No. 21-1170

IN THE
Supreme Court of the United States

LOUIS CIMINELLI,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

TARA S. MORRISSEY
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The "Right to Control" Theory of Mail and Wire Fraud Conflicts with the Statutory Text. 4

II. Adopting the "Right to Control" Theory of Mail and Wire Fraud Would Lead to Harmful Consequences. 9

A. State courts have carefully crafted the scope and remedies for civil fraudulent inducement claims. 9

B. The federal government's position would criminalize many fraudulent inducements, yielding harmful consequences. 13

III. The Court Should Reject the Right-to-Control Theory and Limit the Mail and Wire Fraud Statutes to Core Fraud 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Amgen Inc. v. Connecticut Retirement Plans & Trust Funds, 568 U.S. 455 (2013) 7

Barr v. Dyke, 49 A.3d 1280 (Me. 2012) 12

Cerabio LLC v. Wright Medical Technology, Inc., 410 F.3d 981 (7th Cir. 2005) 11, 12

Cleveland v. United States, 531 U.S. 12 (2000) 15

McDonnell v. United States, 579 U.S. 550 (2016) 18

Neder v. United States, 527 U.S. 1 (1999) 2, 5, 6

Schmuck v. United States, 489 U.S. 705 (1989) 14

SodexoMAGIC, LLC v. Drexel University, 24 F.4th 183 (3d Cir. 2022) 10, 13

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) 14

United States v. Bruchhausen, 977 F.2d 464 (9th Cir. 1992) 17, 18

United States v. Finazzo, 850 F.3d 94 (2d Cir. 2017) 7

United States v. Litvak, 808 F.3d 160 (2d Cir. 2015) 7

United States v. Sadler, 750 F.3d 585 (6th Cir. 2014) 17, 20

United States v. Weaver, 860 F.3d 90 (2d Cir. 2017) 13

Warner Theatre Associates Ltd. Partnership v. Metropolitan Life Insurance Co., 149 F.3d 134 (2d Cir. 1998) 11

STATUTES

18 U.S.C. § 1341 4

18 U.S.C. § 1343 4

18 U.S.C. § 1961(1) 18-19

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of vital concern to the nation's business community.

The Chamber's members have an interest in ensuring that courts properly interpret the federal mail and wire fraud statutes. Although the Chamber takes no position on whether Mr. Ciminelli's conduct in this case rises to the level of mail or wire fraud, the Chamber opposes the government's expansive "right to control" theory. That approach conflicts with the statutory text, which requires a scheme to obtain property, not a scheme that affects in the abstract one's "right to control" property. The government's approach would transform humdrum breach-of-contract disputes into federal criminal prosecutions. Further, because mail

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[1] Counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and wire fraud are RICO predicates, creative plaintiffs' lawyers could use the government's interpretation to transform every breach-of-warranty dispute into a racketeering claim. The Chamber has an interest in ensuring that this Court rejects the government's atextual and overbroad interpretation of federal criminal law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should reject the government's "right to control" theory of mail and wire fraud. To begin, it has no basis in the statutory text. The mail and wire fraud statutes require a scheme for obtaining property. The government contends that this element is satisfied if the defendant in some sense deprived the victim of the "right to control" property. But the government's position conflates materiality and property. As this Court has held, mail and wire fraud require a material misrepresentation. *Neder v. United States*, 527 U.S. 1, 25 (1999). A "false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* at 16 (alteration and internal quotation marks omitted). Under the government's theory, a victim has been deprived of property when a false statement has sufficiently influenced the victim's decisionmaking regarding property. This proposed requirement is indistinguishable from the materiality requirement. Rather than interpreting the property requirement to mean "materiality," the Court should interpret the

requirement in its ordinary sense—as actually obtaining some *thing*.

The government's position would transform ordinary civil disputes into federal crimes. State courts recognize the tort of fraudulent inducement. But to protect freedom of contract and avoid transforming every contract claim into a tort claim, courts restrict fraudulent inducement in several respects. Although state law varies, many states bar fraudulent inducement claims when the alleged fraud concerns the specific contractual promises. Many states also bar fraudulent inducement claims when the contract includes language stating that the parties did not rely on non-contractual representations.

The right-to-control theory would blow through all those carefully crafted restrictions by transforming nearly all fraudulent inducement claims into federal crimes. Indeed, the right-to-control theory would transform many purported frauds that do *not* rise to the level of fraudulent inducement into federal crimes. As a result, if the government's theory prevailed, negotiators in business deals would have to take extreme precautions to avoid the prospect of FBI investigations if a deal does not proceed as hoped. Arbitrary enforcement would be inevitable. And because mail and wire fraud are RICO predicates, plaintiffs' lawyers could transform garden-variety contract disputes into allegations of racketeering.

The Court should reject the right-to-control theory. And the Court should not permit the government to circumvent this decision and weaken the intent and materiality requirements of fraud by replacing them

with the intangible right to control one's property. If the victim obtains what the victim paid for, the defendant has not "obtained property" from the victim, regardless of whether the victim was deprived of information that was not material or whose deprivation did not show fraudulent intent.

ARGUMENT

I. The "Right to Control" Theory of Mail and Wire Fraud Conflicts with the Statutory Text.

The Court should reject the "right to control" theory because it has no basis in the text of the mail and wire fraud statutes. The statutes require a scheme for *obtaining* property—not in some sense affecting another person's "right to control" their property. The government's theory conflates the "property" element—which concerns the thing obtained—with the "materiality" element—which concerns the information used to obtain it.

The mail and wire fraud statutes criminalize fraudulent schemes "for obtaining money or property" via mail or wire. 18 U.S.C. §§ 1341, 1343. Because "a defining feature of most property is the right to control the asset in question," the Second Circuit has taken the view that "property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets." Pet. App. 16a (quotation marks omitted). Hence, the Second Circuit "has endorsed a 'right-to-control theory' of wire fraud that 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.'" *Id.* (citation omitted).

The Second Circuit's theory conflicts with traditional common-law principles. As Petitioner explains, the traditional triumvirate of property rights are the rights to exclude, to use, and to dispose. Pet. Br. 20. This traditional triumvirate does not include the right to accurate information in connection with a transaction. The statutory requirement of obtaining "property" from the victim requires stripping the victim of a traditional property right. When that does not occur, the defendant, at most, engages in deception—not criminal fraud.

Moreover, the Second Circuit's interpretation conflates the "materiality" requirement with the "property" requirement. Although the mail and wire fraud statutes do not expressly recite that materiality is an element of the offense, this Court has nonetheless held that "materiality of falsehood is an element" of those offenses. *Neder*, 527 U.S. at 25. The Court reasoned that when the mail and wire fraud statutes were enacted, "the well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." *Id.* at 22. Thus, the mail and wire fraud statutes incorporate that common-law materiality requirement: "[U]nder the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes." *Id.* at 23. The Court further noted that "a false statement is material if it has a natural tendency to influence, or is

capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* at 16 (alteration and internal quotation marks omitted).

The "materiality" requirement articulated in *Neder* is virtually identical to the Second Circuit's criterion for satisfying the "right to control" theory. "Materiality" requires a statement that "has a natural tendency to influence, or is capable of influencing," a decision. *Id.* (alteration and internal quotation marks omitted). The right-to-control theory requires "withholding or inaccurate reporting of information that could impact on economic decisions." Pet. App. 16a.

In virtually every case, proving "materiality" will inherently suffice to prove the "property" requirement, and vice versa. Suppose the government proves that the defendant made a misstatement that is "capable of influencing" a decision (the materiality requirement). Almost by definition, this will show that the misstatement could "impact on economic decisions." And, according to the government, this is enough to show that the defendant obtained the "right to control" property—thus satisfying the statutory "property" element. In this way, the government's right-to-control theory combines two different statutory requirements—materiality and property—into one.

Recognizing this problem, the Second Circuit has indicated that the right-to-control requirement is marginally more stringent than the materiality requirement. According to the Second Circuit, the concept of materiality embedded in the right-to-control doctrine "is distinct from the separate requirement under the mail and wire fraud statutes that the

defendant's misrepresentations be material." *United States v. Finazzo*, 850 F.3d 94, 109 n.16 (2d Cir. 2017). The difference, criminal defendants and juries are told, is that the right-to-control version of materiality requires that the statement "be capable of resulting in tangible harm," while the materiality version of materiality requires only that the statement be "capable of influencing" a decision. *Id.* (internal quotation marks omitted). "It is certainly possible for a misrepresentation to influence decisionmaking in a manner that nevertheless does not produce tangible harm." *Id.*

This reasoning does not carry the day. First, notwithstanding the Second Circuit's protestations, there is no meaningful distinction between these standards. Materiality is an objective standard; it requires a showing that a statement is objectively capable of influencing a decision. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013); *United States v. Litvak*, 808 F.3d 160, 184 (2d Cir. 2015). If a misstatement is incapable of producing tangible economic harm—in other words, if it is *harmless*—why would it be objectively capable of influencing the relevant decision? The only reason a misstatement would be objectively capable of influencing a relevant decision (*i.e.*, the materiality standard) is that harm might result from not knowing the full truth (*i.e.*, the right-to-control standard). Thus, the two standards mean the same thing. Even if there were some miniscule distinction between the two standards, a jury is not likely to understand the distinction.

To a similar end, the Second Circuit has opined that mail fraud occurs when the defendant's scheme deprives the victim of "information necessary to make discretionary economic decisions," but it is "not sufficient … to show merely that the victim would not have entered into a discretionary economic transaction but for the defendant's misrepresentations." Pet. App. 17a (quotation marks omitted). Again, this distinction is non-existent. *Amicus* is not reciting the standard lawyerly refrain that because the line is hard to draw, there should be no line. Instead *amicus* is arguing that *there is no line*. If "the victim would not have entered into a discretionary economic transaction but for the defendant's misrepresentations," this *means* that the victim lacked the "information necessary to make discretionary economic decisions." *Id.* (quotation marks omitted). It is difficult to imagine any set of facts which satisfies one of those standards but not the other. Certainly, the Second Circuit has never pointed to any.

Even assuming that there were some real distinction between these standards, the Second Circuit's position would still render the materiality requirement meaningless. The Second Circuit's view is that the standard for proving a "property" interest in right-to-control cases is slightly more stringent than the materiality requirement—a kind of materiality-plus requirement. For this reason, the Second Circuit concludes, the "property" requirement is not surplusage. But if that is true, then in every right-to-control case, the *materiality* requirement becomes irrelevant, because proof of materiality-plus would necessarily prove materiality.

All of this complexity is unnecessary. There is no reason to redefine "property" as "the right not to hear information that might affect the listener," as the government would have it. The mail and wire fraud statutes already have one statutory element that governs the effect of misinformation on the victim's decisionmaking process—materiality. They do not need another. Instead, the Court should hold that "property" means *actual* property. That interpretation is more faithful to the statutory text, easier to explain to a jury, and makes more sense.

II. Adopting the "Right to Control" Theory of Mail and Wire Fraud Would Lead to Harmful Consequences.

The government's position would transform all state-law civil fraudulent inducement claims into federal crimes. Indeed, it would transform purported frauds that do not rise to the level of civil fraudulent inducement into federal crimes. That outcome would deter good-faith business negotiations and lead to a flurry of frivolous RICO suits.

A. State courts have carefully crafted the scope and remedies for civil fraudulent inducement claims.

The government contends that making a materially false or misleading statement during contract negotiations constitutes mail or wire fraud because it strips the alleged victim of the "right to control" property. Traditionally, allegations of false statements made during contract negotiations are addressed in civil litigation governed by state law. In addition to contract

law itself, common-law courts have recognized that, at least in some circumstances, "[a] claim for fraudulent inducement … is available when a person under no duty to enter a contract was deceived into doing so." *SodexoMAGIC, LLC v. Drexel Univ.*, 24 F.4th 183, 205-06 (3d Cir. 2022) (listing elements of fraudulent inducement tort). But such courts have recognized this tort gingerly, as to not displace contract law and its remedies. Courts' hesitance in permitting such claims underscores that the federal government should not turn all fraudulent inducement torts—and even simple contract claims short of fraudulent inducement torts—into federal crimes.

Fraud claims differ from breach of contract claims in many respects. They generally carry different remedies (for instance, punitive damages are generally available for fraud but not breach of contract); they may carry different statutes of limitations; and they carry different collateral consequences (for instance, fraud judgments, unlike breach of contract judgments, are not dischargeable in bankruptcy). If every allegation of intentional breach of contract could be recharacterized as a fraud claim, then the primacy of contract law in resolving business disputes would be undermined.

Fraudulent inducement claims divide into two categories: claims that a statement *within* a contract was fraudulent, and claims that a statement *outside* a contract was fraudulent. Both types of claims serve important goals in the right circumstances. But both types of claims, if over-used, threaten to undermine contract law. As to the first type: the remedies for breach of contract are generally provided for in the

contract itself, interpreted against the background of traditional contract-law principles. If an intentional breach of contract is re-characterized as fraud, the resultant judgment may supersede the parties' negotiated deal regarding the consequences of a contractual breach. *See, e.g.*, *Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 989-90 (7th Cir. 2005) ("Tort remedies are inappropriate where commercial contracting parties could have easily protected themselves from the misrepresentation of which they now complain.").

As to the second type: the parol evidence rule has long ensured that oral statements cannot be used to modify the provisions of written contracts. Fraudulent inducement claims premised on statements that do not appear in the contract undermine the parol evidence rule by, as a practical matter, transforming non-contractual statements into binding promises. If a state recognizes this type of fraudulent inducement claim, then parties to a business deal may feel the need to communicate only in writing, lawyer up, and paper over their contracts with legalese. At best, this can needlessly increase the cost of doing business; at worst, the threat of litigation will deter socially productive business deals. *See, e.g.*, *Warner Theatre Assocs. Ltd. P'ship v. Metro. Life Ins. Co.*, 149 F.3d 134, 137 (2d Cir. 1998) (If "naked allegations of prior oral assurances" could "trump at the pleading and summary judgment stage even the most explicit disclaimer in a negotiation agreement," "[t]he disclaiming party would always be forced to settle or go to trial, and perhaps lose on, every fraudulent-inducement claim supported by the bare allegation that

it orally misrepresented its intent regarding a term of a loan. The absence of any means to avoid such costly litigation might well deter some lenders from entering into negotiation agreements and cause fewer loans to be negotiated.").

In recognition of these policy concerns, many courts have adopted guardrails designed to ensure that not every contract dispute transforms into a fraudulent inducement claim. For example, some states have adopted the "economic loss rule" to limit the use of tort remedies when the alleged fraud goes to the heart of the contract. *See, e.g.*, *Cerabio*, 410 F.3d at 990 (Wisconsin law bars fraudulent inducement claim that "pertains to the character and quality of the product that is the subject matter of the contract"). As another example, some states hold that fraudulent inducement claims are barred when the parties agree to a contractual provision disclaiming reliance on statements outside the contract, at least when parties are sufficiently sophisticated. Those cases hold that plaintiffs cannot show reasonable reliance—an element of fraudulent inducement—when they expressly disclaimed reliance on representations outside the contract. *See, e.g.*, *Barr v. Dyke*, 49 A.3d 1280, 1288-89 (Me. 2012) (collecting cases from several state courts).

The crucial point is that state common law already recognizes and addresses the problem of false statements made in connection with business deals. States have adopted common law rules that strike a balance between deterring fraud and ensuring that contract disputes are governed by contract law.

B. The federal government's position would criminalize many fraudulent inducements, yielding harmful consequences.

If the federal government's position prevails, it would transform many instances of common-law fraudulent inducement into federal crimes. Under the Second Circuit's standard, the government must show that the defendant "intend[s] that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed decision." Pet. App. 17a (quotation marks omitted). In every case of fraudulent inducement, that will be true. *See, e.g.*, *SodexoMAGIC*, 24 F.4th at 205 (fraudulent inducement requires a "misrepresentation" made with "the intent of misleading another into relying on it").

Moreover, the government's view of mail and wire fraud is even broader than common-law fraudulent inducement. For example, reliance is an element of common-law fraudulent inducement, but not an element of mail or wire fraud. *United States v. Weaver*, 860 F.3d 90, 94 (2d Cir. 2017). Hence, as the Second Circuit held in *Weaver*, an express disclaimer-of-reliance provision in a contract is not a defense to a mail or wire fraud prosecution, even if it would suffice to defeat civil liability. *Id.* at 95-96.

Injury, too, is an element of common-law fraudulent inducement, but not an element of mail or wire fraud. *Id.* at 95. Suppose a buyer is allegedly given false information during a transaction which purportedly created the *risk* of harm—but cannot show that this risk

ever materialized. Such a buyer could never maintain a civil claim. Indeed, the plaintiff would likely not even have Article III standing. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208-11 (2021). But under the government's theory, the alleged wrongdoing could still be a basis for a criminal prosecution.

Moreover, if the right-to-control theory prevails, the government could pursue criminal prosecution even when there *is* no contract. Allegations of false advertising—even in the absence of any violation of a product warranty—could trigger a felony prosecution. After all, the government could claim that purportedly misleading or incomplete information in an advertisement deprived victims of their "right to control" their money in connection with a subsequent purchase.

Mail and wire fraud have additional "mail" and "wire" requirements, to be sure. But to satisfy those elements, the use of the mails or wires "need not be an essential element of the scheme"; it is "sufficient" for the mailing or use of the wires to be "incident to an essential part of the scheme, or a step in the plot." *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (alteration and quotation marks omitted). In other words, if phone, email, or snail mail were used during contract negotiations, the mail or wire elements are satisfied. In practice, these elements will be satisfied the vast majority of the time.

The result will be the extraordinary injection of federal criminal law into ordinary civil business disputes. For instance, suppose a seller fails to satisfy its product warranty, and the buyer suspects that the

seller knew it would not satisfy the warranty at the time of contracting. Ordinarily the buyer could sue for breach of warranty; but under the government's position, the buyer could call the FBI. Or, suppose a seller makes an oral statement during contract negotiations. The oral statement does not make it into the contract, which instead recites that the parties are not relying on any prior oral representations. The seller may be immune from contract or tort liability, but if the government prevails, the seller might still risk a trip to federal prison.

Both doctrinally and practically, this cannot be right. Doctrinally, the mail and wire fraud statutes target not just *any* fraud, but rather, fraudulent schemes "for obtaining money or property"—which in turn requires a focus on "traditional concepts of property." *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000) (internal quotation marks omitted). This Court has made clear that it would not "read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States." *Id.* at 27. Yet here, the government's position would accomplish exactly that result by transforming all fraudulent inducement torts into federal crimes.

From a practical perspective, adopting the government's position would lead to many bad outcomes. First, businesspeople would feel forced to take extreme precautions every time they negotiate a deal. Every utterance could put a negotiator in a prosecutor's crosshairs. Even if the utterance did not make it into the contract; even if the contract explicitly *disclaimed* reliance on the utterance; and even if no one

ever relied on the utterance and no one was injured. So long as a federal prosecutor feels that the utterance concerned "information necessary to make discretionary economic decisions," Pet. App. 17a, the negotiator would face the risk of prosecution. And the intent requirement would pose no additional barrier to bringing federal criminal charges, as the Second Circuit held that the right-to-control theory satisfies the intent requirement if "the defendant's misrepresentations . . . deprived the victim of the ability to make an informed economic decision"—in other words, intent is automatically satisfied in a right-to-control case. *Id.*

To avoid these risks, a business may make fewer oral and written statements in connection with a transaction, or else may err on the side of providing too much information in the form of even more fine print and disclaimers. For some deals, a business may feel that the threat of prosecution is simply not worth the bother—even if those deals might ultimately benefit businesses and their customers.

In addition to being overbroad, the federal government's position will lead to arbitrary enforcement. In the rough and tumble of contract negotiations, people often make oral statements that might, after the fact, be regarded as inaccurate representations of "information necessary to make discretionary economic decisions." Pet. App. 17a (quotation marks omitted). The Justice Department cannot conceivably prosecute every such case, or come even close.

This creates the risk that the Justice Department will use the mail and wire fraud statutes as a cudgel to

inflate charges against the unpopular. History proves the point. Consider *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014). The defendants in that case operated a clinic where they falsified records and invented patients as a scheme to sell hydrocodone prescriptions without medical justification, and were convicted of maintaining a drug-involved premises—a charge that fit the facts of the case. *Id.* at 592-93. But to inflate the defendants' sentencing exposure, prosecutors threw in a creative wire fraud claim. The alleged victims were not the *drug users*, but the *pharmaceutical distributors*. Even though the defendants paid the distributors full price for the medications, the government alleged that the defendant "defrauded" the distributors by telling them that the drugs would be sold to poor patients. *Id.* at 590-91. There was no allegation that the distributors relied on, or even particularly cared about, this information, except that one distributor's representative stated he might have been "concern[ed]" if he knew more about what the defendants were doing. *Id.* at 591. Unsurprisingly in view of the bad facts, the jury convicted the defendants on a right-to-control theory. *See id.* at 592. The Sixth Circuit reversed the conviction, concluding that the right-to-control theory was not a viable theory of federal criminal liability. *Id.* But if this Court adopts the government's theory here, that is the type of prosecution that the government could bring going forward.

Or consider *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). The defendant bought military equipment from American manufacturers while assuring them that the equipment would go to the

United States. *Id.* at 466. In reality, the equipment was destined for the Soviet Bloc. *Id.* Initially the defendant was charged with tax evasion and export violations, but those charges did not stick. *Id.* Anxious to get a conviction, the government indicted the defendant for wire fraud. The government did not argue that it was *actually* illegal to export the equipment; instead it argued that the defendant "defrauded" the manufacturers by *telling them* the equipment would be used domestically, even though the defendant paid full price. *Id.* No one liked arms dealers who sent military equipment to Soviets, so unsurprisingly, the defendant was convicted and sentenced to fifteen years in prison. *Id.* at 466-67. The Ninth Circuit reversed the conviction, correctly holding that however objectionable the defendant's actions, he did not steal anything from the equipment manufacturers. *Id.* at 468-69. If this Court adopts the right-to-control theory, future convictions of this nature would be affirmed, and the door would be open for the government to use the mail and wire fraud statutes to rescue failed prosecutions of unpopular defendants.

The government may argue that it will exercise restraint in what types of prosecutions to bring. This Court has been wary of this sort of trust-the-government argument. *See McDonnell v. United States*, 579 U.S. 550, 576 (2016) ("[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'"). But even assuming that the government could be trusted, plaintiffs' lawyers cannot. Mail and wire fraud are defined to be "racketeering activity" for purposes of civil RICO claims. 18 U.S.C.

§ 1961(1). Hence, expanding the scope of criminal liability will expand the scope of civil RICO liability, too. The Court should not allow plaintiffs' lawyers to transform civil disputes into racketeering allegations.

III. The Court Should Reject the Right-to-Control Theory and Limit the Mail and Wire Fraud Statutes to Core Fraud.

To avoid these harmful outcomes, the first step is obvious: the Court should hold that "property" means "property," not the right to control property.

Such a holding would be helpful, but it would not go far enough. The problem is that the government might respond to the Court's ruling by redefining all right-to-control fraud cases as traditional property fraud cases. The government's theory would be that any time a person gives up property in a transaction without full information, the defendant has fraudulently "obtain[ed] property" from the victim. For instance, on the facts of *Sadler* and *Bruchhausen*, the government would argue that the defendant fraudulently "obtain[ed] property"—*i.e.*, medicine and equipment—from the victims because the victims lacked full information during the sale. Of course, the victims were paid in full, but the government will say that this is not a defense—as long as the defendant obtained *anything*, the "property" element is satisfied, no matter what the defendant paid in return. If the government could bring prosecutions under this theory, a decision rejecting the right-to-control theory would be meaningless—every right-to-control case could be re-labeled as a traditional property fraud case.

To avoid that outcome, the Court should clarify that the "property" element requires more than merely a showing that property was exchanged during the transaction. Mail and wire fraud require *stealing* property, not merely obtaining property for consideration in a transaction in which some information was purportedly not shared. As the Sixth Circuit put it in *Sadler*: "The pills were gone after the transaction. But paying the going rate for a product does not square with the conventional understanding of 'deprive.' Stealing the pills would be one thing: paying full price for them is another." 750 F.3d at 590.

Rather, to satisfy the "property" requirement, the government must prove, at a minimum, that obtaining property would inflict pecuniary injury on the victim. *Sadler*, 750 F.3d at 590 (noting common-law requirement that the offender's "purpose must be to injure" and that fraud victim suffer "pecuniary losses") (citation and quotation marks omitted). The Chamber takes no position on precisely how to define a pecuniary injury, a question not presented here. Rather, the Court should simply hold that the "right to control" theory is not viable, regardless of whether that theory is re-labeled as traditional money-or-property fraud. An exchange in which the defendant merely deprived the victim of information may be deceptive, but it is not criminal fraud.

CONCLUSION

The Court should reject the United States' right-to-control theory of mail and wire fraud.

Respectfully submitted,

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

TARA S. MORRISSEY
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae