No. 18-1059

In The

Supreme Court of the United States

BRIDGET ANNE KELLY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF MICHAEL BINDAY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF MICHAEL BINDAY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS*[1]

Michael Binday submits this brief as *amicus curiae* in support of the petition in this case.

Binday was convicted under the legal doctrine that equates the "right to control" property with the property element of the mail and wire fraud statutes, as were Bridget Anne Kelly and William Baroni: Binday was convicted of depriving insurance companies of "the ability to make an informed economic decision about what to do with [their] money or property." Kelly and Baroni's jury was instructed that it could find the defendants obtained money or property if the Port Authority "receives false or fraudulent statements that affect its ability to make discretionary economic decisions about what to do with that money or property." *United States v. Baroni*, 909 F.3d 550, 563 (3d Cir. 2018), *cert. granted sub nom. Kelly v. United States*, 139 S. Ct. 2777 (2019).

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[1] Pursuant to Rule 37.6, counsel for Binday states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than Binday made a monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.2, counsel of record for all parties received notice of Binday's intent to file this brief at least ten days before the due date. The parties provided their written consent to the filing of this brief.

Binday is currently serving a 144 month prison sentence and was ordered to pay over $37 million in restitution plus forfeiture. His conviction was affirmed on direct appeal, and this Court denied certiorari. *Binday v. United States*, 136 S. Ct. 2487 (2016). On August 27, 2019, Binday filed a petition for a writ of certiorari. *Binday v. United States*, No. 19-273.

Binday's interest in this case is personal as well as altruistic. He has been deprived of his liberty and has suffered significant financial stress as a result of his conviction. He believes that other business people cannot understand or predict when incomplete or incorrect information provided during contract negotiations or in applications may result in federal criminal prosecutions, especially in areas that are highly regulated by the states. He submits this brief to ensure that the interests of people like him – from the private sector – are heard, since the petitioner in the captioned case was prosecuted for his conduct in the public sector.

INTRODUCTION AND SUMMARY OF ARGUMENT

The mail and wire fraud statutes generally protect only "traditional concepts of property" loss, *Cleveland v. United States*, 531 U.S. 12, 24 (2000). Property includes tangible and intangible property. *See Carpenter v. United States*, 484 U.S. 19, 25 (1987). Before *McNally v. United States*, 483 U.S. 350, 358 (1987), lower courts construed the fraud statutes as protecting a range of intangible rights, such as licensing, but this Court rejected those intangible rights theories because they left the law's "outer boundaries ambiguous," *id*. at 360. After *McNally*, Congress "amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services.' " *Cleveland*, 531 U.S. at 20. Thereafter, the Court in *Skilling v. United States*, 561 U.S. 358, 400, 407 (2010), limited "honest services" to breaches of fiduciary duty in connection with a bribe or kickback scheme.[2]

In *Skilling*, the government contended that honest services also ought to be construed to protect people from "undisclosed self-dealing by a public official or private employee," but this Court disagreed, finding a lack of consensus among lower courts about the meaning of "schemes of nondisclosure and concealment of material information" and concluding that the "self-dealing" category was too amorphous. *Id*. at 410. In doing so, it cited – and rejected – the reasoning in *United States v. Mandel*, 591 F.2d 1347, 1361, 1363 (4th Cir. 1979), an influential decision that embraced the definition of "property" to include the "right to control" the property.

The government has tried to convince this Court to hold that the "right to control" property is "property" protected by the fraud statutes under the plain language of the fraud statutes (*Cleveland*) and as part of the phrase "honest services" (*Skilling*). Both times the

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[2] *See United States v. Milovanovic*, 678 F.3d 713, 722 (9th Cir. 2012) (construing *Skilling* as requiring proof of "a breach of a fiduciary duty" under 18 U.S.C. §§ 1341 and 1346).

Court rejected the effort. Lower courts, however, fail to follow the Court's rulings.

Only Congress has the power to grant federal prosecutors the broad power to police contract negotiation or performance in the way that the right to control theory authorizes, and it has not done so. When lower courts allow prosecutors to separate out strands of property interests, and then use one or more of those strands to charge someone with a crime, they expand federal law enforcement into traditional state regulatory matters, fail to provide any warning of what is proscribed, and create an amorphous set of judicially created criminal laws that any reasonably intelligent person cannot comprehend.

This amicus brief is submitted to (a) provide the Court with background on the development of the right to control theory and its close association with the self-dealing prong of honest services, (b) describe the language used by lower courts to define the crime of right to control fraud in the private sector, and (c) explain that the theory violates constitutional requirements of fair warning and federalism.

ARGUMENT

POINT ONE

THE RIGHT TO CONTROL AND THE SELF-DEALING PRONG OF HONEST SERVICES ARE TWO SIDES OF THE SAME COIN

A. The Origins of the Right to Control Doctrine

The right to control doctrine has its origins in early and middle twentieth century circuit court cases. It originated at a time when courts regularly held that immoral and unethical political and business practices are forms of criminal fraud. Not surprisingly, therefore, the right to control doctrine developed in tandem with the honest services fraud doctrine and especially with the prong of honest services that condemned people for having undisclosed, selfish financial interests in mind when they interacted with their employers or others to whom they might owe some duty.

Probably the first time a court discussed the idea that incomplete disclosure in business discussions could constitute fraud came in the Second Circuit's decision in *United States v. Rowe*, 56 F.2d 747 (2d Cir. 1932). *Rowe* noted, in dicta, that a man is "cheated" even though "he gets a quid pro quo of equal value" because "he has lost his chance to bargain with the facts before him." *Id*. at 749. It suggested that the chance to "bargain with the facts" is essentially what the federal fraud statutes guarantee, and it said that deception in bargaining is "the evil against which the statute is directed." *Id*.

Those statements in *Rowe* were dicta because the defendants in *Rowe* concocted a scheme where they lied about the value of property that they traded for value owned by their victims. *Id*. at 748. It was essentially admitted at trial that the defendants made money, and the victims lost money, as a result of the charged transactions. The defendants' claim on appeal, however, was technical and procedural – they claimed that the indictment was deficient for failing to specifically allege loss. *See id*. at 748-49. The Second Circuit ruled that the deficiency was immaterial, since the indictment did not have to allege the victims suffered an actual loss; the jury instruction explained the jury had to find false representations made "to induce the purchaser to part with his money and such was (sic) calculated to mislead a reasonably intelligent person." *Id*. at 749.

In part because *Rowe* was actually a case involving a straightforward property-loss fraud, the language in *Rowe* itself did not immediately augur a major change in the law.

B. Development of the Immorality Standard of Fraud

In subsequent decades, however, courts began making much more sweeping claims about the scope of the fraud statutes. Disregarding the text of the statute and the common-law limitations on fraud and false pretenses, courts asserted that any immoral conduct in commercial dealings constituted fraud.

In *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941), *overruled on other grounds by United States v. Cruz*, 478 F.2d 408 (5th Cir. 1973), the Fifth Circuit stated that any commercial conduct that is "inconsistent with moral uprightness" is covered by the mail fraud statute. It held, in other words, that it is the "essential immorality of an arrangement" that makes it fraudulent. *Id*. Judges rarely write in such terms anymore, and the language of *Shushan* looks quaint in retrospect. But it was enormously influential in subsequent decades, as courts around the country began to equate "fraud" with "immorality" while providing prosecutors with expanded tools.

The Fifth Circuit, for example, repeatedly reiterated and expanded the *Shushan* doctrine, holding that the fraud statutes must be interpreted broadly to protect morality in business. "The aspect of the scheme to 'defraud' is measured by nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958). In other words, anything immoral counted as fraud.

It was precisely that language that solidified the right to control doctrine as an independent basis on which to find a person guilty of fraud (without having deprived the victim of any actual property), and that language also gave rise to the honest services doctrine.

Before the Fourth Circuit's decision affirming the conviction of Maryland's former governor, in *Mandel*, the district court rejected Mandel's challenge to his indictment, *citing Rowe*, and holding that a person is defrauded even if he gets his full price because he has a right to all the information he may want to "make the best bargain, even where the bargain he has struck is a reasonable or even excellent one." *United States v. Mandel*, 415 F. Supp. 997, 1013 (D. Md. 1976), *disapproved of on other grounds by United States v. Long*, 651 F.2d 239 (4th Cir. 1981).

The Fourth Circuit affirmed Governor Mandel's conviction for fraud, even though Mandel did not clearly deprive someone of property. Citing the Fifth Circuit's decision in *Gregory*, the Fourth Circuit held that courts "used accepted moral standards and notions of honesty and fair play as setting the outer limits to the term 'scheme to defraud.'" *Id*. at 1361 (*citing Gregory*). The gist of these cases was that the prosecution did not have to prove mirror image fraud[3] – the

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[3] *See Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 827 (2016) ("the elements of a fraud cause of action consist of a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury") (internal quotations omitted); *but see Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016) ("Although 'fraud' connotes deception or trickery generally, the term is difficult to define more precisely"; however, "fraud" within the bankruptcy statutes has a specific meaning regarding the transfer of assets).

The judicial departure from the common law elements of fraud when construing the mail fraud statute caused much of the actual or potential exchange of money or property based on false statements. By behaving deceptively and immorally, the defendant deprived the victim of the right to honest dealings and fair play, in both business and government.

C. Development of Honest Services and Right to Control

In the 1970s, the honest services and the right to control doctrine were indistinguishable. They were simply two aspects of the general "immorality" doctrine of fraud. The Seventh Circuit's seminal decision in *United States v. George*, 477 F.2d 508 (7th Cir. 1973), illustrates the convergence. The *George* defendants were employees convicted of defrauding their employer in a kickback scheme. They argued that they were not guilty because the employer had still received the full benefit of the bargain – it received the promised goods at market prices – it suffered no loss. The Seventh Circuit rejected the argument, holding that mail fraud does not require proof that any victim was "actually defrauded." *Id*. at 512. Rather, according to the court, the defendants were guilty because they acted immorally and lied to their employers. In so ruling, the court relied on both *Shushan* and *Rowe*. *Id*. at 513 (*quoting Rowe*, 56 F.2d at 749); *see id*. at 512 (*citing* and *quoting Shushan*).

confusion and overreach reflected in federal prosecutors' contemporary charging decisions.

The *George* court further stated that the defendants' failure to provide their employer with full information had denied the employer its right to "honest and faithful services." *Id*. at 513. That became one of the earliest and clearest statements of what later came to be known as honest services fraud. This non-property conception of fraud was variously described as a denial of honest services, denial of the victim's right to control, or concealment of material information. The various labels all trace to the same idea: People who profited from deceiving those to whom they owed a duty were defrauding their victims, even if the victim lost (or stood to lose) nothing.

D. Re-adoption in *Wallach*

The cycle of reasoning eventually made its way back to the Second Circuit in full force. The Fifth Circuit affirmed a right to control theory in *United States v. Fagan*, 821 F.2d 1002, 1011 n.6 (5th Cir. 1987), where it held: "the scheme here was one to deprive Texoma of its property rights, *viz*: its control over its money." In ruling that such a loss of "control" constituted a loss of "property," the *Fagan* court relied heavily on both *George* and *Rowe*. 821 F.2d at 1009-10. *Fagan* in turn became the primary authority for the Fifth Circuit's holding in *United States v. Little*, 889 F.2d 1367, 1368 (5th Cir. 1989), that concealing economic information constitutes a deprivation of property.

The Eighth Circuit adopted a broad form of the right to control theory in *United States v. Shyres*, 898

F.2d 647 (8th Cir. 1990). The defendants there were convicted in a corporate kickback scheme. They argued that the purported victim received the full value of the services it purchased, but the jury was instructed that the term "'property rights' . . . include[s] the right to exercise control over how one's money is spent." They were convicted on that basis and appealed. The Eighth Circuit rejected the appeal. "We determine that the right to control spending constitutes a property right." *Id*. at 652. As its primary authority for that proposition, the Eighth Circuit relied heavily on *Fagan* and other Fifth Circuit cases. 898 F.2d at 651.

The Second Circuit adopted *Shyres* and *Little* in *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991). The Court in *Wallach* held, in essence, that potential knowledge is property for the purposes of the fraud statutes. "[T]he right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest." *Id*. at 463. It held that "the actions taken by the defendants denied the shareholders the 'right to control' how corporate assets were spent." *Id*. at 462. On that basis, the *Wallach* court reaffirmed and solidified the original *Rowe* suggestion that depriving someone of his "right to accurate information" was itself a deprivation of property.

*   *   *

In the decision below, the Third Circuit called the right to control theory a "traditional concept of property" that supported the defendants' convictions. It distinguished a prior Third Circuit case, *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), even though *Zauber* expressly rejected the notion that defendants obtain property when they deprive others "of control over . . . how money is spent" because *McNally* said the concept was "too amorphous." *Id.* at 147.

The overlap between the self-dealing prong of honest services and the right to control is illustrated by *United States v. Bronston*, 658 F.2d 920, 926 (2d Cir. 1981), a case Justice Scalia highlighted in his concurrence in *Skilling* as an example of where the fraud statute was applied to convict someone for violating a fiduciary duty without any proof that the defendant gained by his action.

The *Bronston* court never mentioned the phrase "honest services"; instead, it focused on Bronston's failure to tell his law firm's client BusTop, which retained the firm to help it obtain a bus shelter franchise, that he personally was helping a different client acquire the franchise (a legal conflict of interest). Gain to Bronston was deemed unimportant; the important factor was whether he deprived one client of information that resulted in the "prospect of substantial economic harm to the victim."[4] The Second Circuit cited to *United States*

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[4] Bronston (a private lawyer and New York State senator) represented one competitor for the franchise (named C&S) and a team of lawyers at the same law firm represented the other (BusTop), which already had the interim franchise. *Bronston*, 658 F.2d at 923 ("Rosenman Colin attorneys labored on behalf of the minority investors in negotiating the exact terms of their participation in BusTop."). The "lost" money, according to the court, were the legal fees BusTop paid for an unconflicted law firm. In

v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970), as the source of the concealment concept. *Regent Office Supply* was, in fact, an early right to control case that discussed *Rowe*: "Where the false representations are directed to the quality, adequacy or price of the goods themselves, the fraudulent intent is apparent because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain."

It is not surprising that *Bronston* was discussed (and rejected) in *Skilling* because it was part of a group

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other words, Bronston acted for his own concealed, selfish economic interests – similar to the employee who leaves work to attend a ball game. *See Sorich v. United States*, 555 U.S. 1204, 129 S. Ct. 1308, 1309 (2009) (dissent from denial of certiorari).

C&S then hired another firm to represent it, though Bronston remained as counsel to C&S and billed time for reviewing documents and attending meetings. He wrote a letter, on his state senator letterhead, to the Controller's office criticizing BusTop's financial performance as interim franchisee.

The opinion does not state that Bronston lied about BusTop's performance or that the city officials were unable to check Bronston's figures or that the firm's presentation of BusTop's bona fides to the city was tainted by Bronston's separate legal work. The dissent pointed out there was no evidence Bronston took advantage of BusTop or misused (or even had) BusTop's confidential information. *Bronston*, 658 F.2d at 931 (dissenting opinion).

Nowadays, many large law firms would ask the two clients to waive the conflict or would create an ethical wall. *See*, *e.g*., *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 809, 108 Cal. Rptr. 3d 620, 644 (2010), *as modified* (May 6, 2010) (ethical wall may be created between lawyers in the same firm to protect client confidences when firm represents two clients with conflicting interests).

of cases from the Second Circuit that policed unethical conduct. At its heart, Bronston's case was about his concealment of his conflict of interest. The Second Circuit held that "the concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other is a violation of the statute." *Bronston*, 658 F.2d at 926. The overlap of liability for breaches of fiduciary duty (self-dealing) and for concealment of information in general (right to control) is obvious: the latter is just a broader version of the former. Eliminate the phrase about a person's fiduciary duty from the foregoing *Bronston* quote and the definition of the right to control doctrine is what's left: a vaguer version of the now-repudiated self-dealing prong of honest services.

In short, history shows that the amorphous theory rejected in *Skilling* has gone nowhere; it exists in a simple-to-prove tool for the government when it cannot find any actual property loss.

POINT TWO

THE LOWER COURTS FAIL TO DEFINE THE RIGHT TO CONTROL PROPERTY STRAND IN AN INTELLIGIBLE WAY

A. How Courts Define the "Right to Control"

Courts of appeals that have adopted the right to control theory define the theory broadly, such that almost any deceptive statement made to anyone or in any context may serve as the property in a federal fraud case. Some decisions emphasize the importance of the omitted or false information and call it "*potentially valuable* economic information," *United States v. Wallach*, 935 F.2d 445, 462-63 (2d Cir. 1991) (emphasis added). Other courts emphasize the possibility that the information "*could impact* on economic decisions," *United States v. Viloski*, 557 F. App'x 28, 33 (2d Cir. 2014) (emphasis in original), while still others say the information must be "*necessary* to make discretionary economic decisions," *United States v. Rossomando*, 144 F.3d 197, 201 (2d Cir. 1998) (emphasis added), or they say it may affect the "economic calculus or the benefits and burdens" of an agreement, *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015), or they simply require that the information *caused* the victims "to make economic decisions based on misleading information." *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007). *See United States v. Little*, 889 F.2d 1367, 1368 (5th Cir. 1989) ("The economic value of the knowledge that the contractor would sell for less is sufficient 'property' to implicate section 1341.").

The complainant need not have any relationship at all with the defendant, let alone a contractual or fiduciary relationship. He may simply be a member of the public who heard the defendant's words: "When an officer or director fraudulently deprives a shareholder (*or future shareholder*) of valuable economic information, which causes tangible, economic harm to a shareholder's property interests, the money or property element of § 1341 and 1348 is satisfied." *Stinn v.*

United States, 856 F. Supp. 2d 531 (E.D.N.Y. 2012) (emphasis added), *aff'd*, 515 F. App'x 4 (2d Cir. 2013).

The courts do not identify whether the victim must specifically ask for the information or whether the defendant is supposed to know that the victim needs or wants the information. Evidently, everyone is supposed to know when requested information is "essential" or "economic" or "potentially valuable" or will simply "cause" the victim to make decisions about the disposition of his property.

Sometimes the courts define the right to control in less subjective terms and hold that the false or omitted information must have diminished "the ultimate value of the transaction" to the victim, regardless of whether the victim lost money in the long run. In *United States v. Dinome*, 86 F.3d 277, 284 (2d Cir. 1996), the defendant falsified his income on a mortgage application and, by obtaining a loan (which was fully secured and which he said he would have repaid), he changed the "ultimate value of the [mortgage] transaction" to the bank. *See also United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994) (explaining that where a victim chooses to spend his money is not property, but false information bearing on the "ultimate value of the transaction" is property).

Despite these few objective definitions, it is hard to believe that the objective difference in value between the transaction with or without the false statements really matters to the courts because, in *Binday*, the court noted that the insurers objected to particular sales for social or reputational (that is, "non-economic") reasons and also because of "their long-term economic interests," rather than because the actual sale caused a loss. More important to the court was the fact that victims know best about their own interests, because victims act in their own "perceived interest." *Binday*, 804 F.3d at 570 n.14.

B. The Lower Courts Improperly Delegate the Power to Define the Crime to Dissatisfied Complainants

The lower courts rarely identify the source of a person's right to essential or valuable economic information when they approve the right to control doctrine. The Second Circuit has stated that the rights to control property "are defined by (i) state law concerning access to the company's books and records and the fiduciary obligations of management and (ii) the law of fraud concerning corporate information that is public." *United States v. D'Amato*, 39 F.3d 1249, 1258 (2d Cir. 1994) (*citing Wallach*). But that cannot be the only source of the right, since people have been prosecuted for failing to provide valuable information in contexts unrelated to corporate recordkeeping and false statements by public companies. For example, in *Dinome* and *Binday*, the courts held that the defendants deprived a bank and insurance companies of accurate information on applications in private business transactions.

Courts often *assume* that lenders or insurers or retailers or employers have a right to information from applicants or employees and that they lose property when the respondents conceal complete information. That assumption ignores this Court's decisions in *McNally, Cleveland, Skilling*, and *Sekhar v. United States*, 570 U.S. 729 (2013), that the word "property" in the criminal statutes (which expressly direct the government to prove the defendant schemed to *obtain property*) is limited to the entire property and does not mean esoteric strands of property interests or rights, such as an owner's "intangible rights of allocation, exclusion, or control" of property. *See Cleveland*, 531 U.S. at 23. The defendant must be able to obtain a thing that is "property in the hands of the victim." *Id*. at 15. In short, property is something obtainable, which means it must be transferable.

Other times, lower courts identify the source of the right to control as fraudulent inducement law: a person who conceals information deprives others of property by "induc[ing]" them to act "based on fraudulent information." *Binday*, 804 F.3d at 587. That is a distortion of fraudulent inducement law. The facts of *Carpenter* illustrate the distortion. The defendants in that case used the Wall Street Journal's confidential information (in the form of an impending financial column in the paper) for their own profit. That information was intangible property – ideas that could be transferred, used, obtained, and exploited. When the defendants embezzled the property,[5] they obtained the power to control it, but could not have obtained that power (or right) before the embezzlement. On the other hand, if the defendants bought the confidential information and (falsely) promised not to sell it to a competitor, and then broke that promise, then that would only be a breach of contract. "[A] fraud claim is not stated by allegations that simply duplicate, in the facts alleged and damages sought, a claim for breach of contract, enhanced only by conclusory allegations that the pleader's adversary made a promise while harboring the concealed intent not to perform it." *Cronos Grp. Ltd. v. XComIP, LLC*, 156 A.D.3d 54, 62 (N.Y. App. Div. 2017).

There is no scenario between these two possible fact patterns; either the property is obtained through false representations or the property purchase is *accompanied* by false representations. Only the former may be fraud because the latter is merely a breach of contract, even if the promisor had no intent to perform. That is so well-established under federal and state law that the courts' dilution and misapplication of fraudulent inducement law is puzzling. "A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where

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[5] The defendants could have been charged under New York's larceny laws for converting the Wall Street Journal's confidential information to their own use. *See* N.Y. Penal Law § 155.05 (McKinney) ("A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.").

the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract." *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 206 (N.Y. App. Div. 2012).

False statements in applications or in anticipation of a contract – such as those in *Dinome* and *Binday* – are not collateral: "there are numerous decisions in which courts have dismissed fraud actions premised upon false promises made in advance of binding agreements." *Int'l CableTel Inc. v. Le Groupe Videotron Ltee*, 978 F. Supp. 483, 488 (S.D.N.Y. 1997) (Sotomayor, J.). Yet, in their decisions affirming convictions for depriving a counterparty of its right to control its assets, courts regularly ignore this collateral promise rule, flip a defendant's representation into a complainant's property right, and mischaracterize the defendant's misstatement as a property loss. There is no difference between a defendant making a false representation and a plaintiff hearing or reading the false representation. A representation is not property, and a false representation does not deprive the listener of property. By turning a material false representation by one person into property of another, the lower courts allow the same proof to establish all the elements of the offense.

Ultimately, the source of the allegedly protected right to control property is the complainant. In these cases, the victim's subjective belief about the importance of the withheld information controls whether the missing information is property because a victim's right to control its assets is "injured when a victim is deprived of potentially valuable economic information *it would consider valuable in deciding how to use its assets*." *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017) (emphasis added).

One obvious problem caused by the courts' failure to identify the source of the alleged right to control is that, in virtually every right to control case, only the complainant knows what information is valuable to him and how that information will affect his economic interests. That means the property right "obtained" by the defendant changes with the vehemence of the victim. There is no objective standard of conduct; anyone who believes he has been swindled because he could have made a better deal with more information will be vindicated with a prison sentence imposed on his counterparty.

There are other problems as well:

First, there is no indication that Congress meant for courts to separate out individual strands of property rights (whether arising under state law or common law) to support a mail fraud prosecution. To the contrary, this Court has explained that Congress cabined the reach of the fraud statutes by choosing to codify the Court's description of the statute's reach in *Durland v. United States*, 161 U.S. 306, 313 (1896) ("everything designed to defraud") with the limitation that the government prove a scheme to obtain money or property. *McNally v. United States*, 483 U.S. 350, 358 (1987).

Second, words in federal criminal statutes are construed "in a manner consistent with ordinary English usage." *Abramski v. United States*, 573 U.S. 169, 196 (2014); *see Smith v. United States*, 508 U.S. 223, 228 (1993) (construe undefined term "in accord with its ordinary or natural meaning."). Property ordinarily means the whole set of property rights, not individual sticks in the bundle. "A common idiom describes property as a 'bundle of sticks' – a collection of individual rights which, in certain combinations, constitute property. . . ." *United States v. Craft*, 535 U.S. 274, 278-79 (2002). When the issue of individual property rights came up in the Fifth Amendment takings context, this Court held that owners cannot define the property as a single strand that a regulation might impact. "If owners could define the relevant 'private property' at issue as the specific 'strand' that the challenged regulation affects, they could convert nearly all regulations into per se takings. And so we do not allow it." *Murr v. Wisconsin*, ___ U.S. ___, 137 S. Ct. 1933, 1952 (2017).

Third, to the extent that courts look to state laws to define the right to control property – that is, they find a disclosure duty in a particular state law – they create a patchwork of inconsistent federal crimes. If, for example, New York imposes a particular disclosure obligation on persons in a particular industry that no other state imposes, prosecutors will simply indict everyone from around the country in New York, as long as there is a convenient mailing or interstate wire. Despite what the Second Circuit said in *D'Amato*, that would also run afoul of this Court's ruling in *Jerome v.*

United States, 318 U.S. 101 (1943), and its progeny. "We agree that in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *United States v. Turley*, 352 U.S. 407, 411 (1957) (*citing Jerome*).

After the decision in *McNally*, the government asked Congress to modify the law to include honest services fraud. Congress did so. If the government wanted Congress to bless the right to control theory, then it could have asked the legislature to criminalize breaches of fiduciary duty or of contract. It did not ask; instead, it chose to ignore the plain language of this Court's decision and indict people for breaching contracts or employment agreements or vague political standards of conduct in New York and New Jersey. In those jurisdictions, it is easy to convict people who don't always tell the truth.

POINT THREE

THE APPLICATION OF THE RIGHT TO CONTROL DOCTRINE VIOLATES THE PEOPLE'S CONSTITUTIONAL RIGHTS TO FAIR WARNING AND LIMITED FEDERAL LAW ENFORCEMENT

The right to control theory deprives people of the notice to which any person is entitled so that he can know that his conduct may be criminal; it is unconstitutionally vague in its formulation and application; and it violates principles of federalism. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (statutes cannot be construed to include conduct that people of "common intelligence must necessarily guess at its meaning and differ as to its application," ambiguities must be resolved to apply "only to conduct clearly covered," and "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.") (citations omitted).

First, people cannot figure out ahead of time what information will later be deemed valuable to a complainant's economic decisions. There are often dozens of questions or representations on loan, mortgage, insurance, and employment applications, which cover the full range of information about the applicant. If someone may be convicted of fraud for any deception in response to questions the complainant or a prosecutor decides is important, then the victims are defining the crime, not Congress. Criminal laws that leave the power to define the crime to the judge and jury are unconstitutionally vague because they do not provide an "ascertainable standard of guilt" and are "[in]adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). *See United States v. Bass*, 404 U.S. 336, 348-49 (1971) ("legislatures and not courts should define criminal activity [because of] 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'") (*citing* H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967)).

A criminal law standard may be couched in general terms, but the words must have an objective meaning to those subject to prosecution. *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (statutes require "a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . . or a well-settled common-law meaning. . . .") (citations omitted).

People of common intelligence know that if they lie to obtain property (for example, they claim the cash used to buy a car is not counterfeit, when it is), then they may be held to answer to fraud charges. But people of common intelligence do not know that their counterparties in a business deal may, after a business deal is done, identify "essential" or "valuable" or "useful" information that would have improved the counterparties' negotiating stance. As the Court noted, "bad and brazen" behavior cannot convert potential state crimes into federal crimes. *Parr v. United States*, 363 U.S. 370, 393 (1960).

Second, lower courts have sanctioned prosecutors' use of the right to control theory to police areas that are traditional state regulatory matters in ways that supersede, circumvent, and, sometimes, overrule state law enforcement efforts. When an "improbably broad" reading of a statutory term would supplant state law regulating the conduct under consideration, principles of federalism mandate that the Court construe the statute narrowly. *Bond v. United States*, 572 U.S. 844, 860 (2014).

The dual sovereign doctrine – reaffirmed last term[6] – authorizes both state and federal law enforcement authorities to pursue criminal charges against one person for the same conduct. The mail fraud statute was passed because of widespread lottery schemes asking people to send small amounts of money in response to mail solicitations, and local law enforcement was nonexistent or inefficient; dual prosecutions were unlikely.[7]

> But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

Durland v. United States, 161 U.S. 306, 313 (1896).

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[6] *Gamble v. United States*, ___ U.S. ___, 139 S. Ct. 1960 (2019).

[7] *Fox v. State of Ohio*, 46 U.S. 410, 435 (1847): "It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor."

Now, however, dual prosecutions are both permissible and abundant. *See*, *e.g.*, *United States v. Coonan*, 938 F.2d 1553, 1563 (2d Cir. 1991) ("the fact that Kelly was acquitted in state court of Holly's murder did not preclude the federal authorities from charging that very same offense as a predicate act in the subsequent RICO action.").

The original purposes of the mail fraud statute (and even those that led to amendments) have long since dissipated. Instead of using the fraud statutes less, prosecutors have found creative new ways to apply them to a wider circle of people operating on the margins of misconduct. In *Binday*, the defendants were prosecuted because they helped clients lie on life insurance applications about the insureds' future plans to sell their policies. The conduct occurred in New York, which, like every other state, has complex regulations and enforcement procedures to oversee the conduct of brokers and insurers. New York's insurance law is composed of over 80 Articles, of which several refer to life insurance. Insurance brokers are regulated under Article 21 consisting of 39 sections. Every violation of the insurance law subjects the violator to prosecution for a misdemeanor and sometimes a felony. N.Y. Ins. Law § 109.

Christopher Finazzo did not work in an industry highly regulated by statute, but his conduct certainly fell within New York's penal law since he was convicted under the federal Travel Act of violating New York's commercial bribery statute. *See United States v. Finazzo*, No. 10-CR-457 RRM RML, 2014 WL 3818628, at *11 (E.D.N.Y. Aug. 1, 2014) ("The Travel Act conspiracy is predicated on the underlying state crimes of Commercial Bribing in the Second Degree, in violation of N.Y. Penal Law §§ 180.00 and 20.00 and Commercial Bribe Receiving in the Second Degree, in violation of N.Y. Penal Law §§ 180.05 and 20.00"), *vacated and remanded*, 850 F.3d 94 (2d Cir. 2017), and *aff'd in part*, 682 F. App'x 6 (2d Cir. 2017).

These examples show that the courts need not stretch the meaning of the word "property" beyond recognition to police misconduct that cannot be addressed by state law. States are capable of investigating and prosecuting people for insurance and mortgage fraud, commercial bribery, larceny, and all of the other clearly written state law crimes that underlie many of the federal fraud prosecutions. *See, e.g.*, *People v. Reynolds*, 174 Misc. 2d 812, 815 (Sup. Ct. 1997), *aff'd sub nom. People v. Wolf*, 284 A.D.2d 102 (2001), *aff'd as modified*, 98 N.Y.2d 105 (2002) (365 count indictment of 45 defendants involved in alleged corruption in the personal injury insurance industry).

Slicing the word "property" into individual rights associated with property ownership and then making a crime out of each slice – or unidentified "essential" slices – represents another instance of "unrestrained reading" of a statute, contrary to its ordinary meaning, its historical meaning before court decisions introduced new modes of judicial governance of business and politics, and the rule of lenity. *See Yates v. United States*, 574 U.S. 528, 135 S. Ct. 1074, 1081, 1088 (2015).

CONCLUSION

For these reasons, Michael Binday respectfully requests that the Court reject the right to control theory and reverse Kelly's convictions based on that theory.

Respectfully submitted,

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