No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LISA A. MATHEWSON
MATHEWSON LAW LLC
123 South Broad Street,
Suite 1320
Philadelphia, PA 19109
215-399-9592
lam@mathewson-law.com

Attorney for Petitioners

QUESTIONS PRESENTED

The circuits are split 6-5 on the validity of the fraudulent inducement theory of mail and wire fraud. The Questions Presented are:

Whether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme.

Whether a sovereign's statutory, regulatory, or policy interest is a property interest when compliance is a material term of payment for goods or services.

Whether all contract rights are "property."

LIST OF PARTIES

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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PETITION FOR A WRIT OF CERTIORARI

Stamatios Kousisis and Alpha Painting & Construction Co., Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion (Pet.App.1-41) is published at 82 F.4th 230 (3d Cir. 2023).

An earlier version of the Third Circuit's opinion, superseded on rehearing, was published at 66 F.4th 406 (3d Cir. 2023).

JURISDICTION

The opinion and judgment of the court of appeals were entered on September 22, 2023. App.1-41. Pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari was initially due by December 20, 2023. By orders dated December 12, 2023 and January 18, 2024, under Dkt. 23A538, Justice Alito extended the time for filing a petition for a writ of certiorari until February 19, 2024. This petition is timely filed on or before the extended due date. Rules 13.1, 13.3, 13.5.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute provides in pertinent 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.

18 U.S.C. §1343.

The federal wire fraud conspiracy statute, 18 U.S.C. §1349, subjects "any person who . . . conspires to commit" that offense to the same penalties.

INTRODUCTION

Even before briefing was complete in *Ciminelli v. United States*, 598 U.S. 306 (2023), the government was urging the Court to neuter it. The "fraudulent inducement" theory it asked the Court to bless there is even more sweeping than the right-to-control theory *Ciminelli* invalidated.

The pattern is familiar. Each time the Court has reeled interpretations of the mail and wire fraud statutes back to their proper limits, the government has shifted course to evade those limits. The Court declared 100 years ago that the mail fraud statute criminalizes schemes for "wronging one in his property rights." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). Yet over decades prosecutors and lower courts eroded that rule, applying the mail and wire fraud statutes to a wide variety of schemes targeting intangible rights. When the Court put a stop to that in *McNally v. United States*, 483 U.S. 350 (1987), the government responded with the right-to-control theory, which criminalizes "almost any deceptive act." *Ciminelli*, 598 U.S. at 315. The theory gave the government a multi-tool it could use when unable to prove either an intent to harm the victim's economic interests—the hallmark of traditionally recognized "property"—or the single intangible-rights theory Congress resurrected with 18 U.S.C. §1346. *Ciminelli*, 598 U.S. at 315-16; *see Skilling v. United States*, 561 U.S. 358, 402-04 (2010).

The government's repudiation of the right-to-control theory in *Ciminelli* did not herald a new day of prosecutorial fidelity to statutory text, structure, and history, however. The government had waiting in the wings the fraudulent inducement theory: approved by five circuits (now six), disapproved by five others, and awaiting only (the government hoped) this Court's imprimatur.

The theory is framed by Judge Learned Hand's famous dictum: "a man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. . . . [H]e has suffered a wrong; he has lost the chance to bargain with the facts before him." *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932). Though the Second Circuit later repudiated *Rowe*, this Court quoted it with approval in *Shaw v. United States*, 580 U.S. 63, 67 (2016), a bank fraud case. Whether deception affecting a victim's decision about who should get its property deprives the victim of the property itself is the heart of the circuit split.

The government jumped the gun in *Ciminelli*. *See* 598 U.S. at 316-17. But it *is* vitally important that the Court step in. Even in circuits that have rejected the theory, the government and lower courts are already emphasizing what *Ciminelli* left open to contend that all fraudulent schemes "to obtain" property are property fraud, even if the completed scheme would harm intangible interests alone. *E.g.*, *United States v. Venkata*, 2024 WL 86287, at *6-*7, *10 (D.D.C. Jan. 3, 2024); *United States v. Miller*, 2023 WL 7346276, at

*3-*4 (N.D. Cal. Nov. 6, 2023). This case is an ideal vehicle for resolving the issue.

Petitioner Alpha Painting and Construction Co., Inc. ("Alpha") is an industrial painting company; Petitioner Stamatios Kousisis was its project manager. Alpha and its business partners won two federally funded bridge repair contracts for the Pennsylvania Department of Transportation ("PennDOT"). They were the lowest bidders by millions, and undisputedly did high-quality work.

How they lowered their bids while doing quality work was the problem. The government contended that they evaded regulatory and contractual Disadvantaged Business Enterprise participation goals to lower their costs, saving PennDOT money on work it needed while depriving it of "the worthy purpose of" the DBE program. C.A.3App.1375; C.A.3Gov't.Br.28, 41, 81-82. As the government told the jury in summation, the alleged fraud "had nothing to do with dollars and cents," but rather "had to do with [PennDOT's] own program, its own desires" to create economic opportunities for DBEs. C.A.3App.3434-3435.

Yet the government also insisted that "obtaining" PennDOT's money with false promises of compliance was property fraud, because PennDOT may have chosen a different bidder—and higher price—had it known the truth. The Third Circuit agreed (*e.g.*, Pet.App.18-20, 25), raising to six the number of circuits endorsing the fraudulent inducement theory and eleven the circuits that have weighed in.

The validity of the theory is squarely and cleanly presented here, on a record that underscores what it puts at stake. The fraudulent inducement theory equates a scheme to impair or impede executive branch policy goals and regulatory requirements with a scheme to fleece a contracting agency of "property." That erases Congress's careful distinction between the mail and wire fraud statutes—which protect property interests a government holds as an individual could—and the "defraud" clause of 18 U.S.C. §371—which protects intangible interests a government holds as a sovereign "administering itself in the interests of the public." *See McNally*, 483 U.S. at 358 n.8 (citing, *e.g.*, *Haas v. Henkel*, 216 U.S. 462, 480 (1910)).

The Third Circuit's attempt to use the common law to defend that analysis only broadens the disarray its ruling threatens. Both resurrecting and misunderstanding the *Lochner*-era[1] doctrine that made the freedom of contract a "property right," it declares instead that every right protected by contract is "property." Pet.App.26, 28. The implications are vast, and not limited to criminal law.

The government has already told the Court it considers these issues "important." At oral argument in *Ciminelli* it explained that it needs the fraudulent inducement theory to criminalize "what [it] might call 'pedigree fraud,' where . . . someone lies about their eligibility for a veterans' preference in contracting." Tr. of Nov. 28, 2022 Oral Arg., *Ciminelli* (No. 21-1170), at

[1] *Lochner v. New York*, 198 U.S. 45 (1905).

31-32. What the government means by "pedigree fraud" is what the Third Circuit described here as "schem[ing] to have PennDOT pay them millions of dollars that they were clearly not entitled to given their material breach of the contracts." Pet.App.21-22.

Defining property fraud to include all deceptive "schemes to get money" (or another form of property) leaves its outer bounds ambiguous. Most fraud is about getting something from someone. The question remains whether the scheme would "deprive [the victim] of traditional property interests" or only of other, intangible interests. *Ciminelli*, 598 U.S. at 309. The fraudulent inducement theory makes "obtaining by fraud" enough. The Court's prompt intervention is essential to address whether that comports with *Ciminelli*, its predecessors, and the federalism and due process principles that underlie them. This case is an ideal vehicle in which to do so.

STATEMENT OF THE CASE

A. Factual Background

1. The Disadvantaged Business Enterprise Program

The U.S. Department of Transportation ("USDOT") created its Disadvantaged Business Enterprise ("DBE") program to help small businesses owned by members of historically disadvantaged groups compete in the marketplace for federally funded contracts. C.A.3App.260-261. USDOT revamped the program in the late 1990s,

increasing flexibility for funding recipients and contractors in response to this Court's ruling that strict scrutiny applies "when government allocate[s] its resources" in a race-conscious way. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995); 64 Fed. Reg. 5096-08 (Feb. 2, 1999). The changes also responded to Congress's desire to free state and local funding recipients from burdensome federal mandates, and its resistance to funding set-asides, quotas, and other entitlements. 64 Fed.Reg. 5102, 5107-08.

With flexibility the watchword, USDOT now sets an "aspirational" goal that 10% of its infrastructure spending benefit DBEs—but allows recipient agencies to set their own goals based on local conditions, and requires only "good faith efforts" to achieve them. 49 C.F.R. §§26.41, 26.47(a); C.A.3App.263. Likewise, though recipients may incorporate DBE participation goals into USDOT-funded contracts, they may not require contractors to *meet* a goal—but only to make good-faith efforts to do so. 49 C.F.R. §26.51; C.A.3App.276. An agency must waive a participation goal if the winning low bidder will fall short despite those efforts, either at the bid stage or while work is underway. 49 C.F.R. §26.53; *see* 64 Fed. Reg. 5099-00 (discussing intent to preserve low-bid system).

An agency using a DBE participation goal sets a single goal for each contract, publicized when the agency solicits bids. 49 C.F.R. §26.53(b); C.A.3App.763. The agency may require bidders to include their plan for meeting the goal in their bids, or—as PennDOT chose here—require the low bidder (the apparent

winner) to submit that information after the agency has accepted its lump-sum bid price but before the contract is awarded. *Id.* §26.53(b)(3).

Contracts with participation goals are not "set aside" for a subset of bidders. A non-DBE prime contractor that wins a contract may meet a participation goal by spending money with one or more DBEs—so long as the DBE performs a "commercially useful function" and is not a mere "pass-through." 49 C.F.R. §26.55(c); C.A.3App.276-277, 805, 2256-2257. While work is underway the prime contractor reports qualifying DBE spending to the agency, which tracks progress via "DBE credits," a "running tally" of progress toward the goal. C.A.3App.277-278.

2. The Philadelphia Bridge Projects

PennDOT was the recipient agency on two major bridge construction projects awarded in 2009 and 2010 (together, "the Philadelphia Projects"). It set DBE participation goals, announced with the bidding opportunities, for both. C.A.3App.754, 763. Petitioner Alpha formed a joint venture ("the ALJV") that was part of bidding groups led by a company called Buckley (the "Buckley ventures") for the Philadelphia Projects.[2] On both Philadelphia Projects Buckley submitted a lump-sum bid that was the lowest PennDOT received by far, by $5 million on one and $7 million on the other.

[2] The ALJV consisted of Alpha and Liberty Maintenance ("Liberty"), whose project manager was Emanouel Frangos. C.A.3App.907-908, 3871, 3875.

PennDOT declared Buckley the presumptive winner ("apparent low bidder") on that basis. C.A.3App.856, 858-859.

When PennDOT did so, it locked its cost for the contracted services to the amount of Buckley's lump-sum bid, which did not detail anticipated costs. PennDOT would not pay less if it later chose to accept a shortfall in DBE participation. And if DBE compliance (or anything else) cost the Buckley ventures more than the contractors had anticipated, the contractors—not PennDOT—would bear the cost. *E.g.*, C.A.3App.757-758, 1368-1369; *see* 49 C.F.R. §26.53(b)(2)(vi), (d).

Once declared "apparent low bidder" Buckley had seven days to show it could fulfill the voluminous contractual requirements—nearly 1000 pages worth, with DBE compliance one of countless statutory, regulatory, technical, *and* ethical obligations—before the contract would be awarded. C.A.3App.763-764, 839, 843-844; 49 C.F.R. §26.53(b)(3)(i)(B). Only then did Buckley identify for PennDOT the DBEs (six on each project) the coventurers would do business with, and the amounts of anticipated spending with each. C.A.3App.763-764, 776, 842-843, 989-992. That detail did not bind the Buckley ventures to spending the predicted amounts with the identified DBEs, however. Even during performance, a prime contractor may change its participation plan; *e.g.*, a shortfall in predicted spending with one DBE may be made up with another—if the shortfall is not excused entirely. C.A.3App.805, 2256-2257.

Buckley's planned DBE spending included the ALJV's purchase of painting supplies from a PennDOT-certified DBE supplier called Markias, Inc. But Markias was a mere pass-through for the ALJV's purchases from non-DBE suppliers, paid a 2.25% markup on each supplier invoice. C.A.3App.2020-2024. Because the ALJV's spending with Markias did not qualify and the Buckley ventures did not compensate for the shortfall by spending more with another DBE, Buckley inaccurately reported that it would, and did, meet participation goals.

Markias's 2.25% markup totaled $170,000 for both projects. C.A.3App.1429-1430. The Buckley ventures' bids totaled approximately $120 million. C.A.3App.3871-3978. Many factors influence a lump-sum bid, but on balance a bidder attempts to predict costs, build in its hoped-for profit, and divine the right balance of protecting against unforeseen costs while minimizing the risk of being underbid. C.A.3App.2387-2389. Buckley considered estimates from its co-venturers and subcontractors when formulating its bid, and pushed them to trim their numbers further to reduce the risk of being underbid. Kousisis and his counterpart at Liberty, Frangos, arrived at the "guesstimate" the ALJV gave Buckley by talking with colleagues, exchanging numbers, and "work[ing] out the difference." They "considered" a wide range of factors, estimated costs among them and Markias's 2.25% fee among those. C.A.3App.2387-2389, 2451-2457.

PennDOT paid Buckley on a "percent-to-completion" basis. That required the contractors to cover

expenses (like buying supplies) with funds on hand so they could do the work that would earn the next chunk of the fixed contract price. C.A.3App.840-841. PennDOT did not cover costs, nor did it earmark funds for payment to DBEs—or to anyone other than Buckley.

At the eventual trial, all parties agreed that complying with DBE participation requirements is more expensive than doing the same job without complying, even accounting for a pass-through fee.[3] The prosecution theory was that the defendants evaded DBE requirements so they could win the jobs with bids that were "lower artificially," giving PennDOT "the benefit of the lower bid" while depriving it of genuine DBE participation.[4] C.A.3App.1375 (USDOT agent testimony). Compliance, the government told the jury, would have "cost more than just 2.25%." C.A.3App.179; *accord* C.A.3App.182, 2258-2260; D.Ct.Dkt.195 (Gov't Sentencing Mem.) at 17-18.

PennDOT would have had options had Buckley disclosed, once declared the "apparent low bidder," that its DBE participation plan would fall short. PennDOT could have accepted reduced participation at the same price; required the Buckley ventures to make additional DBE commitments at their own expense (and take less profit); accepted the next-lowest bid and paid millions more for the "same work"; or re-bid the job

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[3] DBEs are small businesses by definition.

[4] The government alleged a completed scheme that deprived USDOT and PennDOT of property. The black-letter-law doctrine that a scheme is criminal even if it fails was never at issue.

with participation requirements intact—anticipating higher bids. C.A.3Gov't.Br. 7-8, 41-42 n.13, 90; *see* 49 C.F.R. §26.53(a)(2)-(d); C.A.3App.894-895, 2258-2260. The government candidly admitted it is impossible to know what PennDOT would have chosen had it known the truth. C.A.3Gov't.Br. 90.

All parties agreed that the ALJV and its business partners delivered high-quality construction for millions less than their competitors, fulfilling all contract terms save one: the DBE participation requirement. *See* Pet.App.29.

B. District Court Proceedings

A grand jury indicted Petitioners Alpha and Kousisis, and Liberty and Frangos, on April 3, 2018. All four were charged with wire fraud and wire fraud conspiracy (18 U.S.C. §§1343, 1349) and associated false statements (18 U.S.C. §1001). The indictment alleged that they conspired to defraud USDOT and PennDOT, "and to obtain money and property from them," by misrepresenting that Markias would, and did, perform a specified sum of "qualifying DBE work." C.A.3App.95-98 (¶¶28-29, 36, 39, 42). The "money" alleged to be wrongfully obtained was the face value of the contracts. The "property" was "DBE credit." *Id.* at C.A.3App.93-101; *accord* C.A.3App.3252 (government summation).

All four defendants went to trial. Kousisis and Frangos both testified. Having acknowledged that the scheme contemplated PennDOT paying less than it otherwise would have for high-quality work and

materials, in summation the government argued that the defendants violated a contractual "non-financial obligation," causing PennDOT harm that "had nothing to do with dollars and cents" but "had to do with its own program, its own desires." C.A.3App.3434-3435. The government even admitted that recognized "forms of property" would not reach the prosecution theory—and asked the court to "define property for the jury so they're not confused," because "[w]e're not talking about a concrete thing that somebody can hold in their hand or even real estate or other forms of property or even intellectual property." C.A.3App.3227-3228; *see* D.Ct.Dkt.146 at 32 (arguing that "non-economic purpose" of DBE program is agencies' "property").

Though the court declined to give the government's instruction, it agreed that a novel instruction was warranted and wrote its own, "taken directly out of" a not-precedential Third Circuit opinion, *United States v. Tulio*, 263 F. App'x 258 (3d Cir. 2008), "that deals with the definition of property." C.A.3App.3237. As discussed below (at Section II.), *Tulio* adopts a "fraudulent inducement" theory of property fraud, and also deems all rights protected by contract "property rights." The defense objected repeatedly, though unsuccessfully, that the resulting instruction permitted conviction on those legally invalid theories. *E.g.*, C.A.3App.3241, 3305, 3494; *see* Pet.App.154-156 (final instruction).

The verdicts were mixed. The jury convicted Petitioners of wire fraud conspiracy, three counts of substantive wire fraud, and false statements, but acquitted on

two substantive wire fraud counts. Pet.App.54-55, 63-64. It acquitted Frangos and Liberty on five counts of substantive wire fraud and hung on all other counts, which were eventually dismissed. D.Ct.Dkt.101, 236. The district court denied Petitioners' post-trial motions, again following *Tulio*. Pet.App.106-110.

Sentencing brought to the fore that the completed scheme inflicted no economic harm on PennDOT. Restitution was zero. Pet.App.151. The district court expressly found that the scheme caused PennDOT to pay millions of dollars *less* for high-quality work. C.A.3App.3632, 3721. And it identified no property interest the scheme injured. To the contrary, it called the sovereign interest in fostering economic opportunities for DBEs "precisely what the government lost due to" the scheme. C.A.3App.3718-3719. It then attempted to "translate[]" into dollars the "value the government attributes to building connections with DBEs," and called that "loss" under Section 2B1.1 of the U.S. Sentencing Guidelines. C.A.3App.3721.

The court sentenced Mr. Kousisis principally to 70 months' imprisonment. Pet.App.64. It ordered Alpha to forfeit 100% of its profits on the Philadelphia Projects, $10,906,55300, and imposed a $500,000 fine. Pet.App.58, 61.

C. Third Circuit Proceedings

On appeal Petitioners claimed that the evidence was insufficient to prove property fraud as this Court's precedent (and Third Circuit precedent at the time)

defines it, and that the jury instructions permitted conviction on the invalid theories the government argued. Chiefly, they argued that (1) a deceptive scheme to steer the victim's spending to someone who would not have gotten it honestly, but that contemplates no economic harm, deprives the victim only of honest dealings and accurate information; (2) a sovereign's regulatory and policy interests are not property; and (3) writing an intangible right into a contract does not make it property. They also addressed the inapplicability, and invalidity, of the right-to-control theory, because the government had raised it post-trial.

In response the government expressly endorsed a "fraudulent inducement" theory—citing Seventh and Eighth Circuit cases adopting it, and framing the argument with Judge Learned Hand's 1932 *Rowe* dictum. C.A.3Gov't.Br. 24-25 (quoting *Rowe*, 56 F.2d at 749, and citing *Shaw*, 137 S. Ct. at 467). It invoked the "right-to-control" theory in the alternative, complete with the "commandeering fraud" this Court rejected in *Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020). C.A.3Gov't.Br. 49-53. And in a scant ten sentences contradicted by the rest of its brief—and by the record—the government floated a new factual theory that was uncharged, never submitted to the jury, *and* the opposite of its trial theory: that the scheme *increased* Buckley's lump-sum bids, which totaled approximately $120,000,000, by the $170,000 paid to Markias. *Id.* 42-43

The Third Circuit heard argument on August 18, 2021, but did not issue an opinion for another twenty

months, on April 21, 2023.[5] The panel acknowledged that a completed wire fraud scheme must harm the victim economically, but held that a victim "loses" the money it pays a defendant who used material deception to influence the victim's choice of whom to pay.[6] *United States v. Kousisis*, 66 F.4th 406, 415-17 (3d Cir.), *vacated and modified on reh'g*; Pet.App.14-21. Therefore, it explained, a scheme "to obtain" PennDOT's funds by fraud is property fraud. 66 F.4th at 416; Pet.App.18-19.

The panel also held that all interests protected by contract are "property." Noting the amici's concerns that that holding would criminalize essentially every purposeful breach of contract,[7] the panel said those concerns are with "the text of the statute and the Supreme Court's interpretation of it"—because Congress criminalized "any" scheme to defraud, and a contrary holding would read "any" out of the statute. *Id.* at 418; Pet.App.23.

It then backstopped that theory with two new ones, which it may have understood as one (the opinion

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[5] One member of the panel, Judge Joseph A. Greenaway, Jr., announced in early February 2023 that he would retire from the bench effective June 15, 2023.

[6] The panel also took pains to counter an illusory argument for "net economic loss," which the defendants never advanced below and expressly, and repeatedly, disclaimed on appeal. *See* 66 F.4th at 417-18, 419 n.80; Pet.App.21-23, 25 n.81.

[7] Amici were the Americans for Prosperity Foundation, the Cato Institute, the National Association of Criminal Defense Lawyers, and the Due Process Institute. *See* C.A.3Dkt.52 (amicus brief).

is unclear). Entirely on its own it decided Markias's 2.25% markup was a "kickback"—a category it expanded to include payments forward to third-parties for improper purposes. Then, misunderstanding *Skilling v. United States*, 561 U.S. 358 (2010), to hold that bribes and kickbacks supply the required harm to "property," it explained "there was clearly a kickback here and thus economic harm sufficient to sustain wire fraud convictions." *Id.* 414-15, 417.

The panel also endorsed the government's new-on-appeal theory that the scheme caused PennDOT to pay a "premium"—which assumed that had the ALJV not planned to pay Markias $170,000, Buckley would have reduced its lump-sum bid to give that 0.1% savings to PennDOT (instead of taking more profit *or* adding legitimate DBE spending to meet the goal). *Id.* 418 & n.69. But it also emphasized that the "premium" was unnecessary to its holding, because "[e]ven without the premium, Appellants' primary fraudulent objective to obtain PennDOT's funds remains." *Id.* A few weeks later the government reverted to its trial theory, telling a different Third Circuit panel, in *United States v. Porat*,[8] that *Kousisis* held that "taking people's money through fraudulent representations" suffices, because "an honest contractor" would have charged PennDOT

[8] No. 22-1560 (3d Cir.); Pet. for Cert. filed Jan. 31, 2024, No. 23-832 (U.S.). Petitioners respectfully note that the Court may wish to consider, and grant, the *Porat* and *Kousisis* petitions together. If the Court grants Porat's petition, they respectfully request that it hold their petition pending the resolution of *Porat*.

more. Tr. of May 18, 2023 Oral Arg., *Porat*, C.A.3Dkt.72, at 72-73.

This Court decided *Ciminelli* on May 11, 2023, several weeks after the initial *Kousisis* opinion and one week before argument in *Porat*. Kousisis and Alpha's petition for rehearing en banc (filed after both) pointed out that the panel had endorsed a fraudulent inducement theory that is even broader than the right-to-control theory, without adversary briefing or argument on *Ciminelli*; indeed, given the twenty months between argument and decision, *Kousisis* was argued even before the circuit opinion in *Ciminelli* (decided Sept. 8, 2021 *sub nom. United States v. Percoco*, 13 F.4th 158 (2d Cir. 2021)). It also pointed out the panel's grave misunderstanding of "kickbacks" as a species of property fraud, and this Court's most recent reminder that appellate courts may not uphold convictions on theories neither charged nor argued below (*Ciminelli*, 598 U.S. at 317).

The *Kousisis* rehearing petition was pending when the Third Circuit decided *Porat*, which endorses the same "lying to get money" fraudulent inducement theory. *United States v. Porat*, 76 F.4th 213, 219 (3d Cir. 2023). Judge Cheryl Ann Krause concurred separately in *Porat*, rejecting that theory. Cognizant that *Kousisis* bound the *Porat* panel, however, she read *Kousisis* to say that the "premium" theory *was* necessary to its holding—because if a "fraudulent objective to obtain [PennDOT's] funds" sufficed, *Ciminelli* would "obviously" have "abrogated that conclusion just weeks later." *Id.* 228 & n.6.

Any hope of aligning *Kousisis* with *Ciminelli* vanished when the two remaining members of the *Kousisis* panel (*see* n.5) granted panel rehearing in part and issued a revised opinion with no further briefing. C.A.3Dkt.130; Pet.App.1-41.[9] Their revisions properly excised all references to a "kickback" or "premium"—though one orphaned reference to Markias's pass-through fee now suggests a post-payment right to control how the ALJV used the money it earned on the contract (Pet.App.21), and the other uses the conclusory phrase "nature of the bargain" to equate PennDOT's interest in DBE participation with investors' interest in the economic value of stock (Pet.App.22). The only other substantive change is the addition of a footnote dispensing with *Ciminelli*:

> We are likewise unpersuaded that anything in our holding today contravenes the Supreme Court's recent decision in *Ciminelli*. There, the Court explained that "[t]he right to valuable economic information needed to make discretionary economic decisions" (i.e., the "right-to-control theory") cannot sustain a wire fraud conviction, as such rights are not rooted in traditional property interests. *Id*. at 316. But again, the basis of the wire fraud conviction here is not PennDOT's frustrated interest in DBE participation. Rather, it is the

[9] The circuit denied rehearing en banc. C.A.3Dkt.130. A reconstituted three-judge panel issued a separate opinion addressing forfeiture alone a few days later. Pet.App.42-53. References to *Kousisis* in the *Porat* concurrence were not updated with the revised opinion.

> actual money paid as a result of Appellants' fraudulent scheme.

Pet.App.20 n.63. In other words, under *Kousisis* (and *Porat*), a fraudulent objective "to obtain" funds suffices.

The footnote captures succinctly how the fraudulent inducement theory neutered *Ciminelli* in the Third Circuit before this Court even issued its opinion—and will continue to do so there and elsewhere, until the Court clarifies its position on it.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided On Whether Deception To Induce A Fair Commercial Exchange Is Property Fraud.

A. The Second, Sixth, Ninth, Eleventh, and D.C. Circuits reject the fraudulent inducement theory.

Judge Hand's dictum in *Rowe* remains the foundation of the theory. Yet the Second Circuit itself repudiated that reading of *Rowe* more than fifty years ago, in *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970)—precisely because mere fraudulent inducement is untethered to an intent to harm the victim's property interests. The Second Circuit now uses the "essential element of the bargain" to capture the intended economic harm that characterizes property fraud: even if the victim would have avoided a transaction had it known the truth, a deceptive scheme is not property fraud if "the alleged victims

received exactly what they paid for." *United States v. Shellef*, 507 F.3d 82, 102 (2d Cir. 2007).

Four other circuits align with the Second in rejecting the fraudulent inducement theory. *See United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) (Sutton, J.) ("paying the going rate for a product does not square with the conventional understanding of 'deprive'"); *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992); *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016); *United States v. Guertin*, 67 F.4th 445, 451 (D.C. Cir. 2023) (employee's lies that induce employer to pay salary, but "do not deprive the employer of the benefit of its bargain," do not defraud employer of money paid).

B. On the other hand, the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits endorse the theory, and the Third Circuit now joins them.

The Seventh and Eighth Circuits' opinions in *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006), and *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), underlie the not-precedential Third Circuit opinion in *Tulio*, which supplied the framework for the district court and circuit rulings here. The government's Third Circuit brief relied heavily on *Leahy*, *Granberry*, and *United States v. Richter*, 796 F.3d 1173, 1192 (10th Cir. 2015); it also quoted *United States v. Bunn*, 26 F. App'x 139, 142-43 (4th Cir. 2001)

(not-precedential) ("The Government's evidence established that Appellants obtained money to which they were otherwise not entitled by falsely representing that subcontract work would be performed by DBEs. Nothing more is required."). C.A.3Gov't.Br. 25-50, 61-63.

The government invoked Fifth Circuit fraudulent inducement precedent in the form of a case in equity, *Walker v. Galt*, 171 F.2d 613, 614 (5th Cir. 1948), which as discussed below underpins Third Circuit precedent in this lineage. C.A.3Gov't.Br.31, 50, 51. *See also United States v. Fagan*, 821 F.2d 1002 (5th Cir. 1987).

The circuit split has deepened with the Third Circuit's decisions in *Kousisis* and *Porat*. Only this Court's intervention will resolve it.

II. The Third Circuit's Path To Endorsing The Fraudulent Inducement Theory Shows Why The Theory Is Wrong.

Following the path that led the Third Circuit here exposes the circuit's openness to treating intangible interests as "property," and reveals the fraudulent inducement theory as a facile linguistic shift that neuters *Ciminelli*.

1. By its own account the Third Circuit has a long history of "defin[ing] fraud with reference to the elastic concepts of morality and fairness when discussing the reach of the federal fraud statutes." *United States v. Leahy*, 445 F.3d 634, 649-50 (3d Cir. 2006)

(acknowledging criticism but declining to reverse when jury instructed over objection on "deviation from moral uprightness") (citing, *e.g.*, *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987)). In that vein, it adopted a version of the right-to-control theory in *United States v. Hedaithy*, 392 F.3d 580, 604 (3d Cir. 2004).

Though the circuit still considers *Hedaithy* good law even post-*Ciminelli* (*see Porat*, 76 F.4th at 222), its flaws include insisting—long after *McNally*—on reading the mail and wire fraud statutes disjunctively. It maintains that property fraud reaches schemes to "obtain" property without "depriving" the victim of it,[10] and schemes that "deprive" the victim of property without a corresponding "obtaining" (*but see Kelly*, 140 S. Ct. at 1573). 392 F.3d at 598-99, 601-03.

The *Hedaithy* defendants were college students who paid imposters to take a standardized test in their names. They were convicted of mail fraud, with the Educational Testing Service ("ETS") the victim. 392 F.3d at 582. Among other issues, *Hedaithy* weighed the argument that ETS was not deprived of money or property because the defendants paid its testing fees in full. *Id.* 603.

The Third Circuit responded by endorsing the Second Circuit's right-to-control opinion in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991). *Schwartz*

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[10] Only if "taken out of context," *Hedaithy* says, could *McNally* be read to limit property fraud to schemes to "deprive[ ] the victim of a valuable property right." *Id.* 598.

held that purchasing equipment at full price, while falsely promising to meet the seller's express condition that subsequent resales comply with U.S. law, was wire fraud because the seller had not "received all it bargained for"; it was deprived of "the right to define the terms of the sale of its property." *Id.* 421 (describing false promises as "consideration . . . to contract"); *Hedaithy*, 392 F.3d at 604. To bolster the point the Third Circuit quoted a 1949 Fifth Circuit opinion holding that in equity, "fraud" that permits rescission occurs when a vendor "is deceived as to the purchaser's identity and thus induced to enter into a contract with one to whom he did not intend to sell." *Walker*, 171 F.2d at 614, quoted in part at 392 F.3d 604.

Walker actually emphasized that the "identity" of the purchaser—the notorious proprietor of a "floating house of prostitution"—would "hurt sales" of the rest of the plaintiff's subdivided land were he permitted to purchase a piece of it. 171 F.2d at 614. But when the Third Circuit imported malleable civil and equitable concepts like "benefit of the bargain" into its criminal property fraud jurisprudence, it left behind the common law requirement of harm to economic interests.

That is what allowed it to say here that PennDOT's interest in supporting DBEs was part of the very "nature of the bargain" (Pet.App.22), and in *Porat* that business school students' interest in a prestigious U.S. News ranking was part of their "bargain" (76 F.4th at 220-21). Without an anchor in traditional property interests, the "benefit of the bargain" is an "important enough" standard that encompasses intangible

interests and leaves the boundaries of mail and wire fraud to the eye of the beholder. *See Ciminelli*, 598 U.S. at 315-16; *McNally*, 483 U.S. at 360.

2. *Hedaithy* also gave the Second Circuit's right-to-control theory a linguistic tweak—with enormous consequences. Instead of calling the right to control property "property," *Hedaithy* says that when deception caused a property-holder to make a transaction he otherwise would have avoided—*i.e.*, interfered with his right to control his property—"the victim was defrauded of the [property] itself." *Id*. 604.

If the right-to-control theory is valid, as *Hedaithy* assumed, these formulations are logically equivalent. Whether (on the one hand) the right to control property is itself "property," or (on the other) depriving a victim of the right to control his property deprives him of that property, neither the facts nor the outcome will vary. But with the right-to-control theory properly jettisoned, the question becomes whether that linguistic shift suffices to allow the prosecution as mail and wire fraud of *the same conduct*.

It does not. In fact, the Third Circuit's version of the right-to-control theory *is* fraudulent inducement: when deception influences a victim's decision about how to use its assets, the victim is deprived of those assets—which are "property." *Hedaithy*, 392 F.3d at 604; *see* Pet.App.18-19; *Porat*, 76 F.4th at 219 (victims "depriv[ed] of *tuition money*").[11] And when "deception

[11] Notably, the jury in the case that became *Kelly* was instructed with this formulation:

affecting property" is equivalent to "deception injuring property rights," the intent to defraud the victim of property drops out of the statute.

It cannot be that simply rearranging clauses wipes out this Court's jurisprudence from *Haas v. Henkel* forward, restoring the government's ability to prosecute a wide variety of deceptive schemes that target a victim's intangible interests alone. Granted, courts that endorse the fraudulent inducement theory would disagree with the premise—*e.g.*, "the basis of the wire fraud conviction here . . . is the actual money [PennDOT] paid as a result of" the scheme. Pet.App.20 n.63. But that is simple *ipse dixit*.

> **An organization is deprived of money or property when the organization is deprived of the right to control that money or property.** And one way the organization is deprived of the right to control that money and property is when the organization receives false or fraudulent statements that affect its ability to make discretionary economic decisions about what to do with that money or property.

United States v. Baroni, 909 F.3d 550, 560, 563 (3d Cir. 2018) (emphasis added), *rev'd sub nom. Kelly*, *supra*. The government cited Second Circuit and other right-to-control cases to support the instruction, and the district court cited them when declining to dismiss the indictment. *United States v. Baroni*, 2016 WL 3388302, at *8 (D.N.J. June 13, 2016). The Third Circuit called "this traditional concept of property" another basis for affirming. 909 F.3d at 567. The government advocated it to this Court—which unanimously reversed. Brief for the United States, *Kelly*, No. 18-1059 (U.S.), at, *e.g.*, 31-32, 36, 44, 46; *Kelly*, 140 S. Ct. at 1573.

3. The Third Circuit applied the fraudulent inducement theory to DBE fraud in the not-precedential *Tulio* opinion that became the foundation of *Kousisis*.

Tulio addressed seven issues in four pages. 263 F. App'x at 260-64. In two extraordinary paragraphs, it endorsed the fraudulent inducement cases *Leahy, supra* (7th Cir.) and *Granberry, supra* (8th Cir.) and aligned *Hedaithy* with them; declared a sovereign interest in DBE compliance a "fundamental basis of [a contracting agency's] bargain"; and used *Lochner*-era precedent to deem every contractual promise a "property right"—which allowed it to say the agency was "deprived of its contract rights" (*i.e.*, property) to have its contractor spend a portion of its earnings to bring a DBE onto the job, when instead the contractor paid the DBE a pass-through fee and pocketed the extra funds it would have spent on DBE compliance. *Id.* 261-62. And all of this required reaffirming *Hedaithy*'s disjunctive reading of the fraud statutes, so as to uphold a conviction for "depriving" a victim of something no one else can "obtain"—like the "benefit of its bargain" or "contract rights." *Id.* 262.[12]

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[12] A third *Tulio* paragraph declared that the agency was deprived of "money" because it "paid for services—construction done by a certified DBE—it did not receive." 263 F. App'x at 262. This too was part of the *Kousisis* jury instruction (Pet.App.154-155), though another Third Circuit case had already repudiated it. The circuit opinion appears to subsume it into the idea that PennDOT paid "the full contract price" but was "partially deprived of the benefit of its bargain." 82 F.4th at 243; *see id.* 244 (acknowledging that "Appellants delivered the requested work").

The Third Circuit opinion here is the culmination of this line of precedent. It disregards statutory text, structure, and history, and neuters *Ciminelli* with a facile linguistic shift. The Court should not let that stand.

III. The Fraudulent Inducement Theory Has Grave Implications, As Does The Corollary That All Contractual Interests Are Property.

The implications of the fraudulent inducement theory are grave. It reads out of mail and wire fraud its foundational limitation to schemes to "fleece" a victim; i.e., to "wrong[] one in his property rights." *McNally*, 483 U.S. at 356, 358. It discards Congress's century-plus-old distinction between schemes to injure property rights and schemes to injure intangible rights—and Congress's careful selection of certain intangible rights, but not others, for protection with other statutes.

In so doing it will read those other statutes out of the U.S. Code. Under the fraudulent inducement theory, a deceptive scheme to obtain a contract by paying bribes and kickbacks—or by concealing a conflicting financial interest—is property fraud. *But see Skilling*, 561 U.S. at 402-04. Congress's longstanding distinction between interests a government holds as a property owner, and its "intangible rights of allocation, exclusion, and control—its prerogatives over who should get a benefit and who should not" (*Kelly*, 140 S. Ct. at 1572) will collapse as well.

Other disarray in the statutory scheme will follow. In every circuit that approves the fraudulent inducement theory, it is easier for the government to prove criminal mail or wire fraud than it is to prove a civil False Claims Act violation. This Court explained in *Universal Health Services, Inc. v. United States*, 579 U.S. 176, 194 (2016), that "a misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment"—because that rule would make it "an all-purpose antifraud statute," which it is not. Yet criminal fraudulent inducement cases land in the same place: "inducement" *is* materiality, and a misrepresentation that induces a payment fleeces the government of that payment.

The implications of the Third Circuit's corollary ruling that every interest protected by contract is "property" are equally dizzying. The Court noted in *Universal Health Services* that treating contract provisions as controlling would mean the government owes nothing to a contracted health-services provider whose "use of foreign staplers" violates a contractual promise to comply with the Buy American Act. *Id.* 195-96. It hypothesized a contracting agency that writes into its contracts a promise to "comply with the entire U.S. Code and Code of Federal Regulations." *Id.* 196.

PennDOT's contracts require that and more: compliance with all federal, state, and local laws, down to local "decrees"; maintaining the "highest standards of integrity," including disclosing conflicting

financial interests; having an effective policy to prevent and correct sexual harassment. C.A.3App.3870-3878; C.A.3DigitalAppx.3879-4975. The Third Circuit's analysis makes the 1000-pages of terms and conditions PennDOT imposes on contractors a property interest of the United States and Commonwealth of Pennsylvania, enforceable with the weight of federal criminal statutes because "the contracts were awarded based on the representation that" the defendants would honor them, and "included compliance . . . as an explicit term of the agreement." Pet.App.109.

The implications transcend criminal law. The Court has long recognized that treating every interest protected by contract as "property" would federalize all public contract law—because every state breach of contract would give the counterparty a procedural due process claim under 42 U.S.C. §1983. *See*, *e.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972). Consumer class-action plaintiffs would have Article III standing to sue manufacturers and retailers for regulatory noncompliance that violates a term of sale, because the mere breach of the contractual promise would "deprive" the consumer of property and cause her to "lose" the money the promises induced her to spend. *But cf. Thorne v. Pep Boys, Inc.*, 980 F.3d 879, 886, 889-93 (3d Cir. 2020).

The list could continue. The disarray the fraudulent inducement theory will create is another reason to grant the Petition.

IV. This Case Is The Ideal Vehicle For Review.

The confounding factors that often cloud the circuits' analyses of these issues are not present here. Often, for example, regulatory or contractual noncompliance lowers product quality or imposes additional costs on the purchaser. That is not at issue. Nor is the record clouded with a factual dispute about the economic effect of the deception; all parties agreed it saved PennDOT money. Nor is the distinction between schemes that were not completed but would have caused economic harm had they been, and schemes that threatened no economic harm at all, a factor. That too has caused confusion in the courts below—indeed, it is the source of the confusion in *Rowe*. It will not cause confusion here.

Finally, there is (of course) no dispute that Petitioners "obtained" PennDOT's funds. That gives the Court an opportunity to clarify an essential point that continues to bedevil the circuits: the assumption that proving the defendant "obtained" the victim's property obviates—or supplies—proof that the transaction "deprived" the victim of property. That assumption is what allowed the Third Circuit to conclude that a scheme that caused PennDOT to pay millions of dollars *less* for the same high-quality work wronged it in its property rights.

This case embodies the pattern reflected in the Court's mail and wire fraud jurisprudence: no sooner does it repudiate one government expansion of the statutes but the government hatches another, and

many lower courts accede. This time the government laid the groundwork in advance. The Court should respond with alacrity to reinforce—yet again—the narrow bounds of text, structure, and history in the mail and wire fraud statutes.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

LISA A. MATHEWSON
MATHEWSON LAW LLC
123 South Broad Street,
Suite 1320
Philadelphia, PA 19109
215-399-9592
lam@mathewson-law.com

Attorney for Petitioners