No. 15-1140

IN THE

Supreme Court of the United States

MICHAEL BINDAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Criminal Defense Lawyers ("NACDL"), New York State Association of Criminal Defense Lawyers ("NYSACDL"), and New York Council of Defense Lawyers ("NYCDL"), submit this brief as *amici curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF *AMICI CURIAE*

NACDL is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime. NACDL has a nationwide membership of approximately 10,000, and its many state, provincial, and local affiliate organizations encompass up to 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of NACDL's intent to file this brief at least ten days before the due date. The parties have provided their written consent to the filing of this brief, and copies have been filed with the Clerk's Office.

nationwide bar association for public defenders and private criminal defense lawyers. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL frequently appears as *amicus curiae* before this Court and other federal and state courts, offering its perspective in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NYSACDL, a NACDL affiliate and New York's largest private criminal bar group, is a nonprofit membership organization of more than 800 criminal defense attorneys practicing throughout New York. NYSACDL helps its members better serve their clients and works to enhance their professional standing. NYSACDL strives to protect individual rights and liberties for all. Committed to advancing the fair and efficient administration of justice, NYSACDL regularly files *amicus* briefs in federal and state courts, assisting in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the justice system at large.

NYCDL is a not-for-profit professional association of approximately 250 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the per-

spective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited in cases such as *Luis v. United States*, No. 14-419, slip op. at 15 (Mar. 30, 2016), *Kaley v. United States*, 134 S. Ct. 1090, 1104, 1112 (2014) (opinion of the Court and Roberts, C.J., dissenting), *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

Amici have a particular interest in this case because they are committed to combatting the type of statutory expansion reflected in the decision below and promoting clear standards for the imposition of criminal liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal mail and wire fraud statutes require that the defendant seek to "obtain[]" "money or property" through fraud. 18 U.S.C. §§ 1341, 1343. The Second Circuit upheld petitioner Michael Binday's conviction under those provisions for submitting life insurance applications that allegedly included false representations. The government offered no proof that the insurers actually lost money on the policies as a result of Binday's misstatements, Pet. 2, and the jury was explicitly instructed that the requisite "[e]conomic harm is not limited to a loss on the company's bottom line," Pet. App. 40.

The Second Circuit upheld petitioner's conviction on the ground that he deprived the insurance com-

panies of their right to make "an informed economic decision about what to do with [their] money or property." Pet. App. 39. The court of appeals' decision was based on an anachronistic line of Second Circuit precedent, dating back to *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), holding that a defendant can be convicted of "money or property" fraud, even when he did not obtain any money or property, so long as he denied the alleged victim the "right to control" its property. *Id.* at 462-63; *see, e.g.*, *United States v. Carlo*, 507 F.3d 799, 801-02 (2d Cir. 2007) (per curiam); *United States v. Dinome*, 86 F.3d 277, 281-85 (2d Cir. 1996).

The decision below reaffirming the *Wallach* theory conflicts with multiple decisions of other circuits, including most recently the decision of the Sixth Circuit in *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014), which expressly rejected a "right to control" theory of money or property fraud. *Id.* at 591; *see* Pet. 18-23. *Wallach*'s approach also cannot be reconciled with more recent decisions of this Court in *Cleveland v. United States*, 531 U.S. 12 (2000), *Skilling v. United States*, 561 U.S. 358 (2010), and *Sekhar v. United States*, 133 S. Ct. 2720 (2013), which make clear that the mail and wire fraud statutes protect only traditional, transferrable "property" interests—i.e., the type of property that can be "obtained"—and do not reach schemes to deprive an individual or entity of amorphous, intangible property rights like the "right to control." *See* Pet. 23-30.

Those reasons more than suffice to justify this Court's intervention. But the decision below is especially troubling because it reflects a broader pattern

of overcriminalization and prosecutorial overreach. The Second Circuit's "right to control" theory impermissibly expands the scope of the federal mail and wire fraud statutes—already among the broadest and most frequently charged federal criminal offenses—far beyond any limits discernible from the text or other indicators of congressional intent. At the very least, the twin principles of statutory interpretation intended to protect against precisely that result—the rule of lenity and the clear statement requirement—compel rejecting the Second Circuit's expansive fraud theory here.

This Court should accordingly grant certiorari to resolve the circuit conflict and bring the Second Circuit's interpretation of the mail and wire fraud statutes in line with those statutes' text and this Court's precedent.

ARGUMENT

A. A Defendant Does Not "Obtain" Property Merely By Depriving The Victim Of His "Right To Control" Property

1. The federal mail and wire fraud statutes prohibit engaging in a "scheme or artifice" to (i) "defraud" or (ii) "obtain[] money or property" through fraud. 18 U.S.C. § 1341 (mail fraud); *id.* § 1343 (wire fraud). While the statutes might appear to criminalize two distinct acts—a scheme to defraud *or* a scheme to obtain money or property through fraud—this Court has held that "the second phrase simply modifies the first," making it "unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involv-

ing money or property." *Cleveland*, 531 U.S. at 26. Thus, "obtaining money or property" is in all cases "a necessary element of the crime." *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

Under that statutory text, it is not enough merely to show that the victim was *deprived* of the right to control his property. The government instead must prove that the defendant himself *obtained* the victim's right to control—a circumstance that is difficult if not impossible to envision.

Second Circuit decisions from *Wallach* through the decision below have literally written the "obtain" element out of the mail and wire fraud statutes. The Second Circuit has not been coy on this point: "[I]t is sufficient that a defendant's scheme was intended to deprive another of property rights, *even if* the defendant did not physically 'obtain' any money or property by taking it from the victim." *United States v. Males*, 459 F.3d 154, 158 (2d Cir. 2006) (emphasis added); *see Porcelli v. United States*, 404 F.3d 157, 162 (2d Cir. 2005) (same).

2. The Second Circuit's error in refusing to enforce the statute's "obtain" element is sharply underscored by precedent of this Court decided since the Second Circuit started down the wrong path in *Wallach*.

a. In *Cleveland*, the Court explained that the fraud statutes protect only the types of property interests that have "long been recognized as property" and do not go so far as to protect "intangible rights of allocation, exclusion and control." 531 U.S. at 23 (quotation omitted). In other words, "property" un-

der the mail and wire fraud statutes is limited to "traditional concepts of property," *id.* at 24, which is precisely why "obtaining money or property" is "a necessary element of the crime," *Carpenter*, 484 U.S. at 25. The decision below cannot be squared with *Cleveland* for the reasons already explained—Binday did not (and could not have) himself obtained the "property" of which the Second Circuit believed his alleged victims were deprived, i.e., the right to make "an informed economic decision about what to do with [their] money or property." Pet. App. 39.

b. *Skilling* makes the same point in a different way. *Skilling* contrasted so-called "honest-services fraud," 18 U.S.C. § 1346, with traditional "money or property" frauds, explaining that in the latter category of cases, "the victim's loss of money or property *supplied the defendant's gain, with one the mirror image of the other*." 130 S. Ct. at 2926 (emphasis added). Honest-services fraud, by contrast, "targeted corruption that lacked similar symmetry." *Id. Skilling* thus requires that a traditional "money or property" fraud involve not only a deprivation (or attempted deprivation) of the victim's property, but the defendant's gain *of the same property*.

The decision below cannot be reconciled with that "symmetrical" view of the mail and wire fraud statutes. According to the Second Circuit, a defendant commits fraud simply by "denying the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." Pet. App. 15 (quoting *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998)). But nobody contends that "the victim's loss of" that

right "supplied the defendant's gain" in this case. *Skilling*, 130 S. Ct. at 2926. Even if "the ability to make an informed economic decision about what to do with his money or property," or "the right to control money or property," Pet. App. 39, could be considered "money or property" of which the insurers were purportedly *deprived*, Binday himself *obtained* something completely different, i.e., commissions on the policies he procured, Pet. App. 8.[2] Such asymmetry is essentially unavoidable when the victim's alleged loss is the right to control, because that right is not something the defendant can plausibly obtain for himself.

c. Finally, the Court's decision in *Sekhar* confirms beyond any possible doubt that the "right to control" property is not the sort of "money or property" to which the mail and wire fraud statutes refer.

Sekhar addressed the meaning of "property" under the extortion provision of the Hobbs Act, which defines "extortion" as "the *obtaining* of property from

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[2] The insurance companies did not "lose" those commissions in the relevant sense, because they received premium payments in exchange for paying the commission (as well as a death benefit to the beneficiary), as is true of any policy. And the Second Circuit's decision in any event did not rest on Binday's obtaining of these commissions. *See* Pet. App. 32 ("[W]hether payment of commissions would constitute a standalone harm absent a showing of economic difference between STOLI and non-STOLI policies is of no consequence for the instant case."). It turned instead on Binday having deprived the insurers of "economically valuable information," *id.* and the insurers' purported "expectation of reduced profitability" from STOLI policies as compared to non-STOLI policies, Pet. App. 22.

another." 18 U.S.C. § 1951(b) (emphasis added). Reversing a Second Circuit decision based on Hobbs Act precedent akin to the "right to control" precedent at issue here, the Court explained that "[o]btaining property requires 'not only the deprivation *but also the acquisition of property*.'" 133 S. Ct. at 2725 (emphasis added) (quoting *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404 (2003)). "That is, it requires that the victim 'part with' his property, and that the extortionist 'gain possession' of it." *Id.* (citations omitted). And because the Hobbs Act requires that property be "obtained," only *the kind of property that is capable of being obtained* counts as "property" under the Hobbs Act: "The property extorted must … be *transferable*—that is, capable of passing from one person to another." *Id.*

The Court acknowledged that the intangible "property" at issue in *Sekhar*—an attorney's "right to make a recommendation"—could be considered "property" in some abstract sense, in that one could "define[] property to include anything of value." *Id.* at 2726 n.5. But that right nonetheless did not qualify as "property" *under the Hobbs Act*, because "it cannot be transferred" and thus "cannot be the object of extortion under the statute." *Id.*

Sekhar's instruction that not every conceivable notion of property counts as "property" under the Hobbs Act applies equally to the fraud statutes, which similarly prohibit schemes to "*obtain* money or property." Thus, under *Sekhar*'s incontrovertible logic, those statutes can only reach those types of "property" that are "transferable" and "capable of passing from one person to another." *Id.* at 2725.

It is obvious that a person's "ability to make an informed economic decision about what to do with his money or property," Pet. App. 39, is not the sort of property that is "transferrable" or "capable of passing from one person to another." 133 S. Ct. at 2725. The "right to control" one's own property is certainly something that an alleged fraud victim can *lose*, but losing the right does not mean it was transferred to the defendant (or to anyone else). The "ability to make an informed economic decision" is, in short, not "money or property" that can be "obtained," and thus not a proper subject of the "money or property" fraud provisions at issue here.

3. It is no surprise that multiple other circuits have recognized the flaw in the Second Circuit's approach, emphasizing that the mail and wire fraud statutes, by criminalizing schemes "to obtain money or property," clearly "contemplate a transfer of some kind." *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993); *see Monterey Plaza Hotel Ltd. Pshp. v. Local 483 of the Hotel Emps. Union*, 215 F.3d 923, 926-27 (9th Cir. 2000) ("The purpose of the mail fraud and wire fraud proscriptions is to punish wrongful transfers of property from the victim to the wrongdoer, not to salve wounded feelings."); *United States v. Baldinger*, 838 F.2d 176, 180 (6th Cir. 1988) (§ 1341 "was intended by the Congress only to reach schemes that have as their goal the transfer of something of economic value to the defendant" (quotation omitted)).

Most recently, and most directly applicable here, the Sixth Circuit has held that the "right to control" property and "the right to accurate information" re-

lated to that property are "not the kind of 'property' rights safeguarded by the fraud statutes." *Sadler*, 750 F.3d at 591; *see* Pet. 18-20. That conclusion follows directly from this Court's precedent. This Court should accordingly grant certiorari to resolve this circuit conflict, and—much like it did in *Sekhar*—bring the Second Circuit's interpretation of the fraud statutes in line with their text and this Court's precedent.

B. The Decision Below Exemplifies A Broader Pattern Of Overcriminalization Through Expansive Interpretation Of Federal Criminal Laws

For the reasons explained in the petition and above, the Second Circuit's "right to control" theory stretches the fraud statutes beyond the breaking point. Unfortunately, the type of overreaching reflected in this case is not uncommon. In recent years, this Court has confronted—and rejected—several similarly overbroad readings of federal criminal statutes pressed by federal prosecutors and endorsed by the lower courts.

For example, in *Yates v. United States*, 135 S. Ct. 1074 (2015), the defendant, a commercial fisherman, caught undersized red grouper in federal waters in violation of conservation regulations and "ordered a crew member to toss the suspect catch into the sea." *Id.* at 1078-79 (plurality op.). Based on that conduct, Yates was convicted of violating 18 U.S.C. § 1519, a provision of the Sarbanes-Oxley Act that makes it a crime to conceal or destroy "any record, document, or tangible object with the intent to impede, obstruct or influence" a federal investigation. But this Court

"reject[ed] the Government's unrestrained reading" of "tangible object" to include fish. *Id.* at 1081. In doing so, the plurality noted that "[i]t is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Id.* at 1087.

In *Bond v. United States*, 134 S. Ct. 2077 (2014), the defendant, after learning that her husband had carried on an affair with her best friend, spread harmful chemicals on the friend's car door, mailbox, and door knob, causing minor injuries. *Id.* at 2085. On that basis, Bond was convicted of violating a provision of the Chemical Weapons Convention Implementation Act of 1998 that forbids any person knowingly to "possess[] or use ... any chemical weapon." 18 U.S.C. § 229(a)(1). Again, the Court rejected the government's sweeping interpretation of the statute, this time reasoning that it would "dramatically intrude[] upon traditional state criminal jurisdiction." 134 S. Ct. at 2088 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

Yates and *Bond* are among the more recent (and egregious) examples of prosecutorial overreach, but they are far from the only such cases to have found their way to this Court. *See, e.g.*, *Hammerschmidt v. United States*, 265 U.S. 182 (1924); *McBoyle v. United States*, 283 U.S. 25 (1931); *Williams v. United States*, 458 U.S. 279 (1982); *McNally v. United*

States, 483 U.S. 350 (1987); *Cleveland*, 531 U.S. 12; *Sekhar*, 133 S. Ct. 2720.[3]

To be sure, in many cases implicating overcriminalization concerns, the defendant's conduct can be described as in some sense "wrong." But not everything that is wrong is a crime; civil penalties and tort liability suffice to address most forms of wrongdoing. Nor does every instance of dishonesty amount to criminal mail or wire fraud, despite the great frequency with which those offenses are charged and the wide range of conduct they are used to target.

Moreover, even if certain frauds that are not covered by the federal "money or property" fraud statutes are arguably significant enough to warrant criminal punishment, that is no reason to read *federal* criminal law beyond its textual bounds, when

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[3] In fact, the court of appeals' endorsement of the "right to control" theory is not even the only instance of pernicious statutory expansion *in this case*. The Second Circuit also held that Binday's co-defendant, Mark Resnick, was properly convicted of conspiracy to obstruct justice in violation of 18 U.S.C. § 1512(c) & (k), because a future grand jury proceeding was objectively foreseeable—if not subjectively contemplated by Resnick—when he had documents removed from his computer hard drive. Pet. App. 59-60. That holding substantially dilutes § 1512(c)'s mens rea requirement, transforming a statute that targets those who act "corruptly" into a proscription imposing liability on a negligence-type standard that encompasses a vastly greater range of conduct. *See* Pet. for Cert. at 11-18, *Resnick v. United States*, No. 15-8582; *see also* Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, Wall Street Journal (Sept. 27, 2011), *available at* http://www.wsj.com/articles/SB10001424053111904060604576570801651620000 (discussing problems associated with "weak" means rea requirements).

states are fully able to decide for themselves whether such conduct should be subject to the state's own criminal code. Indeed, the effect of the Second Circuit's expansive interpretation of the federal criminal fraud statutes is to federalize traditional areas of state law. As Judge Sutton explained for the court in *Sadler*, "[l]ightly equating deceptions with property deprivation … would occupy a field of criminal jurisdiction long covered by the States, a consideration that has prompted the [Supreme] Court to resist like-minded readings of 'scheme to defraud' before." 750 F.3d at 591 (citing *Cleveland*, 531 U.S. at 24).

The consequences of the type of statutory expansion at issue here are substantial and concrete. Not only does excessively broad and creative application of federal criminal laws expose defendants to liability for conduct few would anticipate falls within the provisions' reach; as the Chief Justice has observed, when criminal statutes are afforded their broadest conceivable interpretation, federal prosecutors have "extraordinary leverage" to charge aggressively and extract guilty pleas. Transcript of Oral Argument at 31, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451); *cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) (breadth and depth of criminal law allow prosecutors to threaten multiple charges with higher sentences, and to use potential penalty "as a bargaining chip, an inducement to plead guilty"). That dynamic makes it all the more important for the Court to enforce the bounds set by federal criminal statutes' text, especially because "for the most part, prosecutorial discretion in charging and plea

bargaining is unreviewable." Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in A Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1936 (2006).

C. The Second Circuit's Reading Of The Federal Criminal Fraud Statutes Conflicts With The Rule Of Lenity And Clear Statement Principles

As explained earlier, the plain meaning of the statutory text and this Court's precedent compel rejecting the Second Circuit's reading of the federal criminal fraud statutes. But even if that court's construction were otherwise plausible, it would nevertheless be precluded by two related canons of construction this Court has invoked with increasing frequency in recent years to deal with vaguely or broadly worded federal criminal statutes: the rule of lenity and the requirement of a clear statement to alter the federal-state balance. *See Yates*, 135 S. Ct. at 1088 (lenity); *Bond*, 134 S. Ct. at 2089-90 (clear statement).

1. a. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008); *see McNally*, 483 U.S. at 359-60 ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language."); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("penal laws are to be construed strictly"). In other words, "the tie must go to the defendant." *Santos*, 553 U.S. at 514.

The rule of lenity serves several important purposes. By helping to ensure that the public is on notice of the meaning of criminal statutes, the rule of lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *Id.*; *see United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute."). The rule guards against "the risk of selective or arbitrary enforcement," *United States v. Kozminski*, 487 U.S. 931, 952 (1988), and "foster[s] uniformity in the interpretation of criminal statutes," *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). It acknowledges that "[b]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348; *see United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."). And it "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *Santos*, 553 U.S. at 514.

b. The clear statement rule, meanwhile, recognizes that "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States," a policy "rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines"

like *Younger* abstention. *Bass*, 404 U.S. at 349. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Expansive federal criminal laws have the potential to "alter sensitive federal-state relationships" and "overextend limited federal police resources," and the clear statement rule ensures that those considerations are weighed by Congress, not the courts. *Rewis v. United States*, 401 U.S. 808, 812 (1971).

2. The Court has on multiple occasions applied these "two wise principles" of statutory construction, *Bass*, 404 U.S. at 347, to curb impermissibly broad readings of the federal fraud statutes.

In *McNally*, the Court rejected the government's theory that § 1341 proscribed schemes to deprive others of the intangible right to honest services. 483 U.S. at 352, 361. After reviewing the statute's text and history, *id.* at 356-59, the Court reiterated that "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language," *id.* at 359-60. Thus, "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, [the Court] read § 1341 as limited in scope to the protection of property rights," instructing that "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

In *Cleveland*, the Court rejected the government's theory that the defendant committed mail fraud by depriving the State of Louisiana of its "right to control the issuance, renewal, and revocation of video poker licenses." 531 U.S. at 23. The Court dispatched with that view "not simply because [it] stray[ed] from traditional concepts of property," but also "because it invite[d] [the Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. That is, "[e]quating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities," and "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Id.* (quoting *Jones v. United States*, 529 U.S. 848, 858 (2000)). The Court further explained that, "to the extent that the word 'property' is ambiguous as placed in § 1341," the rule of lenity required the Court to adopt the narrower construction. *Id.* at 25. Indeed, the Court deemed application of the rule of lenity "especially appropriate in construing § 1341 because … mail fraud is a predicate offense under RICO and the money laundering statute." *Id.* (citations omitted).

The Court also cited the rule of lenity when interpreting § 1346 in *Skilling*, "[h]olding that honest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks" and "resist[ing] the Government's less constrained construction absent Congress' clear

instruction otherwise." 561 U.S. at 411. The Court concluded by repeating *McNally*'s direction that "[i]f Congress desires to go further … it must speak more clearly than it has." *Id.* (quoting *McNally*, 483 U.S. at 360).

3. These principles apply with full force here, and require rejection of the "right to control" theory of money and property fraud that has too long prevailed in the Second Circuit.

To start, it is far from clear (at the very least) that the mail and wire fraud statutes' prohibition of "money or property" fraud protects the right to valuable economic information. "[T]he statute[s] [are] 'limited in scope to the protection of property rights,' and the ethereal right to accurate information doesn't fit that description," *Sadler*, 750 F.3d at 591 (quoting *McNally*, 483 U.S. at 360)—certainly not with sufficient clarity to subject a person to criminal liability. This Court's precedent establishes a comparably clear line regarding what the law prohibits—fraudulent schemes in which the victim's loss of tangible, transferrable property supplies the defendant's gain. The Second Circuit's amorphous rule pulls into the heartland of the mail and wire fraud statutes cases that are at best at the periphery of what Congress has deemed criminal. That result—which merely empowers federal prosecutors at the expense of Congress and the people—is precisely what the rule of lenity is designed to prevent.

The decision below also implicates the federalism concerns underlying the clear statement principle recently reiterated in *Bond*. Binday's fraud conviction was predicated on his submission of insurance

applications containing false statements, and regulation of insurance is a matter traditionally left to the states. *See SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 69 (1959). As the Sixth Circuit explained in *Sadler*, "[f]inding a property deprivation based on [Binday's] lies 'would subject to federal [mail and wire] fraud prosecution a wide range of conduct traditionally regulated by state and local authorities.'" 750 F.3d at 591 (quoting *Cleveland*, 531 U.S. at 24). And the Second Circuit's "right to control" theory is not limited to the field of insurance—it is so broad as to reach almost any type of economic transaction, and thus will inevitably upset the traditional federal-state balance.

* * * *

This Court's decisions at least since *Cleveland* have given the Second Circuit more than sufficient basis for righting the wrong turn it took in *Wallach* 25 years ago. But as the decision below exemplifies, the Second Circuit seems to be uninterested in reconciling its mail and wire fraud precedent with this Court's decisions, not to mention the plain statutory text. As in *Sekhar*, correction will have to come from this Court. Certiorari should be granted.

CONCLUSION

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

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