No. 14-472

In the Supreme Court of the United States

BENJAMIN VILOSKI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment and jury instructions reflected a valid theory of money or property fraud under the federal mail and wire fraud statutes, 18 U.S.C. 1341 and 1343.

2. Whether the district court erred in declining to compel the testimony of a potential defense witness who invoked his Fifth Amendment right against compulsory self-incrimination.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is not published in the *Federal Reporter* but is reprinted at 557 Fed. Appx. 28.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2014. A petition for rehearing was denied on May 23, 2014 (Pet. App. 17a-18a). On August 13, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 20, 2014, 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 Northern District of New York, peti-

tioner was convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; two counts of mail fraud, in violation of 18 U.S.C. 1341; conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); three counts of concealment money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) and 2; transacting in criminally deprived property, in violation of 18 U.S.C. 1957(a) and 2; and making false statements to federal officials, in violation of 18 U.S.C. 1001. Pet. App. 3a-4a. Petitioner was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. *Id.* at 5a; 1/18/12 Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-16a.

1. Petitioner was a real-estate attorney and broker based in Pittsburgh, Pennsylvania. Pet. App. 3a. In the commercial real-estate business, a landlord or developer often pays a commission to a broker or consultant representing a prospective tenant. Gov't C.A. Br. 9. In such cases, the landlord or developer charges the cost of the commission to the tenant by amortizing the fee over the life of the lease in the form of higher rent. *Id.* at 9-10. Between 1998 and 2005, petitioner was involved with real-estate transactions related to the development of new stores for Dick's Sporting Goods. *Id.* at 7. Petitioner worked with codefendant Joseph Queri, who served at the time as the Senior Vice President in charge of real estate for Dick's. *Id.* at 8; Pet. App. 3a. Unbeknownst to Dick's, petitioner accepted consulting fees for numerous real-estate transactions—although he had done no consulting work with respect to many of the transactions—and funneled all or a portion of the fee to Queri, thereby concealing from Dick's the receipt by Queri of the fee. Pet. App. 3a-4a; Gov't C.A. Br. 7-8. Even

when petitioner did not benefit by retaining a portion of the fees, he obtained a great deal of business for his law firm in connection with Dick's store projects. Gov't C.A. Br. 13.

In 1998, Queri was approached by a developer who offered to pay a brokerage fee even though no broker was involved in the transaction. Gov't C.A. Br. 10. Queri understood the payment to be offered as a "kickback" designed to ensure that he would conduct more business with the developer in the future. *Ibid.* Aware that he should not accept the payment without disclosing it to Dick's but wanting the money because of personal financial problems, Queri discussed the opportunity with petitioner, who advised Queri not to accept the payment in his own name. *Id.* at 10-11. In order to conceal Queri's involvement, petitioner instead posed as the broker in the transaction (although he had had no involvement in the transaction). *Id.* at 11. The developer ultimately paid a $75,000 fee to petitioner, who passed approximately $60,000 to Queri. *Id.* at 11-12. Queri never informed Dick's that he had collected the fee and knew that he was not authorized by Dick's to do so. *Id.* at 12.

Between 1999 and 2005, petitioner and Queri repeated their scheme in numerous other store-development transactions, eventually using a third party to transfer the money from petitioner to Queri. Gov't C.A. Br. 12-15. Between 1998 and 2005, petitioner funneled more than $1.2 million in illicit payments to Queri through his own company accounts or through the third party. *Id.* at 14-15; Pet. App. 14a.

2. a. Based on the foregoing conduct, a grand jury returned an indictment charging petitioner (along with Queri and two other co-defendants) with conspir-

ing to commit mail and wire fraud; multiple substantive mail and wire fraud violations; multiple counts of laundering and conspiring to launder money; and making false statements to federal officials, based on petitioner's having denied in an interview with investigators any knowledge of or involvement in the scheme to funnel payments to Queri. C.A. App. 22-88 (First Superseding Indictment); Gov't C.A. Br. 16. The substantive mail fraud counts charged, *inter alia*, "mail fraud and deprivation of honest services mail fraud," C.A. App. 55 (capitalization altered), consisting of a "kickback scheme" "to deprive Dick's and its shareholders of the intangible right of the honest services of its employees and officers" as well as money and property rights, *id.* at 57.

b. At the time the first superseding indictment was returned in November 2009, this Court had recently granted a petition for a writ of certiorari in *Skilling* v. *United States*, 561 U.S. 358 (2010), to determine the requirements for proving honest-services fraud under the wire fraud statute, 18 U.S.C. 1346. The Court ultimately held that honest-services fraud is limited to schemes to defraud involving bribery or kickbacks, and it rejected a vagueness challenge to the statute as so construed. *Skilling*, 561 U.S. at 404-413. In the wake of *Skilling*, the government filed a letter in the district court in this case stating that, although there was "good reason to believe" that the scheme to defraud alleged in the indictment was proper under *Skilling*, petitioner had indicated that he nonetheless planned to file motions asserting that *Skilling* affected his case. C.A. App. 101-102. To avoid further delays and "needless complexity in jury instructions resulting from different views of the meaning of *Skil-*

ling," the government agreed to excise all references to honest-services fraud from the superseding indictment and not to seek jury instructions or present argument to the jury based on an honest-services theory. *Id.* at 102.

Based on the government's post-*Skilling* letter, the district court granted petitioner's "motion to dismiss the deprivation of honest services theory." C.A. App. 111. The court rejected petitioner's arguments for dismissing the remaining fraud counts. *Id.* at 112-115. The court concluded that the indictment gave petitioner adequate notice of two theories of mail fraud liability apart from honest-services fraud: "1) a scheme to obtain money or tangible property; and 2) a scheme to deprive Dick's of potentially valuable information that could impact its business decisions." *Id.* at 113. The court further concluded that the latter theory was well established under cases in the Second Circuit and other jurisdictions. *Id.* at 113-115. The court later approved an amended first superseding indictment that excised the honest-services allegations. *Id.* at 904-945.

3. Petitioner proceeded to trial on the amended first superseding indictment.[1]

a. As part of his defense, petitioner sought to call as a witness Oscar Plotkin, the co-owner of one of the developers that had made kickback payments through petitioner to Queri. See C.A. App. 124-126. Petitioner

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[1] Two of petitioner's co-defendants pleaded guilty to the fraud conspiracy pursuant to plea agreements; each also pleaded guilty to separate substantive counts. Gov't C.A. App. 26-57, 118. His third co-defendant was tried separately, but the district court dismissed the charges before the case was submitted to the jury. Gov't C.A. Br. 4 n.1.

asserted, based on the government's pretrial disclosures, that Plotkin could offer favorable testimony as a defense witness and, specifically, that he would corroborate petitioner's contention that Dick's knew that Queri was receiving payments from developers as part of the real-estate transactions. *Id.* at 124-125. Petitioner filed a motion in limine suggesting that the district court could effectively immunize Plotkin by compelling his testimony, or could require the government to formally immunize him, in order to overcome Plotkin's anticipated invocation of his Fifth Amendment right against compelled self-incrimination. *Id.* at 154-155. The government responded with a letter to the court, see *id.* at 617-622, explaining that Plotkin's potential testimony was of limited exculpatory value; that he remained under investigation for offenses (including bank fraud) for which the statute of limitations had not yet expired; and that the government had sought to interview Plotkin (and even offered him limited immunity), but that he had refused to be interviewed absent full use-and-derivative-use immunity, which the government refused to confer "because doing so would jeopardize its investigation of Plotkin," *id.* at 617-619.

At the close of the government's case, the district court heard argument from the parties and Plotkin's attorney, who formally reasserted Plotkin's Fifth Amendment objection to being called as a defense witness. C.A. App. 648-656. In an oral ruling, the court denied petitioner's motion to compel Plotkin's testimony, holding that petitioner had not established any of the factors required to compel a grant of defense-witness immunity under circuit precedent. *Id.* at 657-658.

b. At the close of all the evidence, the district court instructed the jury on the two theories of mail and wire fraud alleged in the amended first superseding indictment. C.A. App. 808-814. Tracking the statutory language, the court instructed jurors that the first element of the offense required proof of "a scheme or artifice to defraud or to obtain money or property, or to deprive Dick's of potentially valuable information that could impact on its economic decisions, by means of materially false or fraudulent pretenses, representations, or prosmises." *Id.* at 808. The court defined a "scheme to defraud" as "any plan, device, or course of action to obtain money or property, here, potentially valuable information that could impact on Dick's economic decisions, by means of false or fraudulent pretenses, representations, or promises," *id.* at 809, and it specified that the category of fraudulent representations includes "[t]he failure to disclose information" that a defendant is under a duty to disclose. *Id.* at 810; see *id.* at 809 ("Thus, a scheme to defraud is merely a plan to deprive another of money or property by trick, deceit, deception or swindle."). The court explained that, to prove a scheme to defraud, the government must show "that the alleged scheme contemplated depriving another of money or property, which can consist of the intangible right to potentially valuable information that could impact on Dick's economic decisions." *Id.* at 811.

The court's instructions further defined the term "property" to include "intangible property interests such as the right of a business to control the use of its own assets." C.A. App. 812. "A business," the court explained, "has a right both to control the spending of its own funds and to have access to information known

to its employees and officers that could impact on its spending of its funds," and those rights are undermined "when an employee or officer of a company either withholds information or inaccurately reports information that could impact on the company's economic decisions." *Ibid.* Summarizing, the court stated that:

> Thus, you can find that there has been a deprivation of property as charged in the mail and wire fraud counts if you find beyond a reasonable doubt that an employee or officer of Dick's either failed to disclose or inaccurately reported economically material information that the officer or employee had reason to believe would have caused Dick's to change its business conduct.

Id. at 813.

The jury found petitioner guilty of mail and wire fraud conspiracy and two substantive counts of mail fraud, as well as laundering and conspiring to launder money, transacting in criminally derived property, and making false statements. Pet. App. 4a. The jury acquitted petitioner on the remaining counts. *Id.* at 4a. After denying petitioner's post-verdict motions for a judgment of acquittal or a new trial, the district court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. Gov't C.A. App. 214-216.

4. The court of appeals affirmed petitioner's convictions in an unpublished opinion. Pet. App. 1a-16a.[2]

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[2] The court of appeals remanded the forfeiture component of petitioner's sentence because the district court had failed to consider the factors required to determine whether the forfeiture amount violated the Eighth Amendment. Pet. App. 15a. The district court

As relevant here, petitioner argued that "the [g]overnment's theory of mail fraud was legally flawed and/or constructively amended" and that the district court erred in refusing to compel the testimony of potential defense witness Plotkin. *Id.* at 2a. The court of appeals rejected both contentions.

a. With respect to petitioner's mail fraud convictions, the court of appeals explained that its precedents had long recognized "'that the property interests protected by the [mail and wire fraud] statutes include the interest of a victim in controlling his or her own assets.'" Pet. App. 6a (quoting *United States* v. *Carlo*, 507 F.3d 799, 801-802 (2d Cir. 2007)). Under that right-to-control theory, the court further explained, "the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution," so long as "the information withheld" is either "of some independent value" or "bear[s] on the ultimate value of the transaction." *Id.* at 7a (citations and internal quotation marks omitted).

The court of appeals concluded that "the indictment gave sufficient notice that" the government was prosecuting petitioner based on the right-to-control theory and that "[t]he jury instructions were in line with this theory." Pet. App. 7a-8a. The court rejected petitioner's argument that the indictment and jury instructions failed to articulate a valid right-to-control theory because they referred to the withholding of "*potentially* valuable information" that "*could* impact" a business's spending of funds. *Id.* at 8a-9a. The court explained that "the key element in a prosecution

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has since reaffirmed its forfeiture order after considering the relevant factors. Pet. 5 n.1.

under a right-to-control theory [i]s whether tangible, economic harm [is] possible," that the jury instructions accurately reflected that requirement by requiring "that the information be economically material," and that the evidence supported the jury's finding on that point because "the deprivation of information regarding Queri's kickbacks was material and potentially could result in tangible harm because Dick's could have negotiated better deals for itself." *Id.* at 9a-10a.

b. The court of appeals also rejected petitioner's argument "that the [d]istrict [c]ourt erred in refusing to compel the [g]overnment to offer immunity to" Plotkin when he invoked his Fifth Amendment right against self-incrimination. Pet. App. 11a-13a. The court noted that its precedents foreclosed petitioner's attempt "to bring this claim under the Compulsory Process Clause of the Constitution." *Id.* at 11a n.3 (citing *United States* v. *Turkish*, 623 F.2d 769, 773-774 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981)). The court also concluded that the district court properly applied the circuit's standard, derived from the Due Process Clause of the Fifth Amendment, for compelling immunity. *Id.* at 11a-12a & n.3. The court of appeals explained that the government's ongoing investigation of Plotkin for bank fraud was "a legitimate reason to decline to compel immunity" and that there was "no evidence that the [g]overnment's investigation was pretextual," as the government itself had "chose[n] not to call (and immunize) Plotkin * * * in light of its ongoing investigation." *Id.* at 12a-13a.

ARGUMENT

Petitioner renews his contentions (Pet. 5-33) that (1) his mail fraud convictions rest on a legally invalid

theory and (2) the district court violated his constitutional rights by failing to immunize (or requiring the government to immunize) a potential defense witness. The court of appeals correctly rejected these contentions, and its unpublished decision does not conflict with the decisions of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. a. The court of appeals correctly concluded (Pet. App. 6a-11a) that the indictment stated, and the jury instructions reflected, a valid theory of mail fraud.[3] The mail fraud statute prohibits using the mails in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. The statutory phrase "scheme or artifice to defraud" covers "schemes to deprive [people] of their money or property." *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000) (quoting *McNally* v. *United States*, 483 U.S. 350, 356 (1987)). In this context, the term "property" encompasses traditional property-law concepts, see *id.* at 23, and is not limited to tangible property, see *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987).

The indictment charged petitioner with participating in a scheme to deprive Dick's of money and property by means of false or fraudulent pretenses and withholding potentially valuable information that could affect Dick's economic decisions. See C.A. App.

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[3] As noted at pp. 4, 8, *supra*, petitioner was convicted of conspiring to commit mail and wire fraud, but was acquitted of the substantive wire fraud counts in the indictment. This Court has construed the substantive prohibitions of the mail and wire fraud statutes in tandem. See *Neder* v. *United States*, 527 U.S. 1, 20-25 (1999).

933. As the court of appeals correctly explained, Pet. App. 8a, the jury was instructed that, for purposes of the mail fraud statute, the definition of "property" "include[s] intangible property interests such as the right of a business to control the use of its own assets." *Ibid.* The jury was further instructed that "[a] business has a right both to control the spending of its own funds and to have access to information known to its employees and officers that could impact on its spending of its funds." C.A. App. 812; Pet. App. 8a. That understanding of a party's property rights follows from this Court's precedents, which have long recognized that property is "the aggregate of the owner's rights to control and dispose of [a] thing," not just the "thing which is subject of ownership." *Crane* v. *Commissioner*, 331 U.S. 1, 6 (1947); see *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917) (noting that it is "elementary" that "[p]roperty is more than the mere thing which a person owns," but also "consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.") (citing 1 William Blackstone, *Commentaries on the Laws of England: of the Rights of Persons* *134 (1765)); see also *Dickman* v. *Commissioner*, 465 U.S. 330, 336 (1984) (finding, in a tax case, "little difficulty accepting the theory that the use of valuable property—in this case money—is itself a legally protectible property interest"); *Dobbins* v. *Los Angeles*, 195 U.S. 223, 236 (1904) (describing constitutional rights "to use and enjoy property").

In light of those precedents, the court of appeals correctly concluded that "the property interests protected by the [mail fraud] statute[] include the interest of a victim in controlling his or her own assets."

Pet. App. 6a (quoting *United States* v. *Carlo*, 507 F.3d 799, 801-802 (2d Cir. 2007)). Indeed, petitioner does not take issue with that holding. See Pet. 8 (conceding that "the right to control 'how . . . assets are spent' is an attribute of the property interest those assets represent"). Instead, he argues that the undisclosed information that was "in the mind" of petitioner and his co-conspirators about self-dealing is not "property" for purposes of the mail fraud statute. Pet. 5-11.

That contention has scant relevance here. Information possessed by an employee *can* be an employer's property in some circumstances—for example, a journalist's knowledge of confidential information about upcoming articles that his newspaper plans to publish. See *Carpenter*, 484 U.S. at 25-28. At the same time, petitioner is correct that not all information in the minds of an employer's officers or employees qualifies as the employer's property. That proposition does not help petitioner in this case, however, because the court of appeals affirmed petitioner's mail fraud convictions on the understanding that the jury instructions, read as a whole, identified the property at issue as Dick's right to control the disposition of its assets. Pet. App. 8a (noting that "[t]he jury instructions were in line with this [right to control] theory: The District Court defined 'property' under the fraud statutes to 'include[] intangible property interests such as the right of a business to control the use of its own assets.") (second set of brackets in original). The withholding by petitioner's co-conspirator of valuable information that he had a duty to disclose to Dick's was the *means* through which the conspirators schemed to deprive Dick's of its property interest

in controlling its assets: entering leases and deciding how much to spend on those leases. C.A. App. 813 (jury instructions explaining that "[a] business['s] right both to control the spending of its own funds * * * is injured when an employee or officer of a company either withholds information or inaccurately reports information that could impact on the company's economic decisions"). The court of appeals thus concluded that the jury instructions "did not, as [petitioner] claims, instruct the jury that the information *itself* was property." Pet. App. 8a.

b. In contending otherwise, petitioner claims (Pet. 10-12) that the court of appeals improperly interpreted the jury instructions; in his view, they defined the undisclosed information about Dick's employee's self-dealing as the "property" of Dick's and, he asserts, such an interest is not cognizable. Petitioner relies on isolated statements in the jury instructions to suggest that the instructions embodied such a theory of property. See C.A. App. 809 ("A scheme to defraud is any plan, device, or course of action to obtain money or property, here, potentially valuable information that could impact on Dick's economic decisions, by means of false or fraudulent pretenses, representations, or promises reasonably calculated to deceive persons of average prudent."); *id.* at 811 ("[T]he government must prove that the alleged scheme contemplated depriving another of money or property, which can consist of the intangible right to potentially valuable information that could impact on Dick's economic decisions."). "But this is not the way we review jury instructions, because 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *United*

States v. *Park*, 421 U.S. 658, 674 (1975) (quoting *Cupp* v. *Naughten*, 414 U. S. 141, 146-147 (1973)).

The court of appeals correctly concluded that the instructions read as a whole set forth a valid property interest for purposes of mail fraud by articulating a "right to control" theory. Pet. App. 8a. In particular, the court relied on the summary instruction that synthesized the theory of the case and explained that: "the definition of 'property' includes intangible property interests such as the right of a business to control the use of its own assets"; "[a] business has a right both to control the spending of its own funds and to have access to information known to its employees and officers that could impact on its spending of its funds"; and "[t]his interest is injured when an employee or officer of a company either withholds information or inaccurately reports information that could impact on the company's economic decisions." C.A. App. 812-813. In light of those instructions, the jury was to consider the withheld information not as the "property" that was the object of petitioner's scheme, but as the fraudulent means of depriving Dick's of its property interest in "control[ing] the use of its own assets." *Id.* at 812. Petitioner's case-specific contention that the court of appeals should have placed greater emphasis on different parts of the jury instructions does not warrant this Court's review.

c. Because petitioner mischaracterizes the property at issue in this case, his arguments that the court of appeals' decision conflicts with decisions of this Court and of other courts of appeals lack merit.

i. Petitioner first argues (Pet. 12) that the court of appeals' decision conflicts with this Court's decision in *Skilling* v. *United States*, 561 U.S. 358 (2010), which

held that "undisclosed self-dealing" does not qualify as honest-services fraud under 18 U.S.C. 1346. *Skilling,* however, has no relevance here because the government did not proceed on an honest-services theory. Pet. App. 4a. Rather, as explained above, the government proceeded on the theory that petitioner and his co-schemer deprived Dick's of its property-based right to control its assets by concealing economically significant information that Queri had a duty to disclose. As the court of appeals made clear, it has "consistently kept the right to control theory (prosecuted under § 1341) separate from honest services fraud (prosecuted under § 1346)." *Id.* at 7a.

Petitioner's further argument (Pet. 12) that "information that does not already belong to an entity * * * but which it would merely like to have, is not 'property' of the victim of which it can be 'defrauded,' even when the person in possession of that information is a corporate employee," simply reprises his misconception about the basis on which the court of appeals upheld his conviction. As explained, the property at issue in this case was not information in the mind of petitioner and his co-schemer—it was Dick's right to control the use of its assets, in particular, how much money it spent on store leases. A business's right to control how much money it spends on a real estate lease is uncontroversially a form of property, and nothing in *Skilling* suggests otherwise.

Petitioner also argues that the court of appeals' decision conflicts with *Sekhar* v. *United States*, 133 S. Ct. 2720 (2013). Petitioner suggests (Pet. 13-14) that the *Sekhar* Court's understanding of "obtainable property" under the Hobbs Act applies to the mail fraud statute because the second clause of that statute

refers to schemes "for obtaining money or property," 18 U.S.C. 1341. The Court has repeatedly held, however, that this reference to "obtaining money or property" in Section 1341 serves only to make it clear that the mail fraud statute reaches "false promises and misrepresentations as to the future as well as other frauds involving money or property." *Cleveland*, 531 U.S. at 19 (quoting *McNally*, 483 U.S. at 357); see *Loughrin* v. *United States*, 134 S. Ct. 2384, 2391 (2014) (explaining *McNally*'s conclusion that the second clause in Section 1341 "merely codified a prior judicial decision applying the [first clause]" and that, "rather than doing independent work," the second clause thus "clarified that the [first clause] included certain conduct"). The conduct covered by the mail fraud statute, this Court has explained, consists of "schemes to deprive [victims] of their money or property." *Cleveland*, 531 U.S. at 19.

In any event, even if *Sekhar* were relevant here, the unusual form of property at issue in *Sekhar* was quite different from the traditional property at issue in this case. In *Sekhar*, the defendant was convicted of extortion under the Hobbs Act, 18 U.S.C. 1951, for using threats to attempt to obtain property in the form of a government's lawyer's work-related recommendation. 133 S. Ct. at 2723-2724. This Court held that, even if the recommendation could be considered property, it was not obtainable property for purposes of the Hobbs Act because the defendant was not attempting to obtain either the right to give his own recommendation or the right to give the government lawyer's recommendation. *Id.* at 2727. That holding has no bearing on whether petitioner schemed to

deprive Dick's of property when it deprived Dick's of its right to control how to use its assets.

Finally, petitioner errs in asserting (Pet. 14) that the decision below is "irreconcilable" with *Cleveland*, *supra*. The Court held in *Cleveland* that the mail fraud statute did "not reach fraud in obtaining a state or municipal [video poker] license" because "such a license is not 'property' in the government regulator's hands." 531 U.S. at 20. The Court also noted that the government's right to control the issuance, renewal, or revocation of such licenses is not property. *Id.* at 23. Nothing in that decision casts doubt on the court of appeals' conclusion that Dick's right to decide how to use its assets is a property right. Certainly Dick's own money was property in its hands, as was its right to control whether to spend it.

ii. Petitioner's contention (Pet. 12-15) that the court of appeals' decision conflicts with decisions of other courts of appeals is similarly misplaced.

As petitioner acknowledges (Pet. 9), many other courts of appeals have affirmed mail fraud convictions "where the 'property' of which the defendant allegedly schemed to defraud the victim * * * was a 'right to control.'" See *United States* v. *Gray*, 405 F.3d 227, 234 (4th Cir.) (citing with approval cases from the Second, Fifth, Sixth, Eighth, Tenth, and D.C. Circuits holding "that the mail fraud and wire fraud statutes cover fraudulent schemes to deprive victims of their rights to control the disposition of their own assets"), cert. denied, 546 U.S. 912 (2005).[4] Contrary to peti-

[4] Petitioner asserts (Pet. 9) that these cases approved the right-to-control theory "without [requiring] any intent to cause monetary loss." This case, however, presents no occasion to consider the absence of that requirement, because the court of appeals ap-

tioner's claim, however, no court of appeals has rejected application of the right-to-control theory where, as here (Pet. App. 8a-10a), the fraudulent scheme deprived its victim of valuable information that could have affected the victim's economic decisions about the use of its assets.

Petitioner relies on 25-year-old cases from the Third and Seventh Circuits that do not conflict with the decision below. In *United States* v. *Zauber*, 857 F.2d 137 (1988), cert. denied, 489 U.S. 1066 (1989), the Third Circuit overturned mail fraud convictions predicated primarily on honest-services theories of property. *Id.* at 142-146. Those portions of the decision do not conflict with the decision below, which did not rely on an honest-services theory. The court in *Zauber* also rejected the government's attempt to characterize the property at issue as the victim pension fund's "control over its money." *Id.* at 146-148. That holding does not conflict with the decision in this case, however, because the Third Circuit expressly relied (as did this Court in *McNally*, 483 U.S. at 360) on the fact that the victim pension fund did not suffer a monetary loss or a smaller rate of return as a result of the defendant's scheme. *Ibid.* The Third Circuit has since explained that the decision in *Zauber* left open whether defrauding a victim of "the right to control how its money was invested" can constitute mail fraud. *United States* v. *Henry*, 29 F.3d 112, 114 & n.4 (1994) (cited at Pet. 9) (reading *Zauber* as "questioning whether *McNally* supports the argument that the right to

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plied its precedent here requiring proof that petitioner "contemplated some actual harm or injury" to his victims, Pet. App. 6a (citation omitted), and the jury was instructed on that requirement. C.A. App. 811.

control money constitutes property," but declining to address that theory because it had not been alleged in the indictment); see also *United States* v. *Al Hedaithy*, 392 F.3d 580, 601 (3d Cir. 2004) (rejecting argument that *Zauber* "categorically rejected the contention that the 'right to control' one's property is itself a property interest"), cert. denied, 544 U.S. 978 (2005).

The Seventh Circuit's decision in *United States* v. *Ashman*, 979 F.2d 469 (1992), cert. denied, 510 U.S. 814 (1993), is also consistent with the decision below. The court in *Ashman* concluded that one aspect of a fraudulent trading scheme did not qualify as mail or wire fraud because there was no possibility of a loss during certain periods given the structure of the daily trading rules. *Id.* at 479; see *United States* v. *Leahy*, 464 F.3d 773, 788 (7th Cir. 2006) (explaining *Ashman*), cert. denied, 552 U.S. 811 (2007). But the *Ashman* court affirmed the remaining fraud convictions based in part on prior Seventh Circuit precedent recognizing that "a property deprivation might occur where, absent the scheme, the victim is deprived of control over how its money is spent, or where, absent the scheme, the victim would have paid a lower price for the goods or services received." *Ashman*, 979 F.2d at 478-479 (quoting *Ranke* v. *United States*, 873 F.2d 1033, 1038-1039 (7th Cir. 1989)) (alterations, ellipses, and quotation marks omitted). Seventh Circuit cases post-dating *Ashman* have continued to recognize the right-to-control theory. See, *e.g.*, *Sorich* v. *United States*, 709 F.3d 670, 675-676 (2013), cert. denied, 134 S. Ct. 952 (2014).

Finally, petitioner errs in claiming a conflict with decisions of the Sixth Circuit, in particular, *United*

States v. *Sadler*, 750 F.3d 585 (2014). *Sadler* also did not involve a scheme to deprive a victim of the right to control how much money it would spend. *Sadler* instead involved a husband-and-wife team who operated pain-management clinics that illegally dispensed prescription medications. The court of appeals reversed the wife's wire fraud conviction for purchasing drugs at full price from pharmaceutical distributors based on false information about for whom the drugs were intended. *Id.* at 590-592. As relevant here, the court rejected the government's argument that the wife's lies deprived the distributors of property by convincing them to sell controlled substances to individuals they would not have sold to had they known the truth, which the court characterized as "a right to accurate information before selling the pills." *Id.* at 590-591. Relying on *McNally*, the court explained that an "ethereal right to accurate information doesn't fit" within the category of property rights recognized in this Court's cases, at least when not associated with any monetary loss. *Id.* at 591. That decision does not conflict with the decision in this case because the failure of petitioner's co-conspirator to disclose information about commissions that he and petitioner received did not affect simply an "ethereal" interest on the victim's part; it directly affected Dick's economic decisions to enter into real-estate leases at inflated prices, through which it unwittingly covered the cost of the concealed commissions. See p. 22-23, *infra.* A fraudulent scheme that has the natural effect of leading the victim to pay more over the life of real-estate leases is not comparable to a scheme under which the putative victim receives the "full sales price" for a product that it might not have sold if it had known the

truth about the purchaser's resale intentions. *Sadler*, 750 F.3d at 591.

d. In any event, this case would be a particularly poor vehicle for review of petitioner's property-based contentions, because even if those contentions had merit, the verdict in this case would be valid, and any error in instructing the jury harmless, in light of the evidence that petitioner's scheme caused Dick's to lose money. See *Skilling*, 561 U.S. at 414 n.46 (confirming that harmless-error analysis applies when a jury is instructed on multiple theories of guilt, one of which is invalid).

As the district court recognized in denying petitioner's pretrial motion to dismiss, the indictment as amended alleged both a right-to-control theory and the straightforward deprivation of "money or tangible property." C.A. App. 113. The jury instructions reflected both theories, requiring proof of "a scheme or artifice to defraud or to obtain money or property," and defining "scheme to defraud" in part as "a plan to deprive another of money or property by trick, deceit, deception, or swindle." *Id.* at 808-809.

The evidence at trial provided an ample basis for the jury to conclude that petitioner's scheme deprived Dick's of money—in particular, that the costs of the commissions and fees paid by landlords and developers were factored into the rent that Dick's paid, amortized over the life of the leases. See Gov't C.A. Br. 39-41; 7/28/11 Trial Tr. 2244-2246 (government summation arguing both a deprivation-of-money theory and a right-to-control theory). The evidence on this point included an April 2000 letter of intent, drafted by petitioner, stating that the "cost to amortize" a $100,000 commission paid to petitioner's company was

"in [the] minimum rent" to be paid by Dick's. Gov't C.A. App. 165. The witness who received that letter (and participated in the transaction) testified at trial that this provision was standard in real-estate deals and that, under the deal, Dick's would ultimately pay for costs arising from the commissions. C.A. App. 512-513. Given that and other similar evidence establishing that the brokerage and commission payments flowing to Queri increased the rental costs for Dick's, Gov't C.A. Br. 39-41, it is clear that the jury would have found petitioner guilty of money-or-property fraud even absent the portions of the instructions petitioner challenges. Any error in submitting that theory to the jury was therefore harmless. See *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (instructional error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error"); see also *Hedgpeth* v. *Pulido*, 555 U.S. 57, 60-61 (2008) (per curiam) (citing *Neder* in clarifying that harmless-error analysis applies to alternative-theory error).

2. Petitioner separately contends (Pet. 16-33) that the court of appeals erred by affirming the district court's refusal to compel the testimony of a potential defense witness who had invoked his Fifth Amendment right against compulsory self-incrimination. That claim does not warrant further review.

a. The Sixth Amendment's Compulsory Process Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI. Together with the Due Process Clause, the Compulsory Process Clause "guarantees criminal defendants a meaningful oppor-

tunity to present a complete defense." *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (citation and internal quotation marks omitted). As petitioner acknowledges (Pet. 18), however, a "defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," and "may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987)). In particular, state or federal "rules excluding evidence from criminal trials * * * do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Ibid.* (quoting *Rock*, 483 U.S. at 56); see *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) ("[T]he Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses."); see also Pet. 18-19 (citing cases considering whether particular evidentiary rules should yield in light of the Compulsory Process Clause).

The court of appeals correctly concluded that the Compulsory Process Clause does not give a defendant the right to compel the testimony of a witness who invokes his Fifth Amendment right against compelled self-incrimination.[5] That constitutional right is no mere state or federal evidentiary rule, and it cannot plausibly be considered the sort of "arbitrary" or "disproportionate" rule that the Compulsory Process

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[5] Petitioner briefly asserts in a footnote (Pet. 28 n.14) that Plotkin's assertion of the privilege in this case was invalid. The court of appeals did not pass on that fact-bound argument, which does not warrant review in any event.

Clause can displace. Rather, this Court has observed that "the power to compel testimony is not absolute" and has recognized the existence of "a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination." *Kastigar* v. *United States*, 406 U.S. 441, 444 (1972) (footnote omitted). When a witness asserts that privilege, "he may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him in a subsequent criminal proceeding." *Minnesota* v. *Murphy*, 465 U.S. 420, 429 (1984) (internal quotation marks and citation omitted).

Although the government can provide the assurance that the Fifth Amendment requires (and thereby compel a witness's testimony) by granting the witness statutory immunity against the future use of his testimony or its fruits in a criminal prosecution, *Kastigar*, 406 U.S. at 461-462, a district court itself cannot. "No court has authority to immunize a witness." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983); see *United States* v. *Doe*, 465 U.S. 605, 616 (1984) ("We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request [from the government] that the [immunity] statute requires."). The federal immunity statutes vest discretion to grant immunity in the Executive Branch, not the courts. And under those statutes, "only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.*, 459 U.S. at 261. "The decision to seek use immunity necessarily in-

volves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation," and "Congress expressly left this decision exclusively to the Justice Department." *Doe*, 465 U.S. at 616-617.

Petitioner contends that, notwithstanding courts' lack of authority to grant immunity, a district court should still be able to compel the testimony of a witness who invokes the constitutional privilege against compulsory self-incrimination. In petitioner's view (Pet. 21-22), the judicial act of compelling the witness's testimony will have the same effect as a grant of immunity, because an exclusionary rule found in the Fifth Amendment itself will preclude any future court from allowing either the compelled testimony or its fruits into evidence. That contention is mistaken. In decisions cited by petitioner, such as *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), "the judicial exclusion of compelled testimony function[ed] as a fail-safe to ensure that compelled testimony [was] not admitted in a criminal proceeding." *United States* v. *Balsys*, 524 U.S. 666, 683 n.8 (1998); see, *e.g.*, *Murphy*, 378 U.S. at 53-54, 79 (concluding that testimony immunized under state law and given under threat of contempt cannot be used in a federal prosecution). Those decisions did not override the "general rule" that "requires a grant of immunity prior to the compelling of any testimony." *Balsys*, 524 U.S. at 683 n.8.[6]

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[6] Petitioner's reliance (Pet. 23) on *Simmons* v. *United States*, 390 U.S. 377 (1968), is similarly misplaced. In that case, the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony

Contrary to petitioner's suggestion (Pet. 20), the possible prospective operation of an exclusionary principle is not enough "fully to protect" a witness's Fifth Amendment right against compulsory self-incrimination. This Court has made clear that "the prediction that a court in a future criminal prosecution would be obligated to protect against the evidentiary use of compelled testimony is not enough to satisfy the privilege against self-incrimination." *Balsys*, 524 U.S. at 683 n.8 (citing *Pillsbury Co.*, 459 U.S. at 261). As the Court has explained, if a witness were required to "rely on a subsequent motion to suppress rather than a prior grant of immunity," the witness "would be compelled to surrender the very protection which the privilege is designed to guarantee." *Ibid.* (quoting *Maness* v. *Meyers*, 419 U.S. 449, 462 (1975)). In particular, the witness can never be certain that a court in a later criminal prosecution will necessarily recognize that the prosecution is presenting evidence derived from the compelled testimony. See *Pillsbury Co.*, 459 U.S. at 261.

b. Petitioner acknowledges (Pet. 31) that "[o]ther Circuits have rejected defendants' arguments for the judicial authority to confer immunity on a defense witness." See *United States* v. *Quinn*, 728 F.3d 243, 251-252 (3d Cir. 2013) (en banc) (collecting cases),

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may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 394. The Court found it "intolerable that one constitutional right" (the right against compelled self-incrimination) "should have to be surrendered in order to assert another" (the right to be free of illegal searches and seizures). *Ibid.* But this case, unlike *Simmons*, presents no conflict between the same individual's potential assertion of two different constitutional rights. Nor did *Simmons* involve the same considerations of prosecutorial discretion that are present here.

cert. denied, 134 S. Ct. 1872 (2014). Indeed, petitioner identifies no circuit that has adopted his interpretation of the Compulsory Process Clause, and many circuits have rejected it. See *United States* v. *Bowling*, 239 F.3d 973, 976 (8th Cir. 2001) (Clause "does not include the right to compel a witness to waive his or her Fifth Amendment privilege against self-incrimination"); *United States* v. *Taylor*, 728 F.2d 930, 934 (7th Cir. 1984) (Clause "does not suggest a right to supercede [sic] a witness' invocation of his own fifth amendment privilege or the right to demand that the government shield a witness from the consequences of his own testimony") (brackets in *Taylor*) (quoting *United States* v. *Chagra*, 669 F.2d 241, 260 (5th Cir.), cert. denied, 459 U.S. 846 (1982)); *United States* v. *Turkish*, 623 F.2d 769, 773-774 (2d Cir. 1980) (Clause "does no[t] carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination"), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.) (Clause does not confer a "compulsory-process right to have [a] witness[] immunized"), cert. denied, 447 U.S. 929 (1980).

This Court has recently and repeatedly denied review of cases upholding the denial of immunity for defense witnesses. See, *e.g.*, *Wilkes* v. *United States*, 135 S. Ct. 754 (2014) (No. 14-5591); *Quinn*, 134 S. Ct. 1872 (No. 13-7399); *Walton* v. *United States*, 133 S. Ct. 837 (2013) (No. 12-5847); *Phillips* v. *United States*, 133 S. Ct. 836 (2013) (No. 12-5812) (companion case); *Singh* v. *New York*, 555 U.S. 1011 (2008) (No. 08-165); *Ebbers* v. *United States*, 549 U.S. 1274 (2007) (No. 06-590); *DiMartini* v. *United States*, 524 U.S. 916 (1998) (No. 97- 1809); *Wilson* v. *United States*, 510 U.S. 1109

(1994) (No. 93-607); *Whittington* v. *United States*, 479 U.S. 882 (1986) (No. 85-1974). The same result is appropriate here.

c. This case would, in any event, be an unsuitable vehicle for addressing the second question presented, because petitioner would not prevail even under the standard he advocates. Even in petitioner's view, the testimony of a witness who asserts the privilege against compulsory self-incrimination can be compelled by a court only if "the testimony is essential to an adequate defense" and no "important countervailing interest the government may assert" requires the testimony's exclusion. Pet. 27-28. Petitioner cannot satisfy that test here.

While rejecting petitioner's claim under the Compulsory Process Clause (Pet. App. 11a n.3), the court of appeals in this case nevertheless applied a line of precedent—"grounded * * * in the Fifth Amendment's Due Process Clause," *id.* at 12a n.3—recognizing that a court could force the government to choose between forgoing a witness's testimony or conferring immunity where (i) the witness's testimony was material, exculpatory and not obtainable from another source, and (ii) "the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment." *Id.* at 11a. The circumstances under which that due process remedy would be available mirror the circumstances under which petitioner's requested Compulsory Process Clause remedy would be available. The court of appeals, however, determined that this case did not present such circumstances. *Id.* at 11a-13a (concluding that ongoing criminal investigation into Plotkin

was "a legitimate reason to decline to compel immunity," and that there was "no evidence" that the investigation "was pretextual"). Petitioner expressly disclaims (Pet. 16) any "challenge[]" to that determination, and any such challenge would be factbound in any event. For this additional reason, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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