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The 'Right to Control' Wire Fraud Theory Should Be Eliminated

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Judge Jed Rakoff famously noted that, "[t]o federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart — and our true love." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 Duq. L. Rev. 771 (1980). This effusive enthusiasm for the federal mail and wire fraud statutes is rooted largely in their "adaptability." *Id*. In recent decades, the federal prosecutors of the Second Circuit have demonstrated, and the Second Circuit has affirmed, that adaptability by broadly using the federal fraud statutes to penalize even conduct that does not and could not result in a transfer of tangible property from the victim to the defendant. These prosecutions have relied on the theory that a defendant can fraudulently deprive a victim of the intangible "right to control" its assets, even if the victim is not deprived of any tangible money or property. While this theory has been repeatedly affirmed by the Second Circuit, it is incompatible with a series of recent Supreme Court cases in which the Court has narrowed the scope of federal white-collar criminal statutes by adopting narrow definitions of the term "property." Given the Second Circuit's crucial role in defining the law for the prosecution of complex white-collar criminal cases, this discrepancy looms large: the Supreme Court should eliminate the Second Circuit's dubious right to control doctrine.

The federal mail and wire fraud statutes, 18 U.S.C. §§1341, 1343, prohibit "obtaining money or property" by fraud. However, several federal circuits, including the Second Circuit, have construed this provision broadly to encompass intangible, tenuous conceptions of property. Notably, the Second Circuit has for decades allowed for wire fraud prosecution in cases where the defendant has deprived the purported victim of its "right to control" its assets, even where there was no deprivation of transferrable money or property.

The Second Circuit's "right to control" doctrine originated in 1991 with *United States v. Wallach,* 935 F.2d 445 (2d Cir. 1991). In *Wallach*, certain directors of a corporation were charged with mail fraud in conjunction with a public offering of the corporation's securities in which the directors misled shareholders regarding a payment made to the directors for services related to

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the offering. *Id*. at 460. The directors argued that this conduct could not form the basis for a mail fraud conviction because neither the corporation or its shareholders were defrauded of any property—the corporation received services in return for the disputed payments. *Id*. at 461.

Nevertheless, the Second Circuit affirmed the conviction. The court held that the defendants' conduct denied the corporation's shareholders "the 'right to control' how corporate assets were spent — an intangible property interest." *Id*. at 462. Under the "right to control" doctrine, "the withholding or inaccurate reporting of information that could impact on economic decisions" deprives a victim of their intangible property interest in their right to control their economic decision-making, *id*. at 463, and this intangible property interest falls into the definition of property under the federal mail and wire fraud statutes.

In the ensuing years, the Second Circuit has repeatedly reaffirmed the right to control doctrine of mail and wire fraud. *See, e.g., United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015); *United States v. Carlo*, 507 F.3d 799, 801-02 (2d Cir. 2007) (per curiam); *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996). Most notably, in *United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017), the Second Circuit affirmed a mail and wire fraud conviction under the right to control doctrine even in the face of a burgeoning line of Supreme Court precedent that undermines the doctrine.

Finazzo, a clothing retailer executive, was charged with fraud for engaging in a scheme in which he received kickbacks from a supplier in exchange for steering the retailer's contracts to the supplier. *Id*. at 96-97. Finazzo was charged under a "classic" fraud theory — in which the executive intended to deprive his employer of money by steering contracts to a vendor that sold clothing at an above market rate — but was acquitted by a jury. *Id*. at 104. However, Finazzo was convicted of fraud based on a right to control theory, in which the kickback scheme deprived the retailer "of the opportunity to make informed decisions." *Id*. at 97.

On appeal, Finazzo argued that recent Supreme Court decisions had limited the scope of "property" under the federal fraud statutes to "obtainable property," thereby precluding a conviction based on the right to control doctrine. Finazzo relied primarily on the Supreme Court's recent decision in *Sekhar v. U.S.*, 133 S. Ct. 2720 (2013). In *Sekhar*, the Court held that to secure a conviction for extortion under the Hobbs Act, which prohibits "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," 18 U.S.C. §1951(a), the government must prove that the extorted property is "obtainable" in the sense that it is transferable from one person to another. *Id*. at 2725. Finazzo argued that *Sekhar* required reversal of his conviction because the intangible right to control one's economic decisions is not "obtainable" property. 850 F.3d at 105. The Second Circuit, however, rejected this argument and affirmed the conviction, holding that the Hobbs Act definition of property is narrower than the definition of property under the fraud statutes, and that the latter encompasses nontransferable property rights such as the right to control. *Id*. at 105-106.

While the Second Circuit in *Finazzo* reaffirmed the right to control doctrine, the Second Circuit's decision is inconsistent with a developing line of Supreme Court precedent that narrowly interprets the definition of "property" in federal criminal statutes. This line of precedent began with the Court's decision in *Cleveland v. U.S.*, 531 U.S. 12

(2000), in which the Court held that the definition of property under the federal fraud statutes is limited to "traditional concepts of property." *Id*. at 24.

As noted above, in *Sekhar*, the Court narrowed the scope of Hobbs Act extortion by limiting the definition of "property" to obtainable, transferrable property, a definition seemingly inconsistent with the right to control doctrine. Justice Scalia derided the government's interpretation of the statute as applicable to nontransferable property, calling it a "nonsense of words." 133 S. Ct. at 2727. The Second Circuit's *Finazzo* decision attempts to preserve the right to control doctrine in the wake of *Sekhar* by contending that the definition of "property" differs across the statutes, but this distinction is unconvincing: both statutes require that the defendant "obtain" property. There is no valid rationale for construing the same word differently in these two analogous contexts.

Finally, the Court's recent decision in *Kelly v. U.S.*, 140 S. Ct. 1565 (2020) applies the federal fraud statutes in a manner that further calls the right to control doctrine into question. In *Kelly*, the Supreme Court reversed the wire fraud convictions of several government officials involved in the "Bridgegate" scandal, in which several lanes of the George Washington Bridge were ordered closed as a means of retaliating against political opponents of then-New Jersey Governor Chris Christie. The government sought the convictions of the Bridgegate defendants on a theory of wire fraud that is similar to the right to control theory: essentially, they argued that the defendants sought to "commandeer" or "take control" of the George Washington Bridge itself, depriving the relevant agency of its power to control the operation of the bridge. *Id* at 1572. The Court held that this conduct could not constitute wire fraud, because wire fraud requires that an "object of the[ir] fraud [was] 'property.'" *Id*. at 1571 (quoting *Cleveland*, 531 U.S. at 26).

The Supreme Court has yet to review a case that expressly challenges the right to control doctrine. However, the Court will have several opportunities to address the doctrine in the near future. Federal prosecutors in the Second Circuit have relied on the doctrine in a number of recent cases, including high profile cases involving a college basketball recruiting scandal, *see United States v. Gatto*, No. 19-0783 (2d Cir.), alleged political corruption in New York, *see United States v. Percoco*, No. 16 Cr. 776 (S.D.N.Y.) and alleged fraud in the foreign exchange market, *see Johnson v. United States*, No. 19-1412 (U.S.) (petition pending).

Given the Second Circuit's repeated reliance on the right to control doctrine and its well-known reluctance to review its decisions *en banc*, it does not seem likely that the Second Circuit will revisit the doctrine any time soon. The incompatibility between the doctrine and the Supreme Court's interpretation of related federal criminal statutes makes it reasonable to hope that the Supreme Court will review one of these cases in the near future. If and when it does so, the Supreme Court should follow its decision in *Sekhar* and limit the reach of the federal fraud statutes to what those statutes were meant to cover: the taking of transferrable property by means of false representations. If Congress wishes to expand the reach of the federal criminal law — a questionable step after decades of over-criminalization — it should do so openly, with the enactment of clearly worded statutes that provide notice to the public about the distinction between criminal and lawful conduct.

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