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 OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers is a nonprofit bar association that works on behalf of criminal defense attorneys to advance the proper, efficient, and just administration of criminal justice. Its members often represent defendants charged with property fraud under

[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution to fund the preparation or submission of the brief; and no person other than *amici curiae*, their members, or their counsel made such a contribution.

the mail, wire, and bank fraud statutes. Through those representations, NACDL's members have seen the often-hidden costs associated with broad interpretations of the property fraud statutes.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty. Cato's Project on Criminal Justice uses evidence-based methods to study the consequences of the rapid expansion of the federal criminal law for individual liberty and essential constitutional rights. Cato regularly presents its findings to policymakers and advocates for common-sense reforms to ensure the criminal law fulfills its proper role while also protecting the people from government abuse.

Collectively, *amici* have filed scores of *amicus* briefs in this Court and in the courts of appeals across the country regarding the proper interpretation of criminal statutes, including the property fraud statutes. Courts and judges routinely cite and rely on those briefs to resolve important legal issues in American criminal law.[2]

SUMMARY OF ARGUMENT

This case is another example of prosecutors distorting the property fraud statutes – this time through the so-called "fraudulent inducement" theory. As petitioners explain, that theory defies text and precedent. The prop-

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[2] See, *e.g.*, *Erlinger* v. *United States*, 144 S. Ct. 1840, 1859 (2024) (citing NACDL *amicus* brief); *Brown* v. *Ent. Merchants Ass'n*, 564 U.S. 786, 797 (2011) (citing Cato *amicus* brief); *Alabama* v. *Shelton*, 535 U.S. 654, 671 (2002) (citing NACDL *amicus* brief); *Hughes* v. *United States*, 584 U.S. 675, 693 (2018) (Sotomayor, J., concurring) (citing NACDL *amicus* brief); *Bassett* v. *Arizona*, 144 S. Ct. 2494, 2498 (2024) (mem.) (Sotomayor, J., dissenting from denial of certiorari) (citing NACDL *amicus* brief); see also N. Gorsuch & J. Nitze, Over Ruled 108-109 (2024) (quoting NACDL study).

erty fraud statutes do not criminalize – and have never criminalized – every deception that induces someone to enter into a transaction. Those statutes reach only schemes that, if successful, would inflict economic harm. To hold otherwise would erode core constitutional values and exacerbate the overcriminalization that plagues federal criminal law.

ARGUMENT

The government's fraudulent-inducement theory – that any lie inducing someone to enter into a transaction is fraud – rests largely on dictum in Judge Learned Hand's opinion in *United States* v. *Rowe*, 56 F.2d 747 (2d Cir. 1932).[3] That case held that a fraud indictment need not allege the victim *actually* suffered financial loss. *Id.* at 749. It was sufficient that the indictment alleged the defendants duped victims into buying property worth less than the defendants said it was worth. *Id.* at 748.

But the opinion continued needlessly to add 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." *Rowe*, 56 F.2d at 749. "[H]e has lost his chance to bargain with the facts before him." *Ibid.*

That 90-year-old comment – made without citation to any authority – forms the basis of the government's fraudulent-inducement theory. The *Rowe* dictum (read as

[3] See U.S. Brief in Opp'n 8, *Kousisis* v. *United States*, No. 23-909 (U.S.) (filed Apr. 24, 2024) (invoking *Rowe*'s dictum); U.S. Brief in Opp'n 7, *Porat* v. *United States*, No. 23-832 (U.S.) (filed Mar. 4, 2024) (same); U.S. Br. 21-22, 40-41, *Ciminelli* v. *United States*, No. 21-1170 (U.S.) (filed Oct. 12, 2022) (same).

the government suggests) and the theory it inspired are both wrong and dangerous.[4]

I. JUDGE HAND'S DICTUM IN *ROWE* IS WRONG

A. *Rowe*'s Dictum Defies Text and Precedent

The property fraud statutes punish schemes "to defraud." 18 U.S.C. §§ 1341, 1343, 1344. That language codified "common-law fraud" absent specific instruction to the contrary. *Neder* v. *United States*, 527 U.S. 1, 25 (1999). Common-law fraud always required proof the victim "suffered actual economic loss." *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 344 (2005) (citing *Pasley* v. *Freeman*, 100 Eng. Rep. 450, 457 (1789)).

Thus, a scheme to defraud means a scheme that, if successful, would inflict economic injury. Indeed, the "'victim's loss must be an objective of the deceitful scheme.'" *Kelly* v. *United States*, 590 U.S. 391, 402 n.2 (2020) (brackets omitted). Without a scheme to inflict economic harm, there can be no "scheme to defraud" and thus no property fraud.

Judge Hand's dictum (if read broadly) would mean the opposite. It would treat a scheme envisioning no economic injury as property fraud. It would treat every scheme to *deceive* – to deprive the victim of the "chance to bargain with the facts before him" – as a scheme to defraud. *Rowe*, 56 F.2d at 749. It would do so even while acknowledging that an action for fraud at common law "would fail without proof of damage." *Ibid.*

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[4] Judge Hand may have been referring to cases where the scheme deprived the victim of the *specific* property that the "party injured" desired for its unique "qualities." *State* v. *Mills*, 17 Me. 211, 218 (1840). If so, *Rowe* would lend no support to the government's theory. See Pet. Br. 36-37. *Amici* therefore address the flaws in the government's broader reading of *Rowe*.

Judge Hand's dictum suggests he assumed that a 1909 amendment to the mail fraud statute expanded its reach to include schemes *either* "to defraud" *or* to "obtain[ ] money or property" through deception. See *Rowe*, 56 F.2d at 749 (citing *Moore* v. *United States*, 2 F.2d 839 (7th Cir. 1924), which read the 1909 amendment that way). This Court, however, later held that the 1909 amendment did *not* "depart from" the "common understanding" that the mail fraud statute punished only schemes to "wrong[ ] [the victim] in his property rights." *McNally* v. *United States*, 483 U.S. 350, 351 (1987).

Despite the disjunctive language, "the federal fraud statutes criminalize only schemes *to deprive* people of traditional property interests." *Ciminelli* v. *United States*, 598 U.S. 306, 309 (2023) (emphasis added). "[P]aying the going rate for a product does not square with the conventional understanding of 'deprive.'" *United States* v. *Sadler*, 750 F.3d 585, 590 (6th Cir. 2014) (Sutton, J.). Rather, the victim is "deprived" only of the "chance to bargain with the facts before him." *Rowe*, 56 F.2d at 749. But that "chance" is not a traditional property interest any more than the right to "information necessary to make discretionary economic decisions," *Ciminelli*, 598 U.S. at 313.[5]

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[5] Judge Hand's "eloquent[ ]" dictum was the intellectual foundation for the right-to-control theory this Court just rejected. *United States* v. *Wallach*, 935 F.2d 445, 463 (2d Cir. 1991), abrogated by *Ciminelli*, 598 U.S. at 313. Decades earlier, however, the Second Circuit had repudiated *Rowe*'s assertion that "no definable harm need be contemplated by the accused to find him guilty of mail fraud." *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970); see *United States* v. *Starr*, 816 F.2d 94, 100-101 (2d Cir. 1987) (similar).

Thus, the government's broad reading of *Rowe*'s dictum squares with neither text nor precedent and "cannot form the basis for a conviction under the federal fraud statutes," *Ciminelli*, 598 U.S. at 316.

B. This Court Has Never "Endorsed" *Rowe*'s Dictum

Far from "endorsing" *Rowe*'s dictum, as the government often says, this Court's cases repudiate it. See pp. 4-5, *supra*. The government claims otherwise only by distorting this Court's bank fraud cases. See U.S. Br. 21, *Ciminelli* v. *United States*, No. 21-1170 (U.S.) (filed Oct. 12, 2022).

In *Shaw* v. *United States*, 580 U.S. 63 (2016), this Court considered whether a defendant who "intended to cheat only a bank depositor, not a bank," commits bank fraud. *Id.* at 65. This Court held that a scheme to steal from a bank customer is necessarily a scheme to deprive *the bank* of its "property rights" as bailee of the customer's property. *Id.* at 66-67.

In that context, this Court quoted Judge Hand's dictum to support the proposition that the bank fraud statute "demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss" *to the bank* in addition the harm to the bank's rights as bailee. *Shaw*, 580 U.S. at 67. But that context-laden passage in no way overruled decades of precedent holding that a scheme that contemplates no property harm is not property fraud. Rather, *Shaw* reaffirmed that property fraud requires a scheme both "to deceive * * * *and* deprive [the victim] of something of value," *i.e.*, money or property. *Id.* at 72.

Loughrin v. *United States*, 573 U.S. 351 (2014), also undermines the claim that this Court endorsed *Rowe*'s dictum. Indeed, the opinion does not mention *Rowe*. Yet

the government says it endorsed *Rowe*'s dictum by rejecting the notion that bank fraud requires proof that "the defendant's scheme created a risk of financial loss to the bank." *Id.* at 366 n.9. But *Loughrin* did not abandon the requirement that an intended victim of bank fraud suffer an economic loss from a successful fraud. It merely relieved courts of deciding "technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *Ibid.*

This Court's later fraud decisions underscore that point. If the fraud statutes criminalize schemes contemplating no economic harm, *Kelly* was wrong to hold that the "'victim's loss must be an objective of the deceitful scheme,'" 590 U.S. at 402 n.2 (brackets omitted). If the fraud statutes criminalize schemes to deprive the victim of the "chance to bargain with the facts before him," *Ciminelli* was wrong to hold that a scheme to deprive a victim of "valuable economic information * * * cannot form the basis for a conviction under the federal fraud statutes," 598 U.S. at 316.

II. Embracing The Government's Theory Would Exacerbate Overcriminalization And Undermine Core Constitutional Values

A. The Government's Reading of *Rowe*'s Dictum Would Exacerbate Overcriminalization

There are so many federal crimes scattered across the U.S. Code that "no one knows" how many federal crimes there are. N. Gorsuch & J. Nitze, Over Ruled 21 (2024). Gone are the days when "criminal laws were reserved for enforcing a relatively small number of pretty intuitive and widely accepted norms." *Id.* at 105. The thousands of confusing and overlapping statutes punish everything from "injur[ing] a government-owned lamp in Washing-

ton, D.C.," to "consult[ing] with a known pirate." *Id.* at 22. It's estimated that upwards of "70 percent of adult Americans today have committed an imprisonable offense – many, maybe most, without even knowing it." *Id.* at 106.

Congress has also "hugely increased the penalties for criminal violations." J. Rakoff, Why the Innocent Plead Guilty and the Guilty Go Free 22 (2021). The original fraud statute, for example, capped prison sentences at "eighteen calendar months." Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323. Today, the maximum is twenty years, or thirty years if the scheme involved a financial institution. 18 U.S.C. §§ 1341, 1343, 1344. The fraud statutes are not anomalies. Even those who avoid prison "confront collateral consequences that haunt them for years – including the loss of voting rights, licenses, public benefits, jobs, and access to housing." Gorsuch & Nitze, *supra*, at 110; see *United States* v. *Nesbeth*, 188 F. Supp. 3d 179, 184-185 (E.D.N.Y. 2016) (noting "nearly 1,200 collateral consequences").

The results speak for themselves. Prison populations have increased "500 percent * * * over the past forty years" even though "crime rates in the United States have mostly declined" for over thirty years. Rakoff, *supra*, at 7. And "one in nine persons in prison is now serving a *life sentence*." *Id.* at 8 (emphasis added).

The government's theory would make a bad problem worse. It would transform every scheme to *deceive* into a scheme to *defraud*: fibbing on a college application but paying full tuition; concealing information during a background check to keep a job but performing the job impeccably; using dishonest sales tactics but charging a fair price for quality goods. Misrepresenting how a buyer plans to use a product but paying full price. The "victim"

of each deception got "a quid pro quo of equal value" and lost only the "chance to bargain with the facts before him."

Those cases are not hypothetical. The government charged each scenario as a "scheme to defraud" under one or the other property fraud statutes only for a court to later reject the government's theory.[6]

The criminal law is reserved for conduct that merits society's moral condemnation. It is not an invitation for prosecutors "to pursue their personal predilections." *Marinello* v. *United States*, 584 U.S. 1, 11 (2018). But the government is doing just that by using the property fraud statutes "to enforce (its view of) integrity." *Kelly*, 590 U.S. at 404. If adopted, the government's theory will convert every planned breach of contract into property fraud and transform "millions of otherwise law-abiding citizens [into] criminals." *Van Buren* v. *United States*, 593 U.S. 374, 394 (2021).

The problem is even worse when considering property fraud is a predicate for money laundering. 18 U.S.C. § 1956(c)(7). If the government is right, anyone who knowingly engages in transactions involving proceeds of a contract that incorporates a false promise risks up to "twenty years" in prison for money laundering. *Id.* § 1956(a)(1).

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[6] *United States* v. *Sidoo*, 468 F. Supp. 3d 428, 440-442 (D. Mass. 2020) (deceit in college admission), vacated by *United States* v. *Abdelaziz*, 68 F.4th 1 (1st Cir. 2023); *United States* v. *Guertin*, 67 F.4th 445, 452 (D.C. Cir. 2023) (concealed information during background check); *United States* v. *Milheiser*, 98 F.4th 935, 938 (9th Cir. 2024) (dishonest sales tactics); *Regent Office Supply*, 421 F.2d at 1179-1180 (same); *Sadler*, 750 F.3d at 590 (lies about how product would be used); *United States* v. *Bruchhausen*, 977 F.2d 464, 467-468 (9th Cir. 1992) (same).

B. The Government's Theory Would Undermine Core Constitutional Values

Criminal laws "must give people 'of common intelligence' fair notice of what the law demands of them." *United States* v. *Davis*, 588 U.S. 445, 451 (2019). A "broad interpretation" of generic statutory language offers no "fair warning"; it invites "arbitrary prosecution" and erodes "confidence in the criminal justice system." *Marinello*, 584 U.S. at 9, 11. Due process guarantees that the government cannot "condemn someone to prison" on a "shapeless" reading of statutory language. *McDonnell* v. *United States*, 579 U.S. 550, 576 (2016).

Embracing the government's reading of *Rowe*'s dictum disregards that promise of fair notice. The phrase "scheme to defraud" offers no hint that every lie that induces someone to enter a fair-value transaction is a federal crime punishable by decades in prison. Would the salesman falsely telling customers that, if they don't act fast, they will miss out on low prices or the 18-year-old embellishing a college application think they were risking potentially decades in prison?

The "greatest danger of abuse of prosecuting power lies" in the risk that a prosecutor will "pick[ ] some person whom he dislikes or desires to embarrass, or select[ ] some group of unpopular persons and then look[ ] for an offense." R. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 5 (1940). That abuse is all but inevitable if prosecutors can charge fraud for deception that induces someone to enter a transaction or for any false promise that makes its way into a contract. A prosecutor need only find some petty breach to threaten felony charges. Nothing but the "*noblesse oblige*" of individual prosecutors would protect the people from such threats. *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).

The Constitution guards against such abuse by guaranteeing that "Trial of all Crimes * * * shall be by Jury." U.S. Const. art. III, §2. But the government's theory would erode that right by allowing prosecutors to coerce guilty pleas from anyone who told a lie in contract negotiations. In this case, for example, the government charged Kousisis with conspiracy to commit fraud and *three* counts of wire fraud, each punishable by up to twenty years in prison. Pet. Br. 8. But it charged a co-conspirator who pleaded guilty pre-indictment with just one count of conspiracy under 18 U.S.C. §371 – punishable at most by five years' imprisonment. Superseding Information, *United States* v. *Abrams*, No. 2:16-cr-049 (E.D. Pa.) (filed Feb. 12, 2016). That charging disparity and the fact that fraud defendants convicted at trial receive sentences *three times longer* than those who plead guilty explains why only 3% of federal criminal cases go to trial. NACDL, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How To Save It 21 (2018). The pressure is so great that even *innocent* defendants plead guilty. Rakoff, *supra*, at 28. The result is a system where prosecutors can "bludgeon defendants into effectively coerced plea[s]" all "behind closed doors" and with "almost no review." *Id.* at 28, 23.

The government's theory also ignores the separation of powers. Crimes must "'be defined by the legislature, not by clever prosecutors riffing on equivocal language.'" *Dubin* v. *United States*, 599 U.S. 110, 129-130 (2023). Applying the phrase "scheme to defraud" to every intentional breach of contract would "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges." *Davis*, 588 U.S. at 448.

Finally, the government's theory ignores the "Constitution's balance between national and local power." *Bond* v.

United States, 572 U.S. 844, 866 (2014). Converting run-of-the-mill breach-of-contract and fraudulent-pretenses cases into federal crimes would "vastly expand[ ] federal jurisdiction" over "actions traditionally left to state contract and tort law." *Ciminelli*, 598 U.S. at 315. It would insert federal prosecutors and federal courts into every contract negotiation between private parties or, as here, between a private party and a state entity. Pet. Br. 4-6. In fact, because property fraud is a RICO predicate, 18 U.S.C. § 1961(1), it would "empower[ ] both prosecutors and *private enforcers*" to pursue federal RICO actions for false promises in contracts, *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411-412 (2003) (Ginsburg, J., concurring) (emphasis added). It is difficult to imagine a more complete federal usurpation of the States' traditional oversight of contract law.

This Court has repeatedly vindicated these core constitutional values by rejecting overbroad interpretations of the property fraud statutes and other criminal laws. See *Ciminelli*, 598 U.S. at 314-316 (18 U.S.C. § 1343); *Percoco* v. *United States*, 598 U.S. 319, 331 (2023) (§ 1346); *Kelly* 590 U.S. at 403-404 (§ 1343); *Skilling* v. *United States*, 561 U.S. 358, 400 (2010) (§ 1346); *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000) (§ 1341); *McNally*, 483 U.S. at 357-358 (§ 1341); *Fischer* v. *United States*, 144 S. Ct. 2176, 2189 (2024) (§ 1512); *Snyder* v. *United States*, 144 S. Ct. 1947, 1959-1960 (2024) (§ 666); *Dubin*, 599 U.S. at 114 (§ 1028A(a)(1)); *Ruan* v. *United States*, 597 U.S. 450, 468 (2022) (21 U.S.C. § 841); *Van Buren*, 593 U.S. at 396 (18 U.S.C. § 1030); *Marinello*, 584 U.S. at 13 (26 U.S.C. § 7212); *McDonnell*, 579 U.S. at 567 (18 U.S.C. § 201); *Yates* v. *United States*, 574 U.S. 528, 549 (2015) (plurality) (§ 1519); *Bond*, 572 U.S. at 862-863 (§ 229).

It should do so again here.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted.

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