No. 16-10582-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

GLENN JASEN
Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
CASE NO. 8:15-cr-214-JDW-TBM

APPELLANT BRIEF

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GLENN JASEN'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the following have, or may have, an interest in the outcome of this case.

1. DIFRANCISCO, Frank, victim;
2. GERSHOW, Holly L., AUSA, government's trial counsel;
3. HORWITZ, Mark L., attorney for Kathryn Jasen;
4. JAJE, Thomas, victim;
5. JASEN, Glenn, appellant/defendant;
6. JASEN, Kathryn, co-defendant;
7. MAGBEE, Kelly, victim;
8. MARTINEZ, Victor Daniel, trial counsel for Kathryn Jasen;
9. PALERMO, Thomas Nelson, trial counsel for the government;
10. SCHELLER, Fritz, trial counsel for Glenn Jasen;
11. SNAPP, Cassandra, attorney for Kathryn Jasen;
12. WHITTEMORE, James D., United States District Judge;
13. WILLIAMS, Samuel, trial counsel for Kathryn Jasen;
14. UNITED STATES OF AMERICA; plaintiff.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Circuit Rule 28-1(c), Defendant/Appellant requests oral argument. The issue presented by this appeal is complex, and involves an argument for change or extension of existing law. Furthermore, it is respectfully submitted that argument by counsel familiar with the issues, facts, and record on appeal will provide this Honorable Court with assistance in resolving this action.

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STATEMENT OF JURISDICTION

This is an appeal from a final order of the United States District Court, Middle District of Florida, in a criminal case. The District Court had jurisdiction over this criminal action originally pursuant to 18 U.S.C. § 3231. The district court entered a written judgment against Mr. Jasen on January 29, 2016 and an Amended Judgment on February 10, 2016. (DE145; DE163). Mr. Jasen timely filed his notice of appeal on February 11, 2016. (DE166). Thus, jurisdiction now lies with this Honorable Court pursuant to 18 U.S.C. §§ 1291 and 3742.

NOTICE OF ADOPTION

Pursuant to Fed. R. App. P. 28(i) and Eleventh Circuit Rule 28-1(f), appellant Glenn Jasen hereby provides notice that he is adopting the following arguments raised in appellant Kathryn Jasen's brief: Arguments I and II raised in *United States v. Kathryn Jasen*, Appeal No. 16-10582-B.

STATEMENT OF THE ISSUES

I. WHETHER THE GOVERNMENT'S PROSECUTION OF MR. JASEN PURSUANT TO 18 U.S.C. § 1343 BASED ON HIS ALLEGED CONCEALMENT OF A LATENT DEFECT PRIOR TO AN INTRASTATE REAL ESTATE SALE VIOLATED HIS FIFTH AMENDMENT RIGHT TO FAIR NOTICE.

II. WHETHER THE GOVERNMENT'S PROSECUTION OF MR. JASEN UNDER 18 U.S.C. § 1343 BASED ON HIS ALLEGED CONCEALMENT OF A PROPERTY'S LATENT DEFECT PRIOR TO AN INTRASTATE REAL ESTATE SALE VIOLATED THE PRINCIPLE OF FEDERALISM

III. WHETHER THE DISTRICT COURT ERRED IN DENYING MR. JASEN'S RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL WHICH WAS BASED ON HIS ARGUMENT THAT HE DID NOT CAUSE THE USE OF THE INTERSTATE TRANSFER OF BANK FUNDS.

STATEMENT OF THE CASE

Course of Proceedings

On June 22, 2015, the government filed an Information charging Mr. Jasen with wire fraud in violation 18 U.S.C. 1343. (DE1). On July 15, 2015, the grand jury returned a Superseding Indictment charging both Mr. Jasen and his wife, Kathryn Jasen, with a single violation of 18 U.S.C. § 1343. (DE10).

On August 18, 2015, the Jasens timely filed a joint motion to dismiss (DE55), which the district court denied on September 4, 2015 (DE69). The Jasens proceeded to trial on October 5, at which time they renewed their Motion to Dismiss. (DE81 & DE82). The trial was held from October 5 through October 8, 2015. (DE81; DE86; DE88; DE91). During the argument pursuant to Fed. R. Crim. P. 29, the Jasens renewed their Motion to Dismiss. (DE119 at 126).

At the conclusion of the trial, the jury returned a verdict of guilt as to both defendants. (DE120 at 22). The Jasens filed written renewed motions for judgment of acquittal and renewed motions to dismiss, which the court denied. (DE99; DE100; DE105).

The Jasen's joint sentencing hearings were held on January 26 and January 28, 2016 and the district court subsequently entered its written judgment on January 29, 2016. (DE135; DE141; DE145). The court sentenced Mr. Jasen to: 1) five-years

of probation; 2) six-months of home confinement; 3) a $15,000 fine; and 4) 1000 hours of community service. (DE145).

The court entered an amended judgment on February 10, 2016, which imposed a restitution amount of $78,442.93, which included the Jasen's repurchase of their home. (DE163). Said monetary penalties were in addition to the forfeiture of $60,069.24, which was seized from the Jasens' bank account. (DE155).

Mr. Jasen, who is not incarcerated, timely filed his Notice of Appeal on February 11, 2016. (DE166).

Statement Of Facts

The Indictment

The Indictment's allegation of wire fraud against the Jasens was based on their sale of their residence. (DE10). The Indictment alleged that the Jasens submitted a claim for a sinkhole on their property and received payment from Citizen's Insurance. (*Id*. at 2). The Jasens subsequently sold their house without disclosing the existence of a sinkhole or previous sinkhole claim concerning their residence. (*Id* at 2). The Indictment specifically alleged that the Jasens "fraudulently answer[ed] questions in real estate documents, including providing materially false denials of the existence of a sinkhole or a previous sinkhole claim." (*Id*). As a result, the Jasens sold "the home to a family while falsely and fraudulently representing to

the family buying the home that there was no sinkhole and no prior existing sinkhole claim." (*Id*). Finally, the Indictment asserted that the purchasers took out a mortgage to buy the property, with the "proceeds having been were (sic) wired across state lines. (*Id*. at 3).

Defendants' Motion to Dismiss

In response to the Indictment, the Jasens filed a Joint Motion to Dismiss pursuant to Federal Rule of Criminal Procedure 12(b) and the Fifth Amendment to the Constitution. (DE55). The Motion to Dismiss noted that Rule 12(b) permits a defendant to move to dismiss an indictment if fails to invoke the court's jurisdiction or to state an offense. (*See id.* at 3) (citing Fed. R. Crim. P. 12(b)(2)-(b)(3)(B)(v)).

The Motion to Dismiss contended that the Indictment did not provide fair notice to the Jasens that their conduct was criminal. (DE55 at 3). The Indictment's violation of the fair notice requirement was underscored by three precepts, including: 1) the void-for-vagueness doctrine; 2) the rule of lenity; and 3) the principle of due process. (*Id*). The Motion to Dismiss asserted that each of these canons required the dismissal of the Indictment since "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." (*Id*. at 3; 8) (citation omitted). The Motion to

Dismiss also asserted that the federal criminalization of a state real estate contract between private parties violated the principle of federalism. (*Id*).

The Motion to Dismiss argued that the government's prosecution of conduct surrounding a state real estate contract between private parties would encourage the prosecution of any non-disclosures in contracts where bank funds are used or conversations occur over the internet or telephone. (*Id*. at 5). Under the fair-notice requirement, such an expansion was particularly problematic based on the misuse of a significant number of federal criminal statutes to prosecute conduct which the statutes were not meant to address. (*Id*. at 6-7).

Concerning the vagueness challenge, the Jasens asserted that they did not have fair notice that their alleged actions constituted a federal crime. (*Id*. at 9). Indeed, the failure to disclose a latent defect in a real estate transaction was not civilly actionable in Florida until 1985. (*Id*.). The Jasens also noted that application of the wire fraud statute to non-disclosures in real estate sales would lead to arbitrary enforcement based on different state standards governing a seller's obligations in real estate contracts. (*Id*. at 11). In this regard, Alabama, a state within the Eleventh Circuit, still employed the canon of caveat emptor in real estate transactions. (*Id*. at 16).

Regarding the rule of lenity, the Jasens argued that there was an ambiguity as to whether the phrase "scheme or artifice to defraud" under the wire fraud statute was meant to apply to the non-disclosure or concealment of latent defects in private real estate transactions. (*Id*. at 18). In the context of due process, both the statute's text and legislative history did not support federal criminalization of an intrastate real estate between private parties. (*Id*. at 20). Such was especially the case where the buyer was the one who elected to use wired funds. (*Id*.) (citation omitted).

The Jasens also argued that their prosecution violated principles of federalism since it infringed on an area in property law which was traditionally left to the states. (*Id*. at 23). Consistent with the government's prosecution of the Jasens, the government could criminalize every nondisclosure in a real estate sale or other contractual relationship which involved the use of bank wires, the telephone, or internet. (*Id*. at 23-24).

Government's Response

In its Response to the Motion to Dismiss, after reciting the elements of wire fraud, the government asserted the Indictment was legally sufficient since the defendants could prepare their defense and were protected by the double jeopardy clause. (DE60 at 2-4). The government further argued that the Motion to Dismiss was a proxy motion for summary judgment and attack on the sufficiency of the

evidence. (*Id*. at 4). As a result, the government argued the district court was precluded from dismissing the indictment. (*Id.*) (citations omitted).

The government asserted that the rule of lenity was inapplicable, because the wire fraud statute criminalizes "any scheme or artifice to defraud" and did not punish "a broad range of apparently innocent behavior." (*Id*. at 6) (citing *United States v. Svete*, 556 F.3d 1157, 1169 (11th Cir. 2009)). The government maintained that applying the wire fraud statute to real estate transactions was not novel. (*Id*.) (citations omitted).

Concerning the Jasens' void-for-vagueness claim, the government contended that it did not apply since the scope of the wire fraud statute was ascertainable from its clear terms. (*Id*. at 10). Further, the statute was not vague since it punished any scheme to defraud. (*Id*). (citation omitted). Although the government asserted that the Jasens' case was not unique, it contended that an "as applied constitutional challenge" in a "non-prototypical" case would not survive where a person of average intelligence would reasonably understand that his conduct was illegal. (*Id*. at 12) (citation omitted). The government also asserted that ignorance of the law was not a defense. (*Id*. at 13-15).

Court's Order

On September 4, 2015, the court entered an Order denying the Jasens' Motion to Dismiss. (DE69). In its Order, the court noted that the Indictment alleged the essential elements of wire fraud. (*Id*. at 2). Concerning the fair notice objection, the court maintained that the wire fraud's mens rea requirement relieved the statute of the objection that it punishes the defendant of an offense without warning. (*Id*. at 3) (citing *United States v. Conner*, 752 F.2d 566, 574 (11th Cir. 1985)).

Regarding the Defendant's vagueness challenge, the court maintained that there was "nothing vague about the wire fraud statute" and a statute meets constitutional certainty if its language provides definite warning of proscribed conduct when measured by common understanding and practice. (*Id*. at 4) (citation omitted). The court noted that a Florida seller of real property of ordinary intelligence would know that lying about sinkhole damage constituted fraudulent misrepresentation. (*Id*). Rather than merely alleging a contractual breach, the Indictment alleged material misrepresentation and concealment which was the proper subject of the federal wire fraud statute. (*Id*. at 6).

The court rejected the application of the rule of lenity since the wire fraud statute had a broad and unambiguous reach in criminalizing "any scheme or artifice to defraud" and the statute did not penalize innocent behavior. (*Id*. at 7) (citation

omitted). Regarding the defendant's due process claim, the court acknowledged that the doctrine barred a novel construction of a criminal statutes to conduct which neither the statute nor prior judicial decisions have fairly disclosed to be within its scope. (*Id*. at 8). However, the court maintained that there was nothing novel about the application of the wire fraud statute to fraudulent schemes in real estate transactions. (*Id.*) (citations omitted).

Finally, concerning the issue of federalism, the court asserted that "[t]here can be no serious argument, however, that Congress lacks the authority to enact criminal statutes proscribing conduct which uses instrumentalities of commerce for harmful purposes." (*Id*. at 9) (citing *Brooks v. United States*, 267 U.S. 432, 436-37 (1925)).

Trial

Mr. Glenn Jasen is an air conditioning contractor and his wife, Kathryn Jasen, is a retired school cafeteria worker. (DE119 at 101-02). The Jasens purchased their family home at 6281 Kimball Court, Spring Hill, Florida in 1974 and continued to live in it until 2014. (*Id*. at 101). In 2009, Mr. and Mrs. Jasen became aware of a potential sinkhole problem during a friend's repair of some cracks in the stucco. (*Id*. at 103). He informed the Jasens that the damage could be sinkhole related and advised them to call their insurance company. (*Id*). After contacting their carrier,

Citizen's Property Insurance Company ("Citizen's"), the Jasens submitted a claim in April of 2009. (*Id*.; Gov. Ex. GX 4-A).

As a result, Citizens had a subsidence investigation conducted by MCD of Central Florida (MCD). (*Id*. at 105). On June 26, 2009, MCD issued a 68-page report which was provided to Mr. and Mrs. Jasen. (Gov. Ex. GX 4-J). The first page of this report is labeled "Confirmed Sinkhole Certification." (*Id*. at 3).[1] The Report states that: 1) "sinkhole activity was found" at the property; 2) "[s]inkhole loss is verified"; and "[t]he cause of the actual physical and structural damage is due to sinkhole activity within a reasonable professional probability." *Id*. In contrast to the cover letter, the rest of the report provides a more ambiguous depiction.

Indeed, the conclusion section of the report states that "some of the observed damage to the Jasen residence may be at least partially related to sinkhole activity." (*Id*. at 13) (emphasis added). The Report further concludes that "[t]he observed damage is the result of a combination of minor differential settlement, rafter deflection, thermal expansion and contraction and shrinkage." "Differential settlement can be caused by a variety of factors, including the on-going densification of load bearing soils, erosion of load bearing soils due to the percolation of storm

[1] The pages of the composite exhibit are not numbered, the documents comprising the composite either contain no numbers, or are individually numbered. The first page of the MCD report is the third page of Gov. Ex. 4-J.

water runoff, inadequate foundation embedment, extreme changes in the water table and sinkhole activity."[2] In addition to these factors, the report identifies sinkhole activity as one cause of damage to the residence. (Gov. Ex. 4-J at 13).[3]

The MCD report provides no warning that the Jasens were at risk of death or physical injury if they remained in the house. After reading the MCD report, Kathryn Jasen spoke to a Citizen's agent, who advised her that the Jasens were not at risk. (DE119 at 107, 162). Citizen's paid approximately $153,000 to settle the Jasen's claim. (DE 119 at 106).

The Jasens continued to live in the house for another two years, which was approximately three years after the initial claim. (DE119 at 108). During that three-year period, they did not observe any problems. (*Id*). In August of 2013, the Jasens listed their home for sale after moving into another home they owned down the street. (DE118 at 52; DE119 at 110).

Ms. Ward was the real estate agent who represented the Jasens in their sale of the home. Ms. Ward stated that the information provided by the Jasens regarding the home was on the Sellers Disclosure Form ("SDF"). (DE118 at 48; SDF at Gov.

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[2] These statements appear in the conclusion section, pages 7-9 of the MCD report, which are pages 13 through 15 of Gov. Ex. 4-J.

[3] Michael Wightman, who investigated the sinkhole claim, also testified that ground penetrating radar revealed two anomalies that might be indicative of possible sinkhole activity. (DE 119 at 25).

Ex. 6-D). She stated that she uploaded the SDF in the Multiple Listing Service (MLS) system exactly how she received it from the Jasens. (DE118 at 50; 61). Although she stated that she reviewed the form, the form was uploaded without the Jasens' signature. (DE118 at 50, 52; Gov. Ex. 6-D). Although the form was unsigned, each page was initialed by the Jasens. (DE119 at 121).

The SDF[4] contained the following question:

> 4. Are You Aware:
> a. of any past or present settling, soil movement, or sinkhole problems on the property or on adjacent properties?
> i. of any sinkhole insurance claim that has been made on the subject property?
> ii. If claim was made, was claim paid?

(Gov. Ex. 6-D at 2). For each question, the box "No" had been checked. Ms. Ward and Kathryn Jasen provided conflicting testimony regarding the "No" answers to Question 4 of the SDF. Evidence regarding how these false statements came to be made was conflicting.

[4] The government introduced this document several times, as part of different composite exhibits: (Gov. Ex. 1-A, 2-A, 3-A, 5-A, 6-D, and 7-A). Exhibits 1-A, 2-A, 5-A, and 7-A contain Mr. and Mrs. Jasen's signatures on page 5 of the document. Exhibits 3-A and 6-D do not contain their signatures. In all exhibits, each page bears their initials.

Mr. DeFrancesco was a prospective purchaser who made an offer to buy the house accompanied by an electronically initialed and signed copy of the seller's disclosure. (DE118 at 75); *see also* (Gov. Ex. 7-B). After Ms. Ward realized that Mr. and Mrs. Jasen had not signed the seller's disclosure, she brought it to them and told them it had to be signed to be valid, and they signed. (DE118 at 80). The DeFrancescos were unable to purchase the house. (DE119 at 68).

Thomas Jaje was the eventual purchaser of the Jasens' home. He testified that, when he first made an offer on the property, he received a Real Property Disclosure Statement on February 7, 2014. (DE 117 at 177-78, 183). The portions of the disclosure statement asking whether the sellers had knowledge of sinkhole problems or insurance claims made on property were checked "no." (*Id.* at 181–82). However, the Jasens had not signed this disclosure statement. (*Id.* at 184). Even though he had not yet received the signed version of the disclosure statement, Mr. Jaje still made an offer on the property that same day by way of an "as-is" real estate purchase contract. (*Id.*). That contract served as the agreement governing the sale of the property. (*Id.* at 184–85).

The Jasens did not provide the signed version of the disclosure statement until February 10, 2014, three days after Mr. Jaje executed the contract. (*Id.* at 186). The signed disclosure statement contained the same answers as the unsigned version of

the document. (*Id.* at 188.) Mr. Jaje testified that he relied upon the contents of the seller disclosure form. (*Id.* at 190).

The real estate contract stated that the "Seller knows of no facts materially affecting the value of the real property which are not readily observable and which have not been disclosed to the buyer." (*Id.* at 190–91). Yet, in the next sentence, the contract provided that the "Seller extends and intends no warranty and makes no representation of any type, either expressed or implied, as to the physical condition of the property." (*Id.* at 191).

Mr. Jaje contacted a number of different banks in an effort to obtain a mortgage. (*Id.* at 191). He ultimately received financing from Fifth Third Bank, which conditionally approved a loan on March 12, 2014. (*Id.* at 201). At the closing, which occurred on March 27, 2014, Fifth Third Bank wired the required funds from Cincinnati, Ohio, to an escrow account in Florida. (DE 118 at 165-66).

Rule 29 Argument

As noted, Mr. Jasen renewed his Motion to Dismiss during his Rule 29 argument. (DE119 at 126-27). In addition, Mr. Jasen asserted that the government did not establish the necessary element of the use of the wire in interstate commerce. Mr. Jasen noted that the use of the wires wire in this case was caused by the buyer rather than the Jasens. (DE119 at 128-129).

In response, the government argued that the wire crossed state lines as a result of the Jasens' lie in the seller's disclosure form, which the buyer relied on. (*Id*. at 130). The government emphasized that but for the Jasen's lie, the buyer would not have made the offer and the money would not have crossed state lines. (*Id*. at 131).

In denying the Jasens' Rule 29 motion, the district court stated:

> That the wire in this case was the result of Mr. Jaje's application for a mortgage with Fifth Third Bank is likewise of no moment because as the pattern instruction on wire fraud sets forth, it is not required that the use of the wire was intended as a specific and exclusive means of carrying out the alleged fraud, nor is it required that a defendant personally made the transmission over the wire. What is required is that the defendant caused to be transmitted by wire the communication in interstate commerce.
>
> Taking the evidence in the light most favorable to the government, I would simply put it this way: But for the alleged misrepresentation in the seller's disclosure Form, Mr. Jaje would not by his own testimony have applied for a loan, much less consummated the purchase of the property. He applied for the financing and received the mortgage proceeds as a result of the contract and his reliance on the seller's disclosure statement.

(DE119 at 134–135).

Standards of Review

Issues I & II

Ordinarily, the denial of a motion to dismiss in a criminal case is reviewed for abuse of discretion. *See United States v. Pendergraft*, 297 F.3d 1198, 1204 (11th Cir. 2002). Because Mr. Jasen's Motion to Dismiss raised issues of constitutional import, purely legal questions relating to a defendant's claim of a constitutional violation are reviewed *de novo. See United States v. Williams,* 527 F.3d 1235, 1239 (11th Cir. 2008).

Issue III

Denial of a motion for judgment of acquittal is reviewed *de novo*, viewing evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor. *United States v. Ortiz*, 318 F.3d 1030, 1036 (11th Cir. 2003).

SUMMARY OF ARGUMENT

The Jasens failed to disclose a latent defect to buyers in the sale of their Florida residence. This conduct would ordinarily subject the Jasens to at most civil liability under Florida law, e.g., contract rescission and even punitive damages under Florida law if the purchaser could establish civil fraud. But they could not be held criminally liable under Florida law. And perhaps not even civil liability would exist under the law of some States.

The federal government viewed things differently and charged the Jasens with wire fraud under 18 U.S.C. § 1343, exposing them to a potential fine of $1,000,000 or imprisonment for up to 30 years, or both, *see* 18 U.S.C. § 1343, because the buyers chose to fund their loan with an out of state wire transfer. The problem with this unprecedented prosecution is that no one in the public would reasonably expect the federal wire fraud statute to apply to a single intra-state sale of residential real estate. This is especially troublesome considering that the relationship, rights, and obligations between sellers and buyers in real estate transactions are traditionally governed by State law. Yet the prosecution in this case relied on a vaguely worded criminal statute to expand criminal liability into the domain of traditional state police power and far beyond what any ordinary person would understand to be prohibited

The wire fraud statute has "been invoked to impose criminal penalties upon a staggeringly broad swath of behavior," creating uncertainty in business negotiations and challenges to due process and federalism. *See Sorich v. United States,* 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari on scope of "honest services" theory of fraud under the mail fraud statute). Thus, a persistent danger exists regarding a limitless expansion of the reach of the wire fraud statute. *See Pasquantino v. United States,* 544 U.S. 349, 377 (2005) (Ginsburg, J., dissenting) (noting the Court has "also recognized that incautious reading of the statute could dramatically expand the reach of federal criminal law, and we have refused to apply the proscription exorbitantly").

The prosecution of Mr. Jasen under the wire fraud statute for his alleged concealment of latent defect in his home raises significant concerns under both the fair notice requirement of the Fifth Amendment and principles of federalism.

The Fifth Amendment's fair notice requirement is vindicated through its three manifestations: 1) the void-vagueness doctrine; 2) the rule of lenity; and 3) due process. An analysis of these related precepts establish that the application of the wire fraud statute to Mr. Jasen's conduct cannot withstand constitutional scrutiny. First, the void-for-vagueness doctrine prohibits enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common

intelligence must necessarily guess at its meaning and differ as to its application." *Connally*, 269 U.S. at 391. The wire fraud statute fails this test as applied to Mr. Jasen's conduct.

Second, the rule of lenity holds that if, after exhausting all legitimate tools of interpretation a "reasonable doubt persists," *Moskal v. United States*, 498 U.S. 103, 108 (1990)), "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Skilling v. United States*, 561 U.S. 358, 410 (2010)). Here, to the extent there is any doubt or ambiguity about whether the wire fraud statute applies to Mr. Jasen's conduct, the rule of lenity compels this Court to strictly construe the statute against the government and in favor of Mr. Jasen.

Third, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266. The prosecution in this case is so novel and unprecedented that counsel have been unable to identify a single federal decision involving application of the wire fraud statute to a seller's failure to disclose a latent defect in the sale of a private residence. The absence of judicial precedent or clear language in the statute that Mr. Jasen's conduct was fairly disclosed to be within the scope of the wire fraud statute is telling. It also strongly

supports the conclusion that adoption of the government's novel interpretation to sustain Mr. Jasen's conviction would violate due process.

In addition to fair notice concerns, the Government's prosecution of the Jasens is inconsistent with principles of federalism inherent in our constitutional structure Specifically, expanding the wire fraud statute to encompass the Jasens' conduct threatens to criminalize contracts entered into at the state level. In other words, permitting a federal criminal prosecution based on conduct involving a state real estate contract would "dramatically intrude upon traditional state criminal jurisdiction." *See Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Extending the reach of federal criminal law into the realm of state real estate contracts is inconsistent with principles of federalism, considering: (1) the law of real property is generally left to the States under our Constitution; (2) private landowners generally rely on state contract law to transfer real property; and (3) defining and punishing local criminal activity is the province of the states.

Moreover, without clear congressional approval, allowing federal intrusion into the law of real property and contracts risks criminalizing every contractual relationship where the seller failed to disclose a latent defect or even failed to perform. This inevitable outcome not only encroaches on state sovereignty, but encourages arbitrary and discriminatory enforcement of the law. That's because

States, exercising their traditional authority, vary in the duties and obligations of buyers and sellers of real estate. For example, unlike Florida, Alabama does not require disclosure of latent defects.

In addition to upholding a prosecution that violated the Fifth Amendment and the federalism, the Court erred in denying Mr. Jasen's motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29. To commit wire fraud, an individual must use or "cause" the use of wires for the purpose of executing the scheme or artifice. This requires that the use of wires be reasonably foreseeable. However, the use of the wire cannot be immaterial or incidental to the scheme to defraud. Here, Mr. Jasen's use of the wires was exactly that. As a result, for all of the foregoing reasons, his conviction must be reversed.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. THE GOVERNMENT'S WIRE FRAUD PROSECUTION OF MR. JASEN FOR AN ALLEGED NONDISCLOSURE OR CONCEALMENT OF A LATENT DEFECT IN THE SALE OF HIS HOME VIOLATED HIS RIGHT TO FAIR NOTICE UNDER THE FIFTH AMENDMENT.

This section examines Mr. Jasen's fundamental right to fair notice under the Fifth Amendment to the United States Constitution. This section establishes that the district court erred in denying his Motion to Dismiss since his prosecution under 18

U.S.C. § 1343[5] violated his Fifth Amendment right to fair notice. The violation of Mr. Jasen's right to fair notice requires a reversal of his conviction.

A. A Defendant's Right to Fair Notice

The "fair warning requirement" implicit in the Due Process Clause of the Fifth Amendment demands that criminal statutes provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States v. Lanier*, 520 U.S. 259, 265 (1997) (citation omitted). Such a fundamental right is at risk in a system which has seen the rapid federalization of crime. Indeed, as this Court has recently noted, "[o]ver recent generations the federal criminal code has burgeoned, leading some writers to characterize the trend as the federalization of crime." *United States v. McLean*, 802 F.3d 1228, 1230 (11th Cir. 2015) (citing Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825 (2000); Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1 (1997)).

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[5] Title 18, U.S.C. § 1343 states, in pertinent part::

[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme. or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The expansion of federal criminal statutes has been frightening in both its scope and momentum. Federal law contains 4,450 criminal provisions. Brian Walsh & Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirements in Federal Law* 6 (2010). Regarding fraud and false statement offenses, there are "232 statutes pertaining to theft and fraud [and] 215 pertaining to false statements." Julie O'Sullivan, *The Federal Criminal "Code" is a National Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 654 (2006). Because of the overwhelming number of federal criminal statutes, one jurist has observed, "most Americans are criminals and don't even know it." Alex Kosinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, IN THE NAME OF JUSTICE, 43, 44-45 (Timothy Lynch ed., 2009). Such an insight is consistent with James Madison's assertion that "[i]t will be of little avail to the people . . . if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood." Federalist No. 62. Recently, the Supreme Court has again cautioned against federal criminal statutes being read too expansively. *See, e.g.*, *Yates v. United States*, ––– U.S. ––––, 135 S. Ct. 1074, 191 L.Ed.2d 64 (2015) (concluding the term "tangible object" defined within the Sarbanes–Oxley Act of 2002, legislation designed to restore confidence in financial markets, did not apply to the undersized red grouper that a commercial fishing vessel's captain threw overboard).

The federalization of crime is vividly demonstrated in this case. The government's prosecution of Mr. Jasen for wire fraud was predicated on his alleged concealment of a latent defect in his home during its sale to a buyer. Until 1985, the failure to disclose a latent defect in a real estate transaction was generally not actionable even *civilly* under Florida law. *See Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). Furthermore, criminal prosecutions for such conduct are unknown under both Florida and federal law. Indeed, there is no precedent for bringing a federal prosecution for the non-disclosure of latent defects in a real estate transaction. The Jasens might have contemplated facing civil liability for breaching a contract for the sale of their home, but criminal liability is unimaginable.

Although intrastate real estate sales have always been within the province of the States, the government found a federal nexus based on the use of an interstate wire to transmit the buyer's funds. Thus, the government's use of § 1343 to criminalize a local real estate transaction is based on a jurisdictional hook which was solely within the discretion of the buyer and his bank. Such an interpretation of the wire fraud statute not only stretches the statute beyond what the law or logic requires, but also fails to provide notice to the ordinary person that their conduct was illegal. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (stating that no individual

"may be required to speculate at peril of life, liberty, or property to speculate as to the meaning of penal statutes").

The essential question in the instant case is whether the Government's novel and unprecedented application of the wire fraud statute to the Jasen's private real estate contract, an application which is entirely inconsistent with the statute's legislative history, provided them with fair notice that they were criminally liable for their conduct. A strict construction of the wire fraud statute belies such a result based on the application of three judicial doctrines that vindicate the concept of fair-notice including: 1) the void-for-vagueness doctrine; 2) the rule of lenity; 3) and due process. *See, e.g.*, *Lanier,* 520 U.S. at 259.

B. 18 U.S.C. § 1343 is Unconstitutionally Vague as Applied to the Mr. Jasen.

The Fifth Amendment provides that "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. The "Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, — U.S. —, —, 135 S.Ct. 2551, 2554 (2015)(citation omitted). *See also Skilling v. United States*, 561 U.S. 358, 402-403 (2010) ("To satisfy due process, 'a penal statute [must] define the criminal offense [1] with

sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'") (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

The wire fraud statute is unconstitutionally vague as applied to the Jasens because they lacked fair notice that their alleged actions constituted a federal crime. Furthermore, the application of the wire fraud statute to non-disclosures or concealments in real estate contracts would necessarily lead to arbitrary enforcement.

1. Vagueness

Concerning the fair notice component of the vagueness doctrine, the Supreme Court has repeatedly recognized the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964) (collecting cases). Thus, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). "The dividing line between what is lawful and unlawful cannot be left to conjecture. . . . The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course

it is lawful for him to pursue." *Connally*, 269 U.S. at 393; *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) ("To make the warning fair, so far as possible the line should be clear").

Against this backdrop, the prosecution of Mr. Jasen under the wire fraud statutes raises the essential question of whether the line was clear that his concealment of a latent defect in his home prior to its sale plainly fell within the wire fraud statute. *See Fasulo v. United States*, 272 U.S. 620, 629 (1926) ("There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute"). The determination of this question necessarily depends on an analysis of two elements of § 1343. That is, whether Mr. Jasen's concealment of a property's latent defect constituted a "scheme or artifice to defraud," and if so, did Mr. Jasen transmit or cause the wire transmission of money.

Concerning the "scheme or artifice to defraud," because § 1343 does not define the term, courts have relied on an expansive definition which encompasses a wide range of conduct. *See, e.g*, *United States v. Bradley*, 644 F.3d 1213, 1239 (11th Cir. 2011) ("All that is necessary is that the scheme be reasonably calculated to deceive; the intent element of the crime is shown by the existence of the scheme."). The fundamental problem with such an expansive reading is that it results in a

statutory construction that encompasses a party's questionable conduct in any contractual or business relationship, regardless of the state law on such conduct.

As previously noted, a seller's failure to disclose a latent defect in a property did not generally result in even civil liability in Florida until 1985. *See Johnson*, 480 So.2d at 625. Moreover, notwithstanding the eventual attachment of civil liability to a seller's concealment of a latent defect in a Florida real estate sale, such a contractual breach, even if intentional, would still not constitute a federal crime. *See United States v. Blankenship*, 382 F.3d 1110, 1132 (11th Cir. 2004) ("It is not illegal for a party to breach a contract; a contract gives a party two equally viable options (perform or pay compensation), between which it is generally at liberty to choose."); *United States v. Berheide*, 421 F.3d 538, 540 (7th Cir. 2005) ("breach of contract is not a crime"). A mere lapse of fiduciary duty, moreover, "is not in itself a scheme to defraud." *United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir. 1983) (citation omitted).

The same rule holds in regard to state law. As *Cliff Berry, Inc. v. State* explained:

> We are aware of no authority imposing a criminal penalty for the mere violation of a contract; and, while we acknowledge that in appropriate circumstances, a contract may underlie a conviction, *e.g.*, § 877.10(1), Fla. Stat. (2009) (prohibiting the making of dual contracts for the purchase or sale of real property), the mere violation of the contract's

> terms exposes the breaching party to civil liability, not criminal culpability.

116 So. 3d 394, 412–13 (Fla. 3d DCA 2012).

Florida case law is, perhaps unsurprisingly, littered with decisions involving a myriad of latent defects known to the seller, but not disclosed to the buyer, prior to the consummation of the real estate transaction. *See, e.g.*, *Morton v. Polivchak*, 931 So. 2d 935 (Fla. 2nd DCA 2006) (failure to disclose drainage or flood problems affecting the property or adjacent properties); *Syvrud v. Today Real Estate, Inc.*, 858 So. 2d 1125 (Fla. 2nd DCA 2003) (nondisclosure of mildew damage, damage from water leaks, structural cracks, and other structural defects); *Futura Realty v. Lone Star Bldg. Centers*, 578 So. 2d 363 (Fla. 3d DCA 1991) (failure to disclose pollution problems on the property); *Rayner v. Wise Realty Co.*, 504 So. 2d 1361 (Fla. 1st DCA 1987)(failure to disclose termite damage).

Moreover, there are reported decisions that involve the set of facts alleged here: a seller's failure to disclose the existence of a sinkhole prior to selling the property. *E.g.*, *State Farm Florida Ins. Co. v. Bonham*, 886 So. 2d 1072 (Fla. 5th DCA 2004) (failure to disclose and active concealment of damage to the residence caused by sinkhole activity); *U.S. Home Corp. v. Metro. Prop. & Liab. Ins. Co.*, 516 So. 2d 3 (Fla. 2d DCA 1987) (similar).

Notwithstanding the vast number of these cases, each one is civil in nature. There is not a single reported Florida decision concerning a *criminal* prosecution for a seller's failure to disclose a latent defect during the sale of real property. Likewise, there does not seem to be any federal wire fraud prosecutions brought under the factual predicate of the nondisclosure of latent defect by a seller of real estate.[6] In prosecuting Mr. Jasen for such conduct, the government seeks to remedy that long-standing state of affairs, notwithstanding its own guidance to the contrary.[7]

By applying the wire fraud statute to breaches in state real estate contracts, the government ultimately seeks to stretch the statute beyond its already generous boundaries. Such a dubious quest necessarily depends on the jurisdictional nexus of interstate wires. Yet, the vagueness of the term "transmits or causes to be transmitted" as applied to Mr. Jasen's conduct further demonstrates that § 1343 did not provide fair notice that his conduct was prohibited.

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[6] Undersigned counsel has not located any wire fraud prosecutions arising from the non-disclosure of latent defects in private real property transactions.

[7] The case at bar involves an isolated failure to disclose a latent defect in a run-of-the-mill real estate transaction. The Department of Justice's own guidance cautions against bringing fraud charges in isolated transactions such as the case at bar: "Prosecutions of fraud ordinarily should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts." Dep't of Justice, United States Attorneys' Manual § 9-43.100 *available at* http://www.justice.gov/usam/usam-9-43000-mail-fraud-and-wire-fraud (last visited June 30, 2016).

In the instant case, Mr. Jasen allegedly filled out the Seller's Disclosure Form approximately well before it was provided to the home's purchaser. Thus, it was unknown and ultimately irrelevant to Mr. Jasen how the ultimate purchaser of the home, with its latent defect, would purchase the property. It was the purchaser, as well as the bank, that elected to transmit the funds by wire. According to the government, however, Mr. Jasen's alleged conduct in falsely filling out the form was the "but for" cause of the wire. The government's "but for" theory of causation was adopted by the district court. *See* DE119 at 135 (stating that "[b]ut for the alleged misrepresentation in the seller's disclosure Form, Mr. Jaje would not by his own testimony have applied for a loan, much less consummated the purchase of the property").

The result of the "but for" theory of causation in Mr. Jasen's case to satisfy the jurisdictional element of a § 1343 prosecution compels an expansion of the statute to apply to every nondisclosure or concealment in a real estate sale or other contract. Indeed, such business transactions in the modern era would necessarily be effectuated through the wire transmission of funds or the use of email, a telephone, or facsimile. It seems apparent, given the serious criminal penalties that accompany this crime, that proximate cause rather than "but for" causation should be required.

Indeed, proximate causation is also consistent with cases that require the use of wires to be reasonably foreseeable. *See* Issue III, *infra*.

Applying the Supreme Court's admonition that a criminal statute must give fair warning of the conduct that it makes a crime, the prosecution of Mr. Jasen under the wire fraud statute ultimately provides the warning that any fraudulent non-disclosure or concealment in an intrastate business relationship is a federal crime.

2. Arbitrary Enforcement

The expansive application of § 1343 in intrastate real estate sales involving non-disclosures lends itself to arbitrary and discriminatory enforcement.

Although the vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, the Supreme Court has recognized "that the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 357-58 (citation omitted). Due process requires a legislature to establish minimal guidelines to govern law enforcement, so that police officers, prosecutors, and juries are not permitted to pursue their personal predilections. *Id*. at 358. Vaguely defined crimes are traps for the unwary. "If the prosecution is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that

he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud.Soc'y 18 (1940).

As this case is the first of its kind, it is difficult to imagine what standard a court could employ to separate a case involving the nondisclosure of a plumbing or termite problem in a real estate sale. The instant case demonstrates that lack of standards in the wire fraud statute allows prosecutors to arbitrarily apply § 1343 to a limitless range of questionable conduct. *See*, *e.g*, Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 Boston College L.R. 435, 457 (1995).

In addition, the Government's application of the wire fraud statute to real estate transactions would necessarily lead to arbitrary enforcement based on the varying state standards that govern a seller's duty of disclosure in a real estate contract. *See generally* George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry eased the Transition from Caveat Emptor to "Seller Tell All,"* 39 Real Prop. Prob. & Tr. J. 193, 198-213, 218-225 (2004) (collecting cases and statutes governing disclosure requirements from various jurisdictions). While Florida has abolished the doctrine of caveat emptor,[8] other states, including

[8] "Caveat emptor, qui ignorarea non debuit quod jus alienum emit." This Latin phrase, translated

Alabama, still employ the canon. *Compare Johnson*, 480 So. 2d at 625 *with Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C.*, 949 So. 2d 893, 896–97 (Ala. 2006). Thus, even within this Circuit, a single standard for applying § 1343 prosecutions on these facts could not exist. As a result, individuals would be only subjected to criminal liability depending on their state of residence. Given the divergence in the seller's duty of disclosure in state to state, it is difficult to imagine how enforcement would not devolve into a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

Thus, given the lack of notice that the conduct alleged was criminal under state or federal law and in light of its encouragement of arbitrary enforcement, § 1343 is unconstitutionally vague as applied. This Court should therefore dismiss the Indictment against Mr. Jasen.

C. The Rule of Lenity Precludes Criminal Liability.

Even if the Court finds that the statute is not void for vagueness as applied to the Jasens, the rule of lenity forecloses the Government's prosecution in this case.

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as "let the buyer beware, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise caution,"' first appeared on signs in ancient Roman markets. John H. Scheid, Jr., Note, *Mandatory Disclosure Law: A Statute for Illinois*, 27 J. MARSHALL L. REV. 155, 157 (1993).

Pursuant to the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted). As noted in *Bass*, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id*. (citations omitted). Thus, "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 513 (2008) (citation omitted). In other words, when a criminal statute has two possible readings, courts must not "choose the harsher alternative" unless Congress has "spoken in language that is clear and definite." *Bass*, 404 U.S. at 347–49.

Indeed, "probability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger*, 18 U.S.C. 76, 105 (1820). "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955).

Here, as noted above, there is genuine ambiguity as to whether Congress intended the phrase "scheme or artifice to defraud" in 18 U.S.C. § 1343 to cover the non-disclosure or concealment of latent defects in private party real estate

transactions. Although courts have construed this phrase broadly, those same courts never faced the conundrum posed by this prosecution, which raises a novel theory of criminal liability of which the Jasens had no notice. And, in all likelihood, the drafters of the statute could have never foreseen this sort of this application. Indeed, at the time the statute was enacted, home sellers generally had no obligation to mention property defects to buyers, and seller disclosure requirements only came into existence in the early 1990s at the insistence of real estate brokers who sought to limit their own liability. *See* Lefcoe, *supra*, at 195, 213. Moreover, nothing in the statutory text suggests that the drafters intended the wire fraud statute to displace the varying duties of disclosure that states have enacted in respect to real estate transactions.

The wire fraud statute was designed to criminalize the *use of wires* in interstate commerce to perpetrate fraud. It was not designed to target non-disclosures in the sale of real estate in which a wire, happens to be involved. It follows that, since the Court must resolve "ambiguity in a criminal statute as to apply it only to conduct *clearly covered*," *Lanier*, 520 U.S. at 266 (emphasis added), the rule of lenity should preclude this prosecution.

D. Due Process Prohibits the Prosecution of the Jasens.

"Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266 (citations omitted). A review of the wire fraud statute and legal precedent applying the statute demonstrates that the instant prosecution violates the Jasens' rights to due process.

The federal mail and wire fraud statutes outlaw schemes to defraud involving the use of mail or wire communications. *See* 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud). The mail fraud statute was enacted in the late nineteenth century in order to prevent the insidious city dweller from using the mail to cheat the guileless country bumpkin. *See* 43 *Cong. Globe* 35 (1870) (remarks of Representative Farnsworth) ("The prohibition was thought necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country"). Although of more recent vintage, the wire fraud statute was always intended to mirror the provisions of the mail fraud statute.[9]

[9] H. Rept. 82-388, at 1 (1951) ("The general object of the bill is to amend the Criminal Code . . . making it a Federal criminal offense to use wire or radio communications as instrumentalities for perpetrating frauds upon the public. In principal it is not dissimilar to the post fraud statute (18 U.S.C. 1341)"); S. Rept. 82-44, at 14 (1951) ("This section . . . is intended merely to establish for radio a parallel provision now in the law for fraud by mail, so that fraud conducted or intended to

Intended to protect the guileless country folk, the initial emphasis of the mail fraud statute was on the misuse of the postal system as a means of committing of fraud. *See* Ellen S. Podgor & Jerold H. Israel, *White Collar Crime in a Nutshell* § 4.01, at 59 (4th ed. 2009). Thus, the misuse of the mails to effectuate a "scheme or artifice to defraud" was the central aspect of the mail fraud statute as initially enacted. Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223. 225-26 (1992); *see also McNally v. United States*, 483 U.S. 350, 359 (1987)("We believe that Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of" fraudulent schemes).

The language and legislative history of the mail and wire fraud statutes does not support the federal criminalization of a real estate sale that occurred between private parties. Moreover, the instant prosecution is even more suspect based on the fact that that the only federal nexus was the buyer's election to use the wires to pay for the property. *See, e,g*., *Loughrin v. United States*, 134 S.Ct. 2384, 2392 (2014) ("Unless the text requires us to do so, we should not construe § 1344(2) as a plenary ban on fraud, contingent only on use of a check (rather than cash").

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be conducted by radio shall be amenable to the same penalties now provided for fraud by means of the mails").

The lack of fair notice is underscored by the absence of judicial disclosure concerning the application of the wire fraud statute to a private real estate contract. Indeed, there seems to be no legal precedent for the government's novel use of the wire fraud statute to criminalize conduct involving a contractual nondisclosure. (*See* Section IA, *supra*). In the absence of both precedent and clear statutory text, the instant prosecution violates the Jasens' fundamental due process right to fair notice.

II. THE GOVERNMENT'S WIRE FRAUD PROSECUTION OF MR. JASEN BASED ON A NON-DISCLOSURE OR CONCEALMENT OF A PROPERTY'S LATENT DEFECT IN A REAL ESTATE SALE VIOLATES PRINCIPLES OF FEDERALISM

In addition to the principle of fair notice as manifested in the vagueness, rule of lenity and due process doctrines, the instant prosecution puts another critical constitutional principle at risk. That is, the Government's prosecution of the Jasens violates the long-standing principle of federalism as it threatens to criminalize contracts entered into at the state level.

Under our federal system, the "States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (citation and quotation omitted). Permitting a federal criminal prosecution based on conduct involving a state real estate contract would "dramatically intrude upon traditional state criminal jurisdiction." *See Bond v. United States*, 134 S. Ct. 2077 (2014).

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Id*. at 2087. The States have "broad authority to enact legislation for the public good — what we have often called a 'police power.'" *Id.* (*citing United States v. Lopez*, 514 U.S. 549, 567 (1995)). The Federal Government "has no such authority." *Id*.

"For nearly two centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally.'" *Id.* (quoting *Cohens v. Virginia*, 6 Wheat. 264, 428, 5 L.Ed. 257 (1821)). Moreover, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Bass*, 404 U.S. at 349. Thus, "in a proper case, an individual may 'assert injury from governmental action taken in excess of the authority that federalism defines.'" *Bond*, 134 S. Ct. at 2086 (citation omitted).

In *McLean*, this Court maintained that the principle of federalism acted as bulwark against the federalization of crime.

> Despite Congress' increasing role in regulating criminal activity, States traditionally have "undertake[n] criminal prosecutions" springing from their "power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment," *Heath v. Alabama,* 474 U.S. 82, 89, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985)—such is the internal tension of our federalist system. While both sovereigns have the authority to regulate criminal conduct within their spheres of influence, each sovereign must guard against encroachment upon the other's authority.

McLean, 802 F.3d at 1230 (internal citations omitted).

Generally, "the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes v. Washington*, 389 U. S. 290, 295 (1967) (Stewart, J., concurring). "Private landowners rely on state real property law when purchasing real property," *Wilson v. Omaha Tribe*, 442 U.S. 653 (1979), and private land owners generally rely on state contract law in forming agreements to transfer real property, unless a statute displaces state law or "a significant conflict between some federal policy or interest and the use of state law." *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Also plainly within the province of traditional state authority is the punishment of local criminal activity. *United States v. Morrison,* 529 U.S. 598 (2000); *Lopez,* 514 U.S. at 558-59.

The Supreme Court recently acknowledged that extension of the federal bank fraud statute, 18 U.S.C. § 1344, to cover a "garden variety con" would raise grave federalism concerns. *Loughrin*, 134 S. Ct. at 2392. Allowing federal intrusion into the law of real property and contracts, areas of jurisprudence traditionally left to the states, raises serious federalism concerns. Indeed, a federal criminal prosecution could lurk in every contractual relationship where the seller failed to disclose a latent defect or even failed to perform. This outcome would trench on traditional provinces of state law and encourage the sort of arbitrary and discriminatory enforcement that offends due process.

By elbowing its way into a dispute concerning the duties of disclosure under Florida real property law, the Government has exceeded its authority under the principles of federalism. *See Bond*, 134 S. Ct. at 2086-93.

Here, in disregard for the principles of federalism, the Government attempts to enforce a private real estate contract between two parties through the use of the federal wire fraud statute. As previously noted, if this prosecution were sustained, every real estate transaction that involved a seller's non-disclosure or concealment could fall within the purview of § 1343, as long as bank funding, a telephone, facsimile or internet transmission was used. Thus, wire fraud prosecutions could be used to prosecute the non-disclosure of such defects as termites, *Rayner*, 504 So. 2d at 1363, drainage problems, *Morton*, 931 So. 2d at 935, mildew damage, *Syvrud*, 858 So. 2d 1128, pollution, *Futura Realty*, 578 So. 2d at 364, or even the presence of poltergeists, *see Stambovsky v. Ackley*, 169 A.D.2d 254 (N.Y. App. Div. 1991). Such a result is inconsistent with the legislative history and intent of § 1343.

For a general sense of how sweeping such a rule would be, the Court need look no further than the sheer volume of decisions citing to *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), which abolished the rule of caveat emptor in the sale of real property.

Moreover, the Government's theory of prosecution would not only be limited to real estate contracts, but also any contract involving a failure to disclose, as long as payment was transmitted or an email or telephone was used. Nor would it just be limited to the sellers of real estate. Brokers, title agents, inspectors, and termite control companies might also become the targets of overzealous federal prosecutors. Thus, one single real estate transaction could spawn a sprawling multi-defendant wire fraud conspiracy prosecution.

The principles of federalism prohibit the Government from interfering with the private real estate transactions, particularly since it is state law that governs contracts generally, and, more specifically, the duty of disclosure that a seller owes to a buyer in real estate transactions. *See generally* Lefcoe, *supra*, at 194-250; *see also Johnson*, 480 So. 2d at 625. It is not as if Florida law forecloses purchasers from obtaining any form relief on the facts of this case. Rescission and even punitive damages are available under Florida law, provided the purchaser establishes civil fraud. *See*, *e.g.*, *Assad v. Mendell*, 511 So. 2d 682 (Fla. 3d DCA 1987). However, Florida law does not contemplate criminal liability[10] for non-disclosures of latent

[10] While the "fact that a scheme may or may not violate State law does not determine whether it is within the proscriptions of the federal statute," *United States v. Edwards*, 458 F. 2d 875, 880 (5th Cir.), *cert. denied sub nom. Huie v. United States*, 409 U. S. 891 (1972), the fact that Florida does not impose criminal liability for such conduct highlights the federalism concerns at play in this case.

defects. The Government should respect that determination and refrain from bringing wire fraud prosecutions that, if sustained, would upset the delicate balance between state and federal power.

III. THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE USE OF THE WIRES WAS INCIDENTAL AND IMMATERIAL TO THE ALLEGED SCHEME TO DEFRAUD

The district court erred when it denied the motion for judgment of acquittal. In order to establish a wire fraud conviction, the government must establish that the defendant (1) intentionally participates in a scheme or artifice to defraud another of money or property, and (2) uses or "causes" the use of wires for the purpose of executing the scheme or artifice. *See United States v. Ward*, 486 F.3d 1212, 1222 (11th Cir. 2007).

A person "causes" the wires to be used under 18 U.S.C. § 1343, "when he acts with knowledge that the use of the mails (or wires) will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." *Ward*, 486 F.3d at 1222 (citation and quotation omitted). However, wire fraud requires the use of wires "for the purpose of executing the scheme" and a conviction cannot be sustained where the use of the wires is incidental or immaterial to the scheme. *See United States v. Kann*, 323 U.S. 88, 94-94 (1944) ("It was immaterial to them, or to any consummation of the scheme, how the bank which

paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires"). To paraphrase Justice Scalia's dissent in *Schmuck*, it is *wire fraud*, not wire and fraud, that incurs liability. *See Schmuck v. United States*, 489 U.S. 705, 722–723 (1989) (Scalia, J., dissenting).

In the instant case, as in *Kann*, the bank's use of interstate wires to transmit of the funds to the escrow account was immaterial to any aspect of the scheme to defraud. It was Mr. Jaje—not Mr. or Mrs. Jasen—who "caused" the use of the wires, because it was Mr. Jaje who determined the method of payment. The Jasens made the alleged false statements in the seller disclosure form without knowledge or foresight concerning how the purchase would be made. In fact, when they filled out the forms, it was not even clear that the sale would ultimately be consummated, let alone transacted using interstate wires.

Although the district court concluded that the false statements were the "but for" cause of the use of the wires, "but for" causation is far too slender a reed to support the exercise of federal jurisdiction in this case, particularly since the criminality hinges on vague duties of disclosure in the sale of real property, an area where the states are thought to retain their traditional enforcement prerogatives. *See*

Issue II, *supra*. The strong state interest in regulating such matters should require proximate cause, and not merely "but for" causation.

Sustaining the conviction on these facts would risk converting 18 U.S.C. § 1343 into "a plenary ban on fraud, contingent only on use of a [wire transfer] (rather than cash)." *Loughrin*, 134 S. Ct. at 2392. This Court should not countenance such a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000).

CONCLUSION

Based on the foregoing, this Court should reverse Mr. Jasen's convictions and remand for the entry of a judgment of acquittal.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32-1(a)(7)(B). This brief contains 10,630 words.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2016, a true and correct copy of the foregoing brief was filed via CM/ECF, which will electronically serve all parties to the proceeding.

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