No. 23-909

In the Supreme Court of the United States

STAMATIOS KOUSISIS and
ALPHA PAINTING & CONSTRUCTION CO., INC.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE CATO INSTITUTE, DUE PROCESS INSTITUTE, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

SECONDARY SOURCES

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability; the proper and effective role of police in their communities; the protection of constitutional and statutory safeguards for criminal suspects and defendants; citizen participation in the criminal justice system; and accountability for law enforcement.

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system. Guided by a bipartisan Board of Directors and supported by bipartisan staff, Due Process Institute creates and supports achievable solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of

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[1] No persons or entities other than *amici*, their members, or their counsel authored this brief, in whole or in part, or made a monetary contribution to this brief's preparation or submission. Under Supreme Court Rule 37.2, *amici* provided timely notice to the parties of its intent to file their brief, and no party has objected.

criminal defense attorneys to ensure justice and due process for those accused of crime. Founded in 1958, NACDL has a nationwide membership consisting of up to 40,000 direct members and affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient and fair administration of justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, all aimed at providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Consistent with their missions, Cato, Due Process Institute and NACDL have an interest in cases, like this one, that present issues of systemic importance for the individual liberties of criminal defendants. This appeal involves an important statutory question that will continue to harm traditional property rights and criminal defendants until corrected by this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Described as the "Colt 45" and "true love" of federal prosecutors, the mail and wire fraud statutes (codified at 18 U.S.C. §§ 1341 and 1343) have been no stranger to the federal courts. Jed S. Rakoff, *The Federal Mail Fraud Statute*, 18 DUQUESNE L. REV. 771, 771 (1980). In FY 2023 alone, prosecutors were estimated to have filed more than 1,300 wire fraud

charges—the highest number since 1986. Hunter Taylor, Transactional Records Access Clearinghouse, Wire Fraud Charges and Convictions Projected to Reach Record Levels in FY 2023 (July 21, 2023), https://trac.syr.edu/reports/723/. Some of these have been high-profile prosecutions involving allegations of massive financial fraud, like that of Samuel Bankman-Fried, charged with defrauding customers and investors of over $10 billion.

But lurking behind these flashy headlines has been federal prosecutors' use of the federal fraud statutes to criminalize broad swaths of conduct that, though perhaps objectionable, are historically outside the reach of federal criminal law. The court below endorsed one of these prosecutions based on a "fraudulent inducement" theory. Under that theory, federal prosecutors base mail and wire fraud charges on the allegation that the defendant schemed to induce a commercial exchange through misrepresentation, even if the scheme did not contemplate depriving the counterparty of a traditionally recognized property interest.[2]

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[2] The Third Circuit's ruling added to a circuit split. *Compare United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970), *and United States v. Bruchhausen*, 977 F.2d 464, 467 (9th Cir. 1992), *and United States v. Sadler*, 750 F.3d 585, 590 (6th Cir. 2014), *and United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016), *and United States v. Guertin*, 67 F.4th 445, 451 (D.C. Cir. 2023) (all requiring the government to prove scheme to deprive victim of money or property), *with United States v. Fagan*, 821 F.2d 1002, 1009-10 (5th Cir. 1987), *and United States v. Granberry*, 908 F.2d

Here, the lowest bidder did the high-quality work it committed to do—but falsely promised good-faith efforts to help the state contracting agency advance its affirmative-action goals. The court below thus morphed the proper subject of state breach-of-contract or administrative remedies into a federal property fraud crime. This Court should grant a writ of certiorari and put a stop to such unpredictable prosecutions for at least two reasons:

1. The fraudulent inducement theory flouts this Court's unbroken line of cases that demand that the government prove a scheme with the object of injuring the victim in his property rights. *Kelly v. United States*, 590 U.S. ---, 140 S. Ct. 1565, 1571 (2020). As this Court said just last Term, "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests." *Ciminelli v. United States*, 598 U.S. 306, 309 (2023). This benchmark flows from the text, history, and structure of the federal fraud mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.

This clear rule exists for good reason. As this Court has echoed time and again, Congress grounded these statutes in the protection of property rights, preventing the government from turning

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278, 280 (8th Cir. 1990), *and United States v. Adler*, 186 F.3d 574, 576-77 (4th Cir. 1999); *United States v. Leahy*, 464 F.3d 773, 788 (7th Cir. 2006), *and United States v. Richter*, 796 F.3d 1173, 1192 (10th Cir. 2015) (all adopting the fraudulent inducement theory of the federal fraud statutes).

them into all-purpose federal antifraud vehicles, unmoored from any constitutionally delegated grant of federal power. Any other conclusion, including that of the Third Circuit here, would permit the federal government to reach into traditional areas of state regulation and criminalize garden-variety breaches of contract. This Court has long jettisoned interpretations that discard the statutes' text, history, and structure, thus leaving their outer boundaries ambiguous.

The fraudulent inducement theory defies each of these norms. It does not comport with the Court's repeated warnings that expansion of the federal fraud statutes leads to ballooning federal power. Put simply, as this Court has stated about the very same statutory provisions, "[i]f Congress desires to go further, it must speak more clearly than it has." *McNally v. United States*, 483 U.S. 350, 360 (1987). The Court should make clear that Congress has not done so with respect to the fraudulent inducement theory.

2. Beyond contorting this Court's precedents, the fraudulent inducement theory is unworkable for at least three reasons.

First, the fraudulent inducement theory would allow the federal government to prosecute as property fraud every intangible-rights theory this Court has properly held outside of it—so long as the intangible interest could have affected the victim's contracting decision. For example, this Court has repeatedly warned against the government's use of

"criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking." *Kelly*, 140 S. Ct. at 1574. Yet the fraudulent inducement theory would do just that. If allowed to survive, it could logically apply to any interest, tangible or intangible, that is incorporated into a contract—meaning that *any* purposeful breach of contract could be deemed a federal fraud so long as the mails or wires were used in its execution. This case is the paradigm: though Congress deliberately left implementation and enforcement of the Disadvantaged Business Enterprise (DBE) program to the states, and insisted that affirmative-action goals be "aspirational" only, federal prosecutors stepped in to criminalize the failure to fulfill a promise to work toward the goals set by a state and incorporated into a contract between a state agency and a private party.

Second, by redefining all contract provisions as property interests so long as they are important enough to the victim to affect its decisions, the theory would deprive defendants of fair notice of what conduct may be deemed criminal. Indeed, particularly given the freedom that public and private parties enjoy in contracting, the decision of the court below would threaten to allow a fraudulent inducement prosecution on a breach of virtually *any* material term of *any* contract.

Third, like many of its cousins that this Court has already rejected, the fraudulent inducement theory would lead to over-criminalization and

excessive punishment. There is no question that breaches of contract are ordinarily remedied through civil, and often private, means. Yet, the fraudulent inducement theory—carrying with it the federal fraud statutes' 20-year maximum penalty—would permit judges, prosecutors, and even private parties to decide what is criminal and to use that threat to draconian effect. The breadth of interests that the fraudulent inducement theory protects with federal criminal law is staggering, foreseeably impacting every possible contract, from employment contracts to residential leases to any contract for goods and services, and more.

ARGUMENT

I. The Fraudulent Inducement Theory Is an End-Run Around the Text, History, and Structure of the Federal Fraud Statutes.

This Court has consistently held that "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests." *Ciminelli v. United States*, 598 U.S. 306, 309 (2023) (citing *Cleveland v. United States*, 531 U.S. 12, 24 (2000)). In doing so, it has repeatedly rejected government attempts to expand its authority by construing as "property" various intangible interests, such as an intangible interest in good government, *McNally*, 483 U.S. at 356, a state's regulatory interests, *Cleveland*, 531 U.S. at 23-24, and (most recently) an interest in "potentially valuable economic information," *Ciminelli*, 598 U.S. at 309. The fraudulent inducement theory is the latest of these

prosecutorial evolutions to come before this Court. But it simply resurrects prosecution theories the Court has already rejected, as the Court should make clear.

Those theories foundered even when deception would affect how the victim used its property (as in *McNally* and *Ciminelli*); though the prosecution tried to call the intangible interests those schemes targeted "property," they are not. Having finally gotten that message, the government now presses a work-around: it declares that an identical scheme, which threatens harm to intangible interests alone, *actually* deprives the victim of the affected property. That is the fraudulent inducement theory.

But this end-run has no substance, as this case illustrates. The prosecutor told the jury in summation that the scheme had "nothing to do with dollars and cents," but targeted only PennDOT's interest in "something special": its "own program, its own desires" to support DBEs. C.A.3App.3434-3435. This is not a scheme "to deprive people of traditional property interests," as the statutes require. *Ciminelli*, 598 U.S. at 309. It is a thinly veiled end-run around that requirement.

The plain text and structure of the federal fraud statutes prohibits anyone from "devis[ing] or intend[ing] to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses" through mail or wire. 18 U.S.C. §§ 1341, 1343. The Court has "consistently understood the 'money or property'

requirement to limit the 'scheme or artifice to defraud' element because the 'common understanding' of the words 'to defraud' when the statute was enacted referred 'to wronging one in his property rights.'" *Ciminelli*, 598 U.S. at 312 (quoting *Cleveland*, 531 U.S. at 19).

Thus, as the Court recounted in *McNally*, Congress passed the mail fraud statute in 1872 to criminalize schemes for "fleecing" innocent people—*i.e.*, "depriv[ing] them of their money or property." 483 U.S. at 356. Congress's addition in 1909 of the express "money or property" requirement is "further indication" of this legislative limit. *Id.* at 357 (citing Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130). This amendment clarified the common-sense understanding that the phrase "to defraud" meant "wronging one in his property rights by dishonest methods or schemes" and "the deprivation of something of value by trick, deceit, chicane or overreaching." *Id.* (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). The scheme at issue in *McNally* did not meet this requirement, because the government did not charge that the scheme would have caused the victim to pay out more, or receive less, economic value than it otherwise would have. *Id.* at 360-61.

This Court's modern precedent repeatedly reaffirms this limitation, rejecting attempt after attempt to expand the statutes to reach schemes to influence the victim's decisions about how to use its property without "fleecing" it. In *Kelly*, for example, the Court overturned the wire fraud conviction of

New Jersey officials who, for political retribution, closed down toll lanes on the George Washington Bridge. The government proffered that the object of the fraud was "commandeering" government property (the lanes) and depriving the victim Port Authority of its "valuable entitlement" to the employee labor wasted on the scheme. Neither theory worked. The first failed because, although the lanes on the bridge are unquestionably "property," the scheme did not contemplate the required "taking of property." *Kelly*, 140 S. Ct. at 1573. All it did was alter a governmental decision about how public property would be "allocate[ed]"; "in effect, about which drivers had a 'license' to use which lanes," a decision that is a "run-of-the-mine exercise of regulatory power." *Id.*

No less instructive was this Court's forceful rejection of the government's second theory. Though the scheme did "deprive" the Port Authority of its employees' time and labor, a traditional form of property, that was not property fraud either—again because "tak[ing] the government's property" by fraud was not the object of the scheme. *Id.* at 1572-73. Harkening back to the earliest cases interpreting the mail fraud statute, *Kelly* reinforced the distinction between schemes to "fleec[e]" the victim of property and schemes to interfere with the victim's decisions about how to use it. The latter target only the victim's interests in uncorrupted decision-making and accurate information, not in property.

And just last Term, this Court in *Ciminelli* again

rebuked lower courts for "interpret[ing] the mail and wire fraud statutes to protect intangible interests unconnected to traditional property rights." 598 U.S. at 312. The Court reversed the wire fraud convictions of a defendant who had secured a $750 million state project through a bid-rigging scheme. The scheme denied the State the right to control its property by depriving it of potentially valuable economic information about the bidders, but that did not make it property fraud. The right to information is an intangible right, and Congress was very clear that the only intangible rights the mail and wire fraud statutes reach are those that fall within 18 U.S.C. § 1346. *Id.* at 315; *see Skilling v. United States*, 561 U.S. 358, 408-09 (2010) (narrowing sole intangible rights theory to bribes and kickbacks). "The right-to-control theory," said this Court, "cannot be squared with the text of the federal fraud statutes . . . ." *Ciminelli*, 598 U.S. at 314. This informational deprivation was just another expansive theory of the kind that the Court has "consistently rejected." *Id.* at 314-15.

* * *

The fraudulent inducement theory runs headlong into these settled principles. Just like the "right to control" theory in *Ciminelli*, the fraudulent inducement theory has no logical endpoint. Any time a contracting party has denied an alleged victim of something the victim will say could have affected its decision, the theory kicks in. *But cf. Sadler*, 750 F.3d at 590 (Sutton, J.) ("[P]aying the going rate for a product does not square with the conventional

understanding of 'deprive.'). The Court should reject this gloss on these statutes, and its precedents.

It should do so because the government cannot realistically assert a property interest in everything that a public entity tries to accomplish in public contracts. Nor can it reasonably contend that Congress intended any party to a commercial transaction to be protected by federal criminal law against every disappointed expectation that influenced their contracting decision. As the Court has long made clear, the federal fraud statutes do not imbue the government with an all-purpose weapon to prosecute behavior that falls short of expectations.

Notably, from the earliest days of the mail-fraud statute through today, the Court has honored Congress's distinction between a government's interest in "administering itself in the interests of the public" and its interests "as property holder." *McNally*, 483 U.S. at 359 n.8 (discussing, *e.g.*, *Hammerschmidt*, 265 U.S. at 188; *Haas v. Henkel*, 216 U.S. 462, 480 (1910); *Curley v. United States*, 130 F. 1, 6-7 (1st Cir. 1904)). Congress enacted 18 U.S.C. § 371 (among other statutes) to protect the intangible sovereign interests that a government holds for the public. *See id.* Those intangible interests include a state's interest in its regulatory and social welfare programs; *i.e.*, its "'intangible rights of allocation, exclusion, and control'—its prerogatives over who should get a benefit and who should not." *Kelly*, 140 S. Ct. at 1572 (quoting

Cleveland, 531 U.S. at 23). Yet though affirmative action in public procurement is one way a "government seeks to allocate its resources," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995), the fraudulent inducement theory would explode the distinction made by Congress and allow the prosecution of a scheme to evade these policy goals as property fraud.

Moreover, the DBE program at issue was but one of countless regulatory and policy interests that PennDOT incorporated into its 1,000-plus-page contract. For example, the contract required the "highest standards of integrity" and mandated disclosure of outside financial interests. And like any sophisticated drafter, PennDOT took care to declare that "not performing work in an acceptable manner for any cause," including contravening the "Contractor Integrity" provisions, would violate the contract. CA3Digital.Appx. 3951, 4856-57. Under the fraudulent inducement theory, interests the Court deemed too amorphous to support prosecution even under § 1346 (*Skilling*, 561 U.S. at 410) would support a property-fraud conviction.

The Court's intervention is required to prevent the government from avoiding the textual and historical limits on the federal fraud statutes by characterizing as property fraud violations of regulatory and other intangible interests incorporated in a contract.

II. The Fraudulent Inducement Theory Is Unworkable.

The fraudulent inducement theory now endorsed by six circuits not only elides the express limits that Congress placed on the federal fraud statutes but would also encourage prosecutions that run afoul of fundamental principles of federalism, due process, and the limits of criminal law.

A. The Theory Expands Federal Criminal Enforcement Authority.

The fraudulent inducement theory raises fundamental issues insofar as it federalizes all breach-of-contract claims. This Court has repeatedly warned against the risk of the federal fraud statutes being used to improperly expand the powers of the federal government at the expense of the States. In *Cleveland*, the Court cautioned against "a sweeping expansion of federal criminal jurisdiction":

> Equating 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. . . . . As we reiterated last Term, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes."

531 U.S. at 24 (cleaned up) (quoting *Jones v. United States*, 529 U.S. 848, 858 (2000)). The Court echoed

the same sentiment in *Ciminelli*:

> The theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction with our caution that, "absent a clear statement by Congress," courts should "not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States."

598 U.S. at 315-16 (cleaned up) (quoting *Cleveland*, 531 U.S. at 27); *see also Kelly*, 140 S. Ct. at 1571 ("[F]ederal fraud law leaves much public corruption to the States (or their electorates) to rectify.").

Here, the federalism problem arises because the fraudulent inducement theory has its roots in civil contract law. The fact that a federal DBE program was at issue here is no limiting principle on the fraudulent inducement theory. Rather, because the theory incorporates the benefit-of-the-bargain doctrine from contract law, it applies to any intangible interest incorporated into a contract, or even an interest merely implied if material to the victim. Thus, *any* inducement to contract could become the basis of a federal fraud case, so long as the mail or wires are used. This breadth inherently raises federalism concerns because, while contract law is not exclusive to the States, the enforcement of contracts is traditionally left to the States. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) ("[T]he interpretation of a contract is ordinarily a

matter of state law to which we defer.").

Indeed, if every provision in a contract (federal, state, or local) creates a property right, then federal jurisdiction extends to every civil claim for breach of any public contract. Thus even the most routine breaches by a public entity would deprive the counterparty of property, exposing those entities to due process claims by way of litigation under 42 U.S.C. § 1983. This is also not the law. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972) ("[T]he range of interests protected by procedural due process is not infinite."); *Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1398 (3d Cir. 1991) ("[C]ourts have observed that if every breach of contract by someone acting under color of state law constituted a deprivation of property for procedural due process purposes, the federal courts would be called upon to pass judgment on the procedural fairness of the processing of a myriad of contractual claims against public entities. We agree that such a wholesale federalization of state public contract law seems far afield from the great purposes of the due process clause." (citation omitted)).

B. The Theory Fails to Put Defendants on Fair Notice of What Conduct Is Criminal.

The Supreme Court has repeatedly warned against the dangers posed by vagueness, both in how criminal statutes are drafted and how they are construed:

> Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct.

United States v. Davis, 588 U.S. ---, 139 S. Ct. 2319, 2323 (2019); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (explaining that criminal statutes must be construed to apply "only to conduct clearly covered" by the express statutory terms).

These black-letter principles have oft been applied to the federal fraud statutes. As the Court said in a mail fraud case almost a century ago: "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926).

None of the text, history, or structure of the federal fraud statutes provide fair notice that contract terms are protected by federal criminal law. Under the fraudulent inducement theory, federal prosecutors could convert a breach of virtually any contract provision into a federal fraud prosecution. And those provisions are numerous—as this case

shows, the contract here includes more than a thousand pages of terms and conditions.

Even worse, just as provisions requiring "Contractor Integrity" and DBE participation are common in public contracts, so too are provisions that incorporate other, expansive regulatory obligations and intangible expectations. Take, again, the contract here. It includes a vague provision that commands that the "Contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635)." Under the fraudulent inducement theory, the federal fraud statutes apply to a broad, almost indefinable quantum of conduct, including conduct that contractors, unaware of every law and regulation at issue, would not know was covered by the contract; nonetheless they would be exposed to criminal prosecution. *Cf. Gamble v. United States*, 587 U.S. 678, 758 (2019) (Gorsuch, J., dissenting) ("In the era when the separate sovereigns exception first emerged, the federal criminal code was new, thin, modest, and restrained. Today, it can make none of those boasts."); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991) ("By one estimate, there are over 300,000 federal regulations that may be enforced criminally.").

C. The Theory Over-Criminalizes "a Broad Range of Day-to-Day Activity."

A final but related point is that the fraudulent inducement theory promotes over-criminalization. These problems arise when a criminal statute is written or interpreted so broadly as to sweep within its terms "a broad range of day-to-day activity." *United States v. Kozminski*, 487 U.S. 931, 949 (1988). This Court has been careful to avoid this evil, which deters activities the legislature has not clearly prohibited. Nor is prosecutorial discretion a guard against overzealous application of an ambiguous statute. *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.'" (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010))).

Over-criminalization is of particular concern here because of the wide latitude that contracting parties have in crafting contract terms. *See generally The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972) (relying on "ancient concepts of freedom of contract" in permitting certain contract provisions). If the Third Circuit and the other courts embracing the fraudulent inducement theory are correct that incorporating any interest (including an intangible one) into a contract makes it property, and thereby implicates the federal property fraud statutes, then the power to decide what conduct is criminal is effectively delegated not only to judges and prosecutors, but to every private party who drafts a contract. That is no small list: Prospective

employees routinely fill out employment applications in the hopes of obtaining a future salary. Actual employees sign corporate policies year-round as a condition of continued employment. Prospective students complete detailed college and scholarship applications, hoping to garner slots in competitive universities with financial assistance. Still more procurement officers exchange their employer's money for goods as part of their day-to-day functions. The fraudulent inducement theory would turn every misrepresentation in each of these contexts and others into federal crimes.

Indeed, there is no reason why the government's overly expansive theory would not encompass other private contracts as well, including even oral contracts. Breaches of any such agreement would be subject to prosecution as federal property fraud so long as the mail or wires were involved. And because violations of the federal fraud statutes can be predicate acts for civil RICO claims, 18 U.S.C. §§ 1961-1968, such breaches could also dramatically tilt the playing field in civil breach-of-contract litigation. *Cf. Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411-12 (2003) (Ginsburg, J., concurring) ("RICO . . . has already evolved into something quite different from the original conception of its enactors, warranting concerns over the consequences of an unbridled reading of the statute. The Court is rightly reluctant . . . to extend RICO's domain further . . . ." (cleaned up)).

Further, allowing potential federal criminal prosecution to loom over myriad local and state

contracting matters would have practical costs. Fear of liability could lead contractors to shy away from bidding on some projects or cause them to increase their prices to compensate them for the risks. *Cf. Tozer v. LTV Corp.*, 792 F.2d 403, 407 (4th Cir. 1986) (warning that without a government-contractor defense to design-defect claims, contractors would be discouraged from bidding on essential military projects). And the notion of efficient breaches of contract—widely recognized as economically beneficial—would be burdened by a new and uncertain risk of criminal prosecution. *See, e.g.*, *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.) ("Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result."). If the risk of federal criminal prosecution could, solely at the discretion of a prosecutor, be added to the potential consequences of breaching a contract, efficient breaches would be deterred. And the resulting costs ultimately would be borne, directly or indirectly, by the public, especially in the context of public-works contracts.

CONCLUSION

For the foregoing reasons and the reasons in Petitioners' brief, this Court should grant the writ of

certiorari.

Respectfully Submitted,

March 25, 2024

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