No. 18-1059

IN THE

Supreme Court of the United States

BRIDGET ANNE KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR *AMICI CURIAE* LORD CONRAD BLACK AND FORMER GOVERNOR ROBERT F. MCDONNELL IN SUPPORT OF PETITIONER

NATHAN P. EIMER
RYAN J. WALSH
Counsel of Record
EIMER STAHL LLP
224 South Michigan Ave.
Chicago, IL 60604
(312) 660-7639
rwalsh@eimerstahl.com

Counsel for Amici Curiae *Lord Conrad Black and Former Governor Robert F. McDonnell*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF *AMICI CURIAE* 1

ARGUMENT 3

I. THE DECISION BELOW PERMITS PROSECUTORS TO END-RUN *MCNALLY*, *SKILLING*, AND *MCDONNELL* 3

II. THIS CASE REFLECTS A DISTURBING TREND IN FEDERAL CHARGING: THE ROUTINE INDICTMENT OF ALLEGED FRAUD WITH ONLY ATTENUATED EFFECTS ON ABSTRACT "INTANGIBLE PROPERTY" INTERESTS 8

III. THE THEORY OF LIABILITY ENDORSED BELOW ENCOURAGES PROSECUTORIAL OVERREACH 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Black v. United States,
561 U.S. 465 (2010) 1, 2

Bond v. United States,
572 U.S. 844 (2014) 14

Cleveland v. United States,
531 U.S. 12 (2000) 6, 8, 11, 14

Hammerschmidt v. United States,
265 U.S. 182 (1924) 14

McBoyle v. United States,
283 U.S. 25 (1931) 14

McDonnell v. United States,
136 S. Ct. 2355 (2016) .... *passim*

McNally v. United States,
483 U.S. 350 (1987) .... *passim*

Monterey Plaza Hotel Ltd. P'shp v. Local 483 of the Hotel Emps. Union,
215 F.3d 923 (9th Cir. 2000) 10

Porcelli v. United States,
404 F.3d 157 (2d Cir. 2005) 10

Sekhar v. United States,
570 U.S. 729 (2013) 8, 14

Skilling v. United States,
561 U.S. 358 (2010) .... *passim*

Sorich v. United States,
555 U.S. 1204 (2009) .... *passim*

United States v. Baldinger,
838 F.2d 176 (6th Cir. 1988) 10

United States v. Bass,
404 U.S. 336 (1971) 14

United States v. Binday,
804 F.3d 558 (2d Cir. 2015) 10

United States v. Bloom,
149 F.3d 649 (7th Cir. 1998) 5

United States v. Brown,
459 F.3d 509 (5th Cir. 2006) 5

United States v. Carbo,
572 F.3d 112 (3d Cir. 2009) 4

United States v. Czubinski,
106 F.3d 1069 (1st Cir. 1997) 4

United States v. Males,
459 F.3d 154 (2d Cir. 2006) 9

United States v. Post,
950 F. Supp. 2d 519 (S.D.N.Y. 2013) 9

United States v. Sadler,
750 F.3d 585 (6th Cir. 2014) 10, 11

United States v. Stevens,
559 U.S. 460 (2010) 11

United States v. Urciuoli,
513 F.3d 290 (1st Cir. 2008) 5

United States v. Wallach,
935 F.2d 445 (2d Cir. 1991) 10

United States v. Walters,
997 F.2d 1219 (7th Cir. 1993) 10

Williams v. United States,
458 U.S. 279 (1982) 14

Yates v. United States,
135 S. Ct. 1074 (2015) 12, 13, 14

Statutes

18 U.S.C. § 1341 .... 2, 10

18 U.S.C. § 1343 2

18 U.S.C. § 1346 5

18 U.S.C. § 1519 13

18 U.S.C. § 201(b)(2) 6

18 U.S.C. § 229(a)(1) 14

Other Authorities

Brette M. Tannenbaum, Note, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After* Skilling, 112 Colum. L. Rev. 359 (2012) 9

Brian Walsh & Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* 4 (2010) 12

Edwin Meese III & Paul Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminol. 725 (2012) 13

John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics,* 19 Am. Crim. L. Rev. 117 (1981) 9

Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminol. 643 (2006) 4

Michael Dreeben, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 Am. Crim. L. Rev. 181 (1988) 4

Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminol. 3 (1940) 11

Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power,* 84 N.C. L. Rev. 1935 (2006) 12

Ronald Gainer, *Federal Criminal Code Reform: Past & Future*, 2 Buff. Crim. L. Rev. 45 (1998) 12

The Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961) 11

William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 Mich. L. Rev. 505 (2001) 12

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

This brief is submitted by Lord Conrad Black and Governor Robert F. McDonnell, prevailing petitioners in *Black v. United States*, 561 U.S. 465 (2010), and *McDonnell v. United States*, 136 S. Ct. 2355 (2016), respectively. Lord Black is an author and former newspaper publisher. Governor McDonnell served as the 71st Governor of Virginia from January 2010 through 2014 and is now an attorney in private practice and law professor.

Not long ago, Lord Black and Governor McDonnell each found themselves in the crosshairs of a United States Attorney. Although their alleged crimes differed, the Government's theories of liability in both cases were similarly boundless. Lord Black was said to have committed mail fraud by depriving a company of its "intangible right of honest services" through conduct that, according to the jury instructions, need not have even *risked* economic harm to the company. 561 U.S. at 468–71. Governor McDonnell allegedly committed bribery by arranging meetings for a certain constituent and benefactor, contacting other officials on his behalf, and including him in events. 136 S. Ct. at 2361–68. Black and McDonnell argued that the Government's position—indeterminate, untethered to case law, and unhampered by any limiting principles—could not survive a fair reading of the statutes.

This Court sided with *amici*, and the votes were not particularly close. The *Black* Court unanimously rejected the Government's shapeless interpretive theory, citing the companion case *Skilling v. United States*, 561 U.S. 358 (2010)

[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of the amici's intent to file this brief and consented in writing. No counsel for any party authored this brief in any part, and no person or entity other than *amici* or *amici*'s counsel made a monetary contribution to fund its preparation or submission.

for the proposition that the honest-services statute applies only to bribery and kickbacks and so excludes the "amorphous" category of conflict-of-interest cases that the Government frequently charged. *Id.* at 408–10 (discussing *McNally v. United States*, 483 U.S. 350 (1987)). Six years later, prosecutors suffered another unanimous defeat in *McDonnell*, which condemned the Government's "expansive" position as clashing with "text and precedent." 136 S. Ct. at 2372–73.

The prosecutors in this case cooked up a theory of liability perhaps even more wide-ranging, atextual, and constitutionally dubious than what they offered in *Black* and *McDonnell*—and so far they have gotten away with it. A throwback to the pre-*McNally* era, the decision below suggests that a public or private employee commits mail or wire fraud anytime that she performs an act that puts her own interest above that of her employer and then creates a "cover story" to disguise her motive. Such an act *always* satisfies the fraud statutes' deprivation-of-property element because, per the Third Circuit, the unethical act robs the employer *at least* of some of the worker's time. Pet.App.25a, 28a. *See* 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud). By this appalling logic, even someone who "phon[es] in sick to go to a ball game" commits a federal felony punishable by up to twenty years in prison. *Sorich v. United States*, 555 U.S. 1204, 1205–06 (2009) (Scalia, J., dissenting). Yet it was precisely this and other off-the-wall prosecutions that this Court meant to foreclose in *McNally*, *Skilling*, *Black*, and (in the bribery context) *McDonnell*. This case shows that another course correction is necessary to preserve the integrity of this Court's decisions.

Amici have no personal interest in the outcome of this case. It is not their role to pass judgment on Petitioner's political conduct. Yet neither is it the role of federal judges, in the name of the wire-fraud statute, to punish it. There is no "common-law crime of unethical conduct," and the fraud statutes should not be read to codify one. *Sorich*, 555 U.S. at 1207 (Scalia, J., dissenting).

ARGUMENT

I. THE DECISION BELOW PERMITS PROSECUTORS TO END-RUN *MCNALLY*, *SKILLING*, AND *MCDONNELL*

For decades, overzealous prosecutors have sought to conscript generic provisions of the United States Code in a crusade against all manner "of unappealing or ethically questionable conduct" in the public and private sectors. *Sorich*, 555 U.S. at 1206 (Scalia, J., dissenting). So far, that war has seen three major campaigns. Each has ended in this Court, with the government's defeat. Undeterred, aggressive prosecutors have launched a new offensive—a flanking maneuver of sorts—that, if successful, would make up for past setbacks. The Third Circuit's decision maps out the line of attack.

A. It all began with the argument, urged by prosecutors and accepted by many courts in the twentieth century, that the mail- and wire-fraud statutes "proscribe[ ] schemes to defraud" individuals "of their intangible rights to honest [services]." *McNally v. United States*, 483 U.S. 350, 355 (1987). The thinking went that, because these laws forbid "*any* scheme or artifice to defraud," seemingly regardless of whether the scheme targets "money or property," 18 U.S.C. §§ 1341, 1343, then they must sweep in conduct depriving victims of other, *intangible* things as well, including "honest services." This meant that, "[u]nlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest-services doctrine targeted corruption that lacked similar symmetry," such as cases in which "the betrayed party suffered no deprivation of money or property." *Skilling*, 561 U.S. at 400.

Applied to government officials, honest-services doctrine held that "a public official owe[d] a fiduciary duty to the public, and misuse of his office for private gain [was] a fraud." *McNally*, 483 U.S. at 355. The range of liability was vast: Even when "no one suffered a clear economic harm,"

prosecutors would argue that the officials' conduct nonetheless "smacked of fraud because of the impression that public officials had covertly turned their offices to personal ends" and because the officials had not disclosed that they had acted with those ends in mind. Michael Dreeben, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 Am. Crim. L. Rev. 181, 185 (1988). Under this reading, the law made a criminal out of just about every government official, from the legislator who votes "for a bill because he expects it will curry favor with a small minority essential to his reelection" and the mayor who attempts "to use the prestige of his office to obtain a restaurant table without a reservation" right on down to the low-level bureaucrat who recommends "his incompetent friend for a public contract." *Sorich*, 555 U.S. at 1205 (Scalia, J., dissenting).

"Having met with success in pushing this theory in the public corruption area, prosecutors . . . then expanded the scope of the 'honest services' fraud theory to employees of private companies." Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminol. 643, 661 (2006). And here the doctrine proved just as expansive, imposing on employees a broad "duty to act only in the best interests of their . . . employers." *Sorich*, 555 U.S. at 1205 (Scalia, J., dissenting). Consequently, any time an employee acted with *other* interests at heart and did not disclose that fact, he committed a federal felony. It did not necessarily matter to prosecutors whether the conduct was official action or merely workplace misconduct. *E.g.*, *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997). Nor, by the government's lights, was it dispositive whether the defendant had even known of his obligation to disclose. *E.g.*, *United States v. Carbo*, 572 F.3d 112, 116 (3d Cir. 2009). By persuading courts to endorse this limitless reading of the fraud statutes, prosecutors made federal felons out of "a coach who improperly helped players with their course work," "a lawyer who operated under an undisclosed

conflict of interest," and "a city contractor who did not fulfill his contractual obligation to pay his workers" on a certain pay scale. O'Sullivan, *supra*, at 661–62 (collecting cases). A truly unhinged government lawyer could have gone further still, indicting even a hapless sports nut reported to have "phon[ed] in sick to go to a ball game." *Sorich*, 555 U.S. at 1205–06 (Scalia, J., dissenting).

For a time, this Court halted such overreach. In 1987, *McNally* announced that the mail-fraud statute does not include an intangible "right" to have officials or employees "perform their duties honestly" but instead protects only "property rights." 483 U.S. at 356, 358. Among this reading's many virtues, it did not leave the statute's "outer boundaries ambiguous" or invite federal prosecutors to craft "standards of disclosure and good government for local and state officials." *Id.* at 360. An era seemed to have ended.

B. But then, a year later, Congress enacted the honest-services statute, 18 U.S.C. § 1346, and prosecutors at once dusted off their pre-*McNally* playbook. *See* Pet. 22. As before, many courts went along. *Id.* Still, concerns resurfaced that the fraud statutes would come to cover all "kind[s] of legal or ethical abuse[s]," *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008), and even that the new provision's "amorphous and open-ended nature" would put judges back in the business of enforcing what were effectively federal common-law crimes. *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998); *see, e.g.*, *United States v. Brown*, 459 F.3d 509, 522 n.13 (5th Cir. 2006). The law quickly became unsettled, with circuits splitting over many new "difficult questions." *E.g.*, *Urciuoli*, 513 F.3d at 294. A new "chaos prevail[ed]." *Sorich*, 555 U.S. at 1208 (Scalia, J., dissenting).

Skilling restored some order. Avoiding "the due process concerns underlying the vagueness doctrine," this Court read the honest-services statute to apply only to bribery and kickbacks, excluding the "amorphous" category of conflict-of-interest cases that the Government had prosecuted under the

honest-services theory. 561 U.S. at 408–10. So, except for bribes and kickbacks, the state of the federal law of fraud remained after *Skilling* just as it was under *McNally*: traditional fraud prosecutions would need to prove deprivations of actual money or property. *See also Cleveland v. United States*, 531 U.S. 12, 19 (2000) (*McNally* and progeny hold that "§ 1341 protects property rights only.").

C. Lacking once again an open path to indict a wide array of seemingly unsavory actors under the fraud laws, prosecutors worked to clear a new trail, this time by redefining "bribery." Before *McNally*, and again after enactment of the 1988 statute but before *Skilling*, a politician who arranged a meeting for a constituent with the subjective intent of bettering his reelection odds might have faced a charge of generic honest-services fraud. But once *Skilling* foreclosed honest-service prosecutions for "amorphous" conflicts of interest, 561 U.S. at 408–10, prosecutors' only move was to charge such conduct as bribery, whether under the honest-services statute (per *Skilling*) or some other provision. This tactic required the Government to show that the official received something "of value" in return for being "influenced in the performance of any official act," 18 U.S.C. § 201(b)(2)—and so the Government took the position that "official act" covers essentially *any* conduct that an official might undertake.

Once again, this Court intervened, rejecting yet another iteration of a theory that would have "cast a pall of potential prosecution" over "nearly anything a public official does." *McDonnell*, 136 S. Ct. at 2372. Under a more sensible reading of the law, an official commits bribery only if he performs a "formal exercise of government power" for payment. *Id.* at 2374. Simply "arranging a meeting" or "hosting an event" does not cross the line. *Id.* at 2367–68. Quoting *McNally*, this Court again "decline[d] to construe [a] statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of good government for local

and state officials." *Id.* at 2373 (citation omitted). For the third time, prosecutors had overreached.

D. In this case, as Petitioner aptly notes, the Government aims to "take[ ] the jurisprudence full-circle," Pet. 13—not by refighting old interpretive battles, but by pushing a new theory of liability that, if accepted, would render the critical limitations in *McNally*, *Skilling*, and *McDonnell* meaningless.

This latest tack, adopted by the Third Circuit, would undo this Court's precedents by making the notion of "property fraud" in Sections 1341 and 1343 infinitely malleable, so that the statutes would prohibit any fraud that merely *affects* public or employer property, vaguely defined, or if not the property itself, then at least the right to control it. Hence the court below had no trouble concluding that Petitioner had defrauded the Port Authority of its "property" interest in controlling traffic lanes, in addition to its "property" interest in employee labor used to plan, impose, and study the traffic realignment. Yet, if the alleged conduct here caused a deprivation of property, then so did all pre-*McNally* conduct charged as honest-service fraud, since every conceivable fraudulent scheme *at least* diverts a government's or company's money in the form of the fraudster's salary.

Remarkably, under the Third Circuit's holding, even Justice Scalia's memorable sports fan who phones in sick to catch a ball game is once again at risk of a federal indictment. *Sorich*, 555 U.S. at 1205–06 (Scalia, J., dissenting). By creating a "cover story" allowing the employee to put his own private interests ahead of the company's, he deprives his employee of money that would not otherwise have been paid had the worker taken an unpaid vacation day or told the truth. It is not hard to think up a list even more (formerly) far-fetched hypotheticals. That is because practically *any* act tinctured with dishonesty or undisclosed self-interest deprives some other person or entity, to whom some duty is owed, of time or money that would have gone to some other end.

The decision below likewise clears a route around *Skilling* and *McDonnell*. For one thing, the cases that *Skilling* explicitly walled off from prosecution are now back in play: cases *not* involving bribery or kickbacks but only "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." 561 U.S. at 409. Even fact patterns like *McDonnell*'s will now sound in property fraud, since by arranging for meetings between government employees and a donor constituent under a "cover story" cloaking political motives, a public official deprives the state of those employees' labor (in addition to his own), which otherwise would have been put to some other untainted end.

II. THIS CASE REFLECTS A DISTURBING TREND IN FEDERAL CHARGING: THE ROUTINE INDICTMENT OF ALLEGED FRAUD WITH ONLY ATTENUATED EFFECTS ON ABSTRACT "INTANGIBLE PROPERTY" INTERESTS

Although this Court has stated time and again that the fraud statutes are best read to target only crimes against "property" as "traditional[ly]" conceived, *Cleveland*, 531 U.S. at 24; *see also Sekhar v. United States*, 570 U.S. 729, 734 (2013); *Skilling*, 561 U.S. at 400, the Government here and prosecutors in general—enabled by some lower courts—have persisted in charging alleged frauds under theories totally unmoored from the statutes' text and any common-law-based understanding of property rights. As academic commentary has noted, the effect of this "difficult" mission has been the routine "recharacteriz[ion]" of "honest services misconduct . . . to fit the more traditional money-or-property framework set forth in *McNally*." Brette M. Tannenbaum, Note, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After* Skilling, 112 Colum. L. Rev. 359,

372 (2012). The old maxim "when in doubt, charge mail fraud"[2] has taken on new life.

In some cases, the Government has even admitted that crimes that it charges as money-or-property fraud are indistinguishable from the kinds of honest-service prosecutions that *Skilling* rules out. In *United States v. Post*, 950 F. Supp. 2d 519 (S.D.N.Y. 2013), a jury convicted a city official of both honest-services fraud for a conflict of interest and money-or-property fraud. After the jury returned a general verdict against the official, *Skilling* came down, and the court had to figure out what to do about the convictions, which were the product of pre-*Skilling* jury instructions. Strikingly, the Government took the position that "even if the Court cannot be sure the jury convicted on money or property fraud, *it does not matter in the end* because any honest services fraud conviction *overlaps entirely* with a money or property fraud conviction." *Id.* at 538. So, in the Government's view, "any reasonable jury that rendered a verdict that Defendants deprived the City and its citizens of their intangible right to [the defendant's] honest services *necessarily* did so on the ground that Defendants intended to deprive the City of its money or property." *Id.* As the prosecutors saw it, the crimes were basically one and the same.

In other cases, prosecutors and courts have repurposed money-or-property fraud by weakening the causal chain connecting the alleged fraud and the harm. Hence some decisions hold it "sufficient that a defendant's scheme was intended to deprive another of property rights, even if the defendant did not physically 'obtain' any money or property by taking it from the victim." *United States v. Males*, 459 F.3d 154, 158 (2d Cir. 2006) (quotation added); *see Porcelli v.*

---

[2] John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics,* 19 Am. Crim. L. Rev. 117, 126 (1981).

United States, 404 F.3d 157, 162 (2d Cir. 2005) (same). Other courts, meanwhile, have recognized that laws barring schemes "to obtain money or property" plainly "contemplate a transfer of some kind." *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993); *see Monterey Plaza Hotel Ltd. P'shp v. Local 483 of the Hotel Emps. Union*, 215 F.3d 923, 926–27 (9th Cir. 2000) ("The purpose of the mail fraud and wire fraud proscriptions is to punish wrongful transfers of property from the victim to the wrongdoer, not to salve wounded feelings."); *United States v. Baldinger*, 838 F.2d 176, 180 (6th Cir. 1988) (Section 1341 "was intended by the Congress only to reach schemes that have as their goal the transfer of something of economic value to the defendant" (quotation omitted)).

Another favored tactic, deployed in this case, *e.g.*, Pet.App. 12a, is to assert that an alleged fraudster deprives a victim of "property" by interfering with the victim's "right to control" an asset, even if the scheme has no ultimate effect on the underlying asset itself. Here, for example, the Government argued that Petitioner had deprived the Port Authority not of property per se but rather its supposed "right to control" traffic lanes. Pet.App.26a–28a. Applying this theory to the private sector, the Second Circuit has held that "the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution." *United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991); *see also United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015). The Sixth Circuit, meanwhile, has correctly pointed out that this "right to control" principle cannot be reconciled with this Court's *McNally* line of cases, since the fraud statutes are "'limited in scope to the protection of *property rights*,' and the ethereal right to accurate information doesn't fit that description." *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (quoting *McNally,* 483 U.S. at 360). There can be no serious argument, after all, that "the right to accurate information amounts to an interest that 'has long been

recognized as property.'" *Id.* (quoting *Cleveland*, 531 U.S. at 23). Consistent with *Sadler*, this Court has held that a state's "right to control" its programs or regulatory apparatuses—regardless of the number or value of assets that they embrace—is not "property" protected by the fraud laws. *Cleveland*, 531 U.S. at 23.

III. THE THEORY OF LIABILITY ENDORSED BELOW ENCOURAGES PROSECUTORIAL OVERREACH

By stretching the fraud statutes to *at least* their pre-*McNally* domain (if not beyond), the decision below gives prosecutors unbridled discretion to police all manner of unseemly conduct in the public and private sectors. *See* Transcript of Oral Argument at 31 (Breyer, J.), *McDonnell*, 136 S. Ct. 2355 (expressing concern over the Government's use of "the criminal law" as a "weapon" against merely "dishonest behavior"). It thereby puts a cloud of federal imprisonment over "a staggeringly broad swath of behavior." *Sorich*, 555 U.S. 1205 (Scalia, J., dissenting). This is dangerous for several reasons.

To start, such limitless discretion frees prosecutors to pick targets that they think they "should get, rather than pick cases that need to be prosecuted," emboldening bad actors to go after those whose only "real crime" is "being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminol. 3, 5 (1940). And while the Department of Justice leadership no doubt tries to prevent overreach, prosecutors around the country have immense flexibility, and this Court has accordingly emphasized the "danger in putting faith in government representations of prosecutorial restraint," *United States v. Stevens*, 559 U.S. 460, 480 (2010). After all, conscientious officials are not "always [ ] at the helm," *The Federalist* No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961). Judges therefore must resist the temptation to "construe a criminal statute on the assumption

that the Government will 'use it responsibly.'" *McDonnell*, 136 S. Ct. at 2372–73 (quoting *Stevens*, 559 U.S. at 480).

Just as concerning, federal prosecutors armed with boundless criminal statutes wield "extraordinary leverage" to charge aggressively and extract guilty pleas. Transcript of Oral Argument at 31 (Roberts, C.J.), *Yates v. United States*, 135 S. Ct. 1074 (2015). The more counts that prosecutors can tack on to an indictment, the more effectively they are able to use the prospect of severe penalties "as a bargaining chip, an inducement to plead guilty." William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 Mich. L. Rev. 505, 519–20 (2001). And of course, "for the most part, prosecutorial discretion in charging and plea bargaining is unreviewable." Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power,* 84 N.C. L. Rev. 1935, 1936 (2006).

The breadth of prosecutors' charging and bargaining discretion is also a function of the deep incoherence of the federal criminal code—a problem to which the decision below contributes. "Criminal codes expand but don't contract," and ours is no exception. According to recent counts, federal law contains 4,450 criminal statutes and "tens of thousands" of criminal regulations. Brian Walsh & Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* 4 (2010), *available at* https://herit.ag/2NUEonr. About half of those provisions are "found jumbled together in Title 18." Ronald Gainer, *Federal Criminal Code Reform: Past & Future*, 2 Buff. Crim. L. Rev. 45, 53 (1998). The rest are littered throughout the other 49 titles of the U.S. Code.

Not only the sheer sweep of these laws, but especially the reality that one would need to consult thousands of judicial precedents just to know the laws *say*, means that no one is really on notice as to what conduct amounts to a federal crime. *See* Edwin Meese III & Paul Larkin, Jr., *Reconsidering the*

Mistake of Law Defense, 102 J. Crim. L. & Criminol. 725, 738–41 (2012). "Traditionally, the concern has been whether a particular statute is sufficiently clear so that the average person can readily understand it and remain law-abiding. Nowadays, the difficulty is that the entire criminal code has become unknowable and subject to manipulation," so the problem exists at both "the retail level," with "specific crime[s]" under "vague law[s]," and "the wholesale level, with the entire body of federal criminal law, in all of its complexity." *Id.* at 763 (footnote omitted).

Although the judiciary lacks power to repeal statutes or even to tighten them up with a red pen, courts can help keep the Executive Branch within its lane by bridling prosecutors to the fairly read language of criminal provisions. By contrast, judges make things worse by effectively amending those provisions to include various open-ended glosses. That is what the Third Circuit did here.

In recent terms especially, this Court has worked to constrain prosecutorial overreach by correcting especially egregious errors of this sort. In *Yates v. United States,* 135 S. Ct. 1074 (2015), a fisherman caught undersized red grouper in federal waters in violation of conservation regulations and "ordered a crew member to toss the suspect catch into the sea." *Id.* at 1078–79 (plurality op.). For this, Yates was convicted of violating a section of the Sarbanes-Oxley Act that makes it a crime to conceal or destroy "any record, document, or tangible object with the intent to impede, obstruct or influence" a federal investigation. 18 U.S.C. § 1519. But this Court "reject[ed] the Government's unrestrained reading" of "tangible object" to include fish. *Id.* at 1081; *see id.* at 1089–90 (Alito, J., concurring in the judgment). The lead opinion noted that "[i]t is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Id.* at 1087 (plurality op.).

Bond v. United States, 572 U.S. 844 (2014), featured an even more extraordinary prosecution. The defendant in that case had sought revenge on her husband's paramour by spreading harmful chemicals on the woman's car door, mailbox, and door knob, causing her victim to sustain a minor thumb burn. *Id.* at 852. For that misbehavior, a United States Attorney convicted Bond of violating a provision of the Chemical Weapons Convention Implementation Act of 1998 that forbids any person knowingly to "possess[] or use … any chemical weapon." 18 U.S.C. § 229(a)(1). Again, this Court rejected the Government's sweeping interpretation of the law, noting that it would "dramatically intrude [] upon traditional state criminal jurisdiction." 572 U.S. at 857 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

While *Yates* and *Bond* are the latest, striking examples of prosecutorial overreach, they are far from the only such cases to have caught this Court's attention. *See*, *e.g.*, *Hammerschmidt v. United States*, 265 U.S. 182 (1924); *McBoyle v. United States*, 283 U.S. 25 (1931); *Williams v. United States*, 458 U.S. 279 (1982); *Cleveland*, 531 U.S. 12; *Sekhar*, 57 U.S. 729; *McDonnell*, 136 S. Ct. 2355. And, in light of what happened here, one hopes that they will not be the last. Unfortunately, this Court's intervention has once again become necessary.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

March 15, 2019 Respectfully submitted,

NATHAN P. EIMER
RYAN J. WALSH
Counsel of Record
EIMER STAHL LLP
224 South Michigan Ave.
Suite 1100
Chicago, IL 60604
(312) 660-7639
rwalsh@eimerstahl.com

Counsel for Amici Curiae *Lord Conrad Black and Former Governor Robert F. McDonnell*