Case Nos. 24-2230 & 24-2236

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RISHI SHAH and SHRADHA AGARWAL,
Defendants-Appellants.

On Appeal From the United States District Court
For the Northern District of Illinois, Case No. 1:19-cr-864
Honorable Thomas M. Durkin

UNOPPOSED MOTION OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

Pursuant to Fed. R. App. P. 29(a)(2), the National Association of Criminal Defense Lawyers and the Illinois Association of Criminal Defense Lawyers move for leave to file a brief as *amici curiae* in support of Defendant-Appellants Rishi Shah and Shradha Agarwal. All parties to this appeal have consented to the filing of the proposed *amici* brief.

National Association of Criminal Defense Lawyers ("NACDL") and Illinois Association of Criminal Defense Lawyers ("IACDL") represent thousands of advocates across the United States who are committed to advancing the interests and protecting the rights of individuals accused of crimes.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the Supreme Court of the United States and in other federal and state courts in cases that present issues of broad importance to the criminally accused, criminal defense lawyers, and the criminal legal system.

IACDL is a nonprofit organization dedicated to defending the rights of all individuals as guaranteed by the United States Constitution and the Constitution of the State of Illinois. The organization's membership includes private criminal defense attorneys, public defenders, and law professors throughout the State of Illinois. IACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal legal system, redressing systemic racism, and ensuring its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level. IACDL is committed to enhancing the criminal defense bar's capacity to safeguard fundamental constitutional rights. It is an affiliate organization of NACDL.

This case directly implicates multiple core concerns of amici: protecting the Sixth Amendment right to counsel, due process of law, and pushing back against overly broad interpretations of federal criminal statutes. Amici has filed numerous amicus briefs before the Supreme Court of the United States and in the courts of appeals regarding the right to counsel, including counsel of choice issues, and the proper interpretation of criminal statutes such as the property fraud statutes. Courts and judges routinely cite and rely on those briefs to resolve important legal issues in American criminal law. NACDL members have seen the harm caused by limits on defendants' ability to choose their counsel and the risks of overly broad interpretations of federal criminal laws.

"Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace." *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). A nonparty brief should be granted when a party is not adequately represented, when the nonparty has a direct interest in another case that may be materially affected by a decision in the present case, and/or when the nonparty has "a unique perspective, or information, that can assist the court" beyond the capabilities of the parties. *Id.* at 617.

Amici's strong background in criminal law and specific expertise with issues regarding the representation of the criminally-accused in Illinois and across the nation can assist this Court beyond the capabilities of the parties. *Amici* bring "unique information [and] perspective" to this Court's consideration of the instant appeal. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th

Cir. 1997). *Amici*'s brief, which accompanies this motion as an exhibit, will "assist the judges [of this Court] by presenting ideas, arguments, theories, insights, facts, or data that are not . . . found in the parties' briefs." *See Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003). *Amici*'s proposed brief would "add value to [this Court's] evaluation of the issues presented on appeal" by "[p]roviding practical perspectives on the consequences" of affirming the district court's judgment. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020).

For these reasons, *amici* respectfully request that the Court grant this *unopposed* motion for leave to file the accompanying *amici curiae* brief, attached as Exhibit A.

Dated: April 11, 2025

Respectfully submitted,

/s/ Jonathan M. Brayman

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, I electronically filed the foregoing *Unopposed Motion of National Association of Criminal Defense Lawyers and Illinois Association of Criminal Defense Lawyers for Leave to File a Brief in Support of Defendants-Appellants* with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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EXHIBIT A

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-2230 and 24-2236

Short Caption: USA v. Rishi Shah and Shradha Agarwal

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

National Association of Criminal Defense Lawyers and Illinois Association of Criminal Defense Lawyers

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Breen & Pugh (counsel for amici curiae); Law Office of Joshua G. Herman (counsel for amicus curiae)

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Jonathan M. Brayman Date: 04-11-2025

Attorney's Printed Name: Jonathan M. Brayman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

Attorney's Signature: /s/ Todd S. Pugh Date: 04-11-2025

Attorney's Printed Name: Todd S. Pugh

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Joshua G. Herman Date: April 11, 2025

Attorney's Printed Name: Joshua G. Herman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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STATEMENT OF INTEREST

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STATEMENT PURSUANT TO FED. R. CIV. P. 29(a)(4)(E)

Amici represent that: (1) No counsel for a party authored this brief in whole or in part; (2) no such counsel or party made a monetary contribution to fund the preparation or submission of the brief; and (3) no person other than amici curiae, their members, or their counsel made such a contribution.

SUMMARY OF ARGUMENT

This case is crucial for the National and Illinois Associations of Criminal Defense Lawyers, focusing on citizens' right to defend themselves against government power. This amicus brief addresses three interlocking constitutional

crises threatening the integrity of our criminal justice system. First, when Mr. Shah and Ms. Agarwal were deprived of millions in untainted assets needed to retain counsel of their choosing, they suffered a structural Sixth Amendment violation requiring automatic reversal—not an after-the-fact assessment of substitute counsel's competence. Second, the government's strategic use of scripted grand jury testimony violated fundamental confrontation rights by allowing prosecutors to introduce their preferred narrative whenever witnesses deviated from it at trial, effectively substituting government-crafted statements for live testimony tested through cross-examination. Third, the prosecution's expansive theory of fraud criminalized ordinary contractual disputes, transforming alleged breaches of agreements into federal crimes without proving defendants intended to deprive victims of traditionally recognized property interests—precisely the type of overreach the Supreme Court has repeatedly rejected in cases from *McNally* to *Ciminelli*. These violations strike at the very foundation of the adversarial process and require this Court's decisive intervention.

Prominently, the government deprived Mr. Shah and Ms. Agarwal of the use of millions of dollars of their own untainted money to properly and fully fund their defense. This governmental action affected Mr. Shah and Ms. Agarwal's ability to exercise their Sixth Amendment rights to build defense teams of their choosing.

The excessive and improper restraint of these untainted funds constituted a structural error that affected Mr. Shah and Ms. Agarwal's fundamental constitutional rights. It effectively caused them to have to fight the full force of the

government with one hand tied behind their backs and interfered with their ability to hire attorneys of their choosing. The Sixth Amendment violation caused the entire fairness of the proceedings to be called into question. This structural error is not reviewed based on whether the district court believed that the lawyers who ultimately represented Mr. Shah and Ms. Agarwal at trial performed adequately or effectively. The government's unlawful restraint of millions of dollars of Mr. Shah and Ms. Agarwal's money denied them of their Sixth Amendment rights to counsel of their choice and results in automatic reversal.

What occurred in this case poses a grave danger to every future citizen who faces the prospect of a criminal accusation. The excessive and abusive pretrial restraint of millions of dollars needed for their criminal defense deprived Mr. Shah and Ms. Agarwal of their Sixth Amendment rights. This governmental conduct requires rectification through decisive action by this Court to underscore that the occurrences in this case were fundamentally unjust, extraordinary, and must not be repeated. Additionally, as explained further below and in the parties' briefs, the wholesale admission of scripted grand jury statements of key government witnesses warrants reversal, as does the legally defective theory of prosecution employed in this case.

ARGUMENT

Choice is foundational to American democratic values because it embodies the core principles of freedom, autonomy, and self-determination. The government's improper pretrial seizure of funds hindered Mr. Shah's and Ms. Agarwal's ability to

hire their chosen defense counsel, violating their Sixth Amendment rights. The issue does not boil down to whether the lawyers who ultimately tried the case for Mr. Shah and Ms. Agarwal were competent, effective, or even excellent. With all due respect to the trial lawyers, they were not truly of Mr. Shah and Ms. Agarwal's choosing. The government's restraint of millions of dollars hamstrung their ability to fund their legal defense and constrained their ability to hire counsel. This Court should reverse and dismiss the indictment with prejudice, or, at a minimum, grant Mr. Shah and Ms. Agarwal a new trial.

I. The Government's Unlawful Pretrial Restraint of Untainted Assets Violated Mr. Shah and Ms. Agarwal's Sixth Amendment Rights to Counsel of Choice.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall…have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see Powell v. Alabama*, 287 U.S. 45, 53 (1932). The "right to select counsel of one's choice" is at the "root" of the "constitutional guarantee" of the Sixth Amendment right to counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006). The Constitution "commands…that the accused be defended by the counsel he believes to be best." *Id.* at 146. This right to counsel of choice is "fundamental" considering "the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust." *Luis v. United States*, 578 U.S. 5, 11-12 (2016).

For example, in *United States v. Stein*, the Second Circuit held that prosecutorial actions taken pursuant to the "Thompson Memorandum"—a

Department of Justice policy statement setting forth principles for the prosecution of corporations—violated the Sixth Amendment by interfering with the right of corporate employees under criminal investigation to choose their own counsel. *Id.*, 541 F.3d 130, 154 (2d Cir. 2008). The Thompson Memorandum encouraged prosecutors to consider, in determining whether a corporation cooperated with a government investigation, whether the corporation was "protecting its culpable employees and agents" by "advancing…attorneys fees." *Id.* at 136. Under pressure from prosecutors acting pursuant to the Thompson Memorandum, a major international accounting firm under investigation for tax-related crimes tightened its policy on paying legal fees for employees under criminal investigation, and after the government indicted several of the accounting firm's employees, the accounting firm stopped advancing legal fees to the indicted employees. *Id.* at 138-140. The employees moved to dismiss the indictment, arguing that the government had violated their Sixth Amendment rights by inducing their employer to withhold legal fees it otherwise would have provided, which in turn interfered with the employees' ability to retain counsel of their choice. *Id.* at 140-142.

The Second Circuit agreed that the government violated the Sixth Amendment and affirmed a district court decision dismissing the indictment as a sanction. *Id.* at 154. It explained that "the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government or vetoed without good reason." *Id.* It went on to explain that the government's actions amounted to an effective veto of the employees' choice of counsel because the employees could not pay

for their preferred counsel without financial support from the accounting firm, and they would have had the necessary financial support but for the government's pressure campaign. *Id.* at 153, 157. In the years since *Stein*, other courts have reaffirmed its core principle: the Sixth Amendment "prohibits the government from interfering with . . . obligations to fund a defense" to the extent that such interference deprives a defendant of counsel of choice. *See, e.g.*, *United States v. Shelton*, No. 23-cr-00258-JSC-1, 2024 WL 4520944, at *3 (N.D. Cal. Oct. 17, 2024).

The Sixth Amendment violation is complete when the right is denied and does not hinge on the quality of fallback counsel. When a criminal defendant is denied their chosen counsel, the Supreme Court has established that proving ineffectiveness or prejudice is unnecessary to demonstrate a Sixth Amendment violation. *Gonzalez-Lopez*, 548 U.S. at 148. Otherwise, the Sixth Amendment legal analysis conflates "the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence whatever lawyer is chosen or appointed." *Id.* A Sixth Amendment violation of one's right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate," without question constitutes structural error, requiring automatic reversal. *Id.* at 150 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993); *accord Greer v. United States*, 593 U.S. 503, 512-513 (2021); *United States v. Navarrete*, 88 F.4th 672, 674 (7th Cir. 2023).

As the *Gonzalez-Lopez* Court highlighted, "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the

theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." *Id.*, 548 U.S. at 150. Additionally, "the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides to go to trial." *Id.* As the Supreme Court concluded, based on "these myriad aspects of representation," the erroneous denial of counsel of one's choosing bears directly upon the "framework within which the trial proceeds . . . or indeed on whether it proceeds at all." *Id.* (citing *Arizona v. Fulminate*, 499 U.S. 279, 310 (1991)). It is, thus, "impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Gonzalez-Lopez*, 548 U.S. at 150. Because of the dynamic nature of legal representation by a criminal defense attorney, and the inability to know what would have occurred had counsel of Mr. Shah and Ms. Agarwal's choice been at the helm, to conduct harmless-error analysis "would be a speculative inquiry into what might have occurred in an alternate universe." *Id.*

Lawyers are not fungible. One spirited and diligent lawyer is not the same as the next. The ability to choose who represents, speaks for, and advocates on one's behalf is grounded in the concept of autonomy and the belief that an accused individual has the right to decide who will represent him or her in the fight of their life with the government. The Sixth Amendment's right to counsel of choice is not merely a procedural formality; it represents a significant recognition of individual dignity, autonomy, and agency when confronted with governmental authority.

Whether one chooses to represent and speak up for oneself in court as a *pro se* litigant, or chooses to hire an eccentric advocate to give unique voice to the client's factual and legal positions in court, boils down to individual choice and self-determination. To engage an attorney's legal assistance is to utilize him or her as an extension and representative of oneself. This constitutional right is deeply rooted in the concept of agency (or functioning through another), and must be closely guarded, especially in light of the government's conduct in this case.

II. The Erroneous Admission of the Grand Jury Hearsay Statements of the Government's Central Cooperating Witnesses Requires a New Trial.

The admission of government-prepared grand jury testimony in this case raises due process concerns. Instead of allowing witnesses to provide their own genuine testimony at trial, the government introduced its own words through the grand jury statements prepared by the prosecutor, bypassing traditional hearsay protections. This practice fundamentally undermines the truth-seeking function of trials by substituting the government's preferred version of events for the witnesses' actual recollections.

The error was particularly damaging given how the government strategically deployed the witnesses' grand jury statements whenever witnesses failed to deliver testimony aligning with the prosecution theory. This procedural maneuver allowed prosecutors to present their preferred narrative despite contradictory live testimony, effectively asking the jury to credit the government's script over the sworn trial testimony.

Allowing these practices means that prosecutors can introduce pre-scripted narratives when witnesses stray from the government's theory, undermining the constitutional rights to confrontation and cross-examination. The presumption of innocence is undermined when the government can effectively testify against defendants through the mouths of witnesses who, when speaking freely at trial, offer testimony inconsistent with the prosecution's theory of the case. The principle that verdicts should be based on evidence tested through the adversarial process, not on statements crafted by one side before trial even begins, is essential to maintaining both the appearance and reality of justice in our criminal legal system.

III. Mr. Shah and Ms. Agarwal's Fraud Convictions Were Based on Legally Defective Theories That Did Not Require an Intent to Deprive Another of Property or Money.

Defendants-Appellants' fraud convictions are the latest installment in the government's ongoing efforts to expand federal statutes beyond their intended bounds—a trend NACDL has consistently challenged.[1] The government continues to pursue prosecutions focused on "intangible rights," rather than property and money, despite repeated limitations imposed by courts, including the Supreme Court. Here, the government continued its weaponization of the federal fraud statutes to prosecute a "scheme" that does not involve an intent to defraud another of money or property.

As thoroughly detailed in Appellant Agarwal's brief (Dkt. #31, pp. 27-44), the government's fraud theories that led to the convictions of Defendants-Appellants

[1] *See, e.g., Thompson v. United States*, 604 U.S. ____ (2025); *Kousisis v. United States*, 604 U.S. ___ (2025) (No. 23-909), cert. granted, 604 U.S. ____ (2025); *Snyder v. United States*, 603 U.S. ____ (2024); *United States v. Shetty*, No. 2:23-cr-00084-TL (W.D. Wash. Aug. 12, 2024), ECF No. 88 (amicus brief of NACDL); and *Ciminelli v. United States*, 598 U.S. 306 (2023).

were primarily based on the assertion that Outcome did not fulfill its contractual obligations, thereby constituting fraud. This theory is contradicted by the Supreme Court jurisprudence below. Moreover, the District Court's "good faith" instruction torpedoed Defendants-Appellants' chances by further distorting the law. The instruction enabled the government to convict Defendants-Appellants based on any arguable false statement made following the entry of the contracts, which evaded the critical issue that the jury was required to find—a fraudulent intent that existed prior to the execution of any agreements. Amici seek to ensure that the federal fraud statutes are clearly defined and that defendants' convictions rest on sufficient evidence regarding their intent to defraud.

Defendants-Appellants were indicted and ultimately convicted of mail, wire, and bank fraud offenses in violation of 18 U.S.C. §§ 1341, 1343, and 1344. These federal fraud statutes make it a federal crime to use the mail or wires to execute a scheme to defraud someone of money or property, or to obtain a bank's money, funds, or other property through misrepresentations. Over the years, federal prosecutors have sought to expand the scope and reach of the fraud statutes by applying them across a range of conduct that does not involve deprivations of property or money. In response, the Supreme Court has repeatedly restrained the government's efforts by insisting on the limiting of the statutes to schemes to obtain traditionally recognized forms of property, as opposed to interferences with intangible rights and government policies. Amici provide an overview of this jurisprudence to assist the Court's review of Defendants-Appellants' arguments.

The property fraud and bank fraud statutes punish schemes "to defraud." 18 U.S.C. §§ 1341, 1343, 1344. That language codified "common-law fraud," absent specific instruction to the contrary. *Neder v. United States*, 527 U.S. 1, 25 (1999). Common-law fraud required proof the victim "suffered actual economic loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005) (citing *Pasley v. Freeman*, 100 Eng. Rep. 450, 457 (1789)). Thus, a scheme to defraud means a scheme that, if successful, inflicts economic injury. Indeed, the "victim's loss must be an objective of the deceitful scheme." *Kelly v. United States*, 590 U.S. 391, 402 n.2 (2020) (cleaned up). Without a scheme to inflict economic harm, there can be no "scheme to defraud" and thus no property fraud.

The fraud statutes codify the "common understanding" of fraud as "wronging one in his property rights by dishonest methods or schemes." *McNally v. United States,* 483 U.S. 350, 358 (1987). In *McNally*, the government applied 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 covers 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.[2]

The fraud statutes thus do not criminalize interference with non-property interests. *Carpenter v. United States*, 484 U.S. 19, 25 (1987). The Supreme Court has repeatedly emphasized that property fraud reaches only those interests that have long been recognized as property at common law and in the Court's precedents. *Id.* (exclusive use of confidential business information long recognized as property); *Pasquantino v. United States,* 544 U.S. 349, 355-56 (2005) (right to collect unpaid taxes long recognized as property); *Cleveland v. United States*, 53l U.S. 21, 23 (2000) (discretion in issuing licenses to operate video poker machines not property); *Kelly,* 590 U.S. at 401 (corruptly exercising the right to allocate access to toll lanes not property).

More recently, the Supreme Court again curtailed the government's efforts to base fraud convictions on intangible rights, rather than property interests. In *Ciminelli v. United States,* the Supreme Court rejected a "right-to-control" fraud theory that the government advanced to argue that wire fraud can be based on the deprivation of potentially valuable information. *Id.*, 598 U.S. 306, 316 (2023). The Supreme Court emphasized that even the "right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest." *Id.* And in *Percoco v. United States*, the Court rejected the government's

[2] In reaction to *McNally*, Congress enacted 18 U.S.C. § 1346 to make the mail and wire fraud statutes applicable to "honest services" fraud. Section 1346 does not alter the definition of "property," but instead provides that the scheme-to-defraud element of the statutes "includes a scheme or artifice to deprive another of the intangible right of honest services."

argument that a private citizen who may have decision-making control over government officials can violate the "intangible right of honest services" in the federal wire fraud statute. *Id.*, 598 U.S. 319, 330-31 (2023). These cases underscore how the federal fraud statutes extend only to traditionally recognized property interests.

The same property-based principles apply for the bank fraud statute, 18 U.S.C. § 1344. In *Shaw v. United States*, the Supreme Court held that a scheme to steal from a bank customer may not necessarily be a plot to deprive the bank of its "property rights," which thereby emphasized the primacy of a defendant's intent to deprive another of money or property in fraud cases. *Id.*, 580 U.S. 63, 66-67, 72 (2016).

Thus, to prove a scheme to defraud, the prosecution must show that "the thing obtained" is "property in the hands of the victim." *Cleveland*, 531 U.S. at 15 (holding that governmental regulatory and policy interests are not property). The prosecution "need[s] to prove property fraud." *Kelly*, 590 U.S. at 398. It "ha[s] to show not only [that defendants] engaged in deception, but that an object of their fraud was property." *Id.* (internal quotation marks and alterations omitted). A deprivation of intangible rights is not "'property fraud." *Id.* Traditional concepts of property do not encompass "the ethereal right to accurate information" when deciding how to use property. *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014); *see United States v. Walters*, 997 F.2d 1219, 1226 n.3 (7th Cir. 1993) ("the 'right to control' . . . is an intangible rights theory once removed"). Nor can a defendant "obtain" that right by depriving the victim of information.

The Court should vacate Defendants-Appellants' convictions because, if allowed to stand, the case sets a dangerous precedent that could convert any breach of contract into a potential federal crime.[3] The Supreme Court rejected the expansive use of the fraud statutes in a similar manner where "almost any deceptive act could be criminal." *Ciminelli*, 598 U.S. at 315. As discussed in Defendant-Appellant Agarwal's brief, the government's theory focused on a scheme to "oversell and under-deliver." (Dkt. #31, p. 27). That scheme necessarily flowed from Outcome's contractual relationships, including the performance of obligations under those contracts, and the use of projections in the contracts and other communications. But failing to follow through on contractual and other promises is not a traditionally recognized property interest. Instead, that is the type of valuable information that would help Outcome's customers make economic decisions during the performance of the contract. Moreover, even if it could be said that there were misrepresentations made prior to the contractual relationships, the government was still required to prove that Defendants-Appellants contemporaneously intended to deprive customers of traditional property interests. In the absence of substantial evidence, maintaining these convictions contradicts the precedent set by *Ciminelli* and its antecedent cases.

[3] Discover361 Staff, *The Dangers of Prosecutorial Overreach: The Shetty Case*, *Discover361* (Mar. 20, 2025), https://www.discover361.com/the-dangers-of-prosecutorial-overreach-the-shetty-case/article_c319594c-ed5c-51a2-82e2-9cdf3c7ea8cb.html (last visited Apr. 11, 2025) ("The National Association of Criminal Defense Lawyers (NACDL), a respected organization advocating for defendants' rights, has publicly criticized the government's theory in Shetty's case, filing an amicus brief that argues the prosecution is 'an attempt to criminalize self-dealing under the guise of fraud.' According to the NACDL, the government's expansive view of fraud statutes contradicts the Court's recent rulings and risks turning routine corporate matters into criminal offenses.")

This is particularly true given the specifics of this case, as emphasized by Defendants-Appellants' objections regarding the insufficient evidence of their intent to defraud customers of property at the time the contractual promises were made (*e.g.*, Dkt. #31, pp. 27-40; Dkt. #33, pp. 62-64).

Additionally, permitting the convictions to stand would also be improper because Defendants-Appellants lacked fair notice that any breach of contract, even if one had the intent to perform but was prevented from doing so for any number of reasons, would amount to a federal criminal offense punishable by up to decades in prison. This result would be especially pernicious because breaches of contracts entirely governed by state law but could morph into federal crimes in any case in which a prosecutor chose to indict, which leaves prosecutorial discretion unbounded, and the scope of the statutes unclear. Again, *Ciminelli* instructs that the fraud statutes cannot be used to prosecute "an almost limitless variety of deceptive actions traditionally left to state contract and tort law" as doing so is "in flat contradiction with our caution that, "absent a clear statement by Congress, courts should not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States." *Ciminelli*, 598 U.S. at 315-16 (cleaned up).

Permitting such a broad application of the federal fraud statutes would also risk arbitrary and unfair application of the law, which is contrary to the interests of amici, which are mission-driven to ensure that criminal statutes are limited to their proper scope, so that criminal liability is only imposed where there has been fair

notice and the balance between federal and state powers are maintained. Transforming a breach of contract into the lynchpin of the federal fraud cases risks expanding the federal fraud statutes in ways the Supreme Court has repeatedly rejected. Doing so risks federalizing traditional areas of state law and overcriminalization in general. *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). There are so many federal crimes scattered across the United States Code that "no one knows" how many federal crimes there are. Neil Gorsuch & James Nitze, *Over Ruled: The Human Toll of Too Much Law* 21 (2024). Gone are the days when "criminal laws were reserved for enforcing a relatively small number of pretty intuitive and widely accepted norms." *Id.* at 105. The thousands of confusing and overlapping statutes punish everything from "injur[ing] a government-owned lamp in Washington, D.C.," to "consult[ing] with a known pirate." *Id.* at 22.

Congress has also "hugely increased the penalties for criminal violations." Jed S. Rakoff*, Why the Innocent Plead Guilty and the Guilty Go Free* 22 (2021). The original fraud statute, for example, capped prison sentences at "eighteen calendar months." Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323. Today, the maximum is twenty years, or thirty years if the scheme involved a financial institution. 18 U.S.C. §§ 1341, 1343, 1344. The fraud statutes are not anomalies. Even those who avoid prison "confront collateral consequences that haunt them for years—including the loss of voting rights, licenses, public benefits, jobs, and access to housing."

Gorsuch & Nitze, *Over Ruled,* supra, at 110; *see also United States v. Nesbeth*, 188 F.Supp.3d 179, 184-185 (E.D.N.Y. 2016) (noting "nearly 1,200 collateral consequences"). The results are self-evident. Prison populations have increased "500 percent . . . over the past forty years" even though "crime rates in the United States have mostly declined" for over thirty years. Rakoff, *Why the Innocent Plead Guilty*, supra, at 7. And "one in nine persons in prison is now serving a life sentence." *Id.* at 8 (emphasis added).

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

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and dismiss the indictment with prejudice or, in the alternative, vacate and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

The undersigned, counsel for the amici curiae National Association of Criminal Defense Lawyers and Illinois Association of Criminal Defense Lawyers, hereby certifies that this brief contains 4,696 words from the Statement of Interest through the Conclusion. Counsel used Microsoft Word to prepare the brief. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and Circuit Rule 32 because Microsoft Word was used to prepare the brief and the font style is Century Schoolbook with a 12-point size of type.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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