No. 21-____

IN THE

Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit's "right to control" theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343.

PARTIES TO THE PROCEEDING

Petitioner is Louis Ciminelli, defendant and appellant below. Joseph Percoco, Steven Aiello, Joseph Gerardi, and Alain Kaloyeros were Mr. Ciminelli's co-defendants and appellants below.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

Aiello v. United States, No. 21A298 (U.S.).

United States v. Percoco, Nos. 18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272 (2d Cir.).

United States v. Percoco, No. 1:16-cr-776 (S.D.N.Y.).

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Petitioner Louis Ciminelli respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion is reported at 13 F.4th 158, and is reprinted in the Appendix to the Petition (App.) at 1a-41a.

JURISDICTION

The court of appeals entered its judgment on September 8, 2021, and denied a petition for rehearing on November 1, 2021. App. 42a-56a, 57a-58a. On Janu-

ary 7, 2022, this Court extended the time to file a petition for a writ of certiorari until March 1, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

INTRODUCTION

This Court has repeatedly granted review to correct unwarranted extensions of the federal mail and wire fraud statutes so as to confine their scope to traditional "*property* fraud." *Kelly v. United States*, 140 S. Ct. 1565, 1568, 1571 (2020) (emphasis added); *see also Cleveland v. United States*, 531 U.S. 12 (2000); *McNally v. United States*, 483 U.S. 350 (1987). This case involves a paradigmatic overextension: the "right-to-control" theory. This Court should intervene once again to confirm that the federal fraud statutes are not an all-purpose protection of ethereal interests,

permitting conviction even where the government cannot prove an intention to cause economic loss.

Under the right-to-control theory, a property interest is harmed when a defendant's scheme "deprive[s] the victim of potentially valuable economic information" that is "necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (internal quotation marks and citations omitted). Prosecutors employ this abstract information-deprivation theory when they cannot show a traditional scheme to harm property. But this Court's precedent, common law definitions of property, statutory context, and principles of statutory interpretation all confirm that the right-to-control theory is invalid. The theory targets deception without a concrete connection to traditional property interests. A scheme that deprives a person of economic information alone, without threatening economic loss, may violate an intangible interest or a sense of moral uprightness; it does not rise to the level of a property fraud.

The federal courts of appeals are intractably divided on the right-to-control theory. The Eighth and Tenth Circuits have joined the Second Circuit in embracing it. *See, e.g.*, *United States v. Shyres*, 898 F.2d 647, 652-53 (8th Cir. 1990); *United States v. Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003). The Sixth and Ninth Circuits, however, have rejected it. *See, e.g.*, *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014); *United States v. Bruchhausen*, 977 F.2d 464,

467 (9th Cir. 1992); *see also United States v. Yates*, 16 F.4th 256, 265 (9th Cir. 2021).

Resolving this conflict is of critical importance. Amorphous and infinitely expanding interpretations of the mail and wire fraud statutes "creat[e] uncertainty in business negotiations and challenges to due process and federalism." *United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) (quoting *Sorich v. United States*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting from denial of certiorari)). And this case cleanly and clearly presents the issue: petitioner's conviction rests on the right-to-control theory alone, not any intended or actual financial loss to the purported victim of the fraud. As a result, the only basis to sustain petitioner's conviction is the right-to-control theory. Because that theory is invalid, this Court should grant certiorari and reverse.

STATEMENT

A. The Buffalo Billion RFP

1. In 2012, the governor of New York initiated a program to invest one billion dollars in upstate development projects, known as the "Buffalo Billion" plan. App. 5a. The vehicle for these public-private partnerships was to be Fort Schuyler Management Corporation (Fort Schuyler), a non-profit entity affiliated with the state university system and designated to award state-funded economic development projects. *Id.* at 6a. To select developers and construction managers for those projects, Fort Schuyler would issue requests for proposals (RFPs). *Id.* at 7a. The RFPs would not focus on specific projects, but would instead seek a "strategic development partner" that would have a

"first opportunity to negotiate with Fort Schuyler" over particular projects. *Id.* at 7a-8a. The RFPs did not bind Fort Schuyler to a particular developer, nor did they establish price, schedule, goods, or services for particular projects. *Id.*; C.A. App. 1066.

In 2013, the board of directors for Fort Schuyler issued an RFP to select a "preferred developer" for a project in Buffalo to revitalize the western part of the state. App. 7a-8a. The RFP included requirements that potential developers had to satisfy, including that they be headquartered in Buffalo and have 50 years' experience—later revised to 15 years' experience—in construction and operation of mixed-use facilities. *Id.* at 9a-11a. Three companies ultimately responded to the RFP. *Id.* at 11a. In early 2014, Fort Schuyler's board selected two as preferred developers for Buffalo-area projects: LPCiminelli, then among the most significant construction companies in upstate New York, and McGuire Development Company, LLC. *Id.* at 11a; C.A. App. 1243, 1320. Following negotiations, Fort Schuyler awarded LPCiminelli a contract in a $750 million project to build a high-tech facility in Buffalo; McGuire was also awarded a multimillion-dollar contract. App. 12a.

Investigators subsequently uncovered evidence that a member of Fort Schuyler's board—Dr. Kaloyeros, who was then the President of the College of Nanoscale Science and Engineering in Albany and who was in charge of developing proposals for projects under the Buffalo Billion initiative—had worked to draft the RFP to include LPCiminelli's qualifications and attributes so that the bidding process would favor LPCiminelli's selection as a preferred developer. *Id.*

at 5a, 8a-9a. There was no evidence that Mr. Ciminelli directed changes to the RFP's terms. Nevertheless, on September 19, 2017, federal prosecutors indicted Mr. Ciminelli and others involved in the RFP process. *Id.* at 13a. As relevant here, the 18-count superseding indictment charged Mr. Ciminelli and others with conspiracy to commit wire fraud in connection with a scheme to rig the bidding processes for the RFP, in violation of 18 U.S.C. § 1349 (Count One) and wire fraud in connection with rigging the bidding process for the projects in Buffalo, in violation of 18 U.S.C. §§ 1343 and 2 (Count Four). *Id.*[1]

B. District Court Proceedings

1. At trial, the government sought to prove that Mr. Ciminelli and Dr. Kaloyeros conspired with others to tailor the Buffalo RFP so that LPCiminelli would be selected as a preferred developer. C.A. App. 1452-53. The tailoring allegedly consisted of adding terms to the RFP that favored LPCiminelli over other companies, including the 50-year experience requirement and the Buffalo-headquarters requirement. *Id.* at 1467.

The government offered no proof that in the negotiation that followed, or the later performance of the

[1] The superseding indictment also included similar allegations with respect to an RFP for a preferred developer in Syracuse. App. 3a & n.1. Two of Mr. Ciminelli's co-defendants on the conspiracy count—Stephen Aiello and Joseph Gerardi—owned the Syracuse construction company COR Development Company, which won the Syracuse RFP after an alleged scheme to slant the Syracuse RFP to favor COR. *Id.* at 7a-13a. The government has never alleged that Mr. Ciminelli had any role in the Syracuse events, and he did not.

contract, Fort Schuyler was deprived of a fair price, fair terms, or quality workmanship. Nor was there any evidence that Fort Schuyler could have obtained the same quality or a better price for the work from any other provider. And the defense was prohibited from introducing contrary evidence on this point on the theory that such evidence was irrelevant. *Id.* at 999, 1130. The district court denied oral motions attacking the sufficiency of the government's evidence. App. 13a.

2. Over objection, the court instructed the jury on an expansive right-to-control theory of fraud. C.A. App. 1439-40, 1554. Under that theory, the deprivation of "money or property" that the scheme must contemplate "includes intangible interests such as the right to control the use of one's assets"; that interest "is injured," the jury was told, "when [the victim] is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Id.* at 1554. The court further instructed that "'potentially valuable economic information' is information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction." *Id.*

With that amorphous guidance about the nature of the property interest at stake, the jury returned guilty verdicts on conspiracy and substantive wire fraud charges against Mr. Ciminelli. App. 14a. Although Mr. Ciminelli and his co-defendants renewed their Rule 29 motions, the district court denied them at each of the defendants' respective sentencings. *Id.* At Mr. Ciminelli's sentencing hearing in December

2018, the district court stated that it was "unable to make a determination of pecuniary loss without engaging in pure speculation." C.A. App. 2627. The district court sentenced Mr. Ciminelli principally to 28 months' imprisonment. App. 14a.

C. Second Circuit Proceedings

The court of appeals affirmed. Mr. Ciminelli and his co-defendants argued that "the 'right-to-control theory' of wire and mail fraud" is invalid, Ciminelli C.A. Br. 16, because, among other reasons, "the right to control one's own assets is not 'property' within the meaning of the wire fraud statute," App. 4a n.2. Recognizing that circuit precedent adopting the right-to-control theory bound the panel and that the argument was being raised "to preserve it for further review," the court did not directly address the issue. *Id.* But the court then adopted an interpretation of the right-to-control theory that revealed the stark departure of that theory from traditional property frauds.

Initially, the court stated that "[i]n a right-to-control case, 'it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss—it suffices that a defendant intend his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision.'" *Id.* at 17a (quoting *Binday*, 804 F.3d at 579). The court also recognized that its decisions drew "a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail and wire fraud statutes—and schemes that depend for their completion on a mis-

representation of an essential element of the bargain—which do." *Id.* at 19a-20a (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)); *id.* at 22a (same). But the court believed that the conduct proved here fell on the prohibited side of the line. *Id.* at 21a-22a. It viewed success at the RFP stage as giving LPCiminelli "a leg up" on selection for a particular project and found that a competitive RFP process was an "essential" term of the ensuing contracts. *Id.* at 19a-20a; *see also id.* at 22a & n.9. It did not explain why the purported advantage amounted to more than a scheme to induce Fort Schuyler to enter into negotiations. Nor did it explain how the "bargain" represented by the contracts "was not the terms of the contracts ultimately negotiated, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process." *Id.* at 21a.

Having collapsed the RFP and project-contracting phases—and having identified no deceptive conduct in the negotiation of the contract terms themselves—the panel went on to address the absence of proof of economic harm. The panel acknowledged that, in other right-to-control cases, the government offered "more tangible evidence of economic harm than is presented in this case." *Id.* at 20a. "Here, the government offered little evidence that other companies would have successfully bid for the projects and then either charged less or produced a more valuable product absent the fraud." *Id.* But in the panel's view, that evidence is not "a requisite for conviction." *Id.* at 21a. In other words, the right-to-control theory made

it unnecessary for the government to show that even the *completed* scheme produced tangible economic harm to Fort Schuyler; the informational deprivation in the RFP process itself constituted all the harm to "property" the government needed to show.[2]

Mr. Ciminelli filed a petition for rehearing en banc, arguing, *inter alia*, that the Second Circuit's right-to-control theory conflicts with controlling precedents of this Court and the other courts of appeals and that "an amorphous doctrine that defies consistent and predictable application should not be allowed to stand in the nation's commercial center." Ciminelli Rehearing Pet. 6. The Second Circuit denied the petition. App. 57a-58a.

REASONS FOR GRANTING THE PETITION

This case has all the hallmarks for certiorari. The court of appeals' decision is wrong and conflicts with this Court's interpretation of the mail and wire fraud statutes. The decision implicates a deep and enduring circuit conflict. The issue has great significance for principles of fair warning, lenity, and federalism. And the right-to-control theory allows prosecutors to

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[2] The court noted trial evidence that a rival firm considered submitting, but did not submit, a bid for the Buffalo RFP because of an impression that it was being "steered towards a local competitor," and that that firm and another regional construction firm typically offered lower construction-management fees than the selected firms here. App. 20a-21a n.8. But that evidence was not admitted to show that those firms would have offered lower fees on the Buffalo project. C.A. App. 999, 1003. And, more importantly, that proof was irrelevant to the right-to-control theory on which the court of appeals sustained the convictions; the deprivation of "potentially valuable economic information" was enough. App. 18a.

target broad swaths of conduct of which they disapprove, whether or not the conduct implicates traditional property interests. Because this case squarely and cleanly presents the issue of the theory's validity, certiorari is warranted.

I. THE SECOND CIRCUIT'S RIGHT-TO-CONTROL THEORY IS WRONG

A. The Mail And Wire Fraud Statutes Extend Solely To Schemes To Obtain Money Or Property

This Court's precedents establish that the mail and wire fraud statutes prohibit *only* schemes targeted at money or property. *See Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020); *Cleveland v. United States*, 531 U.S. 12, 19 (2000); *Carpenter v. United States*, 484 U.S. 19, 25 (1987).[3] The government therefore must show not only that a defendant "engaged in deception, but [also] that an object of the[] fraud was [money or] property." *Kelly*, 140 S. Ct. at 1571 (internal quotation marks, citation, and alterations omitted). This requirement reflects that the mail and wire fraud statutes are not a general license for "the Federal Government . . . to enforce (its view of) integrity." *Id.* at 1574. The statutes are instead carefully circumscribed to "protect[] property rights only." *Cleveland*, 531 U.S. at 18. Consistent with that principle, the Court has repeatedly rejected the extension of these statutes beyond traditional property interests.

In *McNally v. United States*, 483 U.S. 350 (1987),

[3] The Court applies "the same analysis" to the mail and wire fraud statutes, which "share the same language in relevant part." *Carpenter*, 484 U.S. at 25 n.6.

the Court held that the mail fraud statute proscribed only schemes to obtain money or property, not schemes to defraud aimed at "the intangible right of the citizenry to good government." *Id.* at 356. The Court declined to read the statutory prohibition of "schemes to defraud" independently from the statute's second clause, which covers schemes "for obtaining money or property." *Id.* at 358-59. Rather, the Court confined the statute to its original purpose: to "protect individual property rights." *Id.* at 359 n.8.

Soon after, in *Carpenter*, the Court reaffirmed *McNally*'s focus on property principles by recognizing that intangible interests were covered only if they qualified as traditional property. *Carpenter* held that confidential business information is a cognizable interest under the mail fraud statute because it "has long been recognized as property." 484 U.S. at 26. While contractual interests in an employee's "honest and faithful service" were "too ethereal . . . to fall within the [statute's] protection," *id.* at 25, the Court looked to settled authority treating confidential information of a corporation as a "species of property," *id.* at 26 (quoting 3 W. Fletcher, Cyclopedia of Law of Private Corporations § 857.1, at 260 (rev. ed. 1986)). The Court applied that principle to hold that a newspaper's pre-publication interest in confidentiality of its upcoming columns was a property interest. *Id.* at 25.[4]

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[4] Congress responded to these decisions by enacting the honest-services statute, which extended the mail and wire fraud statutes to encompass "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. "Significantly, Congress covered only the intangible right of honest

In *Cleveland*, the Court again rejected decisions extending the wire fraud statute beyond "money and property" offenses. The Court held the statute did not target the state victim's money or property by "frustrat[ing] the State's right to control the issuance, renewal, and revocation of video poker licenses." 531 U.S. at 23. Disapproving of "theories of property rights" that "stray from traditional concepts of property," the Court explained that the mail fraud statute does not encompass schemes targeting "the[] intangible rights of allocation, exclusion, and control." *Id.* at 23-24.

Most recently, in *Kelly*, the Court rejected the government's theory that a scheme by state officials to "reallocate the [George Washington] Bridge's access lanes" constituted wire fraud. 140 S. Ct. at 1574. It reasoned that, notwithstanding incidental costs incurred by the victim, the object of the defendant's scheme was a version of the "allocation, exclusion, and control" interest that failed to qualify as property in *Cleveland*. *Id.* at 1573-74 (quoting *Cleveland*, 531 U.S. at 23). The Court explained that, to amount to wire fraud, "property must play more than some bit part in a scheme" and instead "must be an object of the fraud." *Id.* at 1573 (internal quotation marks and citation omitted). "Because the scheme here did not aim to obtain money or property," the defendants

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services," *Cleveland*, 531 U.S. at 20—not any other intangible right. Outside of this expansion—which this Court interpreted narrowly in *Skilling v. United States*, 561 U.S. 358 (2010), to encompass solely "schemes involving bribes or kickbacks," *id.* at 408—the scope of the mail and wire fraud statutes set forth in *McNally* and *Carpenter* remains intact. *See infra* at 21-22.

"could not have violated the . . . wire fraud law[]." *Id.* at 1574.

B. The Right-To-Control Theory Extends Beyond Traditional Property Interests And The Statutory Obtaining Requirement

The right-to-control theory fails two statutory requirements. First, it fails the statutory test that a scheme must have as its object a traditional property interest. To determine what constitutes "property," this Court looks to "traditional concepts of property" and avoids "approv[ing] a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. Here, the common law does not establish a property interest in accurate information relevant to economic decisionmaking, as the right-to-control theory posits. Second, the theory turns on a form of asserted property that is not, and cannot be, "obtain[ed]" by the defendant, and thus fails to satisfy the statutory "obtaining" requirement.

1. Traditional understandings of property did not include a right to have complete and accurate information when making decisions about property.

This Court has relied on Blackstone to determine what "has long been thought to be a species of property" under the fraud statutes. *Pasquantino v. United States* 544 U.S. 349, 356 (2005) (citing 3 William Blackstone, Commentaries on the Laws of England 153-55 (1768)). Although Blackstone identified ten different types of property, including many forms of intangible property, none is analogous to a right to accurate information when engaging in economic transactions. *See* 2 William Blackstone, Commentaries on

the Laws of England 20-43; *see also, e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 23-24 (1913) (describing Blackstone and explaining that all property interests can be described as "incorporeal," in the sense that they are "more or less limited aggregates of abstract legal relations," but never mentioning a right analogous to the "right to control").

Blackstone's discussion of personal property in the context of misrepresentation-type offenses likewise does not support imposing criminal liability based on the right-to-control theory. The treatise discusses the offense of fraudulently dispossessing a victim of "[t]he right of property in a[ny] external thing." 3 Blackstone 145. Joel Prentiss Bishop's treatise likewise explains that the common-law offense of false pretenses occurs when one person states to another "as a fact what he knows to be untrue, for the purpose of procuring from him some valuable thing within the terms of the statute . . . the owner does intend to part with his property *in his money or his chattel*, but it is obtained from him by fraud." 2 Joel Prentiss Bishop, A Treatise on Criminal Law 388 § 414(3), (4) (9th ed. 1865) (internal citation, quotation marks, and footnotes omitted) (emphasis added). In other words, these common-law fraud offenses involved one person parting with their *physical* property, and the perpetrator *obtaining* the property. Nothing in this authority suggests that depriving a person of accurate economic information relevant to a decision about assets, standing alone, infringes a property interest.

Even definitions of property as a "bundle of rights" or "bundle of sticks" fail to articulate a right to control

that is said to be infringed by the deprivation of accurate information. *See* Bryan A. Garner, editor, *Black's Law Dictionary* (11th ed. 2019). And the "bundle of sticks" metaphor itself was not ascendent when the mail fraud statute was enacted in 1872. *See McNally*, 483 U.S. at 357 n.5 (citing Act of June 8, 1872, ch. 335 §§ 149 and 301, 17 Stat. 302 and 323). "While the image of a bundle may be credited to an 1888 treatise on eminent domain, the bundle of sticks concept is the result of the combined efforts of early twentieth-century analytical jurisprudence: progressivism and legal realism."[5] The fraud statutes, in contrast, are rooted in the common law. *See Neder v. United States*, 527 U.S. 1, 22-23 (1999). And while historical property definitions vary in their breath and elasticity, *see* John Salmond, *Jurisprudence* 423-24 (Glanville L. Williams ed., 10th ed. 1947) (ranging from "all a person's legal rights, of whatever description" to "the right of ownership in a material object, or that object itself"), criminal statutes should not be construed to reach fringe or exotic senses that range far beyond the accepted common law core. *See* Section I.C, *infra.* The right-to-control theory represents just such an extension.

Reflecting common law principles, this Court has explained that "not everything which *protects* property interests is designed to remedy or prevent deprivations of those property interests." *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense*

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[5] Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 Vand. L. Rev. 869, 877 (2019); *see also id.* at 878 n.32 (citing sources).

Bd., 527 U.S. 666, 674 (1999). For example, "[a] municipal ordinance prohibiting billboards in residential areas protects the property interests of homeowners, although erecting billboards would ordinarily not deprive them of property." *Id.* Likewise, "[t]he assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment. But business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense." *Id.* at 675 (emphasis omitted). Likewise here, having complete and accurate information when making financial decisions protects property interests, but that does not make the denial of such information, without a concrete intent to harm, an infringement of a property interest itself. And the right-to-control theory requires no showing "that a defendant intend that his misrepresentation actually inflict a financial loss." *United States v. Binday*, 804 F.3d 558, 579 (2d Cir. 2015).

2. The right-to-control theory also transgresses the statutory requirement that "the scheme" must "aim to *obtain* money or property." *Kelly*, 140 S. Ct. at 1574 (emphasis added). The mail and wire fraud statutes contain two clauses: the "scheme to defraud" clause and the "scheme. . . to obtain money or property" clause. 18 U.S.C. §§ 1341, 1343. This Court has clarified, however, that the two clauses do not operate independently. Instead, the second phrase was added in 1909 to reflect the holding in *Durland v. United States*, 161 U.S. 306 (1896), and "simply ma[k]e[s] it unmistakable that the statute reached false promises

and misrepresentations as to the future as well as other frauds involving money or property." *McNally*, 483 U.S. at 359; *Cleveland*, 531 U.S. at 26 (same). Reading the two clauses coextensively—rather than giving "scheme to defraud" a broader, independent meaning—means that a scheme must seek to "obtain" property that can be transferred from the victim to another. *See United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (Easterbrook, J.) (mail fraud requires "an actual" or "potential transfer of property from the victim to the defendant").

The "obtaining" element is evident in *Kelly*, where the Court rejected the government's wire fraud theory in part because the defendants did not "commandeer" the bridge's access lanes through their reallocation scheme, in that "[t]hey (of course) did not walk away with the lanes; nor did they take the lanes from the Government by converting them to non-public use." 140 S. Ct. at 1573. And in *Skilling*, the Court contrasted honest-services fraud with traditional "money or property" fraud by noting that money or property frauds involve situations in which "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." 561 U.S. at 400. Even *Pasquantino*, which involved a scheme to defraud Canada of tax revenues by smuggling goods across the border, involved more than an abstract deprivation. Although the Court described the offense as akin to "depriv[ing] a victim of his entitlement to money," 544 U.S. at 356, the victim's lost tax revenues in that case corresponded to the defendant's financial gain, *id.* at 357-358, "with one the mirror image of the other." *Skilling*, 561 U.S. at 400. The

scheme thus contemplated that the defendants would obtain the value of what the victim lost. Treating that conduct as a property offense "made sense given the economic equivalence between money in hand and money legally due." *Pasquantino*, 544 U.S. at 356.

These precedents reflect what this Court has made explicit in the related context of the Hobbs Act, 18 U.S.C. § 1951: "Obtaining property" "requires not only the deprivation but also the acquisition of property." *Sekhar v. United States*, 570 U.S. 729, 734 (2013). The requirement that property be "obtained" means that the property "must . . . be transferable—that is, capable of passing from one person to another." *Id.* That requires not only "that the victim 'part with' his property," but also "that the extortionist 'gain possession' of it." *Id.* (citations omitted). The Court applied that principle to hold that the right to make a recommendation was not "*obtainable property* under the Hobbs Act." *Id.* at 737. For that analysis, *Sekhar* relied (*id.*) on *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), where the Court similarly declined to equate interference with the right to control assets with *obtaining* that interest. The *Scheidler* defendants, the Court stated, may have "deprived" clinics of an "alleged property right" by disrupting their business, but the defendants did not seek or receive something that they could "exercise, transfer, or sell" and thus were not seeking to "obtain" property. *Id.* at 402, 404-05.

Sekhar's rule—that a mere "*interference* with rights" is distinct from obtaining property, and that a defendant must pursue something of value from the victim that can be "exercised, transferred, or sold" to

come within the statute's ambit, 570 U.S. at 735-36—applies with equal force here. The right to control assets is not "obtained" by a defendant, nor is it something that a defendant can "exercise, transfer, or sell." *Id.* at 736 (citation omitted). Even if deprived of all of the economic information it might wish to have, a property holder retains its right to control its assets. For these reasons, deception concerning the right to control assets is not the type of interest that can serve as a predicate for a federal fraud conviction.

C. Statutory History And Fair Notice, Lenity, And Federalism Concerns All Refute The Right-To-Control Theory

Two additional considerations confirm that the right-to-control theory is invalid. First, the theory protects an intangible right that Congress did not resurrect in its response to *McNally*, and to recognize it now would undermine *Skilling*'s interpretation of that congressional response. Second, the theory infringes fair notice concerns, in turn violating cardinal principles of lenity, and would alter the federal-state balance without clear congressional authorization.

1. When Congress enacted 18 U.S.C. § 1346 in response to *McNally* and *Carpenter*, it amended the fraud statutes to cover "just one" intangible right from among the "universe of intangible-right protections" previously recognized: the right of honest services. *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014). The right to accurate economic information bearing on decisions about the control of property was not included in the post-*McNally* provision. Congress's failure to cover that intangible right is "[s]ignificant[]." *Cleveland v. United States*, 531 U.S. 12,

19, 20 (2000) (noting the limited scope of Section 1346 in declining to stretch property fraud to cover a government license). "Congress's reverberating silence about other intangible interests tells us all we need to know" about what the wire fraud statutes criminalize. *Sadler*, 750 F.3d at 591.

The right-to-control theory would also undermine this Court's holding in *Skilling*. In *Skilling*, the Court held that the honest-services statute, 18 U.S.C. § 1346, must be limited to bribery and kickback cases; otherwise, the statute would be unconstitutionally vague. 561 U.S. 358, 412-13 (2010). The Court rejected the government's entreaty to "locat[e] within [the mail and wire fraud statutes]" a prohibition on not just bribery and kickbacks, but also "undisclosed self-dealing by a public or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interest while purporting to act in the interests of those 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.

The right-to-control theory allows the government to circumvent *Skilling*'s holding. Prosecutors can reframe virtually any undisclosed conflict of interest as a money-or-property fraud under the right-to-control theory, treating the undisclosed conflict as "material information" bearing on an "essential element of the bargain." *United States v. Binday*, 804 F.3d 558, 570,

579 (2d Cir. 2015). For example, a county commissioner who votes to approve the purchase of property he secretly owns would fall outside of *Skilling*'s interpretation of Section 1346. But the government could claim that the undisclosed self-dealing deprived the county of its right to control its property. The right-to-control theory thus resurrects through a new channel the very interpretation of the honest services fraud statute that the Court rejected in *Skilling*.

"[C]ourts are [not] free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby 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). Just as this Court in *Kelly* refused to entertain an interpretation of the wire fraud statute that would have allowed prosecutors to "end-run *Cleveland*," 140 S. Ct. 1565, 1574 (2020), the Court should reject the government's effort to subvert *Skilling*'s limitations on honest-service prosecutions. *Cf. United States v. Yates*, 16 F.4th 256, 267 (9th Cir. 2021) (refusing to adopt an interpretation of bank fraud that similarly "would work an impermissible 'end-run' around the Court's holding in *Skilling*").

2. The capacity of the right-to-control theory to undermine *Skilling* underscores an additional problem: right-to-control prosecutions raise no fewer vagueness problems in their new garb. The "fair notice" and "arbitrary and discriminatory prosecution[]" concerns that *Skilling* identified, 561 U.S. at 412, apply equally to self-dealing cases prosecuted under the right-to-control theory.

Like the honest-services cases before *Skilling*, the cases applying the right-to-control theory are hardly "models of clarity or consistency." 561 U.S. at 405. The Second Circuit itself acknowledged that its rule rested on "a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail and wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do." App. 19a-20a (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)); *id.* at 22a (same). This distinction—created out of whole cloth—underscores the arbitrary character of the theory. Non-economic deception that induces a transaction interferes with the intangible right to control decisions no less than economic deception. Yet the Second Circuit inexplicably draws a line between the two. Worse still, that line turns on arbitrary post-transaction judgments about what constitutes an "essential element of the bargain." And those judgments are particularly subjective and unpredictable given that the right-to-control theory comes into play only when the government cannot prove traditional property fraud, such as deception about price, quality, or performance. In a right-to-control case, it does not have to. App. 20a-21a. The government therefore calls on that theory precisely when it cannot prove deceptive conduct that aims to enrich the defendants at the victim's expense.

A legal standard of fraud that turns on such elusive and manipulable determinations cannot survive fair notice and vagueness scrutiny. *See McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016); *Johnson*

v. United States, 135 S. Ct. 2551, 2560 (2015). The fraud statutes may qualify as federal prosecutors' "Stradivarius," "Colt 45, "Louisville Slugger," and "Cuisinart."[6] But citizens are entitled to notice before the fraud statutes are deployed in such novel ways. Returning the right-to-control genie to the bottle "avoids this 'vagueness shoal.'" *McDonnell*, 136 S. Ct. at 2372 (quoting *Skilling*, 561 U.S. at 368).

This lack of clarity in turn implicates the rule of lenity, which provides that "when [a] choice has to be made between two readings" of a criminal statute, "it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks and citation omitted). This Court has repeatedly applied the rule of lenity to construe the mail and wire fraud statutes. In *McNally*, the Court predicated its interpretation of the mail fraud statute in part on the principle that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." 483 U.S. 350, 359 (1987). The Court echoed that rationale in *Cleveland*, explaining that "to the extent that the word 'property' is ambiguous" in the statute, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 531 U.S. at 25 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). "In deciding what is 'property' under [the statute]," the Court stated, "'it is appropriate, before we choose the

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[6] Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 Duq. L. Rev. 771, 771 (1980).

harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Id.* (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)); *accord Skilling*, 561 U.S. at 662. The same principle applies here. At the very least, Congress has provided no clear and definite endorsement of the right-to-control theory, and this Court should resolve any ambiguity against its recognition.

Similarly, this Court has often remarked that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Cleveland*, 531 U.S. at 25 (internal quotation marks omitted). Before federal prosecutors are empowered to substitute their judgment for that of state regulators on how to address deceptions that may affect a person's economic calculus, even those that contemplated no financial harm, Congress must make its intention clear. It has not done so here.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE RIGHT-TO-CONTROL THEORY

Given its tenuous basis, the right-to-control theory has predictably provoked a circuit conflict. Two federal courts of appeals have rejected the theory, correctly recognizing that depriving a person of complete and accurate information when making economic decisions is not a "property" crime within the federal fraud statutes. Three other federal courts, in contrast, endorse the right-to-control theory. And three more have voiced internal confusion about whether and when the right-to-control theory is viable.

This Court should grant review to resolve the conflict. Without its intervention, courts, prosecutors, and individuals will be "left in the odd condition that, depending on where one is charged, a person engaged in identical conduct might either be found guilty of a federal crime (New York City) or not at all (Los Angeles), or maybe (Chicago)." Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes A Crime*, 43 Cardozo L. Rev. 135, 183-84 (2021).

A. The Sixth And Ninth Circuits Have Expressly Rejected The Theory

1. The Sixth Circuit has held that the "right to control" is "not the kind of 'property' right[] safeguarded by the fraud statutes." *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (Sutton, J.). In *Sadler*, a defendant ordered pills from pharmaceutical companies, telling them that her clinic distributed drugs to indigent patients. In fact, the clinic issued painkiller prescriptions to almost anyone who visited, and to patients who did not exist. *Id.* at 588-89.

A jury found the defendant guilty of wire fraud, but the Sixth Circuit reversed. As it explained, the defendant had not "deprive[d]" the companies of "property" because she "paid full price for the drugs she purchased and did so on time." *Id.* at 590. She "may have had many unflattering motives in mind in buying the pills, but unfairly depriving the distributors of their property was not one of them." *Id.* And while the government argued that the defendant's "lies convinced the distributors to sell controlled substances that they would not have sold had they known

the truth," the Sixth Circuit held that the fraud statute "is 'limited in scope to the protection of property rights,' and the ethereal right to accurate information doesn't fit that description." *Id.* at 590-91 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). As the court explained, "the right to accurate information" does not "amount[] to an interest that 'has long been recognized as property.'" *Id.* at 591 (quoting *Cleveland v. United States*, 531 U.S. 12, 23 (2000)).

2. The Ninth Circuit has likewise rejected the right-to-control theory. In *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), the defendant had purchased sensitive technology from U.S. manufacturers, "assur[ing] company representatives that all equipment would be used in the United States," when "the equipment was actually going to West Germany and then on to the Soviet Bloc." *Id.* at 466. "Representatives from these companies testified that they would never have sold to Bruchhausen had they known the truth." *Id.*

Again, the jury found the defendant guilty of multiple counts of wire fraud, but the Ninth Circuit reversed. It recognized that the wire fraud statute "can extend to rights in intangible property." *Id.* at 467. But it held that the manufacturers were not "defrauded of 'property' within the meaning of the statute"; they "received the full sale price for their products" and lost only "control over the destination of their products after sale." *Id.* Although the government argued that "the assurance that the products would be used domestically was . . . part of the consideration for the sale," *id.* at 468, the Ninth Circuit dis-

agreed, explaining that "the interest of the manufacturers in seeing that the products they sold were not shipped to the Soviet Bloc in violation of federal law is not 'property' of the kind that Congress intended to reach in the wire fraud statute." *Id.* at 468. In so holding, the court explicitly acknowledged its departure from and "disagree[ment] with the Second Circuit's approach." *Id.* at 468-69 n.4.

Recently, the Ninth Circuit rejected a similar theory in the analogous context of bank fraud. *See United States v. Yates*, 16 F.4th 256, 264 (9th Cir. 2021) (analyzing the "scheme or artifice to defraud" element "identically for the mail, wire, and bank fraud statutes"). There, the government had argued that the defendant bank officials had sought to deprive the bank of a property interest in "accurate financial information in the bank's books and records." *Id.* The court rejected that argument, stating that "[t]here is no cognizable property interest in 'the ethereal right to accurate information.'" *Id.* at 265 (quoting *Sadler*, 750 F.3d at 591). The court added that while trade secrets or confidential business information can constitute property, "the right to make an informed business decision and the intangible right to make an informed lending decision cannot." *Id.* (internal quotation marks and citation omitted). Because the jury may have relied on that flawed theory, the court vacated the defendants' convictions. *Id.* at 266, 269; *see also id.* at 265 (not reaching the question of the validity of the government's new theory that "what it really meant was that the defendants' decep-

tion deprived the bank of its property rights in restructuring delinquent loans and pursuing debt collection").

B. The Second, Eighth, And Tenth Circuits Embrace The Theory

In contrast, the right-to-control theory is "well-established" in the Second Circuit. App. 4a n.2. For many years, the Second Circuit has held that the object of a fraud scheme can be the victim's amorphous right to control its assets. *See, e.g.*, *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017) (citing cases). Relying on that precedent, but extending it to new lengths, the panel here held that Mr. Ciminelli and his co-defendants "deprived Fort Schuyler of 'potentially valuable economic information' . . . that would have resulted from a truly fair and competitive RFP process." App. 18a.

The Eighth Circuit has likewise affirmed a mail fraud conviction premised on an alleged "deprivation of the right to control spending." *United States v. Shyres*, 898 F.2d 647, 652-53 (8th Cir. 1990). And the Tenth Circuit has reversed a dismissal of an indictment that was premised in part on the right-to-control theory, holding that "[a]t this preliminary stage, *i.e.*, subject to proof at trial," the right-to-control theory of fraud "remains viable." *United States v. Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003). In its view, "the intangible right to control one's property is a property

interest within the purview of the mail and wire fraud statutes." *Id.*[7]

C. The Third, Seventh, And Eleventh Circuits Have Unclear Positions

In the Third, Seventh, and Eleventh Circuits, the fate of the right-to-control theory is unclear—not because these circuits have yet to address the issue, but because cases or judges within each circuit have expressed disagreement or confusion about the scope of the right-to-control theory.

The Third Circuit, for example, initially rejected a claim that "a deprivation of control over how money is spent can constitute an actual loss of money or property," explaining that the various conduct alleged against the defendants (*e.g.*, concealment of kickbacks to avoid withdrawals of pension funds) failed to "cause[] a loss" to the deceived party and was not cognizable as property fraud. *United States v. Zauber*, 857 F.2d 137, 145-48 (3d Cir. 1988). Later, and contrary to *Zauber*'s explicit language, the Third Circuit asserted that *Zauber* did not "categorically reject[] the contention that the 'right to control' one's property is itself a property interest." *United States v. Al*

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[7] Several other circuits have embraced the right-to-control theory of fraud in dicta. *See, e.g.*, *United States v. Gray*, 405 F.3d 227, 234 (4th Cir. 2005) ("A property owner has an intangible right to control the disposition of its assets."); *United States v. Madeoy*, 912 F.2d 1486, 1492 (D.C. Cir. 1990) (holding that fraud statute "does . . . protect intangible property, as well as the right to decide how to use that property"); *United States v. Fagan*, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987) ("We believe that there is sufficient evidence that the scheme here was one to deprive Texoma of its property rights, *viz.*: its control over its money.").

Hedaithy, 392 F.3d 580, 603 (3d Cir. 2004).

The Seventh Circuit has also issued seemingly inconsistent opinions on the right-to-control theory. *Compare United States v. Catalfo*, 64 F.3d 1070, 1077 (7th Cir. 1995) (upholding fraud conviction based on victim's "right to control its risk of loss"), *with United States v. Walters*, 997 F.2d 1219, 1226 (7th Cir. 1993) (finding that university's "right to control" who receives scholarships is not a cognizable property right under the fraud statutes: "[A] university that loses the benefits of [the] amateurism [of an athlete] . . . has been deprived only of an intangible right.").

Finally, the Eleventh Circuit has precedent that could be read as rejecting the right-to-control theory. In *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), the Eleventh Circuit reversed convictions based on a scheme to trick men into entering bars and night clubs, where they purportedly got exactly the drinks they paid for. The court explained that "a schemer who tricks someone to enter a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick." *Id.* at 1313. "For if there is no intent to harm, there can only be a scheme to *deceive*, but not one to *defraud*." *Id.*

Although the court suggested its position was in line with the Second Circuit's, *see id.* at 1314, it also made clear that only a lie about "the nature of the bargain itself," either "about the price (e.g., if he promises that a good costs $10 when it in fact costs $20) or … about the characteristics of the good (e.g., if he promises that a gemstone is a diamond when it is in fact a cubic zirconium)" would qualify, *id.* at 1313-14. That approach would exclude deception that bears only on

the right to control assets. And a few years later, in another wire fraud case, the Eleventh Circuit upheld a conviction for wire fraud where the defendant *did*, in fact, make misrepresentations about price and quality, by "charg[ing] customers for drinks they did not order," and "l[ying] to customers about the number and kind of drinks they were being charged for." *United States v. Feldman*, 931 F.3d 1245, 1258 (11th Cir. 2019); *but cf. id.* at 1265 (Pryor, J. concurring) (writing separately to question *Takhalov*'s analysis).

In sum, the various opinions in these circuits underscore that without this Court's guidance, the courts of appeals are at sea. This Court's intervention is necessary to address the existing conflicts and prevent further confusion.

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING IT

Resolving the conflict in the circuits is critically important. Beyond addressing the unjustified intrusion on individual liberty and resolving the uncertainty, review is warranted to preserve the balance between federal and state criminal justice systems. And this case provides the ideal opportunity to correct the error inherent in the right-to-control theory.

A. Limiting The Fraud Statutes Is Important

1. Resolution of the question presented is vitally important for courts, prosecutors, and individuals. As discussed, courts are in disarray on the validity of the right-to-control theory; prosecutors' ability to indict on that theory varies by jurisdiction; and individuals may be exposed to prosecution based on the vagaries

of venue and which state lines a wire transmission crossed. This Court should intervene to ensure that the mail and wire fraud statutes' "highly abstract general statutory language" is not construed to place a "power in the hands of the prosecutor" in New York that is denied to her counterparts in Ohio or California. *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018).

2. Beyond the unfairness resulting from a patchwork interpretation of federal law, this case implicates federalism concerns. As noted, the right-to-control theory upsets the constitutional balance of federal and state regulation. In the mail and wire fraud context, this Court has cautioned against "a sweeping expansion of federal criminal jurisdiction" into an area "traditionally regulated by state and local authorities," absent "a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *accord McNally v. United States*, 483 U.S. 350, 360 (1987). The right-to-control theory gives federal prosecutors a weapon to criminalize a broad array of corporate, personal, and professional relationships ordinarily left to state regulation. Such an unjustified shift in authority merits this Court's review.

B. This Case Is The Ideal Vehicle For Review

This case squarely presents the question whether the right-to-control theory is a viable theory of fraud: Petitioner was unquestionably convicted under the right-to-control theory, rather than a traditional property fraud theory. The jury instructions made clear that the deprivation of "money or property" necessary to find an unlawful scheme "includes intangible interests such as the right to control the use of

one's assets"; that interest "is injured," the court instructed, "when [the victim] is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." C.A. App. 1554. The government's proof was consistent with that theory; it did not seriously contend that Mr. Ciminelli or his co-defendants contemplated that Fort Schuyler would overpay for LPCiminelli's work or receive lesser work than it bargained for. from that company. Nor did the government establish that Fort Schuyler could have obtained better quality or a better price from any other provider. *See supra* at 6-7. For that reason, the court of appeals upheld his conviction solely on the right-to-control theory, recognizing that circuit law precluded Mr. Ciminelli's challenge to it. App. 4a n.2, 16a-23a. If this theory of fraud is invalid, his conviction must be vacated.

Although this Court has denied other petitions seeking resolution of the conflict over the right-to-control theory, the obstacles previously cited by the government in opposing review are not present here. In some cases, the government argued that the petitioner was not convicted under a right-to-control theory at all.[8] In others, the government highlighted

[8] U.S. Br. in Opp., *Kelerchian v. United States* (No. 19-782), 2020 WL 2066714, at *7-8 ("The phrase 'right to control' does not appear anywhere in the indictment. And the jury was not instructed on a 'right to control theory."); U.S. Br. in Opp., *Aldissi v. United States* (No. 19-5805), at 8-9 ("[P]etitioners were not convicted under a ' right to control' theory, and their objections to such a theory are accordingly misplaced").

that the petitioner was indicted under both a traditional fraud theory and a right-to-control theory.[9] And in still others, the government pointed out that the scheme at issue did cause traditional economic harm.[10]

This case, by contrast, cleanly presents the question whether the right-to-control theory of fraud is viable. That is the only basis for petitioner's conviction. Because the attenuated application of the fraud statutes represented by the right-to-control theory is

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[9] U.S. Br. in Opp., *Viloski v. United States* (No. 16-508), 2017 WL 382956, at *5 (arguing that indictment gave petitioner "adequate notice of two theories of mail fraud liability": "1) a scheme to obtain money or tangible property; and 2) a scheme to deprive Dick's of potentially valuable information that could impact its business decisions"); U.S. Br. in Opp., *Viloski v. United States* (No. 14-472), 2015 WL 3408684, at *22 ("[T]he indictment as amended alleged both a right-to-control theory and the straightforward deprivation of 'money or tangible property.'").

[10] U.S. Br. in Opp., *Gatto v. United States* (No. 21-169), 2021 WL 5206520, at *19-20 (quoting court of appeals' conclusion that "[t]here is no doubt that the Universities' scholarship money is a property interest with independent economic value"); U.S. Br. in Opp., *Johnson v. United States* (No. 19-1412), 2020 WL 5719653, at *13 ("[P]etitioner's misrepresentations had the effect of causing Cairn to spend—and HSBC to receive—more money, the quintessential transferable property."); U.S. Br. in Opp., *Binday v. United States* (No. 19-273), 2020 WL 58597, at *9, 12-13 (arguing that "petitioner was not convicted merely because he deprived insurers of a "right to control,'" but rather that "ample evidence established that the insurance companies in fact suffered economic harms because they issued STOLI policies that had economic characteristics that made them less likely to be profitable than the non-STOLI policies that the insurers thought they were issuing"); U.S. Br. in Opp., *Binday v. United States* (No. 15-1140), 2016 WL 2766151, at *20-22 (same).

squarely presented in this case, this is the perfect case for resolving the longstanding circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 18, 2022