, and Bowen in connection with their commitments to enroll at the Adidas-sponsored universities. See Superseding Indictment 1-4. The indictment alleged that petitioner's co-conspirators "included the families of the student-athletes." *Id.* at 3. It further alleged that petitioner and his co-conspirators schemed to defraud the universities by concealing the payments that Adidas made to the families of the student-athletes, "thereby causing [the universities] to provide or agree to provide athletic-based scholarships and financial aid under false and fraudulent pretenses." *Ibid.*; see *id.* at 2-3.

At trial, the district court instructed the jury that a "'device, scheme or artifice to defraud' is any plan, device, or course of action to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." C.A. Supp. App. 363. It

further instructed that "the government must prove that [petitioner] acted with intent to deceive for the purpose of depriving the relevant University of something of value." *Id.* at 364. The court also stated that "a victim can be deprived of money or property * * * when it is deprived of the ability to make an informed economic decision about what to do with its money or property—in other words, when it is deprived of the right to control the use of its assets," but "if, and only if, the scheme could have caused or did cause tangible economic harm to the victim." C.A. App. 444. The court additionally instructed the jury that it could find petitioner guilty on the wire-counts either by finding that petitioner committed the offense himself, caused someone else to commit the offense, or aided and abetted "someone other than a defendant charged in the indictment" who committed the offense. D. Ct. Doc. 284, at 1832 (Oct. 22, 2018).

The jury found petitioner guilty on each count, and the district court sentenced him to nine months of imprisonment, to be followed by two years of supervised release. Judgment 1-2. The court also ordered petitioner to pay $342,437 in restitution to the universities to compensate them for their actual losses in awarding athletic scholarships to the ineligible student-athletes. Restitution Order 1; Pet. App. 9a.

3. The court of appeals affirmed. Pet. App. 1a-48a.

a. The court of appeals first rejected petitioner's arguments that the evidence was insufficient to sustain the wire-fraud convictions. Pet. App. 10a-18a. It explained that a rational trier of fact could find that petitioner had engaged in a scheme to defraud because the government proved the requisite fraudulent intent. *Id.* at 11a, 13a-15a. The court also determined that a

rational trier of fact could find that money—namely the universities' scholarship money—was an object of the scheme. *Id.* at 15a-18a. In doing so, the court recognized that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Id.* at 12a (quoting *Kelly* v. *United States*, 140 S. Ct. 1565, 1573 (2020)). The court then observed that the fraud here comported with that principle because "the loss of property—the Universities' funds set aside for financial aid—was at the heart of [petitioner's] scheme," which "depended on the Universities awarding ineligible student-athletes athletic-based aid; without the aid, the recruits would have gone elsewhere." *Id.* at 17a. The court additionally stated that wire fraud liability could be supported where a "scheme facilitated the withholding of valuable information that would have caused the Universities not to dispense with their property." *Id.* at 18a.

After rejecting various evidentiary arguments, Pet. App. 19a-28a, the court of appeals further determined that the district court properly instructed the jury. *Id.* at 29a-46a. The court rejected petitioner's contention that "a plain reading of the [wire-fraud] statute makes it clear that the law requires that property or money be obtained *by* the defendant *from* the victim, and the district court erred by not making this clear to the jury." *Id.* at 34a. It explained that "Section 1343 punishes the individual who devises the scheme," and "[w]hat matters, therefore, is that there was a scheme to defraud a victim of money or property." *Id.* at 35a-36a. The court observed that, "[b]y the plain language of the statute, the identity of the ultimate beneficiary is not dispositive and the plain meaning of the word 'obtain' is sufficiently capacious to encompass schemes by defendants to

obtain money for the benefit of a favored third party." *Id.* at 36a.

The court of appeals also determined that the district court did not err in its instruction that "a victim's loss of the right to control the use of its assets constitutes deprivation of money or property if * * * the scheme could have caused or did cause tangible economic harm to the victim." Pet. App. 40a (citation omitted). The court listed three grounds for why it had "no doubt" that the universities' "scholarship money is a property interest with independent economic value": the universities "awarded tuition, room, and board," without which the recruits "would have had to pay tens of thousands of dollars to attend the schools"; each university was permitted to award only "a finite number of athletic-based scholarships," such that "giving a scholarship to one student necessarily preclude[d]" giving it to another; and the universities "would not have awarded" the aid to these recruits had the universities "known [they] were ineligible to compete." *Ibid.*

b. Judge Lynch concurred in part and dissented in part. Pet. App. 49a-87a. He agreed with the majority that the evidence was sufficient to support the jury's verdict and that the jury was properly instructed as to the governing law. *Id.* at 49a. He would have concluded, however, that some of the evidence offered by the defense should have been admitted, and that the erroneous exclusion of that evidence was not harmless. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-27) that (1) the district court was required to instruct the jury that a defendant cannot commit wire fraud unless he personally obtains the victims' property; (2) the district court erred in declining to adopt the particular inadvertent consequence

instruction that he requested; and (3) the district court's limited right-to-control instruction was improper. The court of appeals correctly rejected the first and third contentions and the district court correctly rejected the second, which was neither pressed nor passed on below. And the decision below does not conflict with any decision of another court of appeals or this Court. Further review is unwarranted.

1. a. As the court of appeals recognized (Pet. App. 34a-38a), the district court permissibly declined to require the jury to find that petitioner's scheme had the purpose of personally obtaining the victims' property for himself. *Id.* at 34a.

Under Section 1343, a defendant commits wire fraud if he employs the wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. 1343. This Court has explained that the word "defraud" in the first clause of the mail- and wire-fraud statutes refers "to wronging one in his property rights," *McNally* v. *United States*, 483 U.S. 350, 358-359 (1987), and has accordingly defined the prohibited conduct in terms that focus on whether the scheme seeks to deprive the victim of property—not on whether the scheme seeks to transfer a specific property interest directly from the victim to the defendant. See, *e.g.*, *Cleveland* v. *United States*, 531 U.S. 12, 18-19 (2000) (explaining that the mail fraud statute "protect[s] the people from schemes to deprive them of their money or property") (citation omitted); *McNally*, 483 U.S. at 358 ("[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreach-

ing.'") (citation omitted); see also *Neder* v. *United States*, 527 U.S. 1, 20 (1999) (treating the mail- and wire-fraud statutes, which contain the identical operative language at issue here, collectively).

This Court's decision in *Carpenter* v. *United States*, 484 U.S. 19 (1987), confirms that a conviction under the fraud statutes does not require proof that the defendant himself "obtained" (Pet. 20) a specific property interest from the victim. In *Carpenter*, the Court upheld mail- and wire-fraud convictions of defendants who conspired to trade on financial information contained in a newspaper column before the column became public. 484 U.S. at 22-24. The Court explained that the newspaper "had a property right in keeping confidential and making exclusive use, prior to publication, of the [information contained in the] column." *Id.* at 26. Although the defendants' scheme did not directly transfer that right of confidentiality and exclusivity from the newspaper to themselves, the Court had "little trouble" concluding that the defendants had engaged in a scheme to defraud because the newspaper had "been deprived of its right to exclusive use of the information." *Id.* at 26, 28. *Carpenter* thus illustrates that Section 1343 contains "no requirement that the property flow to the defendant." Pet. App. 37a. To the extent that petitioner relies (Pet. 18) on cases paraphrasing the statutory requirements in slightly different language, cf. *Borden* v. *United States*, 141 S. Ct. 1817, 1833 n.9 (2021), those citations are inapposite because the Court has squarely upheld a conviction for a scheme that deprived a victim of a property right that the defendant did not himself obtain. See *Carpenter*, 484 U.S. at 27-28.

Petitioner errs in contending (Pet. 14) that the jury instructions should have specified that petitioner could

only be found guilty if, in addition to having the purpose of depriving a victim of money or property, he had the purpose of obtaining that money or property. Petitioner purports to rely on the "text of Section 1343," Pet. 18, but he focuses on the second clause of the provision. See Pet. 18-19. The Court has explained, however, that that clause does no "independent work." *Loughrin* v. *United States*, 573 U.S. 351, 359 (2014). Instead, "the words 'to defraud'" in the first clause "refer[] 'to wronging one in his property rights by dishonest methods or schemes," typically through "the *deprivation* of something of value by trick, deceit, chicane[ry] or overreaching," while "the second phrase simply ma[kes] it unmistakable that the statute reache[s] false promises and misrepresentations as to the future as well as other frauds involving money or property." *McNally*, 483 U.S. at 358-359 (emphasis added; citation and internal quotation marks omitted). Moreover, the word "obtain" would not itself inherently require a personal benefit. Pet. App. 36a; see, *e.g.*, *Scheidler* v. *National Org. for Women*, 537 U.S. 393, 408 n.13 (2003) (observing that Model Penal Code defines "obtaining" for purposes of extortion to mean "bringing about a transfer or purported transfer of a legal interest in the property, *whether to the obtainer or another*") (emphasis added; brackets, citation, and internal quotation marks omitted); see also *United States* v. *Green*, 350 U.S. 415, 420 (1956) (rejecting personal benefit requirement to "obtain" property under federal extortion statute).

Petitioner asserts that the court of appeals "appeared to have misunderstood the instruction that [petitioner] had sought," claiming that rather than "ask[ing] the district court to inform the jury that he

needed to 'personally' obtain property from the Universities to be convicted," he "simply asked that the jury be informed that deception does not amount to a violation of Section 1343 unless the defendant's object was to 'obtain' property—for himself *or* for someone else." Pet. 11. But petitioner plainly asked the court to instruct the jury that the government must "prove that the purpose of the alleged scheme to defraud the Universities was to obtain money or property from these Universities," and that a "defendant cannot be found to have 'obtained' money or property from the Universities unless *he himself acquired the property*; it is not enough * * * to find that some *other* participant or conspirator in the scheme acquired the property from the Universities." C.A. App. 1205-1206 (emphasis added); see Pet. C.A. Br. 62-64 (arguing that "Section 1343 reaches only those schemes in which a defendant seeks to obtain money or property from the victim" and that that requirement was not satisfied here because "no 'money or property' moved from the Universities to [petitioner]").

To the extent petitioner now abandons his assertion that the statute contains a personal benefit requirement, and defends only the first portion of the requested instruction, that is an independent reason to deny review. See *United States* v. *Roy*, 783 F.3d 418, 420 (2d Cir. 2015) (per curiam) (explaining that "[a] defendant challenging a jury instruction must demonstrate that he requested a charge that accurately represented the law in every respect") (citation and internal quotation marks omitted). And even if the court of appeals misunderstood petitioner's requested instruction, its factbound error in that regard raises no broader issue that might warrant this Court's review—

particularly because his convictions are valid even under his construction of Section 1343. The indictment alleged that the families of the student-athletes were participants in the scheme, and that they obtained money or property from the universities in the form of athletic aid that funded the students' attendance at the universities. Superseding Indictment 1-2 (stating that petitioner's co-conspirators "included the families of the student[ ]athletes"). The undisputed evidence showed that the universities in fact offered the student-athletes financial aid. See Gov't C.A. Br. 13 (Bowen accepted athletic scholarship at Louisville); *id.* at 21 (N.C. State provided Smith with an athletic scholarship); *id.* at 24 (Kansas offered Preston an athletic scholarship); see also Pet. 22 (acknowledging "the financial aid awarded to the athletes"). Accordingly, the trial established that petitioner committed wire fraud on the very theory that petitioner now advances: that petitioner's "object was to 'obtain' property for himself *or* for someone else" (Pet. 11). As a result, any error in denying petitioner's requested instruction was harmless. See, *e.g.*, *Neder*, 527 U.S. at 4 (applying harmless-error analysis to error in jury instructions).

b. Petitioner errs in asserting (Pet. 15-17) that the court of appeals' rejection of his "obtaining" claim conflicts with the decisions of other courts of appeals. Petitioner primarily contends (Pet. 15-17) that the court of appeals' decision conflicts with the Seventh Circuit's decision in *United States* v. *Walters*, 997 F.2d 1219 (1993). But the court of appeals identified substantial differences between the two cases. See Pet. App. 38a.

In *Walters*, the defendant gave NCAA student-athletes cars and money with the hope that the athletes would retain him as their sports agent when they turned

professional. 997 F.2d at 1221. Because the "athletes' pro prospects depended on successful completion of their collegiate careers," Walters dated his contracts with the students after the end of their eligibility period, and "promised to lie to the universities in response to any inquiries." *Ibid.* The universities continued paying the students' scholarships as they had planned. *Id.* at 1224. Walters was convicted of mail fraud, and the Seventh Circuit reversed his conviction. *Id.* at 1227.

The Seventh Circuit found that no evidence established that Walters knowingly caused the athletes' universities to mail false amateur-status certifications to the NCAA. *Walters*, 997 F.2d at 1223. This case presents no such sufficiency concern because the parties did not dispute that petitioner used the wires to further his scheme. See Pet. App. 10a-11a & n.2. The Seventh Circuit then went on to criticize the "theory of th[e] prosecution," stating that "only a scheme to obtain money or other property from the victim by fraud violates §1341," and that "[l]osses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement." *Walters*, 997 F.2d at 1224, 1227. But the court of appeals here agreed with the principle that a victim's loss must be central, rather than incidental, to the charged scheme, see Pet. App. 12a (citing *Kelly* v. *United States*, 140 S. Ct. 1565, 1573 (2020))—a requirement that the jury instructions captured by requiring the government to prove that petitioner "acted with intent to deceive *for the purpose* of depriving the relevant University of something of value." C.A. Supp. App. 364 (emphasis added); see p. 19, *infra*.[1]

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[1] In addressing petitioner's sufficiency challenge, which he does not renew before this Court, the court of appeals explained that a

Moreover, in *Walters* the Seventh Circuit did not dispute the proposition that, even if Walters did not defraud the universities "the athletes did." 997 F.2d at 1227. That did not save the conviction in *Walters*, because "the indictment charged a scheme *by Walters* to defraud," and "did not depict Walters as an *aide de camp* in the students' scheme." *Ibid.* The court further noted that the jury received only a "boilerplate" accomplice-liability instruction. *Ibid.* Here, however, the indictment expressly identified the families of the student-athletes as "co-conspirators" in petitioner's scheme. Superseding Indictment 3; see Pet. App. 112a (denying motion to dismiss the indictment on the ground that "defendants in this case are alleged to have conspired with prospective basketball players and/or their families"). And the district court expressly instructed the jury that petitioner could be found guilty of wire fraud if the government showed beyond a reasonable doubt that "the parent who signed and submitted the certification knew that the certification was false when the parent signed and submitted it," or if petitioner "aided" or "abetted" "another person [who] actually committed the crime." C.A. App. 441; D. Ct. Doc. 284, at 1856; see *id.* at 1837-1840, 1852-1853, 1855-1860.

Accordingly, the Seventh Circuit would affirm the conviction in this case. See *United States* v. *Sheneman*, 538 Fed. App. 722, 723 (7th Cir. 2013) (explaining that evidence would be sufficient even if the defendant

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rational jury could have determined that this requirement was met here because petitioner's fraudulent scheme (unlike the scheme at issue in *Walters*) involved getting athletes to enroll for the first time in the particular universities, and the athletes' willingness to enroll in the universities turned on the universities paying scholarships to the student-athletes. See Pet. App. 17a.

received "nothing" because "unlike Walters, [the defendant] intentionally participated in a scheme to defraud using the wires to enrich at least one of the schemers—the essence of wire fraud"), cert. denied, 573 U.S. 918 (2014); see also *United States* v. *Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (explaining that "[a] participant in a scheme to defraud is guilty even if * * * all the benefits of the fraud accrue to other participants"), cert. denied, 546 U.S. 1095, 1122 (2006). The same is true of the Sixth and Eleventh Circuits, on whose decisions petitioner similarly errs in relying. See Pet. 15 n.2 (citing *United States* v. *Baldinger*, 838 F.2d 176, 180 (6th Cir. 1988), and *United States* v. *Takhalov*, 827 F.3d 1307, 1313 (11th Cir. 2016)).

The Sixth Circuit's decision in *United States* v. *Baldinger* "[a]t most * * * suggest[s] that it may not be enough for defendants simply to interfere with their victims' property rights where those property rights are intangible," *United States* v. *Males*, 459 F.3d 154, 159-160 (2d Cir. 2006), and the Sixth Circuit has since adopted the same "intent to deprive" formulation articulated by the court of appeals here, see *United States* v. *Daniel*, 329 F.3d 480, 485 (2003) (citation omitted). And in *United States* v. *Takhalov*, the Eleventh Circuit, in likewise stating that wire fraud requires a scheme to "deprive" a victim of something, expressly noted that "[t]he Second Circuit has interpreted the wire-fraud statute in precisely th[e] [same] way." 827 F.3d at 1312, 1314 (brackets and internal quotation marks omitted); see *United States* v. *Wheeler*, No. 17-15003, 2021 WL 4908554, at *9 (11th Cir. Oct. 21, 2021) (per curiam) (explaining that "to prove substantive mail and wire fraud, the government must prove * * * that the defendant *intended to deprive* the victim of something of value")

(emphasis added) (citing *Takhalov*, 827 F.3d at 1313). While *Takhalov* took the view that a scheme to defraud requires misrepresentation "about the nature of the bargain," 827 F.3d at 1313, this case indisputably involves one. In light of petitioner's scheme, the universities believed that they were paying athletic scholarships to athletes who were eligible to play, but the athletes were not eligible—a textbook example of denying the universities the benefit of their bargain.

2. Petitioner separately contends (Pet. 21-24) that the court of appeals erred in "determin[ing] that a jury does not need to be instructed that" the "money or property deprivation must be a goal of the plot, not just an inadvertent consequence of it." Pet. 21-22 (capitalization, citation, and emphasis omitted). Petitioner acknowledges, however, that "the panel's decision was completely silent" as to this issue. Pet. 11; see Pet. App. 1a-48a; Pet. 21-24 (including no citations of the court of appeals' decision). So while petitioner refers to the "panel's conclusion that there was no defect in the instructions," Pet. 24, no such conclusion appears in the decision itself.

Moreover, petitioner did not directly argue in the court of appeals that an inadvertent-consequence instruction was necessary to establish that property rights were an objective of the scheme. Petitioner had asked the district court to instruct the jury that:

> [T]he government cannot satisfy its burden on this element [intent to defraud] by merely demonstrating that the defendant you are considering participated in the scheme with some knowledge or recognition of its capacity to cause harm or deprivation to the Universities. Instead, the government must prove that the defendant acted with the specific purpose of

> causing some financial harm or property loss to the Universities. The money or property deprivation must be a goal of the plot, not just an inadvertent consequence of it.

C.A. App. 1210-1211, 1351-1356 (footnotes omitted). Before the court of appeals, petitioner referred to the district court's rejection of that instruction only in making the argument that the instructions were inadequate to inform the jury that a "'recognition' of harm does not constitute an 'intent to harm,'" Pet. C.A. Br. 92; see *id.* at 90-95; see also Pet. C.A. Reply Br. 48 (contending that the requested instruction should have been given to "ma[k]e clear that [the defendants'] 'knowledge or recognition' of the fact that NCAA penalties could result from [their] actions was *not* enough to satisfy the Government's burden of proof"). Accordingly, the government addressed only that broader argument without joining issue as to the need for the inadvertent consequence language. See Gov't C.A. Br. 79-82; see also *United States* v. *Botti*, 711 F.3d 299, 313 (2d Cir. 2013) (explaining that "issues adverted to in a perfunctory manner * * * are deemed waived").

Because petitioner's argument was neither raised not addressed below, review is unwarranted. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to address issues that were "not addressed" by the lower court because it is "a court of review, not of first view"), and there is no reason to depart from that general rule here. Cf. Sup. Ct. R. 10 (explaining that certiorari may be warranted in various circumstances where "court of

appeals *has decided* an important question of federal law") (emphasis added).

In any event, petitioner has identified no error in the district court's jury instructions. In *Kelly* v. *United States*, this Court explained that, under the wire fraud statute, property "must be an 'object of the fraud,'" rather than "only an incidental byproduct of the scheme." *Id.* at 1573 (citation omitted); accord Pet. App. 12a. Here, the district court instructed the jury that, to prove that petitioner acted with "specific intent to defraud, the government must prove that he acted with intent to deceive *for the purpose of* depriving the relevant University of something of value." C.A. Supp. App. 364 (emphasis added). Accordingly, a jury that determined that the universities' decision to pay the scholarships was "only an incidental byproduct of the scheme," *Kelly*, 140 S. Ct. at 1573, would have acquitted petitioner.

Petitioner does not explain why the district court was obligated to instruct the jury that the deprivation was the "goal" (his word choice) rather than the "purpose" (the district court's instruction) to capture the requirement that deprivation was the scheme's "object" (as the *Kelly* Court put the point). And because "the charge as a whole * * * would have conveyed to a reasonable juror the relevant law," the district court was not required to instruct the jury using the "particular wording" requested by the petitioner. *United States* v. *Gabinskaya*, 829 F.3d 127, 132 (2d Cir. 2016) (citation omitted).

3. Finally, petitioner contends (Pet. 24-27) that he should "never have been indicted on a 'right to control' theory." Pet. 27. Again, the court of appeals did not address that issue as such. Rather than challenge

whether he should have been indicted on that theory, petitioner challenged—and the court only addressed—the particular jury instruction in this case. See Pet. C.A. Br. 69-72 (raising only an instructional error argument). And the court was correct in finding no error in that instruction in the circumstances of this case.

Petitioner contends (Pet. 26) that a right to control its scholarship decisions is not actionable because "it is not an interest that holds any independent economic value." But the jury was specifically instructed that a loss of a "right to control" assets could support a finding of guilt only if "the scheme could have caused or did cause tangible economic harm to the victim." Pet. App. 40a (quoting C.A. App. 444). And the court of appeals explained, "[t]here is no doubt that the Universities' scholarship money is a property interest with independent economic value." *Ibid.* The scholarships cost the universities money and they are available only in a limited number. See *ibid.*; C.A. Supp. App. 188, 199. Cf. *McNally*, 483 U.S. at 360 (suggesting that a mail-fraud conviction could be predicated on a finding that a victim "was deprived of control over how its money was spent").

Petitioner's scheme was akin to a classic property fraud scenario in which a victim is tricked into spending its money on something that does not meet its requirements. Even if the problem is latent and does not ultimately manifest itself in a harmful way, the fraud victim has used its resources on something that it falsely believes will meet its needs. Petitioner's reliance (Pet. 26) on *Kelly*, 140 S. Ct. at 1569, is misplaced. In that case, the Court held that realignment of lanes on a bridge "was a quintessential exercise of regulatory power," and "a scheme to alter such a regulatory choice is not

one to appropriate the government's property." *Id.* at 1572. Petitioner's scheme here was not directed at a state's "sovereign power to regulate," *ibid.* (citation omitted), but at altering how the universities spent their money. See Pet. App. 17a n.4.

In any event, this Court has recently and repeatedly denied petitions for writs of certiorari in cases where defendants have claimed that the Second Circuit has improperly adopted and applied a right-to-control theory. See *Kelerchian* v. *United States*, 140 S. Ct. 2825 (2020) (No. 19-782); *Aldissi* v. *United States*, 140 S. Ct. 1129 (2020) (No. 19-5805); *Binday* v. *United States*, 140 S. Ct. 1105 (2020) (No. 19-273); *Viloski* v. *United States*, 137 S. Ct. 1223 (2017) (No. 16-508); *Kergil* v. *United States*, 136 S. Ct. 2488 (2016) (No. 15-1177); *Resnick* v. *United States*, 136 S. Ct. 2488 (2016) (No. 15-8582); *Binday* v. *United States*, 136 S. Ct. 2487 (2016) (No. 15-1140); *Viloski* v. *United States*, 575 U.S. 935 (2015) (No. 14-472). The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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