Nos. 11-360 and 11-6506

In the Supreme Court of the United States

JAMES CHRISTO, PETITIONER

v.

UNITED STATES OF AMERICA

REMILA CHRISTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS 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 holding that the evidence was sufficient to prove that petitioners conspired to "obtain[]" immigration "document[s]" as "evidence of authorized stay or employment in the United States," knowing the documents "to have been * * * procured by fraud," in violation of 18 U.S.C. 371 and the first paragraph of 18 U.S.C. 1546(a).

2. Whether the court of appeals erred in holding that even if the first paragraph of 18 U.S.C. 1546(a) did not provide a valid theory for the conspiracy charge in this case, that error would be harmless in light of the alternate theory of conspiracy under the fourth paragraph of Section 1546(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a)[1] is not published in the *Federal Reporter* but is available at 413 Fed. Appx. 375. The opinion of the district court (Pet. App. 4a-11a) is unreported.

[1] All references to "Pet. App." are to the appendix to the petition for certiorari in No. 11-360. Because the companion *in forma pauperis* petition in No. 11-6506 is identical in all material respects, this brief cites only to the petition (as "Pet.") in No. 11-360 as well.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2011. Petitions for rehearing were denied on May 6, 2011 (Pet. App. 11a-12a), and June 20, 2011 (Pet. App. 12a-13a). The petitions for a writ of certiorari were filed on September 19, 2011. 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, petitioners were convicted of conspiracy to commit immigration fraud, in violation of 18 U.S.C. 371 and 1546(a). They were each sentenced to five years of probation. The court of appeals affirmed. Pet. App. 1a-4a.

1. Petitioner James Christo (James) was an immigration attorney in Manhattan. Petitioner Remila Christo (Remila), James's wife, assisted him as a translator for Albanian clients who could not speak English. In April and May 2005, as part of an ongoing federal investigation, undercover Special Agent George Gjelaj presented himself to petitioners as "Gjon Stalaj," an Albanian applying for asylum in the United States. Gov't C.A. Br. 3, 5; see Pet. 8-9.

During an introductory interview in April 2005, Agent Gjelaj told James that he had entered the United States in August 2003. Gov't C.A. Br. 6. Agent Gjelaj deliberately chose this date because it would mean that April 2005 was outside the deadline for seeking asylum in the United States, absent exceptional circumstances. *Id.* at 7; see *id.* at 5. When James asked why he had not applied for asylum earlier, Agent Gjelaj responded that he did not know he had to file an application. *Id.* at 7. James also asked Agent Gjelaj if he was a member of

any organization in Albania, and Agent Gjelaj said no. *Id.* at 6. Referring to the legal bases for asylum, James told Agent Gjelaj that he would have to show that he had been persecuted in Albania because of his race, religion, or political views. *Id.* at 7; see *id.* at 4. Notwithstanding Agent Gjelaj's statement that he was not a member of any organization in Albania, James suggested: "Maybe you worked for the Democratic Party," *id.* at 7, or "maybe you had to leave because someone threatened to kill you. Because of something that your father did to somebody else or something to do with the land. You understand?" *Id.* at 8. Agent Gjelaj made clear, however, that he had no fear of persecution. *Id.* at 7. James explained that if they discussed the matter further, "you['re] gonna make it very hard for me" because "[t]here are things I can't tell you" and "there's things I can't do for you" "if I know too much." *Id.* at 8. James then arranged for Agent Gjelaj to meet with Remila. *Ibid.* James told him that after meeting with Remila, "you're gonna decide, based on what she says, what you * * * wanna do." *Ibid.*

In May 2005, Agent Gjelaj met with Remila. Gov't C.A. Br. 9. She asked him whether he could "give [her] a story" of persecution to include in his asylum application. *Ibid.* He explained that he left Albania because the economy was bad and he had trouble finding work. *Ibid.* Remila responded: "That means we have to create a story. Not that you have a persecution story." *Id.* at 9-10. Using a computer, she began entering Agent Gjelaj's data into a Form I-589 asylum application. *Id.* at 10. Although Agent Gjelaj had told her he arrived in the United States in August 2003 (*id.* at 9), she used November 2004 as his date of entry (*id.* at 10). She asked him to find a November 2004 receipt from a res-

taurant near his point of entry so that it could be submitted as evidence of the falsified date. *Ibid.* She also asked him to find paperwork from Albania to support an assertion that he was an active member of the Democratic Party there and was persecuted as a result of that association. *Id.* at 11. And despite Agent Gjelaj's statements to the contrary, Remila indicated on the Form I-589 that Agent Gjelaj was seeking asylum based on his political opinion and membership in a social group. *Id.* at 12.

James joined the meeting with Remila and Agent Gjelaj. Gov't C.A. Br. 10-12. James printed out a persecution statement from another client's asylum application and told Remila to "say the same thing for" Agent Gjelaj. *Id.* at 12. James also told Remila to include statements that Agent Gjelaj was a member of the Democratic Party in Albania; that he received threats as a result; that his parents were dead; that he had no family to help him; and that he did not want to include the names of the people who had assisted him in entering the United States because they would kill him if he mentioned them. *Id.* at 13. Finally, James instructed Remila that the claimed date of Agent Gjelaj's entry should be "recent." *Ibid.* Remila responded that "[i]t's November 2004." *Ibid.*

2. A grand jury in the United States District Court for the Southern District of New York charged petitioners with conspiracy to commit immigration fraud, in violation of 18 U.S.C. 371 and 1546(a).[2] C.A. App. A22-A24.

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[2] Based on facts unrelated to Agent Gjelaj's undercover work, a second count charged James with a separate conspiracy to commit immigration fraud, also in violation of 18 U.S.C. 371 and 1546(a). C.A. App. A25-A27. James was acquitted of that charge (see Pet. App. 5a), and it is not at issue here.

The indictment alleged that the conspiracy had two objects: (1) to "obtain[]" immigration "document[s]" as "evidence of authorized stay or employment in the United States," knowing the documents to be "procured by means of any false claim or statement" or "procured by fraud," in violation of the first paragraph (fraudulent-document prong) of 18 U.S.C. 1546(a); and (2) to make "any false statement with respect to a material fact in any application" for immigration documents, in violation of the fourth paragraph (false-statement prong) of 18 U.S.C. 1546(a). C.A. App. A23-A24.

At petitioners' joint jury trial, Agent Gjelaj testified to the facts described above (pp. 2-4, *supra*), and the government introduced transcripts of recordings the agent had made during his meetings with petitioners. Gov't C.A. Br. 3. The government also introduced, *inter alia*, the Form I-589 asylum application that Remila had prepared (but had never submitted) and a Form G-28 reflecting that James represented Agent Gjelaj in connection with his application. *Id.* at 12. As to both petitioners, the jury returned a general verdict of guilty on the conspiracy charge. C.A. App. A16.

The district court denied petitioners' motions for judgments of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Pet. App. 4a-11a. As relevant here, the court rejected petitioners' contention that the fraudulent-document prong of Section 1546(a) does not "apply to the asylum application context." *Id.* at 7a. The court pointed out that "immigration authorities issue Form I-94 arrival/departure cards to asylees indicating both that the asylee is authorized to remain in, and be employed in, the United States." *Ibid.* (citing, *inter alia*, 8 U.S.C. 1158(c); 8 C.F.R. 208.21(c); 8 C.F.R. 235.1(h)(1)). The court then found the evidence suffi-

cient to show that petitioners conspired to obtain asylum status on Agent Gjelaj's behalf by "fabricat[ing] * * * lies" in support of a "fraudulent asylum application," knowing full well that Agent Gjelaj "did not have a valid asylum claim." *Id.* at 8a-9a. The court further found it "of no import" that petitioners "never filed the fraudulent asylum application," because they were charged with conspiracy, under which "the conspiratorial agreement itself * * * is prohibited." *Id.* at 9a (quoting *United States* v. *Rosa*, 17 F.3d 1531, 1543 (2d Cir.), cert. denied, 513 U.S. 879 (1994)).

The district court subsequently sentenced both petitioners to five years of probation. Docket entry No. 98, at 2; Docket entry No. 99, at 2.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-4a. The court held that "[c]ontrary to [petitioners'] arguments, the evidence adduced at trial supports the verdict." *Id.* at 2a. Like the district court, the court of appeals explained that it was "not essential to the conspiracy charge" that petitioners never filed the fraudulent Form I-589, because conspiracy "focuses on the agreement to commit the illegal act." *Id.* at 2a-3a.

The court of appeals noted petitioners' argument "that falsifying a Form I-589 does not come within the purview [of the fraudulent-document prong] of 18 U.S.C. § 1546(a) because it is not a document required for entry into the United States." Pet. App. 3a; see James C.A. Br. 37-38; Remila C.A. Br. 42. The court did not resolve that argument, however, because it found the evidence sufficient to support a guilty verdict under the false-statement prong of 18 U.S.C. 1546(a). Citing *United States* v. *Rutkoske*, 506 F.3d 170, 176 (2d Cir. 2007), cert. denied, 553 U.S. 1060 (2008), the court explained

that "a verdict can be affirmed even if the evidence does not support one of the two theories of the offense that were submitted to the jury." Pet. App. 3a.[3]

ARGUMENT

Petitioners contend (Pet. 23-31) that for purposes of the first paragraph of 18 U.S.C. 1546(a), a Form I-589 asylum application is not a "document" that is "evidence of authorized stay or employment in the United States" and that the fraudulent-document object of the conspiracy charge therefore was legally invalid. But this case does not present the question of whether an asylum application is *itself* a "document" within the fraudulent-document prong of 18 U.S.C. 1546(a), because the government's theory of prosecution was that petitioners conspired to "obtain[]" an actual visa or employment authorization, knowing *that* "document" to be procured by fraud. Petitioners do not appear to challenge the legal validity under Section 1546(a)'s first paragraph of that theory of prosecution. As a result, this case also does not present the other issue that petitioners attempt to raise (Pet. 14-23): namely, whether a conviction on a multiple-object conspiracy charge can be affirmed where one of the theories alleged is legally flawed. In any event, recent decisions of this Court resolve that issue against petitioners. Further review is not warranted.

1. a. The first paragraph of 18 U.S.C. 1546(a) (in relevant part) prescribes criminal punishment for anyone who

> knowingly * * * utters, uses, attempts to use, possesses, obtains, accepts, or receives any * * * visa,

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[3] The court of appeals also summarily rejected petitioners' other contentions, which are not at issue before this Court. Pet. App. 3a-4a.

> permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained[.]

The fourth paragraph of Section 1546(a) (in relevant part) prescribes criminal punishment for anyone who

> knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder[.]

As noted above (pp. 4-5, *supra*), the indictment in this case alleged that petitioners violated 18 U.S.C. 371 by joining a conspiracy with two objects: (1) to "obtain[]" immigration "document[s]" as "evidence of authorized stay or employment in the United States," knowing the documents to be "procured by means of any false claim or statement" or "procured by fraud," in violation of the first, fraudulent-document prong of 18 U.S.C. 1546(a); and (2) to make "any false statement with respect to a material fact in any application" for immigration documents, in violation of the fourth, false-statement prong of 18 U.S.C. 1546(a). C.A. App. A23-A24.

Petitioners do not dispute that the government's false-statement theory was legally valid or that they in fact conspired to make a false statement in Agent Gjelaj's asylum application. Petitioners instead focus on the fraudulent-document object of the conspiracy charge and contend that, as a matter of law, they could not have conspired to violate the first paragraph of 18 U.S.C.

1546(a) because the Form I-589 that Remila filled out falsely was not itself a "document" that is "evidence of authorized stay or employment in the United States." See Pet. 23-24. That contention misunderstands the government's theory of prosecution.

The government did not allege or prove, as part of the fraudulent-document theory, that petitioners conspired to "obtain[]" the Form I-589 itself while knowing it had been falsified. Rather, the government alleged that petitioners conspired to "obtain[]" a visa, employment authorization, or other "document" that would result from a successful asylum application and that would show "Gjon Stalaj" was lawfully in the United States. Gov't C.A. Br. 32-33.

Petitioners do not appear to contend that that was a legally invalid theory, or that the government's trial evidence was insufficient to prove it. Nor could they. As an asylum officer from United States Citizenship and Immigration Services testified at trial (Gov't C.A. Br. 33 n.*), and as the district court recognized (Pet. App. 7a), when a successful asylum applicant obtains permission to reside and work in the United States, he receives documentation from the agency evidencing his lawful status. See, *e.g.*, 8 C.F.R. 208.21(c) (providing that a Form I-94 shall be provided to asylees and shall indicate both the holder's status as an asylee and his authorization to work in this country). The evidence in this case was sufficient to support a jury finding that petitioners conspired to "obtain[]" *that* "document[ation]"—in part by falsifying a Form I-589 (Gov't C.A. Br. 10), by concocting a false date of entry and a false persecution story (*id.* at 9-13), and by arranging

for Agent Gjelaj to obtain a restaurant receipt and other paperwork to support those fabrications (*id.* at 10-11).[4]

b. Petitioners point out (Pet. 7, 24, 26-27) that the Tenth Circuit held in *United States* v. *Phillips*, 543 F.3d 1197 (2008), cert. denied, 129 S. Ct. 946 (2009), that a Form I-589 asylum application is only that—"simply [an] application[ ]" reflecting a "desire [to] gain the right to enter or remain in the country legally"—and is not itself a "document" that is "evidence of authorized stay or employment in the United States." *Id.* at 1205-1206 (quotations omitted). But the government has not argued otherwise in this case. See Gov't C.A. Br. 31-32 (acknowledging that "an I-589 is merely an application for a document covered by the Fraudulent Document prong [and] is not itself such a document").

Nor did either court below hold that a Form I-589 is itself a "document" that is "evidence of authorized stay

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[4] To the extent petitioners argue that such a theory implicates the rule of lenity (Pet. 30-31) or puts "thousands of [immigration] law practices * * * at risk of prosecution for something as benign as" incorrect data entry by an assistant "outside [a defendant's] immediate supervision" (Pet. 28-29), they are incorrect. The government may prove a fraudulent-document violation only by showing that the defendant "know[s]" the documents at issue were "forged, counterfeited, altered, or falsely made" or that they "have been procured by means of any false claim or statement [or by] fraud." 18 U.S.C. 1546(a). That stringent *mens rea* requirement provides fair notice to putative violators and ensures against ensnaring innocents. See, *e.g.*, *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 342 (1952) (a statute's "requirement of * * * culpable intent as a necessary element of the offense does much to destroy any force" to a lack-of-notice argument); *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (declining to apply the rule of lenity to 18 U.S.C. 1014's prohibition against "knowingly mak[ing] any false statement" to a federally insured bank, in part because the statute's "*mens rea* requirements narrow the sweep of the statute").

or employment in the United States." To the contrary, the district court referred to the Form I-94 card, which is issued to asylees as proof of legal status after an asylum application is approved, as the relevant document. Pet. App. 7a. And the court of appeals expressly declined to "reach the question." *Id.* at 3a. The decisions below thus do not conflict with *Phillips*. For the same reason, the conflict petitioners assert (Pet. 24-26) between *Phillips* and the Fourth Circuit's decision in *United States* v. *Ryan-Webster*, 353 F.3d 353, 360 (2003) (holding that an alien's application for employment authorization falls within Section 1546(a)'s fraudulent-document prong on ground that such document is itself "prescribed by both statute and regulation for entry into the United States" (emphasis omitted)), cert. denied, 547 U.S. 1215 (2006), is not implicated by this case.

2. Citing this Court's decision in *Yates* v. *United States*, 354 U.S. 298 (1957), among others, petitioners further contend (Pet. 21-23) that the court of appeals erred by reasoning that a general guilty verdict on a conspiracy charge may be upheld (based on harmless-error review) even if one of the two theories of conspiracy is legally flawed. Petitioners fail to recognize, however, that their *Yates*-based theory of structural error is no longer good law in light of this Court's decisions in *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008), and *Skilling* v. *United States*, 130 S. Ct. 2896 (2010).

In *Hedgpeth*, which petitioners nowhere cite, the jury had been instructed on multiple theories of guilt, one of which was legally improper, and the jury then returned a general guilty verdict—the same situation that petitioners (incorrectly) allege occurred here. 555 U.S. at 60. The Court explained that *Yates* and its predecessors were decided before the Court had concluded in *Chap-*

man v. *California*, 386 U.S. 18 (1967), that constitutional errors can be harmless. 555 U.S. at 60. The Court further explained that since *Chapman*, it had concluded that various forms of instructional error are not structural but instead are trial errors subject to harmless-error review. *Id.* at 60-61. Although those cases did not arise in the context of a jury instructed on multiple theories of guilt, the Court reasoned that "nothing in them suggests that a different harmless-error analysis should govern in that particular context." *Id.* at 61 ("An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted."). Accordingly, the Court in *Hedgpeth* held that when a jury is instructed on multiple theories of guilt, one of which is invalid as a matter of law, the error is not structural but rather is subject to harmless-error review. *Id.* at 61-62. See also *Skilling*, 130 S. Ct. at 2934 (relying on *Hedgpeth* for the conclusion that the legal invalidity of one of three objects of the conspiracy charge "does not necessarily require reversal of the conspiracy conviction" based on a general guilty verdict).[5]

Petitioners criticize (Pet. 14-15, 17, 22-24) the court of appeals' statement that it "need not reach the question of whether a Form I-589 is a document required for entry into this country" (Pet. App. 3a) because it found sufficient evidence in the record to support a conspiracy conviction under the government's alternate theory based on the false-statement prong of 18 U.S.C.

[5] In light of *Hedgpeth* and *Skilling*, petitioners' reliance (Pet. 15-17) on any preexisting tension among the courts of appeals as to whether a legal error on one of two alternate theories of guilt requires automatic reversal is similarly inapt.

1546(a).[6] But that statement does not warrant this Court's review. The Second Circuit does not rely on a sufficiency-of-the-evidence analysis to conduct harmless-error review of alternate-theory error. Rather, it considers whether the verdict "necessarily" would have been the same even without the error. See *United States* v. *Ferguson*, No. 08-6211, 2011 WL 6351862, at *9 & n.14 (2d Cir. Dec. 19, 2011) (applying *Hedgpeth* and *Skilling*'s harmless-error test to alternate-theory error and noting that prior circuit law "no longer controls"). And because no alternate-theory error occurred in this case (see pp. 8-11, *supra*), the statement on which petitioners focus in the unpublished opinion affirming their convictions has no bearing on the judgment. Accordingly, further review of the court of appeals' decision is not warranted.

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[6] In support of its statement, the court of appeals cited (Pet. App. 3a) its prior decision in *United States* v. *Rutkoske*, 506 F.3d 170 (2d Cir. 2007), cert. denied, 553 U.S. 1060 (2008), which explains that "the Supreme Court has held that a verdict should be affirmed when two theories of an offense are submitted to the jury and the evidence supports one theory but not the other." *Id.* at 176 (citing *Griffin* v. *United States*, 502 U.S. 46, 56-60 (1991)). While that is the correct rule when one of the alternate theories fails on insufficiency-of-the-evidence grounds, it does not apply where the problem is the legal validity of one of the theories (as in *Hedgpeth* and *Skilling*, *supra*, which impose a different standard of harmless-error review). The court of appeals (and the government below, see Gov't C.A. Br. 37) appeared to construe petitioners' argument as one based solely on *Griffin*. Although petitioners cited *Griffin* to the court of appeals, their alternative-theory argument was based primarily on *Yates* (since modified by *Hedgpeth*/*Skilling*), *i.e.*, that the conspiracy charge predicated on the first paragraph of 18 U.S.C. 1546(a) was invalid as a matter of law. See James C.A. Br. 36-41. The court of appeals' apparently mistaken reliance on *Griffin*, however, does not warrant further review for the reasons stated in the text below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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