No. 21-1170

IN THE
Supreme Court of the United States

LOUIS CIMINELLI,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STEVEN F. MOLO
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8160

KENNETH E. NOTTER III
MOLOLAMKEN LLP
300 N. LaSalle Street
Chicago, IL 60654
(312) 450-6700

JOSHUA L. DRATEL
Counsel of Record
CO-CHAIR, NACDL AMICUS COMMITTEE
DRATEL & LEWIS
29 Broadway, Suite 1412
New York, NY 10006
(212) 732-0707
jdratel@joshuadratel.com

Counsel for The National Association of Criminal Defense Lawyers

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

NO. 21-1170

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a nonprofit bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes.

NACDL was founded in 1958. It has a nationwide membership of thousands of members, including private

[1] All parties received timely notice of this brief and consented to its filing. No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution to fund the preparation or submission of the brief; and no person other than *amicus curiae*, its members, or its counsel made such a contribution.

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. Each year, NACDL files *amicus* briefs in this Court and others in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. NACDL has a particular interest in reducing overcriminalization. It regularly opposes overbroad interpretations of criminal laws and has filed multiple *amicus* briefs regarding the proper interpretation of the mail and wire fraud statutes.

SUMMARY OF ARGUMENT

This case is yet another example of overzealous prosecutors distorting the mail and wire fraud statutes – this time through the so-called "right-to-control" theory. That theory epitomizes the overcriminalization that plagues federal criminal law. It is an atextual invention of prosecutors that criminalizes a staggering amount of run-of-the-mill dishonesty traditionally regulated, if at all, by States. And it eviscerates foundational due process protections. This Court has repeatedly rejected similarly aggressive interpretations of federal criminal statutes. The Court should do the same with the right-to-control theory.

ARGUMENT

I. THE "RIGHT-TO-CONTROL" THEORY ILLUSTRATES THE PERILS OF OVERCRIMINALIZATION

The mail and wire fraud statutes codify "traditional concepts of property," *Cleveland* v. *United States*, 531 U.S. 12, 24 (2000), and "bar only schemes for obtaining property," *Kelly* v. *United States*, 140 S. Ct. 1565, 1574

(2020). But the right-to-control theory treats any deprivation "of potentially valuable economic information" relevant to discretionary economic decisions as property fraud. J.A. 41.

Traditional concepts of property do not encompass "the ethereal right to accurate information" when deciding how to ***use*** property. *United States* v. *Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (Sutton, J.); see *United States* v. *Walters*, 997 F.2d 1219, 1226 n.3 (7th Cir. 1993) (Easterbrook, J.) ("the 'right to control' * * * is an intangible rights theory once removed"); Pet. Br. 15-30. Nor can a defendant "obtain" that right by depriving the victim of information. See Pet. Br. 31-34.

That is why prosecutors push the right-to-control theory as an "alternative" to "classic" property fraud. *United States* v. *Muratov*, 849 F. App'x 301, 306 (2d Cir. 2021). That "alternative" theory is a "usurpation of legislative authority" and overcriminalization at its worst. *United States* v. *Open Boat*, 27 F. Cas. 354, 357 (No. 15,968) (C.C. Me. 1829) (Story, J.).

The right-to-control theory carries added danger because it has no limiting principle. ***Every*** deception deprives the victim of accurate information. Economic information is ***always*** "potentially valuable" and ***always*** relevant to "discretionary economic decisions." Nearly every fib or half-truth is thus a crime under the right-to-control theory. The examples are endless. A jokester who emails a friend an invitation to a fake party, inducing the friend to drive to the nonexistent party and "thus expending the cost of gasoline," has committed wire fraud. *Kelly*, 140 S. Ct. at 1573 n.2. An "employee's phoning in sick to go to a ball game" is wire fraud. *Sorich* v. *United States*, 129 S. Ct. 1308, 1309 (Scalia, J., dissenting from denial of certiorari). So is lying over the phone about the reason for buy-

ing any product even if the seller is "paid full price." *Sadler*, 750 F.3d at 590. Fibbing on a résumé or exaggerating on a college application could be either mail or wire fraud. See *United States* v. *Sidoo*, 468 F. Supp. 3d 428, 440-442 (D. Mass. 2020) (deceit in college admission is wire fraud). The right-to-control theory is just another one-size-fits-all theory that leaves the people "at the mercy of *noblesse oblige*" of prosecutors. *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).

Such a limitless theory predictably "intrude[s] upon the police power of the States." *Bond* v. *United States*, 572 U.S. 844, 863 (2014). States ordinarily set their own "standards of disclosure and good government" and structure the rules for business and personal relationships. *McNally* v. *United States*, 483 U.S. 350, 360 (1987). But the right-to-control theory overrides those local judgments by transforming mail and wire fraud into federal "ethics codes" demanding disclosure of every potentially relevant morsel of information. *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). That license for the federal government to "use the criminal law to enforce (its view of) integrity" achieves the "'sweeping expansion of federal criminal jurisdiction'" this Court has long resisted. *Kelly*, 140 S. Ct. at 1574.

And as this case illustrates, the right-to-control theory is incompatible with due process. The jury was instructed to convict Mr. Ciminelli if he withheld "potentially valuable economic information" that "created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." J.A. 41-42. That standardless jumble of buzzwords offers no notice – let alone ***fair*** notice – "of what is prohibited." *Skilling* v. *United States*, 561 U.S. 358, 416 (2010). It turns on subjective views of what information is "potentially valu-

able"; requires mindreading to assess what the purported victim "anticipated it would receive"; and invites conviction by hindsight where the value received falls short of the victim's expectations.

The right-to-control theory thus "encourage[s] arbitrary and discriminatory enforcement," *Skilling*, 561 U.S. at 402-403, and leaves individuals "at peril of life, liberty or property to speculate" as to the lawfulness of their conduct, *Bouie* v. *City of Columbia*, 378 U.S. 347, 351 (1964). To send Mr. Ciminelli to prison under "'so shapeless'" a theory defies "'the Constitution's guarantee of due process.'" *McDonnell* v. *United States*, 579 U.S. 550, 576 (2016).

II. This Court Has Not Hesitated To Correct Overcriminalization

Overcriminalization is rampant with respect to both the volume and application of federal criminal laws. There are so many federal criminal laws that "most Americans are criminals and don't know it." A. Kozinski & M. Tseytlin, *You're (Probably) a Federal Criminal*, *in In the Name of Justice* 43, 44 (T. Lynch ed. 2009). The latest estimate found at least "5,199 discrete [federal] crimes." G. Canaparo et al., *Counting the Code: Quantifying Federalization of Criminal Statutes*, Heritage Found., Special Report No. 251, at 10 (Jan. 7, 2022). These crimes include everything from leaving the country with too many nickels, 31 U.S.C. § 5111(d)(2); 31 C.F.R. §§ 82.1(a), 82.2(a), to picnicking in a non-designated area, 54 U.S.C. § 100101; 36 C.F.R. § 2.11.

The number of federal crimes is just half the problem. Prosecutors and lower courts stretch those laws to reach conduct "***not*** enumerated in the statute." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820) (emphasis added). These overbroad interpretations criminalize lawful

conduct and transform the "criminal law" into a "weapon that goes as far as [prosecutors] want," Tr. of Oral Arg. 31-32, *McDonnell* v. *United States*, No. 15-474 (2016) (Breyer, J.).

The consequences for individual liberty are dire. Contorted interpretations of criminal laws deprive the people of the "fair notice" that due process demands, *McDonnell*, 579 U.S. at 576, and "'partak[e] of the odious nature of an ex post facto law'" by declaring conduct criminal after the fact, *Rogers* v. *Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting). As prosecutors and courts stretch federal criminal laws to conduct also regulated by the States, individuals face "deeply unjust" successive prosecutions for the same conduct. *Gamble* v. *United States*, 139 S. Ct. 1960, 1996 (2019) (Gorsuch, J., dissenting).

Expansive interpretations of federal criminal statutes also "upset the Constitution's balance between national and local power." *Bond*, 572 U.S. at 866. Federal prosecutors exacerbate the problem by diverting cases from state courts and seeking harsher federal sentences where they perceive state law penalties as lenient.[2] These intrusions deprive States of power to express local values and vindicate local interests and displace States' "'primary authority for defining and enforcing' criminal laws." *Torres* v. *Lynch*, 578 U.S. 452, 464 n.9 (2016).

Overcriminalization similarly undermines "the separation of powers." *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019). "It is the legislature, not the Court, which is

---

[2] See R. Leider, *The Modern Common Law of Crime*, 111 J. of Crim. L. & Criminology 407, 477 (2021) (recounting practice where, one day each week, "federal prosecutors diverted all local drug cases to federal court"); *United States* v. *Kupa*, 976 F. Supp. 2d 417, 420, 449-450 (E.D.N.Y. 2013) (had defendant "been prosecuted in the state court * * *, he would certainly have avoided a 20-year prison term.").

to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat.) at 95. But that safeguard disappears when prosecutors and courts "punish a crime not enumerated in the statute." *Id.* at 96. It is a "usurpation of legislative authority." *Open Boat*, 27 F. Cas. at 357. And it consolidates "[t]he terrifying force of the criminal justice system" in individual prosecutors, rather than entrusting it to "society as a whole" represented in the legislature. *Robertson* v. *United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting).

This Court has consistently curbed overcriminalization. It has invalidated vague federal criminal laws that "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges." *Davis*, 139 S. Ct. at 2333; see *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1215-1216 (2018) (invalidating law allowing deportation for committing "crime of violence"); *Johnson* v. *United States*, 576 U.S. 591, 596-597 (2015) (invalidating law imposing increased sentences for felons with three prior convictions for a "violent felony"); *City of Chicago* v. *Morales*, 527 U.S. 41, 57-58 (1999) (plurality) (invalidating law prohibiting "gang members" from loitering); *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) (invalidating law requiring loiterers to provide "credible and reliable" identification to police); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 156-158 & n.1 (1972) (invalidating ordinance prohibiting loitering by "[r]ogues and vagabonds").

The Court has rejected aggressive interpretations that criminalize "breathtaking amount[s] of commonplace" conduct. *Van Buren* v. *United States*, 141 S. Ct. 1648, 1661 (2021) (rejecting reading of "exceeds authorized access" in the computer fraud law that included "every violation of a computer-use policy"); see *McDonnell*, 579 U.S. at 575 (rejecting reading of "official act" in bribery statute that

included everything "from arranging meetings to inviting a guest to an event"); *Bond*, 572 U.S. at 865-866 (rejecting reading of "chemical weapon" in chemical weapons treaty that included every toxic chemical); *Jones* v. *United States*, 529 U.S. 848, 857 (2000) (rejecting reading of "property used in" or "affecting interstate * * * commerce" in arson statute that included private residences); *United States* v. *Kozminski*, 487 U.S. 931, 949 (1988) (rejecting reading of "involuntary servitude" in anti-trafficking law that "include[d] compulsion through psychological coercion"); *McNally*, 483 U.S. at 358 (rejecting reading of "money or property" in the mail fraud statute that included "intangible rights").

The Court has refused to read criminal laws to reach "conduct traditionally regulated by state and local authorities." *Cleveland*, 531 U.S. at 24 (refusing to read the property fraud statutes to reach "false statements on [state] license applications"); see *Kelly*, 140 S. Ct. at 1574 (refusing to read the property fraud statutes to effect "'a sweeping expansion of federal criminal jurisdiction'"); *Bond*, 572 U.S. at 863 (refusing to read a chemical weapons treaty to "reach purely local crimes"); *McNally*, 483 U.S. at 360 (refusing to read the property fraud statutes to allow "the Federal Government [to] set[] standards of disclosure and good government for local and state officials"); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (refusing to read the Travel Act to "transform relatively minor state offenses into federal felonies").

And the Court has emphasized that it "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell*, 579 U.S. at 576 (refusing to rely on prosecutorial discretion when interpreting bribery statute); see *Marinello* v. *United States*, 138 S. Ct. 1101, 1108 (2018) (refusing "to rely upon prosecutor-

ial discretion" when interpreting tax obstruction statute); *Stevens*, 559 U.S. at 480 (refusing to rely on "the mercy of *noblesse oblige*" when interpreting law prohibiting depictions of animal cruelty); *United States* v. *Sun-Diamond Growers of Cal.*, 526 U.S. 398, 408 (1999) (refusing to rely on "Government's discretion" when interpreting bribery statute).

* * *

The right-to-control theory is the latest in a long line of aggressive prosecution theories to reach this Court. It is both a symptom and a cause of overcriminalization. The Court should reject it.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

STEVEN F. MOLO
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8160

KENNETH E. NOTTER III
MOLOLAMKEN LLP
300 N. LaSalle Street
Chicago, IL 60654
(312) 450-6700

JOSHUA L. DRATEL
Counsel of Record
CO-CHAIR, NACDL AMICUS COMMITTEE
DRATEL & LEWIS
29 Broadway, Suite 1412
New York, NY 10006
(212) 732-0707
jdratel@joshuadratel.com

Counsel for The National Association of Criminal Defense Lawyers

SEPTEMBER 2022