Nos. 15-1140, 15-1177 and 15-8582

In the Supreme Court of the United States

MICHAEL BINDAY, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES KEVIN KERGIL, PETITIONER

v.

UNITED STATES OF AMERICA

MARK RESNICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
FINNUALA K. TESSIER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners committed wire and mail fraud when they used material misrepresentations to induce insurance companies to issue policies that were less economically valuable to the insurers than the policies the insurers reasonably believed they were issuing.

2. Whether sufficient evidence supported the jury's finding that petitioner Resnick altered or attempted to destroy his hard drive with an intent to impair its integrity or availability for use in an official proceeding, in violation of 18 U.S.C. 1512(c)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and guideline:

Miscellaneous: Page

In the Supreme Court of the United States

No. 15-1140

MICHAEL BINDAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 15-1177

JAMES KEVIN KERGIL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 15-8582

MARK RESNICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-82)[1] is reported at 804 F.3d 558. The opinion of the district

[1] Unless otherwise indicated, references are to the petition and appendix in *Binday* v. *United States*, No. 15-1140.

court (Kergil Pet. App. 89a-116a) is reported at 908 F. Supp. 2d 485.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2015. Petitions for rehearing en banc were denied on December 14, 2015 (Pet. App. 83-84; Resnick Pet. App. 117a-118a). The petitions for writs of certiorari were filed on March 10, 2016, and March 14, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 1349; mail fraud, in violation of 18 U.S.C. 1341; and wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 3. Kergil and Resnick were also convicted of conspiracy to obstruct justice through destruction of records, in violation of 18 U.S.C. 1512(k). *Ibid.* The district court sentenced Binday to 144 months of imprisonment, Kergil to 108 months of imprisonment, and Resnick to 72 months of imprisonment, each to be followed by three years of supervised release. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1-82.

1. Petitioners are insurance brokers who participated in an insurance fraud scheme involving "stranger-oriented life insurance" (STOLI) policies. Pet. App. 4. A STOLI policy is obtained by the insured for resale to an investor who is a stranger. *Ibid.* Every relevant State protects the right of an insured to resell his or her life insurance policy to an investor after the policy is issued. *Id.* at 4-5. But no State

requires insurers to issue a policy if the insured intends from the outset to resell it. *Id.* at 5.

a. Many insurance companies, including the ones at issue in this case, have rules against issuing STOLI policies and have adopted measures to try to detect them before a policy is issued. Pet. App. 5. Insurers opt not to issue STOLI policies for a variety of reasons, including both reputational concerns and an economic motivation to maximize profits. *Id.* at 20-24. In general, insurers expect to receive less revenue from STOLI policies than from non-STOLI policies. For example, because initial purchasers of high-value STOLI policies tend to be less affluent than the purchasers of similar-value non-STOLI policies and mortality rates tend to have a negative correlation with affluence, the mortality rates for individuals insured by STOLI policies tend to be higher than would be expected given the cost of the policy. *Id.* at 10, 22. In addition, the rates at which STOLI policies lapse is lower than would be expected for an equivalent non-STOLI policy because an investor benefits only from the death of the insured (not from the fact of being insured). *Ibid.* STOLI policies are also funded on a lower basis than would be expected because an investor has no incentive to overfund the policy to obtain a tax benefit. *Id.* at 10, 22-23. Because an insurer would expect to receive less revenue from a STOLI policy than from an equivalent non-STOLI policy, an insurer who chooses to issue a STOLI policy would price the policy in a different manner from its pricing of an otherwise equivalent non-STOLI policy. *Id.* at 21-22.

In response to a mid-2000s rise in popularity of STOLI policies as an investment for hedge funds and

others, insurance companies adopted rules against issuing such policies. Pet. App. 5. In response, insurance brokers—who receive commissions from insurers for new policies they broker—have a financial incentive to disguise an application for a STOLI policy (which an insurer would not issue) as an application for a non-STOLI policy (which an insurer would issue). *Ibid.*

b. In 2006, petitioner Binday assembled a network of independent brokers to assist his company (Advocate Brokerage, Inc.) in using deceit to disguise STOLI policies obtained from an insurer and placed with an investor as non-STOLI policies. Pet. App. 5-6. Petitioner Resnick worked as a field agent and petitioner Kergil supervised a group of field agents. *Ibid.* Under Binday's direction, field agents recruited older persons of modest means to act as "straw buyers," who were promised (and sometimes paid) six-figure payments when the policies were sold to investors. *Id.* at 6. Petitioners arranged the necessary medical tests for straw buyers, submitting the results to multiple insurers for preliminary assessments and to companies that predicted the straw buyers' life expectancies. *Ibid.* Based on those predictions and the insurers' preliminary assessments, Binday generated "illustrations" for prospective investors projecting the expected premium payments necessary to fund a given value of policy until the straw buyer's projected death. *Ibid.* After an investor chose from among the different straw buyers and policies, petitioners applied for the policy. *Id.* at 6-7.

Petitioners generally sought policies worth between $3 million and $4 million because such policies were considered large enough to yield a lucrative

commission, but small enough to "stay under the radar" because "anything over three to four million would require excessive documentation such as tax returns, stock reports, bank statements, that type of thing." Pet. App. 7. Such documentation would thwart petitioners' scheme because it would reveal that the straw buyer's wealth had been inflated, that the straw buyer was not capable of paying the substantial premiums (typically more than $100,000 annually) herself, and that payments would actually be made by a third-party investor. *Ibid.*

In executing the scheme, petitioners had straw buyers sign blank applications, which petitioners filled with false financial information, supported by fraudulent documents prepared by an accountant relative of Binday and supposedly verified by an independent third-party inspector, who in reality simply "assumed [the information] was correct." Pet. App. 7-8. Petitioners also lied in response to insurers' questions aimed at detecting STOLI policies, including questions about the purpose of the policy, how the premiums would be paid, and whether the applicant had discussed selling the policy. *Id.* at 8. Petitioners also lied by providing required certifications that, to their knowledge, the policies were not STOLI. *Ibid.*

Over the course of the scheme, petitioners submitted at least 92 fraudulent applications, resulting in the issuance of 74 STOLI policies with a total face value of more than $100 million. Kergil Pet. App. 9a; Pet. App. 8. Those policies generated for petitioners (and their agents) a total of roughly $11.7 million in commissions, which ranged from 50%-100% of the first year's premium payments and typically exceeded $100,000 on any given policy. Pet. App. 8.

c. In June 2010, petitioners learned that the Federal Bureau of Investigation (FBI) was investigating Advocate Brokerage. Pet. App. 54. After learning of the investigation and after Resnick had been approached by the FBI, Kergil instructed Resnick to "get rid" of his hard drive and anything referencing Binday or Advocate Brokerage. *Id.* at 55. Resnick immediately flew from New York to his primary residence in Florida. *Ibid.* On June 26, 2010 (five days after he was approached by the FBI), Resnick took his desktop computer to an Apple Store, where he paid technicians to "wipe" his hard drive and transfer its contents to a portable device. *Ibid.* On July 23, 2010, Resnick spoke on the phone with broker Paul Krupit, who was cooperating with the FBI, and whom Kergil had also instructed to destroy evidence. *Ibid.* On that call, which Krupit secretly recorded, Krupit stated that he had "deleted stuff" at Kergil's instruction. *Ibid.* Resnick responded: "me too . . . I got back on a plane and . . . went back home the next day and . . . did it . . . it was stupid to do." *Ibid.*

2. a. Based on the foregoing conduct, a grand jury returned an indictment charging petitioners with conspiracy to commit mail and wire fraud; substantive wire fraud; and substantive mail fraud. See Indictment 22-28. In addition, Kergil and Resnick were charged with conspiracy to obstruct justice through destruction of records. *Id.* at 28-30. An additional obstruction charge against Binday was dismissed before trial on consent of the United States. Kergil Pet. App. 91a.

With respect to the fraud counts, the indictment alleged that petitioners defrauded insurers by causing them to issue STOLI policies through misrepresenta-

tions about the applicants' financial information, the purpose of procuring the policy and the intent to resell the policy, the fact that the premiums would be financed by third parties, and the existence of other policies or applications for the same applicant. Indictment 4-5. According to the indictment, those misrepresentations "caused a discrepancy between the benefits reasonably anticipated by the [insurers] and the actual benefits received." Indictment 4.

In particular, the indictment alleged four harms to insurers: (1) insurers would receive fewer than expected premium payments as a result of petitioners' "fraudulent inflation" of the applicants' net worth because insurers expect an applicant with a higher net worth to live longer; (2) insurers would receive less income than expected because third-party investors typically fund policies "at or near the minimum amount necessary," while insured individuals often pay more than the required premiums to obtain tax and investment benefits; (3) insurers would have to pay out on more policies than anticipated because a proportion of individual insureds typically terminate their policies (by surrendering them or letting them lapse) while third-party investors do not; and (4) insurers would receive premium payments later than expected (and therefore have less cash on hand) because third-party investors "typically took advantage of grace periods and other features that permitted late payments of premiums with greater frequency than insured persons." Indictment 5-8.

b. Before trial, petitioners filed a motion to dismiss the fraud counts, arguing that the theory of fraud articulated in the indictment was not viable under the Second Circuit's decision in *United States* v. *Shellef*,

507 F.3d 82 (2007). Kergil Pet. App. 96a. The court in *Shellef* had held that an indictment's wire fraud charge was insufficient when it alleged that the victims were induced to engage in transactions they would not have engaged in absent the defendant's deceit, but failed to allege that the victims received (or the defendant intended them to receive) fewer benefits than they reasonably anticipated as a result. 507 F.3d at 107-109. In the instant case, the district court denied petitioners' motion, concluding that "the indictment alleges that [petitioners] made material misrepresentations as part of a scheme to defraud the" insurers "and explains how these misrepresentations actually cause[d] the [insurers] economic harm." Kergil Pet. 97a-98a. Because "the Indictment also pleads the requisite use of the mails and wires," the district court concluded that the fraud counts were "sufficient on their face." *Id.* at 98a. The court held that petitioners' reliance on *Shellef* was "misplaced" because the Indictment in this case, unlike the indictment in *Shellef*, alleged "that there was a discrepancy between the benefits reasonably anticipated and actual benefits received" as a result of the misrepresentations. *Ibid.* (quoting *Shellef*, 507 F.3d at 109) (internal quotation marks omitted).

3. a. At trial, petitioners "did not dispute that they had submitted applications with misrepresentations in order to generate commissions by inducing the insurers to issue STOLI policies." Pet. App. 11. Petitioners argued instead that their "conduct was not fraudulent because the insurers in fact happily issued STOLI policies, while paying lip service to weeding out STOLI policies for public relations reasons," and that "they did not intend to inflict, and that the insurers

had not in fact suffered, any harm that is cognizable under the mail and wire fraud statutes." *Id.* at 11-12.

Two insurance executives, James Avery and Michael Burns, testified that insurers refuse to issue STOLI policies because such policies have different economic characteristics than comparable non-STOLI policies that can reduce their profitability. Pet. App. 11, 20-23. Burns testified that STOLI policies "would never lapse, so always the death benefit would be paid," while Avery testified that STOLI lapse rates are lower because the policies "would be owned by investors who benefit[t]ed from death and didn't benefit from anything else." *Id.* at 22. Burns testified that the company based its pricing assumptions for such policies on "expectations of higher net worth mortality," because experience showed "better overall mortality" for wealthy persons, while Avery testified that wealth and mortality can be related "indirectly," because the insurer's "mortality studies would indicate what mortality we get based on [the policy's] face amount," which is in turn "related to net worth." *Ibid.* And Burns testified that STOLI policies "would be funded on a minimum basis," which would "reduce investment" available to the insurers while the policy was in effect. *Id.* at 22-23.

b. At the close of evidence, the district court instructed the jury on the requirements for proving a scheme to "deprive someone of money or property." Pet. App. 39. The court instructed the jurors that "a person is deprived of money or property when someone else takes his money or property away from him," but that "a person can also be deprived of money or property when he is deprived of the ability to make an informed economic decision about what to do with his

money or property," which courts "refer[] to as being deprived of the right to control money or property." *Ibid.* The court instructed the jury that the government need not "prove that any insurance company actually lost money or property as a result of the scheme," but must prove that "[s]uch a loss" was "contemplated by the defendant." *Ibid.* The court further instructed the jury that "the loss of the right to control money or property constitutes deprivation of money or property *only* when the scheme, if it were to succeed, would result in *economic harm* to the victim." *Ibid.* (emphases added). The court summed up by stating:

> In order for the government to prove a scheme to defraud, it must prove that the scheme, if successful, would have created a discrepancy between what the insurance companies reasonably anticipated and what they actually received. If all the government proves is that under the scheme the insurance companies would enter into transactions that they otherwise would not have entered into, without proving that the ostensible victims would thereby have suffered some economic harm, then the government will not have met its burden of proof.

Id. at 40.

4. The court of appeals affirmed petitioners' convictions. Pet. App. 1-82. As relevant here, petitioners argued that the government presented "insufficient evidence of any economic difference between STOLI and non-STOLI policies, and therefore insufficient evidence that the misrepresentations did anything more than induce transactions that the insurers would have avoided, for essentially non-economic reasons,

had they known the truth." *Id.* at 18. Petitioners also argued that the government presented insufficient evidence to prove that petitioners intended to expose the insurers to any economic loss. *Ibid.* In addition, petitioners challenged the jury instructions, arguing that they "failed to convey the requirement of a cognizable harm." *Id.* at 38. Resnick also challenged the sufficiency of the evidence establishing the required connection between his conduct and a grand jury proceeding. *Id.* at 59-60. The court of appeals rejected each of petitioners' arguments.

a. The court of appeals rejected petitioners' sufficiency arguments. Pet. App. 18-38.

The court of appeals first rejected petitioners' argument that the government failed to prove any economic difference between STOLI and non-STOLI policies. Pet. App. 20-25. The court concluded that the insurance executives' testimony "provided a legally sufficient basis for a jury to find that [petitioners'] misrepresentations exposed the insurers to an unbargained-for risk of economic loss, because the insurers expected STOLI policies to differ economically, to the insurers' detriment, from non-STOLI policies." *Id.* at 24. The court explained that, because the fraud statutes require that the cognizable harm be contemplated, not necessarily that it materialized, the government did not need to prove that the STOLI policies "in fact have lower lapse rates or insureds with shorter life-spans." *Id.* at 24-25. The court held that it was sufficient that "the misrepresentations were relevant to the insurers' economic decision-making because [the insurers] believed that the STOLI policies differed economically from non-STOLI policies." *Id.* at 25.

The court of appeals also rejected petitioners' argument that the government failed to prove that, "because non-STOLI policies are freely transferable after issuance, the insurers could have no reasonable expectation that the policies would not ultimately be purchased by hedge-fund investors." Pet. App. 25-26 (internal quotation marks omitted). The court disagreed, explaining that petitioners' argument "mistakenly equates the possibility of a future transfer with the certainty of transfer." *Id.* at 26. The court found "a meaningful difference between a policy taken out for personal estate planning that might be transferred upon a change in the holder's circumstances, and a policy that is from the beginning intended as a speculative investment by a third-party." *Ibid.* The court also rejected petitioners' argument that the applicants' age and health (which petitioners did not lie about) were the only data points that were essential elements of the bargain, *id.* at 27, explaining that "[a] reasonable jury could infer that questions asked by an insurer about the insured's characteristics, including his economic status and motivations for taking out the policy, are asked—just like questions about age and health—not out of idle curiosity, but because they are material to the insurer's underwriting decision concerning whether, and at what price, to issue the policy," *id.* at 28.

The court of appeals also found sufficient evidence to support the jury's inference of fraudulent intent. Pet. App. 32-38. The court explained that the "value of credit or insurance transactions inherently depends on the ability of banks and insurance companies to make refined, discretionary judgments on the basis of full information." *Id.* at 35 (quoting *United States* v.

Rossomando, 144 F.3d 197, 201 n.5 (2d Cir. 1998)). The court further reasoned that, "[w]hether or not [petitioners] understood the precise nature of the economic differences between STOLI and non-STOLI policies, they were aware that the hedge funds investing in the STOLI policies were betting that the value of the policies would exceed the premiums paid on those policies, contrary to the interests of the insurers." *Ibid.* Quoting Binday's own explanation, the court noted that his "business model involved selling STOLI policies 'to investors who believed that there was an opportunity for an arbitrage profit' based on their 'betting that the insureds would die sooner than the insurance companies were estimating.'" *Ibid.* (quoting Binday C.A. Br. 31). "In other words," the court concluded, petitioners "knew that their misrepresentations induced the insurers to enter into economic transactions—ones that entailed considerable financial risk—without the benefit of accurate information about the applicant and the purpose of the policy." *Id.* at 35-36.

b. The court of appeals also rejected petitioners' challenge to the jury instructions. Pet. App. 38-43. Assuming "without deciding" that petitioners had preserved their objections to the jury instructions, the court explained that the instructions correctly required a showing of cognizable harm because "the charge states explicitly that 'the loss of the right to control money or property constitutes deprivation of money or property only when the scheme, if it were to succeed, would result in economic harm to the victim.'" *Id.* at 41. In addition, the court explained, the instruction "reiterates that the government would not meet its burden if it showed only that the insurers

'enter[ed] into transactions that they otherwise would not have entered into, without proving that the ostensible victims would thereby have suffered some economic harm.'" *Ibid.* The court thus rejected petitioners' argument that the government relied on an impermissible "no sale" theory because the jury charge expressly explained that such a theory would be insufficient to support conviction. *Ibid.*

c. Finally, the court of appeals found a sufficient connection between Resnick's acts to destroy the evidence on his computer's hard drive and the grand jury proceeding. Pet. App. 59-64. The court held that the government proves the required connection when it proves that "a grand jury proceeding was 'foreseeable' because the defendant was aware 'that he was the target of an investigation.'" *Id.* at 59 (quoting *United States* v. *Persico*, 645 F.3d 85, 108 (2d Cir. 2011), cert. denied, 132 S. Ct. 1637 (2012)). Here, the court explained, "Resnick knew that the subject of the FBI's inquiries was in fact a large insurance fraud scheme in which he participated and about which he possessed incriminating documents." *Id.* at 60. The court found no significance in the fact "[t]hat a grand jury had not been commenced or specifically discussed with Resnick at the time of the destruction." *Ibid.*

ARGUMENT

Petitioners argue (Pet. 18-34; Kergil Pet. 6-12; Resnick Pet. 22-26) that their fraud convictions rest on a legally invalid theory, but they do not directly attack the jury instructions or the sufficiency of the evidence.[2] Their argument is based on mischaracteri-

---

[2] On appeal, petitioners "d[id] not question the legal structure" applicable to their crimes, Pet. App. 17, and did not argue that the

zations of the court of appeals' decision, the jury instructions, and the record below. Review is not warranted because the court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. The court of appeals' determination that sufficient evidence supported Resnick's obstruction of justice conviction (see Resnick Pet. 11-22) also does not warrant review because it is correct and does not conflict any decision of this Court or of any other court of appeals.

1. Petitioners' claims that their fraud convictions rest on a legally invalid theory depend on mischaracterizations of the court of appeals' opinion, on selective quotations from the jury instructions, and on an incomplete picture of the evidence presented at trial. Understood correctly, petitioners' fraud convictions were based on the jury's finding that the evidence at trial proved beyond a reasonable doubt that they used deceptive means to deprive the insurer victims of economic value.

a. The mail and wire fraud statutes make it a crime to use the mail or a wire communication to execute "any scheme or artifice to defraud, or for obtaining

---

mail and wire fraud statutes do not contemplate any right-to-control theory, or that any such theory conflicts with the decisions of this Court and other courts of appeals, see Kergil C.A. Br. 21 ("Under certain specific circumstances, tangible harm may include the 'right to control property.'"); Resnick C.A. Br. 43 (joining Kergil's arguments); see also Binday C.A. Br. 2-3 ("[D]id the trial court's charge on 'economic harm' misstate the law by permitting the jury to convict on a 'right to control' theory without a showing of intended economic harm?"). This Court ordinarily does not consider issues that were not pressed or passed on below, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and nothing justifies a departure from that practice in this case.

money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. The statutes' use of the phrase a "scheme or artifice to defraud" covers "schemes to deprive [victims] of their money or property." *Cleveland* v. *United States*, 531 U.S. 12, 18-19 (2000) (citation omitted). The "object of the fraud" thus must "be '[money or] property' in the victim's hands." *Pasquantino* v. *United States*, 544 U.S. 349, 355 & n.2 (2005) (brackets in original) (quoting *Cleveland*, 531 U.S. at 26). In this context, the term "property" encompasses traditional property concepts, including an "entitlement to collect money" or a "right to be paid money," *id.* at 355-356, and is not limited to tangible property, see *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987).

The indictment charged petitioners with participating in a scheme to deprive insurers of money and property by means of false and fraudulent pretenses. As the court of appeals correctly explained, the jury was instructed that "a person can * * * be deprived of money or property when he is deprived of the ability to make an informed economic decision about what to do with his money or property," but "*only* when the scheme, if it were to succeed, would result in economic harm to the victim." Pet. App. 39 (emphasis added). Petitioners quote only the former portion of the instruction without mentioning the latter qualifying language. "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 district court's instruction on the meaning of property in this context 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 a 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* (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").

Petitioners err in asserting (Pet. 17; see Kergil Pet. 9-10; Resnick Pet. 24-25) that the court of appeals held "that a defendant may be convicted of fraud even if the purported victim has suffered no loss of money or property, but only the amorphous 'right to control' property." The court of appeals explained that a fraud conviction cannot be obtained based on a "show-[ing] merely that the victim would not have entered into a discretionary economic transaction but for the defendant's misrepresentations." Pet. App. 15. Rather, the court explained that the "right to control" theory "does not render every transaction induced by deceit actionable under the mail and wire fraud stat-

utes." *Ibid.* The court further explained that the Second Circuit has "repeatedly *rejected* application of the mail and wire fraud statutes where the purported victim *received the full economic benefit of its bargain*." *Ibid.* (emphases added). The court of appeals' unambiguous rejection of an expansive view of the right-to-control theory is difficult to square with petitioners' characterization of the court of appeals' decision. See Pet. i (stating that the court of appeals "held" "that the right to avoid selling to a disfavored purchaser is a form of intangible property protected by the fraud statutes, even when the purchaser pays full price and the purported victim *receives the full economic benefit of the bargain*.") (emphasis added). The court of appeals specifically rejected petitioners' arguments that the jury was permitted to convict based only on evidence that the insurers were induced to enter into transactions they would not have agreed to had they not been deceived. Pet. App. 40-41. In fact, the jury was given the opposite instruction, *viz.* "If all the government proves is that under the scheme the insurance companies would enter into transactions that they otherwise would not have entered into, without proving that the ostensible victims would thereby have suffered some economic harm, then the government will not have met its burden of proof." *Id.* at 40.[3]

---

[3] On appeal, the government argued that petitioners had waived any right to object to the language of the jury instructions because petitioners and the government had jointly proposed the language to the district court. See Pet. App. 40-41. In their petitions for writs of certiorari, petitioners do not directly attack the validity of the jury instructions. The court of appeals "assume[d] without deciding" that petitioners preserved their objections. *Id.* at 41.

b. Petitioners further err in arguing that, by accepting the legal theory on which petitioners were prosecuted, the court of appeals "collapse[d] the materiality element of fraud into the property element," Resnick Pet. 23; see also Pet. 30, and "ma[de] nonsense of the Sentencing Guidelines," Pet. 30.

Petitioners argue (Pet. 30; see Resnick Pet. 24) that, under the theory of this case, "[i]f depriving an insurance company of information necessarily deprives that company of property, then all lies to insurers are mail or wire fraud, full stop," thereby conflating the requirements that a defendant make a material misrepresentation and that he operate a scheme to obtain property. As explained, the jury was *not* instructed that it could convict based only on evidence that petitioners deceived the insurers. In fact, it was given the opposite instruction, *i.e.*, that it could convict *only* if it found that petitioners' deception caused or was intended to cause economic harm to the insurers because it "would have created a discrepancy between what the insurance companies reasonably anticipated and what they actually received." Pet. App. 40.

Petitioner Binday further argues (Pet. 30-31) that the legal theory upon which petitioners were convicted "makes nonsense of the Sentencing Guidelines" because "[a]ll th[e insurers] were deprived of was the intangible right to avoid a disfavored purchaser." For the reasons already set forth, that assertion is incorrect because the jury was required to find that petitioners caused—or intended or anticipated that their

---

Petitioners' failure to object to the language of the jury instructions in the district court is an additional reason to deny their petitions now.

scheme would cause—the victims to suffer economic harm. When a defendant is convicted of fraud, the Sentencing Guidelines calculation may be based on "actual loss" or "intended loss"—whichever is greater. See Sentencing Guidelines § 2B1.1, comment (n.3(A)). Here, loss was both intended and inflicted: the insurers believed that they were issuing non-STOLI policies but actually issued STOLI policies that were worth less. Petitioner's observation (Pet. 31) that some cases (like this one) present difficult loss calculations is irrelevant. As the court of appeals noted, Pet. App. 70, loss calculations need not be precise; a "court need only make a reasonable estimate of the loss." Sentencing Guidelines § 2B1.1, comment (n.3(C)). The district court was able to make such a reasonable estimate here, see Pet. App. 70-79, and petitioners wisely do not seek this Court's review of the court of appeals' affirmance of that calculation.

Finally, the court of appeals correctly held that petitioners' convictions were supported by sufficient evidence. Pet. App. 18-38. Testimony from insurance executives "provided a legally sufficient basis for a jury to find that [petitioners'] misrepresentations exposed the insurers to an unbargained-for risk of economic loss, because the insurers expected STOLI policies to differ economically, to the insurers' detriment, from non-STOLI policies." *Id.* at 24. The executives also testified that insurance companies did not "price" the policies at issue as STOLI policies because they were fraudulently made to believe that the policies were non-STOLI policies. *Id.* at 21-22. The evidence supported the jury's finding that the insurers lost economic value as a result of petitioners' misrepresentations because the insurers were induced to sell

policies worth less to the insurers than the insurers reasonably expected (and at a lower price than the insurers would have charged if they had chosen to sell STOLI policies).

b. Because petitioners mischaracterize the court of appeals' conception of the property at issue in this case, their arguments that the court of appeals' decision conflicts with decisions of this Court and of other courts of appeals lack merit.

i. Petitioners err in asserting (Pet. 27-30; Kergil Pet. 8-9; Resnick. Pet. 22) 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. 561 U.S. at 410. *Skilling* has no relevance here because the government did not proceed on an honest-services theory. Rather, as explained above, the government proceeded on the theory that petitioners deprived the insurers of "a benefit of the bargain" by inducing the insurers to issue policies that were less economically valuable to the insurers than the insurers reasonably anticipated.[4] And, unlike in *Skilling*, the victims here were deceived into parting with something of value (the

[4] Petitioners err in contending (Pet. 27; see also Resnick Pet. 22) that *Skilling* "held" that fraud "occurs only when 'the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other.'" (quoting *Skilling*, 561 U.S. at 400). The passage from which petitioners quote was merely describing the evolution of the "honest-services theory" of fraud, including a generic description of how that theory differs from a more "traditional" theory of fraud in which a defendant uses deception to take money for himself from his victim. 561 U.S. at 400. The Court did not hold that the loss to a victim must always be the mirror image of the gain to a defendant in such a case.

obligations they incurred under life insurance policies issued at non-STOLI rates) in exchange for something less valuable than they reasonably anticipated (returns on a STOLI policy rather than a non-STOLI policy).

The court of appeals' decision also does not conflict with this Court's decision *Cleveland* v. *United States*, *supra*. See Pet. 24-25; Kergil Pet. 7-8. Unlike this case, *Cleveland* did not involve a defendant who induced his victim to enter into a contract worth less than the victim reasonably believed it to be worth. Rather, 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 an insurer has a property interest in deciding what type of policy to issue based on accurate information about who is obtaining the policy and for what purpose—when that information affects the reasonably anticipated value *to the insurer* of the policy at issue and potentially the price the insurer charges for the policy.

To the extent that Kergil and Resnick assert (Kergil Pet. 7, 10; Resnick Pet. 23) that the decision below conflicts with *Carpenter* v. *United States*, *supra*, and *McNally* v. *United States*, 483 U.S. 350 (1987), they are further mistaken. *Carpenter* embraced the notion that a victim can be defrauded of "intangible" property—namely confidential business information. See Kergil Pet. 7 (citing *Carpenter*, 484

U.S. at 26). And *McNally*, which was later superseded by statute, addressed the "honest services" theory of fraud, which is not at issue here. See *ibid.*

Finally, Binday errs in arguing (Pet. 25-27) that the court of appeals' decision conflicts with this Court's decision in *Sekhar* v. *United States*, 133 S. Ct. 2720 (2013). Binday suggests that the *Sekhar* Court's understanding of "obtainable property" under the Hobbs Act, 18 U.S.C. 1951, 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 that reference to "obtaining money or property" in Section 1341 serves only to make 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, for using threats to attempt to obtain property in the form of a govern-

ment 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 petitioners schemed to deprive insurers of property when misrepresenting the nature of the contract they were entering into, such that the insurers issued policies that were less economically valuable to them than they had been led to believe.

ii. Petitioners' contentions (Pet. 18-23; Kergil Pet. 10-11; Resnick 25-26) that the court of appeals' decision conflicts with decisions of the Ninth and Sixth Circuits is similarly premised on petitioners' mischaracterization of the nature of the property at issue here. As petitioners acknowledge (Pet. 21-22; Kergil Pet. 10-11), many other courts of appeals have affirmed mail fraud convictions where the property the defendant allegedly schemed to defraud the victim of was a "right to control," *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). Contrary to petitioners' claim, however, no court of appeals has rejected application of the right-to-control theory where, as here, the fraudulent scheme caused the victim to enter into a contract that was less valuable to the victim than the victim reasonably believed.

Petitioners err in claiming (Pet. 17, 21-22) a conflict with the Ninth Circuit's decision in *United States* v. *Bruchhausen*, 977 F.2d 464 (1992). The defendant in that case paid full price—the price the purported victim would have charged to any customer—for technology that the defendant intended to export to Soviet Bloc countries. *Id.* at 466-467. The defendant intentionally misled the seller about the ultimate destination of its products and the seller would not have made the sale had it known that material fact. *Id.* at 467-468. The Ninth Circuit held that the defendant had not committed wire fraud, however, because the purported victim was not deprived of any tangible or intangible property with economic value. *Id.* at 468. The purported victims, the court emphasized, "clearly suffered no monetary loss" because they "received the full price for their products." *Id.* at 467. In other words, the sellers received the full economic benefit of their bargain. For that reason, the decision in *Bruchhausen* does not conflict with the decision in this case where the jury was instructed that it could not convict unless the government proved that the insurers "suffered some economic harm" (or would have suffered such harm had the scheme succeeded) as a result of petitioners' material misrepresentations. Pet. App. 39.

Petitioners similarly err in arguing (Pet. 3, 16, 18-20) that the court of appeals' decision conflicts with the Sixth Circuit's decision *United States* v. *Sadler*, 750 F.3d 585 (2014). Unhappily for petitioners, *Sadler* also did not involve a scheme in which a victim was induced to enter into a contract that was less economically valuable to the victim than the victim reasonably anticipated. *Sadler* instead involved a husband-and-

wife team of defendants who operated pain-management clinics that illegally dispensed prescription medications. *Id.* at 588-589. 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 to whom she intended to distribute the drugs. *Id.* at 590-592. As in *Bruchhausen*, the purported victim would not have made the sale to the defendant had the seller known the truth about the ultimate destination of its product. *Id.* at 590-591. But, as in *Bruchhausen*, the sellers obtained full price for their product and the Sixth Circuit therefore concluded that the defendant did not deprive the victim of any money or property. Because petitioners' deceptions *did* deprive the insurers of the full economic benefit of the bargain, the decision in this case does not conflict with the decision in *Sadler*.

2. Resnick separately contends (Resnick Pet. 11-22) that the evidence was insufficient to support the jury's determination that he intended "to impair [an] object's integrity or availability for use in an official proceeding," in violation of 18 U.S.C. 1512(c). Review of that argument is not warranted because the court of appeals correctly rejected it and the court's decision does not conflict with any decision of this Court or of any other court of appeals.

a. Section 1512(c)(1) prescribes criminal punishment for anyone who "corruptly * * * alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." An "official proceeding" is defined to include "a proceeding before a judge or court of the United States, * * * or a Federal grand

jury," 18 U.S.C. 1515(a)(1), but "no state of mind need be proved with respect to the circumstance * * * that the official proceeding before a judge, court, * * * [or] grand jury * * * is before a judge or court of the United States, * * * [or] a Federal grand jury," 18 U.S.C. 1512(g)(1). In addition, "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. 1512(f)(1).

This Court has not interpreted Section 1512(c)(1), but it addressed another provision of Section 1512 involving an "official proceeding" in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005). In that case, the Court held that Section 1512(b)(2)'s prohibition on knowingly corruptly persuading another person to withhold documents from or alter documents for use in an "official proceeding" requires proof of a "nexus between the 'persua[sion]' to destroy documents" and the official proceeding. *Id.* at 707 (brackets in original). Under that requirement, a defendant cannot be convicted if "he d[id] not have in contemplation any particular official proceeding in which th[e] documents might be material. *Id.* at 708; see also *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995) (requiring a similar "nexus" in prosecutions under 18 U.S.C. 1503).

Resnick asserts (Resnick Pet. 14-18) that the nexus requirement applies to Section 1512(c)(1) and that the evidence was insufficient to satisfy it here. But a rational jury could have concluded that Resnick was "contemplat[ing]" a grand jury investigation when he flew to Florida and sought to erase his hard drive after being approached by the FBI about petitioners' fraud scheme and after being instructed by Kergil

(upon his learning of the FBI investigation) to "get rid" of his hard drive and to "get rid of everything with the name of Advocate Brokerage, [or] Michael Binday's name." Pet. App. 55. Indeed, no other explanation is consistent with the facts. Cf. *United States* v. *Johnson*, 655 F.3d 594, 605-607 (7th Cir. 2011) (finding the nexus requirement satisfied in a Section 1512(c)(1) case in which a defendant flushed drugs down a toilet while officers were outside waiting to execute a search warrant).

Resnick also does not deny that the grand jury is an "official proceeding" within the meaning of Section 1515(a)(1). Instead, he argues (Resnick Pet. 15) only that the nexus requirement was not satisfied because, during his encounter with the FBI days before he attempted to erase his hard drive, he was not told that there was any pending grand jury investigation. But that argument finds no support in this Court's precedents and is foreclosed by the text of the statute. The decision in *Aguilar* explained that the government must establish "a relationship in time, causation, or logic" between the defendant's conduct and a judicial proceeding and stated that, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." 515 U.S. at 599. Similarly, *Arthur Andersen* required proof that the defendant "contemplat[ed] a[] particular official proceeding" or that such a proceeding was "foresee[able]." 544 U.S. at 708. Petitioner would require proof not just that the defendant "contemplate[ed]" a particular future proceeding in which the destroyed evidence would be relevant—here, a grand jury investigation and subsequent prosecution—but that he knew with certainty that such a

proceeding would come to pass. Neither *Aguilar* nor *Arthur Andersen* imposes such a requirement, which would be inconsistent with 18 U.S.C. 1512(f)(1)'s direction that "an official proceeding need not be pending or about to be instituted at the time of the offense."

Finally, the court of appeals' decision does not, as Resnick claims (Resnick Pet. 18-20), conflict with the decisions of any other court of appeals. Resnick is correct (Resnick Pet. 18) that at least one court of appeals has held that an FBI investigation is not an "official proceeding" within the meaning of the statute. See *United States* v. *Ermoian*, 752 F.3d 1165, 1172 (9th Cir. 2013); see also *United States* v. *Ramos*, 537 F.3d 439, 463 (5th Cir. 2008) ("[T]he term 'official proceeding, * * * does not apply to routine agency investigations of employee misconduct."), cert. denied, 556 U.S. 1127 (2009). But the "official proceeding" that Resnick conspired to impede was not the FBI investigation; Resnick conspired to impede the grand jury proceeding that was "foreseeable" because he knew that the FBI was investigating "a large insurance scheme in which he participated and about which he possessed incriminating documents." Pet. App. 60.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
FINNUALA K. TESSIER
Attorney

MAY 2016