No. 19-1412

IN THE

Supreme Court of the United States

MARK JOHNSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

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INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL"), submits this *amicus curiae* brief in support of the petition for a writ of certiorari in this case. [1] NYCDL is a not-for-profit professional association of approximately 350 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited in cases such as *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016), *Kaley v. United States*, 134 S. Ct. 1090, 1104, 1112 (2014) (opinion of the Court and Roberts, C.J., dissenting), *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

NYCDL files this amicus brief in support of Petitioner Mark Johnson, urging the Court to grant a writ of certiorari. NYCDL has a particular interest in

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state 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. The parties have provided their written consent to the filing of this brief.

this case because the "right to control" doctrine of money-or-property fraud challenged by Petitioner directly implicates NYCDL's core concerns with combatting the unwarranted extension of criminal statutes and promoting clear standards for the imposition of criminal liability. NYCDL is in a unique position to describe how the Second Circuit's right-to-control jurisprudence illustrates a disturbing trend within the Circuit to criminalize marketplace conduct that, although deemed by prosecutors to be unethical or undesirable, is beyond the reach of the federal fraud statutes.

SUMMARY OF ARGUMENT

To be prosecuted under the federal wire fraud statute, a defendant must seek to "obtain[] . . . money or property" through fraud. 18 U.S.C. § 1343. As this Court held just this year in *Kelly v. United States*, the wire fraud statute is "limited in scope to the protection of property rights[.]" 140 S. Ct. 1565, 1571 (2020) (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). This is the statute's sole purpose. It does not empower federal prosecutors to "set[] standards of disclosure" that then can be enforced through the blunt instrument of the criminal law. *Id.*

In this case, the Second Circuit upheld Petitioner Mark Johnson's wire fraud conviction for engaging in a foreign exchange transaction that was alleged to further a scheme to deprive his counterparty not of property capable of being obtained from the counterparty but of the counterparty's interest "in controlling his or her assets." *United States v. Johnson*, 945 F.3d 606, 612 (2d Cir. 2019). The Second Circuit did so under its by-now firmly

entrenched right-to-control doctrine, which holds that "[i]t is . . . possible for a misrepresentation to influence decision-making in a manner that nevertheless does not produce tangible harm." *Id.* at 615 (quoting *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017)).

The Second Circuit's "right to control" doctrine originated three decades ago in *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991). The Second Circuit continues to rely on it in affirming convictions even as this Court's precedents make its error more plain each term. In *Wallach*, the Second Circuit held that a defendant can be convicted of "money or property" fraud for depriving the purported victim of the "intangible property interest" of being able to control how its money was spent, even assuming the purported victim received an "equal value" to what it bargained for. *Id.* at 461-63 (quoting *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)).

Since *Wallach*, the Second Circuit has regularly upheld fraud convictions based on the right-to-control doctrine, without requiring that the defendant obtain or seek to obtain property beyond that entailed by the parties' bargain. *See, e.g.*, *Finazzo*, 850 F.3d at 108; *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015); *United States v. Carlo*, 507 F.3d 799, 801-02 (2d Cir. 2007) (per curiam); *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996); *see also United States v. Tagliaferri*, 648 F. App'x 99, 103 (2d Cir. 2016) (summary order); *United States v. Viloski*, 557 F. App'x 28, 32-33 (2d Cir. 2014) (summary order); *United States v. Levis*, 488 F. App'x 481, 485 (2d Cir. 2012) (summary order).

The Second Circuit's embrace of the "right to control" doctrine cannot be reconciled with a long line of decisions of this Court—including last term's decision in *Kelly*—that confine mail and wire fraud prosecutions to those cases involving property capable of being "obtained," not the amorphous and non-transferrable "right to control" property. *See Kelly*, 140 S. Ct. 1565 (2020); *Skilling v. United States*, 561 U.S. 358 (2010); *Cleveland v. United States*, 531 U.S. 12 (2000); *see also Sekhar v. United States*, 570 U.S. 729, 737 (2013) (requiring "obtainable property" under the Hobbs Act, 18 U.S.C. § 1951). That the Second Circuit has not conformed its interpretation of the federal fraud statutes to decades of this Court's precedent, even with nothing more, counsels in favor of granting certiorari. *See* Supreme Court Rule 10(c) ("a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

NYCDL is submitting this amicus curiae brief for an additional reason: the right-to-control doctrine is part of a broader pattern of overcriminalization and prosecutorial overreach that has taken hold in the Second Circuit, where many of the most significant white-collar and financial fraud prosecutions in the nation are initiated, in recent years. To demonstrate that overcriminalization is not hypothetical, NYCDL describes herein high-profile, high stakes fraud prosecutions pursued in recent years, some grounded expressly in the right-to-control doctrine. The wire fraud prosecutions are far afield from what this Court has defined as wire fraud: a case in which a person makes a false representation in order to fraudulently obtain for himself another person's property. *See Kelly*, 140 S. Ct. at 1571 ("[t]he wire fraud statute

thus prohibits only deceptive 'schemes to deprive [the victim of] money or property'") (quoting *McNally*, 483 U.S. at 356). Cases in the Second Circuit have involved the alleged defrauding of sophisticated counterparties who are owed no fiduciary duties, in markets that the relevant regulatory authority has chosen not to regulate. Prosecutors have criminalized conduct that was widespread and uncomplained-of until they stepped in. The government has even argued, successfully, that it need not prove the utterance of a false statement. In none of the wire fraud cases did the defendant intend to defraud the alleged victim out of money or property in the traditional sense of those terms.

Johnson faces a substantial term of imprisonment not because he sought to deprive his counterparty of property, but because a jury found that he "intended to deprive [his counterparty] of information 'that could impact [the counterparty's] economic decisions.'" *Johnson*, 945 F.3d at 612 (quoting *Finazzo*, 850 F.3d at 108). Merely depriving someone of information, in the absence of any contemplated harm to money or property, is not, and ought not be, a crime. But the Second Circuit has often approved the right-to-control theory and also has acknowledged the rarity of its *en banc* sittings. *See generally Ricci v. DeStefano*, 530 F.3d 88, 90 (2d Cir. 2008) ("Throughout our history we have proceeded to a full hearing *en banc* only in rare and exceptional circumstances[.]") (Katzmann, J., concurring). Between 2011 and 2020, the Second Circuit granted *en banc* review only four times. As such, the right-to-control doctrine will remain law of the Second Circuit unless and until this Court overrules it.

This Court should grant certiorari to bring the Second Circuit's long-held and robustly-applied interpretation of the mail and wire fraud statutes in line with those statutes' text and this Court's precedents.

ARGUMENT

I. A DEFENDANT DOES NOT "OBTAIN" PROPERTY MERELY BY DEPRIVING THE VICTIM OF THE "RIGHT TO CONTROL" PROPERTY

Wire fraud is committed when a person engages in "any scheme or artifice to defraud, or [] obtain[s] money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343; *Kelly*, 140 S. Ct. at 1571 ("As the Government recognizes, the deceit must also have had the 'object' of obtaining the [victim's] money or property."). Despite the use of the disjunctive, "the second phrase simply modifies the first," making it "unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Cleveland*, 531 U.S. at 26. Thus, "obtaining money or property" is in all cases "a necessary element of the crime." *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

The Second Circuit's right-to-control doctrine cannot be harmonized with this requirement of wire fraud. It is not enough merely to show that the defendant intended to deprive the victim of a supposed property interest. Rather, the defendant must have intended to obtain the property from the victim. Where the supposed harm to the victim's

"property rights" consists merely of its right to control how to dispose of its property (*i.e.*, where there has been no wrongful transfer of the property itself from the victim to the defendant), this requirement is not satisfied. In such a case, the defendant does not (and logically could not) "obtain" the alleged victim's right to control their property. *See Sekhar v. United States*, 570 U.S. at 738 (describing the government's theory that a non-transferrable and non-obtainable form of property can be the object of a Hobbs Act scheme as "mak[ing] nonsense of words").

Second Circuit decisions since *Wallach* have literally written the "obtain" element out of the mail and wire fraud statutes. As recently as three years ago, the Second Circuit proclaimed that "the mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property" and specifically rejected the defendant's argument that "obtainability" was required to prove wire fraud. *See Finazzo*, 850 F.3d at 107. This proposition is impossible to reconcile with this Court's precedent, and yet the Second Circuit has explicitly rejected "obtainability" over and over again, even when the court did not speak in terms of "right to control." *See, e.g., United States v. Males*, 459 F.3d 154, 158 (2d Cir. 2006) ("[I]t is 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.") (emphasis added); *Porcelli v. United States*, 404 F.3d 157, 162 (2d Cir. 2005) (same).

Finazzo found *Sekhar* inapplicable because *Sekhar* interpreted the Hobbs Act statute, 18 U.S.C. § 1951, and not the wire fraud statute at issue in *Finazzo*. Yet both statutes require that the defendant "obtain" property. *Compare* 18 U.S.C. § 1343 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money. . . .") *with* 18 U.S.C. § 1951(b)(2) ("The term 'extortion' means the obtaining of property from another. . .").

The right-to-control doctrine is a sharp departure from this Court's precedent relating to obtainability going back at least two decades. In *Cleveland v. United States*, the Court explained that "property" under the mail and wire fraud statutes is limited to "traditional concepts of property." 531 U.S. at 24. This is precisely why "obtaining money or property" is "a necessary element of the crime." *Carpenter*, 484 U.S. at 25. Nothing like this was proved here, where the conviction rested on the withholding of information capable of "influencing" the counter-party's "economic calculus or the benefits and burdens of the agreement." *Johnson*, 915 F.3d at 613 (quoting *Binday*, 804 F.3d at 570).

A decade later, *Skilling* limited the reach of "honest-services fraud," 18 U.S.C. § 1346, because it did not fit within the paradigm of traditional frauds, in which "the victim's loss of money or property *supplied the defendant's gain, with one the mirror image of the other*." 561 U.S. at 400 (emphasis added). The decision below cannot be reconciled with that "symmetrical" view of the mail and wire fraud statutes; what Johnson allegedly obtained is not the same as what he allegedly took from his counterparty (*i.e.*, the right to control money or property).

Sekhar, which construes the meaning of property in the context of the Hobbs Act, is directly applicable. In the course of reversing a Second Circuit decision, *Sekhar* made clear that "[o]btaining property requires 'not only the deprivation *but also the acquisition of property*.'" 570 U.S. at 734 (emphasis added) (quoting *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404 (2003)). "That is, it requires that the victim 'part with' his property, and that the extortionist 'gain possession' of it." *Id.* (citations omitted). The Court acknowledged that the intangible "property" at issue in *Sekhar*—an attorney's "right to make a recommendation"—could be considered "property" in some abstract sense, in that one could "define[] property to include anything of value." *Id.* at 737 n.5. But that right nonetheless did not qualify as "property" *under the Hobbs Act*, because "it cannot be transferred" and thus "cannot be the object of extortion under the statute." *Id.* The same is true here: the "ability to make an informed economic decision" is not "money or property" that can be "obtained," and thus not a proper subject of the "money or property" fraud provisions.

Finally, *Kelly* involved the same wire fraud statute at issue here and confirms beyond any possible doubt that the "right to control" property is not the sort of "money or property" to which the statute refers. 140 S. Ct. 1565. *Kelly* reaffirms that the government needs to prove not only that the defendant engaged in some form of deception, "but that an 'object of the[ir] fraud [was] 'property.'" *Id.* at 1571 (quoting *Cleveland*, 531 U.S. at 26). In addition, the deprivation of property cannot be incidental, a "bit part in a scheme. It must be an 'object of the fraud.'"

Id. at 1573 (quoting *Pasquantino v. United States*, 544 U.S. 349, 355 (2005)).

In *Kelly*, the government made two arguments about the property that was alleged to be the object of the scheme. One argument was a conventional argument that the defendants sought to deprive the Port Authority of the costs of compensating the employees who carried out the misguided lane realignment. *Id.* at 1568, 1572. The Court rejected this argument because the use of these employees was merely incidental to the scheme to punish a political enemy. *Id.* at 1572. The second argument was that the defendants sought to "commandeer" or "take control" of the George Washington Bridge itself. *Id.* Essentially, the government made a species of the "right to control" argument that the Second Circuit has endorsed. This Court rejected the argument as insufficient for wire fraud under *Cleveland v. United States*, 531 U.S. at 23 ("a quintessential exercise of regulatory power"). If the ability to decide how lanes on a bridge should be arranged is not obtainable, actionable "property" under the wire fraud statute, then neither is the "ability to make an informed economic decision" a proper subject of a wire fraud prosecution.

Decisions of other Circuits have recognized the flaw in the Second Circuit's approach, emphasizing that the mail and wire fraud statutes, by criminalizing schemes "to obtain money or other property," clearly "contemplate a transfer of some kind." *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993); *see Monterey Plaza Hotel Ltd. P'ship. 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) (§ 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)); *United States v. Zauber*, 857 F.2d 137, 147 (3d Cir. 1988) (describing the "right to control" theory as "too amorphous to constitute a violation of the mail fraud statute").

Most recently, the Sixth Circuit has held that the "right to control" property and "the right to accurate information" related to that property are "not the kind of 'property' rights safeguarded by the fraud statutes." *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014). Similarly, the Ninth Circuit has declined to recognize the "right to control" theory. *See United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). That conclusion follows directly from this Court's precedent. This Court should resolve this circuit conflict, and—much like it did in *Sekhar*—bring the Second Circuit's interpretation of the fraud statutes in line with their text and this Court's precedent.

As the decision in this case exemplifies, the Second Circuit has repeatedly declined since *Cleveland* to reconcile its precedent with this Court's decisions, not to mention the plain statutory text. Indeed, in *Finazzo*, 850 F.3d at 107 n.14, the Circuit flatly rejected the applicability of this Court's decisions in *Cleveland* and *Sekhar* to its right to control theory. Correction can only come from this Court. Certiorari should be granted.

II. THE DECISION BELOW EXEMPLIFIES A BROADER PATTERN OF OVER-CRIMINALIZATION THROUGH EXPANSIVE INTERPRETATION OF FEDERAL FRAUD LAWS THAT IS CONTRARY TO THIS COURT'S RECENT PRECEDENTS

In persisting to adhere to its right-to-control doctrine, the Second Circuit is refusing to follow this Court's recent decisions that aim to place limits on the government's ability to make a federal case out of unethical or unseemly conduct that Congress has not criminalized. As the Court explained in *Kelly*, if federal prosecutors "could prosecute as property fraud every lie . . . the result would be . . . 'a sweeping expansion of federal criminal jurisdiction.'" 140 S. Ct. at 1574. Even while this Court has repeatedly emphasized the dangers in giving criminal statutes a broad reading, the Second Circuit has taken just the opposite approach. The right-to-control doctrine is only one manifestation of this trend in the Second Circuit, as we discuss below.

A. This Court Has Limited The Reach of Federal Criminal Statutes To Their Statutory Meaning

In the recent past, this Court has issued an opinion rejecting an overbroad reading of criminal statutes virtually every year, thus policing the bounds of how federal criminal statutes are employed and preventing overcriminalization:

- *Bond v. United States*, 572 U.S. 844 (2014), rejecting the contention that a woman who learned that her husband had carried on an

affair with her best friend and who then spread harmful chemicals on the friend's car door, mailbox, and door knob had violated the Chemical Weapons Convention Implementation Act of 1998. *Id.* at 857 (holding that the government's sweeping interpretation would "'dramatically intrude[] upon traditional state criminal jurisdiction'") (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

- *Yates v. United States*, 574 U.S. 528 (2015), rejecting "the Government's unrestrained reading" of the phrase "tangible object" to include not only documents, but fish. *Id.* at 536; *see also id.* at 546 ("[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").

- *McDonnell v. United States*, 136 S. Ct. 2355 (2016), rejecting the government's interpretation of the term "official act" on the grounds that it would subject public officials to prosecution without fair notice, a "standardless sweep." *Id.* at 2373.

- *Marinello v. United States*, 138 S. Ct. 1101 (2018), rejecting the government's argument that a person could be convicted of obstructing a pending IRS proceeding without any awareness of a pending IRS proceeding. *See id.* at 1108-09 ("[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal

statute's highly abstract general statutory language places great power in the hands of the prosecutor.").

- *Rehaif v. United States*, 139 S. Ct. 2191 (2019), rejecting the government's argument that a person could be convicted of violating the alien-in-possession statute without proof that he or she knew of their status, in order to avoid conviction of those who lacked a "wrongful mental state." *Id.* at 2198.

- *Kelly v. United States*, 140 S. Ct. 1565 (2020), rejecting the conviction of state employees for wire fraud and federal program fraud where the object of the scheme was not property. *See id.* at 1574 ("[T]he Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking. . . . [N]ot every corrupt act by state or local officials is a federal crime.").

Common themes emerge from these disparate cases: This Court does not rely on prosecutors to exercise good judgment when construing federal statutes that are susceptible to abuse. *McDonnell*, 136 S. Ct. at 2372-73 ("[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'"). Not every "corrupt act" or "abuse of power" is a federal crime. *Kelly*, 140 S. Ct. at 1574. In addition, interpreting criminal statutes too broadly fails to provide fair notice to the accused, in derogation of constitutional vagueness principles. *McDonnell*, 136 S. Ct. at 2373

(quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)); *Skilling*, 561 U.S. at 402-03.

It is the role of courts to deter prosecutors and law enforcement from deciding for themselves—after the fact—who has committed a crime, a system which would "allow[] 'policemen, prosecutors, and juries to pursue their personal predilections.'" *Marinello*, 138 S. Ct. at 1108-09 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)); *see also Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) (interpreting the Armed Career Criminal Act and holding that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process"). The wire fraud statute, like the statutes at issue in these other cases, requires an appropriately narrow construction in order to prevent it from being used to prosecute and convict individuals who might not know that their actions are criminal.

B. Prosecutors In The Second Circuit, Including Through Application Of The Right-To-Control Doctrine, Have Been Expanding The Federal Fraud Statutes Beyond Their Statutory Meaning

While this Court has carefully guarded against the over-broad interpretation of criminal statutes, prosecutors and courts within and including the Second Circuit have taken a different approach in enforcing and interpreting fraud statutes. Common features of these recent prosecutions of individual defendants include:

- defendants who engaged in widely practiced and well-known market conduct that the federal government has elected not to regulate and of which the victims did not complain;

- defendants who omitted disclosing information about their own profit or margin to a sophisticated counterparty whose own benefit-of-the-bargain was not impaired;

- defendants who did not make a provably false statement;

- defendants who have been subjected to prosecution for violating the rules of a private organization.

In order to enhance the Court's understanding of the impact of the Second Circuit's recent decisions in the area of federal fraud prosecutions, we provide examples—including but not limited to right-to-control cases—from just within the last several years. These cases often were pending for years and were covered extensively in the media and followed in the affected industries. The purportedly criminal behavior was frequently widespread in the industry. Some defendants were acquitted, either at or after trial, or had their cases dismissed after the government conceded error or the Second Circuit found reversible error, but not before spending years of their lives and substantial amounts defending themselves. Others, however, have been convicted and sentenced to lengthy prison terms, even based on

theories acknowledged by the Second Circuit to have been "novel."

NCAA fraud and bribery prosecutions[2]: Based on the right-to-control doctrine, prosecutors obtained wire fraud convictions of an employee of Adidas, an Adidas consultant, and a 26-year old sports agent. The offense conduct—violations of NCAA recruiting rules by making payments to recruits—was so widespread as to have become virtually an industry practice, according to the NCAA itself. *See* Sentencing Submission on Behalf of James Gatto at 3, *United States v. Gatto*, No. 17 cr. 686 (S.D.N.Y. Feb. 12, 2019); Commission on College Basketball, Report and Recommendations to Address the Issues Facing Collegiate Basketball 16 (April 2018).[3] Two of the three defendants were tried in a second case alleging illegal payments to coaches; in that trial the jury acquitted the defendants of wire fraud while convicting on bribery charges. The wire fraud convictions are now on appeal on the ground, among others, that the right to control scholarship money is not a property right that can be obtained. Brief of Defendants-Appellants at 69, *United States v. Gatto, Code, & Dawkins*, No. 19-0783 (2d Cir. Aug. 8, 2019). Imposing criminal liability for the violation of private organizational rules that can be enforced through internal disciplinary measures or civil litigation is a breathtaking expansion of wire fraud liability.

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[2] *United States v. Gatto, Code, & Dawkins*, No. 17 Cr. 686 (S.D.N.Y); *United States v. Dawkins & Code*, No. 17 Cr. 684 (S.D.N.Y.)

[3] http://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf (last visited July 22, 2020).

Prosecutions Relating to Bid-Rigging in New York State development project[4]: Federal prosecutors obtained wire fraud convictions at trial of individuals alleged to have rigged bids relating to a plan by the New York state legislature to revitalize Western New York. One of the alleged schemes involved representations made to a state-university created entity, Fort Schuyler Management Corp. The district court's jury instructions did not require proof of deprivation of obtainable property. Jury Instructions at 16, *United States v. Percoco et al.,* No. 16 Cr. 776 (S.D.N.Y. Jul. 12, 2018) (trial of Defendants Kaloyeros, Aiello, Gerardi, and Ciminelli). Instead, the victims of the scheme sought "preferred developer status," a non-tangible status conferred by the government which did not actually guarantee the winning of any bid and that the defendants could not possibly "obtain." The district court also held that it was irrelevant whether the nonprofit victim received the benefit of their bargain with the defendants. Tr. of Pretrial Proceedings at 163-66, *United States v. Percoco et al.,* No. 16 Cr. 776 (S.D.N.Y. Jun. 6, 2018). Thus, even an entity that got what it bargained for can be a victim of wire fraud in the Second Circuit—a classic application of the right-to-control doctrine. The convictions are currently being appealed.

Hashemi Nejad Prosecution[5]: This prosecution was charged as a violation of U.S. sanctions, bank fraud and money laundering. The supposed victim of the scheme—the correspondent banks that carried out wire transfers directed by Hashemi Nejad—suffered no actual harm by virtue of the transfers. In addition,

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[4] *United States v. Percoco et al.*, No. 16 Cr. 776 (S.D.N.Y.)

[5] *United States v. Hashemi Nejad*, No. 18 Cr. 224 (S.D.N.Y.)

although Commerzbank "flagged" the first transaction in the purported scheme, and that bank and prosecutors both reported Hashemi Nejad's transactions to the Office of Foreign Assets Control, Commerzbank never concluded there was any violation of U.S. sanctions—for the same reason Hashemi Nejad believed himself innocent—and OFAC determined not to pursue any enforcement action. *See* Memorandum of Law in Support of Motion for Acquittal or in the Alternative a New Trial at 95-101, *United States v. Hashemi Nejad*, No. 18 Cr. 224 (S.D.N.Y. May 1, 2020) (citing, *e.g.*, Tr. of Trial Proceedings at 1822, DX 150, GX 411). The government's theory of harm was that the banks faced a risk of fines and investigative costs and thus were deprived of their right to control their property as a result of Hashemi Nejad's withholding of information, *see* Jury Instructions at 38, *United States v. Hashemi Nejad*, No. 18 Cr. 224 (S.D.N.Y. Mar. 12, 2020)—a similar argument to the one presented in connection with this petition for certiorari. Conceding "failures" and "mistakes" in disclosing *Brady* material, the government successfully moved after trial to dismiss this prosecution. *See* Order, *United States v. Hashemi Nejad*, No. 18 Cr. 224 (S.D.N.Y. July 17, 2020); Letter re: the Court's June 9, 2020 Order, *United States v. Hashemi Nejad*, No. 18 Cr. 224 (S.D.N.Y. July 2, 2020).

Residential mortgage-backed securities ("RMBS") sales practices[6]: Prosecutors brought several cases against employees at institutional

[6] *United States v. Litvak*, 3:13-cr-19 (D. Conn); *United States v. Demos*, 3:16-cr-220 (D. Conn); *United States v. Gramins, Shapiro, & Peters,* 3:15-cr-155 (D. Conn).

broker-dealers, alleging that in marketing RMBS to other "large, sophisticated financial institutions," like the international investment management firm Invesco, the employees made false statements about their employers' profit. *United States v. Litvak*, 889 F.3d 56, 60, 62-63 (2d Cir. 2018). It was conceded that each broker-dealer owed the RMBS investor no fiduciary duty and acted "solely in its own interest as a principal," *id.* at 61-62, and that investors used computer models to determine whether to buy or sell particular securities. In *Litvak*, in which the defendant initially faced securities fraud, TARP fraud, and false statement charges, the Court of Appeals twice reversed convictions on evidentiary grounds before the government proposed dismissing the last charge. Although the victims were not misled as to the intrinsic value of the bond, but only as to what the broker paid for it, the misrepresentations were still material, according to the decision issued by the Second Circuit before the government voluntarily dismissed the case, because "[t]he broker-dealer's profit is part of the price and lies about it can be found by a jury to 'significantly alter[] the 'total mix' of information." *Id.* at 67.

The Second Circuit reversed the district court's decision to grant a post-trial motion for the acquittal of another trader, Michael Gramins, whom a jury had convicted of a single count of conspiracy to commit securities and wire fraud, even while it recognized that "this novel form of prosecution"—a case with no victim, a confusing theory of materiality, and the imposition of a legal obligation where none otherwise existed—"raised issues of first impression[.]" *United States v. Gramins*, 939 F.3d 429, 454 (2d Cir. 2019). In *United States v. Demos*, 3:16-cr-220 (AWT) (D.

Conn.), a securities fraud case brought on a similar theory, the defendant was acquitted on all counts.

LIBOR prosecution[7]: U.S. prosecutors brought several cases involving alleged fraud by traders at the international banks that make submissions of estimated interest rates that are averaged to produce each day's LIBOR benchmark—a benchmark used to set interest rates throughout the banking industry. At most panel banks, LIBOR traders made the bank's submissions, which meant that the LIBOR submitter's financial position inevitably would be impacted by the ultimate LIBOR determination. It has been publicly reported that the Bank of England and the New York Federal Reserve Bank knew that banks could make self-interested LIBOR submissions but took no steps to regulate this procedure.[8]

From among many LIBOR submitters and traders who participated in the same conduct, the government prosecuted a small number—"proxy wrongdoers," as one district judge called them—on a theory that they made or encouraged the submission

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[7] *United States v. Connolly & Black*, No. 16 Cr. 370 (S.D.N.Y); *United States v. Allen & Conti*, No. 14 Cr. 272 (S.D.N.Y.)

[8] David Hou & David Skeie, "LIBOR: Origins, Economics, Crisis, Scandal, and Reform," Federal Reserve Bank of New York Staff Reports (March 2014) 7 ("Further controversy arose in the U.S. when it was revealed that the Federal Reserve Bank of New York had first become aware of manipulative activities in 2007, with senior Federal Reserve officials being briefed by early 2008. . . . [T]hen New York Fed President Tim Geithner did communicate to Bank of England authorities a June 1, 2008 email memo putting forth 'Recommendations for Enhancing the Credibility of LIBOR."), https://www.newyorkfed.org/media library/media/research/staff_reports/sr667.pdf (last visited July 18, 2020).

of a false LIBOR rate in order to help set LIBOR at a level that would benefit the banks' own trading positions. Tr. of Sentencing at 85, *United States v. Connolly & Black*, No. 16 Cr. 370 (S.D.N.Y. Oct. 24, 2019). In two trials, the government denied that it was obliged to prove that the rate actually submitted by the panel bank was false or incorrect, and the district courts agreed. *See United States v. Connolly & Black*, 2019 WL 2125044, at *4 (S.D.N.Y. May 2, 2019) ("[C]riminal liability attaches to conduct intended to deceive another party, even when the statements uttered are reasonable, defensible, or even truthful."); *United States v. Allen*, 160 F. Supp. 3d 698, 701-02 (S.D.N.Y. 2016) ("In the Court's view, the relevant issue was not the accuracy or inaccuracy of defendants' LIBOR submissions, but the intent with which these submissions were made."). It was enough for the submitted rate to benefit the submitting bank—even if the submission was a truthful and reasonable estimate of the bank's borrowing costs. *United States v. Connolly & Black*, 2019 WL 2125044, at *4, *appeal docketed at* 19-3944 (2d Cir. Nov. 22, 2019) ("These implied statements were false because the numbers that the conspirators caused to be submitted were not calculated according to the prescribed considerations, but were instead numbers that would help Deutsche Bank make money at its counterparties' expense").

The convictions of Defendants Allen and Conti were reversed on *Kastigar* grounds. *See United States v. Allen*, 864 F.3d 63 (2d Cir. 2017). NYCDL has argued in an amicus brief in the *Connolly & Black* appeal that it cannot be the case that wire fraud liability may exist based on the utterance of truthful statements simply because those statements were in

the speaker's financial self-interest. Brief of New York Council of Criminal Defense Lawyers at 3, *United States v. Connolly & Black*, No. 19-3944 (2d Cir. May 12, 2020).

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Like in many cases that implicate overcriminalization concerns, the defendants' conduct in these cases can be described as in some sense "wrong." *See Kelly*, 140 S. Ct. at 1574 ("This case involves an 'abuse of power.'"). But not everything that is wrong is a crime; civil penalties and tort liability suffice to address most forms of wrongdoing. Nor does every instance of dishonesty amount to criminal mail or wire fraud, despite the great frequency with which those offenses are charged and the wide range of conduct they are used to target.

The consequences of the type of overcriminalization by statutory expansion embodied by the Second Circuit cases discussed above are substantial and concrete. Not only does excessively broad and creative application of federal criminal laws expose defendants to liability for conduct few would anticipate falls within the provisions' reach, but as the Chief Justice has observed, when criminal statutes are afforded their broadest conceivable interpretation, federal prosecutors have "extraordinary leverage" to charge aggressively and extract guilty pleas. Tr. of Oral Argument at 31, *Yates v. United States*, 574 U.S. 528 (2015) (No. 13-7451); *see also Ocasio v. United States*, 136 S. Ct. 1445 (2016) (expressing concern that expansive reading of Hobbs Act "leaves it for federal prosecutors to answer those questions in the first instance, raising the specter of potentially charging everybody with

conspiracy and seeing what sticks and who flips") (Sotomayor, J., dissenting).

This dynamic makes it all the more important for the Court to grant certiorari and enforce the bounds set by federal criminal statutes' text in those cases like this one, where a defendant like Johnson exercised his right to trial, knowing that conviction at trial might well increase any sentence.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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