No. 21-1170

In The Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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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 and are parties in this Court pursuant to Supreme Court Rule 12.6.

Respondent is the United States of America, appellee below.

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BRIEF FOR PETITIONER

INTRODUCTION

This case involves a paradigmatic overextension of federal fraud law: the prosecution of property fraud under the "right to control" theory. Contrary to that theory, the federal fraud statutes do not afford all-purpose protection of ethereal interests. Yet the right-to-control theory has that impermissible effect, extending the statutes far beyond the protection of traditional property rights.

Under the right-to-control theory, a property interest is harmed when a defendant schemes to "deprive 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 scheme to harm traditional property interests. 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. A scheme that deprives a person of information alone may violate a sense of moral uprightness; it does not establish a scheme or artifice to obtain money or property by means of deception. Because the right-to-control theory formed the sole basis for the court of appeals' holding that the evidence was sufficient to support petitioner's conviction, this Court should reverse.

OPINIONS BELOW

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

JURISDICTION

The court of appeals entered judgment on September 8, 2021, and denied rehearing on November 1, 2021. J.A. 22, Pet. App. 57a-58a. On January 7, 2022, this Court extended the time to file a petition for a writ of certiorari until March 1, 2022. The petition was filed on February 18, 2022 and granted on June 30, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute, 18 U.S.C. § 1343, provides in relevant 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.

STATEMENT

A. The Buffalo Billion RFP

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. Pet. App. 5a. The vehicle for these public-private partnerships was 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 award particular contracts or establish terms for particular projects. *Id.*; J.A. 51-53.

In 2013, the board of directors for Fort Schuyler issued an RFP to select "preferred developer[s]" for

revitalization projects in Buffalo. Pet. App. 7a-8a. The RFP included requirements for potential developers, 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 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; J.A. 71, 93-94. 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. Pet. App. 12a.

Investigators subsequently uncovered evidence that a member of Fort Schuyler's board—Dr. Alain 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 certain of LPCiminelli's qualifications and attributes so that the bidding process would favor LPCiminelli's selection as a preferred developer. *Id.* at 5a, 8a-9a. No evidence existed that Mr. Ciminelli directed changes to the RFP's terms. Nevertheless, federal prosecutors obtained an indictment against Mr. Ciminelli and others involved in the RFP process. *Id.* at 13a. As relevant here, the 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 RFP, in violation of 18 U.S.C. §§ 1343 and 2 (Count Four). *Id.*[1] The superseding indictment relied exclusively on the "right to control" theory of fraud, alleging that the defendants "devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm," through false representations about the fairness and competitiveness of the bidding process. J.A. 31-34 (trial indictment filed July 7, 2018).

B. District Court Proceedings

1. At trial, the government offered proof that Mr. Ciminelli and Dr. Kaloyeros conspired with others to tailor the Buffalo RFP so that LPCiminelli would be selected as a preferred developer. 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. Pet. App. 6a-11a.

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

[1] The superseding indictment also included similar allegations for an RFP for a preferred developer in Syracuse. Pet. 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.

the same quality or a better price for the work from any other provider.[2] And the defense was prohibited from introducing contrary evidence on this point on the premise that such evidence was irrelevant. J.A. 46, 60-62. The district court denied oral motions for acquittal attacking the sufficiency of the evidence and the right-to-control theory. Pet. App. 13a-14a.

2. Over objection, the court instructed the jury on an expansive right-to-control theory of fraud. J.A. 40-43, 103. 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 41a. 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 found Mr. Ciminelli guilty of conspiracy and substantive wire

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[2] The testimony of two contractors cited by the government in its brief in opposition, *see* BIO 22, was not introduced to show—and did not show—that developers other than LPCiminelli could have completed the same work at a lower price or with superior quality. Rather, this testimony was admitted to illustrate only "the normal range of a development fee," not an appropriate range "in this case." J.A. 73. Indeed, the district court recognized that the testifying contractors knew nothing about the specific projects in question. *See id.*

fraud charges. Pet. App. 14a. Although Mr. Ciminelli and his co-defendants renewed their Rule 29 motions, the district court denied them at each of the defendants' sentencings. *Id.* The district court sentenced Mr. Ciminelli principally to 28 months' imprisonment. *Id.*

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," Pet. 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 that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision.'" *Id.* at 17a (quoting *United States v. Binday*, 804 F.3d 558, 579 (2d Cir. 2015)). 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 misrepresentation 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 court went on to address the absence of proof of economic harm. The court 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 court's view, that evidence is not "a requisite for conviction." *Id.* at 21a. Instead, the informational deprivation in the RFP

process itself constituted all the harm to "property" the government needed to show.[3]

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." Rehearing Pet. 6. The Second Circuit denied the petition. Pet. App. 57a-58a.

SUMMARY OF ARGUMENT

The right-to-control theory of wire fraud is invalid. The theory dispenses with the traditional common-law requirement of fraud: proof of intended harm to a recognized property interest. Instead, it finds a scheme to defraud when a person is "depriv[ed] of information necessary to make discretionary economic decisions." Pet. App. 17a (internal quotation marks omitted). But an informational deprivation, standing alone, is not a deprivation of money or property. The theory opens up wide swaths of conduct to prosecution

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[3] 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. Pet. 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. *See supra* at 6 n.2. Beyond that, the 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. Pet. App. 18a.

and offends multiple principles of statutory construction. Because the theory does not state a valid basis for federal fraud liability, this Court should reverse.

I. The right-to-control theory is inconsistent with the statutory text. This Court has made clear that the federal fraud statutes reach only schemes to deprive a victim of a *traditional* property interest. *McNally v. United States*, 483 U.S. 350 (1987); *Cleveland v. United States*, 531 U.S. 12 (2000). The right-to-control theory finds no home in traditional common-law understandings of property: No traditional property interest is infringed by the deprivation of complete information bearing on economic decisions. And a modern-day "bundle of sticks" approach cannot rescue the theory. Under the fundamental principle that statutory language is interpreted as of the date of enactment, the twentieth century bundle-of-sticks approach to property does not apply. But even if it did, the right-to-control theory would fail: The absence of complete information does not automatically deprive the holder of its control over assets; the power to exercise control remains with the holder. And for similar reasons, a person who withholds economically valuable information does not "obtain" the right to control assets. The right-to-control theory thus falls outside the statutory text.

II. The theory also contradicts the structure of the fraud statutes. First, the deprivation of economic information is not an intangible right that Congress reinstated after *McNally*. Congress protected only "the intangible right of honest services," 18 U.S.C. § 1346, not the right to make informed economic decisions. Second, the theory circumvents and defeats

the limitations on honest-services prosecutions announced in *Skilling v. United States,* 561 U.S. 358 (2010). To avoid unconstitutional vagueness, *Skilling* limited honest-services prosecutions to bribes and kickbacks—specifically rejecting undisclosed conflicts of interest as a basis for conviction. *Id.* at 404-13. Yet the right-to-control theory allows the government to prosecute undisclosed conflicts of interest as property frauds. It thus lets in the back door what this Court escorted out the front, while raising all the same vagueness concerns. Third, the theory collapses three distinct elements of fraud—fraudulent intent, contemplated harm to property, and materiality—into a single element: deception about economic information. This Court does not interpret statutes to treat separate elements as equivalents. *United States v. Taylor*, 142 S. Ct. 2015, 2024 (2022).

III. The theory also flouts multiple principles of statutory construction. First, the theory is incurably vague. The ever-finer (and inexplicable) distinctions in the case law underscore the theory's inherent elusiveness. And its vagueness lays traps for individuals in a host of commercial settings. Tough negotiations can easily be second-guessed as fraudulent if the withholding of economically valuable information counts as fraud. And a criminal theory that dispenses with proof of intent to inflict concrete harm invites overreaching. Second, the theory alters the federal-state balance by overlaying federal power into domains traditionally regulated by the states. And, third, interpreting the statute to encompass the ethereal and counter-textual right-to-control theory violates the rule of lenity.

IV. Because the sole basis for petitioner's prosecution was the right-to-control theory and the court of appeals upheld the sufficiency of the evidence solely on that basis, the judgment must be reversed and the case remanded for entry of judgment of acquittal. If Congress wishes to depart from traditional concepts of fraud to criminalize the deprivation of an intangible right to information bearing on the right to control assets, "it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

ARGUMENT

THE RIGHT-TO-CONTROL THEORY FAILS TO STATE A VALID BASIS FOR LIABILITY UNDER THE FEDERAL WIRE FRAUD STATUTE

I. THE RIGHT-TO-CONTROL THEORY CANNOT BE RECONCILED WITH THE STATUTORY TEXT

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 to deprive someone of 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).[4] 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 and alterations omitted). This requirement reflects that the fraud statutes are not a general license for "the

[4] 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.

Federal Government … to enforce (its view of) integrity." *Id.* at 1574. The statutes instead "protect[] property rights only." *Cleveland*, 531 U.S. at 19. The Court has accordingly rejected the extension of these statutes beyond traditional property interests.

In *McNally v. United States*, 483 U.S. 350 (1987), 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 by recognizing that intangible interests were covered only if they qualified as traditional property. *Carpenter* held that confidential business information is a cognizable interest because it "has long been recognized as property." 484 U.S. at 26. While an employee's "honest and faithful service" was "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 an employee's "appropriati[on] [of that] confidential business information for his own use" could be

prosecuted as a property fraud. *Id.* at 28.[5]

In *Cleveland*, the Court again rejected decisions extending the federal fraud laws beyond "money and property" offenses. There, the charged scheme involved false statements in applying for state licenses for video-poker machines. The Court held that the scheme did not target the state victim's money or property when it sought to "frustrate[] 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."

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[5] Congress responded 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 services," *Cleveland*, 531 U.S. at 20—not any other intangible right.

Id. at 1573 (internal quotation marks omitted). "Because the scheme here did not aim to obtain money or property," the defendants "could not have violated the … wire fraud law[]." *Id.* at 1574.

B. The Right-To-Control Theory Impermissibly Extends Beyond Traditional Property Interests

The right-to-control theory cannot be reconciled with this Court's cases or with the text of the fraud statutes. This theory "allows for conviction on a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information." Pet. App. 16a (internal quotation marks omitted). The Second Circuit has never been clear on what property interest has been deprived. But whether the theory rests on the deprivation of a right to make informed economic decisions, or on a purported deprivation of a property interest in controlling one's assets, the theory cannot be squared with what the wire fraud statute requires: *deprivation of a traditional property interest*. No traditional property interest is infringed by the withholding of complete and accurate information bearing on economic decisions. And no deprivation of any right to control occurs solely by the withholding of information; the right still rests with the holder. On either account, therefore, the right-to-control theory fails to state a traditional property fraud.

1. No property right exists to make informed economic decisions

a. The Second Circuit's right-to-control doctrine originated in the context of the withholding of economically important information from stockholders. In *United States v. Wallach*, 935 F.2d

445 (2d Cir. 1991), the court upheld mail fraud convictions of defendants who had failed to disclose to shareholders that part of a fee to an outside consultant was actually a kickback to one of the corporation's directors. *Id.* at 460. As relevant here, the prosecution theory was that shareholders were deprived of the "right to control" how the corporation's money was spent. *Id.* at 461. The court sustained that theory through an attenuated chain of reasoning that had little to do with first principles. The court began with the observation that "ownership of stock" is a property interest and leaped from there to the conclusion that informational deprivation impaired "other incidents accompanying the property interest that a stockholder owns." *Id.* at 462.

To categorize that as a property fraud, the court cited mail fraud cases purportedly recognizing the "right to control" as a property interest, but it readily acknowledged that "[d]espite the recurrent references to a 'right to control,' we think that use of that terminology can be somewhat misleading and confusing." *Id.* It then interpreted "the case law" as basing the theory "on a showing that some person or entity has been deprived of potentially valuable economic information." *Id.* at 462-63. With that understanding, the court held that "[b]y concealing this information [about kickbacks], the value of [the corporation's] stock was obscured and the shareholders and the corporation were deprived of the opportunity to make informed decisions." *Id.* at 464.

Wallach stretched the concepts of property fraud beyond previous boundaries by stitching together a disparate variety of sources addressing different

issues.[6] None of its sources addressed the traditional common-law meaning of property as reflected in the mail fraud statute's origins. *Wallach's* historical context may account for this innovation.[7] But the result was the creation of a doctrine with no traditional roots. The court's key reasoning rested on a shareholder's asserted "property interest" in "monitor[ing] and … polic[ing] the behavior of the corporation and its officers," but then leaped to a sweeping—and unprecedented—conclusion: that "the right to complete and accurate information is one of

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[6] Apart from citing mail fraud cases that contain no analysis of traditional property concepts and that all involved kickbacks, *see* 935 F.2d at 462-63 (citing *United States v. Biaggi*, 909 F.2d 662, 687 (2d Cir. 1990); *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990); *United States v. Kerkman*, 866 F.2d 877, 880 (6th Cir. 1989); *United States v. Little*, 889 F.2d 1367, 1368 (5th Cir. 1989)), *Wallach* cited corporate and securities law sources about the obligation of officers to keep and maintain accurate books and records and make appropriate disclosures to shareholders, *id.* at 462, and out-of-context dictum in a decision written by Learned Hand that addressed a typical property fraud, *id.* at 463 (citing *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)). Absent from any of these sources is an analysis of traditional common-law property concepts.

[7] *Wallach* was charged, tried, and decided in the wake of this Court's invalidation of the intangible-rights theory of fraud in *McNally*—and before Congress enacted Section 1346 to reinstate that theory. In that gap, prosecutors invented the right-to-control theory to prosecute kickbacks received by corporate fiduciaries as property fraud without having to prove economic harm to the corporation. *See* Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 161-62 (2021); Criminal Law Scholars *Amici Curiae* Br. at 7-9, *Aiello & Gerardi v. United States*, No. 21-1161 (Mar. 25, 2022).

the most essential sticks in the bundle of rights that comprise" this property interest. *Id.* at 463.

Subsequent Second Circuit cases have described the "concrete harm" in an informational-deprivation fraud case as the denial of the victim's "right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (internal quotation marks omitted). The core element of the theory is that this deprivation of information bearing on an economic decision can amount to a property fraud. But no traditional property interest exists in making informed economic decisions about one's assets, and the Second Circuit has never adequately explained the basis for treating the purported deprivation as a deprivation of property.

b. The reference point for determining the scope of the property interests that the federal fraud statutes protect is the state of the common law at the time these laws were originally enacted and amended. It is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (internal quotation marks and alterations omitted). To "invest old statutory terms with new meanings" would amount to judicial amendment of statutory text. *Id.* That is a particularly unwarranted exercise for a criminal statute, "[f]or under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620-21 (1998). This principle has applied to the mail fraud statute for nearly a century. *See McNally*, 483 U.S. at 360 ("There are no

constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). And because fraud was an offense well known at common law, the Court presumes that Congress intended to incorporate the common-law meaning of "fraud" in the federal fraud laws unless "the text or structure of the fraud statutes" rebuts that presumption. *Neder v. United States*, 527 U.S. 1, 22-23 & n.7 (1999).

The mail fraud statute was enacted in 1872 to cover "any scheme or artifice to defraud" and was amended in 1909 in light of *Durland v. United States*, 161 U.S. 306 (1896), to add the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *McNally*, 483 U.S. at 356-57.[8] Because the original enactment was designed "to protect the people from schemes to deprive them of their money or property" and the post-*Durland* amendment "gave further indication that the statute's purpose is protecting property rights," *id.,* this Court has read the two clauses in tandem as protecting property rights: "As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to

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[8] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323; Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. Congress enacted the wire fraud statute in 1952. Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722. Congress used "identical language" in the wire fraud statute, reflecting its intent to adhere to the meaning of property embodied in the mail fraud statute. *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005) (reading the mail and wire fraud statutes "*in pari materia*"); *see also Carpenter*, 484 U.S. at 25 n.6; S. Rep. No. 44, 82d Cong., 1st Sess., 14 (1951).

the future as well as other frauds involving money or property." *Id.* at 359. Accordingly, the common-law understanding of "property" prevailing at the turn of the century forms the basis for construing these statutes.

The common law offers no support for the Second Circuit's information-based theory of the right to control. The original "Blackstonian trilogy" of property rights has been "translated" as encompassing the rights to exclude (or possess), to use, and to dispose (or transfer). Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 736-37 (1998); *see* 2 William Blackstone, *Commentaries on the Laws of England* 2 (1765) (defining "the right of property" as "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"); 1 William Blackstone, *Commentaries on the Laws of England* 134 (1765) (the right "of property … consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land"). Thus, "the long-standing definition of property in American law [is that] 'property is the exclusive right of possessing, enjoying, and disposing of a thing.'" Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. Pa. L. Rev. 2001, 2014 & n.54 (2009) (quoting *McKeon v. Bisbee*, 9 Cal. 137, 143 (1858)).

This Court has relied on Blackstone to define what "has long been thought to be a species of property" under the wire fraud statute, *Pasquantino v. United States*, 544 U.S. 349, 356 (2005), and it has repeatedly invoked this description of Blackstone's three core

property rights, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945))); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (same, for intangible property). None of these three traditional rights corresponds to the right to make informed decisions about how to use one's assets.

Right to exclude. "The right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021) (quoting *Loretto*, 458 U.S. at 435); *see also Ala. Ass'n of Realtors v. Dep't of Health & Hum. Serv.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (right to exclude "is one of the most fundamental elements of property ownership"). Sometimes called the right to "possess," *see* Merrill, *supra*, at 736, this right concerns access. *See Loretto*, 458 U.S. at 436 (discussing ability to "exclude others"). In this context, "control" has long meant the ability to "eject or evict a wrongful possessor." *Right of Possession*, Black's Law Dictionary (11th ed. 2019); *see also Right of Possession*, Black's Law Dictionary (1st ed. 1891) ("The right to possession which may reside in one man, while another has the actual possession, being the right to enter and turn out such actual occupant."); *Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting from dismissal of appeal) (describing a landlord's "power to end or terminate the physical invasion" of a tenant as the power to "restor[e] control of his property"). The right does not entitle its holder to all the information

pertinent to its exercise. For example, no authority would support the claim that a restaurant is deprived of its right to exclude a diner because the diner has not disclosed that he plans to flee after his meal without paying.

The right to exclude lies at the heart of the intangible property rights that this Court has recognized as traditional property interests. In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court held that "[c]onfidential business information has long been recognized as property," emphasizing that it is "a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy," *id.* at 25-26 (quoting 3 W. Fletcher, *Cyclopedia of Law of Private Corporations* § 857.1, at 260 (rev. ed. 1986)). In *Carpenter* itself, the Court applied that understanding to unpublished articles of the Wall Street Journal, explaining that the Journal "had a property right in keeping" the articles "confidential and making exclusive use, prior to publication, of the schedule and contents." *Id.* at 26. The defendants in *Carpenter* deprived the Journal of that traditional property interest by making unauthorized use of the unpublished columns for securities trading. *Id.* at 28 (one defendant "appropriat[ed] [the Journal's] confidential business information for his own use"). Nothing analogous can be said about a defendant who deprives a putative victim of economically valuable information bearing on *that* person's decisions.

Right to use. The right to use, meanwhile, means the "power to control the use of the property," whether by occupying it, obtaining a profit from it, or otherwise

doing as one pleases with it. *Loretto*, 458 U.S. at 436. But this right has never encompassed the right to full information about potential uses. A developer who does not inform adjacent homeowners of its development plans does not deprive the homeowners of the use of their homes. The homeowners are free to use them as they see fit even if they lack full information.

Right to dispose. This right means only the right to sell or otherwise alienate property. *See Dispose*, Black's Law Dictionary (1st ed. 1891) ("To alienate or direct the ownership of property, as disposition by will."); *Elston v. Schilling*, 42 N.Y. 79, 79-80 (1870) ("conveyance" or sale is "disposal of property"). Like the rights to exclude and use, the right to dispose does not entitle its holder to information that might affect her decisions. The owner of a lot is not deprived of her right to dispose of it if the purchaser withholds information about plans for a new development nearby that will increase the value of the lot before she agrees to sell it to him. So long as the terms of the sale themselves are transparent and non-deceptive, the seller, though unaware of valuable information, is not deprived of a property interest.

The takeaway from the traditional common-law understanding of property is straightforward. Nothing supports the proposition that the three basic rights—to exclude, use, and dispose—encompass a fourth: the right to full and accurate information when exercising those rights. Yet the deprivation of that purported fourth right forms the basis for the Second Circuit's late-twentieth century invention of the right-to-control theory. The theory's departure from the

traditional common law renders it invalid for that reason alone.

c. The Second Circuit has never set forth a traditional common-law basis for the supposed property deprivation underlying the right-to-control theory. Rather, it has relied on the modern-day "bundle of sticks" metaphor. *See Wallach*, 935 F.2d at 463 ("the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest"). But that metaphor cannot salvage the right-to-control theory.

The nontraditional conception of property as a collection of rights—which in certain combinations rise to the level of property—was not developed until long after the mail fraud statute was enacted and amended to its present form. It therefore cannot be the basis for expanding the federal criminal fraud statutes' coverage of property fraud. And even setting aside that temporal disconnect, the right to control is not property even under the bundle-of-sticks metaphor.

i. The bundle-of-sticks theory postdates by several decades Congress's enactment and amendment of the mail fraud statute. The earliest "image" of property as "a bundle" did not appear until 1888, in a "treatise on eminent domain."[9] Even then, the metaphor was embryonic.[10] "Property scholars' histories of the

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[9] Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 Vand. L. Rev. 869, 877 (2013).

[10] *See* Courtney C. Tedrowe, Note, *Conceptual Severance and Takings in the Federal Circuit*, 85 Cornell L. Rev. 586, 589 (2000).

bundle-of-rights metaphor all begin with Wesley Newcomb Hohfeld,"[11] who in 1913 wrote an article[12] that is widely credited with providing the "intellectual justification for this metaphor."[13] But not until the 1920s and 1930s was Hohfeld's theory "popularized" (or less charitably, "co-opted" and "appropriated") by the legal realists as part of a project to expand the power of government.[14] For the realists, "[i]f property ha[d] no fixed core of meaning, but is just a variable collection of interests established by social convention, then there [wa]s no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of general welfare."[15] With the bundle-of-sticks metaphor in hand, they argued "for the modern administrative state to control and restrict various property uses without implicating the constitutional protections of the Takings or Due Process Clauses."[16]

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[11] Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. Cincinnati L. Rev. 57, 62 (2013)

[12] Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

[13] Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 365 (2001); *see also* Baron, *supra*, at 62 & nn.18-22.

[14] Baron, *supra*, at 63 & nn.27-30; *see also* Merrill & Smith, *supra*, at 365 (noting "the motivation behind the realists' fascination with the bundle-of-rights conception was mainly political" to "smooth the way for activist state intervention in regulating and redistributing property" (internal quotation marks omitted)).

[15] Merrill & Smith, *supra*, at 365.

[16] Mossoff, *supra*, at 2007; *see also id.* at 2009 ("These abstract conceptual moves served the political goal of making property

Whether or not the bundle of sticks metaphor justified its proponents' progressive-era regulatory aims, it cannot be projected back in time to guide the interpretation of federal fraud law. The twentieth-century evolution—and expansion—of property concepts cannot be read back into a statute that took shape in the nineteenth century to protect traditional interests and that has long been understood as limited to that realm. *See supra* at 12-15, 18-20.

ii. Even under the theory that property comprises a bundle of sticks, the right to make informed economic decisions cannot be described as property—at the least, not with the clarity required to import it into a criminal statute. *See McNally*, 483 U.S. at 360; *Fasulo*, 272 U.S. at 629. To start, no authority supports the proposition that the right to full information in making decisions about one's assets is a "stick" in the bundle. In fact, no standardized list of sticks exists at all. As Professor Merrill has explained, the "bundle has no fixed core or constituent elements. It is susceptible of an infinite number of variations, as different 'sticks' or 'strands' are expanded or diminished, added to or removed from the bundle altogether."[17] The Second Circuit's right-to-control theory illustrates one of the major problems with superimposing the bundle-of-sticks metaphor onto the

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more plastic as a legal and constitutional restraint on the then-nascent administrative state.").

[17] Merrill, *supra*, at 737; *see also, e.g.*, Tedrowe, *supra*, at 591 ("[T]his picture does not inform us of what sticks are in the bundle or what their interrelationship is with one another, let alone whether fragments of them amount to property … .").

fraud statutes: the metaphor is inherently vague. *See infra* at 41-47.

The lack of a predetermined list of "sticks" (or rights) is hardly the only flaw. In the modern formulation, the bundle represents "a collection of individual rights which, *in certain combinations*, constitute property." *United States v. Craft*, 535 U.S. 274, 278 (2002) (emphasis added). But which sticks, in which combinations, give rise to property? Here, for example, if the right to make informed economic decisions counts as a stick, does that stick, standing alone, rise to the level of property? "[T]he bundle-of-rights metaphor raises the question of how to understand the connection of the component rights to the whole bundle, but it cannot answer that question."[18]

This Court should not adopt a theory of criminal fraud where a critical question about one of the crime's elements "cannot be determined in advance."[19] Property as a bundle of sticks "is little more than a slogan,"[20] and a "befogging" one at that[21]; it cannot be a basis for deciding whether someone committed a federal crime. *See infra* at 41-47. And given the

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[18] Baron, *supra*, at 70; *see also, e.g.*, Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 Ariz. L. Rev. 371, 373-74 (2003); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. Rev. 711, 723 (1996).

[19] Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531, 545-46 (2005); *see also, e.g.*, Tedrowe, *supra*, at 591 ("ambiguity renders application of the bundle-of-rights picture in actual cases very difficult").

[20] Penner, *supra*, at 714.

[21] Merrill, *supra*, at 755.

absence of historical support for the notion that the right to make informed economic decisions counts as property, no source of law is available to cure that ambiguity.

2. *Withholding potentially valuable economic information does not automatically deprive the victim of property*

If a right to control one's assets is understood as the purported property interest supporting the Second Circuit's right-to-control theory, the theory still fails because withholding economically significant information does not, without more, *deprive* a person of that right. The Second Circuit's theory presupposes that a victim is automatically deprived of a "right to control" its assets any time economically valuable information is withheld. But that is not so, as this case illustrates. Fort Schuyler was not deprived of its right to control how its money was spent. It may have based its decision on incomplete information, but it still possessed the right to make a decision. And absent a scheme to *deprive* a person of a protected property interest, a federal fraud-scheme charge will not lie.

The Court has made clear that a scheme must aim at deprivation of a property interest to state a fraud claim. *See Shaw v. United States*, 137 S. Ct. 462 (2016). In a case under the "analogous" bank-fraud statute, *id*. at 467, this Court held that it is not enough for a scheme to deceive a victim; it must also seek to "deprive [the victim] of something of value," *id*. at 469. This is also the prevailing rule under the mail and wire fraud statutes. *See McNally*, 483 U.S. at 358; *see also*, *e.g.*, *United States v. Miller,* 953 F.3d 1095, 1101 (9th Cir. 2020) ("Like the mail fraud statute from which it is derived, the wire fraud statute, in plain and simple

language, criminalizes the use of interstate wires to further, not mere deception, but a scheme or artifice to defraud or obtain money or property, *i.e.*, in every day parlance, to cheat someone out of something valuable.").

"It follows that to be guilty of wire fraud, a defendant must act with the intent not only to make false statements or utilize other forms of deception, but also to deprive a victim of money or property by means of those deceptions." *Miller*, 953 F.3d at 1101. Yet the Second Circuit's right-to-control theory collapses the deception and deprivation elements, thereby relieving the government of the burden of proving a scheme aimed at deprivation of money or property, not just deception.

According to the right-to-control theory, the deception is "the withholding or inaccurate reporting of information that could impact on economic decisions." Pet. App. 16a. But the Second Circuit then presumes that such deception necessarily injures property: "A 'cognizable harm occurs where the defendant's scheme denies the victim the right to control its assets by depriving it of'" the very information that was deceptively omitted. *Id.* at 17a (quoting *Binday*, 804 F.3d at 570). That formulation skips over any analysis of how the withholding of accurate information deprives the victim of property rights the victim otherwise possesses. Even without full information, a victim is still able to control her assets. She simply cannot exercise that right as

effectively as she otherwise might have.[22] Under the right-to-control theory, therefore, the government has proved deception but has not proved an intent to "deprive" the victim "of something of value." *Shaw*, 137 S. Ct. at 469. That is not enough to constitute a property fraud: "[N]ot everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999).

This case illustrates the reach of the government's theory. Without having to prove any intent to harm Fort Schuyler economically—*i.e.,* without showing a scheme to "wrong[] one in his property rights," *McNally,* 483 U.S. at 358 (internal quotation marks omitted)—the government proceeded on the theory that Fort Schuyler was deprived of the ability to fully assess its decision about using its assets. But that informational impairment is not a deprivation. A diminishment of its ability to make informed decisions because of a lack of complete information did not prevent Fort Schuyler from making decisions. The informational deficit that forms the basis of the right-to-control theory thus does not satisfy a core

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[22] If, for example, a financial adviser tricked a customer into relinquishing control of her portfolio, the government could argue that the victim was deprived of the right to make decisions about her assets (although that would not be property fraud for the reasons above). But the right-to-control theory does not require even that; rather, deception about economically valuable information that a person might use in making a decision about the use of her assets is alone enough to prove a deprivation of control. *See* Pet. App. 17a.

requirement of fraud: the deprivation of a property interest.

C. The Right-To-Control Theory Transgresses The Statutory Requirement That The Scheme Aim To Obtain Money Or Property

The right-to-control theory cannot be squared with yet another statutory requirement: that "the scheme" must "aim to *obtain* money or property." *Kelly*, 140 S. Ct. at 1574 (emphasis added).

1. 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. But as noted, *supra* at 19-20, this Court has clarified 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*, which rejected the government's wire fraud theory in part because the defendants did not "commandeer" the bridge's access lanes through their reallocation scheme: "They (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 v. United States*, 561 U.S. 358 (2010), 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." *Id.* at 400. *Carpenter* reflects the same understanding. There, the "object of the scheme was to take the [newspaper's] confidential business information." 484 U.S. at 25. And the information there was both transferable and "obtained" as part of the insider-trading scheme. The "victim's loss" thus "supplied the defendant's gain" in the "mirror image" contemplated by *Skilling*. 561 U.S. at 400. So too in *Pasquantino*, which involved a scheme to defraud Canada of tax revenues by smuggling goods across the border. 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 357-58, "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.

2. 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) (internal quotation marks omitted). 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 perpetrator "'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" to control their assets 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. 537 U.S. 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. This Court presumes "that the same language in related statutes carries a consistent meaning," *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019), and has accordingly relied on the mail and wire fraud statutes to interpret the Hobbs Act, *see Sekhar*, 570 U.S. at 737 (looking to *Cleveland*'s analysis of the mail and wire fraud statutes).

The government has sought to distinguish these Hobbs Act precedents on the ground that the mail fraud statute "does not specify a particular source for

property that the defendant intends to obtain." BIO 25. But this purported distinction is illusory. The natural understanding of a fraudulent scheme is that the property must be obtained *from the victim of deception*. As *McNally* explained, the mail fraud statute was designed to protect against "thieves, forgers, and rapscallions generally," who engage in schemes "for the purpose of deceiving and fleecing the innocent people of the country." 483 U.S. at 356 (quoting Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth)). And this "original impetus," *id.,* was reflected in Congress's use of the phrase "to defraud," which "commonly refer[s] to wronging one in his property rights by dishonest methods or schemes," *id.* at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

3. The statute thus makes clear the gist of fraud: obtaining property from another by deceiving the victim.[23] But the right-to-control theory dispenses with that requirement. The Second Circuit's theory does not require proof that someone "obtained" a right from the putative victim. In the Second Circuit's view, the government can prove its case "where the

[23] This is consistent with the description of false pretenses at common law, which required a parting with and obtaining of the object of the fraud. 2 Joel Prentiss Bishop, *A Treatise on Criminal Law* 388 § 414(3), (4) (9th ed. 1865) (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 the money or chattel, but it is obtained from him by fraud" (internal citation, quotation marks, and footnotes omitted)).

defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." Pet. App. 17a (internal quotation marks omitted). But as this case illustrates, that formulation does not require proof of obtaining: The government did not have to prove that petitioner schemed to wrest Fort Schuyler's decisional authority away from it and exercise it himself. For that reason as well, the right-to-control theory cannot be reconciled with the statute.

II. THE RIGHT-TO-CONTROL THEORY DEFIES THE STRUCTURE OF THE FEDERAL FRAUD LAWS

The right-to-control theory disrupts the structure of federal fraud law in at least three ways. First, it recognizes an intangible right that Congress did not restore after this Court's decision in *McNally*. Second, it end-runs this Court's limitation of the honest-services statute in *Skilling*. And third, it collapses distinct elements of mail and wire fraud, thus eliminating the government's obligation to prove every element of an offense.

A. The Right-To-Control Theory Runs Counter To The Statute's Limited Protection Of Intangible Rights

The right-to-control theory impermissibly protects an intangible right that Congress did not resurrect in *McNally*'s wake. When Congress enacted 18 U.S.C. § 1346 in 1988 in response to *McNally* and *Carpenter*, it amended the fraud statutes to cover "just one" intangible right from among the "universe of intangible-right[s]" previously recognized: the right of honest services. *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (Sutton, J.). The right to control one's assets (or make informed economic decisions) 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.

B. The Right-To-Control Theory Undermines This Court's Holding In *Skilling*

In *Skilling v. United States*, 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 official 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 and thereby secure a conviction under the mail or wire fraud statutes. Likewise, an attorney who fails to disclose a potential conflict of interest to a prospective client would commit not just an ethical breach but federal fraud. The right-to-control theory thus resurrects through a different channel the honest-services theories 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 to let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988). 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. at 1574, 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*").

C. The Right-To-Control Theory Collapses Discrete Statutory Elements, Thereby Lightening The Government's Burden

Under the right-to-control theory, the government can prove the entirety of its case (save use of a wire or mails) through proof of deception alone. The Second Circuit has tried to solve this problem and restore structure to the statute by drawing ever finer lines between elements and making increasingly baffling distinctions. But these efforts find no support in the statutes and only reveal the theory's inherent ambiguity and expansive reach.

1. To prove a violation of the wire or mail fraud statutes, the government must establish several distinct elements: that the defendant "(1) had an intent to defraud, (2) engaged in a fraudulent scheme to obtain [the victim's] money or property," (3) that the scheme involved "material misrepresentations—that is, misrepresentations that would naturally tend to influence, or are capable of influencing, [the victim's] decisionmaking," and, finally, (4) that the defendant "used the wires [or mail] to further that scheme." *United States v. Johnson*, 945 F.3d 606, 612 (2d Cir. 2019); *see Neder v. United States*, 527 U.S. 1, 25 (1999) (holding that materiality is an element of the wire and mail fraud statutes).

The right-to-control theory takes the first three of these elements—fraudulent intent; the requirement of intended harm to property; and materiality—and effectively collapses them into one. All can be established by the government through proof of an economic deception. Initially, the second element—intended harm to property—is virtually synonymous with economic deception. Deception under the right-

to-control theory means "the withholding or inaccurate reporting of information that could impact on economic decisions." Pet. App. 16a (internal quotation marks omitted). Proof of such deception necessarily establishes a deprivation of property. Because a harm to property under the right-to-control theory means a deprivation of "potentially valuable economic information," *id.* (internal quotation marks omitted), the intended property harm element will always be satisfied by the withholding of information that could impact on economic decisions.

The same is true of materiality. A false statement is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question," *Neder*, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts § 538 (1977)), so a false statement that could affect economic decisions will always satisfy this standard. Indeed, some of the early right-to-control cases frame the theory's property deprivation requirement as the deprivation of "economically material information," underscoring that "materiality" and harm to property are indistinguishable in the right-to-control context. *United States v. Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987).

The fraudulent intent element, as viewed through the right-to-control lens, similarly is subsumed by proof of deception. That element is established by proof that "defendants contemplated some actual, cognizable harm or injury to their victims," *United States v. Finazzo*, 850 F.3d 94, 107 n.15 (2d Cir. 2017), which in turn can be satisfied with evidence that the "necessary result" of the deception is to cause harm,

United States v. D'Amato, 39 F.3d 1249, 1257 (2d Cir. 1994) (acknowledging that "[i]n many cases, [the intent] requirement poses no additional obstacle for the government"); *see also United States v. Regent Off. Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970). But because harm under the right-to-control theory is the informational deprivation itself, an economically relevant deception will always establish fraudulent intent. *See Johnson*, 945 F.3d at 614 ("the question of harm in right-to-control cases is a question of fraudulent intent" (internal quotation marks omitted)).

2. The Second Circuit's answer to this problem has been to draw fine lines—lines that find no support in the text, structure, or history of the federal fraud statutes and that are ultimately vague, *see infra* at 41-47. For example, the Second Circuit has attempted to distinguish materiality from fraudulent intent by drawing a "subtle line" between misrepresentations capable of influencing the intended victim and misrepresentations capable of resulting in tangible harm. *Johnson*, 945 F.3d at 614. Such a distinction is meaningless at worst and elusive at best. Because tangible harm under the right-to-control theory is the deprivation of information that could influence economic decisionmaking, no comprehensible distinction separates the Second Circuit's version of materiality and fraudulent intent, as just explained. To the extent one exists, it turns entirely on a judge's or juror's impressionistic view of the case. *See infra* at 41-47 (describing vagueness problems with the theory).

3. The blurring of elements under the right-to-control theory significantly lightens the government's

burden, allowing prosecutors to secure a federal criminal conviction based on evidence of economic deception alone. Yet courts cannot treat elements of a criminal offense as "surplusage," collapsing one on top of the other with the effect of nullifying distinct requirements. *See Jones v. United States*, 529 U.S. 848, 857 (2000) (rejecting boundless interpretation of the federal arson statute that would cover "[p]ractically every building" "in the land," thus effectively eliminating the interstate-commerce element); *see also Boyle v. United States*, 556 U.S. 938, 947 (2009) (interpreting RICO "pattern" and "enterprise" elements as "distinct," such that "proof of one does not necessarily establish the other" (internal quotation marks omitted)). This Court "do[es] not lightly assume Congress adopts two separate clauses in the same law to perform the same work." *United States v. Taylor*, 142 S. Ct. 2015, 2024 (2022). The right-to-control theory's conflation of statutory elements—and the resulting prosecutorial shortcuts it permits—cannot be squared with the structure of the mail and wire fraud statutes and the Court's obligation to keep separate criminal elements distinct.

III. UPHOLDING THE RIGHT-TO-CONTROL THEORY WOULD HAVE UNTENABLE CONSEQUENCES

A. Prosecutions Based On The Right-To-Control Theory Violate Fair Notice Principles And Raise Vagueness Concerns

This Court's precedents establish that a criminal statute is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes" or "invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). The right-to-control theory implicates these fair notice and vagueness

concerns because it is premised on an amorphous notion of "property"; calls for arbitrary and inconsistent line-drawing; allows prosecutors to secure convictions based on slippery reconfigurations of the statutory elements; and revives the vagueness problems this Court avoided in *Skilling* through its narrow construction of the honest-services statute.

As described above, *see supra* at 15-31, the right-to-control theory is built upon on an invalid foundation: a supposed "property interest" that was not recognized at common law and therefore is not cognizable under the mail and wire fraud statutes. Even if its lack of common-law pedigree did not already invalidate the right-to-control theory's notion of "property," the vagueness concerns implicit in predicating federal criminal liability on such unstable footing would require the same result. *See supra* at 26-28 (describing inherent vagueness of the "bundle-of-sticks" metaphor of property).

The government's brief in opposition, for instance, defended the right-to-control theory's conception of property by citing *Dickman v. Commissioner*, 465 U.S. 330 (1984), *see* BIO 22, a late twentieth-century case that embraced the broad "bundle of sticks" view of property in construing the gift-tax provisions of the Internal Revenue Code. *See Dickman*, 465 U.S. at 336 (describing "property" as "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"); *United States v. Craft*, 535 U.S. 274, 278 (2002) (citing *Dickman* in describing the modern view of property as "a 'bundle of sticks'—a

collection of individual rights which, in certain combinations, constitute property").[24]

In fact, *Dickman* underscores why such notions of property have no place as the basis for federal criminal law. In the gift-tax context, *Dickman* explains, the term "property" is "used in the broadest and most comprehensive sense … reaching every species of right or interest protected by law and having an exchangeable value." 465 U.S. at 334-35. The Internal Revenue Code embraces all forms of what can now be thought of as property, "however conceptual or contingent." *Id.* (quoting *Smith v. Shaughnessy*, 318 U.S. 176, 180 (1943)). Indeed, even "concepts of property and value" that are "slippery and elusive … cannot escape taxation so long as they are used in the world of business." *Smith*, 318 U.S. at 180. While "conceptual," "contingent," "slippery," and "elusive" meanings of "property" thus have a place in tax law, they cannot serve as the predicates for federal criminal liability without introducing grave vagueness concerns.

Little wonder, then, that the cases applying the right-to-control theory are hardly "models of clarity or consistency." *Skilling v. United States*, 561 U.S. 358, 405 (2010). The Second Circuit itself acknowledged that its rule rested on "a fine line between schemes

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[24] *Dickman* further highlights the temporal disconnect between the bundle-of-rights conception of property and the fraud statutes, discussed *supra* at 24-26. The gift-tax scheme was enacted in 1932, *Dickman*, 465 U.S. at 334, when the bundle-of-rights theory was in vogue, *supra* at 25, and the legislative history clearly reflects Congress's intent to embody that capacious conception, *Dickman*, 465 U.S. at 334. The same cannot be said for the fraud statutes. *Supra* at 18-20.

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." Pet. 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.

For instance, deception about one's background or connections to a potential counterparty may gain entrance to a negotiation and win credibility and trust. But the Second Circuit places such deceptions off limits for prosecution. In *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), the defendants solicited sales by making false statements about referrals to a customer (by a friend or officer of the customer), the source of the goods (a doctor seeking to sell excess stationery), or the reason for the sale (*e.g.*, a death). *Id.* at 1176. These lies got the salesmen's feet in the door and were designed to produce sales to customers who otherwise would have turned them away. Yet the Second Circuit rejected the charge of fraud, emphasizing that it would defy common understanding to criminalize false representations "not directed to the quality, adequacy, or price of goods to be sold, or otherwise to the nature of the bargain." *Id.* at 1179. The court held that "when the customer gets exactly what he expected and at the price he expected to pay," the government's fraud case fails. *Id.* at 1180. The government's theory of fraud,

"despite the absence of any evidence of tangible harm suffered … through the defendants' solicitations," ran aground on the fundamental principle that "the purpose of the scheme must be to injure," which can be inferred when the scheme necessarily has that effect—but not where, as in *Regent Office Supply*, it did not. *Id.* at 1180-81 (internal quotation marks omitted).

Since *Regent Office Supply,* the Second Circuit has repeatedly applied the principle that a misrepresentation that merely "induced [a party] to enter into a transaction it would otherwise have avoided" is not enough to constitute fraud. *See Shellef*, 507 F.3d at 109 (no allegation of a "discrepancy between benefits reasonably anticipated and actual benefits received" or misrepresentation of "the nature of the bargain"); *see also, e.g.*, *United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006) ("harm contemplated … must affect the very nature of the bargain itself," and cannot be shown where "the contractors received all they bargained for"); *United States v. Starr*, 816 F.2d 94, 99 (2d Cir. 1987) (evidence showed deception, but "does not identify what harm, if any, the Starrs intended to inflict on their customers," who "received exactly what they paid for").

But the court has since drawn inexplicably arbitrary distinctions that turn on a "fine line" between that line of cases and "schemes that depend for their completion on a misrepresentation of an essential element of the bargain." Pet. App. 19a-20a (quoting *Shellef*, 507 F.3d at 108). The logic behind the distinction is elusive. Worse still, that line turns on arbitrary post-transaction judgments about what constitutes an "essential element of the bargain"—essentially, the court's own determination of what is

core to a transaction versus mere preference or incentive to bargain. That determination yields unpredictable results from case to case. *Compare, e.g.*, *United States v. Schwartz*, 924 F.2d 410, 414 (2d Cir. 1991) (assurance that military equipment would not be exported to certain nations went to an essential element of the bargain between equipment producer and purchaser); *with, e.g.*, *Shellef*, 507 F.3d at 95, 109 (where purchaser misrepresented that product would be sold domestically and manufacturer "would not have sold" product otherwise, recognizing that a prosecution "rested" on "facts … closely resembl[ing] those in *Schwartz*," but nevertheless vacating conviction because jury may have "concluded that the defendants did not misrepresent an 'essential element' of the bargain").

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. Pet. App. 20a-21a. The government therefore calls on that theory precisely when it cannot prove deceptive conduct that aims to enrich the defendant at the victim's expense. And it leaves to prosecutors, judges, and juries the post-hoc task of drawing finer and finer distinctions that are difficult to explain and impossible to comprehend—let alone anticipate.

A legal standard of fraud that turns on such ineffable and manipulable determinations cannot survive fair notice and vagueness scrutiny. *See McDonnell v. United States*, 579 U.S. 550, 576 (2016) (interpreting criminal statute so that "ordinary people

can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement" (internal quotation marks omitted)); *Skilling*, 561 U.S. at 404 ("par[ing] that body of [pre-*McNally*] precedent down to its core" to avoid vagueness); *Johnson*, 576 U.S. at 601 (invalidating statute as vague given "pervasive disagreement about the nature of the inquiry one is supposed to conduct"). The fraud statutes may qualify as federal prosecutors' "Stradivarius," "Colt 45," "Louisville Slugger," and "Cuisinart."[25] But citizens are entitled to fair 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).

B. The Right-To-Control Theory Offends Principles Of Federalism By Upending The Federal-State Balance

The right-to-control theory upsets the constitutional balance of federal and state regulation by vastly expanding the reach of the federal fraud laws. "From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today." *Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020). Accordingly, 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,

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

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. 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. The principle that Congress "will not be deemed to have significantly changed the federal-state balance" unless it "conveys its purpose clearly" thus confirms the invalidity of the right-to-control theory. *United States v. Bass,* 404 U.S. 336, 349 (1971).

C. Upholding The Right-To-Control Theory Would Run Contrary To The Rule Of Lenity

The right-to-control theory's lack of clarity implicates the rule of lenity, which provides "that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). The rule protects citizens from being subjected to punishments that are "not clearly prescribed," incentivizes Congress to "speak more clearly," and keeps courts from "making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

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. at 359. 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 (internal quotation marks omitted). "In deciding what is 'property' under [the statute]," the Court stated, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* (internal quotation marks omitted); *accord Skilling*, 561 U.S. at 402.

The same principle applies here. By capturing conduct that falls far outside the "heartland" of what is proscribed by the mail and wire fraud statutes, the right-to-control theory triggers the rule of lenity. *Salman v. United States*, 137 S. Ct. 420, 429 (2016). 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. *McNally*, 483 U.S. at 460.

IV. PETITIONER'S CONVICTION MUST BE REVERSED

Petitioner's conviction rests solely on the right-to-control theory. In addressing petitioner's challenge to the sufficiency of the evidence, 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 counter-party to enter a transaction without the relevant facts necessary to make an informed economic decision." Pet. App. 17a

(internal quotation marks omitted). That holding was fatally flawed and it prevented the court from granting relief based on the government's failure of proof.

The charged scheme did not depend on a showing that the defendants schemed to cause Fort Schuyler harm by deceiving it about the quality of the work to be performed, the competence of the contractors, the price to be charged, the conditions of performance, or any other feature of their performance of their end of the bargain. The right-to-control theory made those kinds of harms irrelevant; informational deprivation was enough. Indeed, in the district court, the government successfully precluded petitioner from introducing evidence about the fairness of his fee or the quality of his services by arguing that the evidence was irrelevant under the right-to-control theory. J.A. 46, 60-62. Under those circumstances, if the right-to-control theory is invalid, petitioner's conviction must be reversed. Congress did not enact the theory on which the government proceeded, and this Court should not "construe the statute in a manner that leaves its outer boundaries ambiguous." *McNally v. United States*, 483 U.S. 350, 360 (1987). "If Congress desires to go further, it must speak more clearly than it has." *Id.*

CONCLUSION

For the foregoing reasons, the judgment should be reversed, and the case remanded with instructions to enter a judgment of acquittal.

Respectfully submitted.

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