No. 16-508

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

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
ROSS B. GOLDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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's forfeiture order was unconstitutionally excessive under the Eighth Amendment's Excessive Fines Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 814 F.3d 104. A second opinion of the court of appeals (Pet. App. B1-B15) is not published in the Federal Reporter but is reprinted at 557 Fed. Appx. 28. The order of the district court (Pet. App. C1-C14) is reported at 53 F. Supp. 3d 526.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2016. A petition for rehearing was denied on May 11, 2016 (Pet. App. D1). On August 2, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 11, 2016, 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, petitioner 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 (2000 & Supp. IV 2005); 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) (2000 & Supp. IV 2005) and 18 U.S.C. 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 (2000 & Supp. IV 2005). Pet. App. B3-B4. Petitioner was sentenced to 60 months of imprisonment, to be followed by three years of supervised release, and the district court ordered him to forfeit $1,273,285.50. *Id.* at A3. The court of appeals affirmed the convictions and sentence but remanded for the district court to consider whether the forfeiture order violated the Eighth Amendment's Excessive Fines Clause. *Id.* at B1-B15. On remand, the district court held that the forfeiture order did not contravene the Eighth Amendment, and the court of appeals affirmed. *Id.* at C1-C14.

1. Petitioner was a real-estate attorney and broker based in Pittsburgh, Pennsylvania. Pet. App. B3. 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.[1] In such cases, the landlord or developer charges the

[1] Citations to the government's brief, to the court of appeals appendix, and to the separate court of appeals appendix filed by the government are to documents filed in Second Circuit case number 12-265.

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 co-defendant 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. B3. 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. B3-B4; 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. A3, B14.

2. a. Based on the foregoing conduct, a grand jury returned an indictment charging petitioner (along with Queri and two other co-defendants) with conspiring 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. 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. The indictment also "contained a criminal forfeiture allegation seeking a money judgment in an amount equal to the total amount of money involved in each offense of conviction, or conspiracy to commit such offense, for which the defendant(s) is convicted." Pet. App. C2 (internal quotation marks omitted).

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. 102; see *id.* at 101-102. To avoid further delays and "needless complexity in jury instructions resulting from different views of the meaning of *Skilling*," 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.

a. 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 promises." *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 district 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. B4. The jury acquitted petitioner on the remaining counts. *Ibid.* 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.

b. Following his conviction, the government sought forfeiture as to petitioner. Pet. App. C2. Over petitioner's objection, the district court ordered forfeiture of $1,273,285.50, "which equaled the amount of funds [petitioner] had acquired from landlords and developers,

laundered through two entities he controlled, and passed on to Queri." *Id.* at A3; see *id.* at C2-C4.

4. In an unpublished opinion, the court of appeals affirmed petitioner's convictions and sentence, but remanded for the district court to reconsider the forfeiture order. Pet. App. B1-B15.

a. With respect to the fraud convictions, petitioner argued, as relevant here, that "the [g]overnment's theory of mail fraud was legally flawed and/or constructively amended." Pet. App. B2. The court of appeals rejected that contention. The court 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.'" *Id.* at B6 (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." *Ibid.* (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. B7. 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 B8; see *id.* at B8-B10. The court explained that "the key element in a prosecution

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 B9-B10.

b. Although the court of appeals affirmed the sentence of imprisonment, the term of supervised release, and the order of restitution, the court remanded the forfeiture order for the district court to "consider the factors in" *United States* v. *Bajakajian*, 524 U.S. 321 (1998), "to determine whether the forfeiture order violates the 'excessive fines' clause of the Eighth Amendment." Pet. App. B15.

5. On October 20, 2014, petitioner filed a petition for a writ of certiorari seeking, as relevant here, review of the court of appeals' affirmance of his fraud convictions based on a right-to-control theory. See 14-472 Pet. On March 30, 2015, this Court denied the petition. See 135 S. Ct. 1698 (No. 14-472).

6. On October 16, 2014, the district court reaffirmed the original order of forfeiture. See Pet. App. C1-C14. The court interpreted *Bajakajian* to require consideration of four factors: "(1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fits into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct." *Id.* at C8. Petitioner agreed that those factors were relevant, but he argued that the court should

consider in addition "his age, poor health, physical and civic disabilities, and inability to pay the forfeiture"; he "also emphasized his lack of culpability and lack of profit from the scheme compared to co-defendant Queri." *Id.* at A5 (internal quotation marks omitted); see *id.* at C12-C14.

Although the district court was "sympathetic" to petitioner about those concerns, it nevertheless concluded that they were irrelevant in this case because "the Supreme Court limited the inquiry to the four *Bajakajian* factors." Pet. App. C13. After considering only those four factors, the district court held that the forfeiture order did not violate the Eighth Amendment. *Id.* at C14.

7. On February 17, 2016, the court of appeals affirmed the forfeiture order. Pet. App. A1-A22.

The court of appeals explained that *Bajakajian* "established a two-step inquiry for determining whether a financial penalty is excessive under the Eighth Amendment." Pet. App. A5. First, courts ask "whether the Excessive Fines Clause applies at all." *Id.* at A6. If so, courts then ask "whether the challenged forfeiture is unconstitutionally excessive." *Ibid.* Applying that framework, the court of appeals first held that the Excessive Fines Clause applies here. *Id.* at A7-A8. The court explained that "punitive" forfeitures—*i.e.*, "forfeitures for which a defendant is personally liable"—implicate the Eighth Amendment, but that "purely 'remedial' forfeitures" do not. *Id.* at A7. The court then held that the challenged forfeiture here "fits easily within the definition of punitive forfeitures." *Id.* at A7-A8.

The court of appeals then held that the forfeiture amount that petitioner was ordered to pay is not unconstitutionally excessive. Pet. App. A8-A20. A forfeiture

is constitutionally excessive, the court explained, when the amount is "grossly disproportional to the gravity of a defendant's offense." *Id.* at A9 (quoting *Bajakajian*, 524 U.S. at 334). The court applied circuit precedent requiring consideration of the four factors identified by the district court, see p. 10, *supra*, in determining whether a forfeiture order is grossly excessive. Pet. App. A9 (quoting *United States* v. *George*, 779 F.3d 113, 122 (2d Cir. 2015)). The court explained that the "principal question" on appeal was whether those four factors are "exhaustive" or whether a district court may consider additional factors such as a defendant's personal circumstances. *Ibid.*; see *id.* at A9-A10.

Relying on this Court's discussion in *Bajakajian* of the origins of the Excessive Fines Clause in the "English constitutional tradition, including Magna Carta," the court of appeals held that, "when analyzing a forfeiture's proportionality under the Excessive Fines Clause, courts may consider—in addition to the four factors we have previously derived from *Bajakajian*—whether the forfeiture would deprive the defendant of his livelihood, *i.e.*, his 'future ability to earn a living.'" Pet. App. A11-A12 (quoting *United States* v. *Levesque*, 546 F.3d 78, 85 (1st Cir. 2008)). The court of appeals explained that consideration of whether a forfeiture would destroy a defendant's future ability to earn a living "is a component of the proportionality analysis, not a separate inquiry," and that a district court "need not consider this fifth factor in all cases." *Id.* at A13.

The court of appeals rejected petitioner's argument, see Pet. App. A5, A19, that a district court must also consider a defendant's personal circumstances, including his age, poor health, and ability to pay a forfeiture. *Id.* at A14-A16. The court of appeals explained that,

although district courts "may not consider as a discrete factor a defendant's personal circumstances, such as age, health, or present financial condition, when considering whether a criminal forfeiture would violate the Excessive Fines Clause," *id.* at A14, it may consider such factors to the extent they are relevant to a defendant's future ability to make a living, *id.* at A15-A16.

Applying that legal framework to the facts of this case, the court of appeals held that the forfeiture order was not unconstitutionally excessive. Pet. App. A16-A20. The court examined the "four 'traditional' *Bajakajian* factors," *id.* at A16, concluding that those factors "weigh in favor of the forfeiture's constitutionality," *id.* at A21. See *id.* at A16-A18. Turning to the question whether the forfeiture would deprive petitioner of his livelihood, the court noted that petitioner "presented no evidence that [the forfeiture] would prevent him from earning a living upon his release from prison."[2] *Id.* at A19; see *id.* at A19 n.17. The court rejected petitioner's argument that it should consider "personal factors concerning [his] age, health and dire financial circumstances," reiterating that those "factors are irrelevant in themselves." *Id.* at A19 (brackets in original). Accordingly, the court concluded that petitioner did not discharge his burden of showing that the forfeiture was unconstitutionally excessive. *Id.* at A18, A20.

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[2] The court of appeals noted that, because petitioner failed to argue below that his livelihood would be imperiled by the forfeiture order, review of that issue was for "'plain error' only." Pet. App. A19 n.17. But the court added that, because petitioner had "adduced no facts at all suggesting that the challenged forfeiture would deprive him of his livelihood," it "would come to the same conclusion even under *de novo* review." *Ibid.*

Summing up, the court of appeals held that, "because the four *Bajakajian* factors support the conclusion that the forfeiture is not grossly disproportional to the gravity of [petitioner's] offenses, and [petitioner] has failed to establish that the forfeiture would deprive him of his livelihood, we reject as meritless [his] Eighth Amendment challenge to the forfeiture order." Pet. App. A19-A20; see *id.* at A21.

ARGUMENT

Petitioner argues (Pet. 6-31) that (1) his mail fraud convictions rest on a legally invalid theory and (2) the forfeiture order was unconstitutionally excessive. The court of appeals correctly rejected petitioner's first argument in a decision that does not conflict with any decision of this Court or of any other court of appeals, and this Court previously denied petitioner's first petition for a writ of certiorari raising exactly that question. The court of appeals also correctly rejected petitioner's second argument, and no conflict exists that warrants this Court's attention in this case. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 6-19) that the court of appeals erred in upholding his fraud convictions under the right-to-control theory. Petitioner raised the same challenge in a previous petition for a writ of certiorari, following the court of appeals' first decision in this case. See 14-472 Pet. This Court denied that petition and should decline to review petitioner's materially identical challenge here. 135 S. Ct. 1698 (No. 14-472).[3]

[3] This Court has subsequently denied at least one other petition for a writ of certiorari raising the same issue. See *Binday* v. *United States*, 136 S. Ct. 2487 (2016) (No. 15-1140).

a. The court of appeals correctly concluded (Pet. App. B6-B11) that the indictment stated, and the jury instructions reflected, a valid theory of mail fraud. 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. 933. As the court of appeals correctly explained, 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." Pet. App. B8. 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; see Pet. App. B8. 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* *134); 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. B6 (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. 9-10 (conceding that "the right to control 'how . . . assets are spent' is an attribute of the property interest those assets represent") (alteration in original). 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. 7-13.

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. B8 (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. B8.

b. In contending otherwise, petitioner claims (Pet. 10-13) 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. B8. 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[ling] 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. 13) 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. B4. 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 B7.

Petitioner's further argument (Pet. 13-14) 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. 14-15) that the *Sekhar* Court's understanding of "obtainable property" under the Hobbs Act, 18 U.S.C. 1951(a), 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, 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. 15) 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. 16-18) that the court of appeals' decision conflicts with decisions of other courts of appeals is similarly misplaced.

As petitioner acknowledges (Pet. 16-17), 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 petitioner's claim, however, no court of appeals has rejected application of the right-to-control theory where, as here (Pet. App. B8-B10), 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

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[4] Petitioner asserts (Pet. 17) 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 applied its precedent here requiring proof that petitioner "contemplated some actual harm or injury" to his victims, Pet. App. B6 (citation omitted), and the jury was instructed on that requirement. C.A. App. 811.

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. *Zauber*, 857 F.2d at 146-148. 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. 17) (reading *Zauber* as "questioning whether *McNally* supports the argument that the right to control money constitutes property," but declining to address that theory because it had not been alleged in the indictment); see *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 no possibility existed 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. de-

nied, 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. *Ibid.* 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 coconspirator 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 pp. 25-27, *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. 22) that review is warranted to address whether the impact of a criminal forfeiture on a defendant's "personal circumstances" constitutes a factor in analysis under the Excessive Fines Clause of the Eighth Amendment. The court of appeals correctly held that the forfeiture order here was not excessive, even taking into account the impact of the order on petitioner's livelihood. Review of that decision is unwarranted because the court of appeals correctly rejected petitioner's claims and its decision does not implicate a circuit conflict warranting review in this case.

a. In *United States* v. *Bajakajian*, 524 U.S. 321 (1998), the government sought forfeiture of $357,144 in currency that the defendant had attempted to transport out of the country without reporting it, in violation of 31 U.S.C. 5316(a)(1)(A). That statute requires an individual to report to the government when he is transporting more than $10,000 out of the country. The Court held that a forfeiture of the full $357,144 that the defendant failed to report would violate the Excessive Fines Clause. After determining that the forfeiture in question was punitive (thereby triggering the protection of the Eighth Amendment), *Bajakajian*, 524 U.S. at 327-334, the Court stated that a forfeiture would violate the Excessive Fines Clause only if it was "grossly disproportional to the gravity of the defendant's offense," *id.* at 337. The Court concluded that the forfeiture at issue was grossly disproportional to the gravity of the reporting offense and, therefore, unconstitutional. *Id.* at 337-340.

In finding the forfeiture grossly disproportionate, the Court in *Bajakajian* considered a number of factors related both to the statutory prohibition involved and to the culpability of the particular defendant. The Court first examined the nature of the crime charged, concluding that it was "solely a reporting offense," 524 U.S. at 337, and was "unrelated to any other illegal activity," *id.* at 338. Second, the Court took account of the fact that the defendant did "not fit into the class of persons for whom the statute was principally designed," because he was "not a money launderer, a drug trafficker, or a tax evader." *Ibid.* Third, the Court compared the value of the forfeited property to the penalties dictated by the Sentencing Guidelines for the particular defendant. In that case, the maximum fine under the Guidelines was $5000 and the maximum sentence under the Guidelines was six months, which the Court took to "confirm a minimal level of culpability." *Id.* at 338-339. Fourth, the Court noted that the maximum penalties authorized in the statute at issue also are "relevant" to the analysis, and concluded that Congress's authorization of a $250,000 fine and five years of imprisonment indicated that Congress did not regard the offense as "trivial." *Id.* at 339 n.14. Taking the third and fourth factors together, the Court explained that "the maximum fine and Guideline sentence to which respondent was subject were but a fraction of the penalties authorized" by the statute, which "undercut[] any argument based solely on the statute, because [it] show[ed] that respondent's culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—[was] small indeed." *Ibid.* Finally, the Court considered the harm caused by the defendant's offense

and concluded that it was "minimal," both because the government was the sole party affected and because the only harm inflicted was depriving the government of the information that the respondent failed to report. *Id.* at 339.

b. Petitioner does not challenge the court's analysis of three of the four factors identified in *Bajakajian*, but contends (Pet. 29-31) that the court of appeals erred in assessing whether petitioner "fits into the class of persons for whom the [underlying criminal statute] was principally designed." 524 U.S. at 338. Petitioner argues (Pet. 30) that the fraud and money-laundering statutes he was convicted of violating were not principally designed to target defendants like him because he did not "victimize[] large numbers of gullible consumers by us[ing]" the mail or wires and because his money laundering did not "transport[], convert[] or hid[e] the proceeds of crime in the ordinary sense."

That claim lacks merit. This Court has repeatedly recognized that a defendant commits fraud when he "wrong[s] one in his property rights by dishonest methods or schemes" and effects a "deprivation of something of value by trick, deceit, chicane, or overreaching." *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)); *Carpenter*, 484 U.S. at 27. That is precisely what petitioner was convicted of doing here.

Similarly, petitioner claims (Pet. 30) that money-laundering statutes are intended to "deter financial transactions that further criminal activity and help secret[] their proceeds, thus compounding the underlying offense and making it simultaneously more difficult to detect and more feasible to enjoy illegal profits." But petitioner did just that when he deceitfully posed as a

broker in order to facilitate Queri's illegal kickback scheme, to hide the kickback payment, and to allow Queri (and petitioner himself) to enjoy the proceeds of the fraudulent scheme. The court of appeals thus correctly assessed that aspect of the *Bajakajian* analysis.

c. Petitioner's principal contention (Pet. 22-29) is that the court of appeals erred by refusing to consider, as a stand-alone factor, his personal characteristics, including his age, health, or present financial condition. Petitioner is incorrect.

i. In addition to considering the four factors discussed above, the court of appeals also considered "whether the forfeiture would deprive [petitioner] of his livelihood, *i.e.*, his future ability to earn a living." Pet. App. A11-A12 (internal quotation marks omitted). This Court in *Bajakajian* did not consider that issue because no contention was made that the defendant's wealth and income were relevant or that the forfeiture "would deprive the defendant of his livelihood." 524 U.S. at 339 n.15. In determining to consider that issue, the court of appeals noted that "hostility to livelihood-destroying fines is deeply rooted in our constitutional tradition," dating back to Magna Carta and the English constitutional tradition. Pet. App. A13; see *Bajakajian*, 524 U.S. at 335-336. Petitioner agrees with the court of appeals that "a permissible consideration in judging the Eighth Amendment excessiveness of a criminal forfeiture [is] the impact of the exaction on a defendant's 'future ability to earn a living.'" Pet. 22 (quoting Pet. App. A12).

"Personal circumstances," such as a defendant's "health and financial condition," the court of appeals held, might be relevant in assessing a defendant's "abil-

ity to make a living." Pet. App. A15-A16 (internal quotation marks omitted). In that way, the court explained, "[p]ersonal circumstances" could "be *indirectly* relevant to a proportionality determination" under the Eighth Amendment." *Id.* at A16. But the court rejected petitioner's claim that personal circumstances should be considered as an independent factor in determining whether a forfeiture is unconstitutionally excessive. *Ibid.* ("Our holding bars only the separate consideration of personal circumstances as a distinct factor."). The court of appeals explained that, "[w]hile hostility to livelihood-destroying fines is deeply rooted in our constitutional tradition, consideration of personal circumstances is not." *Id.* at A13 (citing *Bajakajian*, 524 U.S. at 335-336). The court added that its approach comports with "one of Congress's basic premises in providing for criminal forfeitures: that forfeitures should be concerned not with how much an individual has but with how much he received in connection with the commission of the crime." *Id.* at A15 (internal quotation marks omitted).

Petitioner errs in contending (Pet. 22-26) that the roots of the Excessive Fine Clause demonstrate that a defendant's personal circumstances, such as age, health, and financial condition, are independently relevant to the gross disproportionality inquiry. The history of the Excessive Fines Clause does not support the conclusion that personal characteristics are a freestanding limitation on the size of a fine. As this Court has explained, the Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689" and is grounded in Magna Carta. See *Bajakajian*, 524 U.S. at 335-336. Magna Carta sought to limit perceived abuses of amerce-

ments (the predecessor of fines) "in four ways: by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; *by requiring that the amercement not be so large as to deprive [a person] of his livelihood*; and by requiring that the amount of the amercement by fixed by one's peers." *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989) (emphasis added); see *Bajakajian*, 524 U.S. at 335; see also *United States* v. *Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) ("As explained by one commentator (who is cited extensively by the Court in its historical discussion in *Browning-Ferris*), 'the great object' of th[e Excessive Fines Clause] was that 'in no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him.'") (quoting William Sharp McKechnie, *Magna Carta* 287 (2d ed. 1914)) (internal punctuation omitted). Nothing in that history suggests that a defendant's personal circumstances constitute a discrete factor independent of effect on future livelihood.

ii. Petitioner also contends (Pet. 26-28) that there is a three-way conflict in the courts of appeals over the relevance, if any, in Excessive Fines Clause analysis of personal and economic circumstances. No court of appeals, however, considers personal circumstances to constitute an independent factor—petitioner's principal contention here. And to the extent any narrow conflict exists on the relevance of a forfeiture's impact on a defendant's livelihood, this case would not be an appropriate vehicle to address it.

Petitioner asserts that the decision in this case situated the court of appeals in an "intermediate" position,

aligned with the First Circuit, in considering the impact of a forfeiture on a defendant as relevant, only to his ability to earn a future living. Pet. 27 (citing *Levesque*, 546 F.3d at 85 (1st Cir.)). He contends (Pet. 26) that the court of appeals' decision conflicts with decisions of the Eleventh Circuit holding that courts should not consider the effect of a forfeiture order on an individual defendant when determining whether the forfeiture is constitutionally excessive and with a Ninth Circuit decision allowing such consideration generally.

The Eleventh Circuit decisions do not create a conflict warranting review here. That court has stated that its Excessive Fines Clause analysis "do[es] not take into account the impact the fine would have on an individual defendant." *United States* v. *Seher*, 562 F.3d 1344, 1371 (2009); see *United States* v. *Dicter*, 198 F.3d 1284, 1292 n.11 (1999), cert. denied, 531 U.S. 828 (2000); *United States* v. *817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (1999), cert. denied, 528 U.S. 1083 (2000). To the extent that rule conflicts with the court of appeals' holding below that some personal circumstances may be relevant to whether a forfeiture order will deprive a defendant of his future livelihood, resolution of the conflict would be of no assistance to petitioner because the rule applied in the Eleventh Circuit is *more* restrictive than the rule that was applied in this case. The decisions of the Eleventh Circuit therefore provide no reason for review of the decision below.

Petitioner contends that (Pet. 27) the Ninth Circuit's decision in *United States* v. *Real Property Located in El Dorado County*, 59 F.3d 974 (1995), situates that court at the other end of the spectrum, because that court identified "the hardship to the defendant, in-

cluding the effect of the forfeiture on defendant's family or financial condition," as a factor to consider "in determining the harshness of the forfeiture," *id.* at 985 (emphasis omitted). That decision predated this Court's decision in *Bajakajian*, however, and petitioner does not identify any Ninth Circuit decision post-dating *Bajakajian* that evaluates whether a fine or forfeiture order was excessive based on the type of personal circumstances petitioner asked the court of appeals to consider as a freestanding matter. To the contrary, the Ninth Circuit—like the court of appeals below—appears to evaluate whether a fine or forfeiture order is excessive based on an examination of the four principal factors identified in *Bajakajian* (and occasionally based on consideration of whether a fine would deprive a defendant of his livelihood, see *United States* v. *Hantzis*, 403 Fed. Appx. 170, 172 (2010), cert. denied, 563 U.S. 952 (2011)), without examining a defendant's health, ability to pay, or similar personal circumstances as independent factors. See, *e.g.*, *United States* v. *$132,245.00 in U.S. Currency*, 764 F.3d 1055, 1057-1062 (9th Cir. 2014); *United States* v. *Grossi*, 359 Fed. Appx. 830, 832 (9th Cir. 2009); *United States* v. *Zigetta*, No. 06-50634, 2007 WL 2564979, at *1 (9th Cir. Sept. 6, 2007); *United States* v. *$100,348.00 in U.S. Currency*, 354 F.3d 1110, 1121-1123 (9th Cir. 2004). Accordingly, petitioner has not identified any conflict between the court of appeals' decision and decisions of the Ninth Circuit that warrants further review in this case.[5]

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[5] This case would be a particularly poor vehicle for review because, to the extent that the impact of a forfeiture on a defendant's livelihood is a proper factor in Excessive Fines analysis, the court of appeals stated that petitioner provided "no facts" or "any argument at all" in the district court. Pet. App. A19 n.17. The court of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
ROSS B. GOLDMAN
Attorney

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appeals accordingly stated that it would review for "'plain error' only"—although it also held that petitioner's claim would also fail under "*de novo* review." *Ibid.*; see Pet. 29 n.13 (acknowledging that petitioner "did not properly focus its presentation on the factor of future ability to make a living").