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 OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS* CURIAE[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of over 300 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who defend some of the most complex and significant criminal cases in the federal courts and who routinely defend against mail and wire fraud charges.

NYCDL supports Petitioner Louis Ciminelli, and his co-defendants Steven Aiello, Joseph Gerardi, and Alain Kaloyeros,[2] in their challenge to the Second Circuit's adoption of and longstanding adherence to the "right to control" theory of property fraud. The Second Circuit's overbroad application of the federal fraud statutes through this theory implicates NYCDL's core concern of combatting the unwarranted extension of criminal statutes and promoting

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[1] The parties have consented in writing to the participation of *amicus*. No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

[2] Messrs. Aiello, Gerardi, and Kaloyeros, whose petitions for certiorari remain pending, filed briefs as Respondents in support of Petitioner Ciminelli. For convenience, all four are collectively referred to herein as "Petitioners."

constitutionally definite standards for criminal liability. NYCDL members defend against the right-to-control theory regularly and have been doing so for decades. NYCDL is thus in a unique position to substantiate that the amorphousness of the right-to-control theory has enabled prosecutors to criminalize mere deceit—to use federal fraud statutes intended to protect property rights to prosecute conduct that may be undesirable or unethical but contemplated no harm to property.

SUMMARY OF ARGUMENT

As set forth in Petitioners' briefs, the right-to-control theory of property fraud is flatly inconsistent with statutory text and structure, the common law, and this Court's precedent. As the Second Circuit has repeatedly held, including in the decision below, the doctrine is predicated on a showing that the defendant "deprived some person or entity of potentially valuable economic information." *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021) (citation omitted); *see also United States v. Finazzo*, 850 F.3d 94, 112 (2d Cir. 2017) (citing cases). But the asserted right to make an informed economic decision that undergirds the theory is not a cognizable property right at all. Proof that an economic actor has been deprived of complete and accurate *information—i.e.*, has been deceived—cannot substitute for the property fraud statutes' core requirement of an intended deprivation of *property*.

NYCDL submits this *amicus* brief to highlight for the Court the practical effects of this erroneous theory on the prosecution and defense of criminal cases within the Second Circuit, where the theory

originated and has been deployed most frequently. We focus below on two central points.

First, the right-to-control theory has become enormously popular among white-collar prosecutors, who have invoked it in scores of cases, in a myriad of different factual settings, to avoid the need to prove intended harm to property. In many of these cases, as here, the right-to-control doctrine has enabled prosecutors to criminalize deceit without contemplated harm to property. Prosecutors have used the theory to target undisclosed self-dealing; corruption in local government; conduct that Congress has chosen not to regulate and that traditionally has been left to the states; the breaking of rules of private organizations; and business practices deemed unsavory or unethical. In short, the right-to-control doctrine has become a tool for criminalizing behavior that falls outside the ambit of the federal fraud statutes.

Even when deployed in cases involving conduct that *could* properly be prosecuted as conventional property fraud, the right-to-control doctrine works substantial injustice. By redefining property fraud as the deprivation of potentially valuable information, the doctrine hands prosecutors a shortcut to conviction, allowing them (and the jury) to gloss over an essential element of the crime. It also allows prosecutors to preclude what would otherwise be viable defense arguments and admissible defense evidence. If prosecutors have genuine proof that the defendant contemplated harm to money or property, they do not need to rely on an alternative right-to-

control theory that relieves the government of its normal burden of proof.

Second, the jury instructions in right-to-control cases show how, in practice, the doctrine so dilutes the property component of property fraud that misrepresentation or deceit itself—depriving an alleged victim of the ability to make an informed economic decision—becomes the offense. In this case, the jury was instructed to deem a "right to control the use of one's assets" to be "property" and to consider that "property" to be "injured" if the alleged victim was deprived of "potentially valuable economic information" that "affect[ed]" the victim's "assessment of the benefits or burdens of a transaction" or "relate[d]" to "the economic risks of the transaction." *Percoco*, 13 F.4th at 175 (quoting instruction).

The juror hearing this can too easily convict based on reasoning that all information has economic value and that anyone would assess the value of a transaction differently with knowledge that he or she had been lied to. Mere deceit is transformed into property fraud, contrary to this Court's longstanding precedent. It is illusory to believe that juries are reliably navigating the "fine line between schemes," *id.* at 171 (quotation omitted), that the Second Circuit itself has struggled to define for decades. This shapeless, malleable standard of criminal liability should not be the basis for conviction and imprisonment.

The time has come for this Court to overrule the Second Circuit's indefensibly broad and elastic definition of "property fraud."

ARGUMENT

I. The Right-To-Control Doctrine Is Deployed In The Second Circuit To Procure Convictions Without Proof Of Property Fraud.

This Court has long made clear that, to secure a conviction under the federal fraud statutes, the government must "prove *property* fraud." *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (emphasis in original). That means that the government must "show not only that [defendants] engaged in deception, but that an 'object of their fraud was property.'" *Id.* (quoting *Cleveland v. United* States, 531 U.S. 12, 26 (2000)) (alterations removed); *see also McNally v. United States*, 483 U.S. 350, 358 (1987) (mail fraud statute limited to those schemes to defraud "aimed at causing deprivation of money or property").

The right-to-control theory, in the Second Circuit's own words, is an "alternative" theory of liability under the property fraud statutes. *United States v. Muratov*, 849 F. App'x 301, 306 (2d Cir. 2021). Under the "classic" theory of property fraud recognized by this Court, "the harm involved in the scheme is the deprivation of money or tangible property." *Id.* The "alternative" theory, however, "allows a cognizable actual harm to be demonstrated '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 *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015)).

The use by prosecutors in the Second Circuit of this "alternative" theory of property fraud has taken root and proliferated in the decades since it was first recognized in *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991). Attached as Appendix A is a chart compiling cases in the Second Circuit in which the government has invoked the right-to-control theory since just 2010. As the chart shows, scores of prosecutions in the Second Circuit alone, brought against over 125 defendants, have been founded in whole or in part on the right-to-control doctrine during this period. These cases encompass a wide variety of factual contexts limited only by the prosecutor's imagination. Far from being an obscure or disfavored alternative, the right-to-control doctrine has become the government's bread-and-butter in mail and wire fraud prosecutions in the Second Circuit, the favored composition on the prosecutor's "Stradivarius."[3]

This Court, in rejecting similar expansive interpretations of the federal fraud statutes and other criminal laws, has repeatedly warned of the dangers of prosecutorial overreach. *See Kelly*, 140 S. Ct. at 1574 (adopting limiting construction to avoid a "ballooning of federal power" that would allow federal prosecutors to enforce their own views of "integrity"); *Cleveland*, 531 U.S. at 24 ("We resist the Government's reading . . . because it invites us to approve a sweeping

[3] *See* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duquesne L. Rev. 771, 771 (1980) (describing mail fraud statute as the 'Stradivarius," "Colt 45," "Louisville Slugger," "Cuisinart," and "true love" of "federal prosecutors of white-collar crime").

expansion of federal criminal jurisdiction in the absence of a clear statement by Congress"); *see also Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) ("[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language . . . risks allowing [prosecutors] to pursue their personal predilections[.]") (citation omitted); *McDonnell v. United States*, 579 U.S. 550, 576 (2016) ("[W]e cannot construe a criminal statute on the assumption that the Government will use it responsibly.") (quotation omitted).

Experience with the Second Circuit's right-to-control doctrine shows that the dangers of overreach arising from this "alternative," judge-made theory of property fraud are all too real. By vesting excessive latitude in the hands of prosecutors, the right-to-control doctrine emboldens prosecutorial creativity and results in overcriminalization, intrusion on Congress' prerogatives, encroachment on enforcement traditionally reserved to states, and circumvention of this Court's precedents.

A. Prosecutors Rely On The Elastic Right-To-Control Doctrine When There Is Deceit But They Cannot Prove Contemplated Economic Harm.

The right-to-control theory has effectively enabled prosecutors to use the fraud statutes to write their own criminal code. With ever-growing frequency, non-disclosure of information has been converted to mail and wire fraud without a showing of

contemplated economic harm. Novel right-to-control cases announced to great media fanfare have criminalized business conduct previously addressed, at most, through state or civil remedies and previously uncomplained of by the purported "victims" because they never believed they had been harmed.

Below are some examples of how the doctrine has been used in the Second Circuit to prosecute cases that are beyond the reach of the property fraud statutes:

1. Undisclosed Self-Dealing

In *Skilling v. United States*, 561 U.S. 358 (2010), this Court held that "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"—falls outside the scope of the federal fraud statutes. *Id.* at 409-11. Yet such conduct has been found to fall *within* the Second Circuit's right-to-control doctrine.

United States v. Viloski, 557 F. App'x 28 (2d Cir. 2014), involved an employee who failed to disclose that he had a financial interest in transactions he authorized on behalf of his employer. After *Skilling*, the government dismissed its honest-services fraud charge, but contended that the defendant (an alleged co-conspirator of the employee) could be prosecuted for money-or-property fraud under a right-to-control theory. *Id.* at 31. Affirming the conviction, the Second Circuit agreed, *id.* at 32-34, despite the fact that the district court found that the employer suffered no loss

and was not entitled to any restitution, *see* Appendix at A-121, A-138-39, *United States v. Viloski*, No. 14-4176 (2d Cir. June 28, 2013), ECF No. 23 (sentencing transcript).

The Second Circuit held that, under its right-to-control precedents, information that merely "'*could* impact economic decisions' can constitute intangible property for mail fraud prosecutions." 557 F. App'x at 33 (quoting *Wallach*, 935 F.3d at 463) (emphasis in original). The undisclosed self-dealing at issue, the court found, satisfied this remarkably lax test because the employer, had it known the truth, "could have negotiated better deals for itself." *Id.* at 34. But it is difficult to conceive of a case of undisclosed self-dealing where the employer would *not* be able to improve its economic position had it known the truth.

In *United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017), the Second Circuit turned the *Viloski* summary order into binding precedent. On substantially similar facts—an employee who did not disclose his interest in the profits generated by purchases of goods he authorized—the Circuit held again that an employee's deceit deprives his employer of "potentially valuable economic information," even if it was not intended to cause "'actual harm . . . of a pecuniary nature,'" so long as the employer "'could have negotiated a better deal for itself.'" *Id.* at 108-09 (citation omitted). Thus, despite *Skilling*, undisclosed self-dealing remains a federal crime in the Second Circuit. *See also United States v. Post*, 950 F. Supp. 2d 519, 539 (S.D.N.Y. 2013) (noting that a theory of property fraud based on city's "right to control its assets on the basis of fair and disinterested information" would be "virtually

identical" to the undisclosed self-dealing theory of honest services fraud invalidated in *Skilling*).

Notably, the jury in *Finazzo*, presented with a special verdict form, *acquitted* the defendant on charges of mail and wire fraud based on the classic theory that he "inten[ded] to deprive [his employer] of money," while convicting him of those same charges on the basis of his employer's "right to control use of its assets." 850 F.3d at 96-97. No better illustration is needed to show how the "alternative" right-to-control theory can spell the difference between conviction and acquittal, enabling the government to prevail where it otherwise is unable to prove an intent to harm or obtain property.

2. Unethical Business Practices

Prosecutors also have reached for the right-to-control doctrine in high-profile cases to prosecute practices that were common in the affected industry but struck prosecutors as unsavory or unethical. In these cases, too, prosecutors backstopped the classic property fraud theory with the "alternative" right-to-control theory because of the difficulty, or impossibility, of proving intended loss. Convictions were then affirmed in reliance on the alternative theory.

One prominent example was a series of prosecutions in the Southern District of New York arising from payments to families of student-athletes in violation of NCAA amateurism rules. *See, e.g., United States v. Gatto*, 986 F.3d 104 (2d Cir.), *cert. denied*, 142 S. Ct. 710 (2021). The *Gatto* defendants (two Adidas personnel and a sports agent) did not seek

to inflict economic harm on the universities that were the purported victims of the wire fraud charges; to the contrary, defendants' conduct was designed to *benefit* the universities by bringing them top athletic recruits who would help their sports teams generate greater revenues for the universities (and Adidas, which sponsored the teams). Convictions were nevertheless obtained and affirmed on appeal because "[d]efendants deprived the Universities of information that would have helped them decide whether to award the Recruits athletic based aid." *Id*. at 116.

Previously, the NCAA rules at issue were enforced through internal disciplinary measures like fines or suspensions or, in most cases, not enforced at all. *See id.* at 132 (concurring and dissenting opinion). But the right-to-control theory allowed prosecutors to make such NCAA rule violations a crime. In a post-trial press release, prosecutors lauded the verdict for upholding "an ideal"—amateurism—"which makes college sports a beloved tradition by so many fans all over the world."[4]

Prosecutors have likewise used the right-to-control theory to criminalize unregulated dealings in the financial industry among sophisticated counterparties. Prosecutors in the Eastern District of New York targeted the widespread practice of "front-running," charging a senior foreign exchange trader with wire fraud for having driven up the price of currency that was the subject of a foreign exchange

[4] Press Release, U.S. Attorney's Office, SDNY, "Adidas Executives And Two Others Convicted Of Defrauding Adidas-Sponsored Universities In Connection With Athletic Scholarships," Oct. 24, 2018.

contract.[5] The defendant did not intend for his misrepresentation (an oral promise that the bank would not aggressively "ramp the fix") to cause any loss to the bank's counterparty; he instructed his traders not to move the price above what the counterparty would have paid absent that promise. *See United States v. Johnson*, 945 F.3d 606, 610-11 (2d Cir. 2019), *cert. denied*, 144 S. Ct. 687 (2020). Thus, the defendant's actions increased his bank's profits from the transaction without causing any loss to the counterparty, which was awarded no restitution. *See id.* at 611, 614-15; Judgment, *United States v. Johnson,* 16 Cr. 457 (E.D.N.Y), ECF No. 239. Nevertheless, the Second Circuit, again conflating deceit with intent to fraud, upheld the conviction under the right-to-control doctrine. The court found that the defendant had "deceived" the counterparty "with respect to both how the FX Transaction would be conducted and the price of the FX Transaction" and, "[f]or this reason," concluded that he had "intended to defraud" the counterparty. *Id.* at 613-14.

3. Conduct Regulated By State Law

In still other cases, the right-to-control doctrine has allowed federal prosecutors to charge conduct that, at most, is a violation of state law and is more properly the province of state authorities—despite this Court's admonition that federal courts "'be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state

[5] Press Release, U.S. Attorney's Office, EDNY, "Former Global Head of HSBC's Foreign Exchange Cash-Trading Found Guilty Of Orchestrating Multi-Million Dollar Front-Running Scheme," Oct. 23, 2017.

power.'" *Bond v. United States*, 572 U.S. 844, 858 (2014) (citation omitted).

This case is a good example. The heart of this prosecution is the allegation that Petitioners "rigged" the RFP process for the New York State-funded Fort Schuyler project, *e.g.*, JA 30, in violation of polices "intended 'to promote open and free competition in procurement transactions,'" Complaint ¶ 76, *United States v. Percoco*, 16 Cr. 776 (S.D.N.Y. Nov. 22, 2016), ECF No. 1). Even assuming procurement rules were violated,[6] a "knowing deviation from state procurement rules is [not] a federal felony," *United States v. Thompson*, 484 F.3d 877, 880 (7th Cir. 2007), and the "interest in a fair bidding process" is not protected "property" under the mail and wire fraud statutes, *United States v. Henry*, 29 F.3d 112, 116 (3d Cir. 1994).

Under the alchemy of the Second Circuit's right-to-control doctrine, federal prosecutors nonetheless were able to bootstrap an allegedly unfair RFP process into a federal property fraud. The government never sought to prove that Petitioners, who provided the contracted-for services at the agreed-upon price, inflicted or intended to inflict any actual pecuniary harm. *See* C.A. App. at 996. Nor did the government prove that Fort Schuyler could have negotiated more advantageous terms with any other firm. *See id.* at 1157-58. No restitution was awarded to or sought by Fort Schuyler, the alleged victim of this completed

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[6] In fact, Fort Schuyler, a non-profit entity affiliated with the State's university system, was not bound by the cumbersome procurement rules that apply to state construction projects. C.A. App. at 1079, 1086, 1232, 1353.

"property fraud." *See id.* at 143, 150-54, 2601. None of this mattered, according to the Second Circuit, for Petitioners had committed the "crime" of "depriv[ing] Fort Schuyler of its ability to award contracts that were the result of a fair and competitive bidding process." 13 F.4th at 173.

Another example is *United States v. Smothermon*, 19 Cr. 382 (S.D.N.Y. May 23, 2019), a pending case in which the government charges that the defendant deprived his employer of "its right to control its assets . . . by causing false entries to be made in [its] accounting system" and "thereby expos[ing] [the firm] to risk of economic harm." Indictment ¶ 1, *Smothermon*, ECF No. 25. Although New York criminal law contains a general proscription on "falsifying business records," *see* N.Y. Penal L. §§ 175.10, 175.15, Congress has not seen fit to create a similar federal crime. There is a federal offense for making false entries in the books and records of a bank, 18 U.S.C. § 1005, as well as for willfully falsifying the books and records of a public company, 15 U.S.C. §§ 78m, 78ff(a). But Smothermon's employer was neither a bank nor a public company; it was a privately-held commodities trading firm.. Amended Compl. ¶ 3, *Smothermon*, ECF No. 3. Nevertheless, through yet another creative application of the right-to-control doctrine, Smothermon now faces federal wire fraud charges for making "false entries."

Under the government's reasoning, many other corporate employees who falsify business records could find themselves in the same position. Invariably such an act could be claimed to have deprived the employer of "potentially valuable economic information" and,

thus, be prosecutable as wire fraud under the right-to-control doctrine.

4. Exposing An Employer Or Counterparty To The Risk Of Regulatory Penalties

In *Kelly v. United States*, this Court held that the property involved in a wire fraud scheme "must play more than a bit part in a scheme: It must be an 'object of the fraud.'" 140 S. Ct. at 1573 (citation omitted). The right-to-control doctrine as applied in the Second Circuit, however, protects property interests that are plainly *not* an object of the defendant's deception—as where it merely has the incidental effect of exposing the purported victim to the risk of regulatory penalties.

In *United States v. Lebedev*, 932 F.3d 40 (2d Cir. 2019), the defendant operated a digital currency business that was not properly registered or licensed under federal or state law. Instead of charging the defendant with operating an unlawful money transmitting business (which carries a five-year statutory maximum, *see* 18 U.S.C. § 1960), the government charged him with wire fraud for deceiving his firm's bank as to the nature of his business. The defendant did not intend to cause, and did not cause, a loss to the bank, which, to the contrary, profited from processing transactions on behalf of his firm.[7] But because the government had proceeded on a right-to-control theory, this was no defense. The defendant had created "regulatory risk" for the bank, including "potential fines for doing business that is illegal," and

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[7] *Lebedev* is yet another case where no restitution was awarded to the bank that was the victim of the fraud. *See* 932 F.3d at 57.

this was deemed sufficient (despite the fact that the defendant obviously did not intend or wish for the bank to be fined, and would not have benefited in any way from a fine) because the defendant "deprived the financial institutions of the right to control their assets by misrepresenting potentially valuable economic information." *Id.* at 48-49.

The government's right-to-control theory in the NCAA prosecutions likewise posited that the defendants' actions threatened economic harm to the universities by "exposing" the universities to the risk of "NCAA fines and penalties." *United States v. Person*, 373 F. Supp. 3d 452, 465-66 (S.D.N.Y. 2019) (upholding government's right-to-control claim against university basketball coach who did not disclose to his employer payments to student-athletes in violation of NCAA amateurism rules); *see also United States v. Gatto*, 295 F. Supp. 3d 336, 340 (S.D.N.Y. 2018). But it was obviously not the "object" of the coach in *Person* to subject his university to penalties; still less did he "[seek] to obtain" such penalties for himself. *Kelly*, 140 S. Ct. at 1573-74.

Under this reasoning, any employee who in the course of his employment commits a criminal or regulatory offense and fails to disclose it—for instance, an employee who causes his company to make a business decision that violates state environmental regulations—faces not only disciplinary action, as well as liability for the violation, but also federal prosecution for wire fraud for depriving the employer of "potentially valuable economic information" and thereby exposing the employer to the risk of fines and

penalties. Such is the all-but-limitless logic of the right-to-control doctrine.

5. Deceit in the Job Hiring Process.

Two related cases, *United States v. Dunn*, 20 Cr. 181 (D. Conn. Oct. 5, 2020), and *United States v. Perez*, 20 Cr. 180 (D. Conn. Oct. 5, 2020), show how prosecutors can use of the right-to-control doctrine to prosecute the prosaic misconduct of cheating on a civil service examination.

In *Dunn* and *Perez*, two Bridgeport city officials were charged with conspiring to commit wire fraud for "rigging" the city's process for hiring a police chief (much like Petitioners here were alleged to have "rigged" the RFP process).[8] Among other things, Dunn, the city's personnel director, gave Perez, then the acting police chief, a preview of examination questions and tailored the examination scoring criteria to favor Perez. *See* Information at 1-5, *Dunn*, ECF No. 1; Information at 1-4, *Perez*, ECF No. 23. While the scheme helped steer the permanent position to Perez (the mayor's favored candidate), it did not target the city's property. The money budgeted for hiring and salary would have been spent regardless of the scheme and there was no allegation that Perez was unqualified. The government, apparently recognizing it would be difficult to prove that the defendants sought to wrongly obtain property from the city, reframed the allegations in right-to-control terms. They cast the offense as "depriving the City of

[8] Press Release, U.S. Attorney's Office, SDNY, "Bridgeport Police Chief And Personnel Director Plead Guilty To Rigging City's Police Chief Search," Oct. 5, 2020.

financially valuable information relevant to its decision on how to allocate the permanent police chief position and the resulting employment contract." Info. at 2, *Perez*, ECF No. 23. The prosecutors readily secured guilty pleas.

Taken to its logical conclusion, this prosecution demonstrates that the right-to-control doctrine can be used to convert any misrepresentation in an employment application, or any misuse of workplace information, in either the public or private sector, into a federal offense. It also shows how prosecutors' reliance on the intangible "right to control" can revive the intangible "right to honest services" invalidated as a theory of property fraud in *McNally*. The point of the prosecution, as the government itself put it, was not to protect the city's coffers, but to "ensur[e] that Bridgeport's citizens and police officers have leaders with integrity."[9] *Cf. Kelly*, 140 S. Ct. at 1574 ("Federal prosecutors may not use property fraud statutes to 'set[] standards of disclosure and good government for state and local officials'" or to "enforce ([their] view of) integrity in broad swaths of state and local policymaking") (quoting *McNally*, 484 U.S. at 360).

In sum, the use of the right-to-control doctrine in the Second Circuit has fulfilled this Court's prescient warning that if federal prosecutors "could prosecute as property fraud every lie . . . the result would be . . . a sweeping expansion of federal criminal

[9] Press Release, *supra* note 8.

jurisdiction." *Kelly*, 140 S. Ct. at 1574 (citation omitted).

B. Even When There Is Proof Of Contemplated Economic Harm, The Right-To-Control Doctrine Serves As An Improper Shortcut For Prosecutors To Procure Convictions and Obtain Other Advantages.

Prosecutors also commonly rely on the "alternative" right-to-control theory where conviction would be appropriate on a "classic" theory of property fraud. Far from justifying the doctrine, however, these cases demonstrate both that it is an unnecessary addition and that the government uses the doctrine to gain an unfair leg-up in the courtroom and leverage in plea negotiations.

United States v. Dinome, 86 F.3d 277 (2d Cir. 1996), illustrates this point. In that case, the defendant was prosecuted for mail and wire fraud for submitting an application for a residential mortgage loan that overstated his income by nearly three times, in order to satisfy the bank's requirement that the borrower's monthly payments not exceed a certain percentage of monthly income. *Id.* at 278-79. This was a case that clearly could have been prosecuted on the "classic" theory that the defendant's lies harmed the bank's property. As the Second Circuit noted, the defendant's deception "significantly diminished 'the ultimate value of the [mortgage] transaction' to the bank as defined by its standard lending practices," as a loan that "is more exposed to default because of an inadequate income stream to fund the required

periodic payments is reduced in value as an asset." *Id.* at 284 & n.7. Nonetheless, the government sought and obtained a right-to-control jury instruction. *Id.* at 284.

Doing so provided the government with a clear strategic advantage. As a concurring opinion noted, the facts cast doubt on whether the bank was truly a victim; it knew that the defendant's initially reported income was too small yet accepted his claim of additional income without further investigation, suggesting that, "despite [defendant's] lack of provable income, [the bank] felt the loan was a good risk." *Id.* at 285 (Oakes, J., concurring). The defenses of immateriality and absence of intended harm would have had substantially more appeal had the jury been instructed, consistent with the classic theory, that it must conclude that the defendant had intended to cause the bank economic harm. But instead the jury was instructed to convict if it merely found that the defendant deprived the bank of valuable *information* bearing on its "right to control the use of [its] assets." *Id.* at 284.

There are numerous other instances in which the government takes a garden-variety property fraud case, chargeable under the "classic" theory, and prosecutes it by relying on a right-to-control theory. *See* Appendix A (listing a number of such examples). The government does so because it dilutes its burden of proof in ways that change outcomes. Instead of having to prove that the defendant intended harm to the victim's property, the government need only prove that the defendant "intended to withhold information relevant to the [victim's] economic decision-making." *Binday*, 804 F.3d at 579-80. In a case where the

government proves that the defendant did withhold material information, this makes a finding of fraudulent intent a foregone conclusion.

The government gains other advantages from invoking the right-to-control doctrine aside from the jury instruction that relieves their ultimate burden—advantages that in practice can be equally outcome-determinative. For example, the government regularly uses the right-to-control doctrine to block defendants from introducing evidence of an absence of intent to inflict economic injury, arguing that such evidence is irrelevant to whether the defendant intended to deprive the victim of information. *See, e.g., id.* at 583 (government successfully moved *in limine* to preclude defendants from offering evidence relating to how the insurers "actually fared, economically, in the wake of defendants' false representations"); *see also* Appendix A, Nos. 4, 19, 22, 35, 37.

In Petitioners' case, the government, with the trial court's approval, precluded Petitioners from introducing any evidence or arguing that Fort Schuyler had received the full benefit of its bargain. *See* JA 44-46. Thus, in a case where the government almost certainly could *not* have procured a conviction on a classic theory of property fraud (and did not even try to do so), the government used the right-to-control both as a sword (to advance an alternative theory of liability) and as a shield (to ensure the jury never learned important evidence tending to show that defendants contemplated no economic harm). Petitioners were thereby effectively prevented from

disputing the central element in any property fraud case—the defendants' fraudulent intent.

Prosecutors also reap undeniable gains simply from having the power to charge and pursue the less-demanding right-to-control theory. As the Chief Justice has observed, when criminal statutes are afforded their broadest conceivable interpretation, federal prosecutors have "extraordinary leverage" to charge aggressively and to extract guilty pleas. Tr. of Oral Argument at 31, *Yates v. United States*, 574 U.S. 528 (2015) (No. 13-7451). This, too, has been a consequence of the additional measure of bargaining power that the right-to-control doctrine affords prosecutors in the Second Circuit. *See* Appendix A (listing numerous examples of guilty pleas following the filing of right-to-control charges).

II. Jury Instructions On The Right-To-Control Demonstrate The Doctrine's Elasticity And Incoherence.

Underscoring the invalidity of the right-to-control theory, jury instructions in such cases are so unintelligible that no jury could reasonably be expected to reliably apply them, even taking into account the usual presumption that jurors follow instructions. *See Yates v. United States*, 354 U.S. 298, 327 (1957) (requiring "precise and understandable instructions" on issues going "to the very heart of the charges"); *Bollenbach v. United States*, 326 U.S. 607, 613 (1946) ("A conviction ought not to rest on an equivocal direction to the jury on a basic issue"). The right-to-control theory invites jurors to criminalize deceit without contemplation of harm.

The instructions were originally brief and merely asked the jury to decide if the defendant deprived the alleged victim of "valuable" or "economically material" or "potentially valuable economic information," without explaining what was meant by this ethereal concept.[10] But as the Second Circuit reformulated and elaborated on the contours of its judge-made doctrine in cases such as *Finazzo*, 850 F.3d at 107-13 & n.20, and *Binday*, 804 F.3d at 570-71, district judges began crafting increasingly longer and more convoluted instructions.

Consider the jury charge in this case. The right-to-control instruction in which the Second Circuit found no infirmity below stated, in relevant part:

> [I]n order to prove a scheme to defraud, the government must prove that the alleged scheme contemplated depriving Fort Schuyler of money or property. Property includes intangible interests such as the right to control the use of one's assets. The victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets. In this context, "potentially valuable economic

[10] *See Finazzo*, 850 F.3d at 108 ("potentially valuable economic information"); *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007) ("information necessary to make discretionary economic decisions"); *Dinome*, 86 F.3d at 284 ("information [the alleged victim] would consider valuable"); *Viloski*, 557 F. App'x at 34 ("economically material information").

> 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. If all the government proves is that the defendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the government will not have met its burden of proof. In this regard, economic harm is not limited to monetary loss. Instead, tangible economic harm has been proven if the government has proven that the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received.

JA 41-42; *see also Percoco*, 13 F.4th at 175 (noting that "this charge closely tracked the language set forth in our prior opinions").

This 218-word exposition, which aggregates and condenses decades of at times internally inconsistent Second Circuit law, is complex, dense, and confusing, whether heard or read. Nor does parsing the instruction improve one's ability to apply it reliably. The instruction requires the jury to find that the

defendants' scheme "contemplated depriving Fort Schuyler of money or property" while defining "property" to include "the right to control the use of one's assets." It adds that this "property" can be deemed "injured" when the victim "is deprived of potentially valuable economic information," thus equating a deprivation of "property" with a deprivation of such "information"—*i.e.*, deceit. The instruction then attempts to define the serial adjectives of "potentially valuable economic" that precede "information," but does so by relying on terms that are equally vague—anything that "affects" the victim's "assessment" of "the benefits or burdens" of a transaction, or that "relates" to "the quality of goods or services received or the economic risks of the transaction."

These instructions permit a juror to convict based on reasoning that in a transaction, all information has potential economic value, thus making intent to deceive—the deprivation of information—the only issue the juror has to resolve. The juror could think that anyone would assess the "benefits or burdens of a transaction" or the "economic risks of the transaction" differently with knowledge that he or she had been lied to. By such reasoning, the deceit itself becomes the basis for finding proven the additional and different element—of contemplated economic harm.[11]

It puts no guardrails around such juror logic, moreover, to instruct that "[i]f all the [g]overnment

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[11] Predictably, prosecutors capitalize on the instructions to urge conviction on the basis of deceit alone. In *Viloski*, for example, the case involving an employee's undisclosed self-interest, the

proves is that the [d]efendant caused Fort Schuyler . . . to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm," the government will have failed to meet its burden. JA 41-42. Under this formulation, the government is only required to prove that "expos[ure] to tangible economic harm" was caused by the scheme (*i.e.*, a consequence), not that defendants *intended* an exposure to tangible economic harm (*i.e.*, defendant's state of mind). The Second Circuit interpreted the requirement precisely this way below, stating that the law requires "misrepresentations or non-disclosures [that] can or do *result in* tangible economic harm." 13 F.4th at 170 (emphasis supplied) (quoting *Finazzo*, 850 F.3d at 111).

The Second Circuit acknowledged below that the right-to-control theory demands *more* than a "scheme[] that do[es] no more than cause their victims

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government argued in its main summation that, "property doesn't have to be physical property. It can be intangible property, that Dick's [the employer] has a right to learn from its employees information needed to make its business decisions." Trial Tr. at 2246, *Viloski*, 09 Cr. 418 (N.D.N.Y. Aug. 5, 2009), ECF No. 386. After the defense argued that the employer had not lost money but instead *profited* from the purported scheme, and that the defendant intended no economic harm, *id.* at 2280-95, the prosecutor rebutted the defense argument that, as the prosecutor characterized it, there was no "big deal" and no one "got hurt" or "was deprived." *Id.* at 2315. The prosecutor argued that Viloski should be convicted because the government proved that the company's "decision making" relied "on the trust" it had in the unfaithful employee and that knowing that trust was "violated" would have "immediately called into question" "any aspect of that specific transaction and frankly others." *Id.* at 2316.

to enter into transactions they would otherwise avoid." 13 F.4th at 171. The court based its affirmance of Petitioners' convictions on its conclusion that Petitioners' conduct crossed the "fine line" that separates such non-crimes from mail and wire fraud because the "scheme[] . . . depend[ed] for [its] completion on a misrepresentation of an essential element of the bargain." *Id*. (citing *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)).

But a lie intended to induce the victim to enter into a transaction it would otherwise avoid—deceit—is *all* the jury found if it concluded that the defendant merely deprived a counterparty of potentially valuable economic information without intending to cause economic harm. The *sine qua non* of property fraud—an intent to wrongly obtain a victim's property—is eliminated by such instructions.

In this case, the very fact the Second Circuit deemed necessary to affirm the convictions was not one the instructions asked the jury to find. The jury was never instructed that it had to find a "misrepresentation of an essential element of the bargain." In fact, the district court *rejected* the proposed defense instruction that the jury must acquit Petitioners if Fort Schuyler "received, and was intended to receive, the full economic benefit of its bargain." C.A. App. 960-61, 1439, 1449.

It is intolerable that an individual's liberty should depend on jury instructions that define the purported crime in such broad and malleable terms as is the case under the Second Circuit's right-to-control theory. Were Congress to enact a statute setting forth

an offense in such terms—a virtually unthinkable proposition—the law surely would be struck down as unconstitutionally vague. *Cf. Skilling*, 561 U.S. at 411 n.44 ("If Congress were to take up the enterprise of criminalizing 'undisclosed self-dealing by a public official or private employee,' it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."). An equally indefinite jury instruction, issued without Congress' imprimatur, is no more valid. "Invoking so shapeless a provision to condemn someone to prison for [up to 30 years] does not comport with the Constitution's guarantee of due process." *McDonnell*, 579 U.S. at 576 (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and invalidate the right-to-control theory of property fraud.

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APPENDIX

Appendix A

Federal prosecutions relying on the right-to-control theory ("RTC") charged or tried in Second Circuit courts since 2010[1]

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[1] This list has been culled from reported decisions and a search of district court dockets. It does not purport to be a comprehensive list of all RTC prosecutions in the Second Circuit since 2010.

	Case And Number Of Defendants Prosecuted Under RTC Doctrine	RTC Use By Government	Disposition / Status Of Property Fraud Charges	Other Charges RTC Defendants Found Guilty Of/Pled Guilty To
1	USA v. Perez, Docket No. 3:20-cr-00180 (D. Conn. Oct. 5, 2020) USA v. Dunn, Docket No. 3:20-cr-00181 (D. Conn. Oct. 5, 2020) 2 RTC defendants	Defendant Dunn, the Acting Personnel Director for the City of Bridgeport, while overseeing the examination process for filling the City's permanent police chief position, directed changes to the scoring system and stole exam questions and provided them to defendant Perez, a candidate for the position, causing Perez to be selected for the position. The government charged both with conspiracy to commit wire fraud, alleging that they "deprive[d] the City of its right to control the use of its assets, by depriving the City of financially valuable information relevant to its decision on how to allocate the permanent police chief position and the resulting employment contract." Information ¶ 2, *Perez*, ECF No. 23.[2]	Both defendants pled guilty to conspiracy to commit wire fraud.	Both defendants pled guilty to making false statements to the FBI.

[2] All citations in this chart to specific court documents are non-exhaustive examples of the government's use of the RTC theory in any particular case.

2	USA v. Weigand et al, Docket No. 1:20-cr-00188 (S.D.N.Y. Mar. 5, 2020) 3 RTC defendants	Defendants, the CEO and two consultants of a California marijuana company, created phony merchants with credit card processing accounts at offshore banks in order to disguise marijuana transactions as transactions in other goods so that U.S. banks would process marijuana-related transactions they otherwise would have declined. The government argued that this was bank fraud because defendants "den[ied] the victim banks the right to control their assets by depriving them of information necessary to make discretionary economic decisions." Gov't's Mem. in Opp. to Defs.' Pretrial Mots. at 20-21, *Weigand*, ECF No. 79 (quotations and alterations omitted).	Two defendants were found guilty of conspiracy to commit bank fraud; a third defendant pled guilty to the same charge. On appeal to Second Circuit.	None.

3	USA v. Ruocco, No. 09-cr-00210 (D. Conn. Sep. 16, 2019) 3 RTC defendants	Defendants, a subcontractor and its president (Tomicic) and project manager, submitted an invoice for toxic waste disposal services performed by their affiliate for a development project without disclosing the affiliation, thereby "depriving another of information necessary to make discretionary economic decisions." Gov't's Proposed Jury Instructions at 43, *Ruocco*, ECF No. 148. In addition, when the project insurer asked for competitive bids related to those disposal services, Tomicic fabricated two competitive bids, which also deprived the insurer and the developer of "of information necessary to make discretionary economic decisions." *United States v. Tomicic*, 2012 WL 2116143, at *2 (D. Conn. June 8, 2012) (denying motion for acquittal and a new trial).	Two defendants were acquitted by the jury of conspiracy to commit mail and wire fraud, mail fraud, and wire fraud; one defendant (Tomicic) was found guilty of wire fraud.	None.

4	USA v. Hild, Docket No. 1:19-cr-00602 (S.D.N.Y. Aug. 26, 2019) 1 RTC defendant	Defendant, the CEO of a company that originated, serviced, and securitized reverse mortgages, caused the company's lenders to extend credit on the basis of inflated bond values, depriving the lenders of the right to control their assets by misrepresenting information the lenders used to determine how much money to lend the company. The government argued that, to show harm for the purposes of wire fraud, it need show "only the impairment of the lenders' right to control their assets through discretionary economic decisions." Gov't's Mem. in Supp. Of Mot. in Limine at 11 n.2, *Hild*, ECF No. 43. At the government's request, the court instructed the jury that "a person is deprived of money or property when he is deprived of the right to control that money or property," and that "he is deprived of the right to control that money and property when he receives false or fraudulent statements that affect his ability to make discretionary economic decisions about what to do with that money or property." Jury Charge at 34-35, *Hild*, ECF No. 70-3.	Defendant was found guilty of wire fraud, bank fraud, and conspiracy to commit wire and bank fraud; motion to acquit or for new trial is pending.	Defendant was found guilty of securities fraud, conspiracy to commit securities fraud.

5	USA v. Smothermon, No. 19-cr-00382 (S.D.N.Y. May 23, 2019) 1 RTC defendant	Defendant, in an effort to retain his job at a financial firm, made false entries in the firm's electronic accounting system to obscure trading losses that were caused by a subsidiary run by the defendant. The government charged him with wire fraud, alleging he deprived the firm "of its right to control its assets." Indictment ¶ 1, *Smothermon*, ECF No. 25.	The court adjourned the pretrial conference and trial until after this Court decides the present case.	None.

6	USA v. Ahuja et al, Docket No. 1:18-cr-00328 (S.D.N.Y. May 7, 2018) 3 RTC defendants	Defendants, three officers of an investment firm that managed hedge funds, mismarked the monthly value of securities held by firm-managed funds, inflating the funds' reported NAVs, causing investors to pay higher management and performance fees and to forestall redemptions by investors who would have redeemed their interests had they known of the scheme. At the government's request, the court instructed the jury that "a person is deprived of money or property not only when someone directly takes his money or property from him" but also "when that person is provided false or fraudulent information that, if believed, would prevent him from being able to make informed decisions about what to do with his money or property." Trial Tr. 4983-84, *Ahuja*, ECF No. 270.	Two defendants were found guilty of conspiracy to commit wire fraud. An appeal to the Second Circuit was withdrawn after the defendants entered into a plea agreement.	Two defendants were found guilty of conspiracy to commit securities fraud; the third defendant pled guilty to the same charge.

7	USA v. Nejad et al, Docket No. 1:18-cr-00224 (S.D.N.Y. Mar. 19, 2018) 2 RTC defendants	Defendants allegedly caused wire transfer beneficiary information to be omitted from transfer orders in order to rout payments from a Venezuelan state-owned energy company through banks in the U.S. to the Swiss accounts of entities owned by one defendant and his family for the ultimate benefit of Iranian entities and individuals doing business with the Venezuelan energy company, in violation of OFAC sanctions. The court held that the government "sufficiently allege[d] a scheme to defraud involving an intent to cause tangible economic harm under a right to control theory" because the scheme "deprived U.S. banks of information with respect to the true beneficiaries of the services these banks were providing." 2019 WL 6702361, at *15 (S.D.N.Y. Dec. 6, 2019) (denying pretrial motion to dismiss).	After lead defendant was found guilty of, among other charges, bank fraud and bank fraud conspiracy, the indictment against him was dismissed with prejudice due to *Brady* violations. Charges against a second defendant remain pending.	Before the dismissal of the indictment, the lead defendant also was found guilty of conspiracy to defraud the U.S., conspiracy to violate IEEPA, and money laundering.

8	USA v. Evans et al, Docket No. 1:17-cr-00684 (S.D.N.Y. Nov. 7, 2017) USA v. Sood, Docket No. 1:18-cr-00620 (S.D.N.Y. Aug. 27, 2018) 4 RTC defendants	Three defendants, assistant college basketball coaches, received payments from the fourth defendant, a financial adviser, in exchange for the coaches' agreement to pressure student-athletes under their control to retain the services of the financial advisor once the student-athletes entered the NBA. All four defendants were charged with wire fraud under a right-to-control theory for allegedly depriving the relevant universities of their "right to control the use of [their] assets, including the decision of how to allocate a limited number of athletic scholarships, and which, if revealed, would have further exposed [the universities] to tangible economic harm, including monetary and other penalties imposed by the NCAA." Complaint ¶ 16, *Evans*, ECF No. 1.	The wire-fraud charges against the basketball coaches were dismissed after they pled guilty to conspiracy to commit bribery. The wire fraud charges against the financial advisor were not included in the superseding indictment.	The financial advisor was found guilty of conspiracy to commit bribery and payments of bribes to agent of federally funded organization, but was found not guilty of conspiracy to commit honest services wire fraud, honest services wire fraud, and Travel Act conspiracy. The basketball coaches pled guilty to conspiracy to commit bribery.

9	USA v. Gatto et al., Docket No. 1:17-cr-00686 (S.D.N.Y. Nov. 7, 2017) 4 RTC defendants	Defendants made and concealed payments to high school student-athletes in exchange for the student-athletes' commitment to play basketball for certain universities, rendering the student-athletes ineligible under NCAA rules. The defendants were charged with wire fraud and conspiracy to commit wire fraud on the theory that they deprived the universities "of their right to control the use of their assets, including the decision of how to allocate a limited amount of athletic scholarships, and which, if revealed, would have further exposed the universities to tangible economic harm, including monetary and other penalties imposed by the [NCAA]." Complaint ¶¶ 3, 5, 12, *Gatto*, ECF No. 1.	Three defendants were found guilty of wire fraud and conspiracy to commit wire fraud; the government dismissed all charges against the fourth defendant.	None.

10	USA v. Connors Person et al, Docket No. 1:17-cr-00683 (S.D.N.Y. Nov. 7, 2017) 1 RTC defendant	Defendant, an assistant men's basketball coach at Auburn University, solicited and received bribes from a financial advisor that were facilitated by another defendant, an operator of a clothing company patronized by professional athletes, in exchange for agreeing to pressure student-athletes under the defendant's control to retain the services of the financial advisor once the student-athletes entered the NBA, all while representing to Auburn that the defendant did not know of any NCAA violations, thereby depriving Auburn of its "right to control the use of its assets, including the decision of how to allocate a limited number of athletic scholarships, and which, if revealed, would have further exposed [Auburn] to tangible economic harm, including monetary and other penalties imposed by the NCAA." Complaint ¶ 11, *Connors Person*, ECF No. 1.	Wire fraud charge dismissed as a result of guilty plea to bribery conspiracy charge.	Defendants pled guilty to conspiracy to commit bribery.

11	USA v. Blazer, Docket No. 1:17-cr-00563 (S.D.N.Y. Sep. 15, 2017) 1 RTC defendant	Defendant paid student-athletes to retain him as a financial advisor or business manager once they became professional athletes and concealed the payments from the universities who granted scholarships to the student-athletes, thereby depriving the universities of "their right to control the use of their assets, such as the payment of athletic scholarships." Information ¶ 5, *Blazer*, ECF No. 1.	Defendant pled guilty to wire fraud.	Defendant pled guilty to securities fraud, aggravated identity theft, and making false statements.
12	USA v. Percoco et al, Docket No. 1:16-cr-00776 (S.D.N.Y. Nov. 22, 2016) 6 RTC defendants	The RTC defendants (a person with authority over the awarding of publicly funded contracts under the "Buffalo Billion" initiative and executives of construction companies hoping to win such contracts) manipulated the bidding process to increase the chances that the executives' companies would be awarded contracts, thus depriving the state-created entity awarding the contracts of its right to control the allocation of contract awards	Four defendants were found guilty of wire fraud and conspiracy to commit wire fraud; one defendant pled guilty to wire fraud and wire fraud conspiracy; one defendant had all charges against him dropped. Case is pending in this Court.	One defendant was also found guilty of conspiracy to commit honest services wire fraud; one defendant was found guilty of making false statements to federal officers.

13	USA v. Johnson et al, Docket No. 1:16-cr-00457 (E.D.N.Y. Aug. 16, 2016) 2 RTC defendants	Defendants "ramped the fix" when buying British pounds to be resold to trading counterparty, driving up the price in a manner consistent with the parties' contract and to an extent the defendants believed the counterparty would find tolerable, but in violation of an oral promise to the counterparty. To support its wire fraud charge, the government alleged that the trading counterparty was deprived of "potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Johnson*, 2017 WL 5125770, at *5 (E.D.N.Y. Sept. 21, 2017).	One defendant was found guilty of wire fraud and conspiracy to commit wire fraud; the other defendant remains in the UK.	None.

14	USA v. Jergensen et al, Docket No. 8:16-cr-00235 (N.D.N.Y. July 28, 2016) 2 RTC defendants	Defendants, the principals of a company that brokered financing agreements for construction and energy projects, misappropriated money from a client for whom they agreed to obtain financing for a construction project, thereby depriving the client of its right control its assets. At the government's request, the court instructed the jury that "[p]roperty includes intangible interests such as the right to control the use of one's assets" and "[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." Jury Instructions at 27, *Jergenson*, ECF No. 96.	Both defendants were found guilty of conspiracy to commit wire fraud.	None.
15	USA v. Seabrook et al, Docket No. 1:16-cr-00467 (S.D.N.Y. July 7, 2016) 1 RTC defendant	Defendant received tens of thousands of dollars in bribes each year from a co-conspirator in exchange for the defendant's union investing millions of dollars in the co-conspirator's hedge fund, depriving the union "of its right to control the use of assets, specifically, the money it invested in the . . . hedge fund." Superseding Indictment ¶ 31, *Seabrook,* ECF No. 194.	The RTC wire fraud charge was dismissed on the government' s motion.	Defendant was found guilty of honest services wire fraud and conspiracy to commit same.

16	USA v. Peralta, Docket No. 1:16-cr-00354 (S.D.N.Y. May 24, 2016) 1 RTC defendant	Defendant solicited and obtained money from investors by falsely representing that he would use the investors' money to purchase and re-sell wholesale quantities of liquor, thereby depriving the investors of information that "would prevent [them] from being able to make informed economic decisions about what to do with [their] money or property," in other words, "depriv[ing] [them] of the right to control that money or property." Joint Requests to Charge at 8, *Peralta*, ECF No. 61.	Defendant pled guilty to wire fraud.	None.

17	USA v. Noze et al, Docket No. 3:16-cr-00100 (D. Conn. May 18, 2016) 6 RTC defendants	Defendants staged fake car crashes to collect insurance benefits, thereby depriving the insurance companies of information necessary to determine whether to pay the defendants' claims. The government proposed instructing the jury that "a contemplated deprivation of money or property can include depriving another of the right to control money or property by withholding information necessary to make discretionary economic decisions." Gov't's Proposed Jury Instructions at 11, *Noze*, ECF No. 195. (When questioned about this RTC instruction by the court, the government agreed to drop it. *See* Trial Tr. at 720, ECF No. 426.)	Two defendants were found guilty of wire fraud, mail fraud, and conspiracy to commit wire and mail fraud; two other defendants pled guilty to wire fraud; two other defendants pled guilty to conspiracy to commit wire and mail fraud.	None.
18	USA v. Mitchell et al, Docket No. 1:16-cr-00234 (E.D.N.Y. May 2, 2016) 9 RTC defendants	Defendants induced investors to buy shares of an LED lighting company by, among other things, orchestrating the trading of the company's stock to create the appearance of genuine trading volume in the stock, thereby depriving the investors "of the right to control the use of their assets by depriving them of information necessary to make discretionary economic decisions." Gov't's Mem. In Opp. to Def.'s Mot. To Dismiss at 17, *Mitchell*, ECF No. 163.	One defendant was found guilty of conspiracy to commit wire fraud.	One defendant was found guilty of securities fraud, conspiracy to commit same, and money laundering conspiracy; six defendants pled guilty to securities fraud; two defendants pled guilty to conspiracy to commit securities fraud.

19	USA v. St. Lawrence et al, Docket No. 7:16-cr-00259 (S.D.N.Y. Apr. 6, 2016) 2 RTC defendants	Defendants induced investors to buy bonds from the Town of Ramapo's local development corporation by misrepresenting the balance of the Town's general operating fund and the development corporation's ability to make its bond payments. In support of the wire fraud charge, the government advanced an RTC theory, arguing that, even if the investors suffered no loss, "defendants deprived investors of the information they needed to decide whether, and at what yield, to invest in the Town's . . . bonds." *St. Lawrence*, ECF No. 67 at 9 (government letter in support of motion in limine); *see also* ECF No. 181 at 29 (government's sentencing memorandum).	One defendant was found guilty of wire fraud.	One defendant was found guilty of securities fraud and conspiracy to commit same; the other defendant pled guilty to securities fraud and conspiracy to commit same.

20	USA v. Marshak, Docket No. 3:16-cr-00011 (D. Conn. Jan. 21, 2016) 1 RTC defendant	Defendant convinced the recipients of U.S. government-funded contracts to falsely certify to the Department of Defense that their contract prices either did not include a commission or did not include any foreign-made content, thereby "depriv[ing] the DOD of the property right to control its assets by causing it to make economic decisions based on false and misleading information." Indictment ¶¶ 20, 36, *Marshak*, ECF No. 1.	Defendant pled guilty to wire fraud and mail fraud.	Defendant also pled guilty to major fraud against the United States.

21	USA v. Zarrab et al, Docket No. 1:15-cr-00867 (S.D.N.Y. Dec. 15, 2015) 3 RTC defendants	Defendants, including defendant Halbank, a Turkish state-owned bank, conspired to evade U.S. sanctions against Iran by withholding information from U.S. banks that funds transfers were payments to and on behalf of Iran. The government charged the defendants with bank fraud, arguing that, even if the conduct did not expose the U.S. banks to any meaningful risk of loss, the defendants nonetheless denied the banks "the right to control their assets by depriving them of information necessary to make discretionary economic decisions," and "properly assess the risk from engaging in these transactions." Gov't Mem. In Opp. at 31-32, *Zarrab*, ECF No. 75 (government's brief opposing motion to dismiss the indictment and suppress evidence) (alterations removed).	One defendant pled guilty to, and the other was found guilty of, bank fraud and conspiracy to commit bank fraud.	One defendant pled guilty to, and the other was found guilty of, conspiracy to defraud the U.S., conspiracy to violate IEEPA and ITSR, and conspiracy to commit laundering.

22	USA v. Shkreli et al, Docket No. 1:15-cr-00637 (E.D.N.Y. Dec. 14, 2015) 2 RTC defendants	Defendants Shkreli and Greebel caused Retrophin, a biopharmaceutical company founded by Shkreli, to enter into, and pay for, settlement agreements and sham consulting agreements with disgruntled investors in Shkreli-founded hedge funds without disclosing the agreements to Retrophin's board of directors. Although the government ultimately opted not to proceed on a RTC theory, *see United States v. Greebel*, 2017 WL 11421950, at *4 (E.D.N.Y. Oct. 13, 2017), the government relied on a RTC argument in support of its motion in limine to exclude evidence regarding a lack of ultimate harm to investors, *see Shkreli*, 2017 WL 3623626, at *12-13 (E.D.N.Y. June 24, 2017).	Greebel was found guilty of conspiracy to commit wire fraud in relation to Retrophin; Shkreli was acquitted of the same charge.	Greebel and Shkreli both were found guilty of conspiracy to commit securities fraud, and Shkreli was found guilty of securities fraud.

23	USA v. Murgio et al, Docket No. 1:15-cr-00769 (S.D.N.Y. Nov. 5, 2015) 4 RTC defendants	Defendants disguised the fact that they were operating a Bitcoin exchange service from banks and credit card companies that processed the service's transactions. Four defendants were charged with wire fraud because they "deceive[d] those financial institutions into allowing [the exchange service] to operate and process transactions through them." Superseding Indictment ¶ 28, *Murgio*, ECF No. 87, thereby "depriv[ing] the financial institutions of the right to control their assets by misrepresenting potentially valuable economic information." *United States v. Lebedev*, 932 F.3d 40, 49 (2d Cir. 2019) (upholding convictions).	One defendant was found guilty of wire fraud, bank fraud, and conspiracy to commit wire and bank fraud; another defendant pled guilty to those same charges; a third defendant pled guilty to wire fraud and wire fraud conspiracy; a fourth defendant pled guilty to conspiracy to commit wire fraud and bank fraud.	Three defendants were found guilty of conspiracy to commit financial institution bribery and making corrupt payments with intent to influence an officer of a financial institution; two defendants were found guilty of conspiracy to operate, and the operation of, an unlicensed money transmitting business; one defendant was found guilty of conspiracy to operate an unlicensed money transmitting business and obstruction conspiracy.

24	USA v. Shapiro et al, Docket No. 3:15-cr-00155 (D. Conn. Sep. 3, 2015) 3 RTC defendants	Defendants, traders on a bond-trading desk that purchased and sold residential mortgage-backed securities, misrepresented price negotiations with contemporaneous, third-party counterparties to customers, depriving the customers of "the right to make a discretionary economic decision." Indictment ¶ 40, *Shapiro*, ECF No. 2.	Two of the defendants (Shapiro and Peters) were found not guilty on all wire fraud counts. The third defendant (Gramins) was found not guilty on all counts of wire fraud, except one, for which the jury was unable to reach a verdict. One defendant was found guilty of conspiracy to commit wire fraud and securities fraud; the jury failed to reach a verdict on that charge against the other defendant, and the re-trial has not yet taken place.	Defendant Gramins was found guilty of conspiracy to commit offenses against the U.S.

25	USA v. Tuzman et al, Docket No. 1:15-cr-00536 (S.D.N.Y. Aug. 12, 2015) 1 RTC defendant	Defendant conspired to have a hedge fund buy stock of his company to artificially inflate its price and trading volume, which the defendant failed to report to the company's shareholders. The government charged the defendant with wire fraud on a RTC theory that was ultimately accepted by the court—that the defendant defrauded the shareholders "by withholding material and valuable economic information about their investment." *United States v. Tuzman*, 2021 WL 1738530, at *40 (S.D.N.Y. May 3, 2021) (denying motion for a judgment of acquittal or a new trial).	Defendant was found guilty of wire fraud and wire fraud conspiracy.	Defendant was found guilty of securities fraud, securities fraud conspiracy, and making false statements in SEC reports and to auditors.

26	USA v. Durante et al, Docket No. 1:15-cr-00171 (S.D.N.Y. Mar. 17, 2015) 6 RTC defendants	Defendants manipulated the stock of a publicly traded company by controlling a majority of the company's public shares and trading them between each other in order to artificially inflate the stock price and trading volume, which induced investors to trade in the company's stock while depriving them of information necessary to determine whether to do so. At the government's request, the court instructed the jury that "a person is deprived of money or property when he is deprived of the right to control that money or property. And he is deprived of the right to control that money and property when important, potentially valuable economic information is withheld from him or where he receives false or fraudulent information of that nature that affects his ability to make discretionary economic decisions about what to do with that money or property." Trial Tr. at 2669, *Durante*, ECF No. 267.	Two defendants were found guilty of wire fraud and wire fraud conspiracy; two defendants pled guilty to wire fraud and wire fraud conspiracy.	Two defendants were found guilty of securities fraud and securities fraud conspiracy; one of whom was also convicted of aggravated identity theft and investment advisor fraud; four defendants pled guilty to securities fraud conspiracy; three defendants pled guilty to securities fraud and money laundering; two defendants pled guilty to money laundering, one of whom also pled guilty to money laundering conspiracy; one defendant pled guilty to investment advisor fraud; one defendant pled guilty to making false statements and another pled guilty to perjury.

27	USA v. Lillemoe et al, Docket No. 3:15-cr-00025 (D. Conn. Feb. 20, 2015) 3 RTC defendants	Defendants presented altered documents, such as copies of bills of lading falsely marked "original," to U.S. banks to induce them to make loans to foreign banks, exposing the U.S. banks to the possibility of litigation for accepting improper documentation. The government charged the defendants with wire fraud and conspiracy to commit wire fraud on a RTC theory—that "the defendants deprived [the banks] of information necessary for [them] to make a discretionary economic decision," and "control the disposition of [their] assets." *United States v. Lillemoe*, 242 F. Supp. 3d 109, 120-21 (D. Conn. 2017), *aff'd sub nom. United States v. Calderon*, 944 F.3d 72 (2d Cir. 2019) (finding sufficient evidence to convict on RTC theory).	Two defendants were found guilty of wire fraud and wire fraud conspiracy; the third defendant was acquitted of all charges.	None.

28	USA v. Williams Scott & Associates, LLC et al, Docket No. 1:14-cr-00784 (S.D.N.Y. Dec. 1, 2014) 5 RTC defendants	Defendants, a debt collection agency, its principal, and three of its employees, made false representations in order to convince victims to pay purported debts. In opposing the defendants' motion for judgment of acquittal, the government relied on a RTC theory to defend the jury's finding defendants guilty of wire fraud: that the defendants misrepresentation affected the victims' "economic calculus." *See* Gov't Mem. In Opp. at 6-9, *Williams Scott*, ECF No. 198.	The principal was found guilty of conspiracy to commit wire fraud; two employees pled guilty to the same charge; a nolle prosequi was entered as to the company.	A third employee was found guilty of possession and use of a controlled substance.

29	USA v. O'Garro, No. 3:14-cr-00227 (D. Conn. Nov. 20, 2014) 1 RTC defendant	Defendant, the operator of an insurance brokerage, submitted applications with falsified insurance policy information in order to obtain financing for insurance premium payments purportedly owed by shell entities he controlled, thereby depriving the financing company of information needed to determine whether to finance the insureds' premium payments. The court instructed the jury that it could convict based on a RTC theory—that the defendants deprived the company of "information necessary to make a discretionary economic decision." *United States v. O'Garro*, 700 F. App'x 52, 53 (2d Cir. 2017) (affirming conviction).	Defendant was found guilty of mail and wire fraud.	None.

30	USA v. Robson et al, Docket No. 1:14-cr-00272 (S.D.N.Y. Apr. 28, 2014) 7 RTC defendants	Defendants, employees of Rabobank, made USD and Yen LIBOR submissions to the trade association responsible for setting LIBOR rates that may have accurately reflected the rate at which Rabobank could borrow unsecured funds but were skewed to favor Rabobank's positions in derivative trades tied to LIBOR, thereby depriving the Rabobank traders' counterparties of the right to control their assets by withholding information necessary to determine whether to enter into the derivatives transactions. The court held that the government presented sufficient evidence to support a wire fraud conviction because it showed that the defendants "deprived the victim of potentially valuable economic information." *United States v. Allen*, 160 F. Supp. 3d 698, 704 (S.D.N.Y. 2016) (alteration removed).	Two defendants were found guilty of wire fraud and conspiracy to commit wire fraud and bank fraud; five defendants pled guilty to conspiracy to commit wire fraud and bank fraud.	None.

31	USA v. Carpenter et al, Docket No. 3:13-cr-00226 (D. Conn. Dec. 12, 2013) 2 RTC defendants	Defendants, life insurance brokers, submitted life insurance applications that disguised the fact that the policies were intended to be sold to third-party investors, which "deprived the providers of information necessary to make discretionary decisions whether to issue the policies." *United States v. Carpenter*, 190 F. Supp. 3d 260, 298 (D. Conn. 2016), *aff'd sub nom. United States v. Bursey*, 801 F. App'x 1 (2d Cir. 2020) (finding that government sustained its burden of proof as to each element of mail and wire fraud).	One defendant was found guilty of mail and wire fraud and mail and wire fraud conspiracy; the other defendant died during the pendency of the proceedings and the charges against him were dismissed.	One defendant was found guilty of illegal monetary transactions, money laundering, conspiracy to commit money laundering, and aiding and abetting the substantive offenses.

32	USA v. Davis et al, Docket No. 1:13-cr-00923 (S.D.N.Y. Nov. 22, 2013) 2 RTC defendants	Defendants, the owner of a subcontractor and the subcontractor company itself, which had won a contract to perform work on the World Trade Center from the Port Authority of New York and New Jersey, submitted an application that contained misrepresentations regarding the ownership, control, and profit-sharing of a joint venture the subcontractor had formed with a minority-owned and woman-owned business enterprise, depriving the Port Authority of information necessary to make the discretionary economic decision of whether to allow the joint venture to perform the WTC contract. The government pressed a RTC theory to support a wire fraud conviction, *see* Gov't's Mem. In Opp. to Defs.' Post-Trial Mots. At 23-25, *Davis*, ECF No. 95, and the court rejected that theory's applicability, *see United States v. Davis*, 2017 WL 3328240, at *14 (S.D.N.Y. Aug. 3, 2017).	Both defendants were found guilty of wire fraud and wire fraud conspiracy, but their convictions were vacated after the district court granted their motions for acquittal.	None.

33	USA v. Tagliaferri, Docket No. 1:13-cr-00115 (S.D.N.Y. Feb. 19, 2013) 1 RTC defendant	Defendant, who operated an investment firm, accepted fees from companies in exchange for investing client funds in the companies without reporting the receipt of such fees to his clients, engaged in cross-trading without disclosing the cross-trades to clients, and disguised an equity investment of client funds in a third-party company as a loan, all of which deprived his clients of information necessary to control their assets. At the government's request, the court instructed the jury that a RTC theory could be used to convict the defendant for wire fraud. Trial Tr. at 2782, *Tagliaferri*, ECF No. 89.	Defendant was found guilty of wire fraud.	Defendant was found guilty of investment advisor fraud, securities fraud, and Travel Act offenses.

34	USA v. Huff et al, Docket No. 1:12-cr-00750 (S.D.N.Y. Sep. 27, 2012) 3 RTC defendants	Defendants conspired to purchase an Oklahoma insurance company by falsely representing to a state regulator that the source of financing for the purchase was one defendant's bank, when in fact the purchase was financed by a loan from a second defendant's investment firm and backed by the Oklahoma insurance company's assets, thereby depriving the state regulator of information "regarding the source of the [funds] used to purchase [the insurance company.]" Superseding Information ¶ 55*, Huff*, ECF No. 119. The government argued that this constituted a deprivation of property under a RTC theory, Mem. of U.S.A. in Opp. to Def.'s Second Mot. to Dismiss the Indictment at 15, ECF No. 129, and the court accepted this argument, 2015 WL 463770, at *6-7 (S.D.N.Y. Feb. 4, 2015) (denying motion to dismiss).	Two defendants pled guilty to conspiracy to commit wire fraud; one defendant pled guilty to conspiracy to commit bank bribery and wire fraud.	One defendant also pled guilty to corrupt interference with tax code, aiding preparation of false tax returns, and willful failure to file taxes; another defendant pled guilty to fraud on bank regulators, conspiracy to commit same, and conspiracy to commit bank bribery.

35	USA v. Kurniawan, Docket No. 1:12-cr-00376 (S.D.N.Y. May 9, 2012) 1 RTC defendant	Defendant induced a financing company to loan him $3 million by misrepresenting the amount of outstanding personal debt he had, the amount of his annual expenses, and his immigration status, depriving the financing company of "the accurate information they need to control their assets," and thus "harm[ing] the [company's] property interest in those assets." Gov't's Mots. in Limine at 6, *Kurniawan*, ECF No. 64.	Defendant was found guilty of mail fraud and wire fraud.	None.

36	USA v. Balboa, Docket No. 1:12-cr-00196 (S.D.N.Y. Mar. 1, 2012) 1 RTC defendant	Defendant, a portfolio manager of a hedge fund, directed two co-conspirators to provide the hedge fund's independent valuation agent with inflated prices for certain illiquid securities in order to inflate the hedge fund's NAV. At the government's request, the court instructed the jury that "a person is also deprived of money or property when that person is provided false or fraudulent information that, if believed, would prevent him from being able to make informed decisions about what to do with his money or property. In other words, a person is deprived of money or property when he is deprived of the right to control that money or property." Trial Tr. at 1965, *Balboa*, ECF No. 74.	Defendant was found guilty of wire fraud and wire fraud conspiracy.	Defendant was found guilty of securities fraud, securities fraud conspiracy, and investment advisor fraud.

37	USA v. Abakporo et al., No. 12-cr-00340 (S.D.N.Y. Apr. 26, 2012) 2 RTC defendants	Defendants conspired to acquire a residential apartment building from an elderly individual by falsely representing that they would pay her $3.1 million for the property, but instead of conveying the net proceeds of the sale to the victim, the defendants induced the victim (and a lender) to enter into an agreement that granted her a private mortgage on the property. In a motion in limine, the government argued that the defendants should be precluded from arguing that the victims suffered no harm, because the defendants nonetheless "deprive[d] [them] of the accurate information they need to control their assets." Mem. in Supp. Of Mots. in Limine of the U.S.A. at 20, *Abakporo*, ECF No. 103.	Both defendants were found guilty of conspiracy to commit bank fraud, conspiracy to commit wire fraud, and bank fraud and aiding and abetting bank fraud.	None.

38	USA v. Binday et al, Docket No. 1:12-cr-00152 (S.D.N.Y. Feb. 15, 2012) 3 RTC defendants	Defendants, life insurance brokers, submitted life insurance applications that disguised the fact that the policies were intended to be sold to third-party investors, which "deprived the insurers of potentially valuable economic information" that could cause them to issue policies they would not otherwise have issued due to the companies' policies against issuing stranger-originated life insurance (STOLI) policies. *United States v. Binday*, 804 F.3d 558, 574 (2d Cir. 2015) (affirming convictions).	All three defendants were found guilty of mail fraud, wire fraud, and conspiracy to commit mail and wire fraud.	Two defendants also were found guilty of conspiracy to obstruct justice through destruction of records.
39	USA v. Mazer et al, Docket No. 1:11-cr-00121 (S.D.N.Y. Feb. 10, 2011) 1 RTC defendant	Defendant orchestrated a kickback scheme while serving as a manager on New York City's CityTime payroll system modernization project in which he caused consultants to be hired by a CityTime subcontractor through two staffing companies controlled by co-conspirators from whom he solicited kickbacks, thus depriving New York City of "the right to control its assets by withholding material facts, and by making material misrepresentations, in dealings with the City." Indictment ¶ 3, *Mazer*, ECF No. 40.	Defendant was found guilty of wire fraud.	Defendant was found guilty of conspiracy to defraud New York City, bribery and conspiracy to commit same, conspiracy to violate the Travel Act, and conspiracy to commit money laundering.

40	USA v. Ghavami et al, Docket No. 1:10-cr-01217 (S.D.N.Y. Dec. 9, 2010) 3 RTC defendants	Defendants, employees of UBS Financial Services, conspired to rig the bidding on investment agreements offered by issuers of municipal bonds, by, among other things, sharing bid information, thereby depriving the municipal bond issuers "of the property right to control their assets by causing them to make economic decisions based on misleading and false information." Superseding Indictment ¶ 24, *Ghavami*, ECF No. 30.	Two defendants were found guilty of wire fraud and wire fraud conspiracy; one defendant was found guilty only of wire fraud conspiracy.	All three defendants were found guilty of conspiracy to defraud the United States.
41	USA v. Plummer et al., No. 10-cr-00235 (D. Conn. Nov. 23, 2010) 2 RTC defendants	Defendants solicited investments for a Mississippi casino development but failed to disclose that a significant amount of the funds would be used for the defendants' personal expenses. At the government's request, the court instructed the jury that the government must "prove that the defendant contemplated actual harm, loss of money or property," but that "[s]uch a loss may include depriving another of information necessary to make discretionary economic decisions." Trial Tr. at 68, *Plummer*, ECF No. 376.	One defendant pled guilty to conspiracy to commit wire fraud; the other defendant was found guilty of wire fraud and conspiracy to commit wire fraud.	One defendant was also found guilty of money laundering.

42	USA v. Carollo et al, Docket No. 1:10-cr-00654 (S.D.N.Y. July 27, 2010) 3 RTC defendants	Defendants conspired to rig the bidding on investment agreements offered by issuers of municipal bonds by, among other things, paying kickbacks in exchange for information on competing bidders' bids, thereby depriving the municipal bond issuers "of the property right to control their assets by causing them to make economic decisions based on misleading and false information." Superseding Indictment ¶ 19, *Carollo*, ECF No 35.	All three defendants were found guilty of conspiracy to commit wire fraud and to defraud the IRS. All three convictions were reversed by the Second Circuit on other grounds.	None.
43	USA v. Finazzo et al, Docket No. 1:10-cr-00457 (E.D.N.Y. June 08, 2010) 2 RTC defendants	Defendants, a merchandise manager for an apparel retailer and an owner of an apparel supplier, conspired to cause the apparel retailer to use the supplier in exchange for kickbacks from the supplier to the merchandise manager, without reporting the kickbacks to the apparel retailer, thereby depriving the apparel retailer of the "right to control its purchasing." *United States v. Finazzo*, 2013 WL 619571, at *4 (E.D.N.Y. Feb. 19, 2013) (denying motion to dismiss portions of second superseding indictment).	One defendant was found guilty of mail fraud, wire fraud, and conspiracy to commit mail fraud and wire fraud; the other defendant pled guilty to conspiracy to commit mail fraud and wire fraud.	One defendant was found guilty of violating the Travel Act; the other defendant pled guilty to violating the Travel Act.

44	USA v. Bilal et al., No. 10-cr-00129 (S.D.N.Y. Feb. 19, 2010) 3 RTC defendants	Defendants were charged with defrauding federally insured lenders by submitting applications for residential mortgage loans containing materially false or misleading information, including false information about the borrowers' employment, income, assets, and whether the borrowers intended to live in the properties. The government moved to preclude evidence that the lenders ultimately suffered no harm, arguing that, regardless, the defendants "deprive[d] lenders of the accurate information they need to control their assets," which thus "harm[ed] the lenders' property interest in those assets." Gov't's Mot. in Limine at 11*, Bilal*, ECF No. 42.	One defendant pled guilty to wire fraud and conspiracy to commit bank fraud; another defendant also pled guilty to conspiracy to commit bank fraud; and a third defendant was found guilty of conspiracy to commit bank and wire fraud.	None.

45	USA v. Stocking et al., No. 10-cr-00035 (D. Conn. Jan. 28, 2010) 3 RTC defendants	Defendants represented to a bank's vendor management department that a corporation they controlled was a legitimate company entitled to certain fees for real estate transactions when in fact the corporation was not actually the broker or landlord for those transactions, thereby depriving the bank "of information necessary to make discretionary economic decisions about the appropriate use of its money." Plea Agreement, *Stocking*, ECF No. 138.	Two defendants pled guilty to bank fraud; the third defendant's bank fraud charges were dismissed after pleading guilty to filing a false tax return.	All defendants pled guilty to filing a false tax return.

46	USA v. Viloski et al, Docket 5:09-cr-00418 (N.D.N.Y. Aug. 5, 2009) 3 RTC defendants	Defendants, a broker and consultant for Dick's Sporting Goods' real estate transactions, an employee of Dick's, and an intermediary, caused consulting fees paid by Dick's to the broker to be paid as kickbacks to the Dick's employee, thereby depriving Dick's of "potentially valuable information that could impact its economic decisions." Amended First Superseding Indictment ¶ 10, *Viloski*, ECF No. 259	One defendant was found guilty of mail fraud and conspiracy to commit mail and wire fraud; one defendant pled guilty to wire fraud and conspiracy to commit mail and wire fraud; a third defendant pled guilty to conspiracy to commit mail and wire fraud.	One defendant also was found guilty of concealment money laundering, conspiracy to commit same, and making false statements; another defendant pled guilty to conspiracy to commit money laundering; a third defendant pled guilty to conspiracy to commit money laundering and conspiracy to commit securities fraud.

47	USA v. Jabar, No. 09-cr-170 (W.D.N.Y. May 21, 2009) 2 RTC defendants	Defendants failed to disclose that they intended to use money granted by the UN for the creation of a radio station in Iraq to pay personal expenses, depriving the UN of "the benefit of the bargain." *United States v. Jabar*, 19 F.4th 66, 78 (2d Cir. 2021). Although the government did not "explicitly articulate[]" a right-to-control theory at trial, it advanced such a theory on appeal. *See* Brief for United States of America at 29, *United States v. Jabar* (2d Cir. No. 17-3514).	Defendants' wire fraud and wire fraud conspiracy convictions were vacated by the district court post-trial but then reinstated on appeal by the Second Circuit. On remand, the parties are briefing the defendants' renewed motions for a new trial.	Both defendants were found guilty of making false statements.

48	USA v. Levis, No. 08-cr-00181 (S.D.N.Y. Mar. 4, 2008) 1 RTC defendant	Defendant, an officer of a financial holding company, misrepresented to the investing public certain information about the company's portfolio of "interest-only strips," including misrepresenting the reasons for the devaluation of that portfolio. The court instructed the jury that the defendant "would be guilty of intending to inflict harm on investors if he intended to put false information before them which would deprive them of the ability to make investment decisions based on actual facts." *United States v. Levis*, 488 F. App'x 481, 486 (2d Cir. 2012) (quoting Trial Tr. at 3728 and affirming jury instruction as "accurately stat[ing]" the right-to-control theory).	Defendant was found guilty of wire fraud.	Defendant was also found guilty of securities fraud.