No. 21-1170

IN THE

Supreme Court of the United States

LOUIS CIMINELLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Associated General Contractors of America, Inc. ("AGC of America") is a leading trade association in the construction industry, representing more than 27,000 member firms, including 7,000 of the country's leading general contractors, nearly 9,000 specialty contracting firms, and more than 11,000 service providers and suppliers, engaged in building, heavy, civil, industrial, utility, and other construction disciplines for both public and private property owners and developers. AGC of America and its nationwide network of 89 chapters have sought to improve and advance the interests of the construction industry for over a century. AGC of America works to ensure the continued success of the commercial construction industry by advocating for federal, state, and local measures that support the industry; providing education and training for member firms; and connecting member firms with resources needed to be successful businesses and responsible corporate citizens. AGC of America's goal is to serve its members by advancing the profession of construction and improving the delivery of the industry's services consistent with the public's interest.

The construction industry ("Industry") has a profound interest in the case before the Court as it presents a real risk of broad-brush criminalization of the long-standing practice whereby government contracting officials (and those acting as their agents on prospective publicly-funded projects) routinely consult with members of the general contracting community prior

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have provided their written consent to the filing of this brief.

to the issuance of a Request for Proposal ("RFP") or formal bid processes. Informal discussions with Industry are initiated by government procurement personnel prior to any formal bid processes in the ordinary course of a public authority's efforts to discern market conditions, best formulate the parameters of the prospective project, and serve to alert Industry members of the potential project being considered such that interested firms may begin to plan and prepare for any participation they may seek. This practice is so well-established and beneficial, especially for large-scale public projects, that it is codified in the Federal Acquisition Regulation ("FAR") and is an encouraged part of the pre-RFP process for federal procurements.

AGC of America, as *amicus curiae*, submits this brief to raise the Court's awareness of this proper and desirable business practice, to show the actual economic benefits this practice promotes, and to demonstrate how such pre-bid contacts are encouraged by existing government policy and are to the real benefit of the public that funds the projects. AGC of America submits this brief in support of Petitioner to the extent that Petitioner urges the rejection of the right-to-control theory for federal criminal wire fraud prosecutions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right-to-control theory supports criminal prosecutions under federal criminal fraud statutes under factual scenarios where tangible economic harm or damage to property interests cannot be shown, much less proven beyond a reasonable doubt, as part of the underlying conduct constituting the scheme to defraud. *See United States v. Binday*, 804 F.3d 558, 576-77 (2d

Cir. 2015) ("it suffices to prove that the defendants' misrepresentations deprived the insurers of economically valuable information that bears on their decision-making"). The right-to-control theory enables the prosecution to meet its burden to prove property/economic harm without any evidence of actual, identifiable money or property loss. Instead, under the right-to-control theory, the prosecution need only prove that misrepresentations or omissions acted to deprive a victim of the intangible "right to control" its property interests. *See id.*; *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021); Pet. App. 16a-17a. Insofar, however, that the fraudulent misrepresentations or omissions for which the Petitioner was convicted occurred as part of pre-RFP discussions between a member of Industry and a public authority and/or its agent (and thereby influenced the constitution of the RFP that was ultimately issued to Petitioner's purported benefit), the right-to-control theory risks criminalization of an established, non-criminal process that benefits, not harms, public authorities, the Industry, and the taxpaying public.

Early communications between government procurement personnel and Industry during the pre-RFP stage of the contracting process are a normal and established part of the public contract/procurement process. The federal government, which spent more than $665 billion on contracts in fiscal year 2020,[2] through the Office of Federal Procurement Policy in the Office of Management and Budget ("OMB") has issued a series of "Myth-Busting" memoranda, which outline the federal government procurement policy

[2] Government Accountability Office, *A Snapshot of Government-Wide Contracting For FY 2020 (infographic)*, June 22, 2021, https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic.

favoring these interactions between procurement officers and Industry and detailing their many benefits, which the right-to-control theory risks criminalizing.

These communications "create a more responsive buying process, modernize the acquisition culture, and deliver greater value to the taxpayer."[3] Pre-RFP interactions with Industry, moreover, have been codified by federal and state regulations and are favored by government contracting officials and their agents. Early engagement with Industry is used by government contracting officials "[t]o maximize the return on its acquisition investment and to ensure access to high-quality solutions."[4] In recent years, "[t]o keep up with the rapidly accelerating pace of technological change, a number of agencies have sought better ways to communicate with industry so they can better understand the commercial marketplace, attract new contractors, and encourage current partners to use new processes and develop, test, and offer more modern solutions."[5] Government contracting officials also recognize that pre-RFP interactions with Industry members are not for the purpose of obtaining

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[3] Lesley A. Field, Office of Management and Budget, *"Myth-Busting #4" – Strengthening Engagement with Industry Partners through Innovative Business Practices*, April 30, 2019, at 1, https://www.whitehouse.gov/wp-content/uploads/2019/05/SIGNED-Myth-Busting-4-Strenthening-Engagement-with-Industry-Partners-through-Innovative-Business-Practices.pdf ("Myth-Busting #4").

[4] Lesley A. Field, Office of Management and Budget, *"Myth-busting 3" Further Improving Industry Communication with Effective Debriefings*, January 5, 2017, at 1, https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/myth-busting_3_further_improving_industry_communications_with_effectiv....pdf ("Myth-Busting #3").

[5] Myth-Busting #4, at 1.

"impartial advice." Indeed, the government is specifically "looking for a variety of options from a variety of sources, each one understandably, and reasonably, attempting to demonstrate the value of its own approach."[6]

This is common sense. How could any single potential vendor know from its own, unique standpoint and perspective the full range of what may or may not be valuable economic information for the public authority on an upcoming project? That is precisely what the public contracting officials are gathering and evaluating in the course of preparing their solicitation and evaluating the bidders.

The right-to-control theory of prosecution of federal wire/mail schemes to defraud has resulted in great uncertainty and confusion in the government contracting process. AGC of America's members, for instance, are confused as to how to respond to pre-RFP contacts from government contracting personnel of a type they had always welcomed as a matter of course and not an exposure to federal criminal jeopardy. The right-to-control theory unfairly exposes members of Industry to criminal liability for engaging in what is (at most) an ordinary, longstanding, and routine part of the public contracting process. This expansion of criminalization of the fraudulent conduct to be reached by the prosecution through elimination of the requirement of proof of actual, tangible property harm results in a chilling effect on normal pre-RFP exchanges between government and Industry that otherwise serve to

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[6] Daniel I. Gordon, Office of Management and Budget, *"Myth-Busting": Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process*, February 2, 2011, at 5, https://www.darpa.mil/attachments/OFPPPolicyMemo.pdf ("Myth-Busting #1).

promote the economic interests (cost, timing, scope, feasibility) involved in important public works projects.

Amicus curiae respectfully urges this Court to reject the right-to-control theory of prosecution. The dispensing with proof of actual economic harm that is the essence of the right-to-control theory criminalizes ordinary business practice and risks the loss of the actual economic benefits that practice promotes.

ARGUMENT

I. The Application Of The Right-To-Control Theory Risks Criminalizing Important Business Practices In The Government Contracting Process And Is Contrary To Existing Precedent

"The federal wire fraud statute makes it a crime to effect (with use of the wires) 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (citing 18 U.S.C. § 1343). The Court has held that the "'money-or-property requirement of the latter phrase' also limits the former" phrase in the statute, meaning that the wire fraud statute "prohibits only deceptive 'schemes to deprive the victim of money or property.'" *Id*. (quoting *McNally v. United States*, 483 U.S. 350, 356, 358 (1987)). To prove a case under this statute, the Government has to prove not only "deception, but that an 'object of their fraud was property.'"[7] *Id*. (quoting *Cleveland v. United States*,

[7] The Court has held that the "same analysis" is to be applied to the mail and wire fraud statutes because they "share the same language in relevant part." *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

531 U.S. 12, 26 (2000)). The Court has disapproved of "theories of property rights" that "stray from traditional concepts of property," and held that the applicable criminal statute does not cover conduct involving the "intangible rights of allocation, exclusion, and control." *Cleveland*, 531 U.S. at 23-24.

In a line of precedent stretching through the case below, the United States Court of Appeals for the Second Circuit has endorsed an expansive theory of prosecution of federal schemes to defraud – the right-to-control theory – that embraces intangible property/economic harm as satisfying the property element of the crime and "allows for conviction on 'a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information.'" Pet. App. 16a.; *see also United States v. Finazzo*, 850 F.3d 94, 105 (2d Cir. 2017) (holding that the "mail and wire fraud statutes do not require that the property involved in the fraud be 'obtainable'"); *Binday*, 804 F.3d at 576 ("The indictment need not allege, and the government need not prove, that the specified harms had materialized for the particular policies at issue or were certain to materialize in the future.").

The right-to-control theory removes the core requirement of the statute as outlined by this Court's precedent under *Kelly, McNally*, and *Cleveland* — that the object of the scheme is to deprive the victim of money or property — and permits conviction based on deception about unspecified information that a party *might* consider valuable before transacting. *See* Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 Cardozo L. Rev. 135, 138 (October 2021). This wholly subjective

informational deprivation is, at most, intangible harm and, in any case, not a property interest that Congress has criminalized or that this Court has recognized as satisfying the property/economic harm element of the fraud statute. Moreover, and more problematic, the right-to-control theory chills valuable informal informational exchange, including the type engaged in as part of the pre-RFP discussions happening between public procurement personnel and Industry, which advance tangible economic interests.

There currently exists a circuit split over the right-to-control theory, with at least two circuit courts of appeals holding that the "right to control" is "not the kind of 'property' right[] safeguarded by the fraud statutes." *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014); *see also United States v. Yates*, 16 F.4th 256, 265 (9th Cir. 2021) ("The accurate-information theory is legally insufficient. There is no cognizable property interest in 'the ethereal right to accurate information'"). There is good reason for courts to decline to embrace the right-to-control theory's dramatic expansion of the property harm element of the statute as encompassing intangible interests (including with no actual, identifiable economic damage): doing so criminalizes otherwise non-criminal conduct that provides actual, tangible economic value.

In addition, these right-to-control cases are hardly "models of clarity or consistency." *Skilling v. United States*, 561 U.S. 358, 405 (2010); *see also McDonnell v. United States*, 579 U.S. 550, 576 (2016) (raising fair notice concerns for government theories of criminal prosecution). The ensuing uncertainty creates ongoing harm for Industry which relies on the certainty provided by the guidelines promulgated by federal, state, and local government contracting officials that

not only permit but favor early information-gathering contacts with government procurement personnel and their agents. *See United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) (amorphous interpretations "create[] uncertainty in business negotiations and challenges to due process and federalism").

In the case below, the government did not prove any actual, tangible economic harm, as the "government offered little evidence that other companies would have successfully bid for the projects and then either charged less or produced a more valuable product absent the fraud." Pet. App. 20a. Instead, the Second Circuit re-defined the benefit of the contractual bargain to which the applicable public entity was entitled, finding that the "bargain at issue was not the terms of the contracts ultimately negotiated, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process." Pet. App. 21a. The Second Circuit then found that the economic harm aspect of the scheme to defraud was met by a theory that the pre-RFP conversations between Petitioner and the non-profit involved in the pre-RFP process resulted in Petitioner relating interests defined by his perspective, but not *all* interests that the state subjectively may have found pertinent to the state's economic considerations, and that constituted a denial of the state's right-to-control. Pet. App. 20a-21a. By criminalizing the ordinary, longstanding practice whereby public contracting personnel initiate contact with Industry prior to the formal RFP process, the right-to-control theory fails to perceive and account for how these pre-RFP informal discussions are actually meant to *advance* the state's interest in best formulating a contemplated RFP through a better understanding of

various Industry members' subjective views of a prospective project.

To the extent that Petitioner's prosecution represents criminalization of otherwise beneficial pre-RFP conversations between public authorities, their agents, and Industry, the effort to substitute for real economic harm through application of the right-to-control theory has the undesired consequence of criminalizing important business practices that provide an actual benefit to the contracting process, as discussed below. It is precisely the type of "sweeping expansion of federal criminal jurisdiction" about which this Court has rightly been suspect. *Kelly*, 140 S. Ct. at 1574 (quoting *Cleveland*, 531 U.S. at 24).

II. Pre-RFP Interactions Between Government Contracting Officials And Industry Are Routine And Beneficial To Both The Government And Industry

A. The Federal Government Has Codified Early Pre-RFP Communications In The FAR And Related Guidance

An important part of the federal government's contracting process, as it is for virtually all public works procurement,[8] is the issuance of RFPs, which, as a general matter, are documents issued by a buyer of services to a seller of services, requesting documentation regarding their experience, capabilities, resources, and related costs, allowing the buyer to determine which seller is best suited to complete the

[8] In this context, "public works" are generally considered to be "works paid for by public funds and made for public use or other benefit." *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 N.Y.3d 530, 538 (2013).

specific assignment required by the buyer. RFPs are "used in negotiated acquisitions to communicate Government requirements to prospective contractors and to solicit proposals." FAR § 15.203. RFPs generally contain, among other things, the expected terms and conditions that would apply to the contract and factors that will be used to evaluate proposals. *Id*.

Where the buyer is a public entity, well-developed regulatory and ethical frameworks apply to ensure that the public entity is safeguarding public funds and receiving the benefit of its bargain for its public works, while ensuring a fair and competitive bidding process. Before the public authority issues a formal request for proposals from Industry, however, it must formulate the formal RFP to be issued and governed by the prolix regulatory standards. For example, an allocation of public funds for the construction of a bridge must be carefully planned in order to assure that the public funds are well-spent and a useful, lasting bridge results. The public authority entrusted with the task of getting the bridge constructed well and efficiently in terms of time and cost must ascertain market conditions that will apply to the project for which the RFP will be issued. Included among the variables to be accounted for in planning and formulating the RFP are ascertaining the availability of firms with bridge-building expertise, the availability of skilled labor, and the availability of required materials, among other factors. In order best to understand the market and formulate the actual RFP for such a project, public authorities solicit information about market conditions from Industry prior to the issuance of the RFP itself. This work is done through the solicitation of information from various market participants, including from Industry, in the lead-up to the issuance of the actual RFP. The pre-RFP solicitation of information

is crucial to the success of the RFP itself, and is as a practical matter perhaps the most critical step in the public construction process.

The well-developed (and well-known) practice of proactive pre-RFP information gathering by public authorities is a recognized practice that has been codified into formal regulation. Over the last three decades, the federal government has acted to improve acquisition and procurement processes involving federal funds through implementation of changes to the FAR, including encouraging "an open exchange between the government and industry in order to ensure the government received the best value in negotiated procurements." Major Brendan J. Mayer, *Encourage Your Clients To Talk To Offerors: Understanding Federal Acquisition Regulation 15.306*, 2016-JAN Army Law. 36, 37 (January 2016).

Through FAR Part 15, the federal government sets out the rules for negotiated procurements, including communications with Industry *prior to the receipt of proposals.* Under the FAR, "[e]xchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged." FAR § 15.201(a); *see also* FAR § 1.102(d) (permitting any "strategy, policy or procedure" that is in the "best interests of the Government" when not prohibited by law or FAR). This early information exchange can "improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation,

and contract award." FAR § 15.201(b); *see also* Steven W. Feldman, *Government Contract Awards: Negotiation and Sealed Bidding*, § 6:2 (December 2021).

Early communications between government contracting officials and Industry are considered valuable informational research governed by FAR Part 10. Gathering information relating to market conditions is necessary to "[e]nsure that legitimate needs are identified and trade-offs evaluated to acquire items that meet those needs." FAR § 10.001(a). The "extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity and past experience." FAR § 10.002.

Permitted information gathering techniques in the pre-RFP stage include, among other things, "[c]ontacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements," "[p]articipating in interactive, on-line communication among industry, acquisition personnel, and customers," and "[c]onducting interchange meetings or holding pre-solicitiation conferences to involve potential offerors early in the acquisition process." FAR § 10.002(b); *see also* FAR § 15.201(c) (permitted techniques for early information exchange includes industry or small business conferences, public hearings, market research, as well as one-on-one meetings with potential bidders); *Advanced American Construction, Inc. v. United States*, 111 Fed. Cl. 205, 226-27 (Ct. Fed. Cl. 2013) (declining to find that the government violated FAR § 10.001 through "unreasonable or inadequate" market research where the contracting official attended small business conferences and met with eighteen firms to discuss construction capabilities, among other things). The benefits provided by the pre-RFP process are comprehensive: they promote the government's interests

as the "buyer" of services as well as the interests of the sellers of the services by enabling them to know the coming need and to plan accordingly.

Discussions and solicitations (initiated by the government) during the pre-solicitation stage promote the government's tangible economic and property interests by helping "the Government plan and understand market potential, price, delivery, [and] industry capabilities."[9] Pre-procurement discussions with Industry, moreover, can

> identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions.

FAR § 15.201(c).

Construction – and particularly as concerns large and complex public works contracting – requires adequate planning for any project RFP to best promote the public's interest. The federal government's policy favoring the long-established practice of pre-procurement interactions is further outlined in a proposed new rule, which is expected to be made final in the near future, that will amend FAR § 1.102-2(a)(4) to

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[9] General Services Administration, *How to Respond to Pre-Award Notices: Knowing the Details Will Have an Impact*, at 2 https://www.gsa.gov/cdnstatic/Pre-Award%20Notices%20-%2050 8%20-%2008272021.pdf (last visited Sept. 1, 2022).

"specifically state that Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, so long as those exchanges are consistent with existing laws and regulations, and promote a fair competitive environment. This revision, coupled with the existing guidance in the FAR subpart 1.1 and the market research strategies set forth in FAR part 10, will better equip Federal acquisition officials with the information needed to issue high quality solicitations." Department of Defense *et al.*, *Federal Acquisition Regulation: Effective Communication Between Government and Industry*, Proposed Rule, 81 FR 85914 (November 2016).

The OMB's series of "Myth-Busting" memoranda outlines the federal government procurement policy favoring pre-solicitation interactions between procurement officers and Industry to illuminate current market information and instructs federal agencies to develop vendor communication plans. As the OMB has written:

> With expenditures of over $500 billion annually on contracts and order for goods and services, the federal government has an obligation to conduct our procurements in the most effective, responsible, and efficient manner possible. Access to current market information is critical for agency program managers as they define requirements and for contracting officers as they develop acquisition strategies, seek opportunities for small businesses[10], and

[10] Official guidance on early Industry-governmental contracting interactions often includes "consideration of small businesses, including socio-economic sub-categories" to promote availability of applicable small business and other contracting assistance and

> negotiate contract terms. Our industry partners are often the best source of this information, so productive interactions between federal agencies and our industry partners should be encouraged to ensure that the government clearly understands the marketplace and can award a contract or order for an effective solution at a reasonable price.[11]

Subsequent memoranda issued by OMB have reinforced and strengthened this public policy:

- "Myth-Busting #2" (2012): "Early, frequent, and constructive engagement with industry leads to better acquisition outcomes. . . . Together, our efforts will result in more effective solutions to the government's needs and provide a better value proposition for all of us as taxpayers."[12]
- "Myth-Busting #3" (2017): "To maximize the return on its acquisition investment and to ensure access to high-quality solutions, the Federal government must ensure it conducts

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set-aside programs, such as programs for historically disadvantaged businesses, women-owned businesses, or veteran-owned businesses. *See*, *e.g.,* Department of Health and Human Services ("HHS"), *Vendor Communication Plan*, April 2020, at 5, https://www.hhs.gov/sites/default/files/hhs-vendor-communication-plan-2020.pdf ("HHS Vendor Communication Plan").

[11] Myth-Busting #1, at 1.

[12] Lesley A. Field, Office of Management and Budget, *"Myth-Busting 2": Addressing Misconceptions and Further Improving Communication During the Acquisition Process*, May 7, 2021, at 1, 3, https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/myth-busting-2-addressing-misconceptions-and-further-improving-communication-during-the-acquisition-process.pdf ("Myth-Busting #2").

productive interactions with its industry partners."[13]

- "Myth-Busting #4 (2019): "The purpose of this memorandum is to improve awareness of vendor engagement strategies that Federal procurement thought leaders are using to create a more responsive buying process, modernize the acquisition culture, and deliver greater value to the taxpayer."[14]

These memoranda set forth, and resolve, various misconceptions about the propriety of pre-bid interactions between government procurement officials and Industry members, and provide guidance with respect to the following topics, among others: (1) one-on-one meetings with potential vendors;[15] (2) Industry conferences;[16] (3) obtaining general market information, in addition to information regarding technical specifications;[17]

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[13] Myth-Busting #3, at 1.

[14] Myth-Busting #4, at 1.

[15] Myth-Busting #1, at 5 ("Prior to the issuance of the solicitation, government officials – including the program manager, users, or contracting officer – may meet with potential offerors to exchange general information and conduct market research related to an acquisition. . . . There is no requirement that the meetings include all possible offerors, nor is there a prohibition on one-on-one meetings.").

[16] *Id.*, at 9 ("Well organized industry days, as well as pre-solicitation and pre-proposal conference, are valuable opportunities for the government and for potential vendors – both prime contractors and subcontractors, many of whom are small businesses.").

[17] *Id.* ("The technical requirements are only part of the acquisition; getting feedback on terms and conditions, pricing structure, performance metrics, evaluation criteria, and contract

(4) the benefits to early pre-RFP communications;[18] and (5) timing for pre-RFP communications.[19]

Official federal government policies note that the information gathering and exchange during the pre-solicitation context is different from concerns that might be raised during the post-solicitation period. In these early communications, the "government is not looking for impartial advice from one source, but is instead looking for a variety of options from a variety of sources, each one understandably, and reasonably, attempting to demonstrate the value of its own approach."[20] Simply, there is official recognition that pre-procurement communications are both appropriate and desired for how they advance the government's (and thereby the public's) actual interests. Importantly, it is clearly understood that the information provided will not be "impartial," much less address *all* the government's potential economic interests, but will necessarily be provided through the prism of the views and experiences of the respective Industry members solicited.

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administration matters will improve the award and implementation process.")

[18] Myth-Busting #2, at 8 ("Early and specific industry input is valuable. Agencies generally spend a great deal of effort collecting and analyzing information about capabilities within the marketplace. The more specific you can be about what works, what doesn't, and how it can be improved, the better.").

[19] Myth-Busting #4, at 9 ("To maximize market research efforts, agencies are encouraged to engage vendors early in the planning process to learn about market capabilities and ways that industry may fulfill requirements in non-traditional ways.").

[20] Myth-Busting #1, at 5.

Federal contracting agencies, including the General Services Administration,[21] the Army Corps of Engineers,[22] the Department of Homeland Security,[23] the Department of Agriculture,[24] the Department of Health and Human

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[21] General Services Administration, *Industry Communications Plan*, February 2020, at 2, https://www.gsa.gov/cdnstatic/GSA_Industry_Communications_Plan%20January%202020_508.pdf ("Successful acquisitions depend on a clear understanding of the market's capabilities and dynamics, requiring an early and meaningful engagement with industry and the application of strong management practices within federal government agencies.").

[22] Department of the Army, U.S. Army Corps of Engineers ("USACE"), *Construction Project Partnering Playbook*, April 30, 2022, at 28, https://www.publications.usace.army.mil/Portals/76/Users/182/86/2486/EP%2034-1-1.pdf?ver=A4U9A4U_J8A3oXAy3qyWLw%3d%3d ("Engaging industry throughout the pre-award phase is critical to setting conditions for success during construction. It is incumbent upon senior leaders to engage with industry on broad issues such as market conditions, industry trends, and current and future USACE programs.").

[23] Department of Homeland Security, *Reverse Industry Day*, https://www.dhs.gov/publication/reverse-industry-day (last visited Sept. 1, 2022) ("Reverse Industry Days (RID) provide DHS acquisition professionals with opportunities to learn about the issues that are most important to industry when doing business with the department. During these events, panels feature industry leaders addressing audiences of DHS acquisition professionals who learn how to enhance the DHS business environment.").

[24] Tiffany Taylor, Department of Agriculture, *Communicating with Industry*, November 6, 2019, https://www.usda.gov/sites/default/files/documents/spe-memo-communicating-industry.pdf ("Communicating with industry early, frequently and clearly throughout the acquisition process is critical to determining whether and how industry can meet the Government requirements to achieve its mission and goals. It helps to maximize the return on acquisition investment and to ensure access to high-quality supplies and services.").

Services,[25] and Naval Air Systems Command,[26] have outlined policies and procedures for pre-procurement/ pre-RFP market research and information solicitation of pertinent Industry members that serve tangibly to strengthen (not diminish) their respective actual economic interests in contracting and RFP processes. These agencies also routinely share draft RFPs with Industry to provide advance notice of upcoming solicitations and to solicit feedback prior to final approval and issuance of the RFP.[27] For example, AGC of America has partnered with public owners to facilitate early and proactive communications with Industry, including through organizing conferences for federal

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[25] HHS Vendor Communication Plan, at 5 ("HHS encourages early exchanges of information surrounding acquisitions. An early exchange of information between industry, the Program Manager, Contracting Officer, and any other acquisition participants can ensure any concerns are identif[ied] and resolved.").

[26] Naval Air Systems Command (NAVAIR), *NAVAIR-Industry Summit Report: A Catalyst for Improved Competitive Procurement Communications*, June 1, 2017, at 10, https://www.navair.navy.mil/sites/g/files/jejdrs536/files/2018-12/navair-industry_summit_report.pdf ("Information transparency in the early stages of procurement holds the potential to benefit both Government and Industry. By improving access to evolving requirements, Industry can better plan prepare, and invest, while Government is more likely to receive superior solutions and proposals that are closely aligned to their needs.").

[27] *See, e.g.,* Department of the Army, U.S. Army Corps of Engineers (USACE), *Phase 1 Draft Request for Proposal for Galveston District $7 Billion Horizontal Construction Projects Now Available on SAM.gov*, Jan. 28, 2022, https://www.swg.usace.army.mil/Media/News-Releases/Article/2916688/phase-1-draft-request-for-proposal-for-galveston-district-7-billion-horizontal/.

contractors to share updates and to help guide public decisions about viability and scope of potential projects.[28]

B. State Procurement Officials Employ Similar Policies Promoting Pre-RFP Communications With Industry

Similar policies favoring pre-RFP communications with Industry exist in various states. These interactions foster transparency and aid competition by allowing Industry to provide their respective perspectives to government contracting officials.[29] These pre-RFP communications promote, not hinder, the state's actual economic interests.

State public authorities specifically recognize the long-standing practice of engaging in valuable pre-RFP interactions with Industry members.[30] For

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[28] *See, e.g.,* AGC of America, *AGC Federal Contractors Conference (AGC FedCon)*, https://fedcon.agc.org/ (last visited Sept. 1, 2022).

[29] These communications are already regulated by applicable state procurement, ethics, and lobbying laws. For example, in New York, there are restrictions on communications between government officials and vendors between the official advertisement and the award of a contract. *See* N.Y. State Finance Law §§ 139-j & 139-k. This "restricted period" commences as of the "earliest posting . . . of written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method provided for by law or regulation for soliciting a response from offerors intending to result in a procurement contract with a governmental entity and ending with the final contract award and approval by the governmental entity and, where applicable, the state comptroller." *Id*. at § 139-j(f). These restrictions do not apply to pre-RFP communications.

[30] Public officials in New York, for example, will participate in a conference in October 2022 that is designed to "foster business partnerships between the city and state level government, prime contractors, and small, minority, service-disabled veteran-owned, and women-owned businesses." This conference includes speakers

example, the Ohio and Kentucky state departments of transportation have conducted Industry forums and one-on-one meetings with Industry members regarding the Brent Spence Bridge Corridor Project;[31] the Texas department of transportation has held Pre-Procurement Partnering one-on-one meetings with design-build teams, prime contractors, and lead engineering firms to discuss the development, procurement, and implementation of the CapEx Central Downtown Project;[32] and in California, Caltrans hosts an Annual Procurement and Resource event where "Caltrans purchasers and partners will have a list of goods and contracts they

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from several state and local public owners, including the New York State Office of General Services, New York City Mayor's Office of Contract Services, New York City Department of Transportation, and New York Power Authority. *See* City & State NY, *Government Procurement Conference*, https://www.cityandstateny.com/feature/2022-Government-Procurement-Conference-/?oref=csny-events-upcoming (last visited Sept. 1, 2022).

[31] Ohio Department of Transportation, Kentucky Transportation Cabinet, *Next Steps Taken To Improve Brent Spence Bridge Corridor* (May 16, 2022), https://brentspencebridgecorridor.com/next-steps-taken-to-improve-brent-spence-bridge-corridor/ (referring to contractor outreach by joint project team "for all firms interested in this historic project to ask questions, provide input to the process, and meet with ODOT and KYTC personnel to learn more about the details"). As a result of early industry meetings, *amicus curiae* is aware that the agencies made substantial changes to the proposed procurement method, which would not have happened absent the pre-procurement industry feedback.

[32] Texas Department of Transportation, *CapEX Central Downtown – Pre-Procurement Information*, https://www.txdot.gov/inside-txdot/division/alternative-delivery/capex-central-downtown/preprocurement.html (last visited Sept. 1, 2022) ("TxDOT held the workshop and is conducting the one-on-one meetings solely to share and obtain information.").

are looking to procure at the fair as well as upcoming opportunities for Small Businesses."[33]

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All of this demonstrates that pre-RFP conversations between public authorities planning a RFP and Industry members needed to participate in the underlying project are routine, important, worthwhile, and effective in terms of providing real economic benefit. The expansive concept of property harm under the right-to-control theory risks the unintended consequence of criminalizing the recognized, accepted, and legitimate business practices embodied by interactions between public procurement personnel and the Industry they need to perform important services. The result is potentially perverse: in the name of reaching fraudulent conduct through dispensing with the need for proof of real economic/property harm, the right-to-control theory risks criminalization of a recognized business practice that actually promotes the public's tangible economic and property interests. This theory (also perversely) interjects uncertainty and confusion for *amicus curiae*'s membership and for the government contracting and construction industries as a whole, since proper, necessary, and specifically sanctioned pre-RFP interactions and solicitations for information initiated by public authorities currently take place at the federal, state, and local level around the country pursuant to applicable policies and guidance. AGC of America's membership is put to the choice of entertaining ordinary course pre-RFP

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[33] Caltrans, *Caltrans 18th Annual Procurement and Resource Fair*, https://www.dgs.ca.gov/PD/Events/Page-Content/Procurement-Division-Events-List-Folder/Caltrans-18th-Annual-Procurement-and-Resource-Fair (last visited Sept. 1, 2022).

solicitations that are favored by the government or declining for fear that their responses (necessarily provided through the prism of their knowledge and experience without regard for "other" government interests) could subject them to criminal exposure.

Amicus curaie respectfully requests that this Court reject the right-to-control theory of criminal prosecution as inconsistent with existing Court precedent over the proper scope of the property harm required under the federal wire fraud statute.

CONCLUSION

For the foregoing reasons, the Court should reverse the ruling below.

Respectfully submitted,

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