No. 23-909

IN THE

Supreme Court of the United States

STAMATIOS KOUSISIS and
ALPHA PAINTING AND 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 *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONERS

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
600 Stewart Street, Suite 400
Seattle, Washington 98101
(360) 320-6435
cline@johndclinelaw.com

Attorney for Amicus Curiae

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Due Process Institute is a nonprofit, bipartisan public interest organization that seeks to ensure procedural fairness in the criminal justice system. Protecting the right of individuals to receive constitutionally adequate notice of which actions are subject to criminal liability is among Due Process Institute's top priorities. Confining the mail and wire fraud statutes to their proper scope will mark an important advance toward that goal.

SUMMARY OF ARGUMENT

Mail and wire fraud are property crimes. A mail or wire fraud scheme must contemplate harm to someone's property. Federal prosecutors find that tie to property frustrating. If the property requirement were removed, they realize, mail and wire fraud could strike at all forms of "deception, corruption, [and] abuse of power." *Kelly v. United States*, 590 U.S. 391, 393 (2020). So prosecutors have devised creative theories to circumvent the property requirement. Complaisant lower courts have too often endorsed those theories. In case after case, this Court has rejected them.

When the Court insists on the property requirement, as it has done repeatedly over the decades since *McNally v. United States*, 483 U.S. 350 (1987), one would expect prosecutors to hew strictly to

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

the lines the Court draws. One would expect the lower courts to enforce those lines when prosecutors stray beyond them. But that is not what has happened. Instead, each ruling from this Court has spawned prosecution theories designed to obliterate, or at least blur, the line between criminal and merely deceitful conduct, and those theories have found courts willing to embrace them.

We trace below the end-runs prosecutors have made around *McNally* and its progeny. To set the stage, consider the mail fraud article Judge Rakoff drafted while still a federal prosecutor and published in 1980, seven years before *McNally*. The mail fraud statute, he declared, is the prosecutor's "Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart--and our true love." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duquesne Law Review 771, 771 (1980). Why such intense devotion? Because the mail fraud statute had been "the first line of defense against virtually every new area of fraud to develop in the United States in the past century." *Id*. at 773 (quotation omitted). After listing the statute's applications, including "blackmail, counterfeiting, election fraud, and bribery," then-prosecutor Rakoff concluded: "In many of these and other areas, where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit." *Id*.

Read in light of *McNally* and this Court's other mail and wire fraud decisions in the intervening years, that description seems jarring, even shocking.

What about the property requirement? What about fair notice and the rule of lenity? What about federalism? Those concerns largely fell by the wayside as prosecutors and courts wielded what they viewed as an all-purpose tool for punishing conduct they deemed morally reprehensible.

In one case after another beginning with *McNally*, this Court has worked to tether the mail and wire fraud statutes to their text and common law roots. This case marks the culmination of that effort. It is an opportunity to put a forceful end to what petitioners correctly describe as a "game of whack-a-mole" between the Court and federal prosecutors. Pet. Br. at 2. But it is no "game"--not, at least, to the countless men and women who have gone to prison over the past eighty or so years because prosecutors and lower courts saw fit to turn the mail and wire fraud statutes into free-floating, shape-shifting nets in which to snare those whose deceitful conduct the federal criminal regime did not expressly prohibit.

ARGUMENT

I. BEFORE *McNALLY*: NO LINK TO PROPERTY; "MORAL UPRIGHTNESS."

The mail fraud statute began life without fanfare in 1872. For the first seventy years or so of its existence, it attracted little controversy; many cases dealt with the requirement that the mails be used. Rakoff, *supra*, 18 Duquesne L. Rev. at 784-821. By the 1940s, however, the statute had fully engaged the attention of federal prosecutors. Initially used, as intended, to prosecute frauds targeting property, the

mail fraud statute began to find a broader application to all forms of deceit.

Prosecutors and courts accomplished this expansion in two ways: they read the initial two clauses of the statute--only the second of which mentions property--as creating independent theories of liability, and they detached the term "defraud" from its common law roots. This approach reached its apotheosis in cases such as *United States v. States*, 488 F.2d 761 (8th Cir. 1973). *States* was an election fraud case. There was no allegation that the object of the alleged scheme was property; it was instead "to deceive and defraud the public of certain intangible political and civil rights." *Id.* at 765. Treating the two clauses of § 1341 as disjunctive, the Eighth Circuit rejected out of hand the defendant's argument that the statute required proof of a scheme that targeted property. *Id.* at 763-67.

Nor did the definition of fraud itself cabin the statute's scope. *States* declared that "the concept of fraud in § 1341 is to be construed very broadly." *Id.* at 764. And to drive that point home, it quoted a Fifth Circuit decision:

> The fraudulent aspect of the scheme to "defraud" is measured by a nontechnical standard. Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of the members of society.

Id. (quoting *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967)) (cleaned up). Small wonder that federal prosecutors rhapsodized about a statute that allowed them to police "moral uprightness."

From fifty years on, it seems extraordinary that such a theory of criminal liability was allowed to stand. But stand it did, for decades. Many defendants went to prison because, in the view of prosecutors, courts, and juries, their conduct "fail[ed] to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of the members of society." And then came *McNally*.

II. FROM *McNALLY* TO *CIMINELLI*: HONEST SERVICES, REGULATORY "PROPERTY," AND THE "RIGHT TO CONTROL."

McNally put an end to *States* and its ilk. The Court held that the mail fraud statute protects property rights. It rejected the disjunctive reading of the first two clauses of § 1341, through which prosecutors and courts had untethered the statute from the property requirement. "As we see it," the Court declared, "adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." 483 U.S. at 359.

The Court rejected as well the limitless definition of fraud that *States* and other cases embraced. It observed that "the words 'to defraud'

commonly refer 'to wronging one in his property rights by dishonest means or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *Id.* at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). And in an implicit rebuke of the *States* "moral uprightness" formulation, the Court 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." *Id.* at 360.

Prosecutors at once set about circumventing *McNally*. They did so in three principal ways: through aggressive use of an honest services statute, 18 U.S.C. § 1346, enacted the year after *McNally*; through characterization of government regulatory interests as "property"; and through the theory that the right to control property is itself property.

Enactment of § 1346 provided the initial opportunity to get around the *McNally* property requirement. Prosecutors and courts soon pushed the statute far beyond its intended purpose, to include, for example, undisclosed self-dealing. Convictions on this theory were obtained and upheld by the lower federal courts, and defendants were duly dispatched to prison.

In 2010, the Court intervened, this time to curtail prosecutors' unbounded interpretation of "honest services." Paring that phrase back to its core, the Court held that § 1346 "criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law."

Skilling v. United States, 561 U.S. 358, 409 (2010) (emphasis in original). It rejected the undisclosed self-dealing theory that prosecutors had used successfully for two decades. *See id.* at 409-11. Even after *Skilling*, however, prosecutors continued to press the honest services theory past its limits. Just last term, the Court overturned a conviction based on jury instructions defining in sweeping terms when a private citizen owes a duty of honest services to the public. *Percoco v. United States*, 143 S. Ct. 1130 (2023).

To create at least the appearance of compliance with *McNally*'s strictures, prosecutors also devised new forms of "property" under the mail and wire fraud statutes. For example, prosecutors began to define certain government regulatory interests as property. Again the Court pushed back. In *Cleveland v. United States*, 531 U.S. 12 (2000), it rejected prosecutors' effort to cast Louisiana's unissued poker licenses as property of the state under § 1341. The Court concluded that "these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate. . . . Even when tied to an expected stream of revenue, the State's right of control does not create a property interest." *Id.* at 23.

The Court's unanimous opinion in *Cleveland* could hardly have been clearer: neither a state's regulatory interest nor its "right to control" the issuance of licenses constituted property. Undeterred, prosecutors and lower federal courts continued to press both theories. In *Kelly*, decided twenty years after *Cleveland*, prosecutors again

argued that a government regulatory interest--in *Kelly*, it was the Port Authority's right to control the toll lanes at the south end of the George Washington Bridge--constituted property, and the Court again unanimously rejected that theory, declaring that "[t]he realignment of the toll lanes was an exercise of regulatory power--something this Court has already held [in *Cleveland*] fails to meet the [wire fraud statute's] property requirement." *Kelly*, 590 U.S. at 393-94.

Kelly thus re-interred the theory that a government regulatory interest constitutes property. But it is worth asking: in the twenty years between the unanimous decisions in *Cleveland* and *Kelly*, how many defendants without the resources or luck to obtain this Court's review pled guilty to indictments asserting that theory or were convicted at trial on jury instructions endorsing it? How many defendants lost their freedom, their families, and their future because federal prosecutors and lower federal courts refused to heed the clear holding in *Cleveland*? And how long will it be before the "regulatory interest as property" theory rises from the grave in which *Cleveland* and *Kelly* left it, perhaps in slightly different form, and forces the Court to bury it a third time? This Court may be playing "whack-a-mole" with federal prosecutors and lower courts, but for those on the receiving end it is no game.

That leaves prosecutors' third main technique for circumventing the *McNally* property requirement: the "right to control" theory. That theory characterized as property under the mail and wire fraud statutes "potentially valuable economic

information necessary to make discretionary economic decisions." *Ciminelli v. United States*, 143 S. Ct. 1121, 1124 (2023) (quotation omitted). It came to the fore after *McNally* in cases such as this one, where the government could prove deceit but no contemplated harm to property interests.

Some lower courts rejected the theory. *See, e.g., United States v. Sadler*, 750 F.3d 585, 590-92 (6th Cir. 2014); *United States v. Bruchhausen*, 977 F.2d 464, 467-68 (9th Cir. 1992). But others, especially within the Second Circuit, embraced it--and, decade after decade, defendants convicted under that theory headed off to federal prison.

The right to control theory finally made it to this Court last year--and, as with the government's previous efforts to end-run *McNally*, the Court rejected it unanimously. In words that could have come from *McNally* and were foreshadowed in *Cleveland*, the Court declared: "[T]he wire fraud statute reaches only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. Accordingly, the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes." *Ciminelli*, 143 S. Ct. at 1128.

III. BEYOND *CIMINELLI*: FRAUD IN THE INDUCEMENT.

Even before *Ciminelli* demolished the right to control theory, the government had readied its next move. In its brief on the merits in *Ciminelli*, the

government conceded that the right to control--the alleged property interest on which the jury had been instructed and Ciminelli had been convicted and sentenced to 28 months in prison--was not actually property at all.[2] It proposed that the Court affirm the conviction on the basis of a different property interest: the "money or other consideration" a defendant obtains "by fraudulently inducing the victim to enter into a transaction."[3] The Court declined to address the new theory. *See id.* at 1129.

That brings us to this case. With a nip here and a tuck there, the government wants to dress up the right to control as fraud in the inducement, just as it did in *Ciminelli*. *Bruchhausen* and *Sadler* show how readily one theory can morph into the other; in those cases, the government offered them as alternative paths to conviction on the same facts. But those cases also show the problem the government faces in swapping theories: both courts rejected the fraud in the inducement theory because the government did not show that the scheme contemplated harm to the victim's property interests. *See Sadler*, 750 F.3d at 590 (no wire fraud where victim pill distributors received "the going rate for

---

[2] *E.g.*, *Ciminelli*, 143 S. Ct. at 1128-29 ("Despite indicting, obtaining convictions, and prevailing on appeal based solely on the right-to-control theory, the Government now concedes that the theory as articulated below is erroneous."); *Ciminelli v. United States*, No. 21-1170, Brief for the United States at 24 ("[T]o the extent that language in the [Second Circuit's] opinions might suggest that depriving a victim of economically valuable information, without more, necessarily qualifies as 'obtaining money or property' within the meaning of the fraud statutes, that is incorrect.").

[3] *Id.*

[their] product"); *Bruchhausen*, 977 F.2d at 467 (no wire fraud where victim manufacturers "received the full sales price for their products" and "clearly suffered no monetary loss").

The government has a solution: eliminate the requirement that the scheme have as its object harm to the victim's property. But abandoning contemplated harm to property presents the very danger the Court warned against in *Ciminelli*: it "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.'" 143 S. Ct. at 1128 (quoting *Cleveland*, 531 U.S. at 27) (cleaned up). The fraud in the inducement theory, like its doppelganger the right to control theory, "thus criminalizes traditionally civil matters and federalizes traditionally state matters." *Id.*

The Court should reject the fraud in the inducement theory, just as it has rejected the other theories prosecutors have devised to circumvent *McNally*. And, we suggest, it should do so in terms so clear and powerful that no prosecutor or lower court can fail to get the message. Because if one thing is evident from the saga of the mail and wire fraud statutes since *McNally*, it is that prosecutors, faced with the demise of the fraud in the inducement theory, will not readily comply with the Court's directive. They will try instead to devise a new theory, a new gap-filling dragnet of the kind then-

prosecutor Rakoff celebrated in the halcyon days before *McNally*. At least some lower courts will endorse the new theory. And in the years or decades it takes for that theory to come before this Court and be rejected, countless men and women will have been prosecuted, convicted, and imprisoned, only to find out, when it is too late to do them any good, that their conduct did not violate the mail and wire fraud statutes after all.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Law Office of John D. Cline
600 Stewart Street
Suite 400
Seattle, WA 98101
(360) 320-6435

Counsel for Amicus Curiae

August 2024