No. 19-1412

In the
Supreme Court of the United States

MARK JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

ALEXANDRA A.E. SHAPIRO
Counsel of Record
ERIC S. OLNEY
JACOB S. WOLF
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

October 5, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTRODUCTION

For decades, the Second Circuit has endorsed a malleable, overbroad "right-to-control" theory that conflicts with this Court's precedents interpreting federal fraud statutes narrowly and in accord with their common-law roots. A series of decisions from *McNally v. United States*, 483 U.S. 350 (1987), to *Kelly v. United States*, 140 S. Ct. 1565 (2020), require the government to prove that a fraud scheme's object was obtaining traditional, transferrable property and causing economic loss. But the Second Circuit has dispensed with these essential requirements, thereby handing the government carte blanche to criminalize standard commercial practices without fair notice.

The prosecution of Mark Johnson is a uniquely disturbing example of this trend. It arose from a currency exchange between two sophisticated enterprises that memorialized their deal terms in an integrated written contract expressly superseding all oral communications and disclaiming any fiduciary, agency, or advisory relationship. The contract obligated HSBC to sell billions of pounds to Cairn for dollars at a published rate. However, neither the contract nor any law or regulation imposed any restrictions on how HSBC would acquire pounds to sell to Cairn. And, as Amicus ACI-Financial Markets Association confirms, Johnson's conduct was fully consistent with industry practice. Nevertheless, the Second Circuit held that Johnson committed wire fraud by violating an unenforceable oral "promise" about how HSBC would conduct its own trading. The Court held that under its "right-to-control" doctrine this alleged promise was criminally fraudulent—even

though the parties excluded it from their subsequent contract, and regardless of whether the "misrepresentation" caused economic loss or was objectively material.

The government does not seriously dispute Johnson's interpretation of this Court's precedents, or that at common law, such a "promise" is neither enforceable nor fraudulent. Instead, it portrays the Second Circuit's opinion and "right-to-control" jurisprudence as garden-variety property fraud decisions. But the government's crabbed reading misrepresents what the Second Circuit actually said here, and has said before: that a person's "interest" in "controlling his or her own assets" is *itself* a freestanding property right, such that depriving an arms-length counterparty of "information that could impact [its] economic decisions" is property fraud; that an oral promise *excluded* from such counterparties' contract can be a "central part" of their "bargain"; and that misrepresentations can be material even if they aren't "capable of resulting in tangible harm." App.13, 15, 18.

The government's other attempts to avoid review are equally meritless. It contests the circuit splits the petition identifies, but misreads the caselaw. It endeavors to conjure up vehicle problems, but Johnson's arguments were preserved and squarely addressed by the Second Circuit in a precedential opinion, and there are no relevant contested facts.

The petition raises legal issues of widespread significance. The Second Circuit's decision enables the government to imprison sophisticated parties who comply with their written contracts whenever

the government doesn't like the terms. This undermines freedom of contract and fair notice and creates uncertainty for market participants. And, as the petition and Amicus New York Council of Defense Lawyers detail, this prosecution is hardly an outlier: In recent years, the government has repeatedly deployed the right-to-control doctrine to prosecute market practices condoned by industry regulations. The government offers no response to any of this. It is imperative that this Court invalidate this pernicious doctrine and enforce the statutes as written.

I. THE GOVERNMENT'S ATTEMPTS TO NARROW THE SECOND CIRCUIT'S HOLDING AND THE SIGNIFICANCE OF ITS RIGHT-TO-CONTROL DOCTRINE FAIL

A. It is a "settled principle of interpretation" that "'Congress intends to incorporate the well-settled meaning of the common law terms it uses.'" *Sekhar v. United States*, 570 U.S. 729, 732 (2013). And under the common law, a sophisticated party cannot "defeat the clear words and purpose" of an integrated contract using an extrinsic, unenforceable promise to "claim fraud in the inducement." *One-O-One Enters., Inc. v. Caruso*, 848 F.2d 1283, 1287 (D.C. Cir. 1988) (R.B. Ginsburg, J.). Additionally, the "object" of a "money or property" fraud must be causing "loss to the victim." *Kelly*, 140 S. Ct. at 1573.

The government does not dispute any of these principles. Instead, it claims review is unwarranted because the Second Circuit "applied the legal rule[s] that the petitioner advocates." BIO.10. In fact,

however, the Second Circuit's opinion is directly at odds with *all* of them.

1. The Second Circuit defied common-law principles by holding that the wire-fraud statute applies "even if the parties' contract was never breached," and that an oral "promise" was "an essential element of the bargain," even though the "bargain" was a fully-integrated contract that expressly superseded oral promises. App.15-18. The court relied on earlier Second Circuit caselaw which, it explained, stands for the same nonsensical proposition: that "even though the victim received the benefit of its bargain under the terms of the parties' contract," "the defendants' misrepresentations implicated an essential element of the bargain." App.15 (citing *United States v. Binday*, 804 F.3d 558, 565-67, 575-76 (2d Cir. 2015)).

This reasoning was essential to the outcome, because it is undisputed that HSBC complied with its contractual obligations by selling British pounds to Cairn at the 3pm fix rate. C.A.App.309-10, 351-75. The government mislabels the contract a "services" agreement, apparently to suggest HSBC should have traded so as to minimize the cost to Cairn. BIO.9, 14, 18. But HSBC wasn't providing any "service" for Cairn; its only obligation was to sell Cairn pounds at the agreed exchange rate.

The government half-heartedly suggests the agreement was not "completely integrated," citing a form appended to the letter agreement, which states the letter was "intended as a summary and not a complete description" of the agreement. BIO.11. But the government ignores the *ISDA*, which contains the

integration clause. C.A.App.362 (§9(a)). At Cairn's request, the parties incorporated the 25-page ISDA into the two-page letter agreement precisely because the latter was not intended to be comprehensive. As amicus ACI-Financial Markets Association explains, the ISDA's "integration and merger provisions…are standard ISDA terms" that "govern nearly every dealing relationship between banks…and their largest customers." Br. of ACI-Financial Mkts. Assoc. As Amicus Curiae ("ACI.Br."), pp.5-6.

The government also cites other cases affirming wire-fraud convictions premised upon extrinsic promises. *See* BIO.12. But that underscores why this Court should intervene. This case typifies the government's increasingly problematic use of the fraud statutes to rewrite contracts and criminalize conduct to which sophisticated parties readily assented. *See* Pet.34-37; Br. for Amicus Curiae New York Council of Defense Lawyers ("NYCDL.Br."), pp.15-24. The government ignores this problem and the evidence that such prosecutions, and the uncertainty they create, have "diminish[ed] liquidity" and increased "volatility and transaction costs" for market participants fearful they will be subject to criminal sanctions even where, as here, they complied with their contractual obligations. ACI.Br.4, 22.

2. The government erroneously claims the decision below and the Second Circuit's other "right-to-control" cases *do* require the government to prove an intent to cause tangible economic loss to the victim. BIO.10. But that is simply untrue. The Second Circuit held that misstatements can

constitute criminal fraud regardless of whether "defendants contemplated" any "cognizable harm," so long as it "influence[d]…the decision" of the victim. App.17. According to the court, Johnson's "promise" "influence[d] Cairn's decision as to the type of transaction to undertake." App.18. Although the "type of transaction" Cairn allegedly rejected because of Johnson's "promise" undisputedly would have cost *more*, the Second Circuit found this irrelevant under its right-to-control jurisprudence:

> As we have explained, the "question of whether a defendant's misrepresentation was capable of influencing a decisionmaker" in a right-to-control case "should not be conflated with [the] requirement that that misrepresentation be capable of resulting in tangible harm."…So "it is…possible for a misrepresentation to influence decisionmaking in a manner that nevertheless does not produce tangible harm."

App.18 (quoting *United States v. Finazzo*, 850 F.3d 94, 109 n.16 (2d Cir. 2017)).

That reasoning typifies the Second Circuit's repeated refusal to enforce the statutory economic loss requirement in right-to-control cases. Indeed, *Finazzo*—which the court applied here but which the government conspicuously ignores—held that a misrepresentation can be material even if it cannot "produce tangible harm." 850 F.3d at 109 n.16. Likewise, *United States v. Schwartz*, cited in *Finazzo*, sanctioned jury instructions stating defendants need not contemplate "monetary" harm, and held that the "fact that [the victim] never suffered—and that

defendants never intended it—any pecuniary harm does not make the fraud statutes inapplicable." 924 F.2d 410, 420-21 (2d Cir. 1991). Other examples abound. *See* NYCDL.Br.3 (collecting cases).

The government claims *Binday* shows the Second Circuit has "rejected application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain." BIO.10. But that is not how the Second Circuit reads *Binday*: As it explained, *Binday* affirmed a "right-to-control" conviction even though the victim "received the benefit of its bargain under the terms of the parties' contract." App.15. In other words, *Binday* too departs from the common-law rule.

B. The "right-to-control" theory is irreconcilable with this Court's decisions requiring that a mail or wire fraud scheme's object be traditional property that can be "obtained." *See* Pet.28-31. The government protests that *Kelly* and *Cleveland* involved government, not private, victims (BIO.13) but fails to explain why that matters. It dismisses the statement in *Skilling v. United States* that "the victim's loss of money or property" must "suppl[y] the defendant's gain, with one the mirror image of the other," 561 U.S. 358, 400 (2010), as "descriptiv[e]" (BIO.14), but does not dispute the accuracy of the description. Nor does the government deny that this Court has construed nearly identical language in the Hobbs Act as limited to "transferable" property. *Sekhar*, 570 U.S. at 734; Pet.30.

And the property in *Carpenter v. United States*, 484 U.S. 19 (1987) (cited BIO.13), was "[c]onfidential business information." *Id*. at 26. This was a

transferrable, "long…recognized" form of property, *id.*, whereas the Second Circuit's right-to-control doctrine protects an entirely non-traditional form of "property"—the "ethereal" and non-transferrable "right to control."

The government tries to circumvent these fatal flaws in the right-to-control theory by asserting, for the first time, that the alleged fraud's object was Cairn's money. BIO.9. But the object of any commercial transaction is money; the relevant question is whether the "object of the fraud" was causing "*loss* to the victim." *Kelly*, 140 S. Ct. at 1573 (emphasis added). Here, Cairn received the benefit of its bargain—£2.25 billion at the 3pm fix rate—and paid *less* than the alternative conversion method would have cost. App.18.

Moreover, this "money" theory was not the basis for the verdict or the Second Circuit's affirmance.[1] The jury was instructed: "Under the 'right to control' theory, *the property at issue* is the alleged victim's right to control its assets." D.Ct.Dkt.162, p.36 (emphasis added). On appeal, the government defended the conviction using that property theory, *see* C.A.Dkt.87, p.23, which was the entire basis for the Second Circuit's affirmance, App.15-19. Accordingly, this is an excellent vehicle for this Court's review of the right-to-control doctrine.

---

[1] Appellate courts "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980).

II. THE GOVERNMENT'S ATTEMPTS TO DENY THE CIRCUIT CONFLICTS FAIL

1. The Circuits are divided on the validity of the right-to-control theory. In arguing otherwise, the government tries to cabin *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) and *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992) to their facts, claiming these cases "involve[d] a buyer's deception of a seller about the ultimate disposition of the items it was purchasing." BIO.14. But that is not *why* the deception in those cases did not constitute fraud: the purported victims in each case received "the consideration" for which they had "bargain[ed]," *Bruchhausen*, 977 F.2d at 467-68, and "the ethereal right to accurate information" and "right to control" one's assets are "not the kind of 'property' rights safeguarded by the fraud statutes," *Sadler*, 750 F.3d at 591. *See also Bruchhausen*, 977 F.2d at 468 n.4 (expressly "disagreeing with the Second Circuit's approach" in *Schwartz*, *supra*). Johnson was innocent under the law of the Sixth and Ninth Circuits because Cairn received precisely "the consideration" it bargained for—£2.25 billion at the 3pm fix rate.

2. The government claims the circuits agree that "a court may judge materiality under either an objective standard" or "a subjective standard." BIO.15. But none of the cited cases adopt this "either/or" approach; the circuits have applied diametrically opposed materiality standards.

Five circuits *prohibit* a subjective standard. In *United States v. Jamieson*, the Sixth Circuit held it is a "*requirement* in this circuit that a mail fraud

scheme be credible enough to deceive persons of ordinary prudence of comprehension." 427 F.3d 394, 415-16 (6th Cir. 2005) (emphasis added). Likewise, in the Eighth Circuit, the government "*needs to show* that…[the defendant's] communications were reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Louper-Morris*, 672 F.3d 539, 556 (8th Cir. 2012) (emphasis added). And in the Tenth Circuit, "'the government *must show* conduct intended or reasonably calculated to deceive persons of ordinary prudence or comprehension." *United States v. Fredette*, 315 F.3d 1235, 1241 (10th Cir. 2003) (emphasis added). *See also* Pet.25 (Ninth and Eleventh Circuits' law).

Other circuits, by contrast, *require* examining materiality from the victim's subjective standpoint. In the Seventh Circuit, "it makes no difference that the victim lacked prudence and that a more astute person would not have been deceived." *United States v. Masten*, 170 F.3d 790, 796 (7th Cir. 1999). The same is true in the Fifth and D.C. Circuits. *See, e.g.*, *United States v. Davis*, 226 F.3d 346, 359 (5th Cir. 2000) (misstatement is "material even though only an unreasonable person would rely on it"); *United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) ("it makes no difference whether the persons the scheme is intended to defraud are gullible or skeptical, dull or bright").

The government contends review of the materiality issue is unwarranted because the *jury* was instructed to apply an objective test. BIO.15-16. But the *Second Circuit* affirmed Johnson's conviction

based on Cairn's subjective views. *See* Pet.26-27. The arms-length counterparty context here provides an ideal vehicle to resolve the well-developed circuit split on the materiality standard for mail and wire fraud.

III. THE GOVERNMENT'S OTHER ATTEMPTS TO DISPARAGE THE VEHICLE FAIL

1. The government claims Johnson's petition is "fact-bound" because the jury instructions were consistent with Second Circuit precedent and the court found the evidence "sufficient…under its precedent." BIO.10, 12. But that is exactly why this case is an *ideal* vehicle to review the validity of that precedent. Johnson's claim is that his conduct is not criminal under *this Court's* interpretation of the wire-fraud statute and that the right-to-control doctrine misconstrues the statute.

It is irrelevant that Johnson is *not* seeking review of the jury's application of the right-to-control theory to the facts or contesting jury instructions consistent with the Second Circuit precedent he is challenging. *See, e.g.*, *Griffin v. United States*, 502 U.S. 46, 59 (1991) ("Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law.").

Nor is it a bar to review that Johnson made his legal arguments by contesting sufficiency rather than jury instructions. Sufficiency review "does not rest on how the jury was instructed" and instead is determined under the correct legal standard. *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016). This Court frequently decides legal questions

raised on sufficiency review, even where the jury instructions went unchallenged and were consistent with Circuit precedent. *See*, *e.g.*, *Kelly*, 140 S. Ct. at 1571-74.

2. The government claims Johnson did not "preserve[]" his claims and the Circuit "accordingly did not address" them. BIO.11, 19. Not true. Johnson argued in his appellate briefs that the right-to-control theory failed because (1) "Cairn got everything it bargained for" under the contracts, C.A.Dkt.60, p.42, and (2) the contracts rendered his oral representations legally irrelevant, C.A.Dkt.96, pp.21-22. Indeed, the Second Circuit characterized Johnson's argument that "he cannot be criminally liable for wire fraud in the absence of a contractual breach" as "Johnson's principal challenge" on appeal. App.14. Johnson also argued that the right-to-control theory conflicts with this Court's precedents. C.A.Dkt.60, pp.46-49; C.A.Dkt.96, p.25.

Regardless, the Second Circuit addressed these arguments. It held that Johnson's alleged oral representation was "an essential element of the bargain"; that it was irrelevant that "the parties' contract was never breached"; and that the representation was subjectively material. App.15-18. This Court "permit[s] review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41 (1992); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 323 (2010) (considering issue "raise[d]…for the first time before" the Court "because it was addressed by the court below").

3. Finally, the government points to its alternative theory of fraud—misappropriation. But it admits the Second Circuit did not "reach that theory" (BIO.19), and the existence of an unresolved alternate theory has no bearing on the certworthiness of Johnson's petition. This Court frequently remands to lower courts to consider alternate theories in the first instance. *See, e.g.*, *Stinson v. United States*, 508 U.S. 36, 47 (1993) ("declin[ing] to address" government's alternative theory that "the Court of Appeals did not consider"); *McCormick v. United States*, 500 U.S. 257, 276 (1991) (remanding for Court of Appeals to consider other "possible grounds for affirming").

Moreover, the government barely mentioned the misappropriation theory in its appellate brief—presumably because it was indefensible. It required proof that HSBC owed Cairn a fiduciary-like duty (App.10), yet the parties expressly disclaimed any such duty. Further, the government's misappropriation theory was that HSBC *secretly* "traded ahead" of the fix (C.A.Dkt.87, pp.52-55), but the Second Circuit found that "Johnson *disclosed* HSBC's intent to trade ahead of the fix," App.17 (emphasis added), thereby defeating this theory. *See United States v. O'Hagan*, 521 U.S. 642, 654 (1997). Accordingly, the misappropriation theory presents no bar to review.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
ERIC S. OLNEY
JACOB S. WOLF
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

October 5, 2020