No. 19-5805

In The
Supreme Court of the United States

MAHMOUD ALDISSI and
ANASTASSIA BOGOMOLOVA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF MICHAEL BINDAY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Michael Binday submits this brief as *amicus curiae* in support of the petition in this case. Binday was convicted under the legal doctrine that equates the "right to control" property with the property element of the mail and wire fraud statutes, as were Dr. Mahmoud Aldissi and Dr. Anastassia Bogomolova: Binday was convicted of depriving insurance companies of "the ability to make an informed economic decision about what to do with [their] money or property." Aldissi and Bogomolova were convicted because their "material lies changed the nature of the bargain with the governmental agencies from whom they sought grants." *United States v. Aldissi*, 758 F. App'x 694, 701 (11th Cir. 2018).

Binday's conviction was affirmed on direct appeal, and this Court denied certiorari. *Binday v. United States*, 136 S. Ct. 2487 (2016).

On August 27, 2019, Binday filed a petition for a writ of certiorari in which he contends his trial lawyer was ineffective because of his misstatement of the right to control law and because the right to control

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[1] Pursuant to Rule 37.6, counsel for Binday states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than Binday made a monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.2, counsel of record for all parties received notice of Binday's intent to file this brief at least ten days before the due date.

theory is unconstitutionally vague. *Binday v. United States*, No. 19-273.

Binday also filed an *amicus* brief in *Kelly v. United States*, 139 S. Ct. 2777 (2019), where the Third Circuit ruled that the property element of fraud is satisfied with proof that the defendants had secret and base motives for performing their jobs and the defendants also deprived their employer of the right to control its finances.

To avoid running afoul of Rule 37.1, Binday respectfully refers the Court to his *amicus* brief in *Kelly* for a more fulsome discussion of the history of the right to control theory, its close association with the (now rejected) self-dealing prong of honest services law, and the disparate language used by lower courts to define the alleged property right and to identify the source of the right. We update a portion of those points here and also provide points regarding the circuit split over the right to control theory and why the right to control doctrine violates constitutional principles limiting the overbroad reading of criminal laws.

Binday believes that business and professional people cannot know the limits of the fraud statutes because he and Aldissi and Bogomolova fully performed their obligations under contracts; they were convicted only for making false representations in financial applications.

SUMMARY OF ARGUMENT

The right to control doctrine, which authorizes the government to prove the "money or property" element of mail and wire fraud, has already been rejected by this Court twice, yet lower courts in some circuits continue to reaffirm this constitutionally vague and overbroad theory. The doctrine imports portions of contract law, without the limitations that courts regularly impose in civil cases, and thus provides a tool that makes it impossible for a defendant who has been less than candid during contract negotiations to avoid prison. Some circuits reject the theory out of hand; others embrace it with gusto. This Court should grant certiorari in this case to remind courts of the limitations it previously imposed and unify the law across all the circuits.

ARGUMENT

The mail and wire fraud statutes generally protect only "traditional concepts of property" loss, *Cleveland v. United States*, 531 U.S. 12, 24 (2000). Property includes tangible and intangible property. *See Carpenter v. United States*, 484 U.S. 19, 25 (1987). Before *McNally v. United States*, 483 U.S. 350, 358 (1987), lower courts construed the fraud statutes as protecting a range of intangible rights, such as licensing, but this Court rejected those intangible rights theories because they left the law's "outer boundaries ambiguous," *id*. at 360. After *McNally*, Congress "amended the law specifically

to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services.'" *Cleveland*, 531 U.S. at 20. Thereafter, the Court in *Skilling v. United States*, 561 U.S. 358, 400, 407 (2010), limited "honest services" to breaches of fiduciary duty in connection with a bribe or kickback scheme.

In *Skilling*, the government contended that honest services also ought to be construed to protect people from "undisclosed self-dealing by a public official or private employee," but this Court disagreed, finding a lack of consensus among lower courts about the meaning of "schemes of nondisclosure and concealment of material information" and concluding that the "self-dealing" category was too amorphous. *Id*. at 410. In doing so, it cited – and rejected – the reasoning in *United States v. Mandel*, 591 F.2d 1347, 1361, 1363 (4th Cir. 1979), an influential decision that defined the "right to control" property as "property."

The government has tried to convince this Court to hold that the "right to control" property is "property" protected by the fraud statutes under the plain language of the fraud statutes (*Cleveland*) and as part of the phrase "honest services" (*Skilling*). Both times the Court rejected the effort. Lower courts, however, fail to follow the Court's rulings.

I. THE RIGHT TO CONTROL AND THE SELF-DEALING PRONG OF HONEST SERVICES ARE THE SAME

A. The Origins Of The Right To Control Doctrine

The right to control and honest services doctrines arose in the 1930s coincidentally with the adoption of federal securities laws requiring full disclosure: "A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." *Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). Caveat emptor requires "the purchaser to take care of his own interests," and the rule "has been found best adapted to the wants of trade in the business transactions of life." *Barnard v. Kellogg*, 77 U.S. 383, 388 (1870).

The "full disclosure" concept informed the decision in *United States v. Rowe*, 56 F.2d 747 (2d Cir. 1932), which noted, in dicta, that a man is "cheated" even though "he gets a quid pro quo of equal value" because "he has lost his chance to bargain with the facts before him." *Id*. at 749. It suggested that the chance to "bargain with the facts" is essentially what the federal fraud statutes guarantee, and deception in bargaining is "the evil against which the statute is directed." *Id*. A few isolated panels of the Second Circuit recognized that the dicta went too far in construing the fraud statute, and they "declined, in the area of private decision making, to follow the letter of Judge Learned Hand's

dictum." *United States v. Dixon*, 536 F.2d 1388, 1400 (2d Cir. 1976).

Congress never adopted statutes criminalizing or regulating disclosures in ordinary business or employment relationships, yet lower courts created new standards criminalizing certain kinds of deception in financial transactions. The *Rowe* dictum influenced a series of judicial decisions approving fraud prosecutions based on a requirement of full disclosure in business deals. The decisions cited to standards drawn from ethics, conflicts of interest, fiduciary duty, contract breaches, and professional conduct to find people guilty of fraud. And at the heart of these prosecutions was the concept that a person with an undisclosed interest "steals" property from his counterparty when he lies. In civil cases, the courts impose strict rules so that business disputes do not bleed into or incorporate fraud concepts. But in criminal cases, people may be found guilty of fraud even when they don't breach the contract between them and their counterparties.

B. Development Of The Right To Control And Honest Services Fraud

After *Rowe*, courts disregarded the text of the fraud statute, and the common-law limitations on fraud and false pretenses, and asserted that immoral conduct in commercial dealings constituted fraud.

The path to the current state of the law, and the broad prosecutorial tool that convicts people for omissions or misrepresentations during contract negotiations,

proceeds from *Rowe* to *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) (commercial conduct that is "inconsistent with moral uprightness" is covered by the mail fraud statute), *overruled on other grounds by United States v. Cruz*, 478 F.2d 408 (5th Cir. 1973), to *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) ("The aspect of the scheme to 'defraud' is measured by nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society"), to *United States v. Mandel*, 415 F. Supp. 997, 1013 (D. Md. 1976) (people have a right to all the information they may want to "make the best bargain, even where the bargain he has struck is a reasonable or even excellent one"), *disapproved of on other grounds by United States v. Long*, 651 F.2d 239 (4th Cir. 1981), *conviction affirmed*, 591 F.2d at 1361 (holding that courts properly use "accepted moral standards and notions of honesty and fair play as setting the outer limits to the term 'scheme to defraud.' "). The gist of these cases was that the prosecution did not have to prove mirror image fraud: the actual or potential exchange of money or property based on false statements.[2]

In the 1970s, the honest services and the right to control doctrines were indistinguishable. They were simply two aspects of the general "immorality" doctrine of fraud. In *United States v. George*, 477 F.2d 508

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[2] *See Skilling v. United States*, 561 U.S. 358, 400 (2010) (property fraud occurs only when "the victim's loss of money or property supplie[s] the defendant's gain, with one the mirror image of the other").

(7th Cir. 1973), the defendants were employees convicted of defrauding their employer in a kickback scheme. They argued that they were not guilty because the employer had still received the full benefit of the bargain – it received the promised goods at market prices – it suffered no loss. The Seventh Circuit held that the defendants were nevertheless guilty because they acted immorally and lied to their employers, citing to *Shushan* and *Rowe*. *Id*. at 513 (quoting *Rowe*, 56 F.2d at 749); *see id*. at 512 (citing and quoting *Shushan*). According to the court, they denied the employer its right to "honest and faithful services." *Id*. at 513. That was an early statement of honest services fraud.

Other circuits adopted *Rowe*'s lofty aspirations for business conduct. The Fifth Circuit affirmed a right to control theory in *United States v. Fagan*, 821 F.2d 1002, 1011 n.6 (5th Cir. 1987), where it held: "the scheme here was one to deprive Texoma of its property rights, viz: its control over its money." In ruling that such a loss of "control" constituted a loss of "property," the *Fagan* court relied heavily on both *George* and *Rowe*. 821 F.2d at 1009-10. *Fagan* was the primary authority for the Fifth Circuit's holding in *United States v. Little*, 889 F.2d 1367, 1368 (5th Cir. 1989), that concealing economic information constitutes a deprivation of property. And then the Eighth Circuit adopted a broad form of the right to control theory in *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990): " 'property rights' . . . include[s] the right to exercise control over how one's money is spent. . . . [T]he right to control spending constitutes a property right."

The Second Circuit adopted *Shyres* and *Little* in *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991): "[T]he right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest." *Id*. at 463.

C. The Current Broadened Construction Of Right To Control Fraud

The Second Circuit has become the leader among the circuits in fostering numerous prosecutions substituting the right to control for "property." On September 12, 2019, the court issued another in its line of right to control decisions, and reaffirmed its belief that, even though the alleged fraud arises in the context of a contract negotiation and performance, the defendant may be convicted of fraud regardless of whether he fully performed the agreement: "Section 1343 applies even if the parties' contract was never breached." *United States v. Johnson*, No. 18-1503-CR, 2019 WL 4308625, at *4 (2d Cir. Sept. 12, 2019). The court reasoned that the defendant had a "fraudulent intent because the defendants' misrepresentations implicated an essential element of the bargain." *Id*. The complainant got full performance plus the satisfaction that his counterparty is going to prison for performing the contract contrary to its precise terms.

The court in *Johnson* focused only on the defendant's intent and did not explain the property he obtained as a result of his misrepresentation. It noted

that the jury could not convict if Johnson's misrepresentation "merely induced" the counterparty to enter into the agreement – because that would not prove an intent to defraud. Rather, it held, the false statement had to go to the "heart of [the] bargain." *Id*. at *3. And the "heart of the bargain" was that Johnson promised to conduct certain financial transactions in a particular way. *Id*. at *5.

So, it is fair to infer that Johnson obtained the same amorphous "right" that Binday identified in his own petition and in his *amicus* brief in *Kelly*: his counterparty's decision to enter into a fully integrated agreement that said nothing about Johnson's supposed promise. *Id*. at *2 and *5; *United States v. Johnson*, 18-1503 (2d Cir.) Dkt. 58 Vol. II at (A-376-395). Calling what Johnson did "fraud" in a civil case would undoubtedly lead to dismissal: false representations during contract negotiations cannot support a fraud claim. But here the Second Circuit ignored all of the contract and civil fraud rules limiting fraudulent inducement claims. It affirmed Johnson's wire fraud conviction because he "deceived" his counterparty about how he would perform and the "quality" of his services. *Id*. at *5.

II. THE EVER-EXPANDING RIGHT TO CONTROL FRAUD THEORY CREATES CRIMINAL LIABILITY FOR FALSE STATEMENTS DURING CONTRACT NEGOTIATIONS

It is a mistake (and it is illegal) for courts to create new crimes. *See United States v. Bass*, 404 U.S. 336, 348-49 (1971) ("legislatures and not courts should

define criminal activity [because of] 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.' ") (citation omitted). The right to control theory – with its grandiose theoretical bases of morality and full disclosure in every business transaction – is a good example why.

First, the suggestion that conduct should be measured based on moral or ethical standards reduces or eliminates any chance that a person would have a clear view of the conduct or promises he should avoid. If those are the standards by which people's liberty are measured, then every professional rule of conduct would constitute potential criminal fraud. Anyone engaged in a transaction that included a financial component who violated a legal, medical, construction, journalistic, or other public or private set of rules would be subject to criminal conviction. Only after careful consideration and debate by Congress should criminal liability be imposed. *See United States v. L. Cohen Grocery Co*., 255 U.S. 81, 89 (1921) (the definition of a crime may not be left to the judge and jury).

Second, people engaged in contract negotiations, even those who intend not to comply with every representation, cannot know ahead of time that their statements will land them in prison. No one can "look up the law" on the right to control to see what he or she may or may not promise. Even if there were a summary of the law someplace, the power to identify the "heart of the bargain" in right to control cases lies with the alleged victim, who may, after the fact, claim to the prosecutor that this one provision or

one promise meant everything to the deal. People of "common intelligence" cannot identify those very important provisions ahead of time. *See United States v. Lanier*, 520 U.S. 259, 266 (1997).

Third, if courts are authorized to import civil law concepts into existing criminal laws (and they should be prohibited from doing so), then they should at least acknowledge, and apply, the standards that attach to those civil rules of conduct. In *Binday* and *Johnson*, at least, the Second Circuit adopted ideas drawn from fraudulent inducement law: if the lie relates to something important to the deal, then the defendant is guilty. That is no different from claiming a defendant fraudulently induced the complainant to enter into the contract. But, as Binday explained in his *amicus* brief in *Kelly*, fraudulent inducement law does not apply to those situations. "[A] fraud claim is not stated by allegations that simply duplicate, in the facts alleged and damages sought, a claim for breach of contract, enhanced only by conclusory allegations that the pleader's adversary made a promise while harboring the concealed intent not to perform it." *Cronos Grp. Ltd. v. XComIP, LLC*, 156 A.D.3d 54, 62 (N.Y. App. Div. 2017). Then district judge Sotomayor explained the distinction well in *Int'l CableTel Inc. v. Le Groupe Videotron Ltee*, 978 F. Supp. 483, 488 (S.D.N.Y. 1997): "there are numerous decisions in which courts have dismissed fraud actions premised upon false promises made in advance of binding agreements."

The lower courts have never explained why the civilly limited concept of fraudulent inducement is

meritorious when a federal prosecutor makes the same assertion. The opposite should be true: if it is not good enough to get past a motion to dismiss in a civil case, then it is certainly not good enough as a criminal case.

If the lower courts have not been relying on fraudulent inducement concepts for the right to control theory, then where did it come from? As we explained, it came from notions of fairness and total honesty in every financial transaction. That is an admirable concept, but if it is going to be a criminal law, then Congress ought to adopt a clearly written statute.

Johnson, Aldissi, Bogomolova, Binday, and others could not fathom, when they were being less than candid in their contract negotiations, that their full performance of the contract would nevertheless result in a prison sentence. That is not because they were blind to the concept of fraud, but because no one of common intelligence would believe that he is guilty of fraud even though he obtained nothing other than what his counterparty agreed to pay him.

III. THE APPELLATE DECISIONS THAT HAVE REJECTED THE RIGHT TO CONTROL THEORY HAVE REMAINED TRUE TO THIS COURT'S HOLDINGS

In their petitions for certiorari, Binday and the petitioners in this case described the conflicts between appellate decisions that have approved and disapproved of the right to control theory. The Ninth Circuit rejected the right to control theory in *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). In that case,

the court reversed the fraud conviction of an equipment purchaser who lied about his plan to sell the equipment to disfavored purchasers: the "manufacturers received the full sale price for their products; they clearly suffered no monetary loss. While they may have been deceived into entering sales that they had the right to refuse, their actual loss was in control over the destination of their products after sale. It is difficult to discern why they had a property right to such post-sale control." *Id*. at 467.

The Ninth Circuit recognized that its decision was directly contrary to one leading Second Circuit right to control case, *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), where the defendants sold American-built arms to disfavored end users, and the Second Circuit upheld the conviction. It noted that the Second Circuit failed to address *McNally* and *Carpenter*. *See* 977 F.2d at 468 n.4; *Monterey Plaza Hotel Ltd. P'ship v. Local 483 of Hotel Employees & Rest. Employees Union*, *AFL-CIO*, 215 F.3d 923, 927 (9th Cir. 2000) ("The purpose of the mail fraud and wire fraud proscriptions is to punish wrongful transfers of property from the victim to the wrongdoer, not to salve wounded feelings.").

Two years later, the Seventh Circuit rejected the right to control theory in *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). Walters circumvented rules of the NCAA (not unlike the *Aldissi*, *Johnson*, and *Binday* defendants' circumvention of the rules of their counterparties), but that violation did not reap property for the defendant. The court rejected the

government's attempt to recast the intangible right rejected by *McNally* as the "'right to control' who received the scholarships," calling it an "intangible rights theory once removed." *Id*. at 1226 n.3.

In *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014), the Sixth Circuit repudiated the right to control theory because it was contrary to this Court's decisions. The decision in *Sadler* explained that the "Supreme Court stopped th[e] expanding universe of intangible-right protections, limiting the fraud statutes' scope to rights that sounded in property." The Congressional addition of section 1346 was limited solely to the "intangible right of honest services." *Id*. The *Sadler* court held that "[l]ightly equating deceptions with property deprivation, even when the full sales price is paid, would occupy a field of criminal jurisdiction long covered by the States." *Id*. Further, the mere "right to accurate information" is not, without more, a property interest protected by the fraud statutes. *Id*. at 592.

Twenty-six years earlier, the Sixth Circuit rejected the "right to conduct business free of false information" as an improper intangible rights theory of property. "*McNally* rejects that line of cases which predicates criminal liability only upon general acts of dishonesty or illegality unrelated to motives of property gain, whatever its nature." *United States v. Baldinger*, 838 F.2d 176, 179 (6th Cir. 1988). There can be no dispute that the right to control theory dispenses with any prosecutorial obligation to prove the defendant obtained, or sought to obtain, property.

On the other side of the divide lie several circuits, though some have not revisited the issue since *Cleveland* and *Skilling* rejected the argument that the right to control property is "property."

The Second Circuit has decided more cases than other circuits on the issue. Its decisions range from *Johnson* and *Binday* (where the defendants obtained (and the complainants lost) no money or property though the alleged victims claimed their reputations suffered) to *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir. 1970), and *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987), where the convictions were reversed because "the deceit did not go to an essential element of the bargain." *United States v. Schwartz*, 924 F.2d 410, 420 (2d Cir. 1991). The difference between an essential and nonessential element of the bargain is a "fine line," according to *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007). Since what is essential may be in the eye of the beholder, the line is less "fine" than it is indefinable.

The Third Circuit said that the right to control property is a traditional property concept in *Kelly*, but before that it appeared to reject the right to control property concept in *United States v. Zauber*, 857 F.2d 137, 147 (3d Cir. 1988), where the court could find no loss, and thus no fraud, when the defendants violated their obligations to oversee pension funds.

Before *Skilling*, but after *Cleveland*, the Fourth Circuit embraced the right to control theory. *See United States v. Gray*, 405 F.3d 227, 234 (4th Cir. 2005) ("A property owner has an intangible right to control the disposition of its assets"). The Fifth Circuit stated that it had not decided the issue in *United States v. Kelley*, 481 F. App'x 111, 113 (5th Cir. 2012) ("we have not confronted whether a scheme to induce someone by false representations to sell a product that he otherwise would not have sold constitutes a harm to property rights, other circuits have done so, with differing results.") (citing *Schwartz* and *Bruchhausen*), but it did say that the right to control licenses was property in *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997), and this Court abrogated that decision in *Cleveland*. The Eighth Circuit decided *Shyres* in 1990, but it has not revisited the theory since then in light of *Cleveland* and *Skilling*.

These decisions demonstrate the need for this Court to decide whether the government can circumvent *Skilling*'s rejection of the self-dealing prong of honest services as too amorphous by recasting the exact same theory as the right to control. Judge Easterbrook saw through the effort in *Walters*; other circuits have not adequately examined their precedent in light of this Court's rulings.

IV. THE RIGHT TO CONTROL THEORY VIOLATES CONSTITUTIONAL LIMITATIONS ON THE APPLICATION OF CRIMINAL STATUTES AND PRINCIPLES OF FEDERALISM

During the past few years, this Court has rejected the federal government's aggressive use of criminal laws to charge people for conduct that typically falls within state regulatory agencies' jurisdiction or results in a civil lawsuit. *See Yates v. United States*, 135 S. Ct. 1074 (2015) (prosecution of a fisherman for throwing certain fish back in the sea); *Bond v. United States*, 572 U.S. 844 (2014) (prosecution of woman for spreading harmful chemicals on a rival's mailbox). These prosecutions stretched criminal statutes well beyond their intended purposes, even though lower courts thought the language of the statutes covered the conduct.

The cases approving of the right to control theory are worse examples of overcriminalization than *Yates* and *Bond*. Those two cases are examples of oddly extreme applications of statutes passed for one purpose applied to ordinary people doing marginally improper things. But the right to control prosecutions represent a well-thought through effort by prosecutors to bypass this Court's decisions limiting the reach of the fraud statutes to reach into ordinary business deals (personal or commercial), and seriously penalize people who would otherwise be subject to breach of contract claims or administrative remedies.

Using the fraud statutes to lock up people who lie on financial applications exaggerates the potential

penalties for making false statements. The Sentencing Guidelines may not be mandatory, but they play a tremendous part in many judges' sentencing decisions. People who falsely represent themselves or their future plans, and who cause no harm to their counterparties, are nevertheless saddled with very long prison sentences because the complainants and prosecutors "prove" massive losses at sentencing – after eschewing any obligation or desire to let the jury decide whether there was a loss and how much it was. The courts long ago held that people could not be sentenced to long prison sentences based on judicial findings of fact, *United States v. Booker*, 543 U.S. 220, 244 (2005), yet the very same thing happens regularly in the right to control cases. Juries convict with no finding of any actual or even intended loss – because the theory does not require it – and defendants are sentenced based on post-trial submissions of complainants claiming millions of dollars in losses.

In an analogous situation, this Court noted that a broad reading of an IRS obstruction statute would turn cash tips, lost donation receipts, and missing records into felonies because the IRS rule requires taxpayers to hold onto these things. "We sincerely doubt [the taxpayer] would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in § 7212(a)." *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018).

We noted in Binday's certiorari petition that the right to control theory authorizes a jury to find all elements of the fraud statute satisfied solely with proof of one material false statement. Binday Petition at 18-19, No. 19-273. Virtually no lawyer, faced with this theory of liability, could ever properly advise his client to risk a trial. The cost of the trial, the ease of conviction, and the piling on at sentencing (with no jury finding of loss) all dictate in favor of a negotiated plea – even if the defendant's false statement was no more than a breach of contract.

During the oral argument in *Yates*, Chief Justice Roberts observed the "extraordinary leverage" that federal prosecutors have when criminal statutes are broadly construed. Transcript of Oral Argument at 31, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451). Couple that power with the conflicts among the circuits on the theory's viability and we have the worst kind of patchwork criminal law enforcement: unequal enforcement and very long prison sentences. *See Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting) (clarity in statutory construction "foster[s] uniformity in the interpretation of criminal statutes.").

The constitutional protections reflected in the rule of lenity, the clear statement rule, and other rules designed to avoid overcriminalization are comprehensible to people of "common intelligence": if the government is going to put someone in prison for particular conduct, then it better be misconduct identified and defined by Congress and not by dissatisfied employers or business partners. People are entitled to be

judged by objective and neutral principles, and not through the eyes of complainants.

Finally, courts recognized long ago that the mail fraud statute potentially sweeps local and regulatory offenses into federal court when there is a mailing or interstate wire – commonplace events. *See Kann v. United States*, 323 U.S. 88, 95 (1944) ("The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."). If the judiciary wishes to remain true to its word that there is no general federal fraud statute, then it cannot allow the unwarranted expansion of the fraud statutes to turn ineffable interests into "property."

CONCLUSION

For these reasons, Michael Binday respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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