No. 20-163

In the Supreme Court of the United States

BRETT C. LILLEMOE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported the jury's finding, in petitioner's trial on charges of fraud, that his falsifications exposed banks to risks of financial losses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-49) is reported at 944 F.3d 72. The order of the district court (Pet. App. 50-83) is reported at 242 F. Supp. 3d 109. A subsequent order of the district court is not published in the Federal Supplement but is available at 2017 WL 3977921.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2019. A petition for rehearing was denied on March 10, 2020 (Pet. App. 84-85). The petition for a writ of certiorari was filed on August 7, 2020. 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 District of Connecticut, petitioner was

convicted on one count of conspiring to commit bank and wire fraud, in violation of 18 U.S.C. 1349; and five counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 3; Judgment 1. The court sentenced petitioner to 15 months of imprisonment, to be followed by three years of supervised release. Judgment 1. The court of appeals affirmed in part and reversed in part. Pet. App. 2.

1. This case concerns international agricultural shipping transactions. Pet. App. 11. The type of transaction at issue here generally begins with a contract for an exporter in the United States to sell agricultural goods to a foreign importer. *Id.* at 6. In such a transaction, the domestic exporter faces a risk that the foreign importer will fail to pay for goods that have been delivered. *Ibid.* The contracting parties thus generally rely on banks to help them avoid that risk. *Ibid.* At one end, the foreign importer pays a foreign bank to issue a letter of credit—an irrevocable promise by the bank to pay the beneficiary upon presentation of certain required documents. *Id.* at 6-7. At the other end, the American exporter assigns its right to payment on the letter of credit to a domestic bank, in exchange for the bank's immediate payment of the contract price for the goods. *Id.* at 7. The domestic and foreign banks thus assume the financial risks of the transaction, while the exporter gets paid quickly. *Ibid.*

In such a transaction, the banks never actually see the goods being exported. Instead, the exporter must present the domestic bank with various documents (such as bills of lading) showing that the goods have been exported. Pet. App. 7. Those documents must strictly comply with the terms of the letter of credit; if not, the foreign bank may refuse to honor the letter when the domestic bank presents it for payment. *Id.* at

7-9. "Because of this, [the domestic bank] inspects the documents *rigorously* to determine that they comply *exactly* with the requirements of the letter of credit—for the documents are its only protection." *Id.* at 8.

The U.S. Department of Agriculture (USDA) also plays an important role in the transactions at issue here. The USDA administers the GSM-102 program, which encourages U.S. banks to participate in those transactions with banks in developing countries, despite the risk that the foreign banks might default on their payment obligations. Pet. App. 10. To that end, the GSM-102 program provides the domestic bank a credit guarantee, "generally covering ninety-eight percent of the foreign bank's obligation under the letter of credit." *Ibid.*

2. Petitioner, who is not himself an exporter, acted as an intermediary in the GSM-102 program. Pet. App. 11-12. As relevant here, petitioner would obtain credit guarantees from the program, acquire shipping documents, and arrange for letters of credit between foreign and domestic banks backed by the guarantee. *Ibid.*

If the shipping documents petitioner acquired failed to comply with USDA requirements or with the letters of credit, petitioner "would simply falsify the documents to *make* them compliant." Pet. App. 12. For example, he would alter copies of bills of lading to make them look like originals, "redact[ing] * * * the phrase 'copy non-negotiable'" and "stamping * * * the word 'original'" instead. *Ibid.* He also would change the "bills of ladings' 'on-board' dates" (which showed when the shippers had loaded the goods on their vessels) in order to make them appear consistent with GSM-102 regulations. *Id.* at 12, 16-17.

A federal grand jury returned an indictment against petitioner and two co-defendants, charging petitioner with one count of conspiring to commit bank and wire fraud, in violation of 18 U.S.C. 1349; 19 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of bank fraud, in violation of 18 U.S.C. 1344; and one count of money laundering, in violation of 18 U.S.C. 1957 (2006 & Supp. IV 2010). Indictment 1-27.

At trial, representatives of two banks testified that they would not have accepted petitioner's bills of lading —and thus would not have released funds in particular transactions—if they had known that he had altered copies to make them look like originals. Pet. App. 14-15. Multiple additional witnesses also testified to the importance of accurate dates on the bills of lading under the GSM-102 regulations. *Id.* at 16-17.

The jury found petitioner guilty on one count of conspiracy and five counts of wire fraud. Judgment 1. The district court denied petitioner's postverdict motion for a judgment of acquittal or a new trial. Pet. App. 50-83. As relevant here, the court determined that sufficient evidence supported petitioner's convictions for fraud. *Id.* at 59-75. The court sentenced petitioner to 15 months of imprisonment, to be followed by three years of supervised release, and also ordered him to pay restitution. Judgment 1-2.

3. The court of appeals reversed the restitution order, but otherwise affirmed. Pet. App. 1-49.

As relevant here, the court of appeals rejected petitioner's contention that the government had introduced insufficient evidence that his misrepresentations were material. Pet. App. 21-26. Petitioner first argued that, under the applicable contracts, the banks were required

to accept the falsified bills of lading because they "*appeared* to be compliant with the letters of credit and the GSM-102 program requirements." *Id.* at 23. The court explained that such an argument would mean, in effect, that "the better the fraudster" is at making the falsified documents look compliant, "the less likely he is to have committed fraud." *Ibid.* The court rejected that argument, "which would entail countenancing any and all falsifications of documents involved in these or similar transactions, as long as they were carried out with sufficient skill." *Ibid.* Petitioner also argued that the alterations to the bills of lading were immaterial because those documents "fulfilled the obligations of the letters of credit" even before they had been altered. *Id.* at 24. The court observed, however, that the government had "offered substantial evidence at trial * * * that the banks could have and would have rejected the bills of lading * * * had the banks known of the specific alterations at issue"—including testimony from bank representatives and emails among the co-defendants discussing the importance of the alterations. *Ibid.*; see *id.* at 24-26.

The court of appeals likewise rejected petitioner's contention that the government had failed to present sufficient evidence that his scheme contemplated harm to the banks. Pet. App. 27-32. The court first emphasized that contemplated "'actual harm or injury'" is a "necessary element" of petitioner's offenses of conviction. *Id.* at 27 (citation omitted). The court observed that such injury can include both "'tangible economic harm'" and deprivation of "'intangible' interests." *Ibid.* (citations omitted). The court then stated that petitioner's scheme harmed banks in at least two ways. First, by presenting documents that failed to comply

strictly with the requirements of the letters of credit, petitioner "exposed the banks to risk of default or non-reimbursement from the foreign banks." *Ibid.* (emphasis omitted). Second, by presenting documents that failed to comply with the GSM-102 regulations, petitioner "increased the risk that the USDA would decline to reimburse the banks in the event of a foreign bank's default." *Id.* at 29. The court noted that an effort to obtain reimbursement "could certainly have resulted in 'protracted and costly litigation'" and emphasized that a USDA official "specifically testified that [petitioner's] changes put the banks at risk of non-reimbursement." *Id.* at 31 (citation omitted).

The court of appeals separately reversed petitioner's restitution order and remanded the case to the district court with instructions to amend its judgment to omit the requirement for restitution. Pet. App. 2. The district court has since amended its judgment accordingly. See Am. Judgment.

ARGUMENT

Petitioner contends (Pet. 17-35) that his convictions for fraud rest on a legally invalid theory, although his petition for a writ of certiorari does not directly challenge either the jury instructions or the sufficiency of the evidence. The court of appeals correctly affirmed petitioner's convictions, and the result here does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioner contends (Pet. 17-28) that "[t]he property fraud statutes only prohibit schemes in which the object is causing economic harm to the victim." Petitioner's fraud convictions, however, are entirely con-

sistent with that view, and petitioner's case-specific disagreements with the decision below do not warrant this Court's review.

a. The district court instructed the jury that, in order to obtain a conviction on the counts at issue here, the government was required to prove that petitioner caused the victim banks economic harm by "plac[ing] [them] at a risk of loss." Pet. App. 66 (citation omitted). In denying the motion for a judgment of acquittal or a new trial, the court found that "sufficient evidence to show that the banks were harmed by [petitioner's] deception." *Ibid.* (capitalization omitted). Similarly, the court of appeals stated that a showing that petitioner's scheme "'contemplated some actual harm or injury to their victims'" was "a necessary element of their offenses of conviction." *Id.* at 27 (citation omitted). The court then observed that the government had "presented a great deal of evidence that [petitioner's scheme] exposed the victim banks to the risk of 'actual harm or injury' on *multiple* dimensions." *Id.* at 32.

Petitioner's challenge (Pet. 24-28) thus boils down to a disagreement with the court of appeals' and district court's determinations that the government had presented sufficient evidence to satisfy that element. Such a factbound contention does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). And "under what [the Court] ha[s] called the 'two-court rule,' the policy has been applied with particular rigor when [the] district court and court of appeals

are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

b. In any event, sufficient evidence supported the jury's finding that petitioner's scheme contemplated economic harm to domestic banks. In particular, the evidence showed that the victim banks "bargained for a set of documents that complied with the letters of credit and satisfied the USDA guarantee requirements." Pet. App. 29. Those documents were themselves a critical part of the transaction, with significant economic value to the domestic banks. "[I]f the documents * * * did not 'strictly' comply with the requirements of the letter of credit, the [foreign] bank [wa]s entitled to refuse to honor the letter of credit, and the confirming bank [wa]s therefore unable to recover the money 'assigned' to it by the seller." *Id.* at 9 (emphasis omitted). The banks thus "inspect[ed] the documents *rigorously* to [ensure] that they compl[ied] *exactly* with the requirements of the letter of credit," *id.* at 8, and the right to do so was necessarily economically valuable. Yet petitioner instead provided documents that failed to conform to those requirements and that had been altered to produce the appearance of compliance. *Id.* at 29. That is fraud, in the same way that it would be fraud for a car dealer to promise a new car, but to provide a used car that has been made to appear new.

The fact that the victim banks "did not receive 'what they bargained for'" in itself establishes that they suffered injury, but the court of appeals identified two additional ways in which the banks suffered harm. Pet. App. 29. First, by providing documents that failed to comply with the letters of credit, petitioner exposed the

victim banks to the risk that the foreign banks would decline to honor those letters. *Id.* at 27-28. Petitioner argues (Pet. 24) that such a risk did not matter because the GSM-102 program and an indemnification agreement guaranteed that the domestic banks would get paid even if the foreign banks defaulted. But that is akin to arguing that a scheme does not amount to fraud if the victim can rely on insurance to cover his losses. Second, by providing documents that failed to comply with the GSM-102 regulations, petitioner exposed the victim banks to "the risk that the USDA would decline to reimburse the banks in the event of a foreign bank's default." Pet. App. 29. Petitioner contends (Pet. 25) that the banks faced no real risk of non-reimbursement and that the court below erroneously relied solely on the cost of litigating for the reimbursement. But although the decision below mentioned litigation cost, it expressly emphasized that a "USDA official * * * specifically testified [at trial] that [petitioner's] changes put the banks at risk of non-reimbursement." Pet. App. 31.

Petitioner errs in suggesting (Pet. 24) tension between the court of appeals' affirmance of his fraud convictions and reversal of the restitution order. The district court had ordered petitioner to pay restitution on account of a foreign bank's failure to pay the domestic banks with respect to five shipping transactions. Pet. App. 41-42. In reversing that order, the court of appeals explained that restitution was available only for losses that were proximately caused by petitioner's crimes. *Id.* at 43-44. The court concluded that the default at issue here had been caused by the foreign bank's "financial inability to fulfill [its obligations] following a global financial crisis," rather than by the "fraudulent shipping documents." *Id.* at 45. That conclusion rested not

on the premise that petitioner's fraud created no risk of loss, but instead on the disconnection between the risks created by the fraud and the risk that actually materialized. See *id.* at 43-45. The reasoning underlying the reversal of the restitution order thus has no bearing on the affirmance of the convictions.

c. Contrary to petitioner's contention (Pet. 18-24), the decision below does not conflict with any decision of this Court or any other court of appeals. Petitioner argues (Pet. 17-19) that this Court's decisions in *Kelly* v. *United States*, 140 S. Ct. 1565 (2020), *Skilling* v. *United States*, 561 U.S. 358 (2010), *Cleveland* v. *United States*, 531 U.S. 12 (2000), *Carpenter* v. *United States*, 484 U.S. 19 (1987), and *McNally* v. *United States*, 483 U.S. 350 (1987), all establish that the object of a fraudulent scheme "must be causing economic loss." He also argues (Pet. 20) that "most lower courts have held that an essential element of property fraud is proof that the defendant intended to inflict economic harm on the victim." But as just discussed, the decision below did apply the principle that contemplated harm was "a necessary element" of petitioner's offenses of conviction. Pet. App. 27.

Petitioner likewise errs in arguing (Pet. 22) that other courts of appeals have "reversed property fraud convictions" in "similar scenarios." For example, he cites (Pet. 22-23) *United States* v. *Takhalov*, 827 F.3d 1307 (11th Cir. 2016), modified 838 F.3d 1168 (11th Cir. 2016), *United States* v. *Sadler*, 750 F.3d 585 (6th Cir. 2014), and *United States* v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), but those cases concerned the application of the fraud statutes where "the defendants had tricked the victims into entering a transaction but nevertheless gave the victims exactly what they asked for

and charged them exactly what they agreed to pay," *Takhalov*, 827 F.3d 1310; see *Sadler*, 750 F.3d at 590-591; *Bruchhausen*, 977 F.2d at 466-468. In this case, petitioner did *not* "g[ive] the victims exactly what they asked for," *Takhalov*, 827 F.3d at 1310; the banks "bargained for a set of documents that complied with the letters of credit and satisfied the USDA guarantee requirements," but received falsified documents instead, Pet. App. 29.

Petitioner also cites (Pet. 26-27) *United States* v. *Agne*, 214 F.3d 47 (1st Cir. 2000), but that case involved a different statute and different facts. In *Agne*, the court of appeals assumed without deciding that being exposed to a risk of loss "affects" a financial institution within the meaning of 18 U.S.C. 3293(2) (Supp. IV 1992), which extends the statute of limitations for wire-fraud charges when the offense "affects" a financial institution. See *Agne*, 214 F.3d at 51-52. The court went on to conclude, on the facts at issue there, that the defendant had not exposed the bank to any such risk by relying on fraudulent documents to obtain a release of funds, because the bank was immediately and automatically reimbursed, 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. *Ibid.* This case, by contrast, does not concern the meaning of 18 U.S.C. 3293(2), and the courts below determined that petitioner *did* expose the victim banks "to the risk of 'actual harm or injury.'" Pet. App. 32.

2. Petitioner also contends (Pet. 28) that the court of appeals misapplied the materiality element of fraud. That contention likewise does not warrant this Court's review.

In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that a false representation can be fraudulent within the meaning of the federal mail-fraud and wire-fraud statutes only if the representation is material. *Id.* at 20-25. The Court explained that a matter is material if "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard [it] as important in determining his choice of action." *Id.* at 22 n.5 (citation omitted). In this case, the government introduced ample evidence showing that "a rational decisionmaker" would attach importance to the fact that the bills of lading had been falsified in deciding whether to enter into the transactions at issue. Pet. App. 22.

Petitioner asserts that, under the banks' contracts, the banks were "legally incapable" of declining to go through with the transactions if they had learned of the alterations of the bills of lading. Pet. 28 (emphasis omitted). He further asserts (Pet. 30-32) that other courts of appeals have held that a statement is not material if it is legally incapable of influencing the relevant decision. The court of appeals, however, rejected petitioner's understanding of the contracts, explaining that "the banks *could have* and would have rejected the bills of lading * * * had the banks known of the specific alterations at issue." Pet. App. 24 (emphasis added). In particular, the court explained that petitioner's reading of the contract boiled down to the view that, "because the bills of lading *appeared* to be compliant," the bank was contractually obligated to accept them. *Id.* at 23. The court rejected that interpretation, "which would

entail countenancing any and all falsifications of documents involved in these or similar transactions, as long as they were carried out with sufficient skill." *Ibid.* Petitioner's disagreement with that factbound determination does not warrant this Court's review. See Sup. Ct. R. 10; *Johnston*, 268 U.S. at 227.

3. Petitioner argues (Pet. 31-35) that this Court should grant review because the Second Circuit, across a wide range of cases, has "refus[ed] to enforce this Court's narrow construction of the property fraud statutes." But petitioner fails to support that characterization. For example, petitioner claims (Pet. 1) that the Second Circuit has "interpreted the property fraud statutes expansively to cover deceit unconnected to economic harm," but the court has "repeatedly *rejected* application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain." *United States* v. *Binday*, 804 F.3d 558, 570 (2015) (emphasis added), cert. denied, 136 S. Ct. 2487, and 136 S. Ct. 2488 (2016). Similarly, petitioner asserts (Pet. 1) that the Second Circuit has departed from the interpretations adopted by "several other Circuits," but one of the decisions that petitioner cites favorably states that "[t]he Second Circuit has interpreted the wire-fraud statute in precisely th[e] [same] way" and that "the Second Circuit's interpretation of the wire-fraud statute is not a parochial interpretation of an ambiguous provision of federal law." *Takhalov*, 827 F.3d at 1314-1315.

Petitioner also criticizes (Pet. 33) the court of appeals' acceptance of the so-called "'right to control' theory of property fraud." But although the court stated in the course of setting out the applicable legal frame-

work that the fraud statutes protect "the right to control the use of one's assets," the court did not subsequently rely on that proposition in affirming petitioner's convictions. Pet. App. 27. In any event, this Court has recently and repeatedly denied certiorari in cases where defendants have claimed that the Second Circuit has improperly adopted and applied that theory. See *Kelerchian* v. *United States*, 140 S. Ct. 2825 (2020) (No. 19-782); *Aldissi* v. *United States*, 140 S. Ct. 1129 (2020) (No. 19-5805); *Binday* v. *United States*, 140 S. Ct. 1105 (2020) (No. 19-273); *Viloski* v. *United States*, 137 S. Ct. 1223 (2017) (No. 16-508); *Kergil* v. *United States*, 136 S. Ct. 2488 (2016) (No. 15-1177); *Resnick* v. *United States*, 136 S. Ct. 2488 (2016) (No. 15-8582); *Binday*, *supra* (No. 15-1140); *Viloski* v. *United States*, 575 U.S. 935 (2015) (No. 14-472).

The same course is warranted here. Indeed, even assuming petitioner's criticisms were sound, he fails to adequately explain why purported errors in other cases would call for this Court's review of his particular fact-bound claims.

4. Finally, petitioner asks (Pet. 36-37) this Court to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further proceedings in light of the Court's recent decision in *Kelly*. But petitioner fails to identify any rule articulated in *Kelly* with which the court of appeals' analysis is inconsistent. Petitioner emphasizes (Pet. 36) *Kelly*'s "requirement that *loss* to the victim be 'an object' rather than 'an incidental byproduct' of the fraud," but in this case, the object of petitioner's scheme was to deceive the banks into accepting non-compliant bills of lading, when the banks had bargained for compliant ones. Petitioner also argues (Pet. 36-37) that, under

Kelly, an interest can qualify as property only if it can be "'obtain[ed]'" from the victim by the fraudster. But the fraudulent scheme here satisfies any such requirement. Petitioner acknowledges (Pet. 36) that he sought "to obtain * * * his fee."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2020