No. 23-909

In The
Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a scheme to induce a transaction in property through deception, but which contemplates no harm to any property interest, constitutes a scheme to defraud under the federal wire fraud statute, 18 U.S.C. § 1343.

PARTIES TO THE PROCEEDING

Petitioners are Stamatios Kousisis and Alpha Painting & Construction Co., Inc., defendant-appellants below. Additional defendants in the district court who were not parties in the court of appeals and are not parties here were Emanouel Frangos and Liberty Maintenance, Inc.

Respondent is the United States of America, appellee below.

CORPORATE DISCLOSURE STATEMENT

Alpha Painting & Construction Co., Inc. does not have a parent company and no stock is publicly owned.

RELATED PROCEEDINGS

United States v. Kousisis, No. 19 2679 and *United States v. Alpha Painting & Construction Co., Inc.*, No. 19-3774 (consolidated), U.S. Court of Appeals for the Third Circuit; judgment entered September 22, 2023.

United States v. Kousisis, Alpha Painting & Construction Co., Inc., et al., No. 18-cr-130, U.S. District Court for the Eastern District of Pennsylvania; judgments entered November 8, 2019 and November 15, 2019.

United States v. Emanouel Frangos, Liberty Maintenance, Inc., No. 19-2482, U.S. Court of Appeals for the Third Circuit; judgment entered July 20, 2020, unrelated appeal from same district court proceeding (No. 18-cr-130).

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BRIEF FOR PETITIONER

Petitioners Stamatios Kousisis and Alpha Painting & Construction Co., Inc. respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's relevant opinion is reported at 82 F.4th 230, and is reprinted in the Appendix to the Petition (Pet. App.) at 1-41. An earlier version of the Third Circuit's opinion, superseded on rehearing, is reported at 66 F.4th 406. The district court's relevant order is unpublished but reprinted at Pet. App. 76-129.

JURISDICTION

The court of appeals issued its opinion on September 22, 2023. Pet. App. 1-41. By orders dated December 12, 2023 and January 18, 2024, Justice Alito extended the time for filing a petition for a writ of certiorari until February 19, 2024. *See* 23A538. The Court granted the petition on June 17, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 1343 provides in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

INTRODUCTION

In the past few decades, this Court has twice rejected the government's extravagant interpretations of the federal statutes criminalizing mail and wire fraud. Each time, the government has responded with, if anything, an even more audacious theory. In *McNally v. United States*, 483 U.S. 350 (1987), the Court held that those statutes do not protect intangible rights; they protect property rights only. In response, the government invented the right-to-control theory, which held that scheming to obtain money or property while depriving the victim of potentially valuable economic information was mail or wire fraud. The Court rejected that theory in *Ciminelli v. United States*, 598 U.S. 306 (2023). But before the ink was dry, the government pivoted to a still broader theory: "fraudulent inducement," under which "us[ing] falsehoods to induce a victim to enter into a transaction," even when no harm to any property right is intended or occurs, constitutes wire fraud. BIO 9.

It is past time for this game of whack-a-mole to end. This Court's decisions are not invitations for creative prosecutors to reimagine criminal fraud. They reflect fundamental limitations on the fraud statutes' reach. In particular, a scheme "to defraud" contemplates harm to a traditional property interest. The mail and wire fraud statutes do not criminalize garden-variety disputes that have typically been the province of "state contract and tort law." *Ciminelli*, 598 U.S. at 315.

McNally and *Ciminelli* are not the only cases the government's new fraudulent inducement theory would relegate to historical footnotes. The Court held in *Cleveland v. United States*, 531 U.S. 12 (2000), and

Kelly v. United States, 590 U.S. 391 (2020), that the property fraud statutes do not protect regulatory interests. Yet under the inducement theory, federal prosecutors may charge regulatory harm as property fraud whenever a federal, state, or local government writes a regulatory interest into a contract—as here.

The government's new theory is breathtakingly expansive in other ways as well. Under the theory, *any* material deception with the goal of obtaining money or property violates the wire fraud statute. BIO 7-8, 10. For instance, a college student seeking a babysitting gig who texts that she'll spend her earnings on books—when she really plans to spend them on beer—could face up to two decades in federal prison, even if she performs her services flawlessly. So too a sales clerk who fibs about an aspect of a product having nothing to do with its value (say, how many are currently in stock) to persuade someone to buy one at the going rate. It is not clear such disputes should land in court at all. For the few that do, state contract and tort law—backed by far less punitive criminal statutes—are more than up to the task. Congress did not provide for a 20-year federal sentence for deceptions that threaten no harm to property in statutes "limited in scope to the protection of property rights." *Ciminelli*, 598 U.S. at 314 (internal quotation marks and citation omitted).

In short, deceptively inducing someone to enter into a transaction that does not contemplate harm to their property rights is not mail or wire fraud. The statutes bar deceptive schemes to harm a pecuniary or other property interest. Petitioners' scheme was not one, so the judgment below should be reversed.

STATEMENT OF THE CASE

The government charged Petitioners Stamatios Kousisis and Alpha Painting & Construction Co., Inc. with wire fraud for fraudulently inducing the Pennsylvania Department of Transportation ("PennDOT") to award, and pay money under, two contracts funded by the United States Department of Transportation ("DOT"). The jury found petitioners guilty under this theory, the district court declined to throw out the verdict, and the Third Circuit affirmed petitioners' convictions.

1. DOT makes funds available to state counterpart agencies to finance transportation projects. Pet. App. 4. In 2009 and 2010, PennDOT received federal grants for two major bridge-repair projects in Philadelphia, and put the projects out for bidding. Petitioners and their business partners submitted a lump-sum bid for each project, together totaling approximately $120 million. JA106-16, 167-77. Those bids were the lowest PennDOT received by far—$5 million lower than the next lowest bidder on one project and $7 million lower on the other. JA44-47.

The PennDOT contracts for these jobs totaled more than 1,100-pages, and imposed countless statutory, regulatory, technical, and ethical obligations. JA106-116, 167-77.[1] PennDOT also reserved the right to

[1] The contracts incorporated most of these obligations by reference to PennDOT Publication 408, a lengthy "set of standard specifications" included in "just about every PennDOT contract." JA38-39; *see* JA108, 169. The contracts incorporate successive versions of Publication 408. The provisions cited herein are identical (and numbered identically) in both versions. *Compare*

declare a default for nonperformance of any contract provision. JA136-38 § 108.08.

Among other things, the contracts required petitioners "[a]t all times, [to] observe and comply" with "all Federal, State, and local laws, ordinances, and regulations," and with all "orders or decrees" then-existing or enacted in the future. JA119 § 107.01. The contracts incorporated federal and state regulations designed to advance the government's policy priorities—for instance, a "Buy America" provision requiring petitioners to use U.S.-manufactured materials for certain aspects of the projects. JA117-18 § 106.10(a). They also required contractors to: pay minimum wage and carry workers' compensation insurance, JA126-29 §§ 107.21, 107.22; "discipline[]" employees who commit sexual harassment, JA160-62; and comply with federal, state, and local "provisions[] and policies governing safety and health," JA121-23 § 107.08. In addition, they required contractors to maintain "the highest standards of integrity," by, for example, disclosing any conflicting financial interests and maintaining confidentiality. JA162-66.

The contracts also required petitioners to make good-faith efforts to spend a target percentage of their earnings with disadvantaged business enterprise ("DBE") subcontractors. JA108-09, 114, 138-60, 168-69, 175. Like other contract provisions, this one was

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PennDOT Publication 408/2007-4, https://www.dot.state.pa.us/public/PubsForms/Publications/Pub_408/408_2007/408_2007_4/408_2007_4.pdf (reproduced digitally at C.A.3 App. 3,879-4,975), *to* PennDOT Publication 408/2007-5, https://www.dot.state.pa.us/public/PubsForms/Publications/Pub_408/408_2007/408_2007_5/408_2007_5.pdf. Relevant pages are reproduced only once in the joint appendix for brevity.

designed to further policy interests captured in regulations. Specifically, to promote diversity in contracting, DOT has set an "aspirational goal" that ten percent of its infrastructure project funds will go to DBEs. 49 C.F.R. § 26.41(b).[2] State entities set their own "good faith" participation goals based on local conditions, and may incorporate project-specific goals into contracts. 49 C.F.R. §§ 26.47, 26.51. Non-DBE prime contractors may satisfy such contract goals by subcontracting with one or more DBEs. *See* Pet. App. 4-5. But payments to a DBE count toward a participation goal only if the DBE performs a "commercially useful function" and is not merely a "pass-through." 49 C.F.R. § 26.55(c).

PennDOT incorporated DBE goals into both contracts at issue here, requiring the successful bidder to commit to good-faith efforts to spend the equivalent of six percent of its contracted earnings on one project, and seven percent on the other, with DBEs. JA18-23; Pet. App. 6. And PennDOT's standard contract specifications provided that "failure to comply with DBE regulations would be a material breach." Pet. App. 6-7; JA140 § I(d).

Once PennDOT accepted petitioners' lump-sum bids, they became the fixed price of the contracts, with no allowance for costs. At the same time, petitioners had to show they could fulfill the contract before PennDOT would award it. That required them to set

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[2] Federal regulations define a DBE as a business that is majority owned and controlled by "one or more individuals who are both socially and economically disadvantaged." 49 C.F.R. § 26.5. Regulations also identify groups that are "presumed to be socially and economically disadvantaged." *Id.*

out their plan for DBE participation (and many other things). JA39-42. Petitioners' DBE plan included obtaining paint supplies from Markias, Inc., "a company that had prequalified as a DBE in Pennsylvania." Pet. App. 6. PennDOT deemed petitioners qualified and the parties executed a contract on each project.

2. PennDOT made periodic payments to petitioners toward the contracts' fixed price, based on its inspectors' reports of completed work. JA21-23; C.A.3 App. 1368-1369. Separately, the prime contractor on each project reported to PennDOT qualifying payments to DBEs. JA7-8, 22-23. As part of this process, petitioners caused the prime contractor to report that Markias earned payments as a supplier. Pet. App. 7; *see* 49 C.F.R. § 26.55(e)(2). In truth, however, Markias was a mere "pass-through." Petitioners purchased supplies from non-DBE suppliers and paid Markias a 2.25% markup on each invoice. Pet. App. 7-8.

This scheme never threatened economic harm to PennDOT. To the contrary, the agency got exactly "the repairs it paid for": the lowest bidders "delivered the requested work, and the quality of the workmanship and materials is uncontested." Pet. App. 18, 29. As the government has recognized, "it may be that PennDOT would have been willing to pay more" if it had known petitioners would fall short of DBE participation goals. C.A.3 U.S. Br. 90. But maybe not: it may be "that PennDOT would have accepted a project with reduced DBE participation at the stated price; or that PennDOT would have re-bid the project." *Id.*

3. The government nonetheless charged petitioners with wire fraud and wire-fraud conspiracy, 18 U.S.C. §§ 1343 & 1349, and causing the submission of false statements, *id.* § 1001. The indictment identified DOT and PennDOT as victims. As to the wire fraud counts, the government's trial theory was that petitioners won the contracts through deceptive "non-financial" inducements, causing PennDOT harm that "had nothing to do with dollars and cents" but "had to do with its own program, its own desires." JA95-96. Petitioners maintained that this theory was illegitimate because the wire fraud statute requires a showing not just that money changed hands, but of a scheme to harm the victim's property rights—for example, to get paid for work not done. But over petitioners' objection, the district court instructed the jury in part that it could convict based simply on PennDOT's wish that "a DBE provide services" and petitioners' breach of their "promise[] that a DBE [would] provide those services." Pet. App. 24-25. Proof of a scheme to harm economic interests was not required.

The jury returned a mixed verdict, finding petitioners guilty of some counts of wire fraud and false statements, as well as the conspiracy charge. Pet. App. 8. Petitioners moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing as relevant here that the government "failed to establish a scheme to defraud the government of 'money or property' within the meaning of the wire fraud statute." Pet. App. 106. The district court rejected that argument. Pet. App. 106-10.

At sentencing, the district court recognized that petitioners' completed scheme caused PennDOT no

financial harm. JA100-05. Accordingly, "what the government lost" here was not money but rather PennDOT's regulatory interest in fostering economic opportunities for DBEs. JA102-03. For this, the district court sentenced Kousisis to 70 months' imprisonment, ordered Alpha to forfeit 100% of its profits on the projects, and imposed a $500,000 fine, Pet. App. 58, 61, 64.

4. While petitioners' appeal was pending in the Third Circuit, this Court decided *Ciminelli v. United States*, 598 U.S. 306 (2023). In *Ciminelli*, as here, the defendant procured and collected on multi-million-dollar government contracts after making certain "misrepresentation[s]"—there, "lying about the manipulation of the process through which his company was selected as the best-qualified developer." U.S. *Ciminelli* Br. 11; *see also Ciminelli*, 598 U.S. at 310. Rejecting the "right to control" theory under which the government had secured those convictions, the Court held unanimously that a person who "schemes to deprive the victim of potentially valuable economic information necessary to make economic decisions" does not commit wire fraud. *Ciminelli*, 598 U.S. at 309 (internal quotation marks and citation omitted). Otherwise, the Court reasoned, the federal wire fraud statute would cover "an almost limitless variety of deceptive actions traditionally left to state contract and tort law." *Id.* at 315.

Petitioners then argued to the court of appeals that *Ciminelli* confirmed their convictions were invalid (both because insufficient evidence supported them and because the trial court's instructions were faulty). The court of appeals nevertheless affirmed. Pet. App 1-41. It reasoned that petitioners committed wire

fraud because they obtained $120 million in contract funds from PennDOT in part through misrepresentations regarding DBE participation. Pet. App. 18-24. According to the Third Circuit, "DBE participation was an essential component of the contract" without which "the nature of the Parties' bargain would have been different." Pet. App. 22. And in the Third Circuit's view, petitioners' misrepresentation about DBE participation was "sufficient evidence to support a federal fraud conviction given all of the circumstances surrounding that misrepresentation and the millions of dollars it fraudulently caused PennDOT to pay to [petitioners]." *Id*.

The court of appeals dismissed *Ciminelli* in a footnote. "[T]he basis of the wire fraud conviction here," the court asserted, "is not PennDOT's frustrated interest in DBE participation. Rather, it is the actual money paid as a result of Appellants' fraudulent scheme." Pet. App. 20 n.63. Put another way, the Third Circuit reasoned that so long as money or property changes hands, a "misrepresentation" or "'fail[ure] to disclose information that a reasonable jury could find affected the nature of the bargain may provide a basis for a wire fraud conviction.'" *Id.* at 21-22 (quoting *United States v. Wheeler*, 16 F.4th 805, 820 (11th Cir. 2021)).[3]

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[3] The Third Circuit also stated that Markias's 2.25% fee alone was "economic harm sufficient to sustain wire fraud convictions." Pet. App. 21. This statement merely reinforces the court of appeals' theory that breaching a promise to spend contractual earnings on legitimate DBE participation (regardless of any

The Third Circuit did not dispute that this deceptive inducement theory would turn "every purposeful breach of contract" involving the payment of money or conveyance of property "into a potential violation of the federal criminal property fraud statutes." Pet. App. 22 (internal quotation marks omitted). If anything, the court of appeals openly acknowledged that. *Id.* at 23. But it asserted that if such sweeping coverage is "a valid concern, the concern is with the text of the statute and the Supreme Court's interpretation of it." *Id.* at 22-23.

5. Petitioner sought certiorari, noting a circuit split over the validity of the fraudulent inducement theory. *See United States v. Guertin*, 67 F.4th 445, 451-52 (D.C. Cir. 2023) (reversing conviction secured under the theory); *United States v. Sadler*, 750 F.3d 585, 589-92 (6th Cir. 2014) (same); *United States v. Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016) (same); *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992) (same). This Court granted the petition. 144 S. Ct. ___ (2024).

SUMMARY OF ARGUMENT

The "fraudulent inducement" theory is not a valid theory of wire fraud.

I. The text of the wire fraud statute, its design and structure, and this Court's precedent foreclose the "fraudulent inducement" theory.

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financial implications) is sufficient to convict. *Id.*; *see also id.* at 24-27 (upholding jury instruction allowing same). PennDOT did not pay petitioners extra to cover the pass-through fee. *See* Cert. Reply at 12-13.

A. The wire fraud statute prohibits devising a "scheme or artifice to defraud." 18 U.S.C. § 1343. In a consistent line of cases stretching back a century, this Court has held that the ordinary legal meaning of "defraud" consists of wronging one in his property rights, and that the mail and wire fraud statutes use the term in exactly this sense. This understanding of fraud as requiring harm to property is well grounded in the common law. In civil law, equity, and criminal law when Congress enacted the mail fraud statute, injury was an indispensable element of fraud. It is therefore an indispensable aspect of mail and wire fraud.

This does not mean the government must prove a realized injury in every case. Mail and wire fraud are inchoate offenses; Congress criminalized devising a scheme to defraud, not the completed fraud. But to prove such a scheme, the government must show that the scheme, *if completed*, would have constituted fraud. And fraud itself, as embodied in the wire fraud statute, requires injury as an essential element.

B. The inducement theory likewise conflicts with the fraud statutes' design and structure. The wire fraud statute protects property rights only; it does not protect the government's regulatory interests. Yet the inducement theory would allow the government to procure convictions for frustrating regulatory interests whenever they are memorialized in a contract.

Lest there be any doubt, other specific statutes protect the government from regulatory harm, including 18 U.S.C. §§ 371 and 1001. In those statutes, Congress carefully calibrated the punishments to no

more than five years in prison. But under the inducement theory, prosecutors and administrative bureaucrats writing contracts—not Congress—would decide whether deception that harms a regulatory interest is punishable by five years in prison or twenty.

The inducement theory is also incompatible with Congress's decision to bring one—and only one—intangible interest under the protection of the mail and wire fraud statutes: the right to honest services. Congress's reverberating silence about other intangible interests signals that a scheme to harm property is otherwise required to convict someone of wire fraud.

C. Endorsing the inducement theory would also unwind nearly all of this Court's fraud decisions, converting them into non-substantive cases identifying nothing more than pleading errors. The holdings in *Kelly* and *Cleveland* that a scheme to harm regulatory interests is not property fraud would be rendered meaningless in any case where a regulatory interest is memorialized in a contract. *McNally*'s holding that the mail and wire fraud statutes do not protect intangible rights would be easy for prosecutors to elide. And *Ciminelli*'s unanimous rejection of the right-to-control theory would be for naught. As the government itself made clear in *Ciminelli*, the fraudulent inducement theory is the right-to-control theory rebranded.

II. Adopting the fraudulent inducement theory would lead to untenable consequences.

A. To begin, the theory is egregiously overbroad. It applies to any deceptive statement or omission designed to induce someone to part with property,

even if they get what they paid for or don't go through with the deal at all. A babysitter who lies about how she will spend the money? A fraudster, even if she is fully qualified and performs the job admirably. An employee who lies about a violation of workplace policy to keep her job? A fraudster, just as well.

B. The government seems to know it has an overbreadth problem here. In *Ciminelli*, it proposed several *ad hoc* patches in an attempt to make the inducement theory appear palatable. But those patches themselves are dubious and, at best, would render the outer boundaries of the mail and wire fraud statutes vague. Only one thing can be certain: If this Court follows the government's course, yet another array of suspect prosecutions—accompanied by an avalanche of legal challenges—will ensue. There is no good reason to go down that path.

ARGUMENT

The Third Circuit affirmed petitioners' convictions on the ground that using deception to induce someone to enter into a transaction—even if the scheme contemplates no harm to any traditional property interest—is a scheme to defraud under the federal wire fraud statute. The Third Circuit thereby adopted the "fraudulent inducement" theory of wire fraud. The government defends that theory, consistent with its merits brief two Terms ago in *Ciminelli v. United States*, 598 U.S. 306 (2023), in which it proposed the theory as an alternate ground to affirm. It argues that "where the defendant uses falsehoods to induce a victim to enter into a transaction," "the government need not prove . . . that the victim suffered loss or harm as a result of such reliance." BIO 7, 9; *see also* U.S.

Ciminelli Br. 11 (arguing that where the defendant obtains “contract funds” by means of material misrepresentations, the wire fraud statute “does not require proof that the defendant caused or intended to cause [financial] harm”); *id.* at 12 (actual or intended economic harm is “not a necessary element”); *id.* at 15 (listing elements and omitting any mention of property harm); *id.* at 21-23. The government, under this theory, need only prove (as relevant here on facts like these) that the transaction involved the payment of money and that the misrepresentation was “material.” *Id.* at 16-20.[4]

The fraudulent inducement theory is wrong. A scheme “to defraud” under 18 U.S.C. § 1343 is a scheme to commit fraud as that term was commonly understood when the mail fraud statute was enacted. And, as this Court has already recognized on multiple occasions, the common understanding of fraud required harm to a traditional property interest as an indispensable requirement.

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[4] The Third Circuit also suggested that any interest (or at least any sovereign’s regulatory or policy interest) written into a contract is “property,” such that any material breach harms a property right. Pet. App. 26, 28. Petitioners noted those suggestions in their petition for certiorari and explained why they are plainly misguided. *See* Pet. i (second and third questions presented), 25-27, 30-31. The government did not disagree in the brief in opposition, resting its defense of the decision below instead on the Third Circuit’s assertions that “tens of millions of dollars constitutes property,” and petitioners’ deceptions “caused PennDOT to pay” them that money. Pet. App. 22-23; *see* BIO 7-8. At this point, therefore, no theory besides fraudulent inducement can support petitioners’ wire fraud convictions. *See, e.g., Smith v. Arizona*, 144 S. Ct. 1785, 1796 n.3 (2024). Petitioners accordingly focus on that theory alone.

I. The fraudulent inducement theory flouts text, structure, and precedent.

A. The text of the wire fraud statute requires proof of a scheme to harm a traditional property interest.

1. Originally enacted in 1872 and amended in 1909, the mail fraud statute prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. Congress used "the same language" when it enacted the wire fraud statute in 1952, so the "same analysis" applies to that statute. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987); *see* Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722 (now codified at 18 U.S.C. § 1343).

This statutory language, the Court has made clear, protects only "traditional property interests." *Ciminelli v. United States*, 598 U.S. 306, 309 (2023). And it protects them from a particular thing: schemes or artifices to "defraud." Although the word "or" links this "defraud" clause to the subsequent "obtaining money or property" clause, the latter clause simply confirms that the statute "reache[s] false promises and misrepresentations as to the *future* as well as other frauds involving money or property." *McNally v. United States*, 483 U.S. 350, 359 (1987) (emphasis added). Either way, the government must prove that the defendant devised a scheme to "defraud" the victim of money or property. *Id.*[5]

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[5] Of course that is not all the government must prove. The government must also prove the requisite *intent* to defraud. *See*

2. This Court has recognized for a century that the word "defraud," as used in in the mail and wire fraud statutes, requires property harm. In *Hammerschmidt v. United States*, 265 U.S. 182 (1924), the Court explained that the ordinary meaning of "defraud" is "*wronging* one in his property rights by dishonest methods or schemes," *id*. at 188 (emphasis added). The Court held there that the precursor to a different statute, 18 U.S.C. § 371, *departed* from this definition, 265 U.S. at 188, consistent with previous cases condoning prosecutions under that statute for "fraudulently obtaining" property from the government without inflicting economic harm, *see United States v. Keitel*, 211 U.S. 370 (1908); *Hyde v. Shine*, 199 U.S. 62 (1905). But the *Hammerschmidt* Court made clear that the mail fraud statute is different; it is "confined" "to pecuniary or property injury inflicted by a scheme to use the mails for th[at] purpose." 265 U.S. at 188-89.

United States v. Cohn, 270 U.S. 339 (1926), reinforced this analysis. There, the Court held that the term "defrauding," when used in its "usual and primary sense," means "the fraudulent causing of pecuniary or property loss." *Id*. at 346-47. The Court consequently held that the defendant's false statements designed to "induc[e]" a customs collector to deliver non-dutiable cigars, *id*. at 344, could not support a prosecution under a statute criminalizing making false statements for the purpose of

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Carpenter, 484 U.S. at 28; 2 Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* ¶ 44.01, Instr. 44-3 (2024). As this case comes to the Court, however, the Court need not address that particular *mens rea* issue; the question presented in this case involves only the nature of the defendants' scheme.

"defrauding" the federal government, *id.* at 347. (In the New Deal era, Congress amended that statute, now codified at 18 U.S.C. § 1001, to remove the "restriction to cases involving pecuniary or property loss to the government." *United States v. Gilliland*, 312 U.S. 86, 93 (1941).)

The Court has never wavered from this common understanding of what "defraud" means when construing the mail and wire fraud statutes. In *Durland v. United States*, 161 U.S. 306 (1896), the Court explained that misrepresentations about future performance come within the mail fraud statute when the defendant knows he will be unable to pay but states otherwise "with an intent to cheat the vendor," *id.* at 313 (internal quotation marks and citation omitted). More recently, in *McNally*, the Court reiterated *Hammerschmidt*'s explanation that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes.'" 483 U.S. at 358-59 (quoting *Hammerschmidt*, 265 U.S. at 188). On that basis, the Court rejected a reading of the mail fraud statute that extended beyond "protecting property rights." *Id.*; *see also id.* at 356 (recognizing that mail fraud statute targeted schemes "for the purpose of deceiving *and* fleecing" (internal quotation marks and citation omitted; emphasis added)); *id.* at 369-70 (Stevens, J., dissenting) (recognizing that majority opinion requires proof of "property or pecuniary loss").

In *Pasquantino v. United States*, 544 U.S. 349 (2005), the Court likewise upheld a wire fraud conviction only after identifying the "economic injury" inflicted by the defendants' conduct, *id.* at 356. In *Skilling v. United States*, 561 U.S. 358 (2010), the

Court reiterated that the hallmark of property fraud (as distinct from honest services fraud) is that "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other," *id.* at 400; *see also Kelly v. United States*, 590 U.S. 391, 401-02 (2020) (property fraud contemplates "taking of property"—that is, a scheme to "convert[]" it to defendant's benefit—causing "economic loss"). And in *Ciminelli*, the Court emphasized yet again that the wire fraud statute uses the word "defraud" as commonly understood—to refer to "wronging one in his property rights." 598 U.S. at 312 (quoting *Cleveland v. United States*, 531 U.S. 12, 19 (2000)).

3. Historical sources confirm this Court's understanding that the term "defraud," as used in the wire fraud statute, requires harm to property.

"Where Congress employs a term of art 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *George v. McDonough*, 596 U.S. 740, 746 (2022) (quoting *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019)). To "defraud," this Court has held, is a "paradigmatic example" of such a statutory term. *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 187 (2016) (citing *Neder v. United States*, 527 U.S. 1, 22-24 & n.7 (1999)). "[A]t the time of the mail fraud statute's original enactment in 1872, … actionable 'fraud' had a well-settled meaning at common law." *Neder*, 527 U.S. at 22. And in 1872, injury or harm to property was an indispensable element of "fraud."

a. At early common law "[f]raud between two private individuals" was "left for civil actions." Ellen S. Pogdor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 736 (1999). That is, the law at that time regarded fraud

between private individuals "as primarily a tort" called deceit. *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 193 (1963) (quoting Harold Greville Hanbury, *Modern Equity* 643 (8th ed. 1962)).

In 1872, the "action of deceit" included "the requirement that the plaintiff must have suffered substantial damage before the cause of action can arise." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 110, at 765 (5th ed. 1984); Restatement (Second) of Torts § 525 (1977) (describing "liability … in deceit for pecuniary loss"). Indeed, the pivotal case widely regarded as having inaugurated the modern action for deceit, *Pasley v. Freeman* (1789) 100 Eng. Rep. 450 (KB), made the injury requirement unmistakable. In their opinions, the justices in the majority repeatedly affirmed the principle that "[f]raud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies." *Id.* at 453 (Buller, J.); *see id.* at 456 (Ashhurst, J.); *id.* at 457 (Kenyon, C.J.); *see also, e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005) (citing *Pasley* for the proposition that "the common law has long insisted" that a fraud plaintiff prove "actual economic loss").

Pasley's rule had become a fixture of the American common law of fraud by the time of the mail fraud statute's enactment. In *Smith v. Richards*, 38 U.S. (13 Pet.) 26 (1839), which *Neder* cited as reflective of common-law fraud, *see* 527 U.S. at 22, the Court observed that "a misrepresentation must be of something material, constituting an inducement" to the victim "by which he has been actually misled *to his injury*," 38 U.S. at 39 (emphasis added). "[T]o maintain an action for fraud," the Court explained the year

before the mail fraud statute was enacted, a plaintiff was required to show that "loss or damage has resulted from the deceit." *Butler v. Watkins*, 80 U.S. (13 Wall.) 456, 464 (1871); *see also, e.g.*, *Randall v. Hazelton*, 94 Mass. (12 Allen) 412, 414 (1866) ("[A]n ancient and well established legal principle" of the common law is "that fraud without damage or damage without fraud gives no cause of action.").

Leading treatises of the era likewise reflect the harm-to-property requirement. Joseph Story's Commentaries—predating the mail fraud statute by just two years—made clear that "to support an action at law for a misrepresentation, there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff." 1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 203, at 205 (10th ed. 1870). Oliver Wendell Holmes similarly observed that to be "liable to an action for deceit," the person to whom a false representation was addressed must have been "persuaded to act to his own harm." Oliver Wendell Holmes, Jr., *The Common Law* 132 (1881); *see also, e.g.*, 2 C.G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* § 1174, at 1004 (4th Eng. ed. 1876) (deceit action cannot be supported unless a person "suffers damage," such that there is "a conjunction of wrong and loss"); Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* Ch. I § 1, at 3 (1877) (same).

This common-law harm-to-property requirement served a distinct purpose: It guarded the boundary between abstract moral grievances and suits properly within the judicial sphere. As Story explained, courts

should not use the cudgel of fraud "for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage." Story § 203, at 205; *see also* 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence, as Administered in the United States of America* § 898, at 1264-65 (2d ed. 1892) (injury requirement ensured "courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral"). The mail and wire fraud statutes reflect this same limitation. *See Ciminelli*, 598 U.S. at 316; *Kelly*, 590 U.S. at 403; *McNally*, 483 U.S. at 360.

b. The injury requirement for fraud was no less a feature of equity in 1872. "In equity, as at law, fraud and injury" were required to "concur to furnish ground for judicial action." *Clarke v. White*, 37 U.S. (12 Pet.) 178, 196 (1838). "[A] mere fraudulent intent," this Court repeatedly explained, "unaccompanied by any injurious act," was "not the subject of judicial cognizance." *Id.*; *see also, e.g.*, *S. Dev. Co. of Nev. v. Silva*, 125 U.S. 247, 250 (1888); *Atl. Delaine Co. v. James*, 94 U.S. 207, 214 (1876); *Slaughter's Adm'r v. Gerson*, 80 U.S. (13 Wall.) 379, 383 (1871).

Again, the leading treatises understood the law the same way. *See* Pomeroy § 898, at 1264 ("Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal."); Bigelow, Ch. XI § 2, at 400 ("A contract cannot generally be rescinded for fraud unaccompanied with damage."); George Tucker Bispham, *The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery* § 217, at 215 (1874) ("Fraud without damage is no ground for relief at law or in equity."); Story § 203, at 205 (same);

William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* 12, 51 (1868) (same).

c. Criminal law at the time—typically found in statutes prohibiting false pretenses—likewise required actual or intended harm to property. One state high court put it this way: "Though money is obtained by misrepresentation, if no injury follows, no crime is accomplished." *State v. Palmer*, 32 P. 29, 30 (Kan. 1893); *see also, e.g.*, *State v. Casperson*, 262 P. 294, 296 (Utah 1927) (same). Treatises confirmed the "rule" of that era "that the person from whom the money or property is obtained shall be defrauded, and if he sustains no injury the offense [was] not committed." 2 Hascal R. Brill, *Cyclopedia of Criminal Law* § 1271, at 1931 (1923); *see also* 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 417(4), at 340 (9th ed. 1923) ("A loss must have resulted."); *id.* § 432(1), at 353-54 ("A morally reprehensible falsehood, the effect whereof has not been a legal injury, is not an indictable false pretence."); Francis J. Byrne, *False Pretenses and Cheats* § II(6), at 828-29, *in* 12 *The American and English Encyclopaedia of Law* (David S. Garland & Lucius P. McGehee eds., 2d ed. 1899) ("[N]o crime is committed if the party from whom the property was obtained is not injured or prejudiced thereby."); 1 Emlin McClain, *A Treatise on the Criminal Law as Now Administered in the United States* § 680, at 686 (1897) ("It must appear that there has been a fraud accomplished, that is, somebody has been injured.").

4. Relying on *Neder*, the government has noted that the wire fraud statute does not require proof "that the victim suffered loss or harm." BIO 7 (citing *Neder*, 527 U.S. at 24-25). That is true as far as it goes. Congress

did not criminalize fraud itself; it criminalized devising a "scheme" to defraud. *See Neder*, 527 U.S. at 25. Put another way, wire fraud is an inchoate crime, so a scheme need not be completed to support a conviction, and an actual injury need not occur. But by prohibiting "schemes to defraud," Congress still criminalized schemes that, *if completed*, would have constituted fraud. After all, a "fundamental characteristic" of inchoate criminal liability is an "endeavor which, if completed, would satisfy all of the elements of the underlying substantive … offense." *Ocasio v. United States*, 578 U.S. 282, 287 (2016) (internal quotation marks, citation, and alterations omitted).

Here, the underlying substantive offense is scheming "to defraud." And a scheme that, if completed as devised, would not cause property harm cannot be described as a scheme to *defraud*. Only schemes to harm property rights can qualify as wire fraud.

B. The statutory structure and design of the property fraud statutes require a scheme to harm a traditional property interest.

The structure and design of the mail and wire fraud statutes reinforce the conclusion that a scheme to induce a transaction in property through deception, without harm to a property interest, is not property fraud.

1. The inducement theory is at war with the fact that the property fraud statutes do not protect the "sovereign power to regulate." *Kelly*, 590 U.S. at 401 (quoting *Cleveland*, 531 U.S. at 23). Nor do the statutes safeguard any intangible interest a sovereign

has in "administering itself in the interests of the public," *McNally*, 483 U.S. at 358 n.8 (internal quotation marks and citation omitted), including exercising its "prerogatives over who should get [its property] and who should not," *Kelly*, 590 U.S. at 400.

Federal, state, and local governments often pursue policies through regulations or other official programs. Implementing those policies may involve anything from allocating licenses, to managing traffic safety, to leveraging their spending authority to incentivize private behavior the sovereign wants to encourage. Certainly those sovereign interests can be important, and schemes to frustrate them may warrant sanction. But this Court has made clear that the interests are not "property," and a scheme to frustrate them is not a property-fraud scheme. Unless the defendant devises a scheme that would harm a *property* interest, the scheme cannot support a property-fraud prosecution. *Kelly*, 590 U.S. at 400.

Accepting the inducement theory would upend that limitation. So long as a regulatory interest is memorialized in a contract, any regulatory violation would subject a person to federal criminal prosecution and 20 years in prison. This case is a prime example. Petitioners could not have been charged with wire fraud simply for contravening the governmental policies reflected in the DBE program. But they were convicted under the inducement theory because they bid for and signed a contract memorializing those policies. JA114, 175.

Retaining the distinction under the fraud statutes between harm to traditional property interests and frustration of regulatory interests is particularly

critical because another federal statute directly protects regulatory interests. Enacted just a few years before the mail fraud statute, 14 Stat. 471, 484 § 30 (1867), 18 U.S.C. § 371 prohibits conspiracies to defraud the United States. Yet Section 371 protects federal regulatory interests—and thereby diverges from the mail and wire fraud statutes. *See McNally*, 483 U.S. at 358 n.8. That is, Section 371 does *not* "contemplate a financial loss or that one shall result"; it encompasses "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Haas v. Henkel*, 216 U.S. 462, 479 (1910); *see also Hammerschmidt*, 265 U.S. at 188. It thus serves as a ready option in cases like this. It is, in fact, the most natural option.

Another statute, 18 U.S.C. § 1001, also criminalizes the making of "any materially false, fictitious, or fraudulent statement or representation" in any "matter within the jurisdiction" of the federal government. That provision is regularly used to punish deceptions that interfere with regulatory interests, regardless of whether they also injure a government property interest. *See, e.g.*, *United States v. Bazantes*, 978 F.3d 1227, 1231 (11th Cir. 2020); *United States v. Bros. Constr. Co.*, 219 F.3d 300, 308-09, 321 (4th Cir. 2000). Indeed, prosecutors secured Section 1001 convictions against petitioners for misrepresenting DBE compliance here. Pet. App. 8.[6]

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[6] On top of Sections 371 and 1001, Congress has also enacted tailored criminal statutes to punish violations of selected

Reading the property fraud statutes to punish the same regulatory harms that Sections 371 and 1001 cover, simply because regulatory policies are readily embodied in government contracts, would collapse Congress's distinction between property fraud and these other statutes.

Worse yet, the inducement theory would upend the property fraud statutes' particular place in the overall federal criminal code. Last Term, this Court observed that it would be "inexplicable" for one federal criminal statute to allow dramatically harsher punishment than another statute allows, based simply on insignificant factual details. *Snyder v. United States*, 144 S. Ct. 1947, 1956 (2024). So too here. Whereas violations of Sections 371 and 1001 are punishable by a maximum of five years in prison, a mail or wire fraud conviction carries with it the possibility of a 20-year sentence. Impairing regulatory interests is not four times more culpable simply because an administrative agency memorialized them in a contract. Congress did not give "prosecutors broad discretion to seek a 20-year maximum sentence for acts Congress saw fit to punish only with far shorter terms of imprisonment." *Fischer v. United States*, 144 S. Ct. 2176, 2189-90 (2024).

2. The fraudulent inducement theory is also incompatible with Congress's treatment of "intangible" interests that relate to economic

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regulatory requirements. For example, the Federal Food, Drug, and Cosmetic Act ("FDCA") criminalizes "[t]he failure to comply with any requirements of the provisions of, *or any regulations* or orders of the Secretary [of Health and Human Services]" under specified sections of the FDCA. 21 U.S.C. § 331(u) (emphasis added). Congress has enacted no such statute for the DBE program, however.

transactions. Congress has brought only one such interest under the mail and wire fraud statutes—that is, only one scenario where the defendant's scheme is not one to harm a traditional property right. The fraudulent inducement theory does not fit that bill.

In the decades preceding *McNally*, the courts of appeals interpreted the property fraud statutes to protect a wide variety of intangible rights. *See Skilling*, 561 U.S. at 400. The *McNally* indictment, for instance, alleged violations of a "right to be made aware of all relevant facts when selecting" a services provider, as well as a "right to have [one's] business … conducted honestly" and "free from … deceit." 483 U.S. at 354 nn. 3 & 4. But this Court held that the property fraud statutes do not protect any intangible rights. *Id.* at 358-59. They "protect property rights only." *Cleveland*, 531 U.S. at 19.

Congress responded to *McNally* by bringing just one intangible-rights theory back into the mail and wire fraud fold: It defined "scheme or artifice to defraud" to include a "scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. And to save that enactment from vagueness, *Skilling* later construed it to reach only bribery and kickback schemes. 561 U.S. at 407.

There the statutory structure stands. The mail and wire fraud statutes protect property interests and, when charged together with Section 1346, one non-property interest: the right to a fiduciary's honest services uncorrupted by bribes or kickbacks. *Ciminelli*, 598 U.S. at 315. Congress's "'reverberating silence'" about schemes to harm other non-property interests, *id.* (quoting *United States v. Sadler*, 750 F.3d 585, 591

(6th Cir. 2014) (Sutton, J.)), precludes unmooring the statutes from the "common understanding" that "to defraud" means to injure property rights, *id.* at 312 (quoting *Cleveland*, 531 U.S. at 19).

Yet by the government's lights, the inducement theory makes any dishonesty that induces a transaction in property into wire fraud. BIO 7-9. "Fraudulent inducement"—as alleged here and in general—is simply "us[ing] falsehoods to induce a victim to enter into a transaction." BIO 9. That is a scheme to deprive the victim of accurate information, but not a scheme to deprive it of property. Nor need it involve bribery or kickbacks, thereby potentially triggering Section 1346. Consequently, the fraudulent inducement theory is "inconsistent" with the structure of the mail and wire fraud statutes. *Ciminelli*, 598 U.S. at 315.

C. The fraudulent inducement theory flouts this Court's precedents.

1. The fraudulent inducement theory is not only incompatible with the text and design of the wire fraud statute, but blessing the theory would render meaningless virtually every one of this Court's fraud decisions from the last four decades. The Court previously has rejected the government's effort to create an "end-run" around its *Cleveland* decision (which, as explained above, the inducement theory would do as well). *See Kelly*, 590 U.S. at 404; *supra* at 24-26. It follows even more emphatically that the Court should reject a theory that would allow the government to circumvent nearly *all* of them.

Ciminelli. In *Ciminelli*, as in this case, the defendant procured multi-million-dollar government

contracts by way of "misrepresentation[s]"—there, "lying about the manipulation of the process through which his company was selected as the best-qualified developer." U.S. *Ciminelli* Br. 11; *see also Ciminelli*, 598 U.S. at 310. The government secured a conviction on the theory that "a defendant is guilty of wire fraud if he schemes to deprive the victim of potentially valuable economic information necessary to make discretionary economic decisions." 598 U.S. at 309 (internal quotation marks and citation omitted).

The Court rejected that right-to-control theory, holding that potentially valuable economic information is not a traditional property interest. *Ciminelli*, 598 U.S. at 316. As the Court observed, the theory would made nearly any misrepresentation or nondisclosure of "valuable economic information" in connection with a transaction into wire fraud, "thus mak[ing] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law." *Id*. at 315-16.

All of this is true of the inducement theory as well. That theory criminalizes misrepresentations that "induce a victim to enter into a transaction," even if the victim suffers no loss "as a result of such reliance." BIO 7, 9; *see also* Pet. App. 22. It would thus cover "almost any deceptive act" in connection with a transaction, federalizing "an almost limitless variety of deceptive actions traditionally left to state contract and tort law." *Ciminelli*, 598 U.S. at 316.

Look no further than Mr. Ciminelli himself. The government maintains that under the inducement theory, he was guilty of wire fraud. *See, e.g.*, U.S. *Ciminelli* Br. 40. In the government's view, "the

requirements of the right-to-control theory are best understood as identifying those fraudulent inducements" that it may prosecute as fraud (including the purported inducement in *Ciminelli*), so long as money or property has changed hands. *Id.* at 24.

Accepting this reasoning would be startling, to say the least. It would mean that *Ciminelli* was not a substantive decision about the scope of the property fraud statutes at all. The only flaw in that prosecution (and countless others under the right-to-control theory) would be nothing more than the framing of the indictments. That cannot be. *Ciminelli* rejected the right-to-control theory not because it was garbled pleading but because it criminalized a broad array of conduct "without statutory authorization." 598 U.S. at 315.

Indeed, if there is any difference between the coverage of the right-to-control theory and that of the fraudulent inducement theory, it is that the latter appears *broader*. Whereas the right-to-control theory swept in misrepresentations about only "economic information," the inducement theory also sweeps in "[a] range of noneconomic misrepresentations." U.S. *Ciminelli* Br. 18. This additional coverage of "deceptive actions traditionally left to state contract and tort law," *Ciminelli*, 598 U.S. at 315, provides still further reason to reject the inducement theory.

McNally. Much the same can be said for this Court's landmark decision in *McNally*. Mr. McNally was a corrupt insurance agent. He paid kickbacks to Kentucky officials from commissions he earned on Commonwealth insurance contracts the officials (and

eventual co-defendants) steered to him. 483 U.S. at 352. But "[i]t was not charged that in the absence of the alleged scheme the Commonwealth would have paid lower premiums or secured better insurance." *Id.* at 360. Instead, the government's theory was that the scheme deprived the citizens and government of Kentucky "of their right to be made aware of all relevant facts when selecting an insurance agent to write the Commonwealth's workmen's compensation policy." *Id.* at 354 n.3. The Court rejected this theory, holding that the defendants' conduct was "not within the reach" of the mail fraud statute. *Id.* at 361.

Yet under the government's inducement theory, any self-dealing employee would still be guilty of fraud. To work around *McNally*, the government need only allege that the employee engaged in a deceptive scheme to obtain money from his employer (e.g., his salary), rather than to deprive the employer of honest services.

It is hard to believe that *McNally*, too, reflected only a prosecutorial charging error. Nor is it plausible that the Court's concerns about the federal government using mail and wire fraud to "set[] standards of disclosure and good government for local and state officials" in cases contemplating no property loss could be so easily circumvented. 483 U.S. at 360.

Skilling. The inducement theory would similarly neuter *Skilling*. In that case, the defendant engaged in self-dealing and misrepresented his company's financial health. But he did not solicit or accept payments from any third party. The Court held that not even the post-*McNally* honest-services statute reaches this sort of nondisclosure theory, which is too

"amorphous" for criminal prosecution. 561 U.S. at 410. To avoid otherwise insoluble vagueness concerns, the Court limited the reach of Section 1346 to schemes involving bribery or kickbacks.

The inducement theory would revive the very concerns the *Skilling* Court sought to lay to rest in undisclosed conflict-of-interest cases. The broad honest-services theory that *Skilling* rejected could have been used, for example, to prosecute a city official who purchased property at fair market value from the city without disclosing her self-dealing—or a lawyer who obtained reasonable fees from a client without disclosing a conflict of interest. Yet these cases and countless others can be reframed as fraudulent inducements to obtain property from the victim.

PennDOT's own contracts require contractors to disclose conflicting financial interests. JA162-64. Had petitioners failed to do so, nothing would distinguish a prosecution based on that noncompliance from this prosecution for noncompliance with the DBE provision. Neither is a scheme to deprive PennDOT of property.

* * *

If nothing else, transforming decades of this Court's precedent limiting the substantive reach of the fraud statutes into nothing more than decisions concerning pleading errors would be incompatible with the bedrock requirement of fair notice. Particularly when it comes to the property fraud statutes, this Court has stressed that the government may prosecute only conduct that is "plainly within the statute[s]." *McNally*, 483 U.S. at 360 (internal quotation marks and citation omitted); *see also Skilling*, 561 U.S. at

412. Yet according to the government and the Third Circuit, untold numbers of prosecutors for decades have misunderstood the proper way to charge cases like this one.

If this country's foremost law enforcement attorneys—those who read and apply criminal statutes on a daily basis—have not previously thought that whenever money or other property changes hands, any misrepresentation about something the victim considers an important aspect of the bargain constitutes mail or wire fraud, then it is hard to understand how those statutes could possibly put the "common" man on notice of that. *Marinello v. United States*, 584 U.S. 1, 7 (2018). If Congress "desires" to decouple property fraud from fraud's injury requirement, perhaps it can. *McNally*, 483 U.S. at 360. But at the very least, "it must speak more clearly than it has." *Id.*

2. Faced with this sea of precedent under the mail and wire fraud statutes, the government has sought support for the inducement theory in two of this Court's decisions construing the *bank* fraud statute: *Shaw v. United States*, 580 U.S. 63 (2016), and *Loughrin v. United States*, 573 U.S. 351 (2014). BIO 8. But neither decision can perform the work the government needs done here.

In *Shaw*, "due to standard banking practices in place at the time of the fraud" at issue there, "no bank involved in the scheme ultimately suffered any monetary loss." 580 U.S. at 67. Against that backdrop, the Court explained that a provision of the bank fraud statute did not require "a showing of ultimate financial

loss nor a showing of intent to cause such loss." *Id.* at 67; *see* 18 U.S.C. § 1344(1).

That statement, in context, was wholly unremarkable. The bank in *Shaw* sustained injury to its "property rights in [the targeted] bank account," including its "right to use the funds" and its "right in a bailment" as a "bailee." 580 U.S. at 66-67 (quoting 2 William Blackstone, *Commentaries on the Laws of England* 452-54 (1766)). It was thus immaterial whether the bank *also* suffered *another* form of property harm, namely "financial" loss.

Furthermore, the Court's observation that criminal fraud statutes do not require "ultimate" loss is consistent with common-law rules—and with petitioners' position. At common law, coverage of "the amount of the loss from" a third party, such as an "insurer[]," was typically "no bar to an action subsequently commenced against the wrong-doer to recover compensation for the injury." *The Atlas*, 93 U.S. 302, 310 (1876). The harm occurred when the victim was first injured, even if someone else later remedied the harm to their own detriment.[7]

The government has also made much of *Shaw*'s quotation of Judge Learned Hand's quip that "'[a] man is none the less cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.'" 580 U.S. at 67 (quoting *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)); *see* BIO 8. But the Court's quotation of Judge Hand did

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[7] Today, this rule is known as the collateral source rule. *See W. Towboat Co. v. Vigor Marine, LLC*, 85 F.4th 919, 926 (9th Cir. 2023) (citing *The Atlas*, 93 U.S. at 310); *see also* Restatement (Third) of Torts § 10 (Tent. Draft No. 2) (2023).

not expand the reach of the wire and mail fraud statutes beyond their common-law boundaries.

To start, the language in *Shaw* was dicta twice over. It was dicta in *Shaw* because, as just explained, the scheme there indisputably injured the bank's property rights; it got nothing in return that could have been characterized as a "quid pro quo of equal value." And the language was dicta "in *Rowe* itself": The victims there "suffered a definable harm because they were induced to pay large sums of money for worthless property." *United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987). Double dicta, even when attributable to an esteemed jurist, cannot displace a long-recognized common-law rule.

At any rate, *Ciminelli* makes clear that the *Rowe* dicta has no purchase here. In *Rowe*, Judge Hand reasoned that a defendant who gave the victim something of different but equal value could be guilty of fraud because the victim has nonetheless "suffered a wrong; he has lost his chance to bargain with the facts before him." 56 F.2d at 749. That reasoning might hold some force where victims do not get what they paid for—say, they receive a different tract of land than expected, or a work of art by one artist instead of another. *See* BIO 8. But under *Ciminelli*, depriving someone of "[t]he right to valuable economic information needed to make discretionary economic decisions" is not criminal property fraud. 598 U.S. at 316.

Indeed, if Judge Hand's reasoning sounds like the right-to-control theory *Ciminelli* rejected, that is because it *is* the right-to-control theory. As this Court observed, 598 U.S. at 313-14, the right-to-control

theory traces its roots to *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), which in turn cited *Rowe* for support, *id.* at 463. Embracing *Rowe*'s statement that a defendant commits fraud merely by impairing someone's ability to "bargain with the facts before him" would resurrect the overbroad and invalid regime that *Ciminelli* interred just two Terms ago.

The government's reliance on *Loughrin* is even further afield. The government quotes a footnote rejecting the argument that the bank fraud statute "requires the Government to prove that the defendant's scheme created a risk of financial loss to the bank." 573 U.S. at 366 n.9; *see* 18 U.S.C. § 1344(2). But that does not mean the property fraud statutes do away with the common-law requirement of *property* harm (even if not necessarily *financial* in nature) to someone. Instead, the next sentence makes clear that the unique language of the bank fraud statute was simply meant to avoid the question whether the bank, as opposed to the depositor, "would suffer the loss from a successful fraud." 573 U.S. at 366 n.9. It is sufficient under subsection (2) of the bank fraud statute that either the bank *or* the depositor suffer a property harm from the completed scheme.

That was certainly true in *Loughrin*. The scheme there, had it succeeded, would have inflicted on the bank the same harms identified in *Shaw*. Consequently, *Loughrin* supplies no support for the inducement theory.

II. Endorsing the fraudulent inducement theory would produce untenable consequences.

The fraudulent inducement theory is breathtakingly broad. Every dispute over a

transaction where one party asserts that the other made material misrepresentations would become grist for a federal prosecution. To curb the damage, the government proposed various *ad hoc* limits in *Ciminelli*. But those purported limits would render the statutes' boundaries intolerably amorphous at best. The Court should avoid the litigation quagmire that would soon follow by adhering to the common-law limitations it has already recognized.

A. The fraudulent inducement theory is egregiously overbroad.

1. In our constitutional system, Congress creates crimes and sets the penalties. *Fischer v. United States*, 144 S. Ct. 2176, 2189 (2024). "Time and again," therefore, "this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes," *Dubin v. United States*, 599 U.S. 110, 130 (2023), requiring Congress to speak clearly before effecting "a sweeping expansion of federal criminal jurisdiction," *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *see also Fischer*, 144 S. Ct. at 2190; *Snyder v. United States*, 144 S. Ct. 1947, 1957 (2024); *Dubin*, 599 U.S. at 124-25; *Van Buren v. United States*, 593 U.S. 374, 393-94 (2021); *Yates v. United States*, 574 U.S. 528, 545-46 (2015).

Pressing federal criminal statutes to their outer limits also threatens principles of fair notice. *Dubin*, 599 U.S. at 129. In addition, it "places great power in the hands of the prosecutor … , which could result in the nonuniform execution of that power across time and geographic location." *Marinello v. United States*, 584 U.S. 1, 11 (2018).

And if all that were not enough, expansive readings of criminal statutes thwart "bedrock federalism principles." *Snyder*, 144 S. Ct. at 1956. States have primary responsibility for policing contract rights and interactions between citizens and state governments. *See id.* Courts, therefore, should not construe indeterminate federal statutes to "convert an astonishing amount of 'traditionally local criminal conduct' into 'a matter for federal law enforcement.'" *Bond v. United States*, 572 U.S. 844, 862-63 (2014) (quoting *United States v. Bass*, 404 U.S. 336, 349-50 (1971)).

Nowhere are these principles of judicial restraint more vital than in this Court's precedent construing the property fraud statutes. Nearly one hundred years ago, the Court emphasized that "[t]here are no constructive offenses; and before one can be punished [for mail fraud], it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926). And in its modern jurisprudence, the Court has refused to construe the statute "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987). Doing so, the Court has explained, would tread on principles of federalism and improperly transform the fraud statutes into all-purpose tools for federal prosecutors to police generalized "deception, corruption, [and] abuse of power," or "to enforce ([their] view of) integrity." *Kelly v. United States*, 590 U.S. 391, 393, 404 (2020); *accord Ciminelli v. United States*, 598 U.S. 306, 312 (2023).

2. The fraudulent inducement theory transgresses these principles. Under the theory, every intentional misrepresentation designed to induce someone to transact in property would constitute property fraud, regardless of whether the scheme contemplated any harm to a property interest. BIO 9. The federal mail and wire fraud statutes would become an all-purpose hammer for everyday deception.

Indeed, state court reports are replete with "fraudulent inducement" claims made in run-of-the-mill contract and tort cases. *See, e.g.*, *Lewis v. Fid. Nat'l Title Ins. Co.*, 887 S.E.2d 337, 339 (Ga. Ct. App. 2023); *Nestler v. Scarabelli*, 886 S.E.2d 301, 312 (Va. Ct. App. 2023); *GG Inv. Realty, Inc. v. S. Beach Resort Dev., LLC*, 337 So. 3d 431 (Fla. Dist. Ct. App. 2022); *Genger v. Genger*, 43 N.Y.S.3d 264, 265 (N.Y. App. Div. 2016). The inducement theory would transform each of these civil disputes into federal crimes, thus effecting a massive federalization of disputes routinely litigated under state law (if at all).

Government contract cases provide perhaps the clearest illustration of the breadth of the government's rule. In Fiscal Year 2022, "the federal government committed about $694 billion on contracts."[8] Each of those contracts imposes innumerable conditions the breach of which could, under the inducement theory, be prosecuted as fraud. In this case, for instance, each PennDOT contract ran more than 1,100 pages. Under the government's theory, a misrepresentation about any one of the contracts' terms would have been fraud,

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[8] U.S. Gov't Accountability Off., *A Snapshot of Government-Wide Contracting for FY 2022* (Aug. 15, 2023), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2022.

punishable by 20 years in prison, so long as the jury concluded that the contract term was "material." Pet. App. 26. To pick just one example, if petitioners had carried out a plan to pay certain employees less than minimum wage—in violation of the contract's requirement to the contrary, *see supra* at 5—they would not have been subject merely to a suit for breach of contract or wage-and-hour violations. The inducement theory would have allowed the government to prosecute petitioners for wire fraud.

But government contracting would be only the beginning. The inducement theory applies equally to *all* public and private contracts. A range of examples—some taken from actual prosecutions; others readily conceivable hypotheticals—illustrate the dramatic reach of the theory:

- If any situation "where the defendant uses falsehoods to induce a victim to enter into a transaction" is a scheme to defraud, BIO 9, then any job applicant who submits a resume that embellishes tasks performed in a past position could be charged with mail or wire fraud—even if the applicant is fully qualified and his performance is stellar (or he doesn't get the job in the first place, since guilt does not depend on the scheme's success). *Cf. United States v. Guertin*, 67 F.4th 445, 451 (D.C. Cir. 2023). Same for an employee who lies about a violation of workplace policy (perhaps checking social media on a work computer) to keep her job and thus continue collecting her salary.

- So too for a recent college graduate who tells a prospective landlord that she will be attending

graduate school (thereby causing the landlord to believe she will be a quiet tenant) but in actuality has no such plans.

- Or imagine someone sells printer toner to various businesses at the regular price, falsely claiming that the price will go up in a week. Such a misrepresentation could induce a buyer to enter into a transaction, *see United States v. Milheiser*, 98 F.4th 935, 938 (9th Cir. 2024), just as would a used car salesman's false assertion that another person is coming to look at a certain car later that day.
- How about a babysitter who persuades a couple to hire her by falsely telling them that she will use the money she earns to pay for college expenses? Or that she will contribute $5 of every $20 she earns to her older brother, who was recently laid off? If the couple chooses the babysitter over other applicants for either reason, the situation would fall squarely within the inducement theory. Indeed, this very case essentially boils down to a false promise to give some of petitioners' earnings to a third party.

What's more, no formal contract is required to trigger the inducement theory. After all, a person can be induced to part with money or property for all sorts of reasons that are not (and were never intended to be) reflected in any written agreement. Every day in this country, for instance, people selling their homes choose among multiple offers based on which prospective buyers' stories about their plans for the property are more compelling. Under the inducement theory, any lie (say, falsely claiming to be planning to

raise a family in the home) would be fodder for a wire fraud prosecution, even if the buyer offered the same price—or better—than others.

Or consider misrepresentations ordinarily covered by state consumer protection laws. Companies sometimes market their products with promises that they donate some portion of their profits to charity or other social or political causes (think, for example, of Newman's Own or Ben & Jerry's). Other businesses represent that their crops are locally grown, or that their granola is based on a recipe from the owner's grandma. Still more claim to be the official supplier of the U.S. Olympic Team or that famous actresses have worn their clothes to the Oscars. If any of these claims is false and material to the purchaser, it would be criminal under the inducement theory, regardless of whether the consumers got exactly what they paid for at market price and thus were not financially injured.

One could go on and on. And that is just the point: The inducement theory would be limited only by the extraordinary diversity of the American marketplace for goods and services and the temperance of federal prosecutors. This "staggering breadth" strongly suggests rejecting the theory. *Dubin*, 599 U.S. at 129.

B. The government's patches do not solve this problem.

Faced in *Ciminelli* with the sweeping implications of the inducement theory, the government suggested some *ad hoc* limiting principles. But those patches would introduce serious vagueness problems of their own. If the inducement theory were adopted, no remotely clear lines would separate criminal fraud from civil deceit, throwing the law into disarray.

1. The government's main suggestion in *Ciminelli* for reining in the fraudulent inducement theory was a turbocharged version of materiality. Materiality normally requires a statement that "has a natural tendency to influence, or is capable of influencing" the person on the other side of the transaction. *Neder v. United States*, 527 U.S. 1, 16 (1999) (internal quotation marks, citation, and alterations omitted). But the government argued that materiality was especially "rigorous" "in the contracting context," requiring a statement that goes "to the very essence of the bargain." U.S. *Ciminelli* Br. 18, 30, 43 (internal quotation marks and citation omitted).

It is unclear whether the government will endorse this version of materiality here. The jury was instructed under the classic materiality standard, *see* C.A.3 App. 3481-82, not the "essence" standard floated in *Ciminelli*. On the other hand, in its brief in opposition, the government quotes the Third Circuit's assertion that DBE participation was "'an essential component of the contract' between petitioners and PennDOT," presenting that assertion as part of its defense of the decision below. BIO 7 (quoting Pet. App. 22). It is unclear whether "essential component" means the same thing as "very essence." And the government elsewhere appears to endorse a more general rule that wire fraud occurs "where the defendant uses falsehoods to induce a victim to enter into a transaction." BIO 9. No mention of essentiality at all there.

There are, in any event, strong reasons for this Court not to put stock in any heightened materiality standard. Start with the government's halfhearted "endors[ement]" of the notion in *Ciminelli*. *See Van*

Buren, 593 U.S. at 394. And even after the government suggested in *Ciminelli* that materiality in this setting requires evaluating whether a misrepresentation goes to the essence of the bargain, federal prosecutors have continued to resist. Again look no further than *Ciminelli* itself. On remand, the government appears to have reverted to the traditional formulation of materiality—and the government in other cases has affirmatively resisted defense requests to apply the heightened standard.[9]

There are also doctrinal reasons to be dubious of any "essence" test. The government fashioned that test in *Ciminelli* from a footnote in *Universal Health Services, Inc. v. United States*, 579 U.S. 176, 193 n.5 (2016). *See* U.S. *Ciminelli* Br. 18, 30, 44. There, the Court cited a 1931 New York decision holding that a particular half-truth was material because it "went to the very essence of the bargain." *Junius Constr. Corp. v. Cohen*, 257 N.Y. 393, 400 (1931). But *Universal Health* addressed the False Claims Act, not the wire or

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[9] *See, e.g.*, U.S. Br. on Remand at 21, 35-37, *United States v. Percoco,* No. 18-2990 (2d Cir. Nov. 7, 2023), ECF No. 551 (reciting traditional standard and explaining that the "same concept" as right-to-control theory is "rooted in the materiality element"); *Milheiser*, 98 F.4th at 940 (noting government objection to "very nature of the bargain" standard); U.S. Br. at 38-39, *United States v. Miller*, No. 23-3194 (9th Cir. May 17, 2024), ECF No. 19.1 (opposing defendant's reliance on government's *Ciminelli* materiality standard); *see also* Tr. of Nov. 1, 2023 Charge Conf. at 3589-90, *United States v. Miller*, No. 20-cr-232 (D. Minn. Nov. 9, 2023), ECF No. 2040 (opposing deviation from model charge on ground that "essential element" is equivalent to traditional materiality); Gov't Opp. to Post-Trial Motions at 60-61, *United States v. Miller*, No. 20-cr-232 (D. Minn. Jan. 23, 2024), ECF No. 2182 (defending model charge).

mail fraud statutes—and the Court expressly disclaimed any view regarding whether the materiality tests for those provisions are the same. *See* 579 U.S. at 192-93. Furthermore, *Universal Health* stressed that the False Claims Act is not an "all-purpose antifraud statute … or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* at 194 (internal quotation marks and citation omitted). But here, adopting the fraudulent inducement theory would enable the government to use the mail and wire fraud statutes to punish garden-variety contract disputes and regulatory violations—exactly what *Universal Health* warned against.

Even if these doctrinal deficiencies could be brushed aside, a "very essence" or "essential component" test would lead to nothing but confusion. How to tell what the government means by "essence" of a bargain? *Junius* indicated the essence of a contract for the purchase of goods or services is the agreement to buy goods that have a certain pecuniary "value." 257 N.Y. at 400. In that sense, the essence of the bargain here was the agreement to repair and paint the bridges for a fixed sum of money—nothing more. There is no evidence that the identities of the people supplying paint for the repairs raised PennDOT's price or lowered the value of petitioners' work. But it is unlikely the government thinks this conception of "essentiality" is correct; otherwise, it would lose under its own test.

So one wonders what the "essence" of a bargain is supposed to mean. Maybe the government thinks the essence of the bargain can be defined by the contract's drafters, such that any term whose breach is deemed material is an "essential component" of the bargain.

That seems to be what the Third Circuit believed, stating that without the DBE provision, "the nature of the parties' bargain would have been different." Pet. App. 22; *see also* Pet. App. 23 (suggesting that any breaches of "contracts themselves" are actionable under the criminal fraud statutes). If that is the test, however, it would seem to cover most, if not all, of the provisions in this 1,100-plus-page contract—and of every contract. Perhaps the government's definition falls somewhere in between. But it is impossible to see where the line would be, or to expect courts to be able to police any potential line with any consistency—much less for ordinary people to guess where that line might be.

Other questions abound. For example, what about inducements expressed only during negotiations and excluded from the parties' contract? Consider this passage from the court of appeals decision this Court reversed in *Ciminelli*:

> We are similarly unpersuaded by defendants' arguments that rigging the Buffalo and Syracuse RFPs was not wire fraud because it merely induced negotiations, or because Fort Schuyler still received the benefit of its bargain. *The bargain at issue was not the terms of the contracts ultimately negotiated*, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process. Depriving Fort Schuyler of that information was precisely the object of defendants' fraudulent scheme, and for Fort Schuyler, it was *an essential element of the bargain*.

United States v. Percoco, 13 F.4th 158, 172 (2d Cir. 2021) (emphasis added). It is hard to imagine a tidier encapsulation not only of the reality that accepting the "fraudulent inducement" theory would in effect revive the right-to-control theory, but also that an "essential component" test would be no meaningful limitation at all.

Finally, what about non-contractual transactions? When does a line on a resume, for example, go to the essence of an employee's suitability for a job? When does a babysitter's statement about how she will spend the money she earns go to the essence of a bargain—only when the parents would have stayed home but for the representation, or also when it was a tiebreaker between two neighborhood teenagers equally capable of handling the gig? Once "essence of the bargain" is unmoored from financial or other property interests, the test seems incapable of predictable application.

In fact, the government itself has already realized this. In a recent filing, the government explained that an essence-of-the-bargain test would be hopelessly "confusing" because "[i]t is not obvious that a bargain even has an 'essence,' and there is no way to ensure that a jury would know how to identify it." U.S. Br. at 39, *United States v. Miller*, No. 23-3194 (9th Cir. May 17, 2024), ECF No. 19.1. Exactly right.

2. In *Ciminelli*, the government also adverted to other "common-law doctrines [that] may further constrain" the fraudulent inducement theory. U.S. *Ciminelli* Br. 44. Maybe the government is right. Or maybe it isn't. The only thing we know for certain from the government's position in *Ciminelli* is that another avalanche of prosecutions, trials, and appeals would be

needed to sort fraud law out. Meanwhile, likely for decades, prosecutors would have enormous leverage to threaten criminal fraud across a dizzying spectrum of fact patterns. And businesspeople would be left wondering when they might be subjecting themselves not just to tort, contract, or consumer protection liability but to criminal convictions and years behind bars.

At the end of the day, the Court faces a stark choice: Adhere to limitations on the fraud statutes it has enforced for over a century, or allow the statutes' coverage to balloon, giving the federal government sweeping criminal jurisdiction over everyday deceptions. But if the choice is stark, it is also easy. Once again, the Court should turn back the government's attempt to repackage the fraud statutes to reach far beyond their intended purpose.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed insofar as it affirmed petitioners' convictions.

Respectfully submitted,

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