UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 19-3679
(Consolidated with 19-3774)

STAMATIOS KOUSISIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICANS FOR PROSPERITY FOUNDATION, AND DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONER-APPELLANT

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INTEREST OF *AMICI*

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

Cato, NACDL, AFPF, and the Due Process Institute file numerous *amicus* briefs each year in federal and state courts, participating in cases, like this one, that present issues of systemic importance. All parties have consented to the filing of this brief. *Amici* respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 29.[1]

[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

As written, the mail and wire fraud statutes (18 U.S.C. § 1341 and 18 U.S.C. § 1343)[2] are simple: they make it a federal crime to use the mail or wires to execute a scheme to defraud someone of money or property. Nevertheless, their litigation history over the past three decades has been a volatile one, reflecting a repeated pattern of expansion and contraction. Specifically, prosecutors have repeatedly sought to expand the reach of the statutes, applying them to an ever-changing broad range of misconduct, while the Supreme Court, and often the Courts of Appeals, have resisted these efforts, limiting the statutes to conduct that falls within their express and intended terms. The Supreme Court caselaw discussed below—in particular, *McNally*, *Carpenter*, *Cleveland*, and *Kelly*—expresses in no uncertain terms the Court's insistence on limiting the statutes to schemes to obtain traditionally recognized forms of property from the victim, and not offenses that interfere with intangible rights or governmental policies.[3]

This case calls upon this Court to once again resist the efforts of federal prosecutors to improperly expand the reach of the property fraud statutes. The prosecution charged, and the district court held, that a provision in a public works

[2] *Amici* here refer to these statutes collectively as the "property fraud statutes" or the "federal criminal property fraud statutes."

[3] The sole exception, of course, is the "honest services" fraud provision added by Congress in response to *McNally*. *See* 18 U.S.C. § 1346.

contract with the Pennsylvania Department of Transportation ("PennDOT"), requiring the prime contractors to spend a specified percentage of the contract value with certified Disadvantaged Business Enterprises ("DBE") in the course of doing the work, was a property right, such that the defendants' misrepresentations about compliance with that provision fell within a tangible rights theory of property fraud. 1Appx.0040-0041. The defendants told PennDOT they would and did meet a portion of that contract goal by purchasing materials from a DBE supplier, but did not. The defendants' convictions, thus, are premised upon the theory that, because "the government's contractual right for a certain amount of the materials to be supplied by a DBE" was "an explicit term of the agreement" and "a fundamental basis of the bargain," it was a form of property of which PennDOT was deprived.[4] *See id.*

Neither the prosecutor nor the district court ever articulated any workable limiting principle for this "basis-of-the-bargain" theory, although that theory potentially converts every provision in every contract, public or private, into "property" subject to the property fraud statutes. As it stands, the ruling would turn essentially every purposeful breach of contract into a potential violation of the federal criminal property fraud statutes. But as the Supreme Court has repeatedly

[4] *Amici* do not address the district court's alternative holding that the scheme may also be treated as one to obtain money.

emphasized, the property fraud statutes do not apply to conduct other than schemes to take money or other property from the victim, and they certainly do not provide fair notice that they also apply to a breach of a contract provision protecting an intangible right otherwise outside the statutes' scope, like the one at issue here. Moreover, the district court's ruling would encompass not only breaches of federal contracts, but purposeful breaches of state and private contracts as well, provided the jurisdictional requirement (such as use of the mail or wires) is satisfied. That is, breaches of contracts entirely governed by state law could become federal crimes in any case in which a prosecutor chose to proceed that way, leaving prosecutorial discretion unbounded, the scope of the statutes unclear, and federalism concerns ignored.

Such a construction of the property fraud statutes risks the arbitrary and unfair application of the law contrary to the interests of *Amici*. *Amici* are dedicated to insuring both that criminal statutes are limited to their proper scope, so that criminal liability is only imposed where there has been fair notice, and that the proper constitutional balance between federal and state power, so fundamental to our constitutional system, is maintained. Accordingly, *Amici* respectfully submit that the Court should grant leave to file this brief and reject the district court's holding that the contractual interest in having a DBE provide materials for a public works project is a property right for purposes of the property fraud statutes.

ARGUMENT

I. The Supreme Court Has Consistently Rejected Attempts to Apply the Federal Criminal Property Fraud Statutes Beyond Their Clearly Intended and Expressed Scope.

The mail and wire fraud statutes prohibit "scheme[s] or artifice[s] . . . for obtaining money or property by means of false or fraudulent pretenses. . . ." 18 U.S.C. §§ 1341, 1343. For decades, prior to 1987, prosecutors nevertheless applied the statutes to a wide range of schemes that did not seek to obtain money or property, interpreting them to prohibit deprivations of intangible rights as well. *See, e.g.*, John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 427-28 (1998) ("The 1970s saw the flowering of the 'intangible rights doctrine,' an exotic flower that quickly overgrew the legal landscape in the manner of the kudzu vine until by the mid-1980s few ethical or fiduciary breaches seemed beyond its potential reach.").

The Supreme Court rejected this improper expansion of the statutes in *McNally v. United States*, 483 U.S. 350 (1987). There, the prosecution sought to apply the mail fraud statute to a scheme to deprive a state of its intangible right to "good government" by directing state contracts to vendors who paid kickbacks. The Supreme Court rejected this theory, holding that the mail fraud statute encompasses only schemes to obtain money or property from the victim, and not deprivations of intangible rights alone. *Id*. at 356. The Court explained: "Rather

than 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, we read § 1341 as limited in scope to the protection of property rights." *Id*. at 360.[5]

In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court further clarified the limitation of the property fraud statutes to schemes to, in fact, take property. There, prosecutors in New York charged a writer of a Wall Street Journal column with mail and wire fraud based upon his sharing of the column's prepublication content with his co-conspirators—brokers who used the information to make trading decisions for the benefit of all of the conspirators. The leaking of that information violated the Journal's policies and the terms of the writer's

[5] Following *McNally*, Congress sought to make the mail and wire fraud statutes applicable to "honest services" fraud by enacting 18 U.S.C. § 1346, which does not alter the definition of property, but does provide that the scheme-to-defraud element of the statutes "includes a scheme or artifice to deprive another of the intangible right of honest services." The history of this provision parallels that of the property fraud statutes: the courts, including the Supreme Court and this Court, curbed prosecutorial efforts to expand the statute's reach by limiting its application to schemes involving bribery or kickbacks. *Skilling v. United States*, 561 U.S. 358, 408-09 (2010) ("[T]here is no doubt that Congress intended § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct … would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes only the bribe-and-kickback core of the pre-*McNally* case law."). *See also United States v. Panarella*, 277 F.3d 678, 693 (3d Cir. 2002) (limiting honest services fraud for failures to disclose conflicts of interest to instances in which state law required disclosure).

employment agreement. *Id.* at 27. In the resulting case, the Supreme Court, carefully distinguishing between tangible and intangible rights, recognized that the Journal's "contractual right to [the writer's] honest and faithful service [was] an interest too ethereal in itself to fall within the protection of the mail fraud statute, which 'had its origin in the desire to protect individual property rights.'" *Id.* at 25 (quoting *McNally*, 483 U.S. at 359 n.8). Nevertheless, the Court noted that the object of the defendants' scheme was "to take the Journal's confidential business information," which it emphasized has economic value, and cited a line of cases demonstrating that it "has long been recognized as property." *See id*. at 26 (citing *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918)). Thus, *Carpenter* teaches that the fraud statutes encompass schemes in which the defendant seeks to take traditionally recognized property, but they do not reach intangible rights—even if those rights are incorporated into a contract. *See id.*

The pattern of the Court rejecting expansive readings of criminal fraud statutes continued in *Cleveland v. United States*, 531 U.S. 12 (2000), where the Court made clear that governmental regulatory and policy interests are not property. The defendants were charged with obtaining a state license to operate video poker machines by misrepresenting facts in their application. The Supreme Court rejected that theory for multiple reasons. First, the unanimous Court emphasized, "It does not suffice, we clarify, that the object of the fraud may

become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Id.* at 15. Then, applying that principle, the Court held that a license to be issued by a state is not property encompassed by the mail fraud statute; rather, it is a component of the state's regulatory interests. *See id.* at 23-24. The Court explained that a state has a "right to choose the persons to whom it issues . . . licenses," but clarified that, "far from comprising an interest that 'has long been recognized as property,' these intangible rights of allocation, exclusion, and control amount to no more and no less than [a] sovereign power to regulate." *Id*. at 23 (quoting *Carpenter*, 484 U.S. at 26). The Court explained that if the property fraud statutes encompassed such interests they would "arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities. . .. [W]e decline to attribute to § 1341 a purpose so encompassing . . . ." *Id*. at 26.

Judicial limiting of prosecutorial overreaching in the criminal property fraud context was most recently manifested in the Supreme Court's decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020). There, the defendants were New Jersey government officials who shut down a bridge's access lanes in order to create traffic jams in a nearby town as an act of political retribution against the mayor of that town. The state officials were charged with wire fraud based upon two alternative theories of property—that they had "take[n] control" of the access lanes

to the bridge themselves, or that they had deprived the State of the value of the public employee labor for work on shutting down the lanes. *Id*. at 1572. The Supreme Court rejected both theories. As for the first, the Court held that, as in *Cleveland*, the State's choice of how to allocate the lanes for use by different drivers was a regulatory decision, not a property interest. *Id.* And with regard to the time and labor of the public employees, the Court held that although the value of the employees' labor was "property," the diversion of which caused economic loss, it could not sustain the conviction because that loss was not the "object" of the scheme but merely an incidental byproduct of it. *Id.* at 1574. The property fraud statutes, the Court held, would have been violated only if the defendants "sought to obtain the services that the employees provided." *Id.* In other words, the employee labor of which the State was deprived did not satisfy the statute because it was not what the defendants sought to obtain. *See id.* at 1573 n.2 ("'The victim's loss must be an objective of the [deceitful] scheme rather than a byproduct of it.'") (quoting *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993)). The Court therefore held that the defendants' scheme did not violate the property fraud statutes.

These four decisions rejecting efforts to expand the reach of the property fraud statues establish several limiting principles:[6]

- The federal criminal property fraud statutes only reach schemes to deprive a victim of money or property. *McNally*, 483 U.S. at 360.
- Although these statutes reach traditionally recognized forms of intangible property, they do not apply to intangible rights that are not property. *Carpenter*, 484 U.S. at 25.
- The thing taken by the defendant must constitute property both in the hands of both the victim and the recipient. *Cleveland*, 531 U.S. at 15.
- A scheme must have as its object both a deprivation of property and a wrongful "obtaining" of that property. *Kelly*, 140 S. Ct. at 1573-74.
- And a state's interests in its regulatory or policy making capacities, including non-pecuniary considerations influencing its award of contracts, are not property. *Kelly*, 140 S. Ct. at 1572; *Cleveland*, 531 U.S. at 23-24; *McNally*, 483 U.S. at 360.

[6] This Court, too, has sought to impose appropriate limits on expansive interpretations of the property fraud statutes. *See* Kousisis Br. at 30-35 (citing, *e.g.*, *United States v. Henry*, 29 F.3d 112 (3d Cir. 1994) (holding that competing banks' interest in fair bidding opportunity is not property); *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988) (holding that the "right to conduct business free of false, fictitious and fraudulent information" is an intangible right, not property)).

Application of these principles here shows that once again the prosecution has improperly attempted to expand the federal criminal property fraud statutes beyond their expressed and intended[7] scope. Indeed, the prosecutorial theory accepted by the district court—that a state's interest in DBE participation is a property right, at least when written into a public contract—violates many of these principles, as well as fundamental rules regarding the construction of federal criminal statutes.

[7] Congress's intent in this regard can be inferred not only from the wording of the property fraud statutes, but also from its response to *McNally*. As the Supreme Court observed in *Cleveland*, "Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services.' . . . Significantly, Congress covered only the intangible right of honest services even though federal courts, relying on *McNally*, had dismissed, for want of monetary loss to any victim, prosecutions under § 1341 for diverse forms of public corruption, including licensing fraud." 531 U.S. at 19-20.

II. Applying The Federal Criminal Property Fraud Statutes to Breaches of Contractual Provisions Like the DBE Requirement Would Violate the Fundamental Principles Regarding Notice, Federalism, and Avoiding Over-Criminalization that Motivate the Supreme Court's Decisions.

The district court's analysis of how the defendants' conduct falls within the scope of wire fraud statute is not a model of clarity. The court held, in pertinent part:

> [T]he scheme implicated the government's contractual right for a certain amount of the materials to be supplied by a DBE. The DBE requirements were "a fundamental basis of the bargain," since the Philadelphia Bridge contracts were awarded based on the representation that a certain amount of supplies would be obtained from [the DBE subcontractor], and the contracts included compliance with the DBE regulations as an explicit term of the agreement. Accordingly, the scheme targeted a traditional property right cognizable under the wire fraud statute.

1Appx.0040-0041 (citations omitted).[8]

This passage suggests that the fraud constituting the scheme was the breach of the contract—the failure to have a DBE supply materials for the project. That is, the only interest implicated is the DBE requirement itself, or in the district

[8] As explained in Appellant Kousisis' brief, the district court's alternative holding that the case involved a scheme to obtain money is wrong because PennDOT received the agreed-upon services at the lowest available price. Kousisis Br. at 35-38.

court's words, "the government's contractual right for a certain amount of the materials to be supplied by a DBE." 1Appx.0040.

That is a novel theory. For one thing, the law has long made clear that a breach of contract, even an intentional one, is not fraud. *See, e.g.*, *Windsor Sec., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 664 (3d Cir. 1993) (noting that a breach of contract is neither a tort nor "illegal"). For another, at least in some states a failure to perform a contractual obligation may not even support a civil breach-of-contract claim where it does not result in cognizable damages. *See, e.g.*, *Doe v. Univ. of Sciences*, 961 F.3d 203, 211 (3d Cir. 2020) (noting that damages resulting from the breach is a required element of a breach-of-contract claim under Pennsylvania law) (citing *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman*, 137 A.3d 1247, 1258 (Pa. 2016)). And it is well-established that inducing someone to enter into a contract based upon misrepresentations does not implicate the mail or wire fraud statutes if it does not result in the defendant taking money or property from the victim, as those statutes require.[9]

[9] Indeed, as explained in defendant Kousisis's brief, a scheme "to obtain" a contract does not implicate the property fraud statutes, absent the required deprivation of property. *See* Kousisis Br. at 29-35 (citing, *e.g.*, *Zauber*, 857 F.2d at 143 (holding that obtaining a contract by falsely promising that non-felons will provide services does not implicate the property fraud statutes); *United States v. Nathan*, 188 F.3d 190 (3d Cir. 1999) (holding that a failure to comply with a

Finding that the right "for a certain amount of the materials to be supplied by a DBE" is a property right sufficient to implicate the property fraud statutes is an even more remarkable holding. Indeed, it is directly contrary to many of the limiting principles articulated by the Supreme Court as set forth above.

For one, the DBE requirement is most accurately viewed as an intangible interest that the state holds in its capacity as a sovereign regulator. It and provisions like it originate from statutes and regulations expressly designed to promote policy goals. The DBE requirement at issue here was based upon U.S. Department of Transportation regulations, set forth in 49 C.F.R. Part 26, D.Appx.4816-4824, regulations which, in turn, were promulgated under the authority of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1101(b), 119 Stat. 1156 (2005) (codified at 23 U.S.C. § 101 note (2008)). The statute and regulations do not impose any requirements or create any rights, let alone property rights; instead, the regulations set a national "goal" of spending 10% of federal funding with DBEs. 49 C.F.R. § 26.41. *See also* 144 CONG. REC. S1427 (daily ed. Mar. 5, 1998) (statement of Sen. Domenici) (reading letter from Attorney General Reno and

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requirement in a federal contract that goods be made in the United States does not deprive the government of revenue, if the goods supplied have the same quality and economic value as contract required)).

Secretary of Transportation Slater) ("The DBE program is a goals program which encourages participation without imposing rigid requirements of any type."). Thus, it is clear that the DBE provision reflects a governmental policy goal of expanding minority opportunities in public contracting, a classic exercise of the government's "intangible right[] of allocation." *See Cleveland*, 531 U.S. at 24 (explaining that governmental decisions regarding allocation of business do not create or transfer property rights). *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995) (describing a DBE program as an effort by the government to "allocate its resources" to achieve a social policy goal). As *Cleveland* makes clear, a scheme implicating such an interest does not violate the property fraud statutes.

A holding treating the DBE requirement as property would run afoul of other limiting principles set forth in the Supreme Court cases described above. For example, it also would violate the requirement that obtaining the property of which the victim is deprived must be the object of the scheme. *See Kelly*, 140 S. Ct. at 1573-74. Indeed, a state's right (contractual or otherwise) to a certain level of DBE participation is not something a third party could ever logically obtain from PennDOT—and therefore it cannot be property for purposes of the property fraud statutes. Appellant Kousisis's Brief identifies many other compelling reasons that

such "DBE rights" are not property, *see* Kousisis Br. at Point I, with which *Amici* concur.

Moreover, treating the DBE requirement as property would not only violate the Supreme Court's limiting principles, but would also implicate the very reasons articulated by the Court as to why those principles are so important. Indeed, the Court has been very clear about why it consistently rejects attempts to construe the property fraud statutes in ways that would expand the reach of federal criminal law—specifically that such constructions would cause the statutes to fail to give fair notice of a wider application, create the potential to federalize traditional areas of state law, and risk over-criminalizing all manner of otherwise civilly redressable conduct. *See*, *e.g.*, *Cleveland*, 531 U.S. at 24-25 (discussing federalization and overcriminalization concerns); *McNally*, 483 U.S. at 360 (discussing fair notice and federalization concerns). This case highlights each of these three problems.

Notice

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

> Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave

> people with no sure way to know what consequences will attach to their conduct.

United States v. Davis, 139 S. Ct. 2319, 2323 (2019). *See also United States v. Lanier*, 520 U.S. 259, 266 (1997) (explaining that criminal statutes must be construed to apply "only to conduct clearly covered" by the express statutory terms); *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) ("That the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law . . ."). And in *McNally*, the Court noted that a failure to limit the property fraud statutes to schemes to obtain established forms of property would trigger precisely those notice concerns. *See McNally*, 483 U.S. at 360.

Neither the terms of the statutes nor caselaw provide fair notice for the district court's holding that a state's interest in DBE participation is property, or that breaching a contractual provision reflecting a DBE participation requirement may be prosecuted as a federal property fraud crime. Moreover, if an intangible or governmental interest such as the one reflected in the DBE provision can be transformed into a property right by virtue of its incorporation into a contract, then any intangible interest could likewise be deemed property if written into a contract.

This would present a particularly egregious problem, given the vast amount of conduct that could be subject to prosecution under the district court's "basis-of-

the-bargain" theory. Provisions like the DBE requirement typically are among an immense number of obligations included in public contracts; indeed, the contract at issue in this case includes more than a thousand pages of terms and conditions. *See* 7Appx.3871-3878; D.Appx3879-4975. Moreover, it is common in such contracts to incorporate expansive rights and obligations with vague cross-references like, "Contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635)." *E.g.*, D.Appx.4837. Thus, under the district court's theory, the federal property fraud statutes would apply to an enormous number of contractual provisions, some of which the contractor may not even know of, and many of which a contractor likely would have no idea would expose him to a federal property fraud prosecution upon a breach.[10]

Given the scope of uncertainty of that exposure, the choice as to which such breaches are crimes would effectively be made by prosecutors rather than the legislature. That reflects another notice problem; allowing statutes to be construed

[10] Whether a breach is "material" for purposes of a breach of contract claim—as it would have to be in order to constitute a civil, let alone a criminal, claim—is also a matter of the pertinent state law, raising the federalism concerns discussed here. As well, whether a breach of a particular provision is a material one is determined by considering the parties' expectations and damages "in the light of the facts of each case. . . ." *Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 92 (3d Cir. 2008) (discussing Pennsylvania contract law). But such a fact-intensive analysis hardly provides a workable standard consistent with the fair notice requirement for criminal statutes.

to apply beyond their clear terms effectively gives prosecutors the ability to write the criminal laws. *See Davis*, 139 S. Ct. 2 at 2323. *See also Marinello v. United States*, 138 S. Ct. 1101, 1108-09 (2018) (cautioning against relying upon prosecutorial discretion to prevent unfair and arbitrary enforcement of vague statutes, and emphasizing, "That is one reason why we have said that we 'cannot construe a criminal statute on the assumption that the Government will use it responsibly.'") (citations omitted). These are precisely the concerns that motivate the Supreme Court's vagueness jurisprudence and that call for rejecting constructions of statutes that leave their "outer boundaries ambiguous." *McNally*, 483 U.S. at 360.

Federalism

The Supreme Court has also warned against the risk of the federal property fraud statutes being used to improperly expand the powers of the federal government at the expense of the states. In *Cleveland*, the Court explained:

> We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. . .. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have

> significantly changed the federal-state balance in the prosecution of crimes."
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> * * *
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> Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities. . .. [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

Cleveland, 531 U.S. at 24-26 (quoting *Jones v. United States*, 529 U.S. 848, 858 (2000)).

The Court emphasized this point in *Kelly*, warning:

> Much of governance involves (as it did here) regulatory choice. If U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making such a decision, the result would be—as *Cleveland* recognized—"a sweeping expansion of federal criminal jurisdiction." And if those prosecutors could end-run *Cleveland* just by pointing to the regulation's incidental costs, the same ballooning of federal power would follow. In effect, the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome. . .. They bar only schemes for obtaining property.

Kelly, 140 S. Ct. at 1574 (citation omitted). *See also Bond v. United States*, 572 U.S. 844, 858-59 (2014) ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. Thus, 'we will not be quick

to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.'") (citation omitted).

Although the DBE requirement at issue here was based upon a federal policy of supporting minority-owned contractors and upon the fact that some federal funds were granted to the project, the district court's ruling is by no means limited to contractual provisions with a connection to federal law. Rather, the "basis-of-the-bargain" theory logically applies to any intangible interest that is incorporated into a contract. As such, *any* breach of contract case could become a federal criminal property fraud case, so long as the mail or wires are implicated. This inherently raises federalism concerns, because while contract law is not exclusive to the states, it is generally an area for state regulation, absent a particular federal interest. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) ("[T]he interpretation of a contract is ordinarily a matter of state law to which we defer.").

Moreover, notwithstanding the presence of some of federal funding, the contract here was ultimately one between private parties and a state entity, PennDOT. Thus, the contract provided for Pennsylvania administrative remedies in the event of disputes regarding performance or payment. 7Appx.3873. That the breach of such a contract could give rise to a federal prosecution only serves to highlight the federalization problem inherent in the district court's ruling, which

could potentially be used to federalize—and criminalize—any breach of almost any contract.

The district court's ruling has other implications for federalism. If every provision in a government contract (local, state or federal) were to create a property right, then federal jurisdiction would be extended to cover every civil claim for breach of any public contract. That is because every alleged breach of contract by a public entity (again local, state or federal), even of the most routine variety, would also be as deprivation of property and would accordingly give rise to a due process claim and hence, potential § 1983 litigation. *Cf. Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1398 (3d Cir. 1991) ("'[I]f every breach of contract by someone acting under color of state law constituted a deprivation of property for procedural due process purposes, the federal courts would be called upon to pass judgment on the procedural fairness of the processing of a myriad of contractual claims against public entities. . .. [S]uch a wholesale federalization of state public contract law seems far afield from the great purposes of the due process clause.'" (quoting *Reich v. Beharry*, 883 F.2d 239, 242 (3d Cir. 1989))). For the same reason, if this Court were to embrace the district court's ruling that the contractual DBE requirement is property, the scope of the federal property fraud statutes would be expanded far beyond their terms and what

Congress intended--a decision that would have implications even beyond the context of the property fraud statutes.

Over-Criminalization

The third problem with the district court's decision in this case is that it promotes over-criminalization of conduct that is ordinarily redressed by civil means. Over-criminalization concerns are raised when a criminal statute is written or interpreted so broadly as to sweep within its terms "a broad range of day-to-day activity." *United States v. Kozminski*, 487 U.S. 931, 949 (1988). Such interpretations must be avoided because they deter activities that the legislature has not clearly prohibited and effectively delegate to the judicial and executive branches the authority to write criminal statutes. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016). And the district court's "basis-of-the-bargain" theory goes even farther: if incorporating any interest, including an intangible one, into a contract makes it property, such that it could implicate the federal criminal property fraud statutes, then the power to decide what conduct is criminal has effectively been delegated not only to judges and prosecutors, but to every private party who drafts a contract.[11]

[11] Although, in this brief, *Amici* focus primarily upon the implications of the district court's "basis-of-the-bargain" theory for public procurement contracts, there is no reason why the government's overly expansive theory would not encompass other private contracts as well, including even oral contracts. Breaches

If every requirement of a public contract amounted to a property right sufficient to support property fraud claims, the range of conduct subjecting contractors to mail and wire fraud charges would be staggering. Governmental contracts are often replete with provisions and conditions promoting governmental policy goals like the DBE requirement. For example, PennDOT contracts include a provision requiring every contractor to certify that he "has not violated any of [the Contractor Integrity] provisions," which include, for example, that the contractor "maintain the highest standards of integrity in the performance of the Contract . . . . "[12] D.Appx.4856-57. Under the district court's "basis-of-the-bargain" theory, a contractor who falsely executed that certification would be subject to prosecution for federal property fraud.

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of any such agreement would be subject to prosecution as federal property fraud so long as the mail or wires were involved. And because violations of the property fraud statutes can be predicate acts for civil RICO claims, 18 U.S.C. §§ 1961-1968, such breaches also could dramatically tilt the playing field in civil breach of contract litigation. *Cf. Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411-12 (2003) ("RICO . . . has already evolved into something quite different from the original conception of its enactors, warranting concerns over the consequences of an unbridled reading of the statute. The Court is rightly reluctant . . . to extend RICO's domain further . . . .") (Ginsburg, J., concurring) (citations and quotations omitted).

[12] Similarly, New Jersey public contracts contain a provision requiring every contractor to certify that he "has read [the New Jersey Business Ethics Guide], understands its provisions and is in compliance with its provisions." N.J.S.A. 52:32-47(b). The district court's theory also would expose every contractor who falsely executed that certification to a federal property fraud prosecution.

Uncertainty about the rules governing contracts, and about the consequences for breaking those rules, will have practical costs. Fear of liability may lead contractors to shy away from bidding on some projects or cause them to increase their prices to compensate them for the risks. *Cf. Tozer v. LTV Corp.*, 792 F.2d 403, 407 (4th Cir. 1986) (warning that without government contractor defense to design defect claims, contractors would be discouraged from bidding on essential military projects). And the notion of efficient breaches of contracts, widely recognized as economically beneficial, would be burdened by a new and uncertain risk of criminal prosecution. *See, e.g., Lockerby v. Sierra*, 535 F.3d 1038, 1042 (9th Cir. 2008) ("The concept of 'efficient breach' is built into our system of contracts, with the understanding that people will sometimes intentionally break their contracts for no other reason than that it benefits them financially."); *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1988) ("Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result."). If the risk of federal criminal prosecution may, solely at the discretion of a prosecutor, be added to the potential consequences of breaching a contract, efficient breaches will

be deterred. And the resulting costs ultimately will be borne, directly or indirectly, by the public, especially in the context of public works contracts.

For these reasons, as well as those discussed above and in Appellant Kousisis's Brief, this Court should reject the district court's "basis of the bargain" theory. Instead, the Court should hold that intangible interests that are not property, such as a state's interest in DBE participation, do not become property by virtue of their incorporation into a contract.

CONCLUSION

For the foregoing reasons, this Court should grant *Amici* leave to file this brief and should reject the holding of the district court that the right to have a DBE perform work under a public contract is a property right for purposes of the federal criminal property fraud statutes.

Respectfully submitted,

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Dated: November 9, 2020

CERTIFICATE OF COMPLIANCE

I, Lawrence S. Lustberg, Esquire, hereby certify that:

(1) this brief contains 6,108 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7), and thus does not exceed the 6,500-word limit as determined by Federal Rules of Appellate Procedure 29(a)(5) and 32(f);

(2) this brief complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared using a proportionally spaced typeface, Times New Roman, with 14-point font, using Microsoft Word 2016;

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Dated: November 9, 2020

CERTIFICATE OF BAR MEMBERSHIP

Lawrence S. Lustberg and Thomas R. Valen are members in good standing of the Bar of United States Court of Appeals for the Third Circuit.

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Dated: November 9, 2020

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 9, 2020, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and to have paper copies delivered by sending seven paper copies of the Brief via FedEx.

I also certify that on November 9, 2020, I caused the foregoing Brief to be served upon all counsel of record through the Notice of Docketing Activity issued by this Court's CM/ECF system.

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Dated: November 9, 2020