No. 20-___

In the

Supreme Court of the United States

BRETT C. LILLEMOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant may be convicted of federal "money or property" fraud when his alleged deceit was incapable of affecting any economic decisions by, or causing any economic harm to, the alleged victim.

PARTIES TO THE PROCEEDING

Brett C. Lillemoe is the petitioner here and was the defendant-appellant below. The United States is the respondent here and was the appellee below.

RELATED CASES

United States v. Brett C. Lillemoe et al., No. 16-CR-0025 (JCH), U.S. District Court for the District of Connecticut. Judgment entered June 14, 2017.

United States v. Pablo Calderon and Brett C. Lillemoe, No. 17-1956, U.S. Court of Appeals for the Second Circuit. Judgment entered December 3, 2019.

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INTRODUCTION

This Court has repeatedly construed the federal mail and wire fraud statutes narrowly to avoid due-process, separation-of-powers, and federalism problems. *See Kelly v. United States*, 140 S. Ct. 1565, 1571, 1574 (2020); *Skilling v. United States*, 561 U.S. 358, 405-06 (2010); *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *McNally v. United States*, 483 U.S. 350, 359-61 (1987). These statutes target only schemes to obtain "traditional" property recognized by the common law—property that can be transferred from victim to defendant. Deceit is therefore necessary, but not sufficient: Fraud requires the "object" of the deceit to be causing actual or potential economic "loss to the victim." *Kelly*, 140 S. Ct. at 1573.

The Second Circuit, however, unlike several other Circuits, has repeatedly interpreted the property fraud statutes expansively to cover deceit unconnected to economic harm. Its broad interpretation eviscerates the "traditional" property requirement and permits prosecutors to imprison people for deceit that isn't intended to cause, or capable of causing, economic loss.

This prosecution typifies how the Second Circuit's expansive interpretation permits prosecutors to charge property fraud where none exists. Petitioner arranged loans from two domestic banks (the putative victims) to foreign banks. The domestic banks were fully protected against any risk of economic loss because the loans were 98% guaranteed under a federal program, and Petitioner *fully* indemnified the domestic banks from *any* risk of

loss. *After* these banks committed to extending loans, Petitioner allegedly made minor alterations to documents presented to the banks. The Second Circuit found that these "misrepresentations were not even arguably related to [the domestic banks'] assessment of the foreign banks' *creditworthiness*." App.46-47. One foreign bank ultimately defaulted—but for completely unrelated reasons (the global economic crisis)—and the Second Circuit held that the "victims" suffered no losses caused by Petitioner.

Yet the Second Circuit held this was a scheme to defraud the domestic banks. The court acknowledged that the alterations did not affect the banks' entitlement to reimbursement under the federal program. But it upheld the convictions because it found that the modifications created a risk that the federal government would pursue meritless "protracted and costly litigation" to try to avoid reimbursement.

If such an ephemeral "risk" could support a property fraud-conviction, then virtually any deceit could be federal fraud, regardless of whether it is capable of affecting economic decisions or cheating someone out of money or property. Such an overbroad interpretation conflicts with decisions by several other Circuits that have faithfully applied this Court's precedents enforcing the statutory "money or property" requirement.

The Second Circuit's holding also clashes with the requirement that, to be fraudulent, deceit must have "a natural tendency to influence, or [be] capable of influencing" a decision that could cause the putative victim to lose money. *Neder v. United*

States, 527 U.S. 1, 16 (1999). A lie that is incapable of influencing the victim's economic decisions or causing the victim economic harm may be morally wrong, but it is not federal criminal fraud.

The alterations here were incapable of influencing any relevant economic decision because the banks were contractually obligated to release the funds when the "misrepresentations" occurred. Several other Circuits have held that false statements that, like those here, are *legally* incapable of affecting a "victim's" decision are immaterial as a matter of law. But the Second Circuit refused to examine the agreements to assess materiality, even though it conceded that they limited the banks' discretion. Instead, it relied on bank witnesses who testified, notwithstanding the contracts, that they could have refused to release the funds if they had known the documents were altered. That conflicts with *Neder* and decisions by several other Circuits.

In this and other cases, the Second Circuit has flouted this Court's decisions limiting the scope of the fraud statutes. At the government's urging, that court has repeatedly endorsed novel and expansive conceptions of property fraud. Given how frequently the fraud statutes are used in federal criminal practice, and the high volume of significant fraud prosecutions in the Second Circuit, these issues are of grave importance. Certiorari should be granted to prevent the Second Circuit from continuing to defy this Court's teachings that criminal property fraud requires more than mere deceit; it requires material deceit capable of causing economic harm.

At a minimum, the Court should grant, vacate, and remand this case for reconsideration under *Kelly*, which was decided after the Second Circuit's ruling. *Kelly* reaffirms that the fraud statutes are strictly limited to schemes intended to deprive victims of traditional property—*i.e.* those with the object of causing economic harm to the victim.

OPINIONS BELOW

The Second Circuit's opinion is reported at 944 F.3d 72 and reprinted at App.1-49. The district court's opinion is reported at 242 F. Supp. 3d 109 and reprinted at App.50-83.

JURISDICTION

The Second Circuit issued its opinion on December 3, 2019 and denied a timely petition for rehearing en banc by Petitioner's co-defendant on March 10, 2020. App. 1, 84. On March 19, 2020, this Court issued an order extending the time to file any yet-to-be filed petition for certiorari to 150 days from the judgment. Accordingly, the deadline for filing this petition is August 7, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions are reproduced at App.86-110.

STATEMENT OF THE CASE

A. Background

1. This case relates to financial transactions that facilitate exports of U.S. agricultural products to

developing countries under the Export Credit Guarantee Program ("GSM-102" or "Program") administered by the U.S. Department of Agriculture ("USDA"). To promote exports, the Program provides guarantees for payments made by "letter of credit" ("LC"). The Uniform Customs and Practice for Documentary Credits ("UCP 600") is an internationally-recognized set of interpretive rules with "binding" force where, as here, an LC expressly incorporates them. *See* C.A.Sp.App.95.

In a typical export, the parties enter a sales contract that requires payment to the exporter by LC. The importer ("applicant") then applies to a foreign bank ("issuing bank") for an LC obligating the bank to pay the exporter ("beneficiary") upon presentation of certain transactional documents. App.6-7. LCs typically require the beneficiary to present a bill of lading confirming shipment. App.7. The LC irrevocably binds the issuing bank to pay if the beneficiary's documents conform to the LC's terms. App.8-9.

It is common for exporters to avoid the hassle of obtaining payment from a foreign bank by assigning their rights under the LC to a domestic bank ("confirming bank") and supplying the domestic bank with the documents the LC requires. App.7-8. The confirming bank then "honors" the LC by paying the exporter and recoups the money from the foreign bank—typically over time and with interest through the extension of a loan to the foreign bank. App.7. Banks charge fees for issuing and honoring LCs and extending such loans. C.A.App.401.

Banks "never see[] the goods at issue." App.8. Instead, banks must release payment so long as, "on the basis of the documents alone," they "appear on their face" to meet the LC's requirements, UCP 600, art.14(a); *see also* UCP 600, art.5 ("Banks deal with documents and not with goods, services or performances to which the documents may relate."). In other words, if a confirming bank honors an LC by accepting a bill of lading for a soybean shipment and paying the exporter, it is entitled to reimbursement from the issuing bank even if no soybeans shipped, or the soybeans were rotten. The purchaser may have a cause of action against the exporter, but no cause of action could lie against either bank. *See* UCP 600, art.4(a) (banks' obligations under LCs "not subject to claims or defenses by the applicant resulting from its relationships with…the beneficiary").

The UCP's default rule is that the beneficiary's documents must exactly match an LC's specifications to trigger payment. App.9. However, LCs may deviate from this default rule and *waive* discrepancies, thereby directing the confirming bank to pay anyway. *E.g.*, C.A.App.868, 893, 1852, 2086. As explained below, that occurred here.

To encourage domestic banks to facilitate exports by honoring LCs, the Program guarantees the debt owed by foreign issuing banks to U.S. confirming banks. 7 C.F.R. §1493.10(a)(3) (2012); App.10. During the relevant period, the USDA issued over $3

billion in credit guarantees annually.[1] The USDA "rigorous[ly]" vets foreign banks for participation in the Program. App.47. In the event of default, U.S. banks are entitled to 98% reimbursement of unpaid principal and interest from the USDA. App.53. They may also contract for additional protection from the beneficiary, as happened here with Petitioner.

2. The complexities and cost of the Program place it out of reach for many U.S. exporters. For example, importers frequently lack the credit or collateral to obtain an LC from a bank. C.A.App.1020. Accordingly, financial intermediaries facilitate transactions under the Program. C.A.App.945, 1020. Petitioner Brett Lillemoe and his co-defendants—as well as large companies such as Cargill—provided such services by arranging LCs where importers would not have been able to do so. Such intermediaries "rent" Program-eligible "trade flows" (the underlying shipment of goods and payment by importers) and arrange Program-guaranteed LCs between foreign and domestic banks. App.11.

Lillemoe identified qualifying exports and compensated exporters to use their trade-flow paperwork to apply for GSM-102 guarantees and obtain LCs from foreign banks naming his business as the beneficiary. His business would assign its rights to receive payment under the LCs to a U.S.

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[1] U.S. Dep't of Ag., Yearly Activity Reports (last visited August 5, 2020), https://www.fas.usda.gov/programs/export-credit-guarantee-program-gsm-102/yearly-activity-reports.

bank, and provide the bank with the exporters' documents demonstrating that exports had, in fact, shipped. This confirmed that the LC qualified for the GSM-102 guarantee and triggered the foreign bank's payment obligation. App.11. Thus, these transactions resulted in U.S. banks loaning foreign banks money.

3. Lillemoe's convictions stem from a handful of GSM-102 guarantees he arranged from 2008 to 2010 for transactions between foreign banks and two U.S. banks (CoBank ACB and Deutsche Bank A.G). The "fraud" allegedly consisted of minor alterations (discussed below) to a few bills of lading presented to CoBank and Deutsche Bank, which caused them to make payments pursuant to their obligations under LCs issued by the foreign banks. The government conceded that the foreign banks were obligated under the LCs to repay the U.S. banks. C.A.App.96. It is also undisputed that the underlying agricultural transactions were entirely legitimate and that the goods identified on the bills of lading in question were shipped. C.A.App.707-08.

In the documents assigning the GSM-102 guarantees, Lillemoe's companies fully indemnified the banks from any losses they might incur if he made any misrepresentations. This indemnification covered potential losses of principal and interest, as well as "any and all losses, costs, and expenses" incurred "on account of" Lillemoe's breach of representations and warranties as to the LCs' compliance with the GSM-102 regulations and the validity of the USDA guarantee. *E.g.*, App.114; *see also* App.122-23 (terms standard in all bank

agreements). Deutsche Bank also required Lillemoe to pay it the 2% not covered by the GSM-102 guarantee in the event of default, which he did after one foreign bank (the International Industrial Bank of Russia ("IIB")) defaulted on some loans from CoBank and Deutsche Bank. C.A.App.421-22, 1726. CoBank also required Petitioner to pay a 3% fee upfront to protect against default, which he did. C.A.App.501.

IIB's default was caused by the global financial crisis, not any conduct by the defendants. App.45. Not only did these "victim" banks lose no money, they bore *no* actual risk of loss when they agreed to the transactions. They were never exposed to economic harm by anything defendants did, because the USDA guarantee and the indemnity and other provisions in the agreements with Lillemoe together ensured that the banks would be made whole in the event of any default.

B. District Court Proceedings

1. In February 2015, the government filed a 62-count indictment alleging that Lillemoe and two colleagues, Pablo Calderon and Sarah Zirbes, defrauded CoBank and Deutsche Bank. The indictment alleged that their "intermediary" businesses were unlawful because they did not "ship" or "participate in the physical movement of…products," but merely purchased bills from exporters in order to "obtain capital for…foreign banks from U.S. financial institutions." C.A.App.94-95.

The district court disagreed, because the GSM-102 regulations did not preclude Lillemoe from applying for Program guarantees as an intermediary. App.11. Thus, at trial, the prosecution instead argued that Lillemoe misled U.S. banks by making minor alterations to bills of lading. This back-up theory implicated only a handful of thousands of bills of lading that Lillemoe submitted—and was almost entirely *rejected* by the jury, which acquitted on most counts. The jury acquitted Lillemoe on all but one conspiracy count (18 U.S.C. §1349) and five wire fraud counts (18 U.S.C. §1343) related to a single USDA-guaranteed LC for goods shipped on a vessel called the "Cool Express." Although the conspiracy charged both wire fraud and bank fraud objects, all defendants were acquitted of the corresponding bank fraud count. C.A.App.314-24. Calderon was convicted on two of the same counts; Zirbes was fully acquitted. *Id.*

To trigger payment, the "Cool Express" LC required "cop[ies] of original" bills of lading. App.15. Lillemoe whited-out the phrase "copy non-negotiable" and stamped "original" on the documents, and Calderon forwarded them to CoBank. App.15. Lillemoe *mistakenly* believed that the "original" stamp was necessary. *E.g.*, C.A.App.1907, 3616. But adding the "original" designation was, as a matter of law, superfluous. Neither the LC nor Program regulations required an original or an original stamp, and the bill of lading forwarded to CoBank was a copy of and contained all the same (accurate) information about the shipments as the "copy of original" required under the LC. C.A.App.1851; 7 C.F.R. §1493.110 (2012). The government also

conceded that the copy did not have to be "negotiable." D.Conn.Dkt.351 at 45; *see* C.A.App.495 (CoBank representative's testimony that bank "accept[s] non-negotiable bills of lading routinely"). And after IIB defaulted on its obligations to CoBank under the LC, the USDA reimbursed CoBank without raising *any* question about Program eligibility. App.13.

The government argued that CoBank would not have accepted the bills of lading and released the funds had it been aware of these changes. However, it was undisputed that the LCs were binding and obligated the foreign banks to repay CoBank, and nothing about the alterations increased the risk of default. C.A.App.96. Moreover, the LCs explicitly waived all discrepancies except for Program requirements (*e.g.*, if the bill of lading was not for a Program-approved commodity). C.A.App.429, 1852. Simply put: the LC required CoBank to release the funds even if the documents had been presented without the alterations. Although two bank representatives testified that they would not have accepted the documents had they known of the alterations, App.15, this conflicts with the binding language of the LCs. Indeed, both witnesses ultimately admitted that they were only permitted to check the bills for facial compliance in determining whether to tender payment. C.A.App.456, 926.

The government presented evidence of one other type of alteration (which relates only to the conspiracy count): "on-board" dates on three bills of lading for CoBank transactions were changed from October 5, 2008 to October 6, 2008 in order to qualify

for the Program (which requires applications for guarantee to be made before goods are exported). It was undisputed that the relevant goods were shipped on October 5 and remained on board the ships on October 6. App.16. However, the parties disputed whether "on board" can include any date the goods are on the ship or only the date the goods are placed on the ship. *Id*. As with the Cool Express transactions, it was undisputed that these alterations had no effect on the likelihood of default. And here, there was no default and CoBank was repaid in full. App.13, 46-48.

In sum, the domestic banks were never exposed to any risk of loss, because the USDA guarantee together with their agreements with defendants ensured that they could be made whole in the event of default. Moreover, the GSM-102 regulations shielded the U.S. banks from responsibility for any misrepresentations of which they are unaware. *See* 7 C.F.R. §1493.120(e) (2012) (providing indemnity for "any action, omission, or statement by the exporter of which the [bank] has no knowledge"). It is undisputed that the banks were unaware of the alterations (indeed, that was the prosecution's theory).

2. Lillemoe and Calderon timely moved for a judgment of acquittal, or alternatively, a new trial. They argued that there was no fraud scheme because the banks received the full economic value of their bargain, and that the altered documents were immaterial since the LCs required the banks to release the funds upon presentation of facially complying documents and waived discrepancies.

The district court denied the motions. App.51.

3. Lillemoe was sentenced to 15-months' incarceration and $1.5 million forfeiture. The district court also ordered defendants to pay $18.5 million in restitution to the USDA for reimbursing the banks following IIB's default, and $304,743 to CoBank for purported losses including attorney's fees related to the investigation and prosecution. App.19.

C. Second Circuit Decision

The Second Circuit affirmed the convictions but vacated the restitution order. The court purported to acknowledge that "misrepresentations or non-disclosure of information" constitute wire fraud only if they "can or do result in tangible economic harm." App.27. But the only potential harm the court found attributable to the altered documents did not actually expose the banks to any risk of loss, because of the combined effect of the USDA guarantees and the agreements with Lillemoe.

The Second Circuit said the altered documents created risks (1) "of default or non-reimbursement from the foreign banks" and (2) "that the USDA would decline to reimburse the banks in the event of a foreign bank's default" and initiate "protracted and costly litigation" with the banks over eligibility for reimbursement. App.27, 31. But the alterations had nothing to do with the foreign banks' ability to repay the loans, and, in any event, the banks' risks were covered by the Program and their agreements with Lillemoe. The GSM-102 regulations guaranteed reimbursement because, per the government's own theory, the banks knew nothing about any fraud, and the indemnity provisions covered the banks for any

incidental costs like the imagined meritless litigation.

Indeed, the Second Circuit's reasons for reversing the restitution order demonstrate the fallacy in its conclusion that a property fraud scheme can be based on such non-existent "risks." The court held restitution unauthorized because neither of these supposed risks had "even arguably materialized," and IIB's default was plainly caused by the "global financial crisis" alone. App.45. The "fraudulent shipping documents had no bearing whatsoever on the foreign banks potential to default in such circumstances"; "Defendants' misrepresentations were not even arguably related to CoBank's and Deutsche Bank's assessment of the foreign banks' *creditworthiness*." App.45-47. The court said this "with complete certainty because *before* the Defendants presented the fraudulent documents to the confirming banks, the USDA and the banks had *pre-approved* the relevant foreign banks for participation in these transactions." App.47. In agreeing to the LCs, the court found, the U.S. banks simply "made a bet that the foreign banks would be able to repay the relevant loans with interest" and "*that* bet was completely unrelated to the risks concealed by Defendants' fraud." App.48. The bank's ultimate "financial decision—to offer the foreign loans—was not influenced by the Defendants' misconduct." App.48.

The court also acknowledged that "[w]here, as here, 'a bank's discretion is limited by an agreement, we must look to the agreement to determine what factors are relevant, and when a misstatement

becomes material.'" App.22. However, instead of analyzing the agreements, which obligated the banks to release the funds upon being presented with facially complying documents, the court credited the bank witnesses' testimony that they "would have declined to go through with the transactions at issue had they known about the…alterations." App.24.

The Second Circuit said that an alternate conclusion would "countenanc[e] any and all falsifications of documents…as long as they were carried out with sufficient skill." App.23. But this presumes that the alterations amounted to *fraud*, which was the very question to be decided. And the court ignored the "unique" nature of LCs in international trade and the background regulations insulating banks from responsibility for problems with the underlying shipment of goods. For example, the Second Circuit failed to acknowledge the U.S. banks' explicit waiver of discrepancies, let alone explain how the alterations could be material in light of those waivers.

REASONS FOR GRANTING CERTIORARI

The federal fraud statutes, 18 U.S.C. §1341 *et seq*., prohibit schemes to obtain "money or property" by deceptive means. This Court has repeatedly held that these statutes reach only "schemes" to obtain traditional property (meaning transferrable property that has financial value in the victim's hands) and require proof that the defendant obtained (or tried to obtain) the property using *material* deceit. *E.g.*, *Kelly*, 140 S. Ct. at 1571; *McNally*, 483 U.S. at 356; *Neder*, 527 U.S. at 20-25. Thus, fraud requires proof that the defendant deceived someone to cheat him or

her out of property and thereby cause economic harm, and that the misrepresentations were capable of affecting some discretionary economic decision by the victim.

The decision below squarely conflicts with these precedents and other Circuits' decisions faithfully following them. The Second Circuit interpreted the wire fraud statute so broadly as to cover misrepresentations that were not intended to cause, and were incapable of causing, any loss to the victim. The Second Circuit agreed that the altered documents "were not even arguably related" to the foreign banks' "creditworthiness" and that the domestic banks were entitled to reimbursement under the federal program. Yet it affirmed the convictions based on imaginary "risks" of default and meritless litigation over eligibility for the reimbursement, and in spite of indemnification agreements covering any losses that could be caused by Petitioner's misrepresentations. The court also found the modifications material even though they occurred *after* the banks had committed to making the loans, and without regard to the banks' contractual obligations to release the funds upon presentation of facially compliant documents. In similar situations where a statement could not as *a matter of law* affect a putative victim's decision, other Circuits have reversed convictions.

This case is not an outlier in the Second Circuit, which has affirmed numerous convictions based on creative prosecution theories that rely on its elastic view of property fraud. The Second Circuit has effectively deleted the "money or property" and

materiality requirements from the statutes. It repeatedly defies this Court's clear and repeated instructions—from *McNally* to *Kelly*—to construe the fraud statutes narrowly. The result forces the public to "rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language" and places far too much "power in the hands of the prosecutor." *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). This Court's intervention is necessary to enforce the important limits it has imposed on these malleable fraud statutes. It is especially important for the Court to prevent their abuse in the Second Circuit, which is home to a large volume of fraud prosecutions and has a longstanding reticence to *en banc* review.

Alternatively, the Court should grant, vacate, and remand for the Second Circuit to reconsider its ruling in light of this Court's subsequent decision in *Kelly*.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The Decision Eviscerates The Statutory Requirement That A Fraud Scheme's Object Must Be Obtaining Property

1. The property fraud statutes only prohibit schemes in which the object is causing economic harm to the victim. This limitation derives from *McNally*, where this Court held that mail fraud covers only schemes to obtain traditional property. 483 U.S. at 356-61. In *McNally*, the Court reversed fraud convictions related to an insurance kickback scheme that purportedly deprived the public of state

officials' "honest services." This Court held that the public's interest in its officials' honest services is not "within the reach" of the mail fraud statute. *Id.* at 361.[2] That statute (like wire fraud) prohibits only "schemes to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§1341, 1343. The Court construed this disjunctive language as a "unitary whole," *Kelly*, 140 S. Ct. at 1571, and rejected the government's argument that the "money or property" language did not "limit schemes to defraud to those aimed at causing deprivation of money or property." *McNally*, 483 U.S. at 358. Invoking the rule of lenity, fair notice, and federalism, the Court held that fraud is "limited in scope to the protection of property rights." *Id.* at 360.

Consistent with this limitation, the Court later affirmed convictions for embezzling a newspaper's confidential business information, which (though intangible) has "long been recognized as property." *Carpenter v. United States*, 484 U.S. 19, 26 (1987). And in *Cleveland*, the Court confirmed that the fraud statutes do not reach false statements made to obtain state-issued licenses because such an interest "stray[s] from traditional concepts of property." 531 U.S. at 24. The state's "intangible rights of allocation, exclusion, and control" over the licenses are not traditional property interests, but merely reflect the state's regulatory power. *Id.* at 23. The "object of the fraud" must be property when it is "in

[2] Congress subsequently criminalized such "honest services fraud" in 18 U.S.C. §1346, which is not at issue here.

the victim's hands," and a poker license is not "property" in the state's hands and only becomes property in the licensee's hands. *Id.* at 26-27.

These cases demonstrate that traditional property means property with commercial value that can be transferred from victim to defendant. In *Carpenter*, the newspaper could use its confidential information to sell newspapers. In *Cleveland*, the state was not in "the video-poker business" and could not use its power to issue the license for commercial purposes. *Id.* at 24.

Since a fraud scheme must seek to deprive someone of traditional property, it naturally follows that its object must be causing economic loss. For instance, in explaining why *McNally* did not involve a property fraud, the Court relied on the lack of any jury finding that the scheme caused the state financial harm. If the state "would have paid a lower premium or secured better insurance," that would qualify as property fraud. 483 U.S. at 360-61.

Kelly further illustrates this point. The defendants were public officials who lied about why they reallocated access lanes to a bridge. The Court held that their deceit was not property fraud because a government agency's interest in "allocation, exclusion, and control" of the lanes was not property. 140 S. Ct. at 1572. By contrast, a scheme to deceitfully usurp government employees' time and labor "can undergird a property fraud prosecution" because "the cost of the employees' services would qualify as an *economic loss* to a city, sufficient to meet the federal fraud statutes' property requirement." *Id.* at 1573 (emphasis added). But

that "loss to the victim" must be "an object of the fraud"; "a property conviction cannot stand" when the loss "is only an incidental byproduct of the scheme." *Id.*

For this reason, most lower courts have held that an essential element of property fraud is proof that the defendant intended to inflict economic harm on the victim. *See*, *e.g.*, *United States v. Vinyard*, 266 F.3d 320, 329 (4th Cir. 2001); *United States v. Jordan*, 112 F.3d 14, 19 (1st Cir. 1997); *United States v. Baldinger*, 838 F.2d 176, 180 (6th Cir. 1988). As Judge Sutton has explained, to "be guilty of fraud, an offender's 'purpose must be to injure.'" *United States v. Sadler*, 750 F.3d 585, 590 (6th Cir. 2014); *see generally Defraud*, Black's Law Dictionary (11th ed. 2019) ("defraud" means "to cause injury or loss to (a person or organization) by deceit"). Put another way, "there is a difference between deceiving and defrauding: to *defraud*, one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all." *United States v. Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016). And there is no fraud unless the deceit "caused (or was intended to cause) actual harm…of a pecuniary nature." *United States v. Frost*, 125 F.3d 346, 361 (6th Cir. 1997).

2. The statutes' requirement of "obtainability" further illustrates that there must be a link between deceit and economic harm. As *Kelly* held, the "object of" a fraud scheme must be "to *obtain* the [victim's] money or property." 140 S. Ct. at 1568 (emphasis added). In other words, property fraud requires that "the victim's loss of money or property supplied the

defendant's gain, with one the mirror image of the other." *Skilling*, 561 U.S. at 400. For instance, in *Cleveland*, the government's regulatory interest in issuing licenses was not "property" that could be obtained by the defendant. 531 U.S. at 20-26; *see also United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (Easterbrook, J.) (mail fraud requires "actual" or "potential transfer of property from the victim to the defendant").

Indeed, in *Sekhar v. United States*, this Court relied on a mail-fraud decision to interpret virtually identical language in the Hobbs Act prohibiting "obtaining of property" by extortion. The Court held that this language requires the property to be "*transferable*—that is, capable of passing from one person to another." 570 U.S. 729, 734 (2013). *Sekhar* built on an earlier Hobbs Act case in which this Court held that the "'obtaining of property' requirement include[s] both a deprivation and acquisition of property." *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 404-05 (2003). And *Sekhar* expressly relied on *Cleveland* and the similar text in the mail fraud statute to hold that a general counsel's recommendation was not transferrable to the defendant and thus not property. 570 U.S. at 737-38. *Sekhar* also cited fraud cases for the proposition that "absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Id*. at 732 (quoting *Neder*, 527 U.S. at 239). This further demonstrates why the "obtainability" language should be construed consistently across the statutes.

3. The materiality element also confirms that nexus to economic harm is required. "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder*, 527 U.S. at 16. The relevant "decision" in a property fraud case obviously must be about the decisionmaker's *property*; thus, a lie incapable of affecting a discretionary economic decision cannot be material to a property-fraud scheme.

A hypothetical analogous to this case illustrates the point: A (a bank) has agreed to loan money to B so that B can buy a car. A asks B to provide a copy of the title to the car after she buys it. B makes a copy and stamps the document "original." Clearly, B has misrepresented the document because she added an "original" stamp. But her misrepresentation was made after A committed to the loan, and it has no impact on A's assessment of the loan's economic risk. Accordingly, there is no wire fraud. The same would be true even if B instead changes the purchase date on the document. By contrast, if B inflates her income in emails to A before A commits to the loan, then B has committed wire fraud, because she has misled A about her ability to repay the loan.

In similar scenarios, several Courts of Appeals have reversed property fraud convictions. These courts have required misrepresentations capable of causing economic harm to sustain convictions under the property fraud statutes. For instance, in *Sadler*, the defendants illegally distributed controlled substances they had purchased from pharmaceutical

distributors but lied about what they planned to do with the products. The Sixth Circuit nevertheless reversed the wire fraud convictions, holding that the defendants had not "deprive[d]" the companies of "property" because they "paid th[eir] asking price." 750 F.3d at 590. While the "lies convinced the distributors to sell controlled substances that they would not have sold had they known the truth," the fraud statute "is 'limited in scope to the protection of property rights,' and the ethereal right to accurate information doesn't fit that description." *Id.* at 590-91 (quoting *McNally*, 483 U.S. at 360). The misrepresentations affected the distributors' decisions, but were not fraudulent because they were incapable of causing the distributors to lose money.

Similarly, in *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), the Ninth Circuit reversed a conviction where the defendants lied to the sellers of certain technology products about their plans to send the goods to the former Soviet Union, a prohibited export. The court held that, because the sellers "received the full sale price for their products," there was no wire fraud even though "they may have been deceived into entering sales that they had the right to refuse." *Id.* at 467.

And in *Takhalov*, the Eleventh Circuit reversed a wire-fraud conviction because the district court refused to instruct the jury that it could convict only if "the defendants had schemed to lie about the quality or price of the goods sold to the victims." 827 F.3d at 1316. As the court persuasively explained: "A 'scheme to defraud,' as that phrase is used in the wire-fraud statute, refers only to those schemes in

which a defendant lies about the nature of the bargain itself." *Id.* at 1314. If "a defendant lies about something" other than the price or characteristics of the goods in question "he has not lied about the nature of the bargain, has not committed wire fraud." *Id.* at 1313-14; *see also*, *e.g.*, *Frost*, 125 F.3d at 361-62 (reversing mail fraud convictions because failure to disclose conflict of interest didn't affect transaction's economics).

4. In this case, by contrast, the Second Circuit affirmed the fraud convictions even though it was unable to point to any economic harm that the alterations to the bills of lading could cause. Indeed, the court correctly found the purported "risks" to the banks non-existent when reversing the restitution order.

The first purported "harm" was the risk of default by the foreign banks. App.27. But this was not an actual risk of *economic* harm. Such a default could not have caused any loss to the U.S. banks, even if the misrepresentations had caused a default (which of course they didn't). The federal guarantee, together with the agreements with Lillemoe, removed *any* theoretical economic risk to the domestic banks that the alterations could have otherwise posed. The federal program guaranteed 98% of any risk of default, and the agreements with defendants covered the remaining amounts. *See supra* at 7-9.

Moreover, the Second Circuit itself found that "Defendants' misrepresentations were not even arguably related to CoBank's and Deutsche Bank's assessment of the foreign banks' *creditworthiness*." App.46-47. Indeed, "the USDA and the banks had

pre-approved the relevant foreign banks for participation in these transactions" "*before* the Defendants presented the fraudulent documents to the confirming banks. *Id.* at 47. The court concluded with "complete certainty" that that "[t]he fraudulent shipping documents had *no bearing whatsoever* on the foreign banks' potential to default." App.47 (emphasis added).

The second "risk" the court posited—non-reimbursement by USDA, App.29—was not a risk of *economic* harm either. The court acknowledged that the "GSM-102 regulations in effect at the time provided that an assignee [such as the confirming banks] could not be held liable for an exporter's misrepresentations of which the assignee had lacked knowledge." App.31 (citing 7 C.F.R. §1493.120(e) (2012)). Nonetheless, the court said there might be "'protracted and costly litigation' as to whether the confirming bank 'had knowledge of the nature of the documents it accepted." App.31. But such litigation would have been completely meritless: The prosecution theory was that the confirming banks had been defrauded because they *didn't know* about the modifications. And regardless, the banks were indemnified for such costs by the assignment agreements, which expressly required Petitioner to reimburse "any and all losses, costs, and expenses" caused by any misrepresentations. App.114.

If the risk of meritless litigation (the cost of which one is indemnified against) counts as economic harm that can be the object of a property-fraud scheme, then the property/economic harm requirement will be reduced to a nullity. On the

Second Circuit's theory, the *Bruchhausen* victim-manufacturer's risk of having the government charge it with export violations would support a fraud prosecution, even though the basis for charging defendants was that they deceived the manufacturers. The Ninth Circuit correctly rejected this and instead reversed the conviction because the manufacturers were exposed to no economic harm; they received what they were entitled to receive for the products they sold the defendants. 977 F.2d at 468.

Likewise, the Second Circuit would have affirmed the convictions in *Sadler* because of the "risk" that the distributors might be prosecuted for participating in the defendant's illegal resales—even though the government's fraud theory was that the defendants deceived the distributors about what they would do with the products. But as the Sixth Circuit reasoned, the pharmaceutical companies received a fair price for their products, so the defendants' misrepresentations did not constitute property fraud. 750 F.3d at 591-92.

The First Circuit expressly rejected a similar litigation risk theory when construing 18 U.S.C. §3293(2), which extends the statute of limitations for wire fraud that "affects a financial institution." In *United States v. Agne*, 214 F.3d 47 (1st Cir. 2000), the defendant presented a bank with a bill of lading indicating that items he sold had been shipped to the purchaser. The bank then paid the defendant pursuant to an LC and reimbursed itself by debiting the purchaser's bank account. It turned out that the defendant had never actually shipped some of the

items and had defrauded the purchaser. The court reversed the wire fraud conviction as untimely because the bank was never exposed to any risk of loss. The court held that "the consequence to the bank, if any, is too remote to sustain the conviction" because the customer had ample funds in his account to cover the payment, and the bank had immediately recovered its money. *Id.* at 52. The First Circuit specifically rejected the government's argument that "the bank was subject to a potential loss in that [the purchaser] could have instituted a civil suit against it for wrongfully honoring the [LC]," because the LC expressly protected the bank for liability in the event documents presented to it turned out to be forged or fraudulent. *Id.*

The facts here are analogous. As in *Agne*, the alterations did not affect the banks' ability to recover the loans' value, because they were unrelated to the borrowers' creditworthiness. And as in *Agne*, the banks had no economic risk: the regulations ensured that USDA would cover 98% of loan value in the event of any default, and the agreements with Lillemoe covered the remaining amounts and fully indemnified the banks, even for the cost of any meritless litigation with USDA.

The decision below also reflects the Second Circuit's refusal to enforce the "obtainability" requirement. Lillemoe plainly wasn't seeking to "obtain" (and couldn't have obtained) the banks' right to control their assets. His fee—the money he obtained—was paid by the foreign banks, not the domestic banks. And he clearly wasn't seeking to *obtain* the risks of default or "costly and protracted"

(albeit meritless) litigation by USDA when he altered the documents. Nor were such risks transferable to him. This case thus lacks the "symmetry" between what Lillemoe sought to obtain—fees from foreign banks—and any traditional property of the "victim" banks. *Skilling*, 561 U.S. at 400. That is an additional reason this case provides an excellent vehicle in which to rein in the Second Circuit's errant and overbroad construction of the property fraud statutes.

B. The Second Circuit's Materiality Ruling Conflicts With *Neder* And Decisions By Several Other Circuits

The decision below also contravenes *Neder* and conflicts with decisions by other Circuits, because the Second Circuit upheld the convictions even though the altered documents were *legally incapable* of affecting any discretionary economic decision by the domestic banks.

As noted, to be material under *Neder*, a misrepresentation must have a "'natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed"—*i.e.*, the domestic banks. But there is no economic "decision" by the U.S. banks that the altered bills of lading could have "influenced." The Second Circuit found that the banks would "not have entered into the transactions at issue" had they known of the mismarking, App.26, but the banks had already agreed to the economics of their loans with the foreign banks *before* they received the bills of lading—a point the Circuit itself emphasized later in its opinion. Therefore, it was impossible for the

alterations to "influence" the banks' decision to loan the money. *See Kungys v. United States*, 485 U.S. 759, 775 (1988) ("[W]hat is relevant is what *would have ensued* from [the bank's] knowledge of the misrepresented fact.") (emphasis added).

Yet the Second Circuit ignored its own analysis when it analyzed materiality. The court erroneously focused on the banks' release of the funds, rather than their earlier decisions to loan the funds. The court paid lip service to the need to "look to the agreement" to determine whether the bank had any discretion to refuse to release the funds. App.22. But it ignored the agreements—and that they expressly waived any discrepancies in the bills of lading, *see supra* at 11—and failed to explain how the bank could have refused to pay after having legally bound itself to do so.

The court's reliance on two bank witnesses' testimony that "their respective banks would have declined to go through with the transactions at issue had they known about the specific alterations the Defendants made to the bills of lading" defies black-letter law. App.24. As any first-year law student knows, the bank's obligations are determined by the contract, not self-serving *post hoc* statements by the parties about what they thought it meant. *See*, *e.g.*, *Renner v. Bank of Columbia*, 22 U.S. 581, 587-88 (1824) ("[T]here is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence, to contradict or substantially vary the legal import of a written agreement."); *accord Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 284

(1990). The witnesses themselves ultimately admitted as much. C.A.App.456, 926.

In similar circumstances, other Courts of Appeals have correctly assessed materiality under the *Neder* standard by asking whether the decisionmaker had the *legal* authority to make any decision based on the misrepresentation. For instance, in *Luciana v. U.S. Attorney General*, the Third Circuit held that a false statement in an asylum application was immaterial because the governing regulation required the agency to deny the application as untimely, and the statement was thus incapable of influencing the agency's decision. 502 F.3d 273, 280 (3d Cir. 2007).

Similarly, in *United States v. Camick*, 796 F.3d 1206 (10th Cir. 2015), the Tenth Circuit reversed mail and wire fraud convictions because the false statements were incapable as a matter of law of affecting the relevant decisions. The defendant's misrepresentations to a Kansas state court when he sought relief from a default judgment were immaterial, because under Kansas law the statements would not have established a meritorious defense or excused his failure to timely answer. *Id.* at 1215-17. A misrepresentation on a provisional patent application was likewise immaterial because such information "only become[s] relevant to a PTO decision if the applicant takes additional action on the application within one year of filing," which the defendant had not done. *Id.* at 1219. *See also United States v. Radetsky*, 535 F.2d 556, 572 (10th Cir. 1976) (false statements to agency immaterial to agency's decision because, even if true, the agency lacked

authorization to pay defendant); *United States v. Robinson*, 83 F.3d 418, *2 (5th Cir. 1996) (false statements in connection with motion to alter confinement conditions immaterial because court lacked jurisdiction over motion).

Had the Second Circuit taken the approach of these other Circuits, it would have analyzed the governing law and the agreements. Had it done so, it would have been compelled to find the alterations immaterial. That is because the LCs obligated the banks to release the funds since the documents were facially compliant, and any discrepancies were waived. *See supra* at 11. The court resisted this analysis to avoid "countenancing any and all falsifications of documents involved in these or similar transactions, as long as they were carried out with sufficient skill," App.23. But this begs the question of whether the alterations amounted to *fraud* in the first place. Holding the modifications *immaterial* does not mean that "the better the fraudster, the less likely he is to have committed fraud." App.23. It merely enforces this Court's requirement that to be *fraudulent* under the mail and wire fraud statutes, misrepresentations must be material, because "the common law could not have conceived of "fraud" without proof of materiality." *Neder*, 527 U.S. at 22.

II. THE COURT SHOULD GRANT CERTIORARI TO REIN IN THE SECOND CIRCUIT'S EXPANSIVE AND MALLEABLE INTERPRETATION OF PROPERTY FRAUD

The decision below typifies the Second Circuit's frequent refusal to enforce this Court's narrow

construction of the property fraud statutes. The Second Circuit has repeatedly affirmed property fraud convictions even where the alleged deceit lacks any nexus to traditional property or economic harm.

For instance, in *United States v. Johnson*, 945 F.3d 606 (2d Cir. 2019), *cert. pending*, No. 19-1412, the Second Circuit affirmed a wire fraud conviction even though the alleged lie could not have caused, and did not cause, the victim to lose money. The court held that a purportedly false promise was material because it "influenced" the alleged victim's decision about which of two types of foreign exchange transactions to conduct. Although the court conceded that the method the victim chose was *cheaper*, this was irrelevant. *Id.* at 614-15. According to the Second Circuit, a statement can be material even if it is incapable of causing economic loss, because materiality is unrelated to the "requirement that the misrepresentation be capable of resulting in tangible harm." *Id.* at 615 (citing *United States v. Finazzo*, 850 F.3d 94, 109 n.16 (2d Cir. 2017)).

The Second Circuit has gutted the traditional property requirement in other cases too. For example, in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), the defendants lied to the seller of night vision goggles about their plans to ship them to Argentina without a required export license. The defendants paid the seller the full price for the goods. Nonetheless, the Second Circuit affirmed the convictions and expressly held that the wire fraud statute does not require any intent to harm the victim's property. *Id.* at 420-21. The court upheld a jury instruction stating that "[w]hile the government

must prove the defendant contemplated harm in order to establish a scheme to defraud, it is not necessary that this harm be monetary in nature." *Id.* at 420. According to the Second Circuit, the contemplated harm "need not be pecuniary in nature"; "[t]he fact that [the victim] never suffered—and that defendants never intended it—any pecuniary harm does not make the fraud statutes inapplicable." *Id.* at 421.

That holding, like the one in this case, directly conflicts with this Court's teachings in *McNally* and *Carpenter*, as well as post-*Schwartz* decisions including *Cleveland* and *Kelly*, which establish that the object of a property fraud scheme must be to obtain traditional property and inflict economic harm. Indeed, the Ninth Circuit expressly "disagree[d] with the Second Circuit's approach" because *Schwartz* contravenes this Court's decisions. *Bruchhausen*, 977 F.2d at 468 n.4. Nonetheless, the Second Circuit has repeatedly reaffirmed *Schwartz* even after *Cleveland*. *E.g.*, *United States v. Binday*, 804 F.3d 558, 570-71 & n.11 (2d Cir. 2015); *Finazzo*, 850 F.3d at 111.

Many of these rulings, including the decision below, rely upon what the Second Circuit calls the "right to control" theory of property fraud. In the Second Circuit, for "purposes of satisfying the elements of mail, wire or bank fraud, a victim can be deprived of 'property' in the form of 'intangible' interests such as the right to control the use of one's assets." App.27. This theory posits that the right to control one's assets is *itself* property, and that "withholding or inaccurate reporting that could

impact on economic decisions" which the "victim" of that intangible "right to control" is property fraud even if the "victim" receives the full economic benefit of the bargain. *See*, *e.g.*, *Finazzo*, 850 F.3d at 108; *Binday*, 804 F.3d at 570-71; *United States v. Wallach*, 935 F.2d 445, 461-63 (2d Cir. 1991); *United States v. Viloski*, 557 F. App'x 58, 32-33 (2d Cir. 2014); *United States v. Levis*, 488 F. App'x 481, 485 (2d Cir. 2012).

This makes no sense, and the Sixth and Ninth Circuits rightly rejected it in *Sadler* and *Bruchhausen*. It conflicts with this Court's cases holding that only traditional, property interests that can be transferred from victim to defendant are obtainable "money or property" in a mail or wire fraud scheme. *See supra* Point I.A.2. Despite the statutory "obtain…property" text and this Court's precedents requiring obtainability, the Second Circuit has repeatedly insisted that "the mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property," *Finazzo*, 850 F.3d at 107; *see also United States v. Porcelli*, 404 F.3d 157, 161-62 (2d Cir. 2005) (holding that fraud statutes do not "require as an element of the crime, that [the defendant] actually obtained or sought to obtain money or property"); *accord United States v. Males*, 459 F.3d 154, 158 (2d Cir. 2006).

The decision below is a paradigmatic example of the Second Circuit's refusal to comply with this Court's narrow construction of property fraud. The malleability and amorphousness of the right to control doctrine, and the Second Circuit's general approach of interpreting fraud expansively in defiance of this Court's decisions, encourages

prosecutors to use the fraud statutes as a catchall crime that can cover any conduct they decide *should* be prohibited, even if that conduct was not clearly illegal at the time. This approach violates the well-established principle that a criminal law may not be "so vague that it [1] fails to give ordinary people notice of the conduct it punishes, or [2] [is] so standardless that it invites arbitrary enforcement." *Johnson v. United* States, 135 S. Ct. 2551, 2556 (2015). And it violates this Court's repeated instructions to construe the fraud statutes narrowly in order to avoid these due process problems. *See*, *e.g.*, *Skilling,* 561 U.S. at 405-06; *McNally*, 483 U.S. at 360-61.

Given the government's frequent use of the fraud statutes, the significant volume of financial fraud cases prosecuted in the Second Circuit, that Circuit's practice of refusing to sit en banc,[3] and the inconsistency between its interpretation of these statutes and that of several other Circuits, this Court's intervention is needed to ensure that the Second Circuit faithfully applies the Court's narrow definition of federal property fraud.

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[3] *See generally Ricci v. DeStefano*, 530 F.3d 88, 90 (2d Cir. 2008) (Katzmann, J., *concurring*) (noting "long-standing tradition of general deference to panel adjudication" and "hearing en banc only in rare and exceptional circumstances"). Between 2011-2016, the Second Circuit granted rehearing en banc only twice, compared to an average of 12 times across all circuits. *See* Flumenbaum & Karp, *The Rarity of En Banc Review In the Second Circuit*, 256 N.Y.L.J., Aug. 24, 2016, at 3. Since then, the Circuit has granted rehearing en banc only twice.

III. AT A MINIMUM, A GVR IN LIGHT OF *KELLY* IS WARRANTED

For the foregoing reasons, this case is worthy of independent review on its own merits. However, in the alternative, Petitioner requests that this Court grant certiorari, vacate the judgment, and remand to the Second Circuit for reconsideration in light of *Kelly*, which was decided after the ruling below was issued. In *Kelly*, this Court unanimously held that the wire fraud statute only applies where the "object" of the alleged scheme is to "obtain" some "money or property" that the victim possesses. 140 S. Ct. at 1571, 1574. And the Court instructed that "loss to the victim" must be "'an object of the fraud,'" not merely "an incidental byproduct of the scheme." *Id.* at 1574.

The Second Circuit's decision plainly cannot stand under *Kelly*. The theory of nonexistent "risk" on which the decision below rests squarely conflicts with Kelly's requirement that *loss* to the victim be "an object" rather than "an incidental byproduct" of the fraud. The object of the alterations was not to cause the foreign banks to default, or to cause USDA to initiate meritless litigation. After all, Lillemoe had indemnified the "victim" banks against these very risks and stood to incur any losses *himself* should the risks materialize.

Furthermore, to the extent there was any doubt, *Kelly* definitively establishes that "obtainability" is required under the fraud statutes. As explained, here that requirement was not satisfied, because Lillemoe was not seeking to obtain anything other than his fee from the foreign banks; neither the

domestic banks' "right to control" their assets nor the fanciful risks imagined by the Second Circuit were the "object" of any "scheme" based on the modified bills of lading.

Accordingly, at a minimum, a GVR is warranted so that the Second Circuit can re-evaluate its erroneous decision in light of this Court's further guidance in *Kelly* on the limits of property fraud. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (GVR appropriate where intervening developments could cause lower court to reject prior decision).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition. Alternatively, the Petition should be granted, vacated, and remanded for reconsideration in light of *Kelly*.

Respectfully submitted,

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