NO. 19-_____

In the Supreme Court of the United States

VAHAN KELERCHIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the "right to control" constitute "property" for purposes of wire and mail fraud in light of this Court's holding in *McNally*, *Carpenter*, *Cleveland* and *Skilling*?

2. Is general regulatory authority vested in a federal agency sufficient to expose the citizenry to criminal prosecution under 18 U.S.C. § 371 in the context of a private business dealing where the agency is not a participant?

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Seventh Circuit

U.S.C.A. No. 18-1320

United States v. Vahan Kelerchian

August 22, 2019 (Judgment Affirmed)

United States District Court for the Northern District of Indiana, Hammond Division

Case No. 2:13 CR 66

United States v. Vahan Kelerchian

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PETITION FOR WRIT OF CERTIORARI

Vahan Kelerchian, a federal inmate currently incarcerated at FCI Fort Dix, by and through his Attorneys J. Michael Katz and Kerry C. Connor, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 937 F.3d 895 (7th Cir. 2019). (App.1a). The district court's opinion denying the motions to dismiss Count 1 and 2 of the indictment is at 2015 WL 3832667. (App. 44a).

JURISDICTION

The Seventh Circuit issued its final opinion on August 22, 2019. (App.1a). The Petition for Writ of Certiorari was filed properly on the date listed herein, and the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced in the appendix.

- U.S. Const., amend. V (App.75a)
- 18 U.S.C. § 371 (App.75a)
- 18 U.S.C. § 1343 (App.76a)
- 18 U.S.C. § 1346 (App.76a)
- 18 U.S.C. § 1956 (App.76a)
- 18 U.S.C. § 1957 (App.91a)

STATEMENT OF THE CASE

I. Nature and Disposition of the Case

On May 17, 2013, Defendant-Appellant Vahan Kelerchian was charged in a nine (9) count Indictment, primarily related to the transfer of machineguns and laser-aiming devices. (App.94a). Count 1 charged Kelerchian with conspiring to provide false information to a federal firearms licensee in violation of 18 U.S.C. § 371 and § 924(a)(1)(A). Specifically, the government alleged that Kelerchian, a firearms' dealer, had conspired with individual law enforcement officer's obtaining machineguns under the guise that the guns were for the Lake County Sheriff's Department (LCSD). Count 2 alleged Kelerchian had conspired to defraud the FDA in violation of 18 U.S.C. § 371. Specifically, the Indictment alleged that Kelerchian had purchased

laser-aiming devices that were only intended for law enforcement departments from Insights Technology, a private company. (App.105a).

Count 3, 4-7 charged conspiracy and making false statements to the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) in violation of 18 U.S.C. § 371 and § 1001. The counts alleged that Kelerchian had conspired to and made false statements to obtain dealer sample sale machineguns. Count 8 charged bribery in violation of 18 U.S.C. § 666(a)(2) and § 2; and, Count 9 charged conspiracy to launder money in violation of 18 U.S.C. § 1956(h), § 1956(a)(I)(B)(i), § 1957, and § 2. The government's theory of money laundering rested on the payment of proceeds from the alleged illegal sale of parts from the machineguns obtained in Count 1. (App.115a, 116a).

On December 22, 2014, Kelerchian filed Motions to Dismiss Counts 1 and 2. After briefing and a hearing, the motions to dismiss were denied on June 22, 2015. (App.62a). On September 30, 2015, Kelerchian filed a Motion to Reconsider the Motion to Dismiss Count 1, which was denied on September 30, 2015. (App.74a).

At the close of the 11-day trial, the defense made a motion under Rule 29, for judgment of acquittal on all counts. The Rule 29 motion was denied as to Counts 1 through 7 and the court took Counts 8 and 9 under advisement. (App.62a). Kelerchian renewed his motion under Rule 29 for judgment of acquittal on all counts. After argument, the court confirmed its prior ruling on the Rule 29 motion, including taking two counts under advisement. (App.127a, 128a).

On October 15, 2015, the parties presented closing arguments, the court instructed, and the jury com-

menced deliberations. At approximately 8:00 p.m., the jury returned a verdict of guilty on Counts 1-7, and 9, but not guilty on Count 8. Kelerchian renewed his motions for judgment of acquittal.

On May 31, 2016, Kelerchian filed a written Motion for Acquittal Pursuant to Fed. R. Crim. P. 29 as to Count 9. After briefing, the Court denied the motion on April 28, 2017. (App.55a).

On November 16, 2017, the district court determined Kelerchian's advisory guidelines range to be 135-168 months with a total offense level of 33 and a Criminal History Category I. On February 5, 2018, Kelerchian was sentenced to 100-months incarceration, one (1) year supervised release; a fine of $100,000; $800 restitution; and agreed forfeiture in the amount of $28,200. (App.44a).

II. The Trial

Vahan Kelerchian was a licensed firearms dealer who owned and operated Armament Services International, Inc. (ASI). Kelerchian had met Ronald Slusser, a Lake County Indiana Sheriff, at a machinegun show in approximately 2008. Slusser, who was a S.W.A.T. team officer, the armorer for the Lake County Sheriff's Department, and a registered firearms dealer, introduced Kelerchian to Joseph Kumstar, the Deputy Chief of the Lake County Sheriff's Department. Interpreting the facts in the light most favorable to the government, Kelerchian subsequently brokered three (3) machinegun purchases from machinegun importer Heckler & Koch ("H&K") for Slusser and Kumstar under the pretense that the machineguns were for the Lake County Sheriff's Department.

A. The Machine Guns. (Count 1)

In December 2008, and using Lake County Sheriff's department letterhead, Kelerchian and co-conspirators ordered 50 machineguns from H&K for $83,026. The paperwork sent to H&K falsely represented that the Sheriff's Department was purchasing all 50 machineguns. H&K filed the appropriate ATF paperwork, including the Form 6; the form indicated that the 50 machineguns were for the Lake County Sheriff's Department. After receiving approval, H&K sent the 50 machineguns to the Sheriff's Department. The guns were dismantled by Slusser with the unregulated upper barrel of 15 of the machine guns being distributed among the co-conspirators. Remaining unregulated parts were distributed to Adam Webber, owner of HK Parts, a web-based company not affiliated with the German importer.

In February 2009, Kelerchian brokered the purchase of nine (9) H&K machineguns to be sent to Slusser and Kumstar. The transaction was conducted much as the transaction in December 2008. Kelerchian did not receive any parts from this transaction. In October 2009, Kelerchian brokered the purchase of twelve (12) more machineguns from H&K. Slusser again disassembled the guns and sent the unregulated parts to Webber.

B. Dealer Sales Samples. (Counts 3-7)

In addition to the three (3) machine gun purchases which Kelerchian had brokered, between October 2007 and March 2010, Kelerchian received nine (9) machine guns through submission of demonstration letters to ATF. The jury verdict reflected the conclu-

sion that Kelerchian had falsely indicated by the letters that Lake County Sheriff's Department was interested in a demonstration and Kelerchian intended to give a demonstration.

C. Laser Aiming Devices. (Count 2)

In the same time period that Kelerchian, Slusser and Kumstar were involved in the machine gun transfers, Kelerchian, Kumstar, and Slusser sought to obtain laser-aiming devices from Insight Technology, a private company. The manufacture of laser-aiming devices is regulated by the FDA. The FDA had granted Insight Technology a variance, by letter directed to Insight, allowing it to manufacture certain laser-aiming devices that did not meet FDA regulation. However, by the letter issued by the FDA to Insight, the FDA limited the sale of certain laser to federal, state, and local enforcement agencies and the military. The FDA restriction placed on the manufacturer only appears in the letter to Insight. Though the FDA is permitted to grant manufacturer's variance from the regulation, the variance granted to Insight only appeared in letters written to Insight by FDA representatives. Unlike with the BATFE and machine guns, there was no FDA paperwork involved in the sale brokered by Kelerchian from Insight.

In December 2008, Kelerchian brokered the sale of 25 laser-aiming sights from Insight. The sights were sent to the Lake County Sheriff's Department where Slusser retrieved them. In March 2010, Kelerchian brokered 22 additional laser-aiming sights. Kelerchian testified that he was unaware of the FDA's regulation of lasers or the variance letter the FDA had sent to Insight. When Kelerchian tried to place

the first order for direct shipment to ASI, he was advised by Insight employee Linda Harms the order must go through a law enforcement agency.

Slusser placed other orders for laser-aiming devices without Kelerchian's assistance. In two instances, Slusser duped the Chief of the Lowell Indiana Police Department to orchestrate the laser orders and into signing Insight's IR Disclosure Agreement. In another order, Kumstar signed Insight's IR Disclosure Agreement. Slusser testified that he had ordered lasers from Laser Devices, a private company that did not require the internal paperwork that Insight had required Kelerchian did not participate or receive lasers from Slusser's purchases of lasers from Laser Devices.

D. Money Laundering. (Count 9)

The Indictment alleged Kelerchian had committed money laundering in violation of 18 U.S.C. § 1956(h) based on 18 U.S.C. § 1956 and § 1957 for transactions that occurred between about February 2009 and January 2010. The underlying offense charged wire fraud in violation of 18 U.S.C. § 1343. As to the 18 U.S.C. § 1956 charge, the government relied on the second machinegun purchase of nine MP5K firearms charged in Count 1. The 18 U.S.C. § 1957 charge is applied to the third machinegun purchase of twelve HK53A firearms charged in Count 1. The Indictment alleged that the underlying offense was wire fraud pursuant to 18 U.S.C. § 1343. (App.118a). The government argued that the February 2009 purchase of 9 MP5K machine guns supported conviction for money laundering under § 1956. An H&K invoice for nine MP5K machineguns was paid by ASI on March 27, 2010. The business check totaling $11,664

clearly included the invoice number. The machineguns were sold and delivered to the LCSD through ASI beginning February 13, 2009. On June 25, 2009, Slusser sent a cashier's check written to ASI in the amount of $9,450.00 with himself as the remitter.

Previously, Slusser received a cashier's check, dated June 12, 2009, from Webber in the amount of $18,900. The check indicated payment for parts kits created from MP5K firearms. The parts kits were created and sold by Slusser under the direction of Kumstar after the MP5Ks were delivered to the LCSD. Kumstar directed Slusser to divide the check and send half to himself and to ASI.

The government argued that the transactions related to the March 2010 purchase of 12 HK53A machine guns supported conviction for money laundering under § 1957. ASI wrote a check December 2009 to H&K for $16,800 to pay for twelve HK53As. The HK53As were purchased by and delivered to LCSD; Slusser parted the guns and sent the parts to Webber. Webber sent Slusser a check for $31,200. Slusser deducted $3000 owed him by Webber and sent ASI a cashier's check for $28,200.

During its closing argument, the government argued to the jury that to prove a money laundering violation under 18 U.S.C. § 1957, all the government had to show was "some illegal activity and if you engage in a financial transaction in excess of $10,000." (App. 125a).

III. The Appeal

Kelerchian challenged each of the counts of conviction on various grounds. The Seventh Circuit

rejected Kelerchian's claims and affirmed each count. *Kelerchian*, 937 F.3d at 904. For purposes of this petition, Kelerchian focuses on two of those claims: Count 2, conspiracy to defraud the FDA; and Count 9, money laundering in violation of 18 U.S.C. § 1956, 18 U.S.C. § 1957, and 18 U.S.C. § 1343.

A. Count 2, conspiracy to defraud the FDA, 18 U.S.C. § 371

On appeal, Kelerchian, as it had below, challenged the government's reliance on 18 U.S.C. § 371 to reach a private transaction between Kelerchian and Insight, merely because the FDA had the authority to regulate aspects of the manufacturing of laser-aiming devices. Kelerchian asserted that the use of § 371 to criminalize agency policy, without the benefit of Congressional action or even formal regulatory process had significant due process implications. Kelerchian alleged that 18 U.S.C. § 371 could not reach private transaction not targeted at the FDA. *Tanner v. United States*, 483 U.S. 107 (1987) .

The Indictment had relied heavily on language from the letters purporting to be a variance granted to Insight by the FDA to manufacture lasers devices that did not meet regulatory guidelines. The variance, in general terms, restricted the sale of certain lasers to law enforcement and military personnel. The language that the lasers are "restricted to law enforcement and military personnel" appears throughout the Indictment. (App.94a). The government had also presented extensive evidence regarding the variance letters at trial.

The Seventh Circuit, rejecting Kelerchian's arguments, determined that the variance letters that declared lasers are "restricted to law enforcement and military personnel" were irrelevant. 937 F.3d at 906. Without citation, the court declared that "Section 371 makes it a crime to defraud an agency for the United States "'in any manner or for any purpose.'" 937 F.3d at 906. The court, referencing the FDA regulatory function under 21 U.S.C. § 360ii and related regulations, found Kelerchian's fraud had impaired the FDA function to regulate lasers. 937 F.3d at 906.

The court did not address Kelerchian's claim that his transaction with Insight, involving private entities, is not a fraud directed at the FDA. *Tanner*, 483 U.S. 107.

B. Count 9, money laundering, 18 U.S.C. § 1956(h) and 18 U.S.C. § 1343

Kelerchian challenged the sufficiency of evidence to support conviction for conspiracy to commit money laundering under 18 U.S.C § 1956(h). The Indictment had asserted claims of violation of § 1956(h) under both 18 U.S.C. § 1956 and 18 U.S.C. § 1957. However, affirming the validity of the conviction under § 1957, the Seventh Circuit ultimately did not address the § 1956 theory. 937 F.3d at 908.

The underlying offense alleged by the Indictment was violation of 18 U.S.C. § 1343, wire fraud. The court noted, citing *Cleveland v. United States*, 531 U.S. 12, 19 (2000), that the government had to prove "the scheme to defraud was aimed at some form of money or property." 531 U.S. at 19. The appellate court

explained the government's § 1957 money-laundering theory:

> Slusser sold the parts to Webber for $18,900 and received a check in his name as payment. He was instructed to deposit that check in his own account and then to issue cashier's checks to Kelerchian and Kumstar for $9,450 each. Kelerchian then waited nine months before paying H&K for the weapons. The intention, the government argued, was to make it appear as though the Sheriff's Department bought and retained control over the weapons. Further, Kelerchian waited months to pay H&K to distance himself from the Webber sale, making it look as though he was unaware of the connection between the money sent to H&K and the check he received from Slusser.

Kelerchian, 937 F.3d at 909.

Kelerchian argued the government's theory failed because it did not establish a distinct money-laundering transaction from the transaction that created the proceeds. *See United States v. Seward*, 272 F.3d 831, 836 (7th Cir. 2001). In response, and for the first time on appeal, the government raised the right to control theory, claiming that the wire fraud had occurred when Kelerchian sent the purchase packets to H&K with the purported false statements. *Kelerchian,* 937 F.3d at 909. Recognizing that H&K had been fully compensated financially for the sale of the machine-guns, *Kelerchian,* 937 F.3d at 911, the Seventh Circuit adopted the right to control theory. "Because this fraud deprived H&K of a cognizable property interest

in avoiding illegal sales of its products, the government established a violation of § 1343.

REASONS FOR GRANTING THE PETITION

This petition presents two (2) important issues for review. First, this case presents a viable vehicle by which this Court may examine and resolve the significant split in the Circuits regarding the use of the "right to control" theory in the context of wire fraud. Second, this case presents a viable vehicle for this Court to review the unprecedented use of 18 U.S.C. § 371 to reach a transaction between two purely private entities merely because a federal agency has been granted authority to regulate a manufacturer.

I. THE CIRCUIT COURTS ARE SPLIT ON WHETHER THE "RIGHT TO CONTROL" THEORY CONSTITUTES A VIABLE DEPRIVATION OF PROPERTY FOR PURPOSES OF WIRE AND MAIL FRAUD

The decision of the United States Court of Appeals for the Seventh Circuit in this matter presents a significant and important issue upon which the appellate courts have disagreed, creating a split between the Circuits. Here, in *United States v. Kelerchian*, 937 F.3d 895 (7th Cir. 2019), the Seventh Circuit, joined by the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits, adopted the "right to control" theory as a basis of a deprivation of property in the context of mail and wire fraud, 18 U.S.C. §§ 1341 and 1343. *See United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 2487 (2016);

United States v. Gray, 405 F.3d 227, 234 (4th Cir. 2005), *cert. denied*, 546 U.S. 912 (2005); *United States v. Fagan*, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1989), *cert. denied*, 498 U.S. 821 (1990); *United States v. Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003); *United States v. Maxwell*, 579 F.3d 1282 (11th Cir. 2009).

The Third, Sixth and Ninth Circuits have rejected the amorphous "right to control" theory and fraud prosecutions that rely on intangible "property" rights that arise out of it. *United States v. Zauber*, 857 F.2d 137, 147 (3d Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014); *United States v. Bruchhausen*, 977 F.2d 464, 468 (9th Cir. 1992).

Remaining true to the holdings in *McNally v. United States*, 483 U.S. 350, 360 (1987) and its progeny, this Court should embrace the minority view and reject the application of the right to control theory here and the other majority Circuits.

A. *McNally* and Its Progeny Have Limited the Scope of Fraud Statutes

Beginning with *McNally v. United States*, 483 U.S. 350, 360 (1987), and followed by *Carpenter v. United States*, 484 U.S. 19 (1987), *Cleveland v. United States*, 531 U.S. 12 (2000), an *Skilling v. United States*, 561 U.S. 358 (2010), this Court has consistently limited the reach of wire and mail fraud statutes by narrowing the meaning of "property."

In *McNally v. United States*, 483 U.S. 350, 360 (1987), this Court held that the federal mail fraud

statute is "limited in scope to the protection of property rights." *Id.* In so doing, the court "stopped the development of the intangible-rights doctrine in its tracks." *Skilling v. United States*, 561 U.S. 358, 401 (2010). "[T]he original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *McNally*, 483 U.S. at 356. Thus, the *McNally* Court held that wire fraud convictions could not be upheld based on the "intangible right" of citizens to honest government. *Id.* "If Congress desires to go further" in its application of wire and mail fraud, the Court urged, "it must speak more clearly." 483 U.S. at 360.

Carpenter v. United States, 484 U.S. 19 (1987), decided only five (5) months after *McNally*, affirmed the holding in *McNally* "that § 1341 protects property rights only." *Cleveland v. United States*, 531 U.S. 12 (2000). *Carpenter* held that "[c[onfidential business information has long been recognized as property." *Carpenter*, 484 U.S. at 26. Thus, the Wall Street Journal's confidential information, specifically stock information, that was to appear in a regular column, was the property of the newspaper; the employee's fraudulent and deceitful appropriation of that business information for personal gain was cognizable under wire and mail fraud statutes. 484 U.S. at 28.

In *Cleveland*, the Court held that government regulators do not have a property interest in the issuance of licenses within the meaning of wire and mail fraud. 531 U.S. at 20. Louisiana had a strict regulatory system in place to control video poker machines. "It license[d], subject to certain conditions, engagement in pursuits that private actors may not

undertake without official authorization." 531 U.S. at 21. However, "for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." 531 U.S. at 20. The Court concluded that though the State of Louisiana had a regulatory interest in licenses it issues, it did not have a property interest.

The *Cleveland* Court further clarified that the language of the fraud statute—"any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises"—may at first glance suggest two distinct means by which fraud may be committed. However, such a reading of the statute is incorrect. The statute does not "'reach[ ] false promises and misrepresentations . . . as well as other frauds involving money or property.'" *Cleveland*, 531 U.S. at 26, citing *McNally*, at 359. Quoting *McNally* again, the *Cleveland* Court reiterated. "'[T]he mail fraud statute . . . had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to *the Government's interests as a property holder*.'" *Id.* at 531 U.S. at 26, *citing McNally*, 483 U.S. at 359 n.8. The Court specifically declined to attribute such a broad application of fraud that "the statute would appear to arm federal prosecutors with power to police false statements in an enormous range" of circumstances. *Id.* at 26.

Prior to *Cleveland*, Congress had passed 18 U.S.C. § 1346, legislatively creating honest services fraud, in direct response to *McNally* and *Carpenter*. The *Cleveland* Court emphasized that absent Congress having "'spoken in language that is clear and definite,'"

the Rule of Lenity requires the less harsh interpretation of the word "property" as applied in the wire and mail fraud context. 531 U.S. at 26, *citing United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). Because, the indictment in *Cleveland* had not charged § 1346 "honest services fraud," it was not until *Skilling* that the Court would look to the breadth of the intangible right to honest services encompassed by § 1346.

Skilling provided the Court with the opportunity to evaluate the breadth of § 1346. This Court considered whether Skilling's misrepresentations to shareholders regarding the value and health of Enron stock could form the basis for a violation of the wire fraud statute under a deprivation of honest services theory, 18 U.S.C. § 1346. The government argued that Skilling's "undisclosed self-dealing" had "implicated tangible economic harm because the defendant made money based on his false statements" and that Skilling had deprived "employees and investors [of] information which was critical for them to make good decisions about what to do with their own stock." Brief for United States, *Skilling v. United States*, No. 08-1394, 2010 WL 302206. Noting that a broader reading of § 1346 would render the provision unconstitutionally vague, the *Skilling* Court specifically rejected the government's argument for a broader application of § 1346, holding honest services fraud, only reaches "fraudulent schemes to deprive another of honest services through bribes or kickbacks." *Skilling*, 561 U.S. at 404, 409.

Thus, even under § 1346, the fraud statute did not reach Skilling's "undisclosed self-dealings" and

false representations made to other Enron employees and investors regarding the value of Enron stock. By reversing Skilling's conviction, the Court expressly overruled circuit holdings that property for purposes of the wire and mail fraud statutes "encompassed . . . the right to use and dispose of an object . . . the right to control the object . . . ." *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997); *Cf. United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992) ("Even if these licenses did not become 'property' until their issuance, . . . the city retained the right to control their alienation by the licensees, a property right analogous to those recognized at common law (fee simple determinable with the possibility of reverter").

Though the plain language of § 1346 would have permitted a broader reading of the new statute, the *Skilling's* majority specifically declined "to proscribe a wider range of offensive conduct." *Skilling*, 561 U.S. at 408. The *Skilling* Court had a plethora of intangible property rights that "honest services" might have recognized via § 1346 based on pre-*McNally* law if the Court had chosen to do so. Acknowledging that a broader reading of § 1346 "would raise the due process concerns underlying the vagueness doctrine;" however, the Court purposefully limited the scope of § 1346 to frauds involving kickbacks and bribes. *Id.* at 408. Specifically citing *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979), the Court rejected the "amorphous category" of honest services fraud that would encompass "'schemes of nondisclosure and concealment of material information.'" *Skilling*, 561 U.S. at 400.

B. The Majority View Must Be Rejected Because the Right to Control Theory Is Based on a Policy Preference for Making Informed Business Decisions and Not Vested in a Property Right

In 1987 with its holding in *McNally*, *Carpenter*, and *Cleveland* "[t]he Supreme Court stopped this expanding universe of intangible-right protections, limiting the fraud statutes' scope to rights that sounded in property." *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014), *citing Carpenter*, 484 U.S. at 25 and *McNally*, 483 U.S. at 360; *see also Cleveland*, 531 U.S. 12. Later, in 2010, when the Court had the opportunity to speak to the breadth of § 1346 in *Skilling*, the Court never lost sight that the fraud statutes require the government to prove "the victim's loss of money or property supplied the defendant's gain, with one mirror image of the other." *Skilling*, 561 U.S. at 400.

Confronted with the task of determining the scope of intangible property encompassed by § 1346 and the meaning of honest services, the Court defined honest services very narrowly. As Justice Scalia points out in his concurrence in *Skilling*, the Court had a smorgasbord of pre-1987 intangible rights previously recognized by various courts and Circuits that could have been embraced by the honest services label. *See Skilling*, 561 U.S. at 416-424. However, the Court only recognized kickbacks and bribes as being encompassed by § 1346. *Skilling* specifically rejected "non-disclosure and concealment of material information" as implicating a property right. *Skilling*, 561 U.S. at 400; *see also Sekhar v. United States*, 133 S.Ct. 2720, 2726

(2013) (property for purposes of fraud statutes (Hobbs Act) must be transferrable).

The right to control theory, however, embraces that very concept rejected by *Skilling*—the "right" to material information. The concept does not require a pecuniary deprivation or a transferable property right as required by *McNally*. 483 U.S. at 356-357. In fact, the right to control theory specifically substitutes "information [one] would consider valuable in deciding how to use his assets" for the required fraud element of deprivation of property. *See United States v. Dinome*, 86 F.3d 277 (2d Cir. 1996); *United States v. Finazzo*, 850 F.3d 94, 109 (2nd Cir. 2017) ("[d]epriving a victim of 'potentially' valuable' information necessarily creates a risk of tangible economic harm"); *United States v. Wallach*, 935 F.2d 462-463 (right to control theory predicated on a finding of fraud based on a deprivation of "potentially valuable economic information"); *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015) (government must only prove deprivation of potentially valuable information); *United States v. Viloski*, 557 Fed. Appx. 28, 33 (2nd Cir. 2014) (had employee defendant disclosed information the employer would have changed its business conduct).

In *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014), the Sixth Circuit, remaining true to *McNally* and its progeny, rejected the government's right to control theory. In *Sadler*, the defendant had engaged in a pill mill scheme to illegally obtain controlled substances and then illegally dispense the pills, primarily to drug addicts. The government argued defendant's "lies convinced the distributors to sell controlled substances they never would have sold had they

known the truth" of her activities. *Id.* at 590. The defendant in *Sadler* paid the market price for the product purchased. The *Sadler* Court noted the defendant "may have had many unflattering motives in mind in buying the pills, but unfairly depriving the distributors of their property was not one of the them." *Id.* at 590.

The *Sadler* Court determined that the right to control theory simply could not square with *McNally*, *Carpenter*, *Cleveland*, and *Skilling*. Fraud statutes are "limited in scope to the protection of property rights,' and the ethereal right to accurate information doesn't fit that description." *Sadler*, 750 F.3d at 591. As the Court had in *McNally*, *Cleveland*, and *Skilling*, the *Sadler* court noted that the Rule of Lenity required the less harsh application of a statute when confronted with any ambiguity in application. "If Congress desires to go further, it must speak more clearly than it has." *McNally*, 483 U.S. at 360; *Cleveland*, 531 U.S. at 25; *Skilling*, 561 U.S. at 411. Congress has not spoken on the matter since 1988 with the enactment of 18 U.S.C. § 1346; nor has Congress spoken in response to *Skilling* and this Court's limitation on the intangible right to honest services to kickbacks and bribes. "Congress's reverberating silence about other intangible interests," such as is inherent in the right to control theory, "requires a more lenient reading of the wire-fraud law." *Sadler*, 750 F.3d at 591-592

C. Applying the Minority Rule Here, There Is No Violation of the Wire Fraud Statute

As in *Sadler*, there is no dispute that Kelerchian had paid full value for the machineguns he brokered from H&K; and H&K shipped the machine guns to

the Lake County Sheriff's Department. *Kelerchian*, 937 F.3d 911. H&K had no deprivation of property—the company was fully compensated for the machine guns. There is no doubt that had the Seventh Circuit rejected the right to control theory, the Seventh Circuit would have had to reverse "Kelerchian's money-laundering conspiracy conviction." *Kelerchian*, 937 F.3d at 911. But still, in affirming the wire fraud conviction, the Seventh Circuit went well beyond the dictates of *McNally*, *Carpenter*, *Cleveland*, and *Skilling*, and identified H&K's "cognizable property interest[s]" as "avoiding illegal sales of its products," avoiding "damage to goodwill," "risks of liability," "increased government scrutiny," "negative publicity," jeopardy to "future sales," and "reputation." *Kelerchian*, 937 F.3d at 913. Such interests could not be more far removed than the pecuniary property rights protected by *McNally* and its prodigy.

In *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), defendants had purchased high-technology products with the representation to the manufacturer that the products would not be shipped overseas; the defendants purchased the products and then shipped the products to Soviet Bloc countries in violation of both its agreement with the manufacturer and in violation of the law. On appeal, the Ninth Circuit rejected the government claim that the manufacturer's interest in controlling the whereabouts of the items sold to the defendants constituted a property interest for purposes of the wire fraud statute. The Ninth Circuit disagreed:

> 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.

Bruchhausen, 977 F.2d at 467.

The Ninth Circuit, remaining true to *McNally* and this Court's related precedent, rejected the government's argument that "the manufacture's lost part of their bargain because they would not have sold the products if they had been told the products were destined for the Soviet Bloc." *Id.* at 467. Though likely a true statement, the manufacture's interest in destination of its product after sale is not a "property" interest for purposes of the mail and wire fraud statutes. *Id.*

Relying heavily on *McNally*, the *Bruchhausen* court pointed out: "In *McNally*, it was doubtless true that the state would not have permitted the policies to be purchased if it had known of the arrangement for sharing of commissions," yet, it was determined that any interest the state had was not a property interest contemplated by the fraud statutes. *Id.* As this Court has repeatedly stated, under the Rule of Lenity, a harsher, more inclusive view of "property," would require Congress to speak to the issue. *Id.*

Prior to *Kelerchian*, the Seventh Circuit in *F.J. Vollmer & Co.*, 1 F.3d 1511 (7th Cir. 1993) had favorably cited the *Bruchhausen* court's rejection of the government's right to control argument. "The property interest alleged here is quite similar to that alleged in *Bruchhausen*, and [the court] conclude that the government's interest in the Steyr AUG-SA rifles

is not one that can be characterized as a property interest for purposes of *McNally*." *Id.* at 1521.

As dictated by *Cleveland*, the Seventh Circuit held "BATF has a regulatory interest in the disposition of firearms, but its legislative grant of authority conveys no property interest." *F.J. Vollmer*, 1 F.3d at 1521. The *F.J. Vollmer* court favorably cited the conclusion in *Bruchhausen*, rejecting that government's claim that a manufacturer's interest in controlling disposition of the property it had sold could be "characterized as a property interest for purposes of the wire fraud statute." *F.J. Vollmer*, *citing Bruchhausen*, 977 F.2d at 468.

The Seventh Circuit's rejection of the right to control theory in *F.J. Vollmer* was not accidental. In *F.J. Vollmer*, the Seventh Circuit also reversed a right to control conviction in *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). Emphasizing that *McNally* had "jettisoned" the concept of "intangible rights," the *Walters* court correctly observed that the "'right to control' who received the scholarships" constituted an "intangible rights theory once removed." *Walters*, 997 F.2d at 1227. The court clarified: "A deprivation is a necessary but not sufficient condition of mail fraud. Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement." *Id.*

Thus, in the face of its previous holdings in *F.J. Vollmer* and *Walters* and its previously favorable citation of *Bruchhausen*, the *Kelerchian* court did an-about-face and jumped on the "right to control" bandwagon. The *Kelerchian* court turned to the Second Circuit, probably the most prolific "right to control"

circuit, for support. *See United States v. Schwartz*, 924 F.2d 410 (2nd Cir. 1991) (defendants misrepresentations to manufactures that they would not export night goggles in violation of the law deprived the manufacturer of the right to control the destination of its product in violation of the wire fraud statute).

In so doing, the Seventh Circuit named the "amorphous category" of intangible interests *Skilling* sought to avoid. Byproducts of deceit such as concerns about liability, bad publicity, loss of reputation, or jeopardy to future business. There is no support for the conclusion that such interests qualify as property and the *Kelerchian* court cites none. Even in the context of a desire or interest in avoiding the illegal sale of one's goods, the desire or avoidance cannot reasonably be characterized as property; one cannot package up a desire to avoid illegal sale of one's goods and transfer it to someone else. *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (destruction of one strand of a property bundle does not constitute a taking). Likewise, though someone may certainly be deceived, it is incongruous to say receipt of false or omission of truthful information is a deprivation of property. "Even when tied to an expected stream of revenue, the State's right to control does not create a property interest." *Cleveland*, 531 U.S. at 23. The Rule of Lenity would require Congress to speak and speak out clearly before inclusion of such intangible and ethereal interests could be declared property under the wire fraud statute. *McNally*, 483 U.S. at 360.

In *Walters*, the court quipped at the government's suggestion that federal prosecutors would widely and fairly exercise broad discretion in charging under

expansive theories of fraud. Noting that even practical jokes gone array could become federal felonies, the court questioned: "But what is it about § 1341 that labels a crime all deceit that inflict any loss on anyone? Firms often try to fool their competitor, surprising them with new products that enrich their treasuries at their rivals' expense. Is this mail fraud because large organizations inevitably use the mail?" *Id.* at 1225.

Here, with *Kelerchian*, the product was machine-guns. And it is likely that the court was impacted by the product at issue. But applying the same holding to a different scenario demonstrates the wide net that the right to control theory throws. An older woman buys 10 teddy bears with the written agreement, electronically signed by internet, and pledging that the bears will not be given to children under age 4. The buttons for the teddy bears' eyes do not meet regulations for young children because there is a risk of choking. But as soon as the teddy bears arrive, the woman sends the teddy bears to an orphanage knowing many of the children are under 4. The teddy bear seller would not have sold the teddy bears to the purchaser had they known they were going to children under 4. The teddy bear manufacturer now risks liability, damage to the company's goodwill, negative publicity, damage to reputation, and possibly increased government scrutiny, particularly if a child chokes on a button from the bear. Under the right to control theory, the purchaser is guilty of federal wire fraud.

A man goes into a liquor store and buys a case of beer with a credit card. The sign at the register says: "It is illegal to buy alcohol for minors." The man

leaves the store and hands the case of beer to a minor waiting in the parking lot. The liquor store would not have sold the beer to the purchaser if it had known the beer was for a minor. The actions of the purchaser expose the liquor store to risk of liability, negative publicity, damage to reputation, and possibly increased government scrutiny. Under the right to control theory, the purchaser of the beer is guilty of federal wire fraud.

One should be "nervous," as the court was in *Walter*, of the limitless bounds prosecution on the right to control theory presents. Applied so broadly, the fraud statutes become "so standardless that [they] authoriz[e] or encourage[e] seriously discriminatory enforcement." *Skilling*, 561 U.S. at 416 (Scalia J. concurring) *citing United States v. Williams*, 553 U.S. 285, 304 (2008). The *Skilling* holding limiting § 1346 honest services to fraud involving only kickbacks and bribes saved § 1346 from a constitutional claim of vagueness. The pervasive application of the right to control theory has marched the fraud statutes back into the fog. The courts are not "free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988).

Since *McNally*, the only time Congress has spoken out to clarify its intention to define "property" more broadly then interpreted by this Court in *McNally* is to codify 18 U.S.C. § 1346, honest services fraud. And *Skilling* has limited § 1346 application only to kickbacks and bribes. Yet, the Seventh Circuit's holding in

Kelerchian and the Circuits who have found property interests in the right to control are ignoring the limits on wire and mail fraud prosecutions as dictated by *McNally*, *Carpenter*, *Cleveland*, and *Skilling*.

This is an excellent case upon which to review the validity of the right to control. But, in the alternative, this Court should hold this case pending the outcome in *Kelly v. United States*, No 18-1059, for which this Court recently granted certiorari. Though in the context of public servant, *Kelly* also involves the reliance on a right to control theory, where there is no tangible monetary or property deprivation, to justify violation of the wire and mail fraud statutes.

II. THE SEVENTH CIRCUIT'S HOLDING THAT GENERAL REGULATORY AUTHORITY EXPOSES THE CITIZENRY TO CRIMINAL PROSECUTION UNDER 18 U.S.C. § 371, PARTICULARLY FOR A PRIVATE TRANSACTION, IS AN ALARMING PROPOSITION WITH NATIONAL RAMIFICATIONS THAT REQUIRES SUPREME COURT REVIEW

Courts have generally defined defraud in the context of § 371 as "impairing, obstructing, or defeating the lawful function of any department of government." *Dennis v. United States*, 384 U.S. 855, 861 (1966) (citations omitted); *see also Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (defining the substantive offense of the defraud prong of § 371 as "to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest"). The ramification of the Seventh Circuit's ruling here is to allow the parameters of "lawful function" to be defined by any topic upon which an agency has been granted some

authority to regulate. The holding casts an indeterminately wide net, permitting the interpretation of what is criminal to be defined by the day to day activities of bureaucrats and the unchecked discretion of federal prosecutors. Due process requires more. *McNabb v. United States*, 318 U.S. 332, 340 (1943).

A. Section 371 Would Be Rendered Unconstitutionally Vague and Overbroad If Allowed to Create Criminal Liability for Conduct Which Congress Has Not Criminalized

"[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403(1966). When all it takes is general regulatory authority vested in any one of the thousands of regulatory bodies to find a "lawful function," there is simply no limit to the conduct deemed as "interference" with that function for which 18 U.S.C. § 371 may criminalize in virtually every aspect of daily life; the possibilities of "interference" with some regulatory body's "lawful function" becomes completely undefined and all encompassing. *Id.*

The elastic reach, and vague and undiscerning hand of § 371, particularly in the context of the "defraud" clause, has raised serious constitutional concerns of courts and legal scholars for the better part of a century.

> Long ago, Learned Hand referred to the general conspiracy statute as the "darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2nd Cir. 1925). It is understandable why that should be so, and it is perhaps understandable but regrettable that prosecutors should recurrently push to expand the limits of the statute in order to have it encompass more and more activities which may be deeply offensive or immoral or contrary to state law but which Congress has not made federal crimes.

United States v. Licciardi, 30 F.3d 1127, 1133 (1994). "The Supreme Court has warned that other 'important considerations of policy' will require it to 'view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.'" *United States v. Minarik*, 875 F.2d 1186, 1192 (6th Cir. 1989)(*citing Grunewald v. United States*, 353 U.S. 391 (1957)). The case at bar implicates Learned Hands' worst fears regarding the overuse of § 371.

Here, there is no federal criminal offense associated with the possession, sale, transfer, or use of laser-aiming devices. There is no statutory provision (even a civil one) that makes it illegal to receive or sell laser-aiming devices on the Internet or otherwise. "Federal crimes . . . 'are solely creatures of statute,'" and the reach of a federal criminal statute requires "a 'narrow interpretation.'" *Dowling v. United State*s, 105 S.Ct. 3127, 3131-32 (1985) (citations omitted). "There can be no constructive offenses; and, before a man can be punished his case must be plainly and

unmistakably within the statute." *United States v. Lacher*, 134 U.S. 624, 628 (1890). This is especially true when the charge is a conspiracy to defraud "because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *Dennis v. United States*, 384 U.S. 855, 860 (1966).

B. The Government's Attempt to Criminalize Third Party Conduct Based on Agency Policy Is an Unconstitutional Usurpation of Legislative Authority and Would Render the Meaning of Interference with a Government Function Vague and Overbroad

1. Business Transactions Between Private Parties Do Not Constitute a Violation of § 371

Count 2 of the Indictment described purchases of laser-aiming devices from Insight, a private corporation. Insight is not "the United States." Insight is not an agent or representative of "the United States." And neither the Indictment alleged nor the evidence presented at trial evidenced any special relationship between Insight and the federal government. For § 371 liability to attach to a third party, the Indictment must allege, and the evidence demonstrate "a showing of more than completely external interference with the working of a governmental program or disregard for federal laws." *United States v. Haga*, 821 F.2d 1036, 1041 (5th Cir. 1987) (emphasis added). To prevail on § 371, "the government must prove that the United States was the ultimate target of the conspiracy." *United States v. Harmas*, 974 F.2d 1262 (11th Cir.

1992); *Tanner,* 483 U.S. at 130 ("The conspiracies criminalized by [the defraud clause of] § 371 are defined . . . most importantly . . . by the target of the conspiracy.") (emphasis original).

In *Tanner*, this Court considered the scope of the defraud clause of 18 U.S.C. § 371. The Seminole Electric Cooperative, Inc. was "a Florida corporation owned and operated by 11 rural electric distribution cooperatives." *Tanner*, 483 U.S. at 110. In 1979, Seminole borrowed over $1.1 billion in to "construct a coal-fired power plant." *Id.* "The loan was guaranteed by the Rural Electrification Administration (REA), a credit agency of the United States Department of Agriculture . . . " *Id.* The defendants in *Tanner* were charged and convicted of violating 18 U.S.C. § 371 because they had defrauded Seminole. The government argued that Seminole was an agency of the United States because it had received federal financial assistance. *Id.* at 130-32. This Court disagreed, however, the Court remanded to determine "[i]f the evidence presented at trial was sufficient to establish that petitioners conspired to cause Seminole to make misrepresentations to the REA." *Id.* at 132.

Unlike in *Tanner*, there was no federal agency that participated in anyway in Kelerchian's brokering of the purchase of laser-aiming devices with Insight. Count 2 relied exclusively on conduct occurring between the alleged co-conspirators and Insight. The ordering of laser-aiming devices, submission of a purchase order, signing of the "IR Product Disclosure Agreement," and shipping of the laser-aiming devices from Insight to the law enforcement agencies, all involved a private business transaction between the alleged

co-conspirators and Insight. No facts alleged in Count 2 of the Indictment or presented at trial lead to the conclusion that a government entity was therefore the target of the "conspiratorial" conduct.

2. FDA Statutory and Regulatory Authority Does Not Extend to Purchasers

The government framed Count 2 of the Indictment to read as if Congress had mandated that laser-aiming devices, like firearms, are subject to statutory registration. *See* 18 U.S.C. § 921 et. seq. Congress has not. In fact, neither Congressional nor regulatory authority charges purchasers with any duty to report the lasers in their possession or limits what a purchaser may do with a laser once she has it. Using phrases like "true first purchaser," (App.107a), "causing false information to be recorded in books and records" (App.106a), and reference to false and fictitious documents, (App.106a)–all borrowed concepts associated with firearm registration under the Gun Control Act. The GCA does not have any bearing on laser-aiming devices.

The Seventh Circuit, in relying on *F.J. Vollmer & Co*, 1 F.3d 1511 (7th Cir. 1993), falls into the trap of treating laser aiming devices as if they are firearms. In *F.J. Vollmer* the defendants sought reversal of their convictions for violation of 18 U.S.C. § 371. The § 371 convictions were not based on some generalized authority to regulate. The BATFE's authority was specifically granted to it by designation of the Secretary of the Treasury and 18 U.S.C. § 925(a)(1) and § 922(l) "to regulate the transfer of the firearm from an importer to the law enforcement agency for which the firearm was imported." 1 F.3d at 1516. Thus, the regulatory

authority for BATFE to regulate the importation of assault rifles and their transfer exclusively to law enforcement once domesticated, was found in specific statutory provisions of the GCA; and, the defendant in *F.J. Vollmer* had lied to BATFE in BATFE paperwork to impede that BATFE authority—the conspiracy to defraud in *F.J. Vollmer* was clearly directed at the BATFE. 1 F.3d at 1516.

3. Though Laser Reporting Obligations Do Not Extend to Purchasers, Congress Has Limited FDA Authority, Even Where There Is a Reporting Violation, to Imposition of Civil Sanction

Under the Federal Food, Drug and Cosmetic Act, laser manufacturers are generally required to "establish and maintain such records (including testing records), make such reports, and provide such information as the Secretary may reasonably require to enable him to determine whether such manufacturer has acted or is acting in compliance. . . ." 21 U.S.C. § 360nn(b). However, the FDA has no statutory or regulatory authority as to what happens with a laser-aiming device once it leaves the manufacturer. Nor are there any criminal penalties associated with a manufacturer's failure to maintain such records.

Congress has dictated, per 21 U.S.C. § 360oo, that the authority of the FDA to sanction violation of the general reporting provision is a civil violation. That section reads that it shall be unlawful:

> (4) for any person to fail or to refuse to make any report required pursuant to section 360nn(b) of this title or to furnish or pre-

> serve any information required pursuant to section 360nn(f) of this title . . .

21 U.S.C.A. § 360oo(a)(4). Congress expressly crafted the penalty for violation of § 360oo—a civil penalty—when it codified the enforcement measures dictated in 21 U.S.C. § 360pp(b).

Courts have a duty to give effect to the plain meaning of statutes as they are written if the language is clear and unambiguous. If that language is plain, the court's only function is "'to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), *quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917). The plain meaning of a statute is conclusive unless "'literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Ron Pair*, 489 U.S. at 242, quoting *Griffin v. Oceanic Contractor*s, 458 U.S. 564, 571 (1982)). "The language of the statute is the most reliable indicator of congressional intent. It is the language, which is chosen with the most care, subjected to the greatest scrutiny and actually voted on by Congress and signed by the President." *Monterey Coal Co. v. Federal Mine Safety and Health Review Commission*, 743 F.2d 589, 595-96 (7th Cir. 1984).

Congress has plainly, clearly, and unambiguously expressed its desire to limit FDA enforcement authority, as it regards 21 U.S.C. § 360oo, to imposition of a civil penalty.

Taken to its logical extreme, the government's theory and the Seventh Circuit's ruling potentially put at risk all persons actively involved in American social or commercial life. Any person who engages in

any conduct that somehow impacts a government program or regulation, no matter how marginal it is, could be subject to § 371 prosecution if it is perceived by the government to be detrimental to the government's interest—and all without an act of Congress or official agency action defining specific conduct as criminal in nature. "The legislative authority of the Union must first make an act a crime, affix a punishment, and declare the court that shall have jurisdiction of the offence." *United States v. Hudson*, 11 U.S. 32, 33-34 (1812) cited by *United States v. Minarik*, 875 F.2d 1186, 1191-1192 (6th Cir. 1989). "Lower courts possess no powers other than those Congress grants, and it has long been recognized that federal trial courts do not have power to create common law crimes." *Id.* at 1191.

This Court cannot let the Seventh Circuit's holding stand that even in a transaction between private parties, "Section 371 makes it a crime to defraud an agency for the United States 'in any manner or for any purpose.'" 937 F.3d at 906. Such broad application of 18 U.S.C. § 371 is untenable.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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