NO. 21-1161

In the
Supreme Court of the United States

STEVEN AIELLO AND JOSEPH GERARDI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR *AMICI CURIAE* CRIMINAL LAW SCHOLARS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

This case involves questions of substantial importance to federal criminal law and the criminal justice system. *Amici curiae*, whose names and affiliations are set forth in the attached Appendix, are professors of law who regularly teach courses on criminal law and have authored numerous articles, treatises, and textbooks on criminal law. They submit this brief to provide the Court with their perspective and expertise on the question presented about the "right to control" theory of fraud and the broader context in which it arises.

SUMMARY OF THE ARGUMENT

The petitions in this case, No. 21-1169, and No. 21-1170 ask whether the Second Circuit's "right to control" theory is a valid basis for liability under the federal mail and wire fraud statutes. As the petitions explain, that question has divided the courts of appeals, is unquestionably important, and was wrongly decided below. This brief explains that certiorari is especially warranted in light of how the "right to control" theory came into prominence—*i.e.*, as a blatant workaround of this Court's decisions—and the ways in which that history exemplifies broader problems in the criminal justice system. By granting certiorari and reversing, this Court can make clear to prosecutors and lower courts that this Court's decisions do not impose mere obstacles to overcome

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing.

through dubious interpretations of federal statutes, but establish real and meaningful constraints on the conduct that may be prosecuted as a federal crime.

First, this brief recounts the history of the "right to control" theory in the Second Circuit, which reveals that its function is and always has been to end-run this Court's decisions. After this Court rejected the then-prevailing expansive interpretation of the mail fraud statute in *McNally v. United States*, 483 U.S. 350 (1987), prosecutors crafted the "right to control" theory as a stopgap so they could keep criminalizing the same conduct until Congress amended the statute. The ensuing amendment caused the "right to control" theory to fall into disuse, but when this Court pared back the scope of that amendment in *Skilling v. United States*, 561 U.S. 358 (2010), prosecutors dusted off the "right to control" theory and pressed on as if nothing had happened. That cannot possibly be what this Court intended, as prosecutions under the "right to control" theory suffer from exact the same infirmities as the prosecutions this Court disallowed in *McNally* and *Skilling*.

Second, unsurprisingly in light of its unholy origins, the "right to control" theory is inconsistent with this Court's cases and common law conceptions of property. This Court has reiterated time and again that the fraud statutes protect only rights that have long been recognized as property at common law. Yet the Second Circuit has stubbornly adhered to its "right to control" theory notwithstanding that its conception of property has neither common-law grounding nor historical roots. The Second Circuit's insistence that a defendant may be convicted of fraud even if the

purported victim suffered no loss of money or property, but only the amorphous "right to control" property, cannot be squared with this Court's precedents, the statutory scheme, or common-law conceptions of property.

Third, this case and the "right to control" theory more broadly exemplify the prosecutorial overreach and judicial indulgence that drive the overcriminalization problem plaguing federal criminal law. In this context and countless others, prosecutors have reacted to statutory text and this Court's decisions not as limits on their authority but as obstacles to evade in their zeal to punish whatever conduct they deem morally blameworthy. All too often, federal courts bless these efforts, losing sight of their critical role in ensuring that defendants are not convicted unless their conduct falls squarely within the scope of a criminal law passed by Congress and as interpreted by this Court. This case thus presents not only an opportunity to resolve a long-standing circuit split on an issue of consequence, but to re-emphasize the importance and necessity of resolving doubts about the meaning or applicability of criminal statutes in favor of individual liberty.

ARGUMENT

I. The "Right To Control" Theory Is And Always Was A Workaround Of This Court's Jurisprudence.

The "right to control" theory arose not from sound legal principles but from expediency. To salvage a high-profile prosecution at a legally unique moment—a moment between this Court's narrowing of the mail-fraud statute and Congress' repudiation of that

reading—prosecutors in the Southern District of New York summoned a textually untethered and historically unmoored theory of fraud. The Second Circuit blessed the effort. But what should have been a short story about a one-time-only workaround has in recent years developed into a saga. In the wake of this Court's decision in *Skilling*, prosecutors dusted off the "right to control" theory and used it to secure conviction after conviction for the very conduct that first *McNally* and then *Skilling* held was outside the reach of the federal fraud statutes. The development of the "right to control" doctrine makes clear that it is, and always has been, a prosecutorial end-run around this Court's cases—an end-run this Court should no longer countenance.

A. The mail fraud statute, as originally enacted, prohibited "any scheme or artifice to defraud." *McNally*, 483 U.S. at 356. In *Durland v. United States*, 161 U.S. 306 (1896), this Court held that the statute reached not just lies about existing facts, but also false promises about the future. Congress codified that holding the next year, amending the statute to its current form, which criminalizes any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §1341.[2]

In the 1940s, courts of appeals began interpreting the statutory phrase "scheme or artifice to defraud" as disjunctive from "scheme or artifice … for obtaining money or property," holding that schemes to defraud

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[2] The wire fraud statute contains the same language in relevant part, and this Court applies "the same analysis" to both. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

could be prosecuted even if they did not contemplate or result in the deprivation of "money or property." These courts accordingly held that the phrase "scheme or artifice to defraud" could encompass deprivations of "intangible rights." *Skilling*, 561 U.S. at 400. Using this "intangible rights" theory, courts imported general standards of ethical conduct into the fraud statute, leading to the development of the "honest services" theory of fraud.

In traditional property fraud, "the victim's loss of money or property supplie[s] the defendant's gain, with one the mirror image of the other." *Id.* The honest-services theory, in contrast, applied to schemes involving kickbacks and bribes or undisclosed self-dealing—situations in which the offender profits but "the betrayed party suffer[s] no deprivation of money or property." *Id.* For example, a city employee who takes a bribe to funnel public-works contracts to the briber's company could be charged with honest-services fraud, even if the city (the purported victim) paid a fair price and the work was done properly—in other words, even if the betrayed party was not deprived of money or property. Courts applying this theory reasoned that "actionable harm lay in the denial of [the betrayed party's] right to the offender's 'honest services.'" *Id.*

The honest-services theory was widely accepted—giving federal prosecutors free reign to prosecute bribery at the state and local level—until 1987, when this Court rejected it in *McNally*. 483 U.S. at 360. *McNally* involved a state officer who made a company the state's insurance agent in exchange for kickbacks. Traditional property fraud was off the table because

the state paid the same premium and received the same coverage as it would have without the kickback scheme. *Id.* Instead, prosecutors charged the officer with honest-services fraud, alleging that the kickback scheme "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.* at 353.

This Court held that the scheme did not qualify as property fraud. The Court explained that the fraud statute was *not* disjunctive and that the "money or property" element applied to all cases prosecuted under the statute. *Id.* at 360. To "construe the statute" to encompass the honest-services theory would "leave[] its outer boundaries ambiguous and involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." *Id.* The Court drew on the longtime "common understanding" of fraud as "'wronging one in his *property* rights by dishonest methods or schemes,'" and so "read §1341 as limited in scope to the protection of property rights." *Id.* at 358-60 (emphasis added).

Congress responded swiftly, amending the mail and wire fraud statutes the next year. *See Cleveland v. United States*, 531 U.S. 12, 19-20 (2000). The new honest-services provision, 18 U.S.C. §1346, provides that for purposes of the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." With that enactment, the fraud statute once again prohibited schemes involving kickbacks, bribes, or self-dealing, even without a deprivation of property.

B. The "right to control" theory came to prominence in the brief period between this Court's decision in *McNally* and Congress' enactment of the honest-services provision. The Second Circuit embraced the theory in *United States v. Wallach*, 935 F.2d 449 (2d Cir. 1991), which involved a kickback scheme in which Wallach "used his friendship with then-attorney general Edwin Meese III to obtain fraud[ul]ently more than $500,000 from a South Bronx defense contractor." Howard Kurtz, *Wallach Was Paid To Link Wedtech To Meese, U.S. Claims*, Wash. Post (Apr. 29, 1989). In particular, Wallach received hundreds of thousands of dollars in illicit payments from the company "to use his influence with Meese" to help the company obtain government contracts, "while covering up the real purpose of the payments" from the company's shareholders. *Id.*

Wallach arrived in federal court at a unique moment in the history of honest-services fraud: The case was being prosecuted after *McNally*, but the conduct at issue occurred before Congress enacted the honest-services provision. This left the government in a bind: It could not charge the defendants with honest-services fraud under the old statute (because of *McNally*); it could not charge the defendants with honest-services fraud under the new statute (because that statute did not exist at the time of the conduct); and it could not charge the defendants with traditional property fraud because the supposed victims (the company's shareholders) were not deprived of any money or property—if anything, they were better off because of the lucrative contracts the kickbacks helped secure.

Prosecutors used the "right to control" theory as a way out of this bind. The indictment charged that the defendants committed property fraud by depriving company's shareholders of the intangible "'right to control' how [the company's] money was spent." *Wallach*, 935 F.3d at 461. In substance, this was the same old honest-services theory, alleging a failure to honestly disclose information but no real or intended deprivation of money or property. Over the defendants' objections that *McNally* "precludes a mail fraud charge based on the alleged taking of such intangible property rights," *id.*, the Second Circuit blessed the "right to control" doctrine, holding that the money-or-property element of §1341 can be satisfied by "a showing that some person or entity has been deprived of potentially valuable economic information." *Id.* at 462-63. Even though the shareholders suffered no monetary harm or property loss from the alleged fraud, they were supposedly deprived of "money or property" because the nondisclosure denied them "the 'right to control' how corporate assets were spent." *Id.* at 462, 464.[3]

By inventing that new, ostensible "property" right, the Second Circuit indulged prosecutorial efforts to evade *McNally* and secure an honest-services-type conviction despite the temporary lack of an honest-services hook in the statute. Indeed, *Wallach*'s "right to control" theory is indistinguishable

[3] The government pressed the "right to control" theory in a handful of other cases in which the conduct occurred before §1346 but was prosecuted after *McNally*. *See, e.g.*, *United States v. Shyres*, 898 F.2d 647 (8th Cir. 1990); *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989).

from the honest-services theory this Court rejected in *McNally*. Both prosecutions posited that a purported victim, not deprived of money or property in any traditional sense, was nevertheless defrauded because the defendant withheld information about why or to whom certain payments were being made. The only difference is that *Wallach* had to conceptualize honest-services fraud as property fraud, necessitating the "right to control" theory.

The right-to-control theory faded almost as quickly as it arrived. Congress had, after all, reinstated honest-services fraud in §1346, rendering fanciful workarounds unnecessary. Accordingly, with the exception of a few cases in which the relevant conduct "predated the effective date of 18 U.S.C. §1346," *United States v. Dinome*, 86 F.3d 277, 283 n.6 (2d Cir. 1996), prosecutors no longer needed the right-to-control theory. When dealing with cases in which the defendant profited but "the betrayed party suffered no deprivation of money or property," *Skilling*, 561 U.S. at 400, prosecutors charged defendants with honest-services fraud instead of trying to pass off the "right to control" as property.

C. That all changed after *Skilling*. Confronted with an argument that §1346 was void for vagueness, this Court was obligated by the canon of constitutional avoidance to "pare" the honest services doctrine "down to its core," which it read as "schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Id.* at 404. The upshot was that prosecutors could no longer use the honest-services statute in cases involving neither bribes nor kickbacks but only

"undisclosed self-dealing by a public official or private employee—*i.e.,* the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 409. The Court explained that "a reasonable limiting construction of §1346 must exclude this amorphous category of cases" because, otherwise, the statute would fail to provide fair notice and would invite arbitrary and inconsistent prosecutions. *Id.* at 408, 410, 412.

Prosecutors' next move, predictably, was to dust off the "right to control" theory and begin using it to prosecute the very cases that *Skilling* deemed outside §1346's coverage. Cases of "undisclosed self-dealing"—say, when a public official conspires to rig a bidding process but does not receive any kickbacks or bribes for doing so, *see* Pet.9-14—could no longer be prosecuted as honest-services fraud under *Skilling*, but if the failure to disclose is dressed up as the withholding of "potentially valuable economic information," the same conduct suddenly becomes property fraud. With that sleight of hand, the "right to control" theory's post-§1346 dormancy gave way to a post-*Skilling* resurgence. *See, e.g.*, *United States v. Percoco*, 13 F.4th 158 (2d Cir. 2021); *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021); *United States v. Johnson*, 945 F.3d 606 (2d Cir. 2019); *United States v. Calderon*, 944 F.3d 72 (2d Cir. 2019);*United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017); *United States v. O'Garro*, 700 F.App'x 52 (2d Cir. 2017); *United States v. Tagliaferri*, 648 F.App'x 99 (2d Cir. 2016); *United States v. Lowe*, 664 F.App'x 38 (2d Cir. 2016); *United*

States v. Binday, 804 F.3d 558 (2d Cir. 2015); *United States v. Viloski*, 557 F.App'x 28 (2d Cir. 2014).

This cannot possibly be what this Court intended in *Skilling*. If the "right to control" concept is too amorphous when prosecuted as honest-services fraud, it is surely too amorphous when prosecuted as property fraud. *See United States v. Yates*, 16 F.4th 256, 267 (9th Cir. 2021) ("Permitting the government to recharacterize schemes to defraud an employer of one's honest services … as schemes to deprive the employer of a property interest … would work an impermissible 'end-run' around the Court's holding in *Skilling*."). If anything, the "right to control" theory is even broader and more amorphous than pre-*Skilling* honest-services fraud: whereas non-bribe, non-kickback honest-services cases required a fiduciary relationship between the defendant and victim, the "right to control" theory requires no relationship other than a business transaction. By blessing this blatant workaround, the decision below "let[s] in through the back door the very prosecution theory that [this] Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988).

* * *

The "right to control" theory, both at its inception and during its current resurgence, is nothing more than an enabling mechanism, providing prosecutors with a way to pursue cases that this Court has repeatedly deemed outside the mail and wire fraud statutes. Allowing prosecutors to continue invoking the "right to control" theory will send the message that such evasions are permissible and that prosecutors may continue treating this Court's decisions as

effectively advisory, as long as they can dream up a creative enough workaround. *Cf. Silvester v. Becerra*, 138 S.Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari) ("Our continued refusal to hear Second Amendment cases only enables this kind of defiance"). The better course is to grant certiorari and make clear that the property fraud statute cannot be manipulated to end-run this Court's decisions.

II. The "Right To Control" Theory Is Inconsistent With This Court's Cases And Common Law Conceptions Of Property.

A. Unsurprisingly in light of its origins as a workaround of this Court's cases, the "right to control" theory conflicts with this Court's cases. The mail and wire fraud statutes prohibit only schemes targeted at money or property. *See, e.g.*, *Kelly v. United States*, 140 S.Ct. 1565, 1571 (2020); *Cleveland*, 531 U.S. at 19; *Carpenter*, 484 U.S. at 25. When interpreting statutes, this Court assumes, "absent other indication," that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," including the term "property." *Sekhar v. United States*, 570 U.S. 729, 732 (2013). Accordingly, the meaning of "property" in the mail and wire fraud statutes must conform to the common-law understanding of "property." *See Cleveland*, 531 U.S. at 23 (rejecting application of fraud statutes to interest that has not "long been recognized as property"). Redefining some other interest as "property" will not do if it is not firmly grounded in the common-law understanding of property.

The "right-to-control" theory fails this test. The "right to control" is *not* property. Rather, the right to

control is an incident of the *ownership* of property, and thus the deprivation of it is part of the injury done to a party when one takes that party's property from them. *See* Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes A Crime,* 43 Cardozo L. Rev. 135, 174-75 (2021). If Jones swindles Smith of his shares in Acme Co., the injury in part is that Smith can no longer sell them, or leave them to his grandchildren, or dispose of them in some other way. Similarly, if Jones steals Smith's car, Smith no longer gets to drive it. But Smith's ability to sell or bequeath his stock, or to choose to drive to church on Sundays, is not *itself* property, but merely an incident of his ownership of that property. For that reason, the "right to control" theory cannot be reconciled with this court's decisions in *Kelly*, *Cleveland*, and *McNally*. *See* Pet.28-33; Ciminelli.Pet.14-20.

Even more crucially, the "right to control" or the right to receive "economically valuable information" is not property by either traditional or modern definitions. Thomas Merrill, in an article this Court recently cited in *Cedar Point Nursery v. Hassid*, 141 S.Ct 2063, 2073 (2021), identifies three intellectual traditions for defining property. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998). The first, grounded in Blackstone but also embraced by utilitarians like Jeremy Bentham and New Dealers like Felix Cohen, is that property is at root the right to exclude. *See id*. at 734; *see also* 2 William Blackstone, Commentaries on the Laws of England *2 (1766) ("[P]roperty[is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total

exclusion of the right of any other individual in the universe."). The right to receive "potentially valuable economic information" is clearly not encompassed within this definition. Nor does it suffice to argue that the property in question is intangible; intangible property was known to Blackstone, *see* 2 Blackstone, *20-43, and these forms (*e.g.* a franchise) were subject to exclusion, while "potentially valuable economic information" is not. *See id.* at *37.

A variation on this view, which Merrill refers to as "multiple-variable essentialism," "posits that the essence of property lies not just in the right to exclude others, but in a larger set of attributes or incidents, of which the right to exclude is just one." Merrill, *supra*, at 736-37. The most common formulation of property under this conception consists of the rights "to possess, use and dispose of it." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The right to "potentially valuable economic information" is not among those rights nor the broader set of rights Merrill attributes to other scholars subscribing to this theory. Merrill, *supra*, at 736-37.

Finally, there is the "nominalist" theory of the "bundle of rights" or "bundle of sticks." *Id.* at 738. For starters, the "bundle of sticks" metaphor itself was not part of the common law or common understanding when the mail fraud statute was enacted in 1872. To the contrary, "the bundle of sticks concept is the result of the combined efforts of early twentieth-century analytical jurisprudence: progressivism and legal realism." Anna di Robilant, *Property: A Bundle of Sticks or A Tree?*, 66 Vand. L. Rev. 869, 877-78 (2013).

Whatever the merits of the nominalist conception of property, it was not the common-law conception.

In all events, all but the most "extreme" versions of this conception of property (holding, *e.g.*, that property literally has no meaning, *see id.*) are not malleable enough to include the "right to control" property or receive "economically valuable information." *See* Park, *supra*, 164-65, 181-82 (cataloguing infirmities of the Second Circuit's "right-to-control" test under the "bundle of rights" theory of property). And the kind of radical nominalism that *could* make the right to receive "potentially valuable economic information" into property would be wholly inconsistent with *Kelly*, which rejected a similar attempt to argue that "tak[ing] control" of the lanes of a bridge through government regulation was a seizure of property. 140 S.Ct. at 1568. *Kelly*, like *Cleveland*, stands for the notion that the mail and wire fraud statutes must be grounded in "*traditional* concepts of property" precisely to prevent encroachments into areas the Constitution reserves for state governments simply by deeming anything and everything "property." *Cleveland*, 531 U.S. at 24; *see Kelly*, 140 S.Ct. at 1571-72.

III. The "Right To Control" Theory Exemplifies The Dangers Of Overcriminalization.

This case typifies the overcriminalization problem plaguing federal criminal law. Most accounts of overcriminalization blame Congress and the ever-expanding federal criminal code—which, to be sure, has been growing at a breakneck pace for generations. But this case makes clear that equal blame lay with prosecutors and lower federal courts, who have offered

and accepted dubious interpretations of criminal statutes whenever doing so seems necessary to convict blameworthy offenders, even in the face of contrary guidance from this Court.

As recounted above, the story of the "right to control" theory is not a story of too much criminal law or overly expansive criminal statutes. Indeed, even when Congress did expand the scope of the fraud statutes in response to *McNally*, it did not cover the entire scope of "intangible rights" that had developed in the lower courts, but "only the intangible right of honest services." *Cleveland*, 531 U.S. at 20. The story of the "right to control" theory is instead the story of prosecutors doing end-runs around statutory text and this Court's decisions, refusing to take no for an answer and instead "us[ing] the criminal law to enforce ([their] view of) integrity." *Kelly*, 140 S.Ct. at 1574. When this Court deems conduct outside the scope of the fraud statutes, the correct response is to stop charging that conduct as fraud, not to spin a novel theory of property fraud (or dust off an old one) and continue right along as before.

The problems with prosecutors' use of the "right to control" theory are especially pronounced in cases like this, where nothing would have prevented them from trying to prove that defendants' scheme intended to inflict or actually resulted in loss of actual money or property. The prosecution's theory of the case was that defendants conspired to make the RFP processes less competitive than they otherwise would have been. Pet.App.61a. There is an obvious way to prove that these schemes inflicted economic harm: "offer evidence that another company with lower prices, better

quality, or better value would have applied and been selected for either the Syracuse or the Buffalo contracts." Pet.App.62a. But not only did prosecutors make no effort to show such harm, *see* Pet.11, Ciminelli.Pet.9-10, the district court deemed such evidence *irrelevant* and *inadmissible*. *See* Ciminelli.Pet.7; *cf. Binday*, 804 F.3d at 599 (defendants prohibited from "submitting evidence that the insurers were not actually harmed by the fraud"). Something has gone terribly wrong when a statute criminalizing deprivations of "money or property" is applied in a way that makes evidence that the victim did not actually lose any "money or property" irrelevant.

The appeal of the "right to control" theory—to prosecutors, at least—is that it obviates the need for such evidence because the informational deprivation constitutes all the harm to "property" the government needs to show.[4] It is one thing to allow such prosecutions under an honest-services provision, on the theory that citizens have the right "to have the [State]'s affairs conducted honestly," *McNally*, 483 U.S. at 353—a theory that this Court condemned as unconstitutionally vague absent bribes or kickbacks—but it is another thing entirely to allow such prosecutions under the rubric of *property* fraud. If a fraudulent scheme was intended to or actually does

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[4] The "right to control" theory would seem to obviate the need for prosecutors to *ever* prove economic harm. All fraud cases involve the misrepresentation of "potentially valuable economic information"—*i.e.*, a material misrepresentation "that would naturally tend to influence" the victim's decision about whether to enter into the transaction. *United States v. Johnson*, 945 F.3d 606, 612 (2d Cir. 2019).

cause economic harm, prosecutors should do the necessary work to prove the loss of money or property. And if it was not intended to and did not cause economic harm, that is not a problem for prosecutors to solve with creative theories like "right to control," but a reason why the prosecution should cease.

Prosecutors' insistence on pressing forward with "right to control" prosecutions typifies one of the driving forces behind overcriminalization: the instinct "to avoid what might be called 'near misses': situations where Congress has criminalized a particular form of behavior, but defined it in ways that allow some morally equivalent kind of behavior to escape prosecution under a particular statute." Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 564 (2012). But this instinct obscures the reality that federal prosecutors are not the last line of defense against wrongdoing. There is no need to "make a federal case" out of everything, much less out of alleged corruption at the state and local level. Alarm bells should have started ringing at the first sentence of the decision below: "This case, which concerns *public corruption in New York State*, requires us to again consider the reach of the *federal* fraud and bribery statutes." Pet.App.4a (emphasis added).

It was not always this way. Although Congress has long criminalized bribery involving federal officials, bribes involving state and local officials have historically fallen within the sole province of state criminal law. *See* Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879, 903 (2005). As far as federal law was concerned, state and local

officials could be prosecuted for bribery only if the bribes pertained to their participation in federal programs or their performance of official functions on behalf of the federal government. *Id.* Otherwise, bribery involving affairs of state and local government was within the sole province of state criminal law. *Id.* While times have surely changed, there remains no good reason for federal prosecutors to stretch the meaning of federal fraud statues just to "bring into federal court defendants who otherwise would have been subject to prosecution only in state court." *Id.* at 907-08. Not only does such federal overreach disturb the federal-state balance in matters of criminal law,[5] it often subjects defendants to punishments harsher than those deemed appropriate by the very state and local citizens who are the purported victims of the fraud. *See id.* at 903-08.[6]

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[5] The federalism problems are even more pronounced where, as here, the defendants are not even alleged to have provided or taken bribes.

[6] Cases prosecuted under the "right to control" theory make nonsense of the Sentencing Guidelines. The Guidelines direct the court to calculate monetary loss caused by the fraud. U.S.S.G. §2B1.1. That calculation makes sense when applied to a true deprivation of property, but makes no sense when applied to "right to control" cases, where the amount of tangible loss is zero. The court here recognized as much and held that it was "unable to make a determination of pecuniary loss without engaging in pure speculation," and therefore found no actual or intended loss for Guidelines purposes. C.A.App.2627. In other "right to control" cases, courts feel obliged to make speculative or nonsensical loss calculations. *See, e.g.*, *Binday*, 804 F.3d at 598 & n.44.

Furthermore, states and localities have remedies beyond the criminal code for dealing with dishonest companies or undisclosed conflicts of interest. If Fort Schuyler felt deceived by COR Development Company (or LPCiminelli) because of how the RFP process played out, it could have cancelled the COR's status as a "preferred developer" or stopped awarding COR new projects. If state authorities felt the need to take action, they could have have revoked COR's license to do business in the state or imposed fines under state law. Instead, even after the indictment, Fort Schuyler "continued to work with COR, paid it millions of dollars, and hired it for additional work." Pet.11. That neither Fort Schuyler nor the state took any action against COR, and instead continued working with and awarding projects to COR, underscores that federal prosecutors used the dubious "right to control" theory solely to make a federal case out of a state non-issue.

The blame does not lay solely with prosecutors. "Far from being innocent bystanders in the federalization of crime, federal judges have been all too willing to construe federal crimes expansively." Smith, *Proportionality and Federalization*, *supra*, at 884. Prosecutors can bring dubious prosecutions relying on dubious workarounds of this Court's precedents "secure in the knowledge that courts will usually stretch existing statutes if the prosecutor targets blameworthy defendants." *Id.* at 927-28. Put another way, when "judges stand ready to create new crimes (by attributing new meanings to pre-existing rubrics of common-law criminalization), police and prosecutors will bring them new crimes to create." John Calvin Jeffries, Jr., *Legality, Vagueness, and the*

Construction of Penal Statutes, 71 Va. L. Rev. 189, 222-23 (1985).

The root of the problem is that courts, like prosecutors, often view themselves as obligated to ensure "that no morally blameworthy defendant ever slips through the federal cracks." Smith, *Proportionality and Federalization*, *supra*, at 884. In this case, for example, the Second Circuit recognized that the prosecution's use of the "right to control" theory was even more questionable than in past cases (which is no mean feat), Pet.App.63a, but instead of heeding that red flag and pumping the brakes, the court obliged the prosecution because of a felt need to punish what it perceived as blameworthy conduct. Through their willingness to unmoor the definition of fraud from its common-law origins, "federal courts have allowed prosecutors to charge as 'fraud' ... a stunning array of misbehavior involving breaches of contract, conflicts of interest, ethical lapses, and violations of workplace rules that otherwise would not be federal crimes (and, in some cases, may not have been crimes at all)." Smith, *Overcoming Overcriminalization*, *supra*, at 549. The inevitable result is a broader and more punitive criminal code. *Id.*

In focusing on the culpability of conduct, courts often lose sight of both this Court's guidance and "the proportionality of the penalties to which their expansive interpretations subject defendants." *Id.* at 544. Indeed, the federal courts' penchant for accepting prosecutorial invitations to construe criminal statutes broadly often "override[s] legislative grading choices—and create[s] risks of disproportionately severe

punishment—by expanding statutes prescribing higher penalties to include conduct for which less severe punishment is provided in other laws." *Id.* at 545. In this respect, "courts have been playing the overcriminalization game right along with the political branches—unwittingly, perhaps, but playing all the same—and the federal criminal code is as broad and harsh as it is today in large part because the federal courts helped make it that way." *Id.*

Granting certiorari would provide this Court with the opportunity to begin addressing the overcriminalization problem exemplified here by making "clear that courts should take seriously the principle that federal criminal statutes should be construed narrowly, even if the particular offenders before the court are, to some degree, blameworthy." Stephen F. Smith, Yates v. United States*: A Case Study in Overcriminalization*, 163 U. PA. L. Rev. Online 147, 156 (2014). This is the rule of lenity. As Justice Gorsuch recently recognized, the rule of lenity helps safeguard the separation of powers—and thus individual liberty—"by preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities." *Wooden v. United States*, 142 S.Ct. 1063, 1083 (2022) (Gorsuch, J., concurring in judgment).

Even someone with a more charitable take on the "right to control" doctrine would have to admit that Congress has not *clearly* endorsed the right-to-control theory. This lack of clarity calls out for application of the rule of lenity. Indeed, a case like this reveals that the common critique of the rule of lenity—that lenity

is an alternative to some neutral, no-thumb-on-the-scale interpretative principle—is sorely misguided. There is no middle option here: either the property fraud statutes encompass the "right to control" theory or they do not. The choice is thus not between a rule of lenity and a rule of neutrality, but between the rule of lenity and a rule of *severity*, under which "statutes [are] broadly construed to prevent culpable defendants from slipping through the federal cracks." Smith, *Proportionality and Federalization*, *supra*, at 936.

A rule of severity has nothing to recommend it—especially when state remedies remain available to sanction blameworthy conduct—while the rule of lenity ensures that federal punishments are imposed "only with the assent of the people's elected representatives and in laws clear enough to supply fair warning to the world." *Wooden*, 142 S.Ct. at 1087 (Gorsuch, J., concurring in judgment) (alterations omitted). By granting certiorari and reversing, this Court can not only resolve a circuit split, it can remind prosecutors and judges to approach their vital interpretive functions with keen sensitivity to the adverse effects that overcriminalization creates, to resolve doubts about the applicability of a criminal statute in favor of individual liberty, and to help right what is so fundamentally wrong with federal criminal law.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse in this case, No. 21-1169, and No. 21-1170.

Respectfully submitted,

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