

Supreme Court and 1st Circuit Significantly Curtail Scope of Federal Property Fraud Status

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Key Points

- In two landmark decisions, the Supreme Court and the 1st Circuit significantly pared back the scope of the federal mail and wire fraud statutes.
- In *Ciminelli v. United States*, a political corruption case, the Supreme Court unanimously rejected the 2nd Circuit’s “right-to-control” theory as a basis for a wire fraud conviction.
- In *United States v. Abdelaziz*, one of the “Varsity Blues” college admissions cases, the 1st Circuit rejected the government’s honest services fraud theory and its property fraud theory that the defendants’ fraudulent scheme deprived universities of the “property” of their admissions slots.
- Both cases will have broad implications for mail and wire fraud prosecutions and signal a significant reorientation of federal property fraud law that should have the effect of reining in fraud prosecutions based on intangible harms.

Ciminelli Background

The federal wire fraud statute criminalizes “scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” 18 U.S.C. § 1343. More than 35 years ago, the U.S. Supreme Court held that the federal fraud statutes are “limited in scope to the protection of property rights.” *McNally v. United States*, 483 U.S. 350, 360 (1987). But in the years that followed, the “right-to-control” theory that emerged in the U.S. Court of Appeals for the 2nd Circuit expanded the reach of the wire fraud statute beyond traditional property interests. Under the right-to-control theory, a wire fraud conviction could be premised on a scheme to deprive a victim of “potentially valuable economic information” that is “necessary to make discretionary economic decisions.” *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021).

The events leading to the prosecution in *Ciminelli* date back to 2012, when then-New York Governor Andrew Cuomo announced the “Buffalo Billion” initiative to invest \$1 billion in tax revenue to develop the greater Buffalo area. Alain Kaloyeros of the State University of New York (SUNY) was in charge of proposing economic development projects through a SUNY-affiliated nonprofit called Fort Schuyler Management Corporation. Kaloyeros used his control over Fort Schuyler to conspire with the owner of an upstate New York construction company, Louis Ciminelli, to skew the proposal process and ensure that a proposal submitted by Ciminelli’s company was preferred over its competitors. At the end of the procurement process, Ciminelli’s company was awarded a \$750 million contract.

After an investigation, Kaloyeros, Ciminelli and several others were charged with wire fraud for their roles in the Buffalo Billion bid-rigging scheme. At trial, the court instructed the jury that “property” includes intangible

interests, including the right to control the use of one's assets, and that depriving another of potentially valuable economic information violates the wire fraud statute. Following the trial, Ciminelli was convicted of wire fraud on the theory that he and his co-conspirators had deprived Fort Schuyler of its right to control its assets in the bidding process. Notably, there was no proof at trial that Fort Schuyler could have obtained a better price or superior product from another contractor. Instead, the government relied on the right-to-control theory to convict Ciminelli, which allowed for a wire fraud conviction based 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." *Percoco*, 13 F.4th at 170. On appeal, the 2nd Circuit affirmed the convictions, holding, in relevant part, that the right-to-control theory could support wire fraud convictions under longstanding 2nd Circuit precedent. *Id.* at 172.

Ciminelli Supreme Court Decision

The Supreme Court granted certiorari and, in a May 11 opinion authored by Justice Thomas, unanimously held that the right-to-control theory does not provide a valid basis for conviction under the federal wire fraud statute. *Ciminelli v. United States*, No. 21-1170, 2023 WL 3356526, at *3 (U.S. May 11, 2023).

The Court reasoned that "[t]he right-to-control theory cannot be squared with the text of the federal fraud statutes, which are 'limited in scope to the protection of property rights.'" *Id.* at *4 (internal citations omitted). The 2nd Circuit first recognized the right-to-control theory in 1991, see *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), but, as the Supreme Court highlighted, it never grounded the theory in traditional property notions. *Ciminelli*, 2023 WL 3356526, at *4. The Court further determined that the right-to-control theory is "inconsistent with the structure and history of the federal fraud statutes" and "vastly expands federal jurisdiction without statutory authorization." *Id.* at *5. Because "[t]he right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest," the Court held that "the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes." *Id.*

In its merits brief, the government confessed error and conceded that the right-to-control theory is "incorrect." Brief for Resp. at 24, *Ciminelli v. United States*, No. 21-1170 (Oct. 2022). Nevertheless, the government asked the Supreme Court to affirm the convictions under an alternative theory of fraudulent inducement, even though the government had charged and tried the case on the right-to-control theory. According to the government, this alternative theory applied because Ciminelli intended to induce Fort Schuyler to rely on his misrepresentations about the nature of the process through which his company was awarded the \$750 million development contract. The Supreme Court declined the government's request to affirm the convictions under this alternative theory, as doing so would require the Court "to assume not only the function of a court of first view, but also of a jury." *Ciminelli*, 2023 WL 3356526, at *5. In a concurring opinion, Justice Alito noted his view that the majority left open the question of whether the government could retry Ciminelli under its alternative theory of fraud.

In *Ciminelli*, the Supreme Court threw out the convictions and was crystal clear that the "right-to-control theory is invalid under the federal fraud statutes." *Id.* at *6. While the government has signaled that it might continue to pursue expansive prosecutions under the wire fraud statute premised on allegations of fraudulent inducement, it will face obstacles in such cases. For example, if the government attempts to use this theory to pursue wire fraud charges based on "noneconomic misrepresentations" as it has suggested it may, Brief for Resp. at 18, *Ciminelli*, No. 21-1170, it will have to overcome precedent holding that misrepresentations must "go to the nature of the bargain itself" to support a wire fraud charge. See *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970). More generally, a new vein of "fraudulent inducement" wire fraud prosecutions would be swimming against the tide of numerous Supreme Court cases, going back to the late 1980s, that have reined in overly-expansive federal property fraud prosecutions.

Abdelaziz Background

In January 2020, the government filed a fourth superseding indictment in the U.S. District Court for the District of Massachusetts against two “Varsity Blues” parents, Gamal Abdelaziz and John Wilson, who had hired Rick Singer, a college admissions consultant, allegedly to secure their children’s admissions as athletic recruits to various universities, including Harvard, Stanford and the University of Southern California, through Singer’s so-called “side door.” Abdelaziz and Wilson were charged, along with 13 other parents and Singer, with one count of conspiracy to commit mail and wire fraud and honest services mail and wire fraud (18 U.S.C. §§ 1341, 1343, 1346, 1349), and 12 other counts of related offenses including substantive mail and wire fraud (18 U.S.C. §§ 1341, 1343). The government alleged that the defendants conspired to commit two types of mail and wire fraud: honest services fraud, by using their payments to deprive the universities of the honest services of their employees, and property fraud, by depriving the universities of property in the form of admission slots.

In the fall of 2021, a jury convicted Abdelaziz and Wilson on all counts. They subsequently appealed their convictions.

Abdelaziz 1st Circuit Decision

On May 10, 2023, in an opinion authored by Judge Sandra L. Lynch, a three-judge panel of the 1st Circuit unanimously vacated Abdelaziz’s and Wilson’s convictions of mail and wire fraud and the related conspiracy convictions.¹

Significantly, the 1st Circuit found that the government’s honest services fraud theory under 18 U.S.C. § 1346 failed as a matter of law. Under that theory, the government was required to prove that Abdelaziz and Wilson had devised a scheme or artifice to defraud others of the intangible right of honest services. In its analysis, the court recounted the tumultuous development of the honest services doctrine up through *Skilling v. United States*, 561 U.S. 358 (2010), which “involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.” *Id.* at 404. Even though the allegedly deceived victims, the universities, were the recipients of the defendants’ payments, the government argued that the defendants’ conduct still constituted honest services fraud under a broad understanding of bribery as defined and proscribed in other federal statutes, including the federal programs bribery statute, 18 U.S.C. § 666, under which the defendants were also convicted. The court rejected the government’s argument as inconsistent with *Skilling’s* core holding, and instead found that the defendants’ conduct fell outside of what has traditionally constituted a classic bribe or kickback.

The 1st Circuit also rejected the government’s theory of property fraud. Under this theory, the government was required to prove that Abdelaziz and Wilson had schemed to obtain money or property from the universities, instead of depriving them of honest services. To this end, the government argued, categorically, that admissions slots at universities constitute “property” within the meaning of the mail and wire fraud statutes. The court rejected the government’s categorical assertion and noted that whether admissions slots could constitute “property” required a case-by-case determination, specific to the facts and law underlying each case. The court also referenced Supreme Court precedent counseling that courts should resort to traditional notions of property, including whether intangible rights have been historically treated as property or bear its traditional hallmarks, when determining what constitutes “property” within the meaning of the mail and wire fraud statutes. Relatedly, the court held that the district court had improperly instructed the jury that admissions slots were necessarily the property of universities for the purposes of the mail and wire fraud statutes. Although the 1st Circuit declined to hold that admissions slots could never be property, it determined that the government’s theory in this case swept too broadly and that its “highly general argument would criminalize a wide swath of conduct,” noting that under the government’s broad understanding of property applied to admissions slots as a class, “embellishments in a kindergarten application could constitute property fraud proscribed by federal law.” *United States v.*

Abdelaziz, No. 22-1129, 2023 WL 3335870, at *23 (1st Cir. May 10, 2023). The court then vacated Abdelaziz’s and Wilson’s mail and wire fraud convictions and remanded the case for proceedings consistent with its opinion.

Conclusion

- Ciminelli is the latest in a series of decisions, going back to *McNally v. United States*, 483 U.S. 350 (1987) and including *Cleveland v. United States*, 531 U.S. 12 (2000), *Skilling v. United States*, 561 U.S. 358 (2010), and *Kelly v. United States*, 140 S. Ct. 1565 (2020), in which the Supreme Court pared back overly-expansive constructions of federal fraud statutes that seek to criminalize mere deception or unethical behavior. In light of *Ciminelli*, the government can no longer support wire fraud charges based on the mere deprivation of information that could affect the alleged victim’s economic decision-making. And while the government might attempt to replace the now-defunct right-to-control theory with a broad theory of fraudulent inducement, the path to obtaining a wire fraud conviction under this new theory will be subject to vigorous challenges.
- Similarly, the Varsity Blues reversal sends a clear signal to the government that it should be cautious in bringing cases based on overly broad interpretations of the criminal fraud statutes, and that allegations of fraud must be grounded in a cognizable property interest, not simply a belief that the conduct was deceptive and unsavory.

¹ The 1st Circuit affirmed Wilson’s conviction for filing a false tax return under 26 U.S.C. § 7206(1).

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