No. 21-1170

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

REPLY BRIEF FOR PETITIONER

Michael R. Dreeben
Counsel of Record
Kendall Turner
Grace Leeper
Jenya Godina
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300
mdreeben@omm.com

Attorneys for Petitioner Louis Ciminelli

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REPLY BRIEF FOR PETITIONER

The government defends the Second Circuit's judgment as if the petition challenges jury instructions. It does not. The petition challenges the court's central legal holding that the right-to-control theory states a valid basis for wire-fraud liability and that, under that theory, the evidence was sufficient. The right-to-control theory eviscerates the core requirement of wire fraud—that the object of the scheme is to deprive the victim of money or property—and permits conviction based on deception about information that a party might consider valuable before transacting. This is not a deprivation of any property, tangible or intangible—it is a purely informational deprivation (one that Congress has not criminalized). The

government's rewriting of the question presented to ask about the "jury instructions," BIO (I), cannot obscure the court's legal holding. Nor does the government's interpretation of the instructions hold water. This prosecution proceeded on a right-to-control theory, not a traditional property theory.

The government's move is understandable. The right-to-control theory rests on a conception of "property" foreign to the common law. The government barely defends it. Its brief ignores the bulk of petitioner's arguments, and its few responses conflict with the statutory text, this Court's precedent, and the statute's common-law roots. The government likewise fails to distinguish the decisions from other courts of appeals rejecting the rule adopted by the decision below. Although it argues that the fraud in those cases concerned a "non-essential" term of the relevant transaction, that distinction is arbitrary. In the Sixth and Ninth Circuits (at the very least), this prosecution would have failed. That it succeeded in the Second Circuit—and that it invites prosecutors to dilute fraud theory to charge a federal crime even when they cannot prove intended financial harm—underscores why this conflict deserves review.

The government never disputes the importance of the question presented. And its vehicle arguments offer no reason to leave this conflict unresolved. Rather than avoid an issue that has long divided the circuits, this Court should grant certiorari to resolve it.

A. This Case Squarely Presents The Second Circuit's Diluted Right-To-Control Theory

1. The court of appeals explicitly held 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 that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision." Pet. App. 17a (internal quotation marks omitted). That is the rule petitioner challenges. The government's opposition scarcely acknowledges this holding.

But that holding's validity is squarely presented. Petitioner raised that legal question in challenging the sufficiency of the evidence—not the adequacy of the jury instructions. Pet. App. 14a-22a (rejecting sufficiency challenge); *id.* at 4a n.2 (recognizing preserved challenge to the right-to-control theory); *id.* at 26a-31a (separately analyzing jury instructions). And "[a] reviewing court's limited determination on sufficiency review . . . does not rest on how the jury was instructed." *Musacchio v. United States*, 577 U.S. 237, 243 (2016). This petition focuses on the sufficiency issue alone, contending that the Second Circuit used a *legally invalid* definition of the elements in finding the evidence sufficient to support petitioner's conviction. Pet. i.

b. The government seeks to change the subject; it converts the case into a jury-instruction challenge and argues that the instructions required a showing of tangible property harm. BIO 10, 23-24, 26-28, 30.

But that effort fails: the instructions allowed a conviction without proof of a scheme to deprive the purported victim of a cognizable property interest.

The instructions stated: "If all the government proves is that the defendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the government will not have met its burden of proof." Pet. App. 61a. But on reading the rest of the instructions, the reference to "tangible economic harm" proves to be a stand-in for the right-to-control theory.

Immediately after referring to "tangible economic harm," the instructions state that "economic harm is not limited to monetary loss," but exists whenever "the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." *Id.* at 61a. To the extent decipherable, this instruction allowed the jury to find an "economic" discrepancy *without* "monetary loss." That can only mean that even if the purported victim got what it paid for—and the scheme contemplated nothing else—some abstract non-monetary (but somehow "economic") *informational* impact was enough. The pivotal language in the instructions confirms this reading: the jury could deem the victim's "right to control the use of its assets . . . injured when it is deprived of *potentially valuable economic information* that it would consider valuable in deciding how to use

its assets." *Id.* (emphasis added). Nothing in that instruction required intended *financial harm*.

But parsing the instructions is beside the point. In articulating the holding challenged here, the Second Circuit dispensed with the indispensable prerequisite of fraud—intended harm to property—and substituted a diluted informational offense of "foreseeably conceal[ing] economic risk or depriv[ing] the victim of the ability to make an informed economic decision." Pet. App. 17a. And it analyzed sufficiency under that standard. *Id.* at 18a-22a. The question presented is whether this watered-down, right-to-control theory is valid.

B. The Right-To-Control Theory Is Flawed

The government presents scant defense of the theory. It never responds to petitioner's argument that this theory has no basis in the common law. It does not explain how this theory can be reconciled with statutory history, *see* Pet. 20-21 (explaining limited congressional revival of intangible rights), or *Skilling v. United States*, 561 U.S. 358 (2010), *see* Pet. 21-22 (explaining how the right-to-control theory circumvents *Skilling*). And the government brushes aside fair notice, lenity, and federalism concerns through its mistaken reliance on the jury instructions. *Compare* BIO 26, *with* Pet. 22-25. The few merits arguments the government offers fail.

1. The right-to-control theory imports into fraud offenses a category of "property" that lacks the common-law pedigree that those statutes embody. *See* Pet. 14-17. A "right to complete and accurate information when making decisions about property" bears

no resemblance to common-law property interests. *See id.* It therefore falls outside the "traditional concepts of property" that federal fraud statutes protect. *Cleveland v. United States*, 531 U.S. 12, 24 (2000).

The government responds with a late twentieth-century case construing the gift-tax provisions of the Internal Revenue Code. BIO 22 (citing *Dickman v. Comm'r*, 465 U.S. 330 (1984)). *Dickman* said *in that context* that "property" is "the sum of all the rights and powers incident to ownership," of which "the right to *use* the physical thing to the exclusion of others is the most essential and beneficial." 465 U.S. at 336 (citations omitted).

But *Dickman* affords no basis for expanding the meaning of property in federal fraud law. It reflects a modern view of property as "a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property." *United States v. Craft*, 535 U.S. 274, 278 (2002) (citing *Dickman*, 465 U.S. at 336). That makes sense in the gift-tax context. "Property" there is "used in the broadest and most comprehensive sense . . . reaching every species of right or interest protected by law and having an exchangeable value." *Dickman*, 465 U.S. at 334-35 (internal quotation marks omitted).

Such broad notions of property have no place in federal criminal law. On the contrary, *Cleveland* rejects "sweeping expansion[s] of federal criminal jurisdiction in the absence of a clear statement by Congress" and limits the reach of the mail and wire fraud statutes to "traditional concepts of property." 531 U.S. at 24. The expansive "bundle of sticks" concep-

tion was an innovation of twentieth-century progressive reformers, and it could not have informed the meaning of "property" in federal fraud statutes that date to 1872. Pet. 16 & n.5. Beyond that, *Dickman* held only that an interest-free loan is a gift of the use of money. 465 U.S. at 335-38. But treating the "right to use" money as a gift of "property" for gift-tax purposes does not justify the leap to finding that depriving a person of the ethereal "right to accurate information" bearing on economic decisions deprives one of "property."

2. The right-to-control theory also conflicts with the fraud statutes' text, which requires that money or property be "obtain[ed]." 18 U.S.C. §§ 1341, 1343. A defendant cannot "obtain" the putative victim's *right to control* his assets. The government suggests that *Carpenter v. United States*, 484 U.S. 19 (1987), proves that the fraud statutes are not "limited to property interests 'that can be'" obtained—that is, "'transferred from the alleged victim to the defendant.'" BIO 24-25 (citation omitted). But *Carpenter* proves the opposite. There, the "object of the scheme was to take the [newspaper's] confidential business information." 484 U.S. at 25. "Confidential business information has long been recognized as property." *Id.* at 25-26. And the information there was both transferable and "obtained" as part of the insider-trading scheme. The offense in *Carpenter* thus exemplified property fraud as *Skilling* later described it: a crime 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. The right-to-control theory defies that paradigm.

The government concedes that the word "obtaining" in the Hobbs Act requires "transferable" property. BIO 25. But it erroneously suggests that "obtaining" has a different meaning in the fraud statutes. *Id.* This Court presumes "that the same language in related statutes carries a consistent meaning." *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019). Adhering to that principle, this Court has relied on the mail and wire fraud statutes to interpret the Hobbs Act. *See Sekhar v. United States*, 570 U.S. 729, 737 (2013). The government offers only the imagined distinction that the mail fraud statute "does not specify a particular source for property that the defendant intends to obtain." BIO 25. But that is obvious from the text: the property must be obtained *from the victim of deception*. *See* 18 U.S.C. § 1343. Besides, even the government does not dispute that the object of the deceptive scheme must be to obtain property from *someone*. When the alleged "property" is only the victim's "right to control" its assets, there is nothing to obtain.

C. The Courts Of Appeals Are Divided On The Right-To-Control Theory

The government suggests that the decision below does not conflict with *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014), and *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), because the alleged "deception in this case did concern an essential element of the bargain," whereas the alleged deception in those cases did not. BIO 27-28 (internal quotation marks omitted). As the petition explained, no principled basis exists for distinguishing between "essential" and "non-essential" terms of a bargain. *See*

Pet. 23. Indeed, in the cited Sixth and Ninth Circuit cases, the government itself argued that the defendants' alleged fraud *did* go to an essential term of the relevant bargains. Those courts ruled against the government not based on a *factual* rejection of that premise, but on the more fundamental repudiation of the government's theory that an informational deception about a precondition for contracting can constitute *property* fraud.

In *Sadler*, a defendant bought pills from a pharmaceutical company after falsely assuring the company that the pills were for indigent patients. The government argued that pill distributors "would not have sold" to defendant "had they known the truth," 750 F.3d at 590-91—that is, that "accurate information" about the pills' recipients was essential to the bargain. The Sixth Circuit rejected that argument, explaining that "the 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 591 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

In *Bruchhausen*, the defendant bought sensitive technology from U.S. manufacturers, "assur[ing] company representatives that all equipment would be used in the United States," when it was actually going to the Soviet Bloc. 977 F.2d at 466. As in *Sadler*, the government argued that the misrepresentation went to an essential part of the bargain—specifically, that "the assurance that the products would be used domestically was . . . part of the consideration for the sale, and the manufacturers were defrauded of that portion of their bargain." *Id.* at 467-68. The Ninth

Circuit, like the Sixth Circuit, rejected that argument, finding that the sellers' interest in information was not protected property. *Id.* at 468. The Ninth Circuit explicitly acknowledged its "disagree[ment] with the Second Circuit's approach" under the right-to-control theory. *Id.* at 468-69 n.4. And it recently reaffirmed that disagreement in holding that "ethereal" informational deprivations are not fraudulent. *United States v. Yates*, 16 F.4th 256, 265 (9th Cir. 2021); Pet. 28.

Given the lack of any principled basis for saying what terms are "essential," Pet. 23, these cases lay bare the disagreement in the circuits. Two circuits treat "the ethereal right to accurate information," *Yates*, 16 F.4th at 265 (quoting *Sadler*, 750 F.3d at 591), as falling outside the property-fraud statutes; in the Second Circuit, prosecutors may rely on that theory. Other circuits have wrestled with the theory for years. *See* Pet. 29-32. This Court should intervene to restore a nationally uniform interpretation.

D. The Question Presented Has Pressing Importance And This Is The Right Vehicle To Resolve It

1. The government does not dispute that this issue is significant. The right-to-control theory enormously extends the fraud statutes: it comes into play only when the government *cannot* prove traditional property fraud. Pet. 23. Why else does the doctrine exist? Its purpose is to lighten the government's burden when proof of harm is missing. But punishing *deception* without intended harm to property is the job of state law or other statutes. This Court should reaffirm that principle. *See* Pet. 32-33.

2. The government suggests that this case is a poor vehicle because it really involved traditional property fraud or any error was harmless. That is wrong.

a. The government errs in contending that this case simply involved classic money or property fraud. Although the government claims the alleged "scheme deceived Fort Schuyler into awarding contracts to [LPCiminelli], rather than other companies that could have provided better rates or superior services," BIO 22, there is no support for this proposition. The part of the record the government cites, *see id.*, relies on the testimony of two contractors; this evidence was not introduced to show—and did not show—that developers other than petitioners could have completed the same work more inexpensively. Rather, this testimony was admitted to illustrate only "the normal range of a development fee," not an appropriate range "in this case." C.A. App. 1291. Indeed, the district court recognized that the testifying contractors knew nothing about the specific projects in question. *See id.*

The government's reliance on this testimony to show harm to Fort Schuyler is not only unfounded; it is unfair. In the district court, the government successfully precluded petitioner from introducing evidence about the fairness of his fee or the quality of his services because—the government then claimed—such evidence is irrelevant under the right-to-control theory. *Id.* at 999, 1002, 1130; *see* Pet. App. 21a. The government cannot now rely on the same evidence petitioner was prevented from rebutting and reframe it as supporting the precise theory of financial harm that the government disavowed at trial.

b. The government claims that the Second Circuit deemed any error harmless. BIO 28-29. That distorts the opinion. The Second Circuit held only that there was "no harmful error[] in the district court's right-to-control jury instruction." Pet. App. 29a. Put differently, the court thought any deviation from the circuit's right-to-control instructions was not prejudicial. That is a far cry from saying that no prejudice occurred *if the right to control theory were invalid.*

In the courts below, the government never raised a harmless-error defense with respect to *that* question. *See* Gov't C.A. Br. 56, 66-67, 78-84, 92, 179. Understandably, therefore, the Second Circuit never conducted a fact-specific harmlessness inquiry on the question presented here. The Court should not do so in the first instance. This Court's "normal practice" when confronted with harmless-error arguments is to resolve the question presented and then "remand th[e] case to the" court below "to consider in the first instance whether the [particular] error was harmless." *Neder v. United States*, 527 U.S. 1, 25 (1999).

c. Finally, the government errs in equating this case with petitions in which this Court has denied review of the question presented. BIO 29-30. Here, unlike in those cases, there is no evidence of intended *financial* harm and the conviction does not rest on such evidence. *See supra* at pp.4-5, 11; Pet. 34-36 & nn.8-10. Nor can the government shift ground and argue that "Fort Schuyler's money" was obtained by fraud. BIO 29. If *that* had been the government's theory, the parties would have tried a different case with different evidence. The conviction cannot be saved based "on legal and factual grounds that were never

submitted to the jury." *McCormick v. United States*, 500 U.S. 257, 269 (1991). And the Second Circuit expressly disclaimed reliance on any evidence of financial loss, saying that such proof was "not necessary" to affirm petitioners' convictions under the right-to-control theory. Pet. App. 17a.

This case thus cleanly presents the question whether the right-to-control theory is valid. The Court should grant certiorari to answer it.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted.

Michael R. Dreeben
Counsel of Record
Kendall Turner
Grace Leeper
Jenya Godina
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300
mdreeben@omm.com

Attorneys for Petitioner
Louis Ciminelli