

# Supreme Court Repudiates “Right-to-Control” Theory Under the Federal Wire Fraud Statute

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On May 11, 2023, the United States Supreme Court issued its latest opinion in a series of decisions narrowing the scope of the federal fraud statutes. In that case, *Ciminelli v. United States*, the Court foreclosed prosecutors’ ability to pursue fraud charges for misrepresentations that did not intend to result in financial harm, but instead deprived victims of information that may have been useful in deciding how to use assets. In repudiating this theory, known as “right-to-control,” a unanimous Court held that the federal fraud statutes touch only schemes aimed at traditional property interests, like money, and not “mere information.” To have held otherwise would have meant that “almost any deceptive act could be a crime.”

Going forward, the Department of Justice will not be able to prosecute a defendant for engaging in mere deceptive or unethical conduct but must additionally prove that the defendant’s objective was to deprive the victim of money or property.

**Ciminelli’s Prosecution and the Supreme Court’s Decision.** Ciminelli’s conviction centered on New York’s “Buffalo Billion” initiative, designed to invest \$1 billion in upstate development projects. To help his construction company win state-funded jobs, Ciminelli engaged a lobbyist. In 2013, Ciminelli, along with the lobbyist and a board member of the nonprofit administering the initiative, schemed to get Ciminelli’s construction company selected as a preferred developer for “Buffalo Billion” projects. This preferred developer status allowed Ciminelli’s construction company to secure a major \$750 million project. By engaging in this bid-rigging scheme, Ciminelli kept information from the nonprofit that may have impacted how it allocated funds and awarded projects. Put another way, Ciminelli deprived the nonprofit of its right to control its economic decisions.

Relying on a right-to-control theory, prosecutors pursued Ciminelli’s bid-rigging scheme and secured his conviction on charges of wire fraud and conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 1343 and 1349.

In a unanimous opinion, the Supreme Court rejected the “right-to-control” theory for three main reasons. First, the theory runs afoul of the statute’s limited reach to schemes depriving a victim of “money or property.” It is also at odds with a 1987 Supreme Court decision, *McNally v. United States*, in which the Court rejected use of the federal fraud statutes to pursue schemes purportedly depriving victims of “intangibles interests.”

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Second, criminalizing misrepresentations where no financial harm occurred clashes with the structure and history of the federal fraud statutes. As honest services fraud is the *only* intangible interest on which Congress chose to legislate post-*McNally*, the wire fraud statute cannot be interpreted as covering any other intangible interest.

Finally, the Court characterized the right-to-control theory as “vastly expand[ing] federal jurisdiction without statutory authorization.” By treating “mere information” as property, almost any deceptive act could be criminalized at the federal level, including those typically left to state contract and tort law.

### **The Decision’s Impact and the Narrowed Scope of Federal Criminal Fraud Statutes.**

Going forward, the key question is how the loss of the right-to-control theory will impact the types of cases pursued by federal prosecutors. In the United States’ brief to the Court, the Government argued that there is a “core” of right-to-control cases that are, at bottom, fraudulent inducement prosecutions where the Government could have satisfied the elements of traditional property fraud.<sup>1</sup> Indeed, the Government argued that *Ciminelli*’s conviction should be affirmed on this basis, but the Court declined to reach that question. In the future, the Government will face more challenging prospects for success given the burden of proving that a defendant intended to deprive a victim of actual money or property, as opposed to deceiving or harming the victim in a more general sense. For example, in one successful wire fraud prosecution, the Government proved that the head of a bank’s trading desk deceived a client about how the bank would carry out a foreign exchange transaction and thereby profit. This deception impacted the client’s decision to undertake a certain type of transaction, though the client still received the full economic benefit of its bargain.<sup>2</sup> Having received that benefit, it is questionable, if not outright unlikely, that prosecutors could have shown an intent to financially harm the client.

Where the Government cannot show this intent to cause financial harm, a fraud-based prosecution will therefore be foreclosed. A number of prior wire fraud prosecutions would appear to fall into this group, with the foreign exchange transaction prosecution being one example.<sup>3</sup>

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<sup>1</sup> Brief for the United States at 12, *Ciminelli v. United States*, 598 U.S. \_\_ (2023), No. 21-1179. For an example of a case that could potentially be brought under a traditional property fraud, see *United States v. O’Garro*, 700 Fed. Appx. 52, 54 (affirming defendant’s wire fraud conviction on a right-to-control theory where the fraud victim had sent the defendant’s company \$250,000).

<sup>2</sup> *United States v. Johnson*, 945 F.3d 606, 613-614 (2d Cir. 2019).

<sup>3</sup> See *id.*; see also *United States v. Gatto*, 986 F.3d 104, 109-12 (2d Cir. 2021) (affirming defendants’ convictions for disguising improper payments to student-athletes’ families, where covering up the payments enabled the student-athletes to attest to compliance with NCAA rules, thereby depriving the universities of information useful to their financial aid decisions, as the payments rendered the student-athletes ineligible).

The *Ciminelli* opinion also represents the latest in a recent line of Supreme Court decisions restricting prosecutors' ability to pursue white collar crimes in other ways under the federal fraud statutes. Since 2010, the Supreme Court has narrowed the honest services fraud statute to coverage of only bribery and kickback schemes,<sup>4</sup> reined in the definition of what constitutes an "official act" required for a federal bribery conviction,<sup>5</sup> and determined that "political retribution" does not constitute "money or property" supporting a fraud prosecution.<sup>6</sup> On the same day as *Ciminelli*, the Court also issued a decision in a companion case, *Percoco v. United States*, which excludes private citizens not otherwise acting as agents of a government entity from the scope of the honest services fraud statute.<sup>7</sup>



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<sup>4</sup> *Skilling v. United States*, 561 U.S. 358, 413, 415 (2010).

<sup>5</sup> *McDonnell v. United States*, 579 U.S. 550, 577, 580 (2016).

<sup>6</sup> *Kelly v. United States*, 140 S. Ct. 1565, 1568-69 (2020).

<sup>7</sup> 2023 WL 3356527, at \*2, \*6-\*8 (U.S. May 11, 2023).