No. 11-862

In the Supreme Court of the United States

MARTIN J. BRADLEY, JR., MARTIN J. BRADLEY, III, AND BIO-MED PLUS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove that petitioners defrauded Florida's and California's healthcare programs by causing the programs to pay for "recycled" medications, where petitioners knew the programs had policies against reimbursing for such medications.

2. Whether probable cause supported warrants authorizing agents to search petitioners' offices for substantially all business records for 1997 through 2002.

3. Whether the district court abused its discretion under Federal Rule of Evidence 403 in admitting evidence of petitioners' wealth as relevant to prove their motive to commit fraud.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

Statutes and rule—Continued: Page

In the Supreme Court of the United States

No. 11-862

MARTIN J. BRADLEY, JR., MARTIN J. BRADLEY, III, AND BIO-MED PLUS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-212) is reported at 644 F.3d 1213.

JURISDICTION

The judgment of the court of appeals (Pet. App. 213-216) was entered on June 29, 2011. Petitions for rehearing were denied on September 12, 2011 (Pet. App. 303-304). On November 29, 2011, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including January 10, 2012, and the petition was filed on that date. 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 Georgia, petitioners Martin Bradley, Jr. (Bradley Jr.), Martin Bradley, III (Bradley III), and Bio-Med Plus, Inc. (Bio-Med), were each convicted on multiple counts of a 286-count indictment. Bradley Jr. was convicted of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to launder money, in violation of 18 U.S.C. 1956(h); and failing to disclose a foreign financial interest while violating federal law, in violation of 31 U.S.C. 5314 and 5322(b). 4:05-cr-00059-BAE Docket entry No. 739, at 1-2 (S.D. Ga. Sept. 11, 2006) (Docket entry). Bradley III was convicted of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to participate in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conspiring to commit wire fraud, in violation of 18 U.S.C. 371 and 1343; wire fraud, in violation of 18 U.S.C. 1343; conspiring to launder money, in violation of 18 U.S.C. 1956(h); money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i); and failing to disclose a foreign financial interest while violating federal law, in violation of 31 U.S.C. 5314 and 5322(b). Docket entry No. 740, at 1-3 (Sept. 11, 2006). Bio-Med was convicted of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to participate in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conspiring to commit wire fraud, in violation of 18 U.S.C. 371 and 1343; and wire fraud, in violation of 18 U.S.C. 1343. Docket entry No.

741, at 1-2 (Sept. 11, 2006). Bradley Jr. was sentenced to 225 months of imprisonment, to be followed by three years of supervised release. *Id.* No. 739, at 3-4. Bradley III was sentenced to 300 months of imprisonment, to be followed by three years of supervised release. *Id.* No. 740, at 4-5. Bio-Med was sentenced to five years of probation. *Id.* No. 741, at 3. All three petitioners were fined and ordered to pay restitution. Pet. App. 7. The court of appeals affirmed in relevant part.[1]

1. Bradley Jr. is Bradley III's father. Together they owned and operated Bio-Med, a drug wholesaler that bought and sold blood derivatives. Blood derivatives are temperature-sensitive medications derived from whole blood or plasma. They are prescribed for immune deficiencies such as AIDS and clotting disorders such as hemophilia. Because they are extremely expensive medications, they are usually underwritten by government health-care programs, such as Medicaid, for patients of modest economic means. The charges at issue in this case arise from petitioners' efforts to defraud Florida's and California's Medicaid and other health-care programs by causing the programs to pay for "recycled" blood derivatives—*i.e.*, medications that had been prescribed to previous patients, were billed to and paid for by government health-care programs, went unused by the patients, were restocked at an undetermined time and in an undetermined state, and were then resold as though they had not been dispensed before. Pet. App. 10-12 & nn.14-15; Gov't C.A. Br. 1-2.

a. Petitioners' scheme to defraud Florida Medicaid functioned in relevant part as follows. Some of Bradley

[1] The court affirmed petitioners' convictions and the sentences of Bradley III and Bio-Med, but it vacated Bradley Jr.'s sentence and remanded for resentencing as to him. Pet. App. 211.

III's associates recruited doctors working at Miami-area AIDS clinics to (1) have their prescriptions for intravenous immune globulin (IVIG), a blood derivative, filled at pharmacies the Bradleys owned or controlled, and then (2) resell to the Bradleys any IVIG that went unused when a patient failed to appear at a clinic for a prescribed infusion.[2] Pet. App. 12-14. "[C]learly established" Florida Medicaid policy required that a patient receive a prescribed medication before a pharmacy could submit a reimbursement request to the Medicaid program. *Id.* at 41 & n.64. But some clinic employees forged signatures for no-show patients, certifying infusions that were never performed. *Id.* at 17 n.29; Gov't C.A. Br. 11. As a result, the Bradley-controlled pharmacies were reimbursed for IVIG that was never infused in a patient. Pet. App. 14. And when buying the unused IVIG back from the clinic doctors, the Bradleys paid only about one-third the price at which Florida Medicaid had reimbursed the pharmacies. *Ibid.* For participating in this arrangement, the clinic doctors received the resale amount along with kickbacks of between $5000 to $10,000 per month, some of which money was shared with the employees who forged patient signatures. *Id.* at 14, 17 n.29; Gov't C.A. Br. 11.

After the Bradleys repurchased the unused IVIG, Bio-Med would sell it to various pharmacies, some of which the Bradleys owned or controlled and some of which were unsuspecting third parties. Pet. App. 15. An associate of the Bradleys, Michael Bossey, would sometimes alter the expiration dates affixed to the recy-

[2] IVIG frequently went unused because the clinic patients were "highly unreliable" about honoring appointments for prescribed infusions: one nurse estimated that only 20% to 30% of the appointments were kept. Gov't C.A. Br. 7; Pet. App. 16-17.

cled IVIG. *Id.* at 15 n.25. Acting on the Bradleys' behalf, Bossey would also forge a medication's accompanying "pedigree" papers—documents designed to track the medication's supply chain and confirm that the medication had been properly shipped and stored. *Ibid.* The pharmacies, in turn, used the recycled IVIG to fill prescriptions for other patients, again obtaining reimbursement from Florida Medicaid. *Id.* at 15. This second reimbursement violated Florida Medicaid's policy against reimbursing for a particular medication that had been recycled after it was not dispensed to the original patient. *Id.* at 41-42 & n.64.

b. Petitioners' scheme to defraud the relevant California health-care programs, California Medicaid (Medi-Cal) and the Genetically Handicapped Persons Program (GHPP), operated in a similar fashion. Apex Therapeutic Care was a California pharmaceutical wholesaler that supplied blood derivatives—specifically, a clotting aid known as Recombinate—to hemophiliac patients. Gov't C.A. Br. 3. Apex's officers (hereinafter Apex) developed a network of hemophiliac patients who were willing to sell Recombinate that they had been prescribed and for which Medi-Cal and GHPP had already reimbursed. Pet. App. 20-21. Bradley III bought this Recombinate at a discounted price, and the patients and Apex shared the proceeds. *Ibid.*; Gov't C.A. Br. 4. Apex removed identifying information from the Recombinate and shipped it to Bio-Med, which retained some in inventory and sold some back to Apex to make it appear as though the Recombinate had never been dispensed to patients. Pet. App. 21-22; Gov't C.A. Br. 4-5 & n.1.

Both Bio-Med and Apex distributed the recycled Recombinate to pharmacies, which dispensed it to patients without knowing that it was recycled, and the

companies billed Medi-Cal and GHPP for the medications on behalf of the pharmacies. Pet. App. 22. The pharmacies, in turn, again obtained reimbursement from Medi-Cal and GHPP. *Ibid.* This second reimbursement violated Medi-Cal's and GHPP's "well known" policies against reimbursing for a particular medication that had been previously dispensed to another patient. *Id.* at 49; see *id.* at 48-50; Gov't C.A. Br. 5.

c. Through a cooperating witness and undercover meetings with the Bradleys, federal agents learned that the Bradleys and Bio-Med had devised and made millions of dollars from a wide range of illegal drug-diversion schemes—schemes in which they bought pharmaceuticals at a reduced rate through misrepresentations and then diverted the products to a different, more profitable market. Gov't C.A. Br. 28-29; Pet. App. 73-74. To the cooperating witness and the agents, the Bradleys and a Bio-Med official explained how they had set up an intermediate company for the specific purpose of concealing illicit drug activity, bragged about doing business in Puerto Rico, claimed to know "of at least 57 ways to return * * * drug diversion profits to the U.S. through creative tax methods," and explained how they had structured millions of dollars of sales to avoid an audit by the Puerto Rican government. Gov't C.A. Br. 29. Citing in affidavits the foregoing information and other information the cooperating witness had provided about petitioners' diversion schemes, see Pet. App. 250-261, agents applied in several different districts for warrants to search Bio-Med's various offices, *id.* at 74-77.

As relevant here, in December 2002, federal magistrate judges in the Southern District of Georgia, the Southern District of Florida, and the District of Puerto Rico issued the requested warrants (Pet. App. 248), find-

ing probable cause to search Bio-Med's offices and seize all business records (in paper and electronic format) relating to petitioners' "purchase and sale of prescription pharmaceuticals" between 1997 and 2002 and all "records of any financial/business transactions" for the same period (*id.* at 75-76 n.90; see *id.* at 74-77).

Federal agents simultaneously executed all the warrants and seized the identified records, which amounted to substantially all of Bio-Med's business records for the period from 1997 through 2002. Pet. App. 77-78. The agents needed advanced equipment that they did not yet have in December 2002 in order to create a searchable database of the millions of pages of seized documents. *Id.* at 80 n.95. Ultimately, it took them about three years to cull out and analyze the relevant information. *Ibid.*

2. A grand jury in the Southern District of Georgia charged petitioners in a 286-count indictment with conspiring to participate in the conduct of an enterprise through a pattern of racketeering activity; racketeering; conspiring to commit wire fraud; wire fraud; conspiring to launder money; money laundering; and failing to disclose a foreign financial interest while violating federal law. Docket entry Nos. 228 (Sept. 20, 2005), 532 (Mar. 22, 2006). The charges were based, in relevant part, on the Florida and California recycling schemes recounted above (see pp. 3-6, *supra*).

a. Petitioners moved to suppress the seized business records, arguing that the search warrants were overbroad. See Pet. App. 81, 249.

i. A magistrate judge issued a report recommending that the district court deny petitioners' motions. Pet. App. 245-302. The magistrate judge cited Eleventh Circuit precedent holding that "all the business records

of [an] enterprise may properly be seized" where there is probable cause to believe that the business is "permeated" with or "perva[ded]" by fraud. *Id.* at 273, 278 (quoting *United States* v. *Sawyer*, 799 F.2d 1494, 1508 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987); and Docket entry No. 204, at 39 (Sept. 2, 2005)) (emphasis omitted). The magistrate judge further noted petitioners' concession that "such an expansive search may be proper" in cases of such pervasive fraud. *Id.* at 273. But the magistrate judge rejected their contention that Bio-Med was not, in fact, permeated with fraud. *Id.* at 273-281.

In the magistrate judge's view, the search-warrant affidavits established that: petitioners "had engaged in a continuous course of fraudulent conduct over many years * * * using a variety of [criminal] methods" (Pet. App. 275); their "fraudulent activity was not localized or isolated to just one narrow corner of [their] business but was spread out and systemic in its effect," having "metastasized throughout Bio-Med and other corporate entities owned by the Bradleys and their associates" (*id.* at 279-280); petitioners' illicit schemes comprised "many millions of dollars" of their business (*id.* at 279); and petitioners and their associates had relabeled products, "manipulate[d] corporate structures," used offshore accounts, and engaged in various transactions for the sole purpose of "promot[ing] and hid[ing] their fraudulent scheme[s]" (*id.* at 279-280). Moreover, the magistrate judge found that the schemes were so "long-standing" and "complex" that they could "fairly be characterized as 'pervasive'" even assuming the illicit proceeds had "constituted only a fraction of Bio-Med's total earnings." *Id.* at 280; see *id.* at 281 ("[a]n expansive search was required in order to unearth the relics of" a fraud that

petitioners themselves had "described as 'buried in history'") (citation omitted).

ii. The district court adopted the magistrate judge's report and recommendation and denied the motions to suppress. Pet. App. 235-244. The court agreed that the warrants were supported by probable cause to believe petitioners' business was so "permeated with fraud" that an all-records search was proper. *Id.* at 239.

b. At trial, Florida and California officials testified about the policies that Florida Medicaid, Medi-Cal, and GHPP had against reimbursing for medication that had been previously dispensed to another patient. Pet. App. 41-42 & n.64, 48-50. They made clear that these policies were based in part on concerns about how recycled blood derivatives had been handled and stored after they were dispensed to the initial patient. *Id.* at 48. The government introduced testimony that petitioners knew of these policies and made efforts to evade them. For example, as to the Florida scheme, Bossey and other witnesses testified that Bradley III told them to structure and invoice transactions involving recycled IVIG in a way that would conceal its pedigree. *Id.* at 45-46; see p. 5, *supra*. Similarly, as to the California scheme, an Apex officer testified that, during a meeting with Apex, Bradley Jr. "yelled out, 'you guys are talking about insurance fraud, you're all going to end up in the big house.'" Pet. App. 47 (emphasis omitted).

Over petitioners' objection pursuant to Federal Rule of Evidence 403, the government introduced and the district court admitted evidence of petitioners' wealth as relevant to prove their motive to commit fraud. See Pet. App. 110, 113. This so-called "wealth evidence" included photographs and valuations of the Bradleys' properties, aircraft, boats, and cars, along with other documents

describing and valuating their assets. *Id.* at 110-111; Gov't C.A. Br. 97.

Petitioners moved for judgments of acquittal, arguing, *inter alia*, that causing Florida Medicaid, Medi-Cal, and GHPP to pay for recycled blood derivatives did not defraud those programs under the mail- and wire-fraud statutes, 18 U.S.C. 1341 and 1343. *E.g.*, Docket entry No. 494, at 6-16 (Mar. 13, 2006). The district court denied their motions. See Pet. App. 39.

Following the 23-day trial, petitioners were convicted as described at pp. 2-3, *supra*. See Pet. App. 5-7 & n.4; Docket entry Nos. 739-741. They moved for a new trial, arguing, *inter alia*, that the district court abused its discretion under Rule 403 in admitting evidence of their wealth. Docket entry No. 627, at 16-22 (Apr. 28, 2006). The court denied the motion, emphasizing that petitioners had "clearly opened the door to such evidence by frequently raising wealth issues during cross-examination of the government's witnesses." *Id.* No. 689, at 4 (July 10, 2006); see *id.* at 4-5. The court sentenced Bradley Jr. to 225 months of imprisonment, to be followed by three years of supervised release (*id.* No. 739, at 3-4), Bradley III to 300 months of imprisonment, to be followed by three years of supervised release (*id.* No. 740, at 4-5), and Bio-Med to five years of probation (*id.* No. 741, at 3).

3. The court of appeals affirmed in relevant part. Pet. App. 1-212.[3]

a. The court of appeals rejected petitioners' contention that the evidence was insufficient to prove, under 18

[3] As noted (note 1, *supra*), the court affirmed all of petitioners' convictions and the sentences of Bradley III and Bio-Med, but it vacated Bradley Jr.'s sentence and remanded for resentencing as to him. Pet. App. 211.

U.S.C. 1341 and 1343, that they had defrauded Florida Medicaid, Medi-Cal, and GHPP by causing the programs to reimburse for recycled blood derivatives. Pet. App. 25-61.[4] In reciting the elements of mail and wire fraud, the court recognized that Sections 1341 and 1343 require the government to show (*inter alia*) (1) "a scheme or artifice to defraud," which in turn "requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property," *id.* at 32 (citation omitted); and (2) "an intent to defraud," meaning an intent to deprive another "of something of value by trick, deceit, chicane, * * * overreaching" or other "deceptive means," *id.* at 33, 35 (citations omitted). The court further observed that "[a] misrepresentation is material if it has a natural tendency to influence, or is capable of influencing, the decision maker to whom it is addressed." *Id.* at 32 (citation omitted).

The court held that the evidence satisfied these requirements. The court first pointed to the testimony from state officials to the effect that Florida Medicaid, Medi-Cal, and GHPP had "clearly established" policies against reimbursing for recycled medications. Pet. App. 41 n.64; see *id.* at 41-43 & n.64, 48-51. In the court's view, a reasonable jury could have found that petitioners were aware of these policies, especially in light of (1) direct testimony from Apex officers about that knowledge (*id.* at 50-51); (2) the efforts of petitioners

[4] The court agreed with petitioners that if they had not defrauded the programs within the meaning of Sections 1341 and 1343, their convictions for racketeering, money laundering, and failing to disclose a foreign financial interest would have to be reversed along with their wire fraud convictions, because mail and wire fraud were predicates for the other convictions. Pet. App. 26; see *id.* at 26-30, 35-39.

and their associates "to structure transactions of recycled medication to confuse the pedigree" (*id.* at 46; see *id.* at 15-17, 22, 40, 43-48); and (3) Bradley Jr.'s own statement that "'you guys are talking about insurance fraud, you're all going to end up in the big house'" (*id.* at 47 (emphasis omitted); see p. 9, *supra*). In sum, the court concluded, petitioners had recycled IVIG and Recombinate knowing full well that, in doing so, they were "induc[ing] Florida Medicaid, Medi-Cal, and GHPP to reimburse for drugs, often for a second time, when the programs otherwise would have refused." Pet. App. 40.

The court further held that, for purposes of the fraud statutes, it did not matter whether the programs' policies against reimbursing for recycled drugs were embodied in "express written regulation[s]," given that petitioners knew their "conduct would cause the Medicaid programs to reimburse for medication they did not intend to cover." Pet. App. 41 n.64; see *id.* at 48 n.71. For the same reason, the court did "not find it legally significant that the Government failed to prove that Bio-Med's recycled [medications were] dangerous to patients or otherwise less effective than" non-recycled medications. *Id.* at 48 n.70. In the court's view, it was enough that the programs simply did not want to pay for recycled medications and that petitioners knew as much. *Id.* at 48.

b. The court of appeals further rejected petitioners' claim that the evidence seized from their offices should have been suppressed because the search warrants were overbroad in authorizing the seizure of substantially all their business records. Pet. App. 81-86. The court agreed with the magistrate judge and the district court that an "all records search" was permissible under the

"pervasive fraud doctrine" because the search warrant affidavits "demonstrate[d] a pattern of illegal conduct that [was] likely to extend beyond the conduct already in evidence and infect the rest of [petitioners'] business." *Id.* at 83 (internal quotation marks and citation omitted).

The court acknowledged that, as a percentage-of-profits matter, petitioners' fraud schemes "represented only a small fraction of Bio-Med's legitimate business." Pet. App. 83. But the court was unpersuaded by petitioners' argument "that the 'pervasive fraud' doctrine is inapplicable unless the Government alleges that the business in question is engaged almost exclusively in fraudulent business practices." *Ibid.* The court reasoned that "'pervasive fraud' does not refer to the percentage of a defendant's business that is fraudulent" (*i.e.*, the "de[pth]" of the fraud) but instead "addresses the extent to which fraud has permeated the scope of the defendant's business" (*i.e.*, the "breadth" of the fraud). *Id.* at 83-84. "In other words," the court explained, "the doctrine is concerned with * * * whether evidence of fraud is likely to be found in records related to a wide range of company business." *Ibid.*

Having stated the standard that way, the court found it satisfied here. Pet. App. 84. The court "agree[d]" with the magistrate judge's and district court's conclusions that "'[t]he fraud had metastasized through[out] Bio-Med and other corporate entities owned by the Bradleys and their associates,'" such that "traces of that fraud were likely to be found spread out amongst the

myriad of records in Bio-Med's possession." *Id.* at 84, 86 n.97 (quoting *id.* at 280) (emphasis omitted).[5]

c. Finally, the court of appeals rejected petitioners' claim that the district court abused its discretion under Rule 403 by admitting evidence of their wealth as relevant to prove their motive to commit fraud. Pet. App. 109-115. The court of appeals acknowledged at the outset that "[u]se of a defendant's wealth to appeal to class bias can be 'highly improper' and can deprive that defendant of a fair trial." *Id.* at 112 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940)). Likewise, it cautioned that although "evidence of wealth or extravagant spending may be admissible when relevant to issues in the case"—such as "motivation" or the timing of a "sudden acquisition of money"—courts "must be careful" not to "permit[ ] the introduction of evidence that is probative of nothing more than the defendant's financial success." *Id.* at 112-113 (citations omitted).

Observing further that admissibility "must turn on the facts of each specific case," the court found no abuse of discretion in this case. Pet. App. 113; see *id.* at 113-115. Much like the district court did (see Docket entry No. 689, at 4), the court of appeals pointed out that petitioners had introduced evidence that they "had a successful business," which in turn might have suggested that they did not need to engage in fraud (Pet. App. 113). The court reasoned that the government could permissibly offer evidence about why "successful busi-

---

[5] Because the court concluded that the warrants were valid, it specifically declined to address the government's alternative contention (Gov't C.A. Br. 33) that, under *United States* v. *Leon*, 468 U.S. 897 (1984), the good-faith exception to the exclusionary rule precluded suppression. Pet. App. 86 n.98.

nessmen" would seek profits beyond those that they had obtained legitimately. *Id.* at 113-114.

In any event, the court concluded, any error would have been harmless, because a substantial amount of other evidence—"much of it introduced by the defense"—reflected Bio-Med's "impressive" legitimate profits. Pet. App. 114. In the court's view, if the jury was at all inclined to convict petitioners because of their wealth, it was "just as likely to be prejudiced by" the evidence of legitimate profits as by the evidence to which petitioners had objected under Rule 403. *Id.* at 114-115.

ARGUMENT

Petitioners contend that (1) the trial evidence was insufficient to prove, under 18 U.S.C. 1341 and 1343, that they defrauded Florida Medicaid, Medi-Cal, and GHPP by causing the programs to reimburse for recycled blood derivatives (Pet. 14-22); (2) the search warrants were overbroad in authorizing the seizure of substantially all of Bio-Med's business records (Pet. 23-31); and (3) the district court abused its discretion under Rule 403 by admitting evidence of petitioners' wealth as relevant to prove their motive to commit fraud (Pet. 31-36). The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners contend "that their recycling scheme[s] did not operate to defraud Florida Medicaid, Medi-Cal, or GHPP" within the meaning of the federal fraud statutes. Pet. 15; see Pet. 14-22. That contention does not warrant further review.

The mail and wire fraud statutes, 18 U.S.C. 1341, 1343, make it a crime to "devise[ ] or intend[ ] to devise

any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Ibid.* Petitioners do not argue that the court of appeals misstated the elements of fraud in holding that the government must prove a "scheme or artifice to defraud" by establishing "a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property." Pet. App. 32 (citation omitted). Nor do petitioners dispute that they caused Florida Medicaid, Medi-Cal, and GHPP to reimburse for recycled medications. See *id.* at 26 ("[Petitioners] do not dispute that Bio-Med was recycling blood derivatives as the Government contended."). Instead, petitioners argue that their recycling schemes did not rest on a material representation that deceived the health-care programs out of money or property. More specifically, they contend that (1) the recycling schemes did not cause the programs to lose any money, because the programs would have had to reimburse pharmacies for patients' prescribed blood derivatives "no matter where the dispensing pharmacies acquired the medications" (Pet. 16; see Pet. 16-17, 20); and (2) the schemes did not "violate[ ] any statutory or regulatory requirement of the programs" (Pet. 17; see Pet. 15, 21). Those contentions lack merit.

First, the recycling theory on which the court of appeals relied was based on the premise that, in the case of many patients, petitioners caused the programs to reimburse for a *kind* of medication of which the programs did not approve. That is, petitioners led the programs to believe they were paying for IVIG and Recombinate that had not previously been dispensed when they were actually paying for IVIG and Recombinate

that had been recycled. Such conduct—knowingly misleading someone in a way that causes him to pay for something when he would not otherwise do so if he knew the truth—is the very essence of fraud and falls squarely within Sections 1341 and 1343. See, *e.g.*, *United States* v. *Campbell*, 845 F.2d 1374, 1375-1376, 1382-1383 (6th Cir.) (upholding mail-fraud convictions against a sufficiency challenge where defendant physician obtained Medicaid reimbursements for unnecessary treatments), cert. denied, 488 U.S. 908 (1988); *United States* v. *Goldstein*, 695 F.2d 1228, 1229-1231, 1233 (10th Cir. 1981) (upholding mail-fraud convictions against a sufficiency challenge where defendant pharmacists and physician obtained reimbursements for prescriptions excluded from Medicaid coverage), cert. denied, 462 U.S. 1132 (1983).

Petitioners acknowledge that is the theory on which the decision below rests, Pet. 16 (the decision rests "on a theory that the programs * * * would not have paid for *these particular* medications"), but they claim that the health-care programs had no tangible property interest in "discriminat[ing]" between medications based on their pedigree, *ibid*. Thus, in petitioners' view, the court of appeals must have "drastically expanded the concept of property, to include the loss of intangible rights." Pet. 15.

Petitioners misread the court of appeals' opinion. As they themselves note (Pet. 15), the government did not charge them with honest-services fraud under 18 U.S.C. 1346. See, *e.g.*, Docket entry No. 532, at 11, 17 (indictment alleged that petitioners devised schemes "to obtain money and property" from Florida Medicaid, and "to obtain money and goods totaling more than $10,000,000" from Medi-Cal and GHPP, "by means of false and fraud-

ulent pretenses"). The court therefore had no occasion to and did not hold that petitioners had deprived Florida Medicaid, Medi-Cal, and GHPP of their honest services or of some other intangible interest. Instead, the court found the trial evidence sufficient to show that petitioners had fraudulently "induced" the programs "to reimburse"—*i.e.*, to unwittingly spend *money* on—medications the programs would not have paid for if they had known the medications were recycled. Pet. App. 40.

Accordingly, and because the health-care programs' money was self-evidently "money" for purposes of Sections 1341 and 1343, the decision below cannot be read to conflict with *McNally* v. *United States*, 483 U.S. 350 (1987), or *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), cases that address intangible rights. Petitioners resist that conclusion by suggesting that, when they caused the state-run programs to reimburse for recycled medications, they deprived the programs only of an intangible interest in "good government." Pet. 18 (quoting *McNally*, 483 U.S. at 360). Just like a private citizen, however, a state agency has a tangible, cognizable interest in spending its money as it sees fit, without being misled by misrepresentations about the products for which it pays.[6] Petitioners cite no case intimating that

[6] Petitioners suggest (Pet. 15-16) that, even if the health-care programs had some cognizable monetary interest at stake, any misrepresentations about the IVIG and Recombinate were not material because "the medications dispensed were not stolen, counterfeit, diluted or beyond their expiration dates." *Ibid.* Because that contention is wholly fact-bound, it does not warrant review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). In any event, the court of appeals correctly rejected that contention, concluding that, because the programs clearly would not have paid for recycled medications if they had known the truth, it did not matter whether the medications were "dan-

state-run programs like Florida Medicaid, Medi-Cal, and GHPP should receive less protection under the fraud statutes than a private individual who buys a used car based on a salesman's pretense that it is new. Indeed, existing precedent is to the contrary. For example, in *Campbell*, the defendant argued that his scheme to obtain Medicaid reimbursements for unnecessary treatments involved only an intangible interest in "good government" under *McNally* and thus did not fall within the mail-fraud statute. *Campbell*, 845 F.2d at 1382-1383. In rejecting that argument, the Sixth Circuit observed that the defendant's "conviction [was] based on a fraudulent scheme to obtain *money* from his patients and the government," conduct that was "clearly within the traditional parameters of the offense described in section 1341." *Ibid.*[7]

---

gerous to patients or otherwise less effective than" non-recycled medications. Pet. App. 48 & n.70. Whether a misrepresentation is material depends only on whether it was "[]capable of influencing the intended victim." *Neder* v. *United States*, 527 U.S. 1, 24 (1999); cf. *id.* at 16. In this case, petitioners' misrepresentations were not only capable of causing but plainly did cause the programs to reimburse for medications they would not have covered otherwise (partly because of storage concerns, Pet. App. 48).

[7] Moreover, although the court of appeals did not address this theory (having concluded that petitioners' convictions could be upheld under the recycling theory, Pet. App. 60 n.78), petitioners' initial billing of Florida's and California's health-care programs for medicine that was never taken by patients was also fraudulent. The government presented evidence showing that, with regard to the Florida Medicaid scheme, petitioners knowingly billed initially for medications that had never been dispensed to a patient and that the Florida Medicaid program prohibited such billings. See *id.* at 41 (testimony of a Florida Medicaid Bureau Chief). Additionally, the government presented evidence showing that the initial billings of California's health-care programs were made with the knowledge that the medications would be sold and recy-

Second, and relatedly, the court of appeals was correct in holding (Pet. App. 41 n.64; see *id.* at 48 n.71) that, for purposes of the fraud statutes, it did not matter whether the health-care programs' policies against reimbursing for recycled medications were embodied in written "statutory or regulatory requirement[s]" (Pet. 17; see Pet. 20-21). In *Goldstein*, a similar case involving false claims for Medicaid reimbursements, the defendants challenged their mail-fraud convictions on grounds that "the relevant state regulations governing medicaid payments for pharmaceutical items did not" prohibit the practices in which they had engaged. 695 F.2d at 1233. The Tenth Circuit rejected that argument, emphasizing that the "defendants were charged with the crime of mail fraud, not with violating the [state] medicaid program." *Ibid.* And "[t]he essence of an offense under section 1341," the court pointed out, is simply the "use of the mails to execute a fraudulent scheme * * * for obtaining money or property" by "concealment of material facts." *Ibid.* (citation omitted). Accordingly, the court held, the state "medicaid laws and regulations" at issue were "relevant to the frauds charged only insofar as they establish[ed] adequate guidelines under which [the] defendants should have known what material facts they had a duty to disclose in claiming medicaid reimbursements." *Ibid.* Here, because petitioners knew of the programs' "clearly established" (Pet. App. 41 n.64) and "well known" (*id.* at 49) policies against

---

cled instead of taken as prescribed. See Gov't C.A. Supp. Br. 3-6 (discussing testimony of Apex owner who billed Medi-Cal and GHPP for medication knowing that it would be sold and recycled instead of taken as prescribed). Accordingly, the initial billings also fraudulently deprived Florida's and California's health-care programs of money.

paying for recycled medications, it was not necessary for the government to rely on a statute or regulation.

Petitioners cite no mail- or wire-fraud case reaching a contrary conclusion. The cases they do cite (Pet. 21), *United States ex rel. Quinn* v. *Omnicare Inc.*, 382 F.3d 432 (3d Cir. 2004) (*Quinn*), *In re Genesis Health Ventures, Inc.*, 112 Fed. Appx. 140 (3d Cir. 2004) (*Genesis Health Ventures*), and *United States ex rel. Crews* v. *NCS Healthcare of Illinois, Inc.*, 460 F.3d 853 (7th Cir. 2006) (*Crews*), involved lawsuits arising under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, not prosecutions under Sections 1341 and 1343. For that reason alone, they cannot be read to conflict with the decision below. In any event, petitioners' cited cases are distinguishable on their facts: FCA liability attaches only when a provider, through the filing of a claim, "knowingly asks the Government to pay amounts it does not owe," *Quinn*, 382 F.3d at 438 (citation omitted), and there was no evidence that the providers in the cited cases intentionally made any misrepresentation in any claim, *id.* at 438-439; *Genesis Health Ventures*, 112 Fed. Appx. at 143-145; *Crews*, 460 F.3d at 856.

2. Petitioners further contend (Pet. 23-31) that Bio-Med was not so permeated with fraud that probable cause supported warrants authorizing agents to search petitioners' offices for substantially all business records from 1997 through 2002. That fact-bound contention lacks merit and does not implicate any conflict of authority.

a. As an initial matter, although petitioners at times present their Fourth Amendment claim as one that sounds in the Amendment's particularity requirement (*e.g.*, Pet. i, 23), it is better characterized as a claim that

the warrants were overbroad and unsupported by probable cause.

As petitioners point out (Pet. 23), the Fourth Amendment requires that search warrants contain "a 'particular description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). The particularity requirement serves "to prevent general searches" that "take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987); see *Horton* v. *California*, 496 U.S. 128, 139-140 (1999). But as then-Judge Alito explained in *United States* v. *$92,422.57*, 307 F.3d 137 (3d Cir. 2002), a warrant is not impermissibly general, and does not violate the particularity requirement, unless it enumerates "vague categories of items" and thereby "vest[s] the executing officers with unbridled discretion to conduct an exploratory rummaging through [a defendant's] papers." *Id.* at 149 (citation omitted). Judge Alito pointed out that a vague, general warrant stands in "contrast[]" to one "that is simply overly broad" because it "describe[s] in both specific and inclusive generic terms what is to be seized [but] authorizes the seizure of items as to which there is no probable cause." *Ibid.* (internal quotation marks and citation omitted; first set of brackets in original). Other courts have made the same distinction. See, *e.g.*, *United States* v. *Bentley*, 825 F.2d 1104, 1110 (7th Cir.) (Easterbrook, J.) ("The Constitution requires that the warrant 'particularly describ[e]' the things to be sought and seized, but when there is probable cause to seize every business paper on the premises, a warrant saying 'seize every business paper' particularly describes the things to be searched for and seized.") (brackets in original), cert. denied, 484 U.S. 901 (1987); *United States* v. *Kow*,

58 F.3d 423, 426-427 (9th Cir. 1995) (addressing "particularity," which depends on "precision," and "breadth," which depends on "probable cause," as two separate issues) (citation omitted); see also, *e.g.*, *In re Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 856-857 (9th Cir. 1997) (*SSDI*) (likewise distinguishing issues of particularity and overbreadth).

The substance of petitioners' Fourth Amendment discussion (Pet. 26-31) makes clear that they are not arguing that the warrants were so vague and open-ended that the executing agents could decide for themselves what to seize, but that the warrants specifically authorized the agents to seize *too much*: namely, all business records, in paper and electronic format, relating to petitioners' "purchase and sale of prescription pharmaceuticals" between 1997 and 2002 and all "records of any financial/business transactions" for the same period (Pet. App. 75-76 n.90; see *id.* at 74-77).

b. The courts of appeals that have addressed the matter have uniformly held that a warrant authorizing the seizure of all of a business's records is not overbroad where the issuing magistrate has probable cause to believe "that most or all of the business records * * * are linked to a mail and wire fraud scheme." *United States* v. *Brien*, 617 F.2d 299, 306-307 (1st Cir.), cert. denied, 446 U.S. 919 (1980); see, *e.g.*, *USPS* v. *C.E.C. Servs.*, 869 F.2d 184, 187 (2d Cir. 1989); *United States* v. *Oloyede*, 982 F.2d 133, 138-141 (4th Cir. 1992) (per curiam); *United States* v. *Humphrey*, 104 F.3d 65, 68-69 (5th Cir.), cert. denied, 520 U.S. 1235 (1997); *Bentley*, 825 F.2d at 1110; *United States* v. *Kail*, 804 F.2d 441, 444-445 (8th Cir. 1986); *United States* v. *Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374-1375 (9th Cir.

1983) (*50 State*), cert. denied, 465 U.S. 1021 (1984). The courts have called this principle the "pervasive fraud" or "permeated with fraud" doctrine. *Brien*, 617 F.2d at 309; *C.E.C. Servs.*, 869 F.2d at 187; *Oloyede*, 982 F.2d at 138; *Kail*, 804 F.2d at 445; *50 State*, 708 F.2d at 1375.

As petitioners at one point acknowledge, the permeated-with-fraud doctrine is not an exception to the Fourth Amendment's particularity or probable cause requirements; instead, it is merely a "recognition that a warrant—no matter how broad—is, nonetheless, legitimate if its scope does not exceed the probable cause upon which it is based." Pet. 26 (citation omitted). Petitioners cite no case in which a court has rejected that principle outright or held that an all-records search is invalid even where a business is, in fact, permeated with fraud.

Contrary to petitioners' claim (Pet. 26-31), no direct conflict of authority exists. While the courts of appeals have stated somewhat different standards for when a business is permeated with fraud, these articulations do not reflect basic analytic disagreements. For example, the Ninth Circuit has stated that "[w]here a business appears * * * to be engaged in some legitimate activity, this Court has required a more substantial showing of pervasive fraud." *SSDI*, 130 F.3d at 857. Similarly, the Tenth Circuit, without squarely approving or rejecting the permeated-with-fraud doctrine, has indicated that it would not apply in any case in which a magistrate lacks "probable cause to believe that fraud pervaded every aspect" of the business. *Voss* v. *Bergsgaard*, 774 F.2d 402, 406 (1985). But no court has suggested, in conflict with the decision below, that "'pervasive fraud'" "refer[s] to the percentage of a defendant's business that is fraudulent" (*i.e.*, the "de[pth]" of the fraud)

instead of the "extent to which fraud has permeated the scope of the defendant's business" (*i.e.*, the "breadth" of the fraud).[8] Pet. App. 83-84.

Rather, the courts have consistently reasoned, including in the cases petitioners cite (Pet. 26-30 & nn.5-10), that a business is permeated with fraud if evidence of the fraud is likely to be found in any *part* of the company's business, such that a magistrate judge cannot reasonably draft a warrant to "segregate" records of crime from records of legitimate business activity by authorizing a search for the former and not the latter. See, *e.g.*, *Brien*, 617 F.2d at 309 n.11 (applying doctrine and distinguishing prior cases, such as *In re Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979), "in which the suspected crime may have been reflected in a segregable class of records"); *C.E.C. Servs.*, 869 F.2d at 187 (applying doctrine where "it would be virtually impossible to segregate documents not related to [criminal] mailings from those related"); *Oloyede*, 982 F.2d at 141 (applying doctrine and observing that "a warrant may authorize the seizure of all documents relating to the suspected

---

[8] Contrary to petitioners' characterization, the court of appeals in this case did not hold "that an 'all records' warrant is permissible so long as there is probable cause to believe that 'a small fraction' of the business is engaged in illegitimate activity." Pet. 27 (emphasis omitted). It held instead that the permeated-with-fraud doctrine applies where there is probable cause to believe that "evidence of fraud is likely to be found in records related to a wide range of company business." Pet. App. 84. Nor did the Court suggest it was irrelevant that, as a percentage-of-profits matter, petitioners' fraud schemes "represented only a small fraction of Bio-Med's legitimate business." *Id.* at 83. Rather, the court quoted with approval the Ninth Circuit's statement in *SSDI* that "a more substantial showing of pervasive fraud" may be required "where a company's business is primarily legitimate." *Id.* at 86 (quoting *SSDI*, 130 F.3d at 857).

criminal area" but not of any documents that are "severable" from that area of business); *Kail*, 804 F.2d at 445 (applying doctrine where "it would not be possible * * * to separate those business records that would be evidence of fraud from those that would not"); *50 State*, 708 F.2d at 1374-1375 (holding the same, and "distinguish[ing] those cases where the suspected crime may have been evidenced in segregable records"); cf. *United States* v. *Ford*, 184 F.3d 566, 576-577 (6th Cir. 1999) (doctrine did not apply where warrant improperly authorized seizure of items that were "separable" from the business's criminal activity), cert. denied, 528 U.S. 1161 (2000); *Center Art Galleries—Hawaii, Inc.* v. *United States*, 875 F.2d 747, 750-751 (9th Cir. 1989) (same); *Voss*, 774 F.2d at 406 (same).

c. Absent any direct conflict of authority, petitioners' claim of overbreadth is nothing more than a fact-bound challenge to the probable-cause findings that several magistrate judges in several different districts independently made in authorizing the search warrants in this case. This Court ordinarily does not review such record-bound claims, particularly where, as here, a district court and court of appeals have agreed there was no error. Such review would be especially unwarranted here, given the deference due the issuing magistrate judges' probable-cause determinations.

Relying on *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983), and *United States* v. *Ventresca*, 380 U.S. 102, 109 (1965), the courts of appeals have consistently declined to second-guess magistrate judges' probable-cause findings in the permeated-with-fraud context. *E.g.*, *United States* v. *Hurwitz*, 459 F.3d 463, 473 (4th Cir. 2006) ("'[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit' should accord 'great deference' to the

magistrate judge's determination of probable cause.") (brackets in original) (quoting *Gates*, 462 U.S. at 236); see also, *e.g.*, *$92,422.57*, 307 F.3d at 146-147 (Alito, J.) ("The reviewing court inquires whether there was 'a "substantial basis" for finding probable cause.'") (citation omitted); *SSDI*, 130 F.3d at 856 (same). No reason for any less deference exists here.

d. Moreover, even if there were a direct conflict of authority, this case would provide an unsuitable vehicle through which to resolve it, for at least two reasons.

First, it is not clear that petitioners' overbreadth claim would succeed under any standard. The magistrate judge and the district court found that petitioners' "fraudulent activity was not localized or isolated to just one narrow corner of [their] business but was spread out and systemic in its effect," having "metastasized throughout Bio-Med and other corporate entities owned by the Bradleys and their associates." Pet. App. 279-280; see *id.* at 244. The court of appeals "agree[d]" with that finding, *id.* at 86 n.97; see *id.* at 84 ("[T]races of th[e] fraud were likely to be found spread out amongst the myriad of records in Bio-Med's possession."), and petitioners do not contest it. Nor do petitioners allege, let alone demonstrate, that the warrants could have "segregated" records of crime from records of legitimate business activity by authorizing a search for the former and not the latter. In short, even if this Court were to grant review and hold that the government had to make a "substantial showing of pervasive fraud" (*SSDI*, 130 F.3d at 857) by establishing "probable cause to believe [the] fraud pervaded every aspect" of petitioners' business (*Voss*, 774 F.2d at 406), the facts as determined by the lower courts would meet that standard.

Second, although the court of appeals declined to address the issue (Pet. App. 86 n.98), the good-faith exception to the exclusionary rule recognized in *United States* v. *Leon*, 468 U.S. 897 (1984), precluded suppression of petitioners' business records. Gov't C.A. Br. 33; see Docket entry No. 239, at 49-51 (Sept. 30, 2005). *Leon* provides an alternative basis for affirmance that would make it unnecessary for this Court to consider in this case the precise contours of the permeated-with-fraud doctrine.

In *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), a companion case to *Leon*, this Court held that the good-faith exception to the exclusionary rule applied to an overbroad warrant because the officers there could reasonably believe the warrant authorized the search. *Id.* at 987-991. Relying on *Sheppard*, Judge Alito explained in *United States* v. *$92,422.57*, *supra*, that agents are "not required to question" a warrant later held to be overbroad unless the warrant and its supporting affidavit are "so lacking in indicia of probable cause * * * as to render official belief in the warrant's legality entirely unreasonable." 307 F.3d at 146, 152; see *id.* at 145-152. As in *Sheppard* and *$92,422.57*, it cannot be said that it was "entirely unreasonable" for the agents in this case to rely on the warrants authorizing seizure of all of petitioners' business records for 1997 through 2002, given that (1) petitioners' "fraudulent activity was not localized or isolated to just one narrow corner of [their] business but was spread out and systemic in its effect" (Pet. App. 279; see *id.* at 84, 86 & n.97, 279-280); and (2) the relevant appellate precedent uniformly makes "segregability" a touchstone in the permeated-with-fraud analysis (see pp. 25-26, *supra*). See *Davis* v. *United States*, 131 S. Ct. 2419, 2429 (2011) ("An officer who conducts a

search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances.") (internal quotation marks, brackets, and citation omitted).[9]

3. Further review is similarly unwarranted to consider petitioners' renewed challenge (Pet. 31-36) to the district court's admission of evidence reflecting their wealth. That challenge necessarily rests on Rule 403, the rule petitioners invoked in objecting to the evidence in the district court. See Pet. App. 110.[10] Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403, 28 U.S.C. App. at 326 (2006) (amended 2011). This Court has made clear that such unfair prejudice may result from "appeals to class prejudice." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940).

---

[9] The additional fact that several magistrate judges independently issued warrants based on substantially the same affidavit (see Pet. App. 248) reinforces the reasonableness of the agents' reliance on those probable-cause determinations.

[10] Petitioners argued for the first time in the court of appeals that the government's closing argument improperly referred to petitioners' profits and relied on a "Greed is Good" poster seized from Bio-Med. See Gov't C.A. Br. 105-106. But they did not contemporaneously object on that basis in the district court. See *id*. at 105. To the extent petitioners attempt to renew their unpreserved contention here (*e.g.*, Pet. 9, 32-35), it is not properly before the Court. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (the Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below") (citation omitted); see, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks and citation omitted); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

The court of appeals did not hold otherwise. Rather, the court recognized that "[u]se of a defendant's wealth to appeal to class bias can be 'highly improper' and can deprive that defendant of a fair trial." Pet. App. 112 (quoting *Socony-Vacuum Oil Co.*, 310 U.S. at 239). It further admonished that although "evidence of wealth or extravagant spending may be admissible when relevant to issues in the case"—such as "motivation" or the timing of a "sudden acquisition of money"—courts "must be careful" not to "permit[] the introduction of evidence that is probative of nothing more than the defendant's financial success." *Id.* at 112-113 (citations omitted).

Petitioners do not dispute that those were correct statements of law. Nor do the cases they cite (Pet. 32-36) hold that wealth evidence is always inadmissible under Rule 403. And neither did the court below suggest that such evidence is always admissible. Rather, the court correctly emphasized that the Rule 403 inquiry "must turn on the facts of each specific case." Pet. App. 113.

Petitioners' argument is that, on the facts of this case, Rule 403 required exclusion. *E.g.*, Pet. 31 (seeking "summar[y] revers[al]" because the courts below "bless[ed]" a "brazen * * * appeal to the class bias of the jurors"). But there is no reason for this Court to disturb the record-bound conclusion of the lower courts that the evidence of petitioners' assets was admissible to prove their motive to commit fraud and to obtain profits beyond the ones they had made legitimately. That is particularly so where, in the view of both courts below, petitioners themselves "clearly opened the door to such evidence by frequently raising wealth issues during cross-examination of the government's witnesses." Docket entry No. 689, at 4; Pet. App. 113-114; see

Branti v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) ("absent the most exceptional circumstances," this Court "accept[s] * * * factual determinations in which the district court and the court of appeals have concurred"); see also *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008) (in "deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters," reviewing courts "afford broad discretion to a district court's evidentiary rulings" under Rule 403, which "requires an on-the-spot balancing of probative value and prejudice") (internal quotation marks and citation omitted).

Finally, this case would provide an especially unsuitable vehicle for review of the Rule 403 issue because the court of appeals concluded that any error was harmless. Pet. App. 114-115. As petitioners again do not dispute, that conclusion was undoubtedly correct: the jury was well aware of petitioners' wealth through independent evidence, and, in any event, the evidence of petitioners' fraudulent intent was compelling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

APRIL 2012