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 RESPONDENT ALAIN KALOYEROS IN SUPPORT OF PETITIONER

BRUCE C. BISHOP
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 429-6747

MICHAEL C. MILLER
Counsel of Record
REID H. WEINGARTEN
MICHAEL G. SCAVELLI
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 506-3900
mmiller@steptoe.com

Counsel for Respondent Alain Kaloyeros

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315246

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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.

Respondent is the United States of America, appellee below.

Alain Kaloyeros, Steven Aiello, and Joseph Gerardi, co-defendants and appellants below, are Respondents in support of Petitioner under Rule 12.6.

Joseph Percoco, a defendant and appellant below whose case was severed and tried separately, is Petitioner in *Percoco v. United States*, No. 21-1158.

Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Shuler were non-appealing defendants in the district court.

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INTRODUCTION

This Court has long held that the mail and wire fraud statutes punish only schemes to obtain money or property. *E.g., Kelly v. United States*, 140 S. Ct. 1565, 1571-72 (2020); *Cleveland v. United States*, 531 U.S. 12, 18-19 (2000); *McNally v. United States*, 483 U.S. 350, 356, 360 (1987). Through the years, federal prosecutors have tried to wedge a wide variety of behavior involving intangible rights into those fraud statutes, and many lower courts have assented. *See, e.g.¸ Skilling v. United States*, 561 U.S. 358, 400-01, 407-410 (2010) (collecting examples). This Court has just as consistently rejected those expansive interpretations, stating, "[i]f Congress desires to go further, it must speak more clearly than it has." *Cleveland*, 531 U.S. at 20 (quoting *McNally*, 483 U.S. at 360).

This case concerns the "right to control" theory, which holds that the right to make informed economic decisions about the use of one's assets is itself "property," so that one commits mail or wire fraud if he deprives another of "potentially valuable economic information" that the latter "would consider valuable in deciding how to use its assets." *United States v. Finazzo*, 850 F.3d 94, 111-12 (2d Cir. 2017); *see United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015); Pet. App. 17a, 27a; Joint Appendix (JA) 41-42.

The right-to-control theory contravenes this Court's consistent rulings that mail or wire fraud requires a scheme aimed at money or property, traditionally understood. Its expansion of what constitutes "property" well beyond that term's plain meaning presents the same fair warning, separation

of powers, and federalism problems that led this Court to reject similar intangible-rights theories in *McNally* and progeny.

The right-to-control theory does not trace its roots to statutory text or concepts of property prevalent at the time the mail fraud statute was enacted. Instead, it arose immediately after *McNally*, in appeals considering whether convictions in pre-*McNally* intangible rights prosecutions could survive *McNally*'s holding. From its inception, the right-to-control theory's purpose and effect was to end-run *McNally* (and later *Skilling*), and enable fraud prosecutions to continue even where the deceitful scheme involved neither harm to money or property, nor any bribe or kickback (required for honest-services fraud under 18 U.S.C. § 1346).

The right-to-control theory contravenes this Court's consistent limitation of the mail and wire fraud statutes to schemes against money or property. Because this invalid theory was the sole basis for defendants' convictions, the prosecution's case was insufficient. This Court should reverse and remand for entry of judgments of acquittal.

STATEMENT

A. Factual Background

1. This case arises from a New York State-funded project to spur economic development in Western New York by funding construction of state-of-the-art technology research centers in Buffalo and Syracuse. To lead the project, the governor turned to Alain Kaloyeros, then the head of the State University of New York (SUNY) College of Nanoscale Science and Engineering, which later became SUNY Polytechnic

Institute. Dr. Kaloyeros had worked with several New York governors, beginning with George Pataki, to spearhead the construction of a renowned nanotechnology research center in Albany that has attracted many of the world's leading technology companies and brought lasting economic development to the region. *See* Pet. App. 5a-6a; C.A. App. 1036 (Tr. 169-70), 1047 (Tr. 231-32), 1059 (Tr. 315), 1346 (Tr. 814).

The vehicle for this "Buffalo Billion" campaign was Fort Schuyler Management Corporation (Fort Schuyler), a private, non-profit entity established to support research and development in the SUNY system. Pet. App. 6a. Dr. Kaloyeros served on Fort Schuyler's board of directors. *Id.* Fort Schuyler issued Requests for Proposals ("RFPs") to preliminarily identify qualified "preferred developers" in Buffalo and Syracuse. When development projects then arose, the RFP's provided that Fort Schuyler could, at its discretion, turn to these initially vetted developers to negotiate specific development contracts, or seek out other contractors. Pet. App. 7a-8a; JA 51-53; C.A. App. 1065-66 (Tr. 342-42).

2. The scheme that was charged and tried involved "tailoring" the preferred-developer RFPs to include factors favoring the companies ultimately chosen (LPCiminelli in Buffalo and COR in Syracuse). Pet. App. 8a-10a. The government introduced evidence that LPCiminelli and COR provided Kaloyeros with qualifications for the RFPs and that Kaloyeros caused some of those qualifications to be incorporated into the RFPs. *See* Pet. App. 8a-9a. Each of the qualifications incorporated into the RFPs was approved by the then-chairman of Fort Schuyler,

each of whom who testified that he believed those qualifications were sensible and, in many cases, widened the potential pool of bidders. C.A. App. 1063-1065 (Tr. 332-340); 1088-1089 (Tr. 458-61). Fort Schuyler's staff, including its procurement director, in-house counsel, and board chair were tasked with drafting the RFPs. *See, e.g.*, C.A. App. 1152 (Tr. 910-11).

3. After requesting that these RFPs be drafted, Kaloyeros recused himself from the selection process. C.A. Ap. 1068 (Tr. 351-54). A selection committee comprised of Fort Schuyler staff named LPCiminelli as one of two preferred developers for Buffalo, and COR as the preferred developer for Syracuse. C.A. App. 1151 (Tr. 906-07), 1166 (Tr. 985-86), 1804 (GX 1009, admitted *id.* 1146 (Tr. 885)).

4. As the RFPs stated, "preferred developer" status did not entitle a preferred developer to any contract, or determine any contract terms. If Fort Schuyler elected to use a preferred developer for a particular project, the actual development contracts, including the "details of what the construction would be," would be (and were) negotiated subsequently at arm's length. C.A. App. 1067 (Tr. 347), 1096-97 (Tr. 491-93) (board chair explaining that contract negotiations were "at arm's length" and "in good faith"); *see also* C.A. App. 1421-22 (Tr. 2213-17) (COR attorney describing negotiations as "protracted," "frustrating," and "difficult," adding that while other typical negotiations might last one month, negotiations with Fort Schuyler for one project lasted eighteen months). LPCiminelli and COR were ultimately awarded development contracts in Buffalo and Syracuse, respectively. Independent staff at Fort Schuyler deemed

both companies to be well qualified for their respective projects. C.A. App. 1045 (Tr. 223), 1225 (Tr. 1224), 1804 (GX 1009, admitted *id.* 1146 (Tr. 885)); JA 71.

B. District Court Proceedings

1. Kaloyeros was charged with one count of conspiracy to commit wire fraud, 18 U.S.C. § 1349, and two substantive counts of wire fraud, 18 U.S.C. § 1343, for the preferred developer RFP process in Buffalo and Syracuse, respectively. Pet. App. 3a, 13a-14a. Those charges relied exclusively on the "right to control" theory, charging that the scheme was "to defraud Fort Schuyler of its right to control its assets, ... thereby expos[ing] [Fort Schuyler] to risk of economic harm," by concealing that the "preferred developer" RFPs had been tailored to favor LPCiminelli and COR. JA 31-34.

The indictment did not charge honest-services fraud under § 1346. *See* JA 31-34. There was no allegation or evidence that Kaloyeros received any bribe or kickback, or any other financial benefit from the scheme.

2. Nor did the government allege or attempt to prove contemplated or actual loss to Fort Schuyler, in either the terms or performance of the contracts (*i.e.*, the price, quality, or timely delivery of the buildings). *See* C.A. App. 850-851, 998 (Tr. 127). The court barred the defense from introducing evidence that the projects were completed on time, on budget, and at reasonable cost, ruling such evidence was not relevant in a right-to-control prosecution. *See* JA 44-46; C.A. App. 1000-01 (Tr. 138-139); 1002 (Tr. 143, 145).

Instead, the government claimed, and the court ruled, that in a right-to-control case, "it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss.... It is sufficient that a defendant intend that his misrepresentations induce a counter-party to enter a transaction without the relevant facts necessary to make an informed decision." C.A. App. 997 (Tr. 126).

3. The court thus instructed the jury, over objection, that "property" under the wire fraud statute includes "intangible interests such as the right to control the use of one's assets," and that the right to control "'is injured' when the victim 'is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets.'" Pet. App. 28a; JA 41-42. It defined "potentially valuable economic information" as "'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.'" Pet. App. 28a; JA 41-42.

The court refused to instruct that "'[i]ntent to defraud' means to act ... for the purpose of depriving another of money or property." C.A. App. 913. Instead it instructed, over objection, that "intent to defraud" means to act "for the purpose of causing Fort Schuyler to enter into a transaction without potentially valuable economic information." JA 43.

4. The information at issue in this case was that the preferred-developer RFPs had allegedly been secretly tailored to favor LPCiminelli and COR. *See* JA 31-34. The government argued that deceiving Fort Schuyler that the preferred-developer RFP pro-

cess was competitive, while concealing such tailoring, was alone sufficient to constitute a crime, because "the fact that there had not been a competitive process is exactly the kind of economic information a victim would want to know when agreeing to give their money to these companies." C.A. App. 1472 (Tr. 2514); *see* C.A. App. 1470-71 (Tr. 2508-09, 2513-17).

To the extent that exposure to economic harm was required, the government theorized that an uncompetitive RFP process exposed Fort Schuyler "to risk of economic harm," because of the "possibility" that some other hypothetical competitor might have "come in with ... a better value proposition." C.A. App. 875 (Tr. 15-16). But the government offered no evidence that any other developer could or would have offered better terms, and admitted in closing argument that it could not show that the only two other developers who testified would have charged any less. *See* C.A. App. 1473 (Tr. 2518).

5. Defendants moved for judgment of acquittal, challenging the right-to-control theory, the failure to prove a scheme to obtain property, and the failure to prove actual or intended economic harm. *See* Pet. App. 13a-14a; JA 103. The court denied defendants' motions at their sentencings.

Kaloyeros was sentenced principally to 42 months' imprisonment. Pet. App. 14a.

C. Second Circuit Opinion

The Second Circuit affirmed. It acknowledged defendants' preserved challenges to the right-to-control theory, but did not address them, as "the right-to-control theory of wire fraud is well-established in Circuit precedent." Pet. App. 4a n.2.

Applying that theory, the court of appeals ruled that "property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets," and that a defendant may be convicted of wire fraud if, "through the withholding or inaccurate reporting of information that could impact on economic decisions, [he] deprived some person or entity of potentially valuable information." Pet. App.16a (quoting *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019), *cert. denied sub nom. Gross v. United States*, 140 S. Ct. 1224 (2020)).

Though it recited that the right-to-control theory "requires proof that 'misrepresentations or non-disclosures can or do result in tangible economic harm,'" the court ruled that such harm need not be pecuniary. Pet. App. 17a. Instead, deprivation of information is sufficient: "A 'cognizable harm occurs where the defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *Id.* (quoting *Finazzo*, 850 F.3d at 111, and *Binday*, 804 F.3d at 570). Thus, "it is not necessary that a defendant intend that his misrepresentations 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.* (quoting *Binday,* 804 F.3d at 579).

The court rejected defendants' challenge that the evidence was insufficient to show a risk of tangible economic harm, principally because of its ruling that "in rigging the RFPs to favor [certain] companies, defendants deprived Fort Schuyler of 'potentially valuable economic information,'" Pet. App. 18a, which

alone was sufficient to convict under Second Circuit law, *id.* 16a-17a.[1]

SUMMARY OF ARGUMENT

Respondent Kaloyeros adopts in full the arguments presented by Petitioner, as well as those presented by Respondents Aiello and Gerardi, challenging the validity of the right-to-control theory of wire fraud. The theory impermissibly extends beyond the traditional property interests to which mail and wire fraud are limited, both because the right to informed economic decision-making is not property as that term was understood when the statute was enacted,[2] and that interest cannot be obtained as the statute requires.[3] The right to control is not one of the limited intangible rights enacted by Congress after *McNally*,[4] and it undermines this Court's holding in *Skilling*, by allowing fraud prosecution for conduct not within *Skilling*'s limitation—namely, nondisclosure by an official in the absence of any bribe or

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[1] The court rejected the contention that the RFPs were not capable of causing harm because they awarded only preferred-developer status, not actual development contracts, finding that even preferred-developer status gave the companies "a leg up" on getting contracts. Pet. App. 19a-20a. It rejected the argument that the government failed to offer evidence that another developer could or would have offered a better deal, admitting the government offered little such evidence, but holding such evidence was not required. *Id.* at 20a-21a.

[2] Br. of Petitioner ("Pet. Br.") Sec. I; Br. of Respondents Aiello and Gerardi ("Aiello Br.) at 31-33.

[3] Pet. Br. Sec. I.C; Aiello Br. at 19-26.

[4] Pet. Br. at 35-36.

kickback.[5] Reading right-to-control theory into the statutes' prohibition on schemes aimed at obtaining property would violate principles of fair notice, federalism, and lenity that this Court has emphasized time and again in reining in previous attempts to expand the statute's reach to cover other asserted intangible rights.[6]

The facts of this case show precisely why the right-to-control theory contravenes this Court's holdings in *McNally* and *Skilling*. The scheme for which Kaloyeros was convicted strongly resembles the scheme in *McNally*—a scheme to steer contracts to certain vendors, with no allegation that the goal was for the contract issuer to lose money or suffer economic harm, and no allegation that but for the scheme the contract issuer would have paid any less or received a better product. The only difference is that here, unlike in *McNally*, there were no bribes or kickbacks. *McNally*'s conclusion—that such a scheme was not mail fraud, because without pecuniary harm it did not implicate property—applies equally here.

Under the right-to-control theory, every case of secret contract-steering would constitute property-based wire fraud, whether or not there is a bribe or kickback. Resurrecting this intangible-right theory as fraud against "property," when this Court already rejected it as fraud against "honest services," would raise even greater fair notice, vagueness, separation

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[5] Pet. Br. Sec. II.

[6] Pet. Br. Sec. III.

of powers, and federalism problems than those presented in *McNally* and *Skilling*.

Moreover, if secret contract-steering without contemplated pecuniary harm or any bribe or kickback constitutes property fraud, then this Court's holding in *McNally*, Congress's enactment of the honest-services fraud statute (§ 1346), and this Court's holding in *Skilling* were all an unnecessary detour, because deception about such contract-steering was right-to-control fraud all along.

Indeed, the history of the right-to-control theory shows it developed precisely as a means of preserving the fraud statutes' expansive reach, after (and despite) this Court's holding in *McNally*. In the 115 years between the mail fraud statute's enactment and *McNally*, there was no right-to-control theory of property fraud. Instead, the theory arose immediately after, and in direct response to, *McNally*'s invalidation of intangible-rights honest-services theories.

The first case to hold that the right to control use of assets was property protected by the mail fraud statute was a case affirming a pre-*McNally* mail fraud conviction that had been obtained and affirmed on an intangible honest-services theory. After *McNally* declared that theory invalid, the court reissued the same opinion, adding a footnote stating that although *McNally* had invalidated the theory of prosecution, it made no difference because the same scheme had deprived the victim of "its control over its money." *United States v. Fagan*, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987). A raft of similar cases followed, upholding pre-*McNally* intangible-rights convictions against post-*McNally* appeals. The

Second Circuit's seminal right-to-control case, *United States v. Wallach*, was such a post-*McNally*, pre-§ 1346 case, and based the right-to-control theory solely on cases following *Fagan*'s footnote recharacterization.

The right-to-control theory's end-run function has acquired renewed vigor in the wake of *Skilling*. Now, as before § 1346 was enacted, the honest-services theory of fraud is no longer available for prosecuting intangible-rights schemes that do not involve bribes or kickbacks. The right-to-control theory has thus resumed its usefulness for fitting schemes not aimed at obtaining money or traditional property back into the mail and wire fraud statutes. But post-*Skilling* right-to-control cases are no more rooted in first principles than the post-*McNally*, pre-§ 1346 cases were. Instead, they simply build on those cases that arose as post-*McNally* workarounds, still without reference to the traditional concepts of fraud and property that prevailed when the mail fraud statute was enacted.

ARGUMENT

I. Legal Background

1. The mail and wire fraud statutes punish "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343.[7] From the 1940s to the 1980s, the disjunctive

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[7] The Court has long interpreted this language identically in both statutes. *See, e.g.*, *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

phrasing of the statutes led "the Courts of Appeals, one after the other," to interpret "'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights," *Skilling*, 561 U.S. at 400, including the right of the citizenry to be free of political corruption. *See* W. Robert Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562 (1980). Although the second, false-pretenses phrase expressly required "obtaining money or property," courts treated the earlier phrase "scheme or artifice to defraud" as "independent of, and broader than, the [money or property] clause." Gray, *supra*, at 569; *accord Skilling*, 561 U.S. at 399; *McNally*, 483 U.S. at 358; *id.* at 365 (Stevens, J., dissenting).

In *McNally*, however, this Court "[c]onstru[ed] that disjunctive language as a unitary whole," to hold "that 'the money-or-property requirement of the latter phrase' also limits the former." *Kelly*, 140 S. Ct. at 1571 (quoting *McNally*, 483 U.S. at 358). After *McNally*, "a state or local official's fraudulent schemes violate [the wire fraud statute] only when ... they are 'for obtaining money or property.'" *Id.* at 1572 (quoting § 1343).

2. The most prominent intangible-rights theory of fraud was the "honest services" doctrine. In various permutations, the "honest services" doctrine extended the punishment of "schemes to defraud" to cover deprivations of the honest services of government officials, interference with honest elections, and, in the private sector, breaches of fiduciary duty by employees or union officials who accept kickbacks or sell confidential information. *McNally*, 483 U.S. at 362-

63 (Stevens, J., dissenting) (collecting cases); *Skilling*, 561 U.S. at 400-01 (same).

"Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, ... the honest-services theory targeted corruption that lacked similar symmetry." *Skilling*, 561 U.S. at 400 (citation omitted). The paradigmatic honest-services fraud was steering public contracts: if a city official took a bribe or kickback in exchange for awarding such a contract, "yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss." *Id.* The illicit enrichment came instead from the bribe payer, who was neither deceived nor defrauded. *Id.*; Gray, *supra*, at 565. Lower courts nonetheless reasoned that an official who steered a contract based on improper personal enrichment, rather than his employer's interest, engaged in an actionable denial of the employer's "right to the offender's 'honest services.'" *Skilling*, 561 U.S. at 400 (citation omitted). "[B]y 1982, all Courts of Appeals had embraced the honest-services theory of fraud." *Id.* at 401 (citation omitted).

3. This Court's *McNally* decision "stopped the development of the intangible-rights doctrine in its tracks." *Id.* Despite *McNally*'s resemblance to the paradigmatic honest-services fraud case—awarding public contracts in exchanged for bribes or kickbacks, *see id.* at 400 (describing *Shushan v. United States*, 117 F.2d 110 (1941) and *McNally*, 483 U.S. at 360)—this Court held the scheme was not mail fraud. "'Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of dis-

closure and good government for local and state officials,'" this Court "read the statute 'as limited in scope to the protection of property rights,'" stating, "'If Congress desires to go further, it must speak more clearly than it has.'" *Id.* (quoting *McNally*, 483 U.S. at 360) (alteration in original).

4. "Congress responded swiftly," enacting "a new statute 'specifically to cover one of the 'intangible rights' that lower courts had protected ... prior to *McNally*: 'the intangible right of honest services.'" *Id.* (quoting *Cleveland*, 531 U.S. at 19-20) (alteration in original). That statute, 18 U.S.C. § 1346, adds what is not contained in § 1341 or § 1343: a definition of "scheme or artifice to defraud" that includes "a scheme or artifice to deprive another of the intangible right of honest services." *Id.* at 402 (quoting § 1346).

In the years that followed, prosecutors relied on the honest-services statute to resume criminalizing a "staggeringly broad swath of behavior, including misconduct not only by public officials and employees but also by private employees and corporate fiduciaries." *Sorich v. United States*, 555 U.S. 1204, 1204 (2009) (Scalia, J., dissenting from denial of cert.) (collecting examples). Despite two decades of effort by the courts of appeals "to cabin the breadth of § 1346 through a variety of limiting principles. No consensus emerged." *Id.*

5. In 2010, in *Skilling*, this Court limited the reach of the honest-services theory. Recognizing that the decisions defining honest-services fraud "were not models of clarity or consistency," but rather reflected "considerable disarray over the statute's ap-

plication," the Court found the honest-services statute presented fair-warning and arbitrary-enforcement concerns that would render the statute unconstitutionally vague. *See Skilling*, 561 U.S. at 402-07. Rather than invalidate the statute, this Court imposed a limiting construction, ruling the statute could be applied only to cases at the "core" of pre-*McNally* honest-services doctrine: those involving bribes and kickbacks. *See id.* at 407-09, 411.

The Court rejected cases of "undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 409-10. Absent bribery or kickbacks, this Court found that this "amorphous category of cases" fell outside the core of the honest-services doctrine. *Id.* at 410.

II. The Second Circuit's opinion conflicts with *McNally*

The fact pattern of this case is almost a mirror of *McNally*: a state official was tried by federal prosecutors for a scheme to secretly steer state-funded contracts to favored vendors. *Compare* 483 U.S. at 352 *with* Pet. App. 3a, 7a-14a. Neither indictment charged, and neither jury was required to find, either a deprivation of money or property, or that the putative victim would have paid less, or secured a better product in return—either better insurance (*McNally*) or better buildings (this case). *Compare* 483 U.S. at 360 *with* C.A. App. 850-51, 996-1002 (Tr. 121-46) (discussed *supra* at 10). In both cases, federal prosecutors charged the official with mail or wire fraud,

contending that the scheme deprived the state of intangible rights—in *McNally,* the right to the honest services of its officials; here, Fort Schuyler's right to control its assets. Both courts of appeals affirmed the convictions based on a line of appellate decisions holding that the mail and wire fraud statutes proscribe schemes to defraud others of those intangible rights. *Compare McNally*, 483 U.S. at 353-55 *with* Pet. App. 4a-5a, 17a-23a.

The only difference is that here, unlike in *McNally*, there were no bribes or kickbacks. *Cf.* 483 U.S. at 352-53. Kaloyeros never received a dime.

In *McNally*, this Court ruled the scheme was not mail fraud, because the mail fraud statute reaches only schemes to obtain money or property, and does not refer to the intangible right to good government. 483 U.S. at 356, 359-60. The same is true of the identically-worded wire fraud statute. Based on principles of strict construction (that "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute"); fair warning and lenity (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"); and federalism, this Court declined to "construe the statute in a manner that leaves its outer boundaries ambiguous and invokes the Federal Government in setting standards of disclosure and good government for local and state officials." *Id.* at 359-60 (citations omitted). Instead, it "read § 1341 as limited in scope to the protection of property rights," stating, "If Congress desires to go

further, it must speak more clearly than it has." *Id.* at 360.

McNally remains good and binding law, and its reasoning governs here. The mail and wire fraud statutes, Sections 1341 and 1343, have not changed since *McNally* (apart from increasing the severity of authorized punishment). They contain no more reference to intangible property rights than they did in 1987. Reading such a right into § 1343 violates the same principles of strict construction, fair warning, lenity, and federalism that grounded *McNally*.

Nor has Congress spoken any more clearly. The only statement from Congress since *McNally* was its 1988 enactment of the honest-services statute, § 1346. Kaloyeros was not charged under that statute. Nor could he have been, since this Court's limitation of § 1346 to cases involving bribery or kickbacks. *See Skilling,* 561 U.S. at 402-06, 407-09, 411. The government did not charge, and Kaloyeros did not receive, any bribes or kickbacks.

Under the Second Circuit's right-to-control theory, *every* case of undisclosed steering of contracts—the exact fact pattern of *McNally*—will be property-based wire fraud, because in every such case, "withholding [such] information" will deprive the contract issuer "of potentially valuable economic information." Pet. App. 16a. It will not matter whether one who steers a contract "intends that his misrepresentation actually inflict a financial loss," because not disclosing the steering will have "deprived the victim of the ability to make an informed economic decision." *Id.* at 17a.

There will be no need to invoke honest-services theory, or to satisfy *Skilling*'s limitation of it (by showing a bribe or kickback), even though, as *Skilling* explained, an official or employee steering contracts to favored vendors is precisely the pattern that gave rise to the honest-services theory. *See Skilling*, 561 U.S. at 400-02 (citing *McNally*). Nor will there be any requirement to show the defendant intended that the contract issuer pay any more, or receive any less, than it contracted for. Instead, with no limiting principle, the nondisclosure or deception alone will constitute property-based mail or wire fraud.

This dramatic expansion of mail and wire fraud presents precisely the same fair notice, vagueness, and lenity problems presented in *McNally* and *Skilling*. *See supra* at 17-18; Pet. Br. Sec. III. It equally offends the separation of powers: "[U]nder 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); *accord United States v. Wiltberger*, 5 Wheat (18 U.S.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."). And it runs roughshod over this Court's repeated admonitions that courts should not adopt interpretations that would significantly alter the federal-state balance in the prosecution of crimes, thereby effecting an expansion of federal criminal jurisdiction, in the

absence of a clear statement from Congress. *See, e.g., Cleveland*, 531 U.S. at 24.[8]

This Court should continue to decline to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360; *see Kelly*, 140 S. Ct. at 1574.

III. The right-to-control theory is an end-run around *McNally*, § 1346, and *Skilling*

If depriving a party to a transaction of information it would consider valuable in economic decision-making is property fraud, then this Court's holding in *McNally*, Congress's enactment of § 1346, and this Court's limitation of that statute in *Skilling* were all an unnecessary detour. There is no longer any need to show intent to obtain money or actual property, or to harm the victim in a pecuniary way. Nor is there a need to consider whether the depriver owed honest services to the party deprived, or if so, whether there was a bribe or kickback. Prosecutors may avoid all of those hurdles simply by re-labeling the intangible right at issue the "right to control assets."

The case law shows that is exactly how the right-to-control theory developed: as a response to *McNally*, to keep intangible theories of dishonest dealing within the scope of the fraud statutes, even where a scheme aimed at money or traditional

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[8] *Accord Kelly v. United States*, 140 S. Ct. at 1574; *McDonnell v. United States*, 579 U.S. 550, 576-77 (2016); *Jones v. United States*, 529 U.S. 848, 858 (2000); Pet. Br. 48.

property could not be shown. The right-to-control theory has assumed even greater importance after *Skilling* limited honest-services prosecutions to bribes and kickbacks. Prosecutors now use it, as here, to prosecute schemes involving alleged dishonesty of public officials where no bribes or kickbacks were paid.[9]

A. The right-to-control theory originated as a way around *McNally*

As this Court has recounted, the mail fraud statute, enacted in 1872, was aimed at "protect[ing] the people from schemes to deprive them of their money or property." *McNally*, 483 U.S. at 356. In the late nineteenth century, crimes of fraud were generally regarded as crimes against property involving trickery or deception. *See, e.g.*, 1 J. Bishop, Commentaries on the Criminal Law §§ 565-590 (7th ed. 1882); (classifying major fraudulent crimes as crimes against property).[10] "As the Court long ago stated, [ ] the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes.'" *McNally*, 483 U.S. at 358 (quoting *Ham-*

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[9] *See* Br. for *Amici Curiae* Crim. Law Scholars in support of Petitioners, *Aiello v. United States*, No. 21-1161 (Mar. 25, 2022); Br. for *Amicus Curiae* New York Council of Defense Lawyers in support of Petitioners, *id.* (Mar. 24, 2022).

[10] "For example, in the nineteenth century, the prominent forms of fraud were embezzlement, false pretenses, forgery, and larceny by trick. Each of these frauds was a crime against property." Gray, *supra* at 13, at 573 (citing 2 Bishop, *supra*, §§ 318-383 (embezzlement), *id.* §§ 409-488 (false pretenses); *id.* §§ 521-612 (forgery), and C. Kenny, Outlines of Criminal Law 206 (1902) (larceny by trick)).

merschmidt v. United States, 265 U.S. 182, 188 (1924)).

Congress's 1909 amendment adding the language "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" did not alter that understanding. Instead, the addition of that phrase simply codified this Court's holding in *Durland v. United States*, 161 U.S. 709 (1896), clarifying "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 357, 359. "Property" meant property as traditionally understood. *See Cleveland*, 531 U.S. at 23 (rejecting reliance on "intangible rights of allocation, exclusion, and control," because those interests were not "long … recognized as property"); *id.* at 24 ("they stray[ed] from traditional conceptions of property"); *see also Pasquantino v. United States*, 544 U.S. 349, 356 (2005) (holding right to collect money is "'property' as that term ordinarily is employed").[11]

In the 115 years after the statute's 1872 enactment, including the 76 years between the 1909 addition of "money or property" and the 1987 *McNally* decision, the words "right to control" did not appear in any case in this Court or the courts of appeals in-

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[11] This Court has long grounded its interpretation of the mail fraud statute in the common law, *Neder v. United States*, 527 U.S. 1, 24-25 (1999), including the meaning of "property." *See Pasquantino*, 544 U.S. at 356. Kaloyeros adopts the arguments of Petitioner Ciminelli and Respondents Aiello and Gerardi regarding the meaning of property under traditional Blackstonian principles. *See* Pet. Br. 20-21; Aiello Br. 31-32.

terpreting the scope of the mail or wire fraud statutes.[12] The first reference to control over spending that pertained to a scheme to obtain property in a mail or wire fraud case was the *McNally* opinion's observation that the jury there had not been required to find "that the Commonwealth was deprived of control over how its money was spent." 483 U.S. at 360.[13]

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[12] The phrase appears in only five pre-*McNally* cases containing the terms "mail fraud" or "wire fraud." Two cases used the phrase in describing commodities option contracts. *United States v. Iaciofano*, 734 F.2d 87, 88 (1st Cir. 1984); *United States v. Bein*, 728 F.2d 107, 109 (2d Cir. 1984). One analyzed whether the control vested by a fractional undivided interest in a mining operation made that interest a "security" under the federal securities laws. *Penturelli v. Spector, Cohen, Gadon & Rosen*, 779 F.2d 160, 167 (3d Cir. 1985). In *United States v. Cauble*, 706 F.2d 1322, 1343 (5th Cir. 1983), the phrase appeared in a jury instruction on the defendant's participation in the affairs of a RICO enterprise. And *United States v. Johnson*, 496 F.2d 1131 (5th Cir. 1974), upheld a trial court's right to control the orderly introduction of evidence. *Id.* at 1135.

[13] To be sure, there were pre-*McNally* cases upholding mail or wire fraud predicated on deception or nondisclosure of material economic information. *See, e.g.*, *United States v. George*, 477 F.2d 508, 511-13 (7th Cir. 1973) ("Not only did [Defendant] secretly earn a profit from his agency, but also he deprived [his employer] of material knowledge that [the vendor paying kickbacks] would accept less profit."); *United States v. Von Barta*, 635 F.2d 999, 1005-06 (2d Cir. 1980) (collecting cases turning on "the employee's duty to disclose material information to his employer").

But those cases were based on deprivation of honest services—the theory rejected in *McNally*—not on the right to control the use of assets. *See George*, 477 F.2d at 513; *United States*

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That isolated sentence in *McNally* did not state that control over spending was "property" under the statute, much less that the *McNally* scheme would have been property fraud if such an instruction had been given. Nor did it refer to any such doctrine in courts of appeals, or cite any case or other authority. There were no such cases, or any such doctrine at the time.

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v. Conner, 752 F.2d 566, 572-73 (11th Cir. 1985) (breach of fiduciary duty); *Von Barta*, 635 F.2d at 1005.

They also were based on the language "scheme or artifice to defraud," which those courts interpreted not to require harm to money or property. *See, e.g., George*, 477 F.2d at 512 ("Since the gravamen of the offense is a 'scheme to defraud,' it is unnecessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss."); *Von Barta*, 635 F.2d at 1005; *McNally*, 483 U.S. at 362-65 (Stevens, J. dissenting) (collecting intangible-rights cases, and noting they all "share[d] ... in common" the premise that the phrase "any scheme or artifice to defraud" was independent of the phrase "or for obtaining money or property")—again, a premise rejected in *McNally*, 483 U.S. at 356-60.

Most also involved bribes or kickbacks, and used those payments as evidence and measure of monetary gain by the defendant (*e.g.*, *George*, 477 F.2d at 513), and/or loss to the principal—either on the theory that the ill-gotten funds belonged to the employer under agency law, *see McNally*, 483 U.S. at 377 n.10 (Stevens, J., dissenting), or as evidence that a better deal was available. *See George*, 477 F.2d at 513-14; *Conner*, 752 F.2d at 573. Although *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), did not involve bribery or kickbacks, it charged, in addition to a scheme to defraud based on three intangible-rights theories, that Bush had also obtained money and property by false pretenses because through his disloyalty he was able to collect both his salary and profits from undisclosed self-dealing at the same time. *Id.* at 646.

The *McNally* case had been tried, and the conviction affirmed, not on a property theory, but on the theory of the citizens' intangible right to honest government. *See* 483 U.S. at 355-56 (collecting honest-government cases). *McNally*'s holding was that the intangible right to honest government was not a property right protected by the statute, *id.* at 356, 360, and that the jury instruction predicated on that theory[14] allowed conviction for conduct that was not within the statute. *Id.* at 361. Its observation that the jury had not been required to find that the Commonwealth had been deprived of a deprivation of control over its spending was merely one among a half-dozen observations about the fact that the prosecution had charged or shown any harm to property. *See id.* at 360.[15]

Although these observations collectively showed the absence of a property fraud that would support conviction, they do not establish the inverse—that if the jury had been instructed regarding the right to control, that (much less that alone) would have es-

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[14] The jury was instructed that the state officials could be convicted if they awarded state contracts without disclosing that they directed the payment of commissions from the contracts to a company they partly owned. *Id.* at 354-55.

[15] Those observations included that the indictment did not charge the Commonwealth was defrauded of money or property; nor that in the absence of the scheme it would have "paid a lower premium or secured better insurance"; that the commissions (*i.e.*, kickbacks) were not the Commonwealth's money; that "the premium would have been paid to some agency" in any event; and that the control at issue was not the award of the contract, but the direction of the insurance company's payment of commissions to its agent (with its own funds). *Id.* at 360-61.

tablished a property fraud. Indeed, they "could not, since the [case] did not present the question." *Sisson v. Ruby*, 497 U.S. 358, 373 (1990) (Scalia, J., concurring). *McNally*, a case rejecting intangible-rights theories of mail fraud, "gave no indication that it was revolutionizing" mail fraud by creating a new one. *Id.*[16]

That did not stop lower courts from immediately seizing that slender thread to salvage pre-*McNally* convictions. The first reported holding that the right to control use of assets is a property right under the mail fraud statute came just six weeks later. In *United States v. Fagan*, the Fifth Circuit affirmed a mail fraud conviction where the owner of a boat-leasing enterprise secretly kicked back $100 per boat per day to an oil drilling manager who leased the boats for his employer. The court upheld the conviction on the theory that the drilling manager had violated his duty to disclose economically material information to his employer (namely, that the boat

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[16] Nor did that single observation among a half-dozen explain any of the details that might govern the existence or scope of a right to control. *See Skilling*, 561 U.S. at 417-20 (Scalia, J., concurring in the judgment in relevant part) (asking whether fraud by breach of fiduciary duty reached only public officials? private individuals who participate in public decisions? all private employees? "What obligations does he owe as a fiduciary?" (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943)), What is "the *source* of the fiduciary obligation[?]" How broad is its scope? What "*je-ne-sais-quoi* beyond a mere breach of fiduciary duty was needed[?]" Must the breach of fiduciary duty be for the defendant's gain? Must there be something in addition to failure to disclose? Must the victim suffer some loss? Does a gain by the defendant suffice?).

vendor would accept $100/day less for his boats), and had thereby captured for himself an illicit profit that belonged to his employer—*i.e.*, the funds kicked back. *See* 821 F.2d 1002, 1005, 1008-10 (5th Cir. 1987).

The *Fagan* opinion, which was based on pre-*McNally* agency principles, not property rights, *id.* at 1009-10, was first issued six days after *McNally*, and took no account of it—it had been prepared before *McNally* was issued. *See id.* at 1002, 1010 n.6. Six weeks later, the Fifth Circuit re-issued the same opinion, adding a footnote stating that *McNally* did not change the result. After acknowledging that *McNally* had rejected the intangible honest-services theory and instead "'read section 1341 as limited ... to the protection of property rights,'" the court quoted *McNally*'s statement that the jury had not been charged regarding the Commonwealth's control over how its money was spent, and stated, "We believe that there is sufficient evidence that the scheme here was one to deprive Texoma of its property rights, *viz:* its control over its money, as it parted with its rental payments on the basis of a false premise." *Id.* at 1010 n.6. (quoting *McNally*, 483 U.S. 350).[17]

Fagan's footnote was a hit. A small wave of similar cases quickly followed. *See United States v. Rico Indus.*, 854 F.2d 710, 713-14 (5th Cir. 1988) (affirm-

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[17] The court further relied on "the economic value of possibly being able to rent the boats from Fagan for less," and on the theory, expressed in Justice Stevens's *McNally* dissent, that under agency principles the kickbacks themselves, which were ill-gotten in violation of his duty of loyalty, belonged to the employer. *Id.*

ing conviction for pre-*McNally* kickback scheme, based on concealing economically material information) (following *Fagan*); *United States v. Kerkman*, 866 F.2d 877, 880 (6th Cir. 1989) (same); *Ranke v. United States*, 873 F.2d 1033, 1038 (7th Cir. 1989) (same); *United States v. Little*, 889 F.2d 1367, 1368 (5th Cir. 1989) (same); *United States v. Shyres*, 898 F.2d 647, 651-52 (8th Cir. 1990) (same); *see also United States v. Biaggi*, 909 F.2d 662, 673-74, 687 (2d Cir. 1990) (affirming conviction for pre-*McNally* scheme to defraud DoD of its right to control contract awards). All of these cases arose in the same context: upholding pre-*McNally* honest-services convictions, after *McNally* rejected that theory. And they all followed the proposition in *Fagan*: that the deprivation of material economic information in violation of a duty of loyalty (which before *McNally* had been recognized as a deprivation of the intangible right to honest services[18]) deprived the employer of a property right, *i.e.*, its right to control its money.

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[18] "A leading case" that *Fagan* cited for the proposition that the existence of a kickback scheme was "economically material information" whose deprivation would support liability was *United States v. George*, 477 F.2d 508 (7th Cir. 1973). *See Fagan*, 821 F.2d at 1009-10. *George* had held that "'Since the gravamen of the offense is a 'scheme to defraud,' it is unnecessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss"—the theory this Court expressly rejected in *McNally*. *See* 483 U.S. at 359-60; *see also id.* at 363 & n.3 (Stevens, J., dissenting); note 13, *supra*. *Fagan*'s footnote 6 turned George's precise theory—the deprivation of "economically material information"—into a property right that survives *McNally*.

United States v. Wallach, 935 F.2d 445 (2d Cir. 1991), the Second Circuit's seminal right-to-control case, arose from the same pattern. In *Wallach,* consultants to Wedtech, a publicly traded company, were charged with mail fraud based on a scheme to funnel payments from Wedtech through corporations they owned, and to misrepresent the purpose of those payments, in order to disguise the payments' true purposes and recipients. *See id.* at 460-61.[19] The indictment, based on pre-*McNally* conduct (from 1981-86), was returned in 1988—after *McNally* had invalidated the intangible honest-services theory, but before Congress enacted the honest-services fraud statute. *Id.* at 454, 461. To get around that problem, the government argued that Wedtech and its shareholders were deprived of the "'right to control' how corporate assets were spent—an intangible property interest." *Id.* at 461.

The Second Circuit accepted the invitation, and upheld the convictions. Its support for the theory was limited to a handful of cases that all had recognized the "right to control" in the wake of *McNally.* All of those cases followed directly or indirectly from *Fagan*.[20] *Wallach* also speculated that the same obser-

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[19] The disguised purposes and recipients included funding a stock-parking scheme to boost the company's stock price, paying a kickback that was part of that scheme, hiding a payment to a company director that was required to be publicly disclosed under SEC rules, and paying another consultant to use his friendship with a highly-placed friend of the President of the United States to help obtain government contracts. *See id.* at 450-54, 460.

[20] *See Wallach*, 935 F.2d at 462 (citing *Biaggi*, 909 F.2d at 687; *Shyres*, 898 F.2d at 652; *Kerkman*, 866 F.2d at 880 (1989);

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vation in *McNally* about the absence of an instruction about control over how money was spent suggested *McNally* would have come out differently if such a theory had been charged. *Id.*[21] Examining those cases (all predicated on the same pre-*McNally* reasoning about concealing "economically material information," *Fagan*, 821 F.2d at 1009), the Second Circuit court stated the term "right to control" was "misleading and confusing," and that those cases turned on whether "some person or entity has been deprived of valuable economic information." *Id.* at 462-63. On that basis, *Wallach* pronounced that "the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution." *Id.* at 463.

Wallach's formulation became the touchstone of the right-to-control theory, turning it into a theory of

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Little, 889 F.2d at 1368). *Kerkman* and *Little* followed *Fagan*. *See supra* at 27-28. *Shyres* cited *Ranke, Kerkman*, and *Fagan*. *See* 898 F.2d at 651. *Biaggi* cited *Ingber v. Enzor*, 841 F.2d 450, 455-56 (2d Cir. 1988), which in turn cited *Fagan*.

By contrast, the First Circuit correctly recognized that *Fagan* simply "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); *cf. United States v. Yates*, 16 F.4th 256, 267 (9th Cir. 2021) (refusing to recognize "ethereal right to accurate information" as a basis for property-fraud liability under the bank fraud statute, because it "would work an impermissible 'end-run' around the Court's holding in *Skilling*").

[21] The fact that the right to control was not charged in *McNally* of course meant the case did not present that question. *See supra* at 25-26. Much less did it "suggest" what the contours of such a right might be if it existed. *See supra* at 26 n.16.

information deprivation. *See*, *e.g.*, *Finazzo*, 850 F.3d at 108-12 (tracing development of the theory from *Wallach*). The *Wallach* case concerned the rights of corporate shareholders, who had a definite but intangible property interest in their ownership of the corporation, *id.* at 462, and the *Wallach* court explained that one of the incidents of that ownership was the shareholders' right "to monitor and police the behavior of the corporation and its officers." *Id.* at 463. That right in turn depended on accurate information in the company's books and records. *Id.* at 463. But that focus on accurate books in the corporate context quickly fell away, as did the requirement of fiduciary duty in the *Fagan* line of cases. Instead, *Wallach*'s language, removed from context, became widely quoted to support "right-to-control" fraud liability whenever any economic actor is deprived of "information that could impact on economic decisions." *Id.*; *see Finazzo*, 850 F.3d at 108-12; Pet. App. 17a.[22] That language now defines right-to-control fraud, even between parties to arms-length transactions. *See, e.g.*, *Lebedev*, 932 F.3d at 46-49 (fraud against credit-card-processing bank by merchant website); *Binday*, 804 F.3d at 570, 579 (fraud against life insurers by purchasers of policies).

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[22] *See* Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*," 43 Cardozo L. Rev. 135, 164-65 (2021) (tracing this development, and noting that the right to accurate information pronounced in *Wallach* was "inextricable from stock ownership" and makes sense in that context, but "loses coherence when it is applied outside that context and in arms-length transactions involving money").

Importantly, nothing in *Wallach*'s reasoning is based on first principles—either the statute's text, or the meaning of fraud or property at the time of its enactment. Instead, *Wallach* was based only on a small body of cases that all derived their authority from the same footnote, issued weeks after *McNally*, that had re-labeled a pre-*McNally* intangible-rights theory to affirm a pre-*McNally* conviction.

This body of precedent—the entire foundation of the right-to-control theory—thus arose from a specific need: to identify a property-based rationale to uphold pre-*McNally* intangible-rights convictions after *McNally* upended those prosecutions' prior rationale.

B. The right-to-control theory is now a way around § 1346 and *Skilling*

After Congress enacted the honest-services fraud statute, intangible-rights fraud prosecutions resumed under the honest-services rubric. The contours of the various iterations of honest-services theory continued to vary as widely as they had before *McNally*. *See, e.g.*, *Sorich v. United States*, 55 U.S. 1204, 1204 (2009) (Scalia, J., dissenting from denial of cert.) (describing the "staggeringly broad swath of behavior" successfully prosecuted under § 1346, and the lack of consensus after two decades of judicial efforts "to cabin [its] breadth ... through a variety of limiting principles").[23]

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[23] This pattern was a continuation of the "considerable disarray" that characterized honest-services prosecutions before *McNally*. *Skilling*, 561 U.S. 406; *see id.* at 417-20 (Scalia, J., concurring in part and concurring in the judgment).

In *Skilling*, this Court drew one bright line: intangible-rights mail or wire fraud may only be prosecuted under the honest-services statute if it involved bribes or kickbacks. 561 U.S. at 404, 411. After *Skilling*, as after *McNally*, deceptive schemes that do not involve bribes or kickbacks may be prosecuted only if they have as their object obtaining money or property. *E.g.*, *Kelly*, 140 S. Ct. at 1571, 1572.

Thus, after *Skilling,* just as in the period immediately after *McNally*, the right-to-control theory has re-assumed an important role: a tool for fitting deceptive schemes involve neither harm to money or traditional property nor any bribe or kickback into fraud statutes that are limited to deprivations of property rights. Schemes that were prosecuted as quintessential deprivations of honest services both before *McNally* and after § 1346 now must be prosecuted under the theory *Fagan* fashioned from a stray observation in *McNally*: that putative victims' right to control their assets, or their right to accurate information they would find valuable in economic decision-making, are property rights.

Post-*Skilling* right-to-control cases are no more rooted in first principles of fraud and property than pre-§ 1346 right-to-control cases were. Instead, they simply continue to follow and extend the rulings of the post-*McNally* wave of cases. *See, e.g.*, *Finazzo*, 850 F.3d at 108 (beginning analysis not with the enactment of the mail fraud statute, but with *Wallach*); *Lebedev*, 932 F.3d at 48 (beginning from *Finazzo*); Pet. App. 16a-17a (beginning with *Lebedev* and *Finazzo*). The post-*McNally* cases, in turn, derived from *Fagan*, which—having been written before *McNally*—relied on pre-*McNally* intangible-rights

cases. Those cases expressly did *not* require harm to property, because they were based on the mistaken premise that "scheme or artifice to defraud" did not require it. *See McNally*, 483 U.S. at 358; *id.* at 362-65 (Stevens, J., dissenting) (discussed *supra* at 25-30).

The result is a theory that evades *McNally* and *Skilling*, because it developed from a need to do so. As it did in *McNally*, this Court should return mail and wire fraud analysis to first principles.

* * *

The goal of interpreting the federal fraud statutes is not to ensure punishment of dishonesty. It is to interpret the statutes as written, *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989), using the plain meaning of their terms as understood when they were enacted. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019).

That a charged set of facts may *resemble* what Congress made criminal does not authorize reading it into the proscription through interpretation, where Congress has not done so through legislation. *See Wiltberger*, 5 Wheat (18 U.S.) at 95-96. Instead, before conduct may be punished as mail or wire fraud, "it must be shown that [it] is plainly within the statute." *McNally*, 483 U.S. at 360 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). If the statute is susceptible to two rational readings, this Court will "choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359-60 (citations omitted).

The right to control assets is not property as that term was understood when the mail fraud statute

was enacted in 1872, or when its "obtain money or property" language was added in 1909. Nor is it property that can be obtained, as the statute requires.

Instead, the right-to-control theory is a new, post-*McNally* label for the intangible honest-services theory that was rejected in McNally, enacted in § 1346, and limited in *Skilling* in order to withstand a vagueness challenge. It cannot sustain a wire fraud conviction under § 1343, where honest-services fraud was not charged, and where no bribe or kickback was involved.

"If Congress desires to go further, it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

CONCLUSION

Because the sole theory of prosecution was insufficient to sustain conviction, the judgment should be reversed, and the case remanded for entry of judgment of acquittal.

Respectfully submitted,

MICHAEL C. MILLER
Counsel of Record
REID H. WEINGARTEN
MICHAEL G. SCAVELLI
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 506-3900
mmiller@steptoe.com

BRUCE C. BISHOP
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 429-6747
bbishop@steptoe.com

Counsel for Respondent
Alain Kaloyeros

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