No. 21-1170

In the

Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

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

BRIEF FOR RESPONDENTS STEVEN AIELLO AND JOSEPH GERARDI IN SUPPORT OF PETITIONER

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Respondents Steven Aiello and Joseph Gerardi

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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 a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343.

PARTIES TO THE PROCEEDING

Petitioner Louis Ciminelli was a Defendant-Appellant in the Second Circuit.

Steven Aiello, Joseph Gerardi, and Alain Kaloyeros were also Defendants-Appellants in the Second Circuit and, pursuant to Rule 12.6 of this Court's Rules, are Respondents herein.

Respondent United States of America was the Appellee in the Second Circuit.

Joseph Percoco was also a Defendant-Appellant in the Second Circuit. His case was tried separately, and he is the Petitioner in *Percoco v. United States*, No. 21-1158. Peter Galbraith Kelly, Jr., Michael Laipple, and Kevin Schuler were Defendants in the district court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

In recent years, several Justices of this Court have lamented the "pathology" of "overcriminalization" in the federal criminal code. *E.g.*, *Yates v. United States*, 574 U.S. 528, 569-70 (2015) (Kagan, J., dissenting); *see also Gamble v. United States*, 139 S. Ct. 1960, 2008 (2019) (Gorsuch, J., dissenting) (noting the stunning growth in the scope of federal criminal law). One unfortunate source of this overcriminalization is the tendency of prosecutors and lower courts to expansively interpret the federal fraud statutes in ways that purport to cover nearly any conduct that prosecutors determine was dishonest, immoral, or untoward. *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 418 (2010) (Scalia, J., concurring in judgment).

In a seminal series of cases—including *McNally*, *Cleveland*, *Skilling*, and *Kelly*—this Court sought to rein in these breathtakingly broad interpretations. Applying ordinary principles of statutory interpretation, the Court held that the fraud statutes do not cover all dishonest dealings in business or politics. Instead, the fraud statutes are generally limited to their common-law roots, covering only schemes to obtain property by deception. What counts as "obtaining property," moreover, is not limitless.

Unfortunately, however, in the wake of each of these rulings, federal prosecutors sought to continue business as usual, and their expansive theories have often been endorsed by lower courts. The "right to control" doctrine at the heart of this case exemplifies this troubling trend.

Respondents Steven Aiello and Joseph Gerardi co-own COR, a real estate development company in Syracuse, New York. A consultant approached them about a potential business opportunity. He asked for COR's qualifications and shared them with Respondent Alain Kaloyeros, who ran a non-profit company managing a state-funded economic development program. Later, the consultant invited COR to comment on a draft of a document that would be used to solicit developers interested in obtaining contracts under the program. Gerardi suggested a few edits that would broaden the criteria and enable more developers to qualify; some were incorporated in the final "request for proposals" document when it was made public, and some were not. Ultimately, COR was the only interested developer in the area, and it was retained to build two real estate projects. COR fully performed its obligations under the contract. There was no evidence the non-profit company received less than what it paid for. There was no evidence that any other developer was deterred from expressing interest in the Syracuse program by any aspect of the final "request for proposals."

Yet on these facts, the government procured wire fraud convictions on the theory that Respondents engaged in a scheme to defraud the non-profit company of its "right to control" its assets. According to the government and the Second Circuit, Respondents failed to disclose to the non-profit's board that COR had shared its qualifications and commented on the draft document before the document was made public. This supposedly deprived that company of "potentially valuable economic information" and constituted federal

property fraud, even though it caused no conceivable harm to the "victim's" property interests.

This case typifies what can happen when lower courts interpret federal criminal statutes in ways that go beyond the careful limits set by Congress and this Court. The statutes say: fraud means "obtaining money or property" by deception. 18 U.S.C. §§ 1341, 1343. Applying the plain meaning of that text, this Court has held that defendants "violate those laws only if an object of their dishonesty was to obtain the [victim's] money or property." *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020). And the Court has held, in the context of the similarly-worded Hobbs Act, that the common-law phrase *obtaining property* has a limited and specific meaning, and that a defendant does not obtain property when he merely interferes with another's supposed "right to control" property. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401-02 (2003).

Yet lower courts have said that the obtaining property element does not exist *at all*. The law in the Second Circuit (among others) is this: "the mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property." *United States v. Finazzo*, 850 F.3d 94, 107 (2d Cir. 2017); *see United States v. Gatto*, 986 F.3d 104, 123 (2d Cir. 2021).

How do lower courts justify this result, so obviously at odds with the statutory text and this Court's cases? The answer is the right-to-control doctrine—an astonishingly broad theory that threatens to criminalize virtually any deceit in a commercial transaction. In practice, the doctrine means that dishonesty alone is sufficient for fraud, and it thereby "essentially

nullifies the property requirement" that has been central to this Court's case law from *McNally* through *Kelly*. Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 189 (2021).

This Court should now affirm once and for all that the doctrine is invalid, and that defendants only violate the fraud statutes if the object of their deception is to obtain money or property.

STATEMENT OF THE CASE

A. Factual Background

1. *The Economic Development Initiative*

In 2012 New York's then-Governor Andrew Cuomo launched an initiative (known as the "Buffalo Billion" program) to promote economic development in upstate New York. Cuomo tapped Alain Kaloyeros, a State university official, to identify and pursue development projects in cities including Syracuse and Buffalo. Pet.App.5a-6a.

The program attracted the interest of several developers, including COR Development Company, based in Syracuse, and LPCiminelli, based in Buffalo. Respondents Steven Aiello and Joseph Gerardi are co-founders and principals of COR, and Petitioner Louis Ciminelli is the principal of LPCiminelli. Both COR and LPCiminelli retained Todd Howe, a well-connected government relations consultant, to assist with state-funded work.

Kaloyeros implemented the plan through Fort Schuyler Management Corporation ("Fort Schuyler"), a private non-profit corporation affiliated with New York State's university system. Fort Schuyler was chosen to finance and manage the projects because it was not bound by cumbersome state procurement rules that State agencies had to follow and thus could proceed with greater speed and efficiency. Kaloyeros served on Fort Schuyler's board of directors. Pet.App.6a; C.A.App.1041, 1056.

As an initial step, Fort Schuyler sought to partner with qualified construction firms in the communities where it would pursue development projects. A key component of Fort Schuyler's strategy throughout the region was to promote local job growth by working with such local firms. C.A.App.1046. To identify local partners in several cities, Fort Schuyler issued requests for proposals ("RFPs"). The RFPs did not identify any specific projects, and at the time it issued the RFPs, Fort Schuyler had no specific Syracuse projects in mind. Pet.App.7a-8a. Rather, the RFPs outlined Fort Schuyler's desired qualifications for developers. The RFP winners ("preferred developers") obtained the ability to negotiate with Fort Schuyler for contracts in that region. But they were not guaranteed any contract, and Fort Schuyler could choose to negotiate with other candidates instead or terminate the process. *E.g.*, Pet.App.7a-8a, 19a.

Fort Schuyler selected COR as the Syracuse preferred developer and negotiated contracts with COR to build two projects in Syracuse, which were successfully completed. Pet.App.11a-12a. Fort Schuyler selected two preferred developers for Buffalo, including LPCiminelli, which negotiated a contract for a Buffalo project. *Id.* (COR had no connection to or involvement in the Buffalo process.)

Aiello, Gerardi, and Kaloyeros were subsequently charged with wire fraud (18 U.S.C. § 1343) and wire-fraud conspiracy (18 U.S.C. § 1349) for "tailoring" the Syracuse RFP to favor COR. Ciminelli and Kaloyeros were similarly charged with "tailoring" the Buffalo RFP to favor LPCiminelli. There was no suggestion

that Kaloyeros was bribed or had any financial interest in either developer. Nor was there any allegation that any defendant intended to cause Fort Schuyler to lose money, or that either developer overcharged Fort Schuyler for its services. Instead, the government's theory was that Kaloyeros failed to disclose to Fort Schuyler's board that he was steering contracts to his preferred winners. According to the government this defrauded Fort Schuyler not of any money, but of its "right to control its assets," and the developers assisted in this alleged scheme. JA31-33.

2. *The Alleged "Tailoring"*

In mid-2013, COR's consultant Howe arranged meetings between COR and Kaloyeros regarding a potential partnership with Fort Schuyler, and he suggested that COR meet other Fort Schuyler personnel as well. *E.g.*, C.A.App.1714. Howe subsequently asked COR for bullet points concerning COR's qualifications, which Gerardi sent. C.A.App.1700-02.

The next month, Howe sent Aiello and Gerardi a draft RFP that he said Fort Schuyler was "fine tuning." C.A.App.1650. In response, Gerardi provided a few comments on the RFP that included suggestions broadening the criteria in ways that would make it easier for other developers to qualify. For instance, Gerardi questioned the RFP's requirement that developers have at least 15 years' experience, even though COR satisfied it. He proposed broadening the categories of prior experience deemed relevant under the RFP, even though COR had the required experience. He proposed omitting a requirement that developers use specific software programs, even though COR

used those programs. He proposed eliminating a performance-bond requirement, even though COR regularly issued performance bonds. And while COR benefitted from one of Gerardi's proposals—which softened the requirement that developers provide "audited" financial statements—so did many other developers. C.A.App.1328, 1420-21, 1656-60.[1]

Howe forwarded Gerardi's suggestions to Kaloyeros, and the final RFP included some of them. Pet.App.8a-9a; C.A.App.1675-78. But Kaloyeros did not control the content of the RFP. Fort Schuyler's board chair, staffers, and lawyers were involved in drafting, reviewing, editing, and issuing the RFP, and they could have removed any provision they felt was improper. *E.g.*, C.A.App.1050, 1080, 1155, 2542. At trial, Fort Schuyler personnel consistently testified that the Syracuse RFP was fair, sensible, and not slanted in favor of any developer, and that the allegedly "tailored" provisions were reasonable. *E.g.*, C.A.App.1063-65, 1088-89, 1096, 1152, 1154-55, 1171. Indeed, the Syracuse RFP was used as a model for several RFPs that Fort Schuyler issued in other regions of New York. *E.g.*, C.A.App.1167.

3. *COR's Selection As Preferred Developer*

COR was the only developer that responded to the Syracuse RFP. Pet.App.11a. The government presented no evidence the allegedly "tailored" RFP provisions disfavored or discouraged any other Syracuse developer from competing with COR. Nor did COR or

[1] Government witnesses testified that it was not uncommon for entities like Fort Schuyler to seek potential bidders' input to improve their RFPs. *See, e.g.*, C.A.App.1057, 1278-80.

Kaloyeros do anything to exclude competition. To the contrary, Kaloyeros encouraged Fort Schuyler to respond to potential bidders' inquiries even though they had missed RFP deadlines ("the more the merrier," he said). *E.g.*, C.A.App.1157-58.

Fort Schuyler's evaluation committee and board selected COR as the Syracuse "preferred developer." They selected COR on the merits and without input from Kaloyeros, who recused himself. *E.g.*, Pet.App.11a. At trial, Fort Schuyler personnel testified that the decision to select COR was fair. C.A.App.1066-67, 1152.

After COR was selected, it engaged in protracted arm's-length negotiations for specific projects with experienced Fort Schuyler procurement staff, who tried "to get the best deal they could get." C.A.App.1096-97. If Fort Schuyler had been dissatisfied, it could have issued RFPs for each specific project to compare bids based on price, but it did not. *E.g.*, C.A.App.1089-90.

COR subsequently contracted with Fort Schuyler to build a film hub and a manufacturing plant. Pet.App.11a-12a. COR performed its obligations under the contracts, and there was no evidence its work was anything other than excellent. Even after the indictment, Fort Schuyler continued to work with COR, paid it millions of dollars, and, during the trial, hired it for an additional $6 million of work. C.A.App.2601.

B. The District Court Proceedings

The indictment did not allege that Fort Schuyler was defrauded of any money or suffered any pecuniary

harm, and the government conceded that preferred-developer status was not "property" under the wire fraud statute. C.A.App.996. The sole prosecution theory was that the defendants schemed to "defraud [Fort Schuyler] of its right to control its assets" by representing that the RFP process was "fair, open, and competitive" while "secretly tailor[ing]" the RFP so COR "would be favored to win in the selection process." JA31-33.

The defendants repeatedly argued that this theory was legally invalid and that the government had to prove Fort Schuyler received less than it paid for or overpaid because of defendants' lies. The district court rejected these arguments based on Second Circuit precedent that "[i]n a right-to-control case the property interest at issue is the information that was misrepresented or withheld." C.A.App.996. The court therefore refused to allow the defense to introduce evidence that the developers charged a fair price and did excellent work. *E.g.*, JA44-46.

As its sole attempt to prove economic harm, the government called two witnesses interested in the Buffalo RFP who testified about their normal range of fees. They did not testify about fees in Syracuse or what they would have charged for any of Fort Schuyler's projects. The government conceded they might have charged as much as COR or LPCiminelli. *E.g.*, C.A.App.1292, 1472-73. The district court admitted the evidence solely to show that developer fees can differ, but it ruled that the witnesses could not competently testify about fees for Fort Schuyler's projects. JA73 ("THE COURT: … I have no idea how Mr. Balling has any idea what the development fee ought to

have been in this case."); C.A.App.2627 ("THE COURT: … Balling and Bills also testified that there were many variables that affect [the] fee …. [I]t's not fair to the defendant to ignore those variables ….").

There was no evidence COR overcharged, underdelivered, or gave Fort Schuyler anything less than it paid for. There was no evidence Fort Schuyler would have drafted the RFP differently to attract more competition or select the best developer. There was no evidence the RFP excluded any Syracuse developer, let alone one with a better deal, or made a better deal any less probable.

The jury instructions permitted the jury to convict without proof of any contemplated economic harm. Over objection, the jury was instructed that Fort Schuyler's "property" included "intangible interests such as the right to control the use of one's assets," which "[wa]s injured" if Fort Schuyler "[wa]s deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." JA41.

The instructions on this "right to control" theory were a confusing maze that no juror could have understood. "Potentially valuable economic information" was defined as anything "that affects the victim's assessment of the benefits or burdens of a transaction" or "relates to … economic risks." *Id.* The jury was asked to consider whether Fort Schuyler risked "economic harm," but that term was never defined. JA42. Instead, the jury was told that "economic harm is not limited to monetary loss" and could instead include "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it

actually received." *Id.* And with respect to intent to defraud, all that was required was "an intent to deceive, for the purpose of causing Fort Schuyler to enter into a transaction without potentially valuable economic information." JA43.

Based on these instructions, the government argued in closing that "the fact that there had not been a competitive [RFP] process is exactly the kind of economic information [Fort Schuyler] would want to know." C.A.App.1472. The district court compounded the problem by refusing to instruct the jury to acquit if Fort Schuyler "received, and was intended to receive, the full economic benefit of its bargain," or to acquit unless "the scheme, if it were to succeed, would result in economic harm to the victim." C.A.App.911, 960-61, 1449; JA103.

Aiello and Gerardi were convicted on both the wire fraud and wire-fraud conspiracy counts. The district court sentenced them to 36 months' and 30 months' imprisonment, respectively. Pet.App.14a.[2] At sentencing, the court found no actual or intended loss under the Sentencing Guidelines because it was "unable

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[2] Gerardi was also convicted for making false statements under 18 U.S.C. § 1001 because he told the government that he never asked to tailor the RFP to COR and that his suggested edits were intended to broaden the criteria to qualify as a preferred developer under the draft RFP. Pet.App.12a-14a. If his fraud convictions are reversed, his § 1001 conviction should be remanded for the Second Circuit to determine whether it should be reversed as well due to spillover prejudice or the statements' lack of materiality. Aiello was also convicted at a separate trial of participating in a conspiracy to commit honest-services fraud. This Court granted certiorari to consider the validity of the theory underlying that conviction in *Percoco v. United States*, No. 21-1158.

to make a determination of pecuniary loss without engaging in pure speculation." C.A.App.2627; *see also* C.A.App.2645.

C. The Second Circuit's Decision

The Second Circuit affirmed the convictions under its "right to control" doctrine, which "allows for conviction 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.'" Pet.App.16a. The court explained that "[i]n a right-to-control case, 'it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss—it suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision.'" Pet.App.17a.

The court concluded that "in rigging the RFPs to favor their companies, defendants deprived Fort Schuyler of 'potentially valuable economic information' that would have resulted from a truly fair and competitive RFP process." Pet.App.18a. The court acknowledged that "many of [its] right-to-control precedents have involved more tangible evidence of economic harm than is presented in this case." Pet.App.20a.

The court further conceded that "the government offered little evidence that other companies would have successfully bid for the projects and then either charged less or produced a more valuable product absent the fraud." *Id.* However, it held this irrelevant,

because the wire fraud statute does not require proof the victim "suffered harm." Pet.App.21a. The court observed that "if Fort Schuyler had been able to consider additional applications, it might have selected a preferred developer who could offer more favorable economic terms." Pet.App.20a n.8. The court did not explain how this deprived Fort Schuyler of property.

The court rejected the defendants' argument that Fort Schuyler was not defrauded because it "received the benefit of its bargain"—the construction services for which it paid COR. Pet.App.21a. The court did so by redefining the bargain as the receipt of accurate information. According to the court: "The bargain at issue was not the terms of the contracts ultimately negotiated, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process. Depriving Fort Schuyler of that information was precisely the object of defendants' fraudulent scheme, and for Fort Schuyler, it was an essential element of the bargain." Pet.App.21a-22a. The court also endorsed the jury instructions, holding that they "clearly explained the right-to-control theory" and "closely tracked the language set forth in our prior opinions." Pet.App.27a-28a.

SUMMARY OF ARGUMENT

As Petitioner and co-defendant Ciminelli explains in his brief, the right-to-control doctrine is inconsistent with this Court's jurisprudence interpreting the mail and wire fraud statutes. This Court has held that those statutes are limited in scope to the protection of property rights. The right-to-control doctrine

finds no basis in traditional, common-law conceptions of property. Respondents join those arguments.

The full context of the statutory text buttresses that conclusion. The fraud statutes require a scheme for "*obtaining* money or property." 18 U.S.C. §§ 1341, 1343 (emphasis added). In closely related contexts, this Court has already held that the phrase "obtaining property" is a phrase with a well-defined common-law meaning—and that the right-to-control doctrine is inconsistent with that common-law meaning. In order to obtain property, a defendant must acquire some transferable property interest. When a defendant merely deprives a counterparty of information and thereby interferes with the so-called right to control, the defendant does not obtain property.

In part because it is unmoored from any common-law conception of "property" or "obtaining property," the right-to-control doctrine is irretrievably amorphous. It criminalizes a wide range of innocuous and commonplace business practices. The problem of overbreadth is not merely theoretical. Federal prosecutors' use of the doctrine—including in this very case—illustrates how broad the doctrine can be in application. The right-to-control doctrine gives the government free-ranging authority to prosecute dishonest or untoward business practices. That authority goes far beyond anything authorized by Congress in the fraud statutes themselves.

This Court should reject the right-to-control doctrine and reaffirm that the fraud statutes are limited to the protection of traditional property rights.

ARGUMENT

I. THE RIGHT-TO-CONTROL THEORY IS INCONSISTENT WITH THE STATUTORY REQUIREMENT THAT FRAUD REQUIRES "OBTAINING MONEY OR PROPERTY"

This Court made clear 35 years ago that obtaining money or property "is a necessary element" of wire fraud. *Carpenter v. United States*, 484 U.S. 19, 25 (1987). And just two years ago, the Court reaffirmed that the defendant's deceit must have "the 'object' of obtaining the [victim's] money or property." *Kelly v. United States*, 140 S. Ct. 1565, 1572 (2020). Thus, the property in question must be obtainable—*i.e.*, capable of being transferred from the alleged victim to the defendant. The right-to-control theory fails this requirement because the right to make an informed decision about how to dispose of assets is not itself property; it is merely an attribute of property ownership. That is not something a defendant can *obtain* from another person.

A. The Object Of A Wire Fraud Scheme Must Be "Obtaining Property" From Another

The mail and wire fraud statutes prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. §§ 1341, 1343. Based on the statutes' use of the disjunctive "or," many circuits initially held that the statutes create *two* distinct offenses—(1) a scheme to defraud, and (2) a scheme to obtain property—and that the former type contains no requirement of obtaining property. *See*, *e.g.*, *United States v. Clapps*, 732 F.2d 1148, 1152

(3d Cir. 1984) ("[T]he 'scheme or artifice to defraud' clause is to be read independently of the 'obtaining money or property by ... false ... pretenses' clause.").

In *McNally v. United States*, 483 U.S. 350 (1987), this Court rejected that reading of the offense. It held that when Congress added the disjunctive language, it was merely clarifying the meaning of a "scheme to defraud," which "commonly refer[s] 'to wronging one in his property rights by dishonest methods or schemes.'" *Id.* at 358-59. The "money or property" clause "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359. In other words, Congress was clarifying that a "scheme to defraud" *is* a scheme for obtaining money or property.

Some lower courts and prosecutors, however, continued to ignore that ruling. So in *Cleveland v. United States*, this Court once again rejected the argument "that the second phrase of § 1341 defines a separate offense." 531 U.S. 12, 26 (2000). And in *Loughrin v. United States*, the Court again reaffirmed that the mail and wire fraud statutes define "just one offense." 573 U.S. 351, 359 (2014). Most recently, in *Kelly*, this Court reiterated that the wire fraud statute contains just one offense and "prohibits only deceptive 'schemes to deprive [the victim of] money or property.'" 140 S. Ct. at 1571. The defendant's deceit must have "the 'object' of obtaining the [victim's] money or property." *Id.* at 1572.

In sum, the mail and wire fraud statutes define a single offense. That offense has an *obtaining money or property element*—a "scheme to defraud" means a

scheme to obtain money or property by deception. The only question, then, is the legal meaning of the *obtaining money or property* element. As demonstrated below, this Court's cases in both fraud and other contexts have already defined the meaning of that phrase: obtainable property means transferable property. The right-to-control doctrine is inconsistent with that requirement.

B. The Fraud Statutes Protect Only "Property" That Is Obtainable—Meaning Transferable From Victim To Defendant

As Petitioner Ciminelli demonstrates, even if the phrase "money or property" were read in isolation, the right-to-control doctrine would be invalid. The same conclusion is even more firmly established when the phrase "money or property" is read in conjunction with the transitive verb "obtain." Because the defendant must seek to "obtain property" from the victim, the statute protects only property that can be *transferred* from a victim to the defendant. The "right" to have sufficient information to make an informed decision does not qualify.

1. As this Court explained in *Skilling v. United States*, 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. 358, 400 (2010). In other words, it 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").

Thus, the statute does not apply to schemes that "lack[] similar symmetry," such as deceitful efforts to deprive people of "intangible" rights such as the right to a public official's "honest services." *Skilling*, 561 U.S. at 400. Likewise, this Court has held that a state's "right to control the issuance, renewal, and revocation" of video-poker licenses is not "property," because the "object of the fraud" must be property when it is "in the victim's hands." *Cleveland*, 531 U.S. at 23, 26. A poker license is not "property" in the state's hands and only becomes property in the licensee's hands, so making a false statement to obtain a license is not property fraud. *Id.* at 15, 26-27.

2. This Court has also interpreted similar statutory language in other federal criminal statutes. In those decisions, it has affirmed that "obtaining property" includes a requirement of transferability. And it has held that that requirement is not satisfied in a right-to-control case.

a. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court held that interfering with another person's right to control his property is not the same as acquiring or obtaining that property. The decision in *Scheidler* was based on the text of the Hobbs Act, which prohibits the "obtaining of property from another" through force, threats, or violence. 18 U.S.C. § 1951(b)(2).

The plaintiffs in *Scheidler* were abortion clinics and a prominent women's rights organization. They filed a RICO suit against abortion protestors who had engaged in a variety of tactics to discourage abortions and block access to abortion clinics. They alleged that the protestors had "obtained property" in violation of

the Hobbs Act (a predicate offense under RICO) by blocking access to the clinics.

Whatever the legality or morality of their conduct, the protestors had not actually *obtained* anything by protesting as they had. Consequently, the plaintiffs' theory of the case rested on a right-to-control theory. The plaintiffs argued that "'[p]roperty' historically has *encompassed* the right lawfully to control one's assets" and rejected any "attempt[] to distinguish between 'property' and 'property rights.'" Brief of Respondents at 14 (Sept. 17, 2002). They also insisted that property need not be transferable. *Id.* at 16-17 & n.20. According to the *Scheidler* plaintiffs, in its "normal and accepted legal use," the word property simply means "'an exclusive right to control an economic good.'" *Id.* at 18.

For this reason, according to the plaintiffs, the protestors had "obtained" property by interfering with the clinics' right to control that property. They "argue[d] that because the right to control the use and disposition of an asset is property, [the protestors], who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain [the plaintiffs'] property." *Scheidler*, 537 U.S. at 401.

This Court squarely rejected these arguments. It held that they would impermissibly expand the meaning of "obtain property" and thus the scope of the statute. "Whatever the outer boundaries may be, the effort to characterize [the protestors'] actions here as an 'obtaining of property from' [plaintiffs] is well beyond them." *Id.* at 402.

The Court began with the "the general presumption that a statutory term has its common-law meaning." *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 592 (1990), and *Morissette v. United States*, 342 U.S. 246, 263 (1952)). Examining the common law, this Court held that the phrase "obtaining of property" was a phrase with a well-known meaning—"this 'obtaining of property' requirement included both a deprivation and acquisition of property." *Id.* at 403; *see also id.* at 404 ("the 'obtaining' requirement of extortion under New York law entailed both a deprivation and acquisition of property").

Under that common-law definition, the protestors in *Scheidler* did not obtain any property. While they undoubtedly "interfered with, disrupted, and in some instances completely deprived [plaintiffs] of their ability to exercise their property rights," they did not *acquire* anything. *Id.* at 404. Interfering with property rights is not the same as obtaining property. To obtain property means to come into possession of it, which ordinarily means the acquiror must have "received 'something of value from' [the other party] that they could exercise, transfer, or sell." *Id.* at 405 (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)).

Notably, this Court explicitly rejected the right-to-control doctrine as a basis for liability. The protestors "may have deprived or sought to deprive [the plaintiffs] of their alleged property right of exclusive control of their business assets, but they did not acquire any such property." *Id.* To rule otherwise "would effectively discard the statutory requirement that property must be obtained from another." *Id.*

b. This Court reaffirmed *Scheidler*'s holding in *Sekhar v. United States*, 570 U.S. 729 (2013). The defendant in *Sekhar* had sent threatening emails to a New York state employee in hopes that the employee would approve an investment in a fund managed by the defendant's firm. The Second Circuit held that because the defendant generally sought to profit by his conduct, he had sought to "obtain property" within the meaning of the Hobbs Act. *United States v. Sekhar*, 683 F.3d 436, 442-43 (2d Cir. 2012).

This Court reversed. It reiterated both the plain meaning and common-law meaning of the statutory phrase "obtaining property." "Obtaining property requires 'not only the deprivation but also the acquisition of property.'" 570 U.S. at 734 (quoting *Scheidler*, 537 U.S. at 404). The statute, in other words, "requires that the victim 'part with' his property, and that the extortionist 'gain possession' of it." *Id.* (citations omitted). To be obtainable, property "must therefore be *transferable*." *Id.*

This Court noted that the theory of conviction was both inconsistent with *Scheidler* and fairly "absurd"—an "employee's yet-to-be-issued recommendation" on an investment cannot "be called obtainable property." *Id.* at 737-38. "No fluent speaker of English would say that 'petitioner *obtained and exercised* the general counsel's right to make a recommendation,' any more than he would say that a person '*obtained and exercised* another's right to free speech.'" *Id.* at 738.

When one merely deprives another of information relevant to the use or disposition of property, no fluent English speaker would say that he *obtained and exercised* the right to control that property.

c. More recently, in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), this Court extended the logic of *Scheidler* and *Sekhar* to the federal forfeiture statute. That statute allows the government to forfeit "property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" the crime. 21 U.S.C. § 853(a)(1). Lower courts had held that the statute allows joint and several liability in criminal cases—that is, it allows the government to forfeit from a defendant any proceeds of a criminal conspiracy, even if the defendant himself never came into possession of the proceeds.

Once again, this Court's rationale focused on the meaning of the transitive verb *obtain*. The plain meaning of "obtain" is "to come into possession of" or to "get or acquire." 137 S. Ct. at 1632 (quoting Random House Dictionary of the English Language 995 (1966)). That was the ordinary English meaning of the verb when the forfeiture statute was enacted, and it remains the ordinary English meaning of the verb today. *See id.* (citing Black's Law Dictionary, defining "obtain" as "[t]o bring into one's own possession; to procure, esp. through effort"). And this Court quoted *Sekhar*, which in turn quoted *Scheidler*, reaffirming that *obtaining property* requires "the acquisition of property." *Id.* (quoting *Sekhar*, 537 U.S. at 734).

In short, the statutory phrase *obtaining money or property* has a concrete meaning, grounded in the common law and settled by this Court's case law. The right-to-control doctrine is inconsistent with that settled meaning.

3. This Court should apply the logic of *Scheidler*, *Sekhar*, and *Honeycutt* to the mail and wire fraud statutes. Indeed, to reach the same conclusion, this Court need do no more than apply the ordinary rules of statutory interpretation.

This Court "interpret[s] criminal statutes, like other statutes, in a manner consistent with ordinary English usage." *Nichols v. United States*, 578 U.S. 104, 111 (2016) (quoting *Abramski v. United States*, 573 U.S. 169, 196 (2014) (Scalia, J., dissenting)). And this Court has already held that the ordinary English meaning of the verb "obtain" is to *get or acquire* something, to *come into possession* of it. *Honeycutt*, 137 S. Ct. at 1632 (quoting several dictionaries). That is and has always been the ordinary English meaning of the word. "Obtain" means "[t]o come into the possession or enjoyment of (something) … to acquire [or] get." 10 Oxford English Dictionary 669-70 (2d ed. 1989).

A defendant does not obtain property every time he interferes with the owner's use or enjoyment of that property. A landowner has, for example, a right to exclude others from her land so that she can use the property as she sees fit. If a trespasser enters her land, while he may *interfere* with her right to exclude, he does not *obtain* her property. Nor does he "obtain" her right to exclude—indeed, the very notion is grammatically senseless. Similarly, if a meddling neighbor engages in annoying and abusive conduct to prevent a sale of the owner's land, the neighbor may interfere with the owner's right to alienate, but the neighbor obtains neither property nor the right to alienate it. That is the fundamental point this Court recognized in *Sekhar*: "No fluent speaker of English would say

that 'petitioner *obtained and exercised* the general counsel's right to make a recommendation,' any more than he would say that a person '*obtained and exercised*'" another person's right to sell her land, or spend her money as she sees fit. 570 U.S. at 738.

Moreover, this Court has already held that the phrase "obtaining of property" had a well-known meaning at common law—"this 'obtaining of property' requirement included both a deprivation and acquisition of property." *Scheidler*, 537 U.S. at 403. It is a cardinal rule of statutory interpretation that when Congress borrows common-law terms, this Court assumes that Congress meant to incorporate the common-law meanings. *See Evans v. United States*, 504 U.S. 255, 259-60 (1992). Thus, when Congress used the phrase "obtaining money or property" in the fraud statutes, it is reasonable to assume that Congress meant to incorporate the common-law meaning—the same meaning that this Court already elucidated in other statutes using the same phrase.

Statutory interpretation can be complicated when the ordinary English meaning of a term diverges from its common-law meaning. In this instance, however, there is no such complication—the meanings are congruent. The plain text of the statute states that, to commit fraud, a defendant must seek to *obtain money or property* from the victim by deception. That means that the defendant must seek to obtain some transferable property that the victim gives up. That requirement is not satisfied when a defendant merely interferes with another's "right to control" a piece of property. It is not satisfied by mere deception or withholding of information.

C. Lower Courts Adopting The Right-To-Control Doctrine Have Obliterated The *Obtaining Property* Requirement

1. Despite the plain text of the statutes, and despite this Court's holdings, some lower courts have ignored the requirement that a defendant must seek to obtain money or property. The Second Circuit continues to insist, for example, that "the mail and wire fraud statutes do not require that the property involved in the fraud be 'obtainable.'" *United States v. Finazzo*, 850 F.3d 94, 105 (2d Cir. 2017); *see also id.* at 107 ("the mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property"). That conclusion cannot be squared with the plain meaning of the statute, which says that a scheme to defraud is a scheme for "obtaining money or property."

Lower courts have also brushed aside this Court's Hobbs Act decisions regarding the meaning of "obtaining property." What little reasoning they have offered collapses upon analysis. In the wake of *Scheidler*, criminal defendants correctly noted that the right-to-control doctrine in the fraud context was dubious, at best. Lower courts responded with something akin to an *ipse dixit*: *Scheidler* interpreted a different statute, therefore its rationale doesn't apply, period. As the Second Circuit said: "The fact that the Hobbs Act and the mail and wire fraud statutes contain the word 'obtain' does not necessitate imposing *Scheidler's* construction of a wholly separate statute onto this Court's pre-existing construction of the mail fraud statute." *Porcelli v. United States*, 404 F.3d 157, 162 (2d Cir. 2005).

The court offered no further explanation for why the common-law term "obtaining property" would mean one thing in one federal criminal statute but something else in another federal criminal statute. And even after *Sekhar*, the Second Circuit reaffirmed *Porcelli* and refused "to extend *Sekhar*'s obtainability requirement to the mail and wire fraud statutes." *Finazzo*, 850 F.3d at 107. It did so even though in *Sekhar*, this Court relied in part on *Cleveland* and the mail fraud statute's similar textual requirement, "obtaining money or property." *See Sekhar*, 570 U.S. at 737.

To the extent that any justification for distinguishing the "obtaining property" language in the statutes has ever been offered, it came in passing in a footnote in the Third Circuit's decision in *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004). The court seized on a minor textual difference between the Hobbs Act and the fraud statutes—namely, the words *from another*. "Unlike the mail fraud statute, the Hobbs Act expressly requires the Government to prove that the defendant 'obtain[ed] property from another.'" *Id.* at 602 n.21. The government made a similar argument in opposing certiorari here. *See* BIO at 25.

That distinction makes no sense for several reasons. First, nothing in this Court's *Scheidler* opinion was based on the phrase "from another." The rationale of *Scheidler* was based entirely on the phrase "obtaining property." Second, this Court later applied the rationale of *Scheidler* and *Sekhar* to the forfeiture statute, even though that statute also lacks the words "from another." Third, one cannot obtain property

from oneself; anytime one obtains property, one obtains it from another. Those words are legally and grammatically implicit in the very concept of *obtaining property*.

In sum, the lower courts that maintain the right-to-control doctrine have ignored the plain implication of this Court's case law, and they have eviscerated the requirement that property be obtainable and transferable.

2. The right-to-control doctrine also has the practical effect of eliminating the "obtaining property" element altogether. In justifying the right-to-control doctrine, lower courts have reasoned that the core deprivation is the deprivation of the so-called "right to accurate information." As the Second Circuit said in its seminal right-to-control decision, "the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest." *United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991); *see also United States v. Little*, 889 F.2d 1367, 1368 (5th Cir. 1989) (stating that "concealing economic information constitutes a property loss"). According to *Wallach* and its progeny—including the decision in this case—withholding information is *itself* a violation of the right to control and is therefore *a deprivation of property*.

But the theory ignores the symmetry inherent in the term "obtaining"—that there must be "both a deprivation and acquisition of property." *Scheidler*, 537 U.S. at 403. In a right-to-control case, there is no such symmetry. Even if the purported victim is deprived of information that he might find useful in deciding how to spend his money, the defendant does not "acquire"

or "obtain" the alleged victim's right to control the use of his money. Nor does he acquire or obtain the information that he has deprived the victim of learning, because the defendant already had the information.

Moreover, the theory that withholding information automatically deprives one of property effectively collapses the property element into the deception element. Fraud is supposed to require both deception and obtaining property. If "obtaining property" simply means concealing information, then all deception violates property rights—and when a prosecutor proves deception in a business transaction, she also automatically proves a deprivation of property.

In that manner, the right-to-control doctrine renders the "obtaining property" element meaningless. It violates this Court's repeated holding that proving deception is insufficient to prove mail or wire fraud—rather, "the deceit must also have had the 'object' of obtaining the [victim's] money or property." *Kelly*, 140 S. Ct. at 1572. And it violates the canon against surplusage: Statutes should not be read in a manner that renders any portion redundant. *See Kungys v. United States*, 485 U.S. 759, 778 (1988).

In sum, lower courts adopting the right-to-control doctrine have ignored the statutes' plain statement that fraud requires a scheme for *obtaining* money or property. Petitioner Ciminelli has demonstrated that the right-to-control doctrine is inconsistent with the common-law meaning of *property*. It is also inconsistent with the ordinary English and common-law meaning of *obtaining property*. To obtain property means to acquire something that someone else gives

up. Merely withholding information, including potentially valuable economic information, does not satisfy this essential element.

D. The Right-To-Control Theory Ignores The Conceptual Distinction Between Property Itself And Property Rights

There is also another related sense in which the right-to-control doctrine is at odds with traditional conceptions of property: It elides the distinction between property itself and the rights attendant to property. "As a matter of common sense, 'right to control' is an *incident* of ownership of property, not the property itself." Park, *supra*, at 174 (emphasis altered); *see id.* at 174-75 (discussing the different legal meanings of ownership, possession, and property). And Congress itself has made that distinction by expressly protecting not just property, but also property rights, in other statutes—but not in the mail and wire fraud statutes.

1. As Petitioner Ciminelli explains in detail (at Point I.B.1), the classic common-law formulation of property rights comes from Blackstone. He described the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world." 2 William Blackstone, Commentaries on the Laws of England 2 (1766); *see Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting Blackstone). In Blackstone's formulation, the property itself consisted of the "external things" of the world. Commentaries 1-3. These were divided into two simple categories: "lands and moveables." *Id.* at 9. Laws of property developed to address the scarcity problem that arose as the human race

grew—the scarcity of these "external things," the lands and chattels of the planet.

The Blackstonian conception drew a distinction between the *property itself*—that is, the external object—and an owner's *rights* attached to the property. (This was no different from saying a man's *life* was different from his legal *right to life*.)

This conception of property was the dominant conception in Anglo-American law well into the nineteenth century. The first edition of Black's Law Dictionary, published in 1891, defined "property" as "any external object over which the right of property is exercised." *Wilson v. Ward Lumber*, 67 F. 674, 677 (C.C.E.D. Mo. 1895) (quoting Black's). A piece of property is not the same thing as the incidents of ownership that legally attach to that property.

The right-to-control doctrine elides that fundamental distinction. The doctrine rests on a confused application of the twentieth century "bundle of rights" theory—the notion that property consists not of things but of varying relationships between people. That theory was popularized by legal realists who believed that the traditional conception of property was an obstacle to progressive reform. *See*, *e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 21-24 (1913); *see also* Gregory A. Alexander, Commodity & Propriety 319-20 (1997) (discussing early-twentieth-century development of "bundle of rights" metaphor). Whatever the abstract merits of the deconstructed modern conception of property, it was most assuredly *not* the common-law conception.

As Petitioner explains, the Blackstonian conception of property rights had a more concrete meaning—the treble rights of use, exclusion, and alienation. The Blackstonian conception did not include some additional general notion of a "right to control." Additionally, an even more fundamental point is that the Blackstonian conception drew an analytical distinction between the piece of property itself and the rights attendant to property. The idea that the "right to control" is *itself* property finds no basis in the common law.

2. Nor does the statutory text provide any indication that Congress intended to depart from that traditional understanding. The plain meaning of the statutory term "property" is most naturally read in its customary, concrete sense, which is fully consistent with its common-law meaning. That is, the fraud statutes refer only to "money or property" rather than "property rights." This suggests, based on ordinary English usage—at least in cases like this one, where the "right" at issue is merely the right to spend one's money—that the statutes' scope is limited to the property itself, not the rights attendant to the ownership of money or property.

By contrast, when Congress intends to reach beyond "property" to protect the broader interest in conducting a business or exercising autonomy over money or property, it does so expressly. *See*, *e.g.*, 18 U.S.C. § 1964(c) (requiring injury to "business or property"); *id.* § 2333(a) (requiring injury to "person, property, or business"); 20 U.S.C. § 4302(a) (vesting university with "property and the rights of property"). Here, however, it elected not to do so. Instead, it

clearly stated that fraud requires a scheme to obtain property. Under the meaningful-variation canon, when Congress uses one term in one statute but a different term in a different statute, there is a "presumption" that "the different term denotes a different idea." *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (quoting A. Scalia & B. Garner, Reading Law 170 (2012)).

* * *

Money and property are things that are obtainable and transferable. Even if the rights attendant to property are considered part of the property itself—which is a dubious proposition for a statute enacted against a Blackstonian background—one does not "obtain property" when one merely interferes with property rights. And that is indeed precisely what this Court held in *Scheidler*. While the defendants in that case "interfered with, disrupted, and in some instances completely deprived [the plaintiffs] of their ability to exercise their property rights," they did not obtain property. 537 U.S. at 404.

Perhaps it is conceivable that Congress could enact a law criminalizing interference with the right to control property. But the fraud statutes only cover a narrower class of conduct: schemes to obtain money or property. "If Congress desires to go further, it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

II. THE RIGHT-TO-CONTROL DOCTRINE CRIMINALIZES COMMON BUSINESS PRACTICES

The right-to-control doctrine vastly expands the scope of the property fraud statutes. Because of the ubiquity of electronic communications in the twenty-first century, it enables prosecutors to charge virtually any deceit as a federal felony. Such a sweeping expansion would stretch the statute far beyond the bounds set by its text, this Court's decisions, the Due Process Clause, and federalism and separation of powers principles. *See generally* Petitioner's Brief, Point III (discussing constitutional concerns with right-to-control theory).

As the Second Circuit explained in the decision below, its "'right-to-control theory' of wire fraud … allows for conviction 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.'" Pet.App.16a (quoting *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019)). According to the Second Circuit, "[a] 'cognizable harm occurs'" where the defendant deprives the victim of "'information necessary to make discretionary economic decisions.'" Pet.App.17a (quoting *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015)). In other words, the mere deprivation of the information supposedly constitutes the requisite harm to property.

1. One problem with this is that virtually any information could qualify as "potentially valuable economic information." For instance, the existence of competitors who might offer potentially different

terms is information that a project sponsor might want to know. For that reason, the fact that an RFP was "tailored" to a particular bidder could also be deemed "potentially valuable economic information," such that failing to disclose it is always property fraud, even absent concrete proof that the "tailoring" could cause financial loss or reasonably affect an economic decision.

To be sure, the mail and wire fraud statutes contain inchoate liability—a defendant is guilty even if his scheme fails. But the object of the scheme must nonetheless be to obtain property. The absence of any proof of harm (in a case like this, where the alleged scheme was, according to the government, *completed* and *successful*) reveals the broad and abstract nature of an information-deprivation-based theory of property. In this case, there was no *evidence* that the "tailoring" caused any economic harm: It is undisputed that the government introduced no proof that any other developer could have built the Syracuse projects for less money or could have done better work for the same money. Nor did the government present evidence that any other developer would have responded to the Syracuse RFP if there had been no "tailoring." In other words, apparently no one was deterred from competing for "preferred developer" status in Syracuse by the purported "tailoring." Thus, there was no actual or potential economic harm to Fort Schuyler; and, for similar reasons, the failure to disclose the "tailoring" was immaterial. Even if Fort Schuyler's board had known of the "tailoring," its decision to bargain with COR would have been unaffected, since no potential competitors were interested.

Yet despite the complete lack of evidence of any economic harm or even a potential competitor's bid, the Second Circuit affirmed the convictions because it *assumed* that "potentially valuable economic information … would have resulted from a legitimate and competitive RFP process." Pet.App.21a. In other words, it substituted speculation for actual evidence. The ease with which the court dispensed with the need for evidence of harm highlights how dangerously malleable and manipulable the right-to-control theory is.

2. The doctrine also enables the government to criminalize behavior that is routine in commercial negotiations where one party has an informational advantage, even if the party had no legal duty to disclose the withheld information. In many commercial transactions, one or both sides have information the other side doesn't have. Sometimes, of course, there is a duty to disclose such information—a specific statutory duty applicable to the type of transaction, like a "lemon law" for used car sales, or a common-law fiduciary duty requiring, for example, a financial adviser to disclose a financial interest in a transaction he proposes to his client. The Second Circuit's precedents, however, do not limit right-to-control fraud to such circumstances; they hold that "[a] 'cognizable harm occurs'" whenever the defendant deprives the victim of "'information necessary to make discretionary economic decisions.'" Pet.App.17a. But many commercial transactions involve sophisticated arm's-length counterparties who are permitted by law to use proprietary information to their advantage in negotiations, or even to engage in other, more affirmatively deceitful tactics like bluffing. Accordingly, if this

Court approves the right-to-control theory, much common and currently legal commercial behavior would be criminalized.

For instance, suppose two parties to litigation are engaged in settlement negotiations. The defendant estimates that the value of the plaintiff's claim is $5 million but says he will only pay $3 million. The defendant's $5 million calculation is surely "potentially valuable economic information" that the plaintiff would find useful in making a "discretionary economic decision" about how much to accept to settle the suit. But there is no duty to disclose this information. Indeed, even if the defendant affirmatively makes a misleading statement in the negotiations, that should not constitute criminal property fraud. Suppose that, instead of saying nothing about the $5 million estimate, the defendant falsely states that he thinks the claim is only worth $3 million. Imposing a duty to disclose the true information would cause a sea change in the U.S. legal system (and surely make civil litigation more difficult to settle). Yet under the right-to-control doctrine, a litigant in settlement negotiations who sends an email that omits confidential information undermining its own negotiating position or makes a statement about its thinking that is potentially misleading could be committing federal property fraud.

Or suppose the CEO of a struggling company arranges a deal to sell the company's commercial real estate. The CEO persuades a potential buyer to take him on as a partner as part of its offer to purchase the property by claiming the company will not otherwise sell. At the same time, he also falsely asserts to his company's board that the buyer will not complete the

sale without his involvement. The company agrees to the deal and sells the property for 33% more than its target price. This conduct is surely a breach of the CEO's duty to his employer and may provide the employer with a basis to fire the CEO. But it is not honest-services fraud, because there is no undisclosed bribe or kickback, as required by *Skilling*. And it should not be property fraud, because the selling company's money or property has not been harmed, as the Seventh Circuit held in reversing a conviction based on these facts. *See United States v. Weimert*, 819 F.3d 351, 353-54 (7th Cir. 2016). The court explained that "the only ways in which [the defendant] misled anyone concerned … negotiating positions. He led the successful buyer to believe the seller wanted him to have a piece of the deal. He led the seller to believe the buyer insisted he have a piece of the deal. All the actual terms of the deal, however, were fully disclosed and subject to negotiation." *Id.* at 354. The prosecution theory was untenable, because it would permit the fraud statutes "to criminalize deception about a party's negotiating positions." *Id*. at 357.

Yet under the right-to-control doctrine, the government could prosecute the CEO for property fraud, even though there was no contemplated or actual harm to the selling company's property interests. The government could do so because the company has been deprived of potentially valuable economic information—the fact that the deal could have been effectuated without the CEO's participation—which is enough under the doctrine to establish property fraud.

3. And for that matter, the right-to-control doctrine, if endorsed, could criminalize a wide variety of

sales practices. In *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), for example, the defendants used saleswomen posing as tourists to trick businessmen into coming into the defendants' nightclubs. The defendants admittedly failed to disclose the relationship between the saleswomen and the clubs—thereby depriving customers of information. The prosecution argued that such deception was itself sufficient for conviction: "In the government's view, the jury could convict the defendants of wire fraud based on those lies alone." *Id.* at 1311.

The Eleventh Circuit wisely rejected that theory of guilt, reversed the conviction, and remanded for a new trial. *Id.* at 1314-16; *see also United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (Sutton, J.) (holding that the fraud statutes do not "stretch ... to cover the right to accurate information before making an otherwise fair exchange.").

But if the right-to-control doctrine were valid, then the defendants in such cases would be guilty based merely on the fact that they had withheld information from the other party in the transaction—and had therefore deprived the counterparty of the right to make "an informed economic decision about what to do with its money or property." *United States v. Gatto*, 986 F.3d 104, 126 (2d Cir. 2021). For that matter, a business would similarly be guilty of fraud for advertising a certain price as a "great deal" while failing to disclose that it planned to lower the price even further the next week. The right-to-control doctrine converts puffery into fraud.

* * *

These concerns are not merely hypothetical. As the above cases demonstrate, and Amicus Curiae New York Council of Defense Lawyers further details, the federal government has repeatedly used the "right to control" / "right to accurate information" theory to prosecute an enormously wide variety of conduct. Much of that conduct does not involve a scheme to obtain money or property. Simply put, much of that conduct is not actually fraud.

These prosecutions typify how the right-to-control theory's overbroad definition of "property" creates a trap for the unwary and places too much "power in the hands of the prosecutor." *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). This Court's decisions in *McNally*, *Cleveland*, and *Kelly* have set clear limits on the scope of the federal property fraud statutes. They are limited to schemes to obtain money or property; they are not all-purpose weapons to enforce "grandiloquen[t]" notions about "'standards of moral uprightness, fundamental honesty, fair play and right dealing.'" *Skilling*, 561 U.S. at 418 (Scalia, J., concurring in judgment). This Court should reinforce the limits it set in *McNally*, *Cleveland*, and *Kelly*, because otherwise virtually any deceit could be deemed a federal fraud.

III. THE CONVICTIONS MUST BE REVERSED

If this Court disavows the right-to-control doctrine, then the convictions must be reversed, because the government failed to prove a scheme to obtain property, and the defendants are entitled to a judgment of acquittal. The sole theory of property alleged in the indictment or at trial was that the defendants' scheme "defraud[ed] [Fort Schuyler] of its right to control its

assets" by "secretly tailor[ing]" the RFP so COR "would be favored to win in the selection process." JA31-33.

The defendants repeatedly objected that the government's theory of the case was invalid. The district court rejected those arguments, explicitly relying on the right-to-control doctrine. It relied on Second Circuit law: "In a right-to-control case the property interest at issue is the information that was misrepresented or withheld." C.A.App.996 (citing *Wallach*, 935 F.2d at 463, and *Finazzo*, 850 F.3d at 110). It consequently excluded defense evidence that there was a fair bargain and no property deprivation.

Accordingly, because of the government's charging decision and the district court's rulings, the only theory of fraud presented to the jury was the right-to-control theory. The district court instructed the jury that "property" includes "intangible interests such as the right to control the use of one's assets," which "is injured" when the purported victim "is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." JA41. And the district court rejected a proposed defense instruction that there is no fraud where the putative victim receives the full benefit of the bargain. The Second Circuit likewise affirmed the conviction based entirely on the right-to-control doctrine. Pet.App.3a-5a, 16a, 26a.

In short, the right-to-control doctrine was the sole basis upon which the defendants were charged, tried, and convicted. If this Court rejects the misguided right-to-control theory, then the convictions must be

reversed, and the defendants are entitled to a judgment of acquittal.

CONCLUSION

This Court should reverse the decision below and remand the case with instructions to enter a judgment of acquittal.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Respondents Steven Aiello and Joseph Gerardi

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