No. _____

In The
Supreme Court of the United States

MICHAEL BINDAY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit's "right to control" theory of fraud – which treats the deprivation of complete and accurate information bearing on one's economic decision as a form of "property" fraud – is a valid basis for a conviction under the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343.

PARTIES TO THE PROCEEDING

Petitioner Michael Binday was the defendant, appellant, and petitioner in the proceedings below. Respondent United States was the appellee below.

RELATED PROCEEDINGS

United States v. Binday, 12 CR. 152 (CM), U.S. District Court for the Southern District of New York. Judgment entered Oct. 1, 2018.

United States v. Binday, 804 F.3d 558 (2d Cir. 2015), *cert. denied*, No. 15-1140, 579 U.S. 917, June 20, 2016.

Binday v. United States, No. 12 CR. 152 (CM), 2018 WL 2731269 (S.D.N.Y. May 23, 2018), *certificate of appealability denied*, No. 18-2143, 2019 WL 302079 (2d Cir. Jan. 15, 2019), *cert. denied*, No. 19-273, 140. S. Ct. 1105, February 24, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Binday respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion below, CM/ECF No. 46, *Binday v. United States*, No. 21-1206 (2d. Cir. Oct. 12, 2021), is unpublished but is reproduced at Pet.App.1-3.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision on October 12, 2021. On December 14, Justice Sotomayor extended until March 11, 2022, the time for filing a petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The federal mail fraud statute, 18 U.S.C. § 1341, states in pertinent part that whoever uses the mails "for obtaining money or property by means of false or fraudulent pretenses" is guilty of mail fraud. The wire fraud statute, 18 U.S.C. § 1343, similarly states that whoever uses means of interstate communication "for obtaining money or property by means of false or

fraudulent pretenses" is guilty of wire fraud. Both statutes are reproduced in full at Pet.App.119-20.

INTRODUCTION

Time and again, this Court has instructed that the scope of the federal mail and wire fraud statues is confined to traditional "property fraud." *Kelly v. United States*, 140 S. Ct. 1565, 1568, 1571 (2020); *see also Cleveland v. United States*, 531 U.S. 12 (2000); *McNally v. United States*, 483 U.S. 350 (1987). And yet, this Court has repeatedly been forced to curb the charging decisions of federal prosecutors that ignore this Court's precedent and the fraud statutes' text. *See Kelly*, 140 S. Ct. at 1571; *Skilling v. United States*, 561 U.S. 368, 401-04 (2010). Petitioner Michael Binday's case is more of the same. Petitioner was charged with violations of the mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, statutes for misrepresenting on insurance applications that his clients did not intend to resell their life insurance policies. Prosecutors in the Southern District of New York alleged that Petitioner deprived the insurance companies of "money or property" by depriving them of the intangible "right to control" their assets or information that may have borne on the companies' decisions to issue the policies. Petitioner was convicted in 2013 of mail and wire fraud, and the Second Circuit affirmed his conviction in 2015.

But in 2020, this Court made clear that the mail and wire fraud statutes prohibit *only* schemes targeted at money or property. *Kelly*, 140 S. Ct. at 1571. Thus, to secure a mail or wire fraud conviction, the government must show that the object of the alleged scheme was "to *obtain* money or property." *Id.* at 1574 (emphasis added). So, relying on *Kelly*, Petitioner moved for leave to file a 28 U.S.C. § 2255 motion and simultaneously filed a 28 U.S.C. § 2241 petition asserting that he is actually innocent. The Second Circuit denied Petitioner leave to file a § 2255 motion on the ground that it would be "second or successive." And, relevant here, the court denied the § 2241 motion because Petitioner's theory of conviction – that he had deprived insurance companies of information and thus the "right to control" their assets – had been recently upheld by the Second Circuit, and because his case was not "otherwise . . . covered by the ruling in *Kelly*."

The Second Circuit's denial of Petitioner's § 2241 motion conflicts with this Court's precedent. The Second Circuit's "right to control" doctrine allows federal prosecutors to secure a mail or wire fraud conviction without proving the defendant sought to obtain tangible or intangible property or the complainant suffered any quantified economic loss. Instead, it is enough to establish that a defendant merely failed to disclose information that the complainant claims was important in deciding whether to sell something – even when it receives full price. But as this Court has made clear, the mail and wire fraud statutes reach *only* schemes to "obtain" "money or property." *Kelly*, 140 S. Ct. at 1565;

see also McNally, 483 U.S. at 500; *Cleveland*, 531 U.S. at 12.

The Second Circuit's decision also deepens a circuit split with other circuits that have rejected the "right to control" theory, holding that the "ethereal right to accurate information" is not property under the mail or wire fraud statutes. *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (Sutton, J.); *see also United States v. Yates*, 16 F.4th 256 (9th Cir. 2021); *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992).

And the Second Circuit's "right to control" doctrine raises an important question about federal prosecutions of people who are less than completely candid in their business dealings – conduct that has traditionally been regulated by the states. *Kelly*, 140 S. Ct. at 1565 (instructing the federal government not to use "the criminal law to enforce (its view of) integrity").

Certiorari is thus warranted to clear the air and clarify whether the mail and wire fraud statutes' text and this Court's precedent permit a conviction based on only the deprivation of a victim's "right to control" their assets.

STATEMENT OF THE CASE

Petitioner's Indictment, Trial, Sentencing, and Direct Appeal.

Petitioner Michael Binday – an insurance broker – and his agents obtained life insurance policies for clients, intending from the get-go to facilitate resale of those policies to investors. (Once sold, life insurance policies are called "stranger-owned life insurance," or "STOLI" policies.) Petitioner, however, falsely told the insurance companies that his clients did not intend to sell the policies. The applications Petitioner's clients filled out would honestly represent the applicants age, sex, and health – among other things – but would falsely represent that the insureds did not plan to try to make them into STOLI policies.

Generally, insurers cannot stop an insured from selling their life insurance policy to anyone else – in fact, they are required by law to permit the resale of policies. But insurers may refuse to sell life insurance policies to individuals who admit they plan to later sell them. So insurers will ask in an insurance application whether the proposed insured intends to sell the policies. For example, insurers require applicants to affirm that they do not intend to sell their policies to investors; they require brokers to affirm that policies are not intended for investors; and they void policies or pursue breach of contract claims against insureds or brokers who misrepresent their intentions.

Petitioner's counsel conceded at trial that Petitioner's clients falsely represented in their insurance

applications that they had no intent to re-sell their policies. The applications asked that question because insurers objected to STOLI policies for "social" and "non-economic" reasons, though they had "characteristics" that could reduce their ultimate profitability. Pet.App.52-54. And because of Petitioner's misrepresentations, the insurance companies might sue him for breach of contract, terminate him as a broker of their policies, or sue to void the policies issued in violation of the insurance companies' rules.

Instead, Petitioner's misrepresentations were transformed into a federal criminal prosecution. On February 15, 2012, Petitioner and two other insurance brokers were indicted in the United States District Court for the Southern District of New York on multiple counts of mail and wire fraud. Pet.App.40. The indictment alleged that Petitioner defrauded the insurance companies by causing them to issue STOLI policies through misrepresentations about: the applicants' financial information; the purpose of procuring the policy and the intent to resell the policy; the fact that the premiums would be financed by third parties; and the existence of other policies or applications for the same applicant. In other words, the indictment alleged that the insurance companies were "harmed" by Petitioner because they issued STOLI policies when they believed they were issuing non-STOLI policies. Pet.App.41.

At Petitioner's September 2013 trial, the parties disputed whether Petitioner deprived the insurance companies of "property" under the federal fraud statutes. Petitioner argued repeatedly that the government

must prove that the insurance companies suffered an actual economic loss of "money or property" – that the STOLI policies Petitioner procured were less profitable for the insurance companies than comparable non-STOLI policies. Because his misrepresentations caused no "discrepancy between the benefits reasonably anticipated by the insurers and what they actually received," Petitioner contended the government could not make this showing. Pet.App.44.

The district court, however, rejected Petitioner's argument and instead held that Second Circuit law obviated the need to show actual economic loss. Doubling down, the district court also prohibited Petitioner from proving that the insurance companies benefitted – in this case, made money – from the STOLI transactions, thus depriving Petitioner of the chance to prove his scheme was *not* to obtain money or property. To meet its burden, then, the government only had to prove that the insurance companies were *deprived of information* that may have borne on their decision to issue the STOLI policies. The government's evidence on this point consisted mostly of the testimony of two insurance companies: James Avery, the chief executive officer of Prudential Insurance Company of America's individual life insurance business, and Michael Burns, a senior vice president at Lincoln Financial. Each testified why insurers prohibited the sale of policies to individuals who intended to sell those policies from the start, and each eventually testified that the companies disfavored STOLI policies out of fear that it would hurt the public's perception of the life insurance industry.

Avery, for example, testified that Prudential did not want to issue STOLI policies because investors who owned policies insuring strangers "were not in line with how [Prudential] price[s] [its] generic business [because they] would not behave the same." Trial Tr. at 513, United States v. Binday, 12-CR-152-CM (S.D.N.Y. Sept. 17, 2013) ("Trial Tr."). He later clarified that investors did not sell or abandon their policies as often as ordinary insureds do. *Id*. at 515. And Burns testified that STOLI policies lapsed less often than non-STOLI policies, thereby "impair[ing] [the] profitability" of the insurance companies. *Id.* at 641.

After the close of evidence, the jury was instructed on an expansive "right to control" theory and was told that the government need only prove that Petitioner deprived the insurance companies of the ability to make informed economic decisions:

> Now, as I told you a few minutes ago, a scheme to defraud is a course or a plan of action to deprive someone of money or property. What does that mean, deprive someone of money or property? Well, obviously a person is deprived of money or property when someone else takes his money or property away from him. But a person can also be deprived of money or property when he is deprived of the ability to make an informed economic decision about what to do with his money or property. We referred to that as being deprived of the right to control money or property.

Id. at 1579. Of particular importance, the jury instruction *did not* require that the jury find economic harm or that Petitioner's object was to obtain that harm, only that Petitioner "deprived" the insurance companies of the "ability to make an informed economic decision about what to do with [their] money or property."

The jury returned a guilty verdict on all charges on October 7, 2013. And on July 30, 2014, Petitioner was sentenced to 144 months' imprisonment.

Petitioner appealed to the Second Circuit, where his conviction was upheld,[1] and his petition for a writ of certiorari before this Court was denied in June 2016.

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[1] On direct appeal before the Second Circuit, Petitioner and his codefendants argued that the district court's jury instruction was confusingly conveyed to suggest that, although economic harm was required, it was "not limited to a loss on the company's bottom line." Pet.App.73. But the court rejected those arguments on waiver and preservation grounds, and thus did not address what sort of economic harm – if any – would not be reflected on a "company's bottom line." Pet.App.73-75. Even if the defendants had preserved the "general challenge that economic harm must be required," the court ruled that they did not preserve a claim that "the specific language of the jury instruction did not convey that requirement with sufficient clarity." Pet.App.76. So, if the government claims it could or did prove Petitioner sought to obtain money or inflict an economic loss, that is beside the point: the jury was instructed that it did *not* have to find a loss to the insurance companies' "bottom line," so it would be impossible to sustain a jury verdict on the grounds that the jury found evidence of economic loss.

In any event, Petitioner's involvement in the scheme would not have affected the insurance companies' "bottom line," as he received only commissions from the STOLI policies, which were

Petitioner's Habeas Proceedings Regarding Ineffective Assistance of Counsel.

After his direct appeal, Petitioner moved to vacate his conviction pursuant to 28 U.S.C. § 2255 on the ground that his trial counsel was ineffective, arguing that his counsel's performance was constitutionally deficient because he misunderstood the law governing mail and wire fraud. The district court denied the motion to vacate, reasoning that trial counsel's argument that the insurance companies suffered "no actual loss" was not the "gravamen" of Petitioner's defense because Petitioner's counsel also claimed that the insurers "had engaged in a wink and a nod practice of bashing STOLI publicly, while secretly letting such policies 'slip through the cracks' so that they could earn the hefty premiums that the policies generated." Pet.App.16. Instead, the "gravamen" of Petitioner's defense, the district court reasoned, was that Petitioner's conduct was not fraudulent and that Petitioner did not intend to inflict any harm. *Id.* The district court likewise declined to issue a certificate of appealability ("COA").

Petitioner then moved the Second Circuit for a COA, but the court of appeals declined to issue one because petitioner failed to make "a substantial showing of the denial of a constitutional right." Pet.App.10. Petitioner then asked the Second Circuit to reconsider

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already priced into the insurance; the insurance companies kept the premiums. *See* Trial Tr. at 1437-45, 1462.

the denial of the COA, or, in the alternative, to rehear the case *en banc*. But that motion, too, was denied.

So Petitioner filed a petition for a writ of certiorari in this Court and asked, as one of the questions presented, if "the strand of property rights known as the 'right to control property' [is] sufficiently 'property' within the meaning of the fraud statutes given that this Court rejected the suggestion in *Cleveland*, *Skilling* and *Sekhar*?" Pet. for Cert. at ii, Binday v. United States, No. 21-1170 (filed Aug. 27, 2019). In the petition, Petitioner noted that the Court had recently granted certiorari in *Kelly v. United States*, and that the Court's decision in *Kelly* may bear on the validity of Petitioner's conviction. *Id.* Indeed, in September 2019, Petitioner filed an *amicus curiae* brief in *Kelly* and argued that this Court should reject the "right to control" theory of property and reverse Kelly's convictions for federal wire fraud and for fraud on a federally funded program or entity. Br. of Michael Binday In Support of Petitioner, Kelly v. United States, 18-1059 (filed Sept. 23, 2019).

Petitioner's petition for a writ of certiorari was denied in February 2020. *Binday v. United States*, 140 S. Ct. 1105 (2020).

This Court Reverses Convictions in *Kelly v. United States*, 140 S. Ct. 1565 (2020).

Shortly after Petitioner's second petition for a writ of certiorari was denied, this Court handed down its decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020).

In *Kelly* – colloquially known as the "Bridgegate" case – the federal government sought to prove wire fraud in a scheme where the defendants (state government employees) closed three of the four George Washington Bridge lanes between New York and New Jersey. The employees closed the lanes to exact political payback on the mayor of a city – whose inhabitants used the now-closed lanes – for the mayor's refusal to support a particular gubernatorial candidate. To provide cover for the scheme, the defendants used government employees to conduct a sham traffic study and to provide a backup toll collector for the single remaining open lane. The government charged the defendants with wire fraud based, in part, on the use of salaried employees to conduct the sham traffic study and cover the toll collection. The defendants were convicted, the Third Circuit affirmed their convictions, and the case made its way to this Court.

In its merits brief before this Court, the government argued that "resources – payments to workers who would not otherwise have been on duty, the value of wages paid to salaried employees whom the conspirators unwittingly conscripted into their plans, and the right to control the real property of the George Washington Bridge – are each a 'species of valuable right [or] interest' that constitutes 'property' under the fraud statutes." Brief for Respondent United States at 22, Kelly v. United States, 140 S. Ct. 1565 (citation omitted) (available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1059.html). It also claimed that "[t]he right to

control the George Washington Bridge, however, is not a regulatory interest, but instead an interest in real property – one of the most fundamental of property rights." *Id.* at 46.

But the Court rejected the government's arguments and reversed the Third Circuit, explaining that the defendants could violate fraud laws

> only if an object of their dishonesty was to obtain the Port Authority's money or property. The Government contends it was, because the officials sought both to "commandeer" the Bridge's access lanes and to divert the wage labor of the Port Authority employees used in that effort. We disagree. The realignment of the toll lanes was an exercise of regulatory power – something this Court has already held fails to meet the statutes' property requirement. And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme. We therefore reverse the convictions.

Kelly, 140 S. Ct. at 1568-69 (citation omitted). Going further, the Court stated that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Id.* at 1573.

For this proposition, the Court discussed Judge Easterbrook's opinion in *United States v. Walters*, *id.* at 1573 n.2, which rejected the "right to control" theory of property, *see* 997 F.2d 1219, 1226 n.3 (7th Cir. 1993) ("The United States recasts this argument by contending that the universities lost (and Walters gained) the

'right to control' who received the scholarships. This is an intangible rights theory once removed."). The Court stated that, without an "incidental byproduct" rule, "even a practical joke could be a federal felony" and quoted Judge Easterbrook's example:

> "'A [e-mails] B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation,' thus expending the cost of gasoline. 'But there is no party; the address is a vacant lot; B is the butt of a joke.' Wire fraud? No. And for the reason Judge Easterbrook gave: '[T]he victim's loss must be an objective of the [deceitful] scheme rather than a byproduct of it.'"

Kelly, 140 S. Ct. at 1573 n.2 (citations omitted) (quoting *Walters*, 997 F.2d at 1224, 1226).

Kelly, then, unanimously rejected the "right to control" theory of property and reaffirmed that the federal fraud statutes do not criminalize "all acts of dishonesty." *Id.* at 1571; *see also id.* at 1568 ("The evidence the jury heard no doubt shows wrongdoing – deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct.").

Petitioner's Post-*Kelly* Habeas Proceedings.

Following this Court's decision in *Kelly*, Petitioner moved in the Southern District of New York to vacate his conviction, this time under 28 U.S.C. § 2241 – through 28 U.S.C. § 2255's "savings clause" – or under § 2255 itself.

Regarding § 2241, Petitioner argued that § 2255 would be "inadequate or ineffective" to test the legality of his detention, *see* 28 U.S.C. § 2255(e), because his conduct was no longer criminal, he was thus innocent, and he could not have made that argument in earlier proceedings. Mot. to Vacate Conviction at 31, Binday v. United States, No. 21-1206 (2d Cir. Mar. 12, 2021). Petitioner's conviction, he contended, was based on a theory of property endorsed by the Second Circuit – the "right to control" property – that this Court rejected in *Kelly*. This, Petitioner claimed, satisfied the statutory requirements and the Second Circuit's test for the filing of a § 2241 petition. *Id.* at 30-31 (discussing § 2241, § 2255, and citing *Cephas v. Nash*, 328 F.3d 98, 104 (2d Cir. 2003)). Petitioner's position, then, was that the district court retained jurisdiction to hear his habeas claim under § 2241.

Alternatively, in his § 2255 arguments, Petitioner contended that his conviction must be vacated after *Kelly*. *Id.* at 20. Again, Petitioner argued that *Kelly* repudiated Second Circuit case law construing the federal fraud statutes to permit a conviction where the property at issue was the intangible "right to control" property, rather than traditionally defined property. *Id.* at 30. And Petitioner stated that his § 2255 petition was not procedurally barred as "second or successive" under this Court's decisions in *Sanders v. United States*, 373 U.S. 1 (1963); *Davis v. United States*, 417 U.S. 333 (1974); and *Panetti v. Quarterman*, 551 U.S. 930 (2007) – he had "challenged the right to control theory as an improper extension of the fraud statutes"

at every turn, and there had been an intervening change in the law. Mot. at 28.

On May 6, 2021, the Southern District of New York transferred Petitioner's motion to the United States Court of Appeals for the Second Circuit. *See* Pet.App.7. The Second Circuit directed the government to respond to Petitioner's motion and to address seven issues in response:

> "(1) Whether Petitioner's proposed motion falls within § 2255 and/or § 2241; (2) If encompassed by § 2255, whether it is successive within the meaning of § 2255(h); (3) If encompassed by § 2241, whether Petitioner is entitled to any relief; (4) Whether *Kelly v. United States*, 140 S. Ct. 1565 (2020), announced 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,' within the meaning of § 2255(h)(2); (5) Whether *Kelly* is otherwise retroactive to Petitioner's case; (6) Whether *Kelly* has overturned or otherwise affected this Court's decision in *United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017), or other relevant decisions; and (7) Whether Petitioner's arguments have been preserved in prior proceedings and whether that affects this Court's analysis of any relevant issue."

Pet.App.4-6.

In response to the court's order, the government claimed that Petitioner's motion was "second or successive" under § 2255, and even if it were not, it failed to

meet the requirements for a petition under § 2241. Opp. Br. at 9, 14, Binday v. United States, No. 21-1206 (2d Cir. Mar. 12, 2021). As to § 2241, the government contended that Petitioner is not "actually innocent" because "*Kelly* does not call Binday's convictions into question." *Id.* at 15. The government stated that this Court's decision in *Kelly* does not "call into question" the Second Circuit's "right to control" precedents, instead taking an exceedingly narrow view of *Kelly* – that *Kelly* addressed only "the two theories of property before it: the Port Authority's realignment of lanes and the employees' time and labor." *Id.* at 17.

Petitioner replied and again emphasized that this Court *could* have assented to the government's intangible rights theory in *Kelly*, but it declined to. Instead, the Court embraced the opinion in *Walters*, 997 F.2d 1219, which, again, explicitly rejected the "right to control" theory of property.

On October 12, 2021, the Second Circuit denied Petitioner's motion for permission to file a § 2255 or § 2241 petition. To start, the court determined that Petitioner's motion – if it was brought under § 2255 – was "second or successive" because *Kelly* did not announce "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Pet.App.2. Rather, the court reasoned that *Kelly* "interpreted a statute and did not rely on any constitutional provision." *Id.*

Turning to § 2241, the court determined that Petitioner had not established actual innocence because

his theory of conviction had recently been upheld by the Second Circuit. Pet.App.2-3. In support, the court relied only on *United States v. Gatto*, a post-*Kelly* case in which the Second Circuit reaffirmed the "right to control" theory of property and distinguished *Kelly* because it involved "regulatory decisions," while the defendant's scheme in *Gatto* involved obtaining university funds "set aside for financial aid." 986 F.3d 104, 116, 126 & n.4 (2d Cir. 2021).

The Second Circuit, then, has ignored this Court's instructions and narrowed *Kelly* to just its facts: absent any "regulatory decision," *Kelly* simply does not apply.

REASONS FOR GRANTING THE WRIT

Over twenty years ago, this Court cautioned against using the federal fraud statutes to create a "sweeping expansion of federal criminal jurisdiction." *Cleveland v. United States*, 531 U.S. 12, 24 (2000). More recently, the Court reiterated that the fraud statutes "do not criminalize all" acts of "deception, corruption, [or] abuse of power." *Kelly*, 140 S. Ct. at 1568. Instead, to violate the fraud statutes, the "object" of a defendant's dishonesty must be to "obtain" "money or property." *Id.* Additionally, the Court has made clear that lower courts' construction of a criminal statute to encompass an "amorphous category of cases" violates due process; the rule of lenity is applied to eliminate such

constructions. *Skilling v. United States*, 561 U.S. 358, 410 (2010).

But the Second Circuit has consistently ignored this Court's instruction, instead repeatedly endorsing a theory of fraud based on the amorphous "right to control" property. In both pre- and post-*Kelly* cases, the Second Circuit has adhered to a wrongheaded view of the federal fraud statutes that grants federal prosecutors nearly unfettered authority to prosecute mere acts of dishonesty as mail or wire fraud.

The decision below is wrong. The Second Circuit, in rejecting Petitioner's motion under 28 U.S.C. § 2241, ignored this Court's mail- and wire-fraud precedent, deepened a circuit split, and raised an important question about the expansion of fraud prosecutions of immoral – but not traditionally criminal – conduct. This Court's review is necessary.

I. The Second Circuit's Decision That *Kelly* Does Not Apply To Petitioner's 28 U.S.C. § 2241 Petition Is Wrong.

A. The Second Circuit's decision ignores this Court's precedent.

The federal mail and wire fraud statutes are "limited in scope to the protection of property rights." *Kelly*, 140 S. Ct. at 1571 (citation omitted). Specifically, they prohibit any "scheme or artifice to defraud" or "obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. Although written in the disjunctive,

this Court has construed the statutes as a unitary whole, holding that "the money-or-property requirement of the latter phrase also limits the former." *McNally v. United States*, 483 U.S. 350, 358 (1987). So, "obtain[ing]" money or property is always 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 squared with this Court's precedent. Because a defendant – to be convicted of mail or wire fraud – must have intended to *obtain* property from the victim, that property must, of course, be obtainable. And yet, the Second Circuit continues to apply a theory of fraud that allows mail and wire fraud convictions for the "depriv[ation]" of the intangible "right to control" property – something that defendants do not (and logically cannot) – obtain. *See*, *e.g.*, *United States v. Gatto*, 986 F.3d 104, 126 (2d Cir. 2021) ("And because the Universities would not have awarded the Recruits this aid had they known the Recruits were ineligible to compete, withholding that information is a quintessential example of depriving a victim of its right to control its assets."). To understand precisely why the right to control doctrine cannot be harmonized with the fraud statutes' text or this Court's precedent, it is simplest to review some of this Court's decisions.

Start with *McNally*. There, this Court reversed fraud convictions stemming from an insurance kickback scheme that supposedly deprived the public of state officials' honest services – an "intangible right[]." *See* 483 U.S. at 352-54. Noting that the "original

impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property," the Court limited the scope of the federal mail fraud statute "to the protection of *property* rights." *Id.* at 356, 360 (emphasis added). With this holding, the *McNally* court "stopped the development of the intangible-rights doctrine" – which had flourished in the courts of appeals for nearly fifty years – "in its tracks." *Skilling*, 561 U.S. at 401.

Turn to *Carpenter*. Decided less than five months after *McNally*, *Carpenter* affirmed mail and wire fraud convictions of a reporter who "embezzle[ed]" his employer's confidential business information by tipping others in exchange for a share of their trading profits. 484 U.S. at 27. That was fraud, the Court determined, because although the confidential business information was intangible, the information could be "take[n]" and "sold" and had long been recognized by the Court as property. *Id.* at 25-27.

Next, consider *Cleveland*. In that case, this Court ruled that lying on an application to obtain a state video poker license is not federal criminal fraud because licenses are not government "property." 531 U.S. at 15. Noting that the mail and wire fraud statutes do not extend beyond "traditional concepts of property," the Court reasoned the mail fraud statute did "not reach fraud in obtaining a state or municipal [video poker] license" because "such a license is not 'property' in the government regulator's hands." *Id.* at 20, 24. The Court likewise noted the government's "right to control" the issuance, renewal, or revocation of video poker

licenses is not property: "these intangible rights of allocation, exclusion, *and control* amount to no more and no less than Louisiana's sovereign power to regulate." *Id.* at 23 (emphasis added). Concluding, the Court stated that "the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor." *Id.*

Then, on to *Skilling*. In response to *McNally* and *Carpenter*, Congress had passed 18 U.S.C. § 1346, which legislatively created honest services fraud. *Skilling* gave the Court a chance to determine whether the "honest-services statute" was "unconstitutionally vague." *Skilling*, 561 U.S. at 399. Faced with whether Skilling's misrepresentations to shareholders about the value of Enron stock could support a wire fraud violation under a deprivation of "honest services" theory, the Court reversed Skilling's convictions and held that honest services fraud reaches only "fraudulent schemes to deprive another of honest services through bribes or kickbacks." *Id.* at 404. Skilling's alleged misconduct – that he had deprived "employees and investors [of] information which was critical for them to make good decisions about what to do with their own stock," Brief for the United States, Skilling v. United States, No. 08-1394, 2010 WL 302206, at *52 (Jan. 26, 2010) – was not enough to support a conviction.

Now, to *Sekhar*. In reversing a Second Circuit decision affirming a Hobbs Act conviction, this Court held that "[o]btaining property requires 'not only the deprivation but also the acquisition of property.'"

Sekhar v. United States, 570 U.S. 729, 734 (2013) (quoting *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 404 (2003)). While the Court recognized that "intangible property" – there, an attorney's "right to make a recommendation" – could abstractly be considered property, it held that the right was not "property" under the Hobbs Act because "it cannot be transferred" and thus "cannot be the object of extortion under the statute." *Id.* at 737 n.5, 738.[2]

And finally, to *Kelly*. As detailed above, this Court explained in *Kelly* that a defendant violates the fraud statutes "only if an object of their dishonesty was to obtain the [victim's] money or property." 140 S. Ct. at 1568; *see also id.* at 1572 ("[F]raudulent schemes violate [§ 1343] only when, again, they are 'for obtaining money or property . . . '"); *id.* at 1574 (stating that the "property fraud statutes . . . bar only schemes for obtaining property"). In other words, the fraud statutes mean what they say: a defendant must "*obtain*[] money or property by means of false or fraudulent pretenses." 18 U.S.C. §§ 1341, 1343 (emphasis added).

Indeed, and at risk of repetition, this Court in *Kelly* cited approvingly to the Seventh Circuit's opinion in *Walters*, in which Judge Easterbrook explained why schemes to "deprive" a victim of money or

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[2] In *Kelly*, the Supreme Court treated the language of the Hobbs Act and the federal fraud statutes the same when it cited *United States v. Delano*, 55 F.3d 720, 730 (2d Cir. 1995) – a Hobbs Act prosecution – for the proposition that someone who usurps an employer's labor and services may satisfy the property element of the fraud statutes. *See Kelly*, 140 S. Ct. at 1573.

property do not violate the mail and wire fraud statutes, but schemes to "obtain" money or property from the victim do. *See* 140 S. Ct. at 1573 n.2. This is significant not only because *Walters* rejected the "deprivation" theory of fraud, but also because the Seventh Circuit explicitly rejected the government's position that the "right to control" property was sufficient to satisfy the "property" element of the mail fraud statute. *Walters*, 997 F.2d at 1226 n.3.[3]

From these cases, a pattern emerges: this Court has never held that a scheme in which the defendant did not obtain – or at least *try* to obtain – the victim's property violates the mail- or wire-fraud statutes.[4]

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[3] This Court's decision in *Kelly* also rests on a constitutional foundation. In *Kelly*, the Court made clear that the federal government, to prove a wire fraud scheme, must show that the "object" of the defendant's fraud was "property." *Kelly*, 140 S. Ct. at 1571. This requirement prevents the federal fraud statutes "from criminalizing all acts of dishonesty." *Id.* The Court "declined to go along" with the broader interpretation of the federal fraud statutes, at least in part, because that broader reading would render the statutes unconstitutionally vague. *Id.* (citing *Skilling*, 561 U.S. at 405, 410 (adopting a "limiting construction" of § 1346 to preserve that statute without transgressing constitutional limitations)).

[4] To be clear, this Court has, at times, spoken of a "deprivation" to the victim. *See Cleveland*, 531 U.S. at 18-19 ("[T]he original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." (citation omitted)). But this does not alter the Court's instruction that mail and wire fraud convictions must be limited to the situations in which the defendant "obtains" property from the victim. As the Court explained in *Skilling*, in almost every case, "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. So, in a mail

Now, compare this Court's precedent with the Second Circuit's decision below. Rejecting Petitioner's claim that he is entitled to relief under 28 U.S.C. § 2241 because he is "actually innocent," the court simply stated that Petitioner's theory of conviction has recently been upheld by another Second Circuit case, *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021).[5] But *Gatto*'s reasoning suffers from precisely the same defects as the decision below.

In *Gatto*, the defendants were employees at a sports apparel company that had sponsorship agreements with sports programs at universities. 986 F.3d at 111. The defendants were prosecuted for wire fraud after illicitly paying money to basketball recruits'

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or wire fraud prosecution, the "deprivation" to the victim *is* the property "obtained" by the defendant.

[5] This Court is considering petitions for writs of certiorari from other defendants convicted of mail and/or wire fraud based on the "right to control" doctrine. *See*, *e.g.*, Pet. for Cert., Ciminelli v. United States, No. 21-1170 (filed Feb. 18, 2022). Some of these petitions – like Ciminelli's – attempt to distance themselves from Petitioner's case on the ground that "the government pointed out that the scheme at issue [in Petitioner's case] did cause traditional economic harm." *Id.* at 35 & n.10. But as noted *supra* n.1, this is irrelevant because Petitioner's jury was not instructed that it need to find any loss to the insurance companies' "bottom line" to convict Petitioner. At any rate, Ciminelli and Petitioner both applied for contracts (one construction, one insurance) without disclosing allegedly material information to the supposed victims. *See United States v. Percoco*, 13 F.4th 158, 168 (2d Cir. 2021) (discussing the award of Ciminelli's construction contract). And both were awarded those contracts. But neither Ciminelli's nor Petitioner's conduct supports a mail or wire fraud conviction under this Court's precedent.

families, which would have made the student-athletes ineligible under NCAA rules. *Id.* The Second Circuit upheld the defendants' convictions, reasoning that, "[b]ecause one has a right to control one's property, a wire fraud charge under a right to control theory can be predicated on a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information." *Id.* at 126 (quotations and citations omitted). And the court disposed of defendants' argument that *Kelly* required their convictions be overturned and attempted to distinguish the case in a footnote:

> In *Kelly*, the Court explained that "a scheme to alter . . . a regulatory choice is not one to appropriate . . . property." 140 S. Ct. at 1572. Because the defendants in *Kelly* made a regulatory decision regarding lane usage, there was no fraudulent obtainment of property, especially because any loss to the victim was only incidental to the object of the scheme. *Id.* at 1573. Here, Defendants did not make any regulatory decisions in transmitting and concealing payments to the Recruits' families. Thus, the Court's holding in *Kelly* that the regulatory decisions were not punishable under a property fraud theory is inapposite to the case at hand.

Id. at 116 n.4.[6] Thus, the Second Circuit artificially limited *Kelly*'s holding only to cases involving "regulatory decisions."

But the Second Circuit's – and the below decision's – dogged insistence on applying the "right to control" doctrine simply cannot be harmonized with this Court's precedent.[7] The "right to control" relies on an intangible-rights theory of fraud, a theory that *McNally* derailed. *Skilling*, 561 U.S. at 404 (discussing *McNally*). The "right to control" was – in the context of issuing state video poker licenses – rejected by the Court in *Cleveland*. *Cleveland*, 531 U.S. at 23. The "right to control" embraces the "right" to material information, a concept spurned by *Skilling*. *Skilling*, 561 U.S. at 410. The "right to control" relies on the notion that the ability to make an "informed economic decision" is property, *Gatto*, 986 F.3d at 124, but the "right to control" is not "*transferable* – that is, capable of passing from one person to another," and cannot be "acqui[red]," as required by *Sekhar*, 570 U.S. at 734, 738 (emphasis in original). And the "right to control" cannot be the

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[6] Following *Gatto*, the Second Circuit used a similar footnote to distinguish *Kelly*, again limiting *Kelly* only to cases involving the "exercise of regulatory power." *United States v. Percoco*, 13 F.4th 158, 164 n.2 (2d Cir. 2021).

[7] Indeed, the Second Circuit has recognized that the "right to control theory" is not a "classic" theory of mail fraud. *United States v. Muratov*, 849 F. App'x 301, 306 (2d Cir. 2021) (distinguishing the "right to control" from "the classic mail fraud theory" where "the harm involved in the scheme is the deprivation of money or tangible property").

"object of" a fraud scheme that can be "obtain[ed]" from a victim, as *Kelly* mandates. *Kelly*, 140 S. Ct. at 1568.[8]

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[8] The Second Circuit's "right to control" doctrine also goes far beyond what this Court has considered traditional property interests. To start, the fraud statutes are rooted in the common law. *Neder v. United States*, 527 U.S. 1, 22-23 (1999). Staying true to these common law underpinnings, this Court has explained that "not everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999) (emphasis in original). Here, the right to complete and accurate information when issuing an insurance policy may *protect* a property interest, but the *deprivation* of that information is not an infringement on the property interest itself. A recent law review article notes as much:

> As a matter of common sense, "right to control" is an incident of *ownership* of property, not the property itself. Black's Law Dictionary defined "ownership" as, *inter alia*, "[t]he exclusive right of possession, enjoyment and disposal; involving as an essential attribute the *right to control*, handle, and dispose." Likewise, it defines "possess" as, *inter alia*, "to have in one's actual control." In contrast, in common parlance, "property" is understood to be the asset or thing that is owned or possessed, and thus capable of being controlled by the property owner. There is, thus, a thing (property) and certain attributes of owning that thing (such as the right to control it).

Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 174-75 (2021) (footnotes omitted) (emphasis in original).

Similarly, in the Takings Clause context, the Court has held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). That principle applies with equal force here: while the "right to control" may be one strand of a "property right," it is not the full bundle, and the deprivation of

That the Second Circuit's precedent has not responded to developments in mail and wire fraud case law from this Court is no surprise, as the "right to control" emerges from pre-*McNally* precedent. *See*, *e.g.*, *United States v. Rodolitz*, 786 F.2d 77, 80-81 (2d Cir. 1986) (stating that government need only show that defendant "employed a deceptive scheme intending to prevent the insurer from determining for itself a fair value of recovery" to sustain a mail fraud conviction); *see also United States v. Handakas*, 286 F.3d 92, 102 (2d Cir. 2002) (surveying the pre-*McNally* line of mail and wire fraud cases prosecuted under the "intangible rights" doctrine). Though *McNally* brought the intangible rights doctrine to a screeching halt, *see Skilling*, 561 U.S. at 401, the Second Circuit insists on continuing to breathe life into the right to control doctrine.[9]

Thus, the decision below, and its reliance on *Gatto*, reflects the Second Circuit's ongoing refusal to take

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the "right to control" does not mean a defendant has "obtained" the entirety of the property necessary to support a mail or wire fraud conviction.

[9] This is nothing new for the Second Circuit. Following this Court's decision in *Cleveland*, the Second Circuit substantially narrowed the scope of that decision almost beyond recognition to keep applying pre-*Cleveland* Second Circuit precedent. *Fountain v. United States*, 357 F.3d 250, 260 (2d Cir. 2004) ("Because we interpret the Supreme Court's decision in *Cleveland* as effecting a limited alteration in the course of interpretation of the mail and wire fraud statutes rather than as completely redirecting the stream, we continue to deem taxes owed to governments – whether foreign or domestic and whether state or federal – 'property' within the meaning of the mail and wire fraud statutes."). And, in so doing, the Second Circuit – as here – rejected a claim of actual innocence. *Id.*

seriously this Court's instruction that schemes to defraud under the mail and wire fraud statutes are "limited in scope" to schemes that "obtain[] money or property." 140 S. Ct. at 1568, 1572 (citation omitted). Put simply, the Second Circuit's right to control theory of mail and wire fraud is diametrically opposed to this Court's precedent and the statutory text, and this Court should grant certiorari to clarify whether its precedent embraces the "right to control" property as property under the fraud statutes.

B. The Second Circuit's decision deepens a circuit split.

The Second Circuit on one hand, and the Sixth and Ninth Circuits on the other, have reached competing conclusions about whether a seller is deprived of "property" for purposes of the federal fraud statutes when a purchaser pays full price but misrepresents what he plans to do with the product.

On the one hand, the Sixth and Ninth Circuits have each concluded that the "right to control" property is *not* property under the mail and wire fraud statutes. *See* Park, *supra* n.8, at 182-84 (discussing the circuit split surrounding the "right to control" theory). In *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), the defendant purchased sensitive technology and represented that the products would not be shipped overseas. But the defendant did precisely that – he purchased the products and then shipped them to Soviet Bloc countries. *Id.* at 466. Had the defendant

told the manufacturer that they planned to do so, the manufacturer testified that they would not have entered into the agreement in the first place. *Id.* The defendant was convicted of fifteen counts of wire fraud. *Id.* at 466-67.

But the Ninth Circuit reversed and vacated the wire fraud convictions, holding that "the interest of the manufacturers in seeing that the products they sold were not shipped to the Soviet Bloc in violation of federal law is not 'property' of the kind that Congress intended to reach in the wire fraud statute." *Id.* at 468.

The Sixth Circuit in *Sadler* reached the same conclusion. There, the defendants – Nancy and Lester Sadler – operated an opiate "pill mill." *United States v. Sadler*, 750 F.3d 585, 595 (6th Cir. 2014) (Sutton, J.). The defendants purchased opiates from a pharmaceutical distributor by claiming that the business was a legitimate pain management clinic when, in reality, they were reselling the opiates to people addicted to the drugs. *Id.* at 589. Nancy Sadler was found guilty of, among other things, wire fraud. *Id.*

It was undisputed that Nancy Sadler had lied to distributors about the intended use of the opiates. But it was also undisputed that she paid the pharmaceutical manufacturers full price for the pills. So, the parties' dispute focused on whether Nancy Sadler had deprived the government of any "property" cognizable under the fraud statutes. The government made two arguments on this point. First, the government argued that Nancy Sadler obtained "property" because she

"deprived the distributors of their pills." *Id.* at 590. The Sixth Circuit rejected that argument out of hand: "Well, yes, in one sense: The pills were gone after the transaction. But paying the going rate for a product does not square with the conventional understanding of 'deprive.'" *Id.*

So the government tried its second argument – Nancy Sadler deprived the pharmaceutical companies "the right to accurate information" in a commercial transaction. *Id.* at 590-91. Even though Nancy Sadler paid full price for the opiates, the government claimed that she defrauded the pharmaceutical manufacturers because her "lies convinced the distributors to sell controlled substances that they would not have sold had they known the truth." *Id.* at 590. Put differently, she "deprived the companies of what might be called a right to accurate information before selling the pills." *Id.* at 590-91. And a representative of one of the companies testified that, had she known more about Nancy Sadler's operation, she would have been "concern[ed]" about making the sales. *Id.* at 591 (alteration in original).

But the Sixth Circuit rejected that theory, too. Noting that the fraud statute is "limited in scope to the protection of *property rights*," the court determined that "the ethereal right to accurate information doesn't fit that description." *Id.* (citing *McNally*, 483 U.S. at 360) (emphasis in original). Instead, Congress limited the fraud statute to interests that have "long been recognized as property." *Id.* (quoting *Cleveland*, 531 U.S. at 23). Going further, the court emphasized that

"equating deceptions with property deprivation, even when the full sales price is paid, would occupy a field of criminal jurisdiction long covered by the States." *Id.* Relying on *Cleveland*, the Sixth Circuit stated that "[f]inding a property deprivation based on Nancy's lies 'would subject to federal [wire] fraud prosecution a wide range of conduct traditionally regulated by state and local authorities.'" *Id.* (quoting *Cleveland*, 531 U.S. at 24) (alterations in original). The court thus held that "[w]ithout more, we must conclude that the distributors' truth-in-purchasing concerns do not support a federal criminal conviction." *Id.* at 592.[10]

And the Ninth Circuit recently endorsed the *Sadler* decision. In *United States v. Yates*, the court held that "[t]here is no cognizable property interest in 'the ethereal right to accurate information.'" 16 F.4th 256, 265 (9th Cir. 2021) (quoting *Sadler*, 750 F.3d at 591). The court emphasized that while one can have a property right "in trade secrets or confidential business information," there simply is no property right to "make an informed business decision." *Id.* at 265. To hold otherwise "would transform all deception into fraud." *Id.* Indeed, at oral argument, the government conceded that "it was no longer 'defend[ing] that

[10] Compare Petitioner's case with *Sadler*. Here, Petitioner made a commission on the STOLI insurance policies, and his mail and wire fraud convictions were affirmed by the Second Circuit. In *Sadler*, Nancy Sadler made money re-selling the opiates she purchased, but the Sixth Circuit reversed her wire fraud conviction. 750 F.3d at 589, 592.

accurate information standing alone is a cognizable interest.'" *Id.* (alteration in original).

The decision below, and the Second Circuit's "right to control" doctrine, could not be further from the decisions in *Bruchhausen*, *Sadler*, and *Yates*. While the Sixth and Ninth Circuits have held that depriving another person of material information is not a deprivation of property under the fraud statutes, the Second Circuit denied Petitioner's § 2241 petition by relying exclusively on *Gatto*, a post-*Kelly* case holding that "depriving the victim of 'economic information it would consider valuable in deciding how to use its assets' satisfies the object-of-the-scheme element" of the fraud statutes. 986 F.3d at 114 (quoting *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017)). Indeed, *Gatto* repeatedly noted that the "right to control" property is itself property, *id.* at 114-26, in diametric opposition to the holdings of the Sixth and Ninth Circuits. Yet the mere fact that the "right to control" theory of conviction was upheld in *Gatto* was enough for the Second Circuit to deny Petitioner's § 2241 motion. Pet.App.2-3.

This state of affairs is untenable: what is criminal in the Second Circuit is not in the Sixth or Ninth Circuits. *See* Park *supra* n.8 at 183-84 ("[W]e are left in the odd condition that, depending on where one is charged, a person engaged in identical conduct might either be found guilty of a federal crime (New York City) or not at all (Los Angeles), or maybe (Chicago)."). This Court's intervention is thus warranted to clarify whether the "right to control" property is itself

property under the mail and wire fraud statutes and to prevent further confusion.

C. The question presented is critically important.

The Second Circuit's decision below implicates federal prosecutors' "true love" – the fraud statutes. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980) (discussing the mail fraud statute). Judge Rakoff – then a prosecutor in the Southern District of New York – has called the mail fraud statute a federal prosecutor's "Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart" because of its "simplicity, adaptability, and comfortable familiarity." *Id.* But the utility of the fraud statutes should not be expanded so greatly as to capture immoral, rather than criminal, conduct. Park, *supra* n.8, at 144-48 (discussing an expansive theory of fraud adopted by lower courts, including the Second Circuit, that captures any departure from "moral uprightness"). Indeed, this Court has instructed the federal government not to use "the criminal law to enforce (its view of) integrity." *Kelly*, 140 S. Ct. at 1574.

But that is precisely what the Second Circuit's "right to control" theory does. In *Gatto*, the Second Circuit reaffirmed its view that "[f]raud involves a departure from fundamental honesty, moral uprightness, or fair play, and depriving one of property through dishonest methods or schemes or trick, deceit, chicane or overreaching." 986 F.3d at 130 (citations and

quotations omitted). This expansive view of the fraud statutes allows prosecutors to target conduct of which they disapprove, but which does not fall into traditional notions of criminality or property. Indeed, a former New York federal prosecutor recently wrote that "courts that equate fraud with any departure from 'moral uprightness,'" like the Second Circuit, "may be more receptive to theories of criminality that support prosecution of immoral conduct." Park, *supra* n.8 at 147-48 (footnote omitted).

Similarly, the right to control theory exploits the fraud statutes' "general statutory language" to place "power in the hands of the prosecutor" to "pursue their own personal predilections." *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). This raises the risk of "non-uniform execution" of prosecutorial power "across time and geographic location" – something this Court has expressly cautioned against. *Id.* at 1109.

The right to control theory, then, gives federal prosecutors nearly unfettered authority to criminalize a broad array of possibly immoral – but not otherwise criminal – conduct that would traditionally be left to state regulation. In this case, for example, without the right to control doctrine, Petitioner may have faced state-law breach of contract or tort claims, but not a federal criminal prosecution. This Court's review is needed to curb this unjustified expansion of federal authority.

CONCLUSION

The petition for writ of certiorari should be granted.

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