No. 20-163

In the
Supreme Court of the United States

BRETT C. LILLEMOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

ALEXANDRA A.E. SHAPIRO
Counsel of Record
LAUREN M. BRODY
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

November 12, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. CERTIORARI IS WARRANTED TO REIN IN THE SECOND CIRCUIT'S OVERBROAD THEORY OF PROPERTY FRAUD 3

A. The Second Circuit's Decision Extends The Property Fraud Statutes To Schemes That Do Not Contemplate Economic Harm 3

B. The Second Circuit's Materiality Holding Conflicts With *Neder* And Decisions By Several Other Circuits 9

II. AT A MINIMUM, A GVR IN LIGHT OF *KELLY* IS WARRANTED 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Page(s)**

Kelly v. United States,
140 S. Ct. 1565 (2020)............................ 1, 9, 11, 12

Kisor v. Wilkie,
139 S. Ct. 2400 (2019).. 3, 4

Luciana v. U.S. Attorney General,
502 F.3d 273 (3d Cir. 2007) 9, 10

McNally v. United States,
483 U.S. 350 (1987)... 1

Musacchio v. United States,
136 S. Ct. 709 (2016)... 9

Neder v. United States,
527 U.S. 1 (1999)... 9

Red Ball Interior Demolition Corp. v. Palmadessa,
173 F.3d 481 (2d Cir. 1999) 5

Teva Pharm. USA, Inc. v. Sandoz, Inc.,
574 U.S. 318 (2015)... 4

United States v. Agne,
214 F.3d 47 (1st Cir. 2000) 8

United States v. Binday,
804 F.3d 558 (2d Cir. 2015) 6

United States v. Bruchhausen,
977 F.2d 464 (9th Cir. 1992)................................... 8

United States v. Camick,
796 F.3d 1206 (10th Cir. 2015)......................... 9, 11

United States v. Finazzo,
850 F.3d 94 (2d Cir. 2017) 6

United States v. Frost,
125 F.3d 346 (6th Cir. 1997).................................... 8

United States v. Johnson,
945 F.3d 606 (2d Cir. 2019),
cert. denied, __ S. Ct. __ (2020) 2, 6, 7

United States v. Robinson,
83 F.3d 418 (5th Cir. 1996)................................ 9, 11

United States v. Sadler,
750 F.3d 585 (6th Cir. 2014).................................... 8

United States v. Schwartz,
924 F.2d 410 (2d Cir. 1991) 2, 6

United States v. Takhalov,
827 F.3d 1307 (11th Cir. 2016)................................ 8

Statutes

7 C.F.R. §1493.120(e) (2012) 4

INTRODUCTION

In a series of decisions from *McNally v. United States*, 483 U.S. 350 (1987) to *Kelly v. United States*, 140 S. Ct. 1565 (2020), this Court has repeatedly held that the federal fraud statutes criminalize only schemes to obtain traditional, transferrable property. As the Court reaffirmed just this year, the statutes do not criminalize "every lie"; rather, the "object of the fraud" scheme must be causing economic "loss to the victim." *Kelly*, 140 S. Ct. at 1573-74. In this case and many others, however, the Second Circuit has interpreted the fraud statutes so expansively as to criminalize virtually any deceit, regardless of whether it can cause economic harm; by contrast, several other Circuits have construed fraud more narrowly. Given the high volume of significant fraud prosecutions brought in the Second Circuit, certiorari is warranted to enforce this Court's much narrower reading of these frequently-charged federal crimes.

The government does not dispute petitioner's interpretation of this Court's decisions. Instead, it attempts to portray the decision below and other Second Circuit fraud jurisprudence as consistent with that precedent and the petition as factbound. But its characterizations do not withstand scrutiny. The minor changes to the documents here had no conceivable impact on the alleged victims' property interests, but the Second Circuit still upheld the convictions. Its decision cited, and was entirely consistent with, other Second Circuit cases erroneously holding that "the fact that [the victim] never suffered—and the defendants never intended it—any pecuniary harm does not make the fraud

statutes inapplicable," *United States v. Schwartz*, 924 F.2d 410, 421 (2d Cir. 1991), and that a misrepresentation can be material even if it is incapable of causing economic harm, *e.g.*, *United States v. Johnson*, 945 F.3d 606, 614-15 (2d Cir. 2019), *cert. denied*, __ S. Ct. __ (2020). The government's attempt to deny the Circuit conflicts identified in the petition fails for the same reasons.

If this Court denies plenary review, it should grant, vacate and remand the decision below and direct the Second Circuit to reconsider it in light of *Kelly*'s guidance on the limits of the federal property fraud statutes. The government is unable to refute that the decision conflicts with *Kelly* in several respects and could cause the Second Circuit to reverse its decision. Among other things, *Kelly* makes clear that the "object" of a fraud scheme must be to "obtain" something from the victim. Petitioner plainly was not trying to "obtain" protection against the two supposed "risks" the Second Circuit identified, and what he was trying to obtain—his fee—was paid by the foreign banks, not the alleged victim domestic banks. Thus, under *Kelly*, petitioner's conduct did not violate the wire fraud statute.

ARGUMENT

I. CERTIORARI IS WARRANTED TO REIN IN THE SECOND CIRCUIT'S OVERBROAD THEORY OF PROPERTY FRAUD

A. The Second Circuit's Decision Extends The Property Fraud Statutes To Schemes That Do Not Contemplate Economic Harm

1. The government agrees that the property fraud statutes only prohibit schemes in which the object is causing economic harm to the victim but argues that the decision below is "consistent with that view." BIO.6-7. This misconstrues the Second Circuit's decision and ignores that the trivial alterations to the bills of lading could not have caused any financial loss to the domestic banks.

As a matter of law, it was impossible for the domestic banks to lose money in these transactions, and the reasons why are uncontested. The government does not dispute that these banks' financial interests were described in written loan agreements and USDA regulations. Nor can it dispute that the banks obtained valid loan obligations, and that the agreements and regulations "guaranteed that the domestic banks would get paid even if the foreign banks defaulted." BIO.9. Consequently, there is no dispute that the legal provisions defining the banks' property rights protected them from any financial losses they could have suffered had the foreign banks defaulted on the loans. And even if this point were contested, the dispute would be legal, not factual, because the interpretation of contracts and regulations are questions of law. *See*, *e.g.*, *Kisor v.*

Wilkie, 139 S. Ct. 2400, 2423-24 (2019) (it is for "the court…to determine…whether the regulation really has more than one reasonable meaning"); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325 (2015) ("document construction [i]s a question of law"). The Second Circuit's affirmance of petitioner's conviction therefore endorsed a legal theory of wire fraud that encompasses "schemes" that cannot cause economic harm, in defiance of this Court's decisions.

The government's efforts to avoid this ineluctable conclusion are meritless:

First, citing the Second Circuit's conclusion that the domestic banks "bargained for a set of documents that complied with the letters of credit and satisfied the USDA guarantee requirements," the government claims that the bills of lading had "significant economic value to the domestic banks," BIO.8; *id.* (claiming right to inspect documents was "economically valuable"). But the government never explains what that "economic value" supposedly is, because there was none. It says that "the foreign bank was entitled to refuse to honor the letter of credit." BIO.8; *accord id.* at 9. But it is undisputed that the loan obligation was enforceable (C.A.App.96), and even if the foreign banks had refused to pay, any losses were covered by the indemnification and the GSM guarantee, which the banks were entitled to under the regulations irrespective of petitioner's alterations.[1]

[1] *See* Pet.App.31 (citing 7 C.F.R. §1493.120(e) (2012)). Accordingly, the USDA official's testimony (*see* BIO.9) is entirely irrelevant; whether the banks were entitled to the guarantee

Consequently, even if the foreign bank could withhold payment, the domestic bank was exposed to no economic risk.

Moreover, as the petition explains and the government nowhere contests, the banks expressly waived any discrepancies between the bills of lading it received and what the LCs required. *See* Petition at 11, 29. Having done so, the bank cannot now complain that these same discrepancies allegedly exposed the bank to a loss. *See, e.g.*, *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999) (Sotomayor, J.) (courts may not "impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself").

The government's used car analogy (BIO.8) is completely inapposite. Putting an "original" stamp on copies of accurate bills of lading—particularly where one has agreed to waive any discrepancies—is not remotely comparable to selling someone a used car while falsely representing it is new. The "new car" here is the valid loan obligation and USDA guarantee, (the only economic benefits to which the banks were entitled), which is exactly what they received.

Second, the government suggests petitioner is "arguing that a scheme does not amount to fraud if the victim can rely on insurance to cover his losses." BIO.9. The implication appears to be that the purported victim may be exposed to economic risk if it must seek recoupment from a third party like an

---

under the regulations is a legal question determined without regard to some official's personal opinion.

insurer. But here, the parties who were obliged to cover any losses—petitioner and/or the USDA—were integrally involved in the underlying transaction, and it is undisputed that the guarantee they provided was absolute and enforceable by the bank. Consequently, the only real "risk" involved the cost of litigation to enforce that guarantee, which even the government admits is not cognizable harm under the fraud statutes. BIO.9.

2. The Second Circuit's refusal to enforce the property requirement here is not an outlier. It has affirmed property fraud convictions in many other cases where there was no proof the object of the "scheme" was to obtain *property* and inflict financial loss on the victim. The Second Circuit has repeatedly held that the defendant need not contemplate "pecuniary" harm and that "the fact that [the victim] never suffered—and that defendants never intended it—any pecuniary harm does not make the fraud statutes inapplicable." *Schwartz*, 924 F.2d at 421; *accord Johnson*, 945 F.3d at 614-15; *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017); *United States v. Binday*, 804 F.3d 558, 570-71 & n.11 (2d Cir. 2015); *see generally* Petition at 32-34. These cases are irreconcilable with this Court's cases requiring proof that the defendant sought to obtain traditional, transferrable property and that the object of a property fraud scheme was inflicting economic harm on the victim.

The government disputes this reading of the Second Circuit caselaw but ignores most of these cases. And what it does say about them is simply wrong. The government claims *Binday* says the

Second Circuit has "repeatedly *rejected* application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain." BIO.13. But that is not how the Second Circuit reads *Binday*. As it has explained, *Binday* affirmed a wire fraud conviction even though the victim "received the benefit of its bargain under the terms of the parties' contract." *Johnson*, 945 F.3d at 613. Indeed, in *Johnson*, the court affirmed a wire fraud conviction even though the alleged victim received what it was entitled to under a written contract and would not have paid less absent the alleged misrepresentation. *Id.* at 614-15.

The decision below, in short, reflects an entrenched, overexpansive interpretation of the federal fraud statutes. Many cases invoke the so-called "right-to-control" theory, which, as the petition explains, departs radically from this Court's insistence that the statutes criminalize only schemes to obtain traditional, transferrable property. *See* Petition at 18-21. The government points out that here the Second Circuit cited the doctrine but did not "subsequently rely on" it. BIO.14. That is true only in the narrow sense that the court mentioned the phrase "right to control" only once. The Second Circuit's analysis rests on a similarly flawed departure from the traditional property requirement, and the point remains the same: The Second Circuit has enabled prosecutors to stretch the federal fraud statutes far beyond their terms, to prosecute just about any falsehood—regardless of whether its object is obtaining property from, and thereby causing economic harm to, the victim. Here it affirmed petitioner's conviction based on these expansive fraud

precedents, even though the alterations were incapable of causing the victims any financial loss. Certiorari is warranted to ensure that the Second Circuit enforces this Court's narrow interpretation of the property fraud offenses.

3. The Second Circuit's expansive fraud doctrine conflicts with decisions by several other circuits. *See* Petition at 22-24 (citing *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014), *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), and *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992)). The government attempts to reconcile *Sadler*, *Bruchhausen*, and *Takhalov* on the ground that the victims in those cases got what they paid for. BIO.10-11. But so did the domestic banks here—the "bargain" was not to receive bills of lading in a particular format, but to receive a valid loan obligation and GSM-102 guarantee, which they did receive.

The government also notes that *United States v. Agne*, 214 F.3d 47 (1st Cir. 2000), involved "a different statute and different facts." BIO.11. But the statutes and facts are analogous. In *Agne*, the statute required proof that a fraud "affects" a financial institution; here, the statute requires the government to show that a misrepresentation could cause economic harm to the domestic banks. And in *Agne*, as the government itself points out, the court held that the banks were not exposed to any risk based on presentation of false bills of lading because "there was no realistic risk that the bank would be denied reimbursement, and the bank was contractually protected even if the documents upon which it relied turned out to be fraudulent."

BIO.11. The same is true here: The banks were contractually protected by valid loan obligations and indemnification provisions.

4. Contrary to the government's suggestion (BIO.6), petitioner *is* contesting sufficiency; he argues the evidence is insufficient under the proper legal standard. Sufficiency is determined under the correct legal standard and "does not rest on how the jury was instructed." *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016). This Court frequently decides legal questions on sufficiency review, even if jury instructions were consistent with Circuit precedent. *E.g.*, *Kelly*, 140 S. Ct. at 1571-74. Here, the Second Circuit *applied the wrong legal standard* by affirming a conviction under the wire fraud statute without any risk of economic harm.

B. The Second Circuit's Materiality Holding Conflicts With *Neder* And Decisions By Several Other Circuits

To satisfy the materiality element of the mail and wire fraud statutes, a misrepresentation must have a "natural tendency to influence, or [be] capable of influencing," a decision by the putative victim. *Neder v. United States*, 527 U.S. 1, 16 (1999). Accordingly, the Third, Fifth, and Tenth Circuits have held that a misrepresentation which is legally incapable of influencing the alleged victim's decision is legally immaterial. *See* Petition at 30-31; *e.g.*, *United States v. Camick*, 796 F.3d 1206, 1215-19 (10th Cir. 2015); *Luciana v. U.S. Attorney General*, 502 F.3d 273, 280 (3d Cir. 2007); *United States v. Robinson*, 83 F.3d 418, *2 (5th Cir. 1996). Yet the Second Circuit, by contrast, ruled that the alterations to the bills of lading could be

material even though they were legally incapable of affecting any economic decisions by the domestic banks.

The government does not dispute that *Neder* requires proof the alterations could have influenced a financial decision by the banks. Nor does it dispute that the alterations were incapable of influencing the domestic banks' decision to enter the transactions, because they occurred *after* the banks had already agreed to loan the funds. Nor could the government dispute these points. As the Second Circuit itself acknowledged, the domestic banks' "financial decision—to offer the foreign loans—was not influenced by the Defendants' misconduct." Pet.App.48.

Instead, the government claims petitioner's argument is factbound because the Second Circuit "rejected petitioner's understanding of the contracts" when it held that the banks "could have and would have rejected the bills of lading…had the banks known of the specific alterations at issue." BIO.12 (citing Pet.App.24). In fact, however, the Second Circuit completely *disregarded* the terms of the underlying loan agreements. Instead of analyzing the controlling legal documents, the court relied exclusively on testimony by bank representatives that conflicted with the binding, undisputed language of the agreements—as the witnesses themselves ultimately admitted, *see* Petition at 11.

By contrast, in *Luciana* the Third Circuit analyzed the governing regulation to determine whether the false statement could influence the agency's decision, *see* 502 F.3d at 280; in *Camick*, the

Tenth Circuit analyzed the relevant Kansas law and PTO procedures to determine whether the false statements could influence any relevant decisions, *see* 796 F.3d at 1215-17; and in *Robinson*, the Fifth Circuit found perjury immaterial because, as a matter of law, the district court "lacked the authority to grant relief on the motion on which the perjurious testimony was given." 83 F.3d 418, *2. It is the Second Circuit's refusal even to consider the legal meaning of the contracts which conflicts with the decisions of these other Circuits and warrants this Court's review. Yet the government completely ignores the Circuit conflict and the Second Circuit's failure to engage in contract interpretation to determine whether the alterations had the legal capability of affecting the banks' financial decisions.

II. AT A MINIMUM, A GVR IN LIGHT OF *KELLY* IS WARRANTED

In *Kelly*, the defendants directed government employees to realign traffic lanes to the George Washington Bridge and lied about why they did so. This Court rejected the government's attempt to defend the conviction on the ground that the cost of the employees' labor was "property," because the "property must play more than some bit part in a scheme: It must be an 'object of the fraud.'" 140 S. Ct. at 1573. In other words, the property must be what the defendant seeks to obtain from the victim; "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Id.*

The Second Circuit's decision cannot be reconciled with *Kelly*. *First*, the Second Circuit

concluded that petitioner exposed the banks to risks of non-reimbursement by the foreign banks and USDA and meritless "costly and protracted" litigation (Pet.App.27, 29), but these hypothetical potential losses fail to satisfy *Kelly*'s requirement that the "object" of the alleged scheme be to "obtain" some "money or property" that the *victim* actually possesses, 140 S. Ct. at 1571-72. Protection against the supposed risks of default or litigation was not something petitioner sought to obtain from the banks, nor something the banks could have transferred to him.

The government admits that "an interest can qualify as property only if it can be obtained from the victim by the fraudster," but erroneously contends that petitioner's "fee" for facilitating the LC transaction satisfies this requirement. BIO.15. As the Second Circuit acknowledged, however, the defendants "received fees *from the foreign banks*"—not the domestic banks that were the putative victims of the scheme. Pet.App.11. Accordingly, the government's theory fails *Kelly*'s obtainability requirement.

Second, the risks identified by the Second Circuit do not constitute traditional "money or property" under any reasonable understanding of those terms, given how ephemeral they were in light of the indemnification and USDA regulations. And any such risks would be, at most, the kind of "incidental byproduct of the scheme" upon which "a property fraud conviction cannot stand." *Kelly*, 140 S. Ct. at 1573. The government's only response is to repeat its argument that the bank "bargained for compliant"

bills of lading (BIO.14), but that is irrelevant if the defendants did not expose them to any economic harm. Accordingly, a GVR is warranted, because *Kelly* requires reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, this Court should grant the petition, or at least grant, vacate, and remand for reconsideration in light of *Kelly*.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
LAUREN M. BRODY
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

November 12, 2020