No. __________

In the

Supreme Court of the United States

MARK JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ALEXANDRA A.E. SHAPIRO
Counsel of Record
ERIC S. OLNEY
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

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QUESTION PRESENTED

The federal mail and wire fraud statutes prohibit "obtaining money or property by means of false or fraudulent, pretenses, representations, or promises." 18 U.S.C. §§1341, 1343. This Court has repeatedly held that terms in federal criminal statutes, particularly fraud statutes, must be interpreted in accordance with their common-law meanings. *See, e.g.*, *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016); *Skilling v. United States*, 561 U.S. 358, 404-05 (2010); *Neder v. United States*, 527 U.S. 1, 21-23 (1999). Under the common law, an oral promise is unenforceable if arms-length counterparties exclude it from a written contract containing an integration clause. Yet the Second Circuit affirmed Petitioner's criminal conviction for the purported breach of such an oral promise, on the theory that he deprived the "victim" of its "right to control" its assets, because the purported breach "affected the very nature of the bargain." The court held that "even if the parties' contract was never breached," a person can be imprisoned for wire fraud because an unenforceable oral promise excluded from a written contract can nevertheless be deemed a "central part of the bargain."

The question presented is:

Can an oral promise excluded from a fully-integrated written contract, which is unenforceable under the common law, be a "false or fraudulent…promise[]" under federal criminal statutes on the theory that it furthered a scheme to obtain the "victim's" intangible "right to control" its assets?

PARTIES TO THE PROCEEDING

Mark Johnson is the petitioner here and was the defendant-appellant below. The United States is the respondent here and was the appellee below.

RELATED CASES

United States v. Johnson, No. 16-CR-457 (NGG), U.S. District Court for the Eastern District of New York. Judgment entered May 10, 2018.

United States v. Johnson, 18-1503-cr, United States Court of Appeals for the Second Circuit. Judgment entered December 16, 2019.

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INTRODUCTION

Time and again, federal prosecutors deploy the federal mail and wire fraud crimes in novel and expansive ways. Time and again, this Court rejects these overbroad interpretations. This Court has repeatedly held that the statutes must be construed narrowly and consistent with the common law of fraud, to avoid trampling due process, separation of powers, and federalism. *See*, *e.g.*, *Kelly v. United States*, 140 S. Ct. 1565, 1571, 1574 (2020); *Skilling v. United States*, 561 U.S. 358, 405-06 (2010); *Cleveland v. United States*, 531 U.S. 12, 24 (2000). The government nonetheless continues its quest to expand the statutes' scope. Its arguments find some success in the lower courts, until eventually this Court steps in to reinforce the strict limits it has imposed. This case warrants similar intervention.

This prosecution typifies a growing trend in which the federal government has interjected itself in the private affairs of sophisticated businesspeople and used federal fraud statutes to prohibit practices assented to by Congress, industry regulators and the parties themselves. Petitioner Mark Johnson faces imprisonment for commercial conduct that would not even support civil liability. Petitioner was the British head of foreign exchange at a leading British bank. He helped execute a $3.5 billion currency exchange between the bank and an arms-length counterparty—a British energy conglomerate. The bank complied with the contract governing the transaction and violated no law, rule, or industry practice. The counterparty never complained to the authorities. Nevertheless, five years later, the government

charged wire fraud, and the Second Circuit affirmed Johnson's conviction on the ground that a stray remark he made during negotiations was a false "promise." The purported promise was unenforceable because it was excluded from the parties' subsequent, fully-integrated written contract. Any civil action alleging a breach of that promise, or that the promise was "fraudulent," would have been dismissed.

Yet the Second Circuit held that violating this imaginary contractual obligation was a crime. Its decision flouts this Court's instructions to interpret federal fraud statutes consistent with the common-law, which prohibits fraud claims based upon unenforceable promises. It also conflicts with the Court's decisions holding that materiality is an objective standard. No sophisticated party could rely on an unenforceable promise, yet the Second Circuit held Johnson's remark material because it found the counterparty had actually relied on the "promise." That ruling implicates a well-developed Circuit split on whether materiality in mail and wire fraud cases is assessed from an objective or subjective perspective.

The ruling below also reaffirms a long line of Second Circuit decisions endorsing an incoherent "right to control" doctrine that conflicts with the statutory text, this Court's precedents, and decisions by two other Circuits. Under Second Circuit law, the intangible "right to control" one's assets is *itself* "money or property" that the perpetrator of a fraud scheme can "obtain." This theory posits that a defendant who misrepresents his identity or intentions deprives the "victim" of that intangible "right to control," even if the "victim" receives the full

economic benefit of the bargain, where the "scheme" involves "withholding or inaccurate reporting that could impact on economic decisions." *See*, *e.g.*, *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017). The Second Circuit held that under this doctrine the fraud statutes can be violated "even if the parties' contract was never breached," because a misrepresentation about something *excluded* from the contract can nevertheless be "an essential element of the bargain." That makes no sense. And it conflicts with this Court's cases holding that only traditional, transferrable property interests, but not amorphous, intangible concepts like the "right to control," are "money or property" that can be "obtained" in a mail or wire fraud scheme. *See*, *e.g., Kelly*, 140 S. Ct. at 1572-74; *Cleveland*, 531 U.S. at 24. The Sixth and Ninth Circuits have rightly rejected this misguided "right to control" theory. This case provides an excellent vehicle for resolving that split and reining in the Second Circuit's malleable doctrine.

Left undisturbed, the Second Circuit's decision would criminalize entirely legal industry practices and threaten the liberty, freedom of contract, and settled expectations of people engaged in complex commercial transactions, particularly in the global foreign exchange market. And because New York City is the U.S.'s financial capital, the ruling will likely have substantial nationwide (indeed, international) consequences.

The petition for certiorari should be granted.

OPINIONS BELOW

The Second Circuit's amended opinion is reported at 945 F.3d 606 and reprinted at App.1-21.

JURISDICTION

The Second Circuit issued its amended opinion on December 16, 2019 and denied a timely petition for rehearing en banc on January 23, 2020. On March 19, 2020, this Court issued an order extending the time to file any yet-to-be filed petition for certiorari by 150 days, making the deadline for this petition June 22, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App.23.

STATEMENT OF THE CASE

A. Factual Background

1. Cairn Energy, an oil and gas conglomerate, is among the largest public companies in Britain. Cairn is a sophisticated foreign exchange player and routinely executes large currency trades. C.A.App.113.

Cairn announced in 2010 that it would sell a foreign asset and distribute approximately $4 billion in proceeds to shareholders. App.4. To do so, Cairn needed to convert the proceeds to British pounds. Cairn retained Rothschild & Co., a leading investment bank, to "advise it" in connection with the conversion. *Id.*

Currency prices fluctuate constantly in response to supply and demand, and there are multiple ways to set an exchange rate for large conversions like Cairn's. Cairn assessed various conversion methods and ultimately chose a "fix," which is a benchmark exchange rate published hourly, based on a calculation

of rates observed by WM/Reuters, an independent and regulated company, within a one-minute window at the hour. App.4-5 & n.1. With this method, the parties agree to exchange currency at a future "fix" rate. A party might contact a bank at 2pm and ask to exchange dollars for pounds using the 3pm "fix." C.A.App.47. The bank would then accumulate the requisite pounds between 2pm and 3pm and sell them to the party at the published 3pm rate. C.A.App.56, 204, 234-35. This is known as "trading ahead" of the fix.

Banks do not charge a fee for fix transactions. C.A.App.55-57, 202. Instead they try to make money by "beating the fix." C.A.App.127-28. In a transaction this large, the pound's price is likely to rise as the bank buys pounds in significant quantities. C.A.App.58-59. If it does, and the bank's average purchase price is lower than the fix, the bank profits by selling pounds to the counterparty at the fix price. C.A.App.56. Banks tend to purchase currency close in time to the "fix" because the longer the bank holds the currency, the greater the risk of an adverse price movement that could cause it to incur significant losses. C.A.App.203.

Trading ahead of the fix is a legal, standard practice for banks to manage their risk and seek a profit and, per the government's expert, "the normal way in 2011 that banks executed these trades." C.A.App.59, 95-96. No law, rule or regulation prohibited trading ahead. Congress, the Treasury Department, and the CFTC have deliberately chosen not to regulate fix transactions or subject them to Commodities Exchange Act anti-fraud provisions. *See* Br. of Amicus Curiae ACI-The Financial Markets

Association, C.A.ECF.73, at 21-23 ("ACI.Amicus.C.A.Br."). That is because regulators have determined that the sophisticated actors in this $5 trillion market understand the risks and benefits associated with fix transactions and are in the best position to set their own terms. *Id.* at 4, 16, 21-22. "If constraints were to be imposed on the pre-hedging activities of dealers, a new mechanism to compensate dealers, such as fees for service, would likely take its place, and the cost of trade execution would likely rise." Br. of Amicus Curiae Torben G. Andersen, C.A.ECF.107, at 9.

2. In October 2011, Cairn considered proposals from nine banks to execute the transaction, including HSBC. App.4. Johnson was then the London-based leader of HSBC's foreign exchange business. App.2-3.

On October 13, 2011, before Cairn selected a bank to conduct its transaction, Francois Jarrosson, the Rothschild banker advising Cairn, called Johnson on a recorded line to discuss certain market data HSBC had supplied. Johnson's liberty now turns on his remarks during that call, which became the basis for the Second Circuit's affirmance of his conviction.

Before speaking to Johnson, Jarrosson had already advised Cairn that "the strategy which makes most sense to me for your shareholders is an execution at a fixing." C.A.App.403 (10/9/11 email). Thus, during the call, Jarrosson asked many questions about fixes including how much advance notice HSBC would need. Johnson stated that HSBC would need a "minimum of two hours" before the fix to avoid undue upward pressure on the fix rate. C.A.App.386. Jarrosson asked why "30 minutes or one hour"

wouldn't suffice. *Id.* Johnson responded, "the more time we have…the more quietly we can just accumulate the position"; "if you've told us…we need the fix in 30 minutes then we've got a lot to buy and we're gonna cause a lot of noise and we run the risk; one of losing a lot and two of upsetting the customer." C.A.App.387.

Using an 11am fix as an example, Johnson explained:

> "[I]n a perfect world we start at 9 and we, or 8 in the morning, and we gradually build it up, build it up, build it up, build it up and then just try and control the market so it doesn't look too noisy because obviously, you know our aim is to make a small amount of money out of this clearly because that's our business. But, you know, have a happy customer go away." *Id.*

Jarrosson then asked whether, "if for whatever reason you achieve a rate much better than the fixing, for the bank," HSBC would "be happy to share some upside" with Cairn. C.A.App.389. Jarrosson noted, "some banks have mentioned this." *Id.* Johnson referenced an occasion when HSBC had decided, *after* a particularly profitable transaction, to share some of its profits with its counterparty, but refused to commit HSBC in advance to such a profit-sharing arrangement. *Id.* In response, Jarrosson acknowledged that such an arrangement was not necessarily in Cairn's interest, saying: "it's one way for the bank to look good but at the same time…it's not something that we would um want to get obviously because…I understand some banks would simply

push the fixing a little bit to have us pay for the cash back." *Id.* Johnson agreed that the issue "is a tricky one" and suggested that banks that promise to share profits in this manner are "intending to ramp the fix," *i.e.,* pressure the rate higher to make the currency more expensive for the counterparty, thereby negating any benefit from the profit-sharing arrangement. App.6; C.A.App.389. Johnson also pointed out that "the problem with" "offering improvement to the fix is" that "the reason" to use "a fix is because it's, it's clear and transparent." C.A.App.389. Jarrosson observed that he would be "worried if somebody…guarantees me one or two pips[1] below the fix because clearly" this would "destroy more value than you get," to which Johnson responded that he was "horrified when I see people sort of do that sort of thing because it's just obvious." C.A.390-91.

The government characterized Johnson's statements on this call as a fraudulent "promise" not to "ramp" the fix price in any future transaction with Cairn. But as the full context shows, Johnson was merely providing reasons for HSBC's refusal to guarantee Cairn a share of its profits in advance of any fix trade. The two men were sophisticated players in the foreign exchange market discussing potential terms of a transaction. Jarrosson was exploring whether HSBC would be willing to provide a particular benefit; Johnson was rejecting the idea while attempting to undermine competitors who might agree to such a term. It was all part of a negotiating dance between arms-length

[1] A "pip" is $0.0001. App.4.

counterparties who are well aware that they should be on their guard and shouldn't trust each other.

On October 20, 2011, Rothschild confirmed its October 9 recommendation that Cairn conduct a "fixing" transaction, principally because it would provide "optimal transparency" for shareholders since fix rates are publicly available. C.A.App.305-08, 403, 407. However, Rothschild warned Cairn that it would not "control [the] timing" of the trades that the bank would make "between notice and fixing," which meant that the pound "could move against Cairn" due to the "[r]isk of market disruption owing to a compressed execution window." C.A.App.304, 307.

3. Cairn selected HSBC as its counterparty. Cairn understood that because the transaction was so "large," it could "mov[e] the market." C.A.App.105. And Cairn knew HSBC's trading would "pressure the fixing" and fully "expect[ed] [the bank] would make money" by "beat[ing] the fix." C.A.App.136, 397.

Cairn "wanted to lock in key terms" and insisted on a written agreement memorializing each party's obligations. C.A.App.129. Rothschild drafted and Cairn's counsel reviewed that contract. C.A.App.129-30, 444-47. The contract committed HSBC to exchange up to $4 billion for pounds at Cairn's request and allowed Cairn to choose among several execution methodologies. It required Cairn to give two hours' advance notice for a fixing transaction. App.7. Nothing in the contract restricted how HSBC would accumulate pounds for a fix order. The agreement did not require HSBC to refrain from "ramping" or "trading ahead," avoid adverse market impact to Cairn or limit any profits it earned by "beating the fix."

The contract expressly incorporated the parties' pre-existing International Swap Dealers Association Master Agreement ("ISDA"). C.A.App.309 ("Any transaction undertaken will be governed by the terms of the ISDA in place between HSBC and Cairn."). The ISDA is a widely-used agreement memorializing "the legal and credit relationship between the parties." *Aon Fin. Prods., Inc. v. Societe Generale*, 476 F.3d 90, 93 n.4 (2d Cir. 2007). The Cairn-HSBC ISDA specifically "supersedes all oral communication" between the parties "with respect to its subject matter." C.A.App.362 (§9(a)). The contract also specifies that HSBC was "not acting as fiduciary for or as an adviser to [Cairn]." C.A.App.373; *see also* C.A.App.310 (agreement "shall not be regarded as creating any form of advisory or other relationship")).

4. Cairn decided on a "fix" and how much it would convert in October 2011 and knew when it would conduct the exchange by December 1, 2011. However, it withheld that information from HSBC until the afternoon of December 7, 2011 because it wanted to give HSBC "as little information as possible." C.A.App.124.

On December 7, 2011 at 1:51pm, Cairn asked HSBC to exchange approximately $1.2 billion (around £770 million) for pounds at the 3pm fix rate, providing one hour's notice instead of the requisite two. At 2:25pm, 35 minutes before the 3pm fix time, Cairn replaced that order with one to purchase £2.25 billion. C.A.App.325-26. By then, HSBC had purchased a significant number of pounds. C.A.App.401.

Johnson, who was in New York on other business, "didn't" give Frank Cahill, the London trader

primarily responsible for purchasing the pounds "any direction" about "how to execute." C.A.App.149-50. Cahill traded "the same way [he] normally trade[s] fixes" and used strategies to minimize increases in the pound's price as well as some "aggressive" methods. C.A.App.173, 206-07.

At 2:54pm, upon learning that HSBC still needed to purchase £1.2 billion, Johnson told the banker supervising Cahill not to "ramp" higher than the price HSBC would have charged under an alternative conversion method ("full-risk transfer") that Cairn had rejected. Johnson also twice said to "go short some" to reduce upward pressure on the pound's price. C.A.336. But Johnson's instructions were never conveyed to Cahill, who purchased the remaining pounds in the next six minutes. C.A.App.399.

As anticipated, the pound's price increased as HSBC bought pounds, particularly in the final minutes before 3pm. Calculated using the 3pm fix rate, Cairn's cost was $2.6 million *less* than it would have been in a "full-risk" deal. App.9-10 (comparing rates). And HSBC earned only 0.2% of the £2.25 billion—approximately $7 million in profits. C.A.App.210-11. The government's experts identified no plausible alternative way for HSBC to execute the transaction; one conceded HSBC's was the "normal way" to trade fixes. C.A.App.58-59, 182-83.

On a 3:15pm call after the transaction, an HSBC banker attributed an unspecified portion of the exchange rate increase to "the Russian Central Bank" "buying" pounds before 3pm. C.A.App.339. Johnson responded that "Central Banks" are "always selling dollars." C.A.App.340. The government claimed this

minimized the role HSBC's buying had played in moving the exchange rate in HSBC's favor. HSBC also told Cairn on this call that the bulk of its trading occurred in the five minutes prior to the 3pm fix. C.A.App.339. Yet even though Cairn knew that purchasing close to £2 billion in five minutes would have significantly ramped up the fix price, Cairn didn't complain or refer to any promise not to ramp upon hearing this information. Nor did Cairn suggest that HSBC should have spread its trades out more evenly to reduce that price. In fact, Cairn never complained to *anyone* about HSBC's execution of the trades until *after* the government, on its own initiative, arrested and charged Johnson five years later.

B. Indictment and Trial

In August 2016, Johnson was indicted in the Eastern District of New York on one count of conspiracy to commit wire fraud (18 U.S.C. §1349) and ten counts of wire fraud (18 U.S.C. §1343). C.A.App.37-41. The government presented two theories regarding what "money or property" the alleged scheme aimed to obtain from Cairn. Its principal, "misappropriation," theory applies only if a "fiduciary" or similar relationship of "trust and confidence" with the victim exists. *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991). The indictment alleged that HSBC owed such a duty to Cairn and that Johnson breached it by using Cairn's confidential information to purchase pounds "kn[owing] that the transaction would cause the [pound's] price…to increase." C.A.App.28 ¶10(a). Johnson countered that the contractual disclaimers of

fiduciary and similar relationships barred misappropriation.

Johnson's conviction was affirmed solely based on the government's other, "right to control" wire-fraud theory, that Johnson induced Cairn to select HSBC by promising to "execute the transaction" in Cairn's "best interests" and avoid "adverse market impact" to Cairn. C.A.App.28-29 ¶10(b).

The district court instructed the jury that the government's "right to control theory" was that Johnson "committed wire fraud by making material misrepresentations and omissions that deceived Cairn and deprived it of potentially valuable economic information that Cairn would consider valuable in deciding how to use its assets." G.C.A.App.105. The remainder of this right-to-control jury charge closely tracked longstanding Second Circuit law, discussed below. *Id.*

Johnson moved for acquittal after the government rested and renewed his motion after the defense rested. The district court denied both motions from the bench. C.A.App.192-96, 240.

On October 23, 2017, Johnson was convicted of conspiracy and all but one wire-fraud count. C.A.App.260-63, 448-50. The jury rendered a general verdict without indicating which fraud theory it relied upon. *Id.*

On April 26, 2018, Johnson was sentenced principally to 24 months' imprisonment. App.11.

C. Second Circuit Decision

Johnson appealed, and the Circuit granted bail pending appeal. He argued that both prosecution theories were legally precluded by the contract and that his conduct was not fraudulent. Even though "the Government's primary theory of liability" at trial was misappropriation, App.10, the government made little attempt to defend that theory on appeal. The Second Circuit affirmed the conviction based solely on "right to control" and refused to address misappropriation. App.14-21.

The court relied on well-settled Second Circuit law holding that "'the property interests protected by the…wire fraud[] statute[] include the interest of a victim in controlling his or her own assets.'" App.13 (quoting *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015)). Under this doctrine, the "right to control" property is itself a property right, and a defendant who misrepresents his intentions "deprive[s] [the victim] of information 'that could impact…[its] economic decisions.'" App.13 (quoting *Finazzo*, 850 F.3d at 108).

The Second Circuit ruled that Johnson's October 13 statements constituted a "promise" not to ramp. App.16-18. Even though the governing contract expressly excluded the alleged promise and superseded any "oral communications," the Second Circuit found that this "promise" was "an essential element of the bargain" which "deceived Cairn with respect to both how the FX Transaction would be conducted and the price of the FX Transaction." App.15-18.

The Second Circuit considered the contract itself irrelevant, finding that it made no difference "the parties' contract was never breached." App.15. The court instead concluded that the promise "den[ied] Cairn's right to control its assets by depriving it of information necessary to make discretionary economic decisions." App.3.

The Second Circuit also held the "promise" material because it influenced "Cairn's decision as to the type of transaction to undertake"—even though Cairn would have paid *more* had it chosen the alternative method. App.18. The Court reasoned that "'whether a defendant's misrepresentation was capable of influencing a decisionmaker' in a right-to-control case 'should not be conflated with [the] requirement that that misrepresentation be capable of resulting in tangible harm.'" App.18 (quoting *Finazzo*, 850 F.3d at 109 n.16). The court also found the purported post-transaction misstatements material because Cairn "could have…sought immediate legal action on the ground that it had been defrauded." App.19.

The Second Circuit stayed the mandate pending the filing and disposition of this petition, underscoring that this petition "presents…substantial question[s]" as to the legality of Johnson's conviction. Fed. R. App. P. 41(d)(1).

REASONS FOR GRANTING CERTIORARI

I. The mail and wire fraud statutes prohibit, in pertinent part, "any scheme or artifice to defraud" "by means of false or fraudulent pretenses, representations, or promises," which has "obtaining

money or property" as its object. 18 U.S.C. §§1341, 1343. This Court has repeatedly interpreted these statutes consistent with common-law principles under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses" unless the statute "otherwise dictates." *Neder v. United States*, 527 U.S. 1, 23 (1999).

The Second Circuit, however, ruled that an oral "promise" can be fraudulent even if it is *excluded* from a subsequent contract expressly superseding any oral representations. That squarely conflicts with this Court's directive to interpret the fraud statutes consistent with the common law, which holds that such promises are unenforceable and not actionable as fraud. But the Second Circuit's decision gives prosecutors carte blanche to undo bargains negotiated by sophisticated parties. The result is that contracts "would not be worth the paper on which they are written," *One-O-One Enters., Inc. v. Caruso*, 848 F.2d 1283, 1287 (D.C. Cir. 1988) (R.B. Ginsburg, J.), and prosecutors now have a draconian weapon to deprive unsuspecting businesspeople of their liberty based on stray remarks during negotiations.

The Second Circuit's decision also deepens an existing Circuit split on whether mail or wire fraud materiality is assessed under an objective or subjective standard. This Court has long held that in securities fraud cases, materiality is an "objective" test. *See, e.g.*, *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976). And it has similarly held that only statements "capable of" or having a "natural tendency to influence" a decisionmaker are material under the wire fraud statute. *Neder*, 527 U.S. at 16.

Accordingly, in mail/wire fraud cases the Sixth, Eighth, Ninth, Tenth and Eleventh Circuits require proof that any misstatement was reasonably calculated to deceive persons of ordinary prudence and comprehension. Those Circuits would have reversed Johnson's conviction, because an extrinsic, unenforceable promise is by definition immaterial to a reasonable promisee. But the Second Circuit, like several others that view materiality from the victim's subjective standpoint, credited Cairn's purported reliance upon the promise. This Court's intervention is warranted to resolve the circuit conflict and confirm that in wire fraud cases misstatements are material only if a reasonable person in the victim's shoes could rely on them.

II. For over three decades, the Second Circuit has adhered to an expansive and atextual "right to control" theory that directly conflicts with this Court's decisions in *Kelly*, *Skilling,* and *Cleveland*, among others. Those cases teach that a property fraud scheme's object must be to "obtain" "money or property" from the victim. Only traditional property interests—property that can be transferred from victim to defendant—qualify, and the scheme's purpose must be to cause economic harm. But the Second Circuit's long-entrenched caselaw holds that the "right to control" one's property is *itself* a property right, even though it cannot be transferred to the defendant. Under this doctrine, deceit that merely leads someone to engage in a transaction they might otherwise have avoided is fraud, even if they got exactly what they paid for and were not exposed to any economic harm.

The Sixth Circuit expressly rejected this theory in *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014). It held, in stark contrast to the Second Circuit, that the intangible "right to control" property is not within the scope of the fraud statutes. *Id.* at 591. The Ninth Circuit likewise refuses to recognize right-to-control fraud. *See United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992).

This case is an excellent vehicle in which to resolve that Circuit split and put an end to the Second Circuit's radical expansion of the property fraud statutes. Unlike some past decisions in which the Circuit affirmed "right to control" convictions, here the alleged victim got what it paid for and was not "ripped off" or exposed to economic harm by the "deceit." Nonetheless, the court below expressly held that it didn't matter whether or not the "false promise" could have caused Cairn any economic harm. According to the Second Circuit, Johnson's "promise" was material because it "influenced Cairn's decision as to the type of transaction" to select—even though Cairn would have paid *more* money had it pursued the alternative to a fix. And the Court held that Johnson's unenforceable oral "promise" affected "a central part" or "essential element" of the bargain—even though this "promise" was *excluded* from the integrated contract that the "victim" wrote. That this could qualify as fraud illustrates the absurdity of the Second Circuit's convoluted doctrine, and why such "fraud" is not cognizable under the statutes.

III. This prosecution reflects a disturbing trend. Recently, the government has advanced expansive interpretations of fraud to deprive people of their

liberty for common industry practices that it finds distasteful. The Second Circuit's decision invites more of these abuses. It licenses prosecutors to inject themselves into commercial relationships between equals, rewrite their contracts, and thereby create crimes where there is not even a civil violation. The result is "a sweeping expansion of federal criminal jurisdiction," *Cleveland*, 531 U.S. at 24, that "fails to give ordinary people fair notice," *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

The conduct here involved an industry practice commonplace in the global foreign exchange market, which U.S. regulators have chosen *not* to prohibit. Given New York's leading role in the financial markets, the Second Circuit's nationwide influence in this area, and the importance of the question presented to complex commercial transactions, this Court's intervention is plainly warranted.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND RADICALLY EXPANDS THE FEDERAL FRAUD STATUTES

A. Extending Federal Fraud To Unenforceable "False Promises" Is An Extreme Departure From The Statutes' Common-Law Roots

"It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Sekhar v. United States*, 570 U.S. 729, 732 (2013); *accord Johnson v. United States*, 559 U.S. 133, 139 (2010) ("[A] common-law term of art

should be given its established common law meaning."). This Court has repeatedly applied this principle to the federal fraud statutes, because "scheme to defraud" and "fraudulent" are staple terms of the common law.

For instance, in *Neder*, the Court held that when both statutes were enacted, "actionable 'fraud' had a settled meaning at common law." 527 U.S. at 22. Because "the common law could not have conceived of 'fraud' without proof of materiality," and the statute did not "otherwise dictate[]," materiality is an element of mail and wire fraud. *Id.* at 23-25. Likewise, this Court construed "fraud" under the False Claims Act based on the common law, because "the term 'fraudulent' is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud." *Universal Health Servs.*, 136 S. Ct. at 1999. Similarly, this Court relied upon the "common understanding" of "defraud" to hold that mail fraud was limited to deprivations of traditional property and did not cover the "intangible right to honest services." *McNally v. United States*, 483 U.S. 350, 358-59 (1987).

Yet the Second Circuit flouted these instructions when it affirmed Johnson's conviction for conduct that would not be civil fraud under the common law. The court injected an extrinsic oral promise—one that sophisticated arms-length counterparties deliberately excluded from the contract itself—into their bargain. The common law, however, prohibits courts from "impos[ing] obligations on the parties that are not mandated by the unambiguous terms of the agreement itself." *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999)

(Sotomayor, J.). It is "a firmly settled principle that parol evidence" of an extrinsic promise "cannot be permitted to vary, qualify, or contradict, to add to or subtract from the absolute terms of the written contract." *Specht v. Howard*, 83 U.S. 564, 566 (1872); *accord Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 284 (1990) ("At common law…the parol evidence rule prevents the variations of the terms of a written contract.").

And to be "actionable" as fraud, a "promise must be an enforceable one." 26 Williston on Contracts §69:11 (4th ed.). A "fraud theory may not be used to impose additional obligations upon a party to a written contract containing an integration clause." *Coal Res., Inc. v. Gulf & W. Indus., Inc.*, 756 F.2d 443, 446 (6th Cir. 1985). Permitting extrinsic oral promises "to defeat the clear words and purpose of the Final Agreement's integration clause" would defeat the very purpose of writing contracts. *One-O-One Enters.*, 848 F.2d at 1287. Thus, a party "with the capacity and opportunity to read a written contract"—in Cairn's case, the drafter— "cannot overcome the written instrument…and, particularly, the integration clause," by "later claim[ing] fraud in the inducement." *Id.*

Johnson's alleged promise was quintessentially extrinsic and unenforceable. Cairn, a multi-billion-dollar company represented by sophisticated counsel, insisted upon and drafted a fully-integrated written contract to "lock in key terms." C.A.App.129. Knowing that HSBC intended to accumulate pounds before the fix to fill Cairn's order, Cairn elected *not* to bargain for any limitation on when and how it did so—

likely because such a term would have contravened industry practice and subjected HSBC to risks that Cairn knew were unacceptable to the bank. And the contract's integration clause expressly "supersedes all oral communications," confirming that there was no such limitation on HSBC's execution of Cairn's order. C.A.App.362 (§9(a)). "On a matter of such large significance to the parties' bargain, silence in a final agreement containing an integration clause…must be deemed an abandonment or excision of [any] earlier representations." *One-O-One Enters.*, 848 F.2d at 1287.

In addition, under the common law the "[v]agueness" of a "statement is a strong indication that it was not intended to be a promise," and such a vague statement "creates no rights." *Brines v. XTRA Corp.*, 304 F.3d 699, 701 (7th Cir. 2002) (Posner, J.) (emphasis omitted). Unless an alleged promise is "definite" and "at least minimally clear," then "there wasn't really a promise" to begin with; what the purported promisee received was instead "a mere prediction or aspiration or bit of puffery." *Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698, 703, 705 (7th Cir. 2004) (Posner, J.). On the October 13 call, Rothschild requested that HSBC share its profit if it beat the fix and observed that other banks are willing to do so. Johnson responded, "if you're doing that clearly you're doing it 'cause you're intending to ramp the fix." C.A.App.389. The Second Circuit accepted the government's characterization of this as a "promise" not to ramp, but Johnson made no promise at all. He merely commented on how other banks behave when they agree to share profits. At most he was supplying a reason why HSBC would not agree to

share its profits. Even if that was not the real reason, there was no "definite" and "clear" promise about how HSBC would purchase pounds in the absence of any profit-sharing arrangement.

Johnson was convicted for making what was at worst a meaningless promise that the parties excluded from the governing contract. The Second Circuit "gratuitously rewr[ote]" that "contract to accord with" its own "notions of fairness" in a way that "ignor[ed] the language of the contract[] and the expressed understanding of the parties," and deprived Johnson of his liberty for "breaching" this imaginary bargain. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 311-12 (1942) (Murphy, J, concurring).[2]

B. The Lower Court Applied An Untenable Subjective Materiality Standard Implicating A Deep Circuit Split

Deceit is not material under the mail/wire fraud statutes unless it "has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Neder*, 527 U.S. at 16. *Neder* did not specifically state whether this standard requires courts to assess materiality from the subjective perspective of the alleged victim, or the objective perspective of a reasonable person. But the words "natural tendency

[2] The alleged post-transaction misstatements are irrelevant for the same reasons. There was nothing wrong with how HSBC purchased the pounds, even if anyone "covered up" those details. App.9-10. It is not a crime to deflect attention from legal and permissible conduct.

to influence" and "capable of influencing" certainly suggest an objective standard.

Additionally, in securities fraud cases this Court has repeatedly held that "materiality is judged according to an objective standard." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013); *accord Basic, Inc. v. Levinson,* 485 U.S. 224, 231-32 (1988). As the Court has noted, "it is universally agreed" that the "question of materiality…is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable" person. *TSC Indus.*, 426 U.S. at 445.

There is no reason why the standard should be different in mail/wire fraud cases. Securities fraud is fraud "of the same species" as mail/wire fraud. *United States v. O'Hagan*, 521 U.S. 642, 654 (1997). And statutory terms (particularly those with similar common-law roots) are generally construed consistently. *See Neder*, 527 U.S. at 21-23.

The Sixth, Eighth, and Tenth Circuits have thus rightly applied an objective standard to mail/wire fraud. It "is well-established" in the Sixth Circuit that misrepresentation must be "reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Jamieson*, 427 F.3d 394, 415 (6th Cir. 2005). Likewise, in the Eighth Circuit "a material fact" is one "that would be important to a *reasonable* person in deciding whether to engage or not to engage in a particular transaction." *United States v. Heppner*, 519 F.3d 744, 749 (8th Cir. 2008). And in the Tenth Circuit "the government must show conduct intended or reasonably calculated to deceive persons of ordinary prudence or

comprehension." *United States v. Fredette*, 315 F.3d 1235, 1241 (10th Cir. 2003).

Recent decisions by the Ninth and Eleventh Circuits also endorse an objective test, although prior cases were inconsistent. The Eleventh Circuit explained:

> A 'material fact' is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is material if it has the capacity or natural tendency to influence a person's decision. It does not matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

United States v. Takhalov, 827 F.3d 1307, 1316-17 (11th Cir. 2016). Similarly, *United States v. Lindsay*, held that a "false statement is material if it *objectively* had a tendency to influence, or was capable of influencing" an economic decision; this "standard is not concerned with a statement's subjective effect on the victim, but only 'the intrinsic capabilities of the false statement itself.'" 850 F.3d 1009, 1014-17 (9th Cir. 2017). It is irrelevant whether the purported victim *actually relied* on the statement. *Id.* at 1015-16.

Under this objective standard, Johnson's purported "promise" was plainly not material, because an unenforceable promise cannot conceivably influence a *reasonable* promisee. Such a promise is thus necessarily immaterial as a matter of law under an objective materiality test. As then-Judge Ginsburg

explained, when a contract contains an integration clause, "prior representations" by a contractual counterparty are "immaterial" and cannot support a fraud claim. *One-O-One Enters.*, 848 F.2d at 1286.[3] Accordingly, Johnson's conviction would have been reversed in the Sixth, Eighth, Ninth, Tenth and Eleventh Circuits.

Indeed, in a remarkably similar case, a trial judge in the Ninth Circuit granted a Rule 29 acquittal because a banker's false statements during negotiations about a foreign exchange transaction were immaterial. As here, an ISDA expressly disclaimed any fiduciary relationship, and the sophisticated counterparty (Hewlett-Packard) could not reasonably have relied on the defendant's statements. As here, the government claimed the defendant lied to the counterparty during negotiations. Given the parties' relationship and the contract, the district court held that "no reasonable jury could conclude beyond a reasonable doubt that it was objectively reasonable for HP to be influenced by the [defendant's] statements." *United States v. Bogucki*, 2019 WL 1024959, at *7 (N.D. Cal. Mar. 4, 2019) (Breyer, J.).

But the Second Circuit assessed materiality from Cairn's subjective perspective and ignored that Cairn was a sophisticated arms-length counterparty. The Court held that Johnson's statements "not only could,

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[3] Nor would a reasonable actor have attached any significance to statements made after the transaction, since there was nothing left for any supposed misstatement to induce. Consequently, Cairn could not have sought "immediate legal action" for fraud. App.19.

but in fact did, influence Cairn's decision as to the type of transaction to undertake." App.18. Thus, the court affirmed the jury's materiality finding based on Cairn's *subjective* reliance, rather than whether a reasonable person in Cairn's shoes would have relied on Johnson's statement.

Several other circuits likewise apply a subjective test for mail/wire fraud materiality. *See*, *e.g.*, *United States v. Davis*, 226 F.3d 346, 358-59 (5th Cir. 2000) (rejecting argument that "misrepresentation is only material if a reasonable person would rely on it"); *United States v. Masten*, 170 F.3d 790, 796 (7th Cir. 1999) ("even if…a 'reasonable person' would not have invested," that would not "rescue" defendant because "mail fraud statute also protects unreasonable persons"); *United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (wire fraud "where the persons defrauded unreasonably believed the misrepresentations made to them"). In these circuits, "a statement could indeed be material, even though only an unreasonable person would rely on it." *Davis*, 226 F.3d at 359.

Johnson faces two years in prison for legal industry practices that are not criminal fraud in other Circuits. A man's liberty should not turn on an accident of geography. Because his oral promise was plainly unenforceable, this case supplies an excellent vehicle in which to resolve the well-developed Circuit split on whether the mail/wire fraud materiality standard is objective or subjective. That is another reason why this case warrants review.

II. THE COURT SHOULD GRANT CERTIORARI TO INVALIDATE THE SECOND CIRCUIT'S "RIGHT TO CONTROL" DOCTRINE

The Second Circuit affirmed Johnson's conviction based on its peculiar "right to control" theory, which defines property fraud so expansively that it covers "schemes" that do not expose the "victim" to any economic harm. That holding and the Circuit law underpinning it conflict with the statutory text and decisions of this Court and other Circuits. The doctrine is also dangerously malleable and invites prosecutorial abuse.

1. This Court has construed the disjunctive language in the mail/wire fraud statutes as a "unitary whole"; the statutes prohibit only "deceptive 'schemes to deprive [the victim] of money or property.'" *Kelly*, 140 S. Ct. at 1571. Proof of deceit is not enough; "the deceit must also have…the 'object' of obtaining the [victim's] money or property." *Id.* at 1572; *accord id.* at 1573. And the only "money or property" that can be the object of a fraud scheme under this Court's precedents is a "traditional" property interest that can be transferred from victim to defendant.

In *McNally*, the Court held that mail fraud proscribes only schemes to obtain traditional property, and not "intangible" rights such as the right to a public official's "honest services." 483 U.S. at 356-61; *compare Carpenter v. United States*, 484 U.S. 19, 26 (1987) (confidential business information "has long been recognized as property").

In *Cleveland*, this Court held that a state's "right to control the issuance, renewal, and revocation" of video-poker licenses was not "property," reiterating that the fraud statutes only protect interests "long…recognized as property." 531 U.S. at 23. The "intangible rights of allocation, exclusion, and control" are not traditional property interests, but merely reflect the state's regulatory power. *Id.* The "object of the fraud" must be property when it is "in the victim's hands." *Id.* at 26. Because a poker license is not "property" in the state's hands and only becomes property in the licensee's hands, deceit to obtain a license is not property fraud. *Id.* at 26-27.

In *Kelly* the Court again reaffirmed that "intangible rights of allocation, exclusion, and control…do 'not create a property interest'" cognizable under the fraud statutes. 140 S. Ct. at 1572. The defendants were public officials who lied about why they reallocated access lanes to a bridge. This Court held that their deceit was not property fraud because a government agency's regulatory interest in "allocation, exclusion, and control" was not property, and the scheme was thus not "directed" at "usurp[ing]" agency property. *Id.*

These cases and others teach that only "property" which can be transferred from victim to defendant qualifies under the statutes. As *Kelly* explains, "an object of" the alleged fraud must be "to *obtain* the [victim's] money or property." 140 S. Ct. at 1568 (emphasis added). The property must be *obtainable* by the defendant, because what §1343 prohibits is fraudulent schemes "to obtain…money or property."

The Court made the same point in *Skilling*. It explained that under *McNally* property fraud requires that "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. Honest-services fraud, by contrast, "targeted corruption that lacked similar symmetry." *Id.* Traditional "money or property" fraud therefore must involve not only a deprivation of the victim's property, but the defendant's gain of (or attempt to gain) that same property. *See also United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (Easterbrook, J.) (mail fraud requires "an actual" or "potential transfer of property from the victim to the defendant").

The Court's interpretation of similar language ("obtaining" "property from another") in the Hobbs Act confirms this point. *Sekhar* held that "[o]btaining property requires 'not only the deprivation but also the acquisition of property.'" 570 U.S. at 734. The "property extorted must be…*transferable*—that is, capable of passing from one person to another." *Id.* Citing *Cleveland* and the similar text in mail fraud, the Court held that a general counsel's recommendation was not transferrable to the defendant and thus not property. *Id.* at 737-38; *see also Honeycutt v. United States*, 137 S. Ct. 1626, 1635 (2017) (forfeiture statute aimed at "proceeds" obtained by "defendant" does not permit forfeiture of property defendant did not acquire).

The Second Circuit's "right to control" theory is directly at odds with these precedents. The Second Circuit expressly rejects the notion that property must be "obtainable" under the fraud statutes. *See Finazzo*,

850 F.3d at 105-07. And here, the purported object of the scheme was Cairn's "'right to control' its assets," App.12, tracking three decades of Second Circuit decisions holding that the object of a property-fraud scheme can be the victim's "right to control" its property. *See, e.g.*, *Finazzo*, 850 F.3d at 108-15; *Binday*, 804 F.3d at 570-74; *United States v. Wallach*, 935 F.2d 445, 462-63 (2d Cir. 1991). Under Second Circuit law, Cairn's "right to control" property is *itself* a property right that Johnson, according to the government, sought to "obtain." App.13. But Cairn's "right to control" its assets was neither something it could transfer to HSBC, nor something Johnson could have schemed to "obtain."

2. Another fatal flaw in the Second Circuit's reasoning is that the "object of the fraud" must be causing "*loss* to the victim." *Kelly*, 140 S. Ct. at 1573 (emphasis added). Paying "the going rate" or charging less than the victim would otherwise pay is not fraud. As Judge Sutton has explained, to "be guilty of fraud, an offender's 'purpose must be to injure.'" *Sadler*, 750 F.3d at 590; *see generally Defraud*, Black's Law Dictionary (11th ed. 2019) ("defraud" means "to cause injury or loss to (a person or organization) by deceit"). Put another way, "there is a difference between deceiving and defrauding: to *defraud*, one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all." *Takhalov*, 827 F.3d at 1312. And there is no fraud unless the deceit "caused (or was intended to cause) actual harm…of a pecuniary nature." *United States v. Frost*, 125 F.3d 346, 361 (6th Cir. 1997).

If a defendant fulfills a contract's requirements, and the victim wouldn't "have had to pay less money or would have received more services" absent the deceit, there is no fraud. *Id.* That is this case. There was no evidence Cairn could have purchased £2.25 billion for fewer dollars from another bank or through the alternative "full-risk" methodology it rejected—which actually would have cost *more* money.

But to the Second Circuit, this was irrelevant. Even though Cairn would have paid more with full-risk, the court found that Johnson's "promise" was a material deceit because it influenced "Cairn's decision as to the type of transaction to undertake." App.18. It said that materiality "in a right-to-control case" is a free-floating inquiry completely severable from the "requirement that the misrepresentation be capable of resulting in tangible harm." App.18 (citing *Finazzo*, 850 F.3d at 109 n.16). This eviscerates the economic harm requirement. If a fraud's object must be to cause economic harm, then any deceit must be material *to that harm*. If that were not the case, the statute would criminalize conduct that is plainly not fraudulent.

3. The Sixth and Ninth Circuits have rejected the Second Circuit's right-to-control theory. The Sixth Circuit expressly held that the "right to control" is "not the kind of 'property' right[] safeguarded by the fraud statutes" in *Sadler*, 750 F.3d at 591. The defendant had illegally distributed controlled substances that she purchased from pharmaceutical companies after lying to them about what she planned to do with their products. The Sixth Circuit reversed her wire fraud conviction, holding that the defendant had not "deprive[d]" the companies of "property" because she

"paid th[eir] asking price," thereby satisfying the terms of their agreement. *Id*. at 590. While her "lies convinced the distributors to sell controlled substances that they would not have sold had they known the truth," the fraud statute "is 'limited in scope to the protection of property rights,' and the ethereal right to accurate information doesn't fit that description." *Id*. at 590-91 (quoting *McNally*, 483 U.S. at 360).

The Ninth Circuit likewise rejected a right-to-control theory in *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). There, the defendant purchased sensitive technology while concealing his intent to illegally export it to the U.S.S.R. The Ninth Circuit reversed his fraud conviction, because "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.

Johnson was innocent under the law of the Sixth and Ninth Circuits. Cairn received precisely what it bargained for, just like *Sadler*'s pharmaceutical companies and *Bruchhausen*'s technology seller. Johnson at most provided Cairn with inaccurate information, and in the Sixth and Ninth Circuits, "the ethereal right to accurate information doesn't" qualify as a property right under the wire fraud statute. *Sadler*, 750 F.3d at 591.

The Second Circuit acknowledged that deceit which merely causes people to "enter into transactions they would otherwise avoid" is not fraudulent. But it held Johnson "misrepresent[ed]…an essential

element of the bargain"—on the head-spinning logic that the "bargain" was something deliberately *excluded* from the contract. App.15. According to the Second Circuit, even if "the victim received the benefit of its bargain *under the terms of the parties' contract*," "promises" excluded from the contract can be criminally fraudulent "misrepresentations implicat[ing] an essential element" or "central part" of "the bargain." *Id*. (emphasis added).

The Second Circuit, in other words, ruled that a person can be sent to prison for *property fraud* when he makes an insincere "promise" that is excluded from a subsequent contract; fulfills his obligations under that contract; the victim gets exactly what it paid for; and the victim would have paid *more* had it known the truth. This case demonstrates what can happen when a malleable theory like right-to-control persists and expands to suit prosecutors' whims. It is an ideal vehicle in which to resolve the Circuit split and rein in the Second Circuit's vastly overbroad interpretation of the property fraud statutes.

III. THE DECISION BELOW UNDERMINES LIBERTY AND FREEDOM OF CONTRACT ON AN IMPORTANT ISSUE AFFECTING MANY COMMERCIAL TRANSACTIONS

This case is not an outlier. It epitomizes a recent wave of fraud prosecutions in which the government seeks to criminalize industry practices that it dislikes, but which are not themselves illegal. Consider, for instance, the foreign exchange case filed in the Ninth Circuit discussed *supra* at 26. There, the government "pursued a criminal prosecution on the basis of conduct that violated no clear rule or regulation, was

not prohibited by the agreements between the parties, and indeed was consistent with the parties' understanding of the arms-length relationship in which they operated." *Bogucki*, 2019 WL 1024959, at *7.

Another example is the government's multi-year effort to police participants in the Residential Mortgage Backed Securities industry for unappealing (though not illegal) negotiating tactics between industry equals who know not to trust each other. These cases involve traders negotiating with arms-length counterparties at sophisticated financial institutions. Neither side is honest with the other during bargaining. But the government prosecuted some brokers who profit by buying low and selling high for lying to counterparties about the prices they had paid for bonds, even though the brokers were not agents or fiduciaries and "the counterparty ha[d] no legitimate expectation that the broker-dealer will resell the bond at the price paid to the counterparty." *United States v. Litvak*, 889 F.3d 56, 61 (2d Cir. 2018); *see also United States v. Gramins*, 939 F.3d 429 (2d Cir. 2019); *United States v. Demos*, No. 16 Cr. 220 (D. Conn.).

In another case, a defendant successfully arranged a deal whereby a bank sold commercial real estate to someone who partnered with him for the sale. The sale price "exceeded the bank's target price by about one third." *United States v. Weimert*, 819 F.3d 351, 353 (7th Cir. 2016). However, the defendant misled the bank when he falsely asserted that the buyer would not complete the sale without his involvement. As the Seventh Circuit explained in

reversing his conviction, the prosecution theory there—similar to the one affirmed here—would permit the fraud statutes "to criminalize deception about a party's negotiating position." *Id.* at 357.

Those prosecutions typify how the "wide-ranging" application "of a criminal statute's highly abstract general statutory language" places too much "power in the hands of the prosecutor." *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). This case, like the similar Ninth Circuit prosecution for trading ahead in a way that allegedly disadvantaged a counterparty, illustrates the dangers of permitting the government to "assume the role of nanny of the FX…market." *United States v. Bogucki*, No. 18-Cr.21 (CRB), 3/4/19 Tr. at 1039. As Judge Breyer observed before granting an acquittal, the charges created "a massive due process problem" because the government had, "after the fact…impose[d] a set of rules on [defendant]" and "prosecute[d]" him for breaking them "before [he] even kn[e]w what the rules were." *Id.*, 2/28/19 Tr. at 1013, 1031.

Under the Second Circuit's decision, people are now exposed to criminal liability for stray remarks during negotiations. The decision gives the government carte blanche to rewrite contracts between sophisticated parties by adding terms the parties themselves rejected. And the government may prosecute whichever party "violated" these imaginary terms, on the theory that this somehow constitutes wire fraud.

Purchasing large quantities of currency before the fix was standard industry practice. No law, rule or regulation prohibits it, and this was "the normal way

in 2011 that banks executed these trades." C.A.App.59. The Second Circuit's decision effectively criminalizes this routine practice, shocking market participants, who were "unaware of the potential criminal consequences" of trading ahead. ACI.Amicus.C.A.Br.7. Johnson's conviction has "eliminate[d] predictability" in the industry and created "uncertainty" that "threatens a substantial chilling of FX liquidity as bank dealers become less willing to face unpredictable personal legal peril." *Id.*

This Court has repeatedly warned against expansive interpretations of the fraud statutes. This case exemplifies the lower courts' continued failure to heed that warning. The Second Circuit's decision is unmoored from the common law, upends settled expectations about the enforceability of contracts and criminalizes routine market conduct. The constitutional dimension of these defects, combined with the pall they cast on the $5 trillion foreign exchange market, underscores the exceptional importance of the question presented and the need for this Court's intervention.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
ERIC S. OLNEY
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

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