

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS CIMINELLI, )  
 )  
Petitioner, )  
 )  
v. ) No. 21-1170  
 )  
UNITED STATES, )  
 )  
Respondent. )  
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Pages: 1 through 77  
Place: Washington, D.C.  
Date: November 28, 2022

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v. ) No. 21-1170

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Washington, D.C.

Monday, November 28, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ERIC J. FEIGIN, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-1170, Ciminelli versus United States.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN  
ON BEHALF OF THE PETITIONER

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

For decades, the Second Circuit has applied an invalid theory of wire fraud called the right-to-control doctrine. The government now agrees. It concedes that the right-to-control doctrine "could lead to overbroad results that would expand property fraud beyond the definition at common law and as Congress would have understood it."

Instead, the government offers a new and even broader theory of fraud, fraudulent inducement of a transaction. Yet, in the 150 years since the mail fraud statute was enacted, no case of this Court has embraced that theory. This Court should not do so now.

First, the Court should not entertain

1 the theory at all. The theory was not the basis  
2 for the jury verdict. This Court has held that  
3 it can "not affirm a criminal conviction on the  
4 basis of a theory not presented to the jury."

5 Second, the government not only  
6 forfeited but intentionally abandoned a fraud  
7 theory treating the contract funds as property.  
8 The government superseded the indictment to drop  
9 that theory. It proceeded solely on the right  
10 to control. And it used that theory to exclude  
11 critical defense evidence.

12 Third, the new theory is wrong. The  
13 theory dispenses with a quintessential  
14 requirement of common law fraud, harm to a  
15 traditional property interest if the scheme  
16 succeeds. It would radically expand federal  
17 law, violate federalism principles, and end-run  
18 limits on honest-services fraud. And the  
19 theory's breadth requires ad hoc patches that  
20 contradict black letter law and that even the  
21 government does not fully endorse.

22 Instead of wading into those issues,  
23 the Court should resolve the question presented,  
24 reject the right-to-control theory, and reverse.  
25 And because the government has offered no other

1 theory of property fraud below, the Court should  
2 direct entry of an acquittal.

3 I welcome the Court's questions.

4 To begin with the right-to-control  
5 theory, which is the question presented, the  
6 Second Circuit crafted that theory based on  
7 non-traditional ideas drawn from a set of cases  
8 that did not examine fundamental questions of  
9 what property means under the property fraud  
10 statutes.

11 Those statutes incorporate the common  
12 law, as this Court has repeatedly held, and --

13 JUSTICE KAGAN: So, Mr. Dreeben, I  
14 mean, let's say that you win this case because  
15 the government presented the right to control as  
16 a property interest and now is not even  
17 defending that, all right? So I -- I just want  
18 to -- so let's -- let's -- let's say you win.

19 But -- but you're saying that the  
20 government doesn't even have it right now, and I  
21 guess I wonder why that's the case. You know, a  
22 billion dollars is a lot of property. And, if  
23 you take what the government is now saying, you  
24 know, frame it as this was an effort to obtain  
25 money, the most classic form of property,

1 through a fraudulent scheme.

2 So why couldn't -- I know it didn't --  
3 but why couldn't the government have framed its  
4 case in that way?

5 MR. DREEBEN: So, Justice Kagan, the  
6 fundamental reason why that cannot be a valid  
7 basis for property fraud is it was not the  
8 meaning of common law fraud at the time that  
9 Congress enacted the mail fraud statute and that  
10 assimilated those common law concepts.

11 Fraud requires harm to a traditional  
12 property interest. It is usually, in government  
13 prosecuted cases, pecuniary harm. For example,  
14 the government says this could be an  
15 overcharging case. It wasn't. But, if the  
16 government wanted to prosecute pecuniary fraud  
17 as an overcharging case, that fits within common  
18 law fraud.

19 It also fits within common law fraud  
20 if the victim is deprived of another --

21 JUSTICE KAGAN: So, if -- if I -- if I  
22 understand you correctly, you're saying that in  
23 addition -- the government has to prove -- in  
24 addition to proving that there was a scheme to  
25 obtain property, a scheme to obtain money, the

1 government also has to prove that on the other  
2 side there was economic loss.

3           And I guess that strikes me as just a  
4 different issue, an orthogonal issue from the  
5 one that really has been raised in this case,  
6 which is what does obtaining property look like.  
7 Is it enough to say the -- the fact that there  
8 was interference with a right of control, that's  
9 not property, but the fact that you're trying to  
10 get contract money, that is property?

11           And then, as to all the other elements  
12 of the prosecution, whether it's what's the  
13 right materiality standard, whether it's --  
14 whether it's do you have to show economic loss  
15 to the defrauded party, as to all those  
16 elements, I mean, they're just not in this case  
17 at all.

18           Didn't we basically take this case to  
19 decide was there a scheme to obtain property  
20 here? Well, no, there wasn't, because the  
21 government thought about it as the right to  
22 control, but, yes, if the government had said  
23 they were trying to obtain a billion dollars,  
24 that would have been sufficient.

25           MR. DREEBEN: So, Justice Kagan, I



1 completely agree with the first part of what you  
2 said. This case is about the right to control  
3 and whether the right to control is a cognizable  
4 property interest that can be obtained.

5 I would part company on whether the  
6 government can just shift to a pure fraudulent  
7 inducement theory either in this case or as a  
8 general matter. I was answering your question  
9 about whether it is a valid theory of fraud or  
10 whether there does need to be some kind of  
11 pecuniary harm, harm to a distinctive recognized  
12 property interest of another kind.

13 We say yes. The government says no.  
14 That was not an argument that the government  
15 made below. It's not something on which this  
16 Court can look to a wealth of mail fraud cases  
17 that analyze the question. So we don't think  
18 that it's in this case.

19 And I -- to that extent, I agree with  
20 you. It is orthogonal. It's not presented.  
21 It's an improper issue before the Court. If the  
22 Court were to reach it, it would have --

23 JUSTICE KAVANAUGH: So -- can I stop  
24 you there? So, if we could just write an  
25 opinion saying the right-to-control theory is no

1 good for the reasons you've stated and even the  
2 government acknowledges, then that's the end of  
3 it?

4 MR. DREEBEN: That would be fine with  
5 us, Justice Kavanaugh, so I --

6 JUSTICE KAVANAUGH: We don't have to  
7 resolve anything more?

8 MR. DREEBEN: You do not, except that  
9 --

10 JUSTICE KAVANAUGH: You want us to,  
11 but we don't have to, correct? To -- to pick up  
12 on Justice Kagan's question.

13 MR. DREEBEN: The Court should direct  
14 an entry of acquittal because the only property  
15 interest that the government offered below isn't  
16 a property interest. The proof that corresponds  
17 to the jury instructions and the theory does not  
18 establish the elements of fraud. That should be  
19 the end of the case.

20 The Court could write a short opinion  
21 explaining that the right to control doesn't  
22 have common law provenance. It doesn't satisfy  
23 the elements of the mail and wire fraud  
24 statutes. In this case, that's the only theory  
25 that the government can properly rely on in

1 order to sustain the prosecution.

2           There was no proof of a traditional  
3 property interest. Therefore, you enter a  
4 judgment of acquittal.

5           JUSTICE BARRETT: But can't we just --

6           JUSTICE JACKSON: Well --

7           JUSTICE BARRETT: -- let the Second  
8 Circuit figure that out?

9           MR. DREEBEN: Well, Justice Barrett,  
10 the reason why I don't think that it's an  
11 appropriate issue for the Second Circuit to get  
12 on remand is this Court's repeated statements in  
13 cases like Dunn, McCormick, and specifically  
14 Chiarella and McNally itself that the Court  
15 cannot affirm a criminal conviction on the basis  
16 of a theory not presented to the jury.

17           JUSTICE JACKSON: But that -- but  
18 there's a -- there's a gulf between not  
19 affirming and acquitting. I mean, we could not  
20 affirm and send it back, and then maybe the  
21 Second Circuit says there has to be a new trial  
22 on whatever other theory the government has.

23           MR. DREEBEN: Well, Justice Jackson,  
24 the -- that would only make sense if it were  
25 permissible under the rules of procedure and the

1 Constitution for the government to get that  
2 second bite at the apple.

3           And in a case like Chiarella, which is  
4 pretty much on all fours like the -- with this  
5 case, the Court simply entered a -- an opinion  
6 that said reverse. It didn't remand for  
7 anything else. Chiarella involved the financial  
8 printer who was charged and convicted of  
9 defrauding innocent market traders based on  
10 information that he stole from the print shop  
11 about upcoming financial transactions.

12           The Court said: That's not a valid  
13 theory of insider trading because it doesn't  
14 involve fraud. The government came back and  
15 said: Yes, but he stole the information from  
16 the print shop, in breach of an established  
17 fiduciary duty, an agency relationship, and that  
18 constitutes everything you need for an insider  
19 trading violation, which, by the way, this Court  
20 later held in United States versus O'Hagan. But  
21 the Court said we cannot affirm a criminal  
22 conviction on the basis of a theory not  
23 presented to the jury, and the judgment was  
24 reversed and Chiarella went free.

25           And that is the same, I think, result

1 that should occur in a case like this one. The  
2 government's new theory, beyond all of its other  
3 flaws, was not charged in the indictment. The  
4 government is actually asking the Court to  
5 entertain in a theory that would create a  
6 constructive amendment of the right --

7 JUSTICE JACKSON: But you don't -- you  
8 don't charge theories. I mean, the government  
9 charged the statute, violation of the wire fraud  
10 statute, and it went to trial on a particular  
11 theory as to how that was accomplished. But I  
12 think the indictment is not defective, is it?

13 MR. DREEBEN: Yeah, the indictment  
14 actually is defective, Justice Jackson, because  
15 it's not enough at least in a case like this,  
16 where the government says what the property  
17 interest is. There is a theory of the  
18 indictment, and the government has to prove the  
19 theory that it charged, not a different theory.

20 And that is particularly true in this  
21 case because the indictment specifically charges  
22 the right to control its assets as the property  
23 interest, and that was not an accident.

24 The government originally had an  
25 indictment in which it did charge that the

1 ultimate state-awarded contracts were the  
2 property interest, the same thing that my friend  
3 now says is the property interest.

4 But there was a case in the Southern  
5 District of you -- New York called United States  
6 versus Davis in which the government had gone to  
7 trial on a similar indictment that charged a  
8 contract as the property interest, and then it  
9 tried to save the conviction by pointing to the  
10 right-to-control theory, which is very vast and  
11 nebulous.

12 And the district court said you cannot  
13 do that. That would be a constructive amendment  
14 of the indictment. So what did the government  
15 do? It went back and it changed from the first  
16 superseding indictment to the second superseding  
17 indictment to delete contract funds as property  
18 and to substitute the right to control.

19 And you can see that most clearly in a  
20 red-lined document that the government filed  
21 with the Court, which is Docket Entry 319-2,  
22 which contains a red line of the differences  
23 between the two indictments, and you can see  
24 that the government red-lined out that "the  
25 scheme to defraud defrauded Fort Schuyler of" --

1 now I'm going to read the strick -- the stricken  
2 language -- "an award of significant  
3 taxpayer-funded development contracts," and it  
4 substituted in "defrauded Fort Schuyler of its  
5 right to control its assets, and thereby exposed  
6 Fort Schuyler to the risk of economic harm."

7           So the government didn't just not  
8 charge this theory or not charge any theory. It  
9 put the defendants on notice, it put the Court  
10 on notice, and it repeatedly relied on  
11 right-to-control rather than a property fraud  
12 conventional theory to exclude critical defense  
13 evidence.

14           And I think, when you have all of  
15 those features, whether it adds up to a formal  
16 waiver or as the kind of abandonment of a new  
17 theory that should foreclose the government from  
18 getting its second bite at the apple, I think it  
19 adds up to an acquittal.

20           JUSTICE ALITO: Well, whether there  
21 was a constructive amendment to the indictment  
22 is a complicated question and it wasn't one that  
23 I understood us to take. But put -- putting  
24 that aside, if in a case there is no objection  
25 to a jury instruction, it turns out that the

1 jury instruction is erroneous, maybe even omits  
2 an essential element of the offense, but the  
3 evidence is sufficient to support -- arguably  
4 sufficient to support conviction under a proper  
5 interpretation of the statute, and the argument  
6 that's made on appeal is that the defendant is  
7 entitled to a judgment of acquittal, is that  
8 person entitled to a judgment of acquittal?

9 MR. DREEBEN: Justice Alito,  
10 ordinarily not, but that -- that would  
11 presuppose a situation in which the government  
12 proceeded on its theory and didn't actually  
13 abandon that theory in prior litigation so that  
14 as a matter of whether you call it forfeiture,  
15 waiver, invited error, whatever you want to call  
16 it, the government forewent the theory that it  
17 is now urging upon the Court.

18 And so, once that -- it is out of the  
19 case, I think you have to ask the question  
20 whether the evidence that was introduced to  
21 prove the crime charged satisfied the elements  
22 of that crime. And the government can't come up  
23 on appeal as it has done here for the first time  
24 in this Court and said: Since this is a  
25 sufficiency case, we get to completely reinvent



1 the theory, we get to substitute in a new one  
2 for the defective one that the Second Circuit  
3 used, and the only question that we ask is  
4 whether the evidence was sufficient under that  
5 theory, and we can ask the Court to announce  
6 this new theory for the first time in this case.

7           If that were true, the government  
8 would have been able to defend the insider  
9 trading conviction in Chiarella by saying:  
10 Decide the misappropriation doctrine. After  
11 all, it turned out to be a valid theory, and  
12 there were a couple of justices in the dissent  
13 who thought it was a valid theory even in that  
14 case. But the Court said no, you cannot affirm  
15 a criminal conviction on a basis of a theory not  
16 given to the jury.

17           And even if that doesn't hold true in  
18 every single case -- and I think, Justice Alito,  
19 Neder and cases like that suggest that there can  
20 be harmless error -- it should hold true in a  
21 case like this, where the government's new  
22 theory emerges only in its merits briefing in  
23 this Court and was abandoned by amendments to  
24 the indictment below.

25           JUSTICE ALITO: I -- I know --

1 JUSTICE SOTOMAYOR: Counsel, you're  
2 assuming -- I'm sorry.

3 JUSTICE ALITO: Go ahead.

4 JUSTICE SOTOMAYOR: You can -- no, no,  
5 no. Finish.

6 JUSTICE ALITO: Well, this was a  
7 different point, but --

8 JUSTICE SOTOMAYOR: I was going to  
9 follow up on this.

10 CHIEF JUSTICE ROBERTS: Why don't you  
11 go ahead, Justice Sotomayor.

12 JUSTICE SOTOMAYOR: Justice Alito's  
13 question assumed a jury waiver, a jury  
14 instruction waiver.

15 Did you waive here?

16 MR. DREEBEN: Well, I don't -- I don't  
17 think we waived anything. We preserved all the  
18 way through our objection that the  
19 right-to-control doctrine is not a valid theory  
20 of fraud. That's preserved at page 103 of the  
21 JA.

22 The Second Circuit dropped a footnote  
23 and said: The defendants challenge this theory.  
24 We don't have to reach it because it's settled  
25 Second Circuit law. And it used that theory to

1 analyze the sufficiency of the evidence. And  
2 that's the theory -- the only theory on which  
3 the Second Circuit found that the evidence is  
4 sufficient.

5 We've gotten --

6 JUSTICE SOTOMAYOR: So you say you  
7 object -- that's reserved --

8 MR. DREEBEN: That's preserved.

9 JUSTICE SOTOMAYOR: -- preserved your  
10 jury instruction?

11 MR. DREEBEN: Correct. That's  
12 correct. Well, I -- I -- I want to be -- be  
13 clear, Justice Sotomayor, we're not talking  
14 about the jury instructions on our theory of the  
15 argument. What we are talking about is the  
16 sufficiency of the evidence and the legal  
17 standard that the Second Circuit used to find  
18 the evidence sufficient.

19 It used an incorrect standard based on  
20 right-to-control. That's the only theory that  
21 it used to examine the sufficiency of the  
22 evidence. Because the evidence is not  
23 sufficient to prove property under that theory,  
24 an acquittal is mandated.

25 And the government's --

1 JUSTICE SOTOMAYOR: All right. Let's  
2 go back to Justice Alito.

3 MR. DREEBEN: -- tangent has brought  
4 up things that require me to talk about the  
5 indictment and the jury instructions because  
6 it's not, Justice Alito, that we're asking you  
7 to resolve a constructive amendment theory.  
8 It's that the government's theory would create a  
9 constructive amendment. It would change the  
10 language of the indictment back to the S1  
11 indictment after having dropped that and put in  
12 the S2 indictment, a right-to-control theory.

13 And we're looking at the jury  
14 instructions only to answer the question: Did  
15 the jury resolve the question that the  
16 government is now putting to it under its  
17 fraudulent inducement theory? And the answer to  
18 that is clearly no. The property differs. The  
19 government won't dispute that.

20 Instead of it being the  
21 right-to-control assets, it migrates over to  
22 become the contract funds at the end of the day.  
23 The government offers a new materiality theory  
24 that says that the misrepresentations have to go  
25 to the essence of the bargain. There's nothing

1 in the jury instructions that contain that  
2 amorphous characteristic anyway. The jury  
3 didn't decide that.

4 And the government offers a slant on  
5 "by means of" that the acquisition of the  
6 property or the obtaining of the property has to  
7 be by means of the misrepresentation. That  
8 borrows from this Court's decision in Loughrin  
9 to say that it has the natural tendency to  
10 induce the person to part with property. That  
11 also was not in the jury instructions.

12 And, critically, the defense has  
13 defenses on both of those issues that it was not  
14 given the chance to litigate because that was  
15 not the theory of the case that the government  
16 went forward on below.

17 On the essence of the property, the  
18 essence of the bargain requirement that the  
19 government now offers, it is highly significant  
20 that at page 47 of the government's brief the  
21 government says that a fair exchange can negate  
22 the materiality under its essence of the bargain  
23 theory of a misrepresentation.

24 JUSTICE ALITO: But what -- what if  
25 accurate information is the essence of the

1 bargain? Now I know you don't think we need to  
2 get into this, and -- and you may be right about  
3 that, but I just want to draw on your knowledge  
4 of -- of criminal law and -- and -- and your  
5 understanding of common law fraud.

6           So take -- take this example. Suppose  
7 someone hires an agency -- enters into a  
8 contract with an agency to find, let's say, a  
9 nanny for the -- the -- their children or a  
10 caregiver for an older person, and the agency  
11 promises that they're going to do a thorough  
12 check of these individuals. They are going to  
13 contact prior employers and get references and  
14 do a criminal background check. And, in fact,  
15 they do none of those things, but it turns out  
16 that the nanny or the caregiver actually does a  
17 decent job.

18           Is there not fraud there?

19           MR. DREEBEN: There may be, Justice  
20 Alito, and it would turn on whether the -- the  
21 government chooses to show pecuniary loss.  
22 Overcharging, overpaying for services that were  
23 not performed, that is the kind of conventional  
24 fraud case that the government points to in the  
25 Finazzo case.

1 JUSTICE ALITO: Yeah, but what if  
2 there is no -- they don't try to prove that they  
3 paid -- they paid too much, but they paid for a  
4 person who was unproven?

5 MR. DREEBEN: Yes. Yes.

6 JUSTICE ALITO: And they -- and what  
7 they wanted was somebody who was a proven  
8 commodity.

9 MR. DREEBEN: Well --

10 JUSTICE ALITO: Certainly, they're  
11 going to think we were defrauded, we were  
12 exposed to a risk that we didn't want to  
13 undertake, and we paid money for that. That's  
14 just why we paid the money.

15 Why isn't that fraud?

16 MR. DREEBEN: So they certainly were  
17 deceived. And the government certainly can try  
18 to show that there would be pecuniary loss  
19 associated with that, that they paid for  
20 services that they didn't get, which is a very  
21 conventional type of fraud claim.

22 If all there is is deceit and the  
23 contract actually was a fair exchange and the  
24 employee was fully competent, capable,  
25 certified, qualified, then it wouldn't be common

1 law fraud. It might be some other crime that  
2 covers deception. It might be a civil case that  
3 would entitle the victim to rescission. The  
4 civil rules have different criteria and  
5 requirements than the criminal law. And it  
6 might be a violation of some other criminal  
7 statute.

8 But the fraud law at common law always  
9 looked to some kind of a loss, be it be  
10 pecuniary or a loss of specific property that  
11 you set out to buy or something else that could  
12 be monetized, because, after all, fraud law  
13 originated in protecting people's property  
14 rights.

15 And this Court in McNally said: It  
16 protected against being wronged in your property  
17 rights. And it didn't mean conventional  
18 fraudulent inducement, which is grist for the  
19 mill in a thousand civil cases that would all  
20 become fit cases for criminal fraud if the  
21 government's new and vastly enlarged fraudulent  
22 inducement theory is adopted.

23 So, while the victim may have a  
24 subjective sense of being wronged, that does not  
25 mean that it fits within the parameters of what



1 has always been required for a fraud scheme up  
2 till the government's current submission, which  
3 is some sort of a scheme to deceive someone for  
4 the purpose of obtaining property in a way that  
5 would produce a pecuniary loss or some other  
6 harm to a traditional property interest.

7 JUSTICE BARRETT: Mr. Dreeben, let's  
8 say that we don't want to say that this statute  
9 protects just common law Blackstonian property,  
10 as you propose in your brief.

11 Could we decide that the right to  
12 control assets isn't a sufficient basis for the  
13 prosecution another way? Maybe by saying that  
14 they're conflating -- that the government is  
15 conflating the materiality element with the  
16 intent-to-defraud element and that way not have  
17 to decide cases that aren't before us about  
18 other, you know, bundles -- sticks in the bundle  
19 of property?

20 MR. DREEBEN: Well, Justice Barrett, I  
21 -- I think that there are a number of ways to  
22 conclude that the right-to-control theory is  
23 invalid. Your Honor pointed to one. It tends  
24 to merge different elements, not only  
25 materiality, but the way that the Second Circuit

1 has described it, it also subsumes intent to  
2 defraud by collapsing all the -- those elements.  
3 It violates core requirements of the statute.

4 It also tends to run aground because  
5 it infringes on turf that's covered by Skilling  
6 and McNally and would allow the government to  
7 prosecute a variety of kinds of things -- the --  
8 through the guise of calling them property fraud  
9 when it cannot do so under honest services.

10 And I'm not saying that the two are  
11 hermetically sealed worlds, but the way the  
12 government has treated right-to-control in the  
13 Second Circuit, it fills in the blanks where the  
14 right -- where the honest-services doctrine got  
15 cut off by McNally and not reinstated by 1346.

16 So the Court could also say: Congress  
17 reinstated certain intangible rights in the  
18 honest-services amendment, Section 1346. The  
19 right to control assets is not one of them.  
20 And, therefore, it does not qualify as property  
21 for purposes of the property fraud statutes.

22 JUSTICE BARRETT: And you don't see  
23 any problem with any of those routes?

24 MR. DREEBEN: I think they all  
25 cumulatively reinforce each other, and the Court

1 may wish to take this opportunity to say what it  
2 has already said in Cleveland and in Carpenter,  
3 which is that the wire fraud and mail fraud  
4 statutes protect traditional property interests.  
5 It does not have to map what every traditional  
6 property interest is today.

7           This is not a case, for example, about  
8 intellectual property. It's about a made-up  
9 right to information that bears on an economic  
10 decision. That has no roots in the common law.  
11 I think the Court can at least say that without  
12 prejudicing the government in arguing for other  
13 kinds of property, whether exotic or  
14 traditional.

15           JUSTICE ALITO: What do you say about  
16 the statement in Shaw that bank fraud requires  
17 no actual loss or intent to cause loss?

18           MR. DREEBEN: So I think that  
19 statement is entirely correct. And if you look  
20 at the -- the facts of Shaw, it involves someone  
21 who stole somebody's credentials to their  
22 account and used it to extract money from the  
23 bank. And the defense was: Hey, I did not want  
24 to harm the bank. I -- I was just trying to  
25 defraud the customer. And beyond that, the bank

1 isn't going to lose any money because there are  
2 all these banking regulations that allow it to  
3 recoup money from the -- from the customer and  
4 from other banks.

5           And what Justice Breyer was saying in  
6 that opinion was: That's not a defense. The  
7 fact that you think that someday the bank will  
8 be made whole is not a defense to fraud, just as  
9 it would not be a defense to fraud if I went to  
10 a bank, totally misrepresented my income, got a  
11 loan at an interest rate that I never would have  
12 gotten if I gave my true income, and I said:  
13 But it doesn't really matter because I'm going  
14 to come up with the money and pay them back.

15           The fact that you think everything  
16 will turn out okay doesn't obviate the finding  
17 of a scheme to defraud. And I don't think  
18 Justice Breyer was doing anything other than  
19 that in that opinion.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Thomas, anything further?

22           Justice Sotomayor?

23           JUSTICE SOTOMAYOR: I am a little  
24 confused. Assume that I want to enter a  
25 transaction, and the other side says I won't do

1 it if you have been in cahoots with someone  
2 who's part of this decision-making.

3           Isn't the essence of my bargain that I  
4 gave you this contract and you took my money?  
5 You performed services, but I wouldn't have  
6 entered this contract with you. It's very  
7 clear. I said it to you.

8           MR. DREEBEN: Mm-hmm. And you would  
9 have an excellent action in breach of contract,  
10 Justice Sotomayor. You would have potentially a  
11 --

12           JUSTICE SOTOMAYOR: Why isn't that  
13 false pretenses?

14           MR. DREEBEN: Well --

15           JUSTICE SOTOMAYOR: Which is what the  
16 argument the -- the --

17           MR. DREEBEN: -- I -- I --

18           JUSTICE SOTOMAYOR: You call it  
19 fraudulent inducement, but the government calls  
20 it a common law false pretenses case.

21           MR. DREEBEN: I think the government  
22 calls it fraudulent inducement. And we and the  
23 government have disagreed on what fraudulent  
24 pretenses at common law required. We think that  
25 it does require some form of a loss. The

1 government has countered with citations that it  
2 thinks supports the opposite.

3 One of the problems with this Court  
4 trying to resolve complicated issues of common  
5 law when the parties only raise the issue in the  
6 respondent's brief and then reply briefs is that  
7 the Court doesn't have a full foundation of the  
8 literally hundreds of common law cases that  
9 address this.

10 But our view would be there might be  
11 some other offense, there might be some civil  
12 action, almost certainly would, but the  
13 requisites for a criminal conviction, and in  
14 this case, one that carries 20 years in prison,  
15 are not met for every misstatement in a  
16 contract, every false statement that the  
17 government --

18 JUSTICE SOTOMAYOR: I -- I didn't say  
19 every false statement or misstatement. A  
20 material one.

21 MR. DREEBEN: True. And -- and the  
22 government would substitute yet a different  
23 materiality standard from the one that this  
24 Court has said in an effort to limit the reach  
25 of its fraudulent inducement theory because,

1 taken at face value, there are hundreds of cases  
2 that are litigated in state courts every year on  
3 a fraudulent inducement theory, and, under the  
4 government's theory, they are all federal  
5 crimes, at least if the government can show its  
6 new "essence of the bargain" requirement and its  
7 "by means of" requirement.

8           And that has never been the way that  
9 fraud prosecutions have previously proceeded.  
10 Every single case in this Court is either a  
11 something-for-nothing fraud or something --

12           JUSTICE SOTOMAYOR: But -- we're back  
13 to we shouldn't get into this?

14           MR. DREEBEN: I -- I would entirely  
15 encourage the Court not to get into it and to  
16 decide instead the question presented.

17           CHIEF JUSTICE ROBERTS: Justice Kagan?  
18 Justice Gorsuch?  
19 Justice Kavanaugh? No?  
20 Justice Barrett?  
21 Justice Jackson? Okay.  
22 Thank you, counsel.

23           MR. DREEBEN: Thank you.

24           CHIEF JUSTICE ROBERTS: Mr. Feigin.

25

1

2

ORAL ARGUMENT OF ERIC J. FEIGIN

3

ON BEHALF OF THE RESPONDENT

4

MR. FEIGIN: Thank you, Mr. Chief

5

Justice, and may it please the Court:

6

If I could just start with two main

7

points, one about the scope of property fraud

8

generally and the other about how the

9

right-to-control doctrine fits into that.

10

It's always been property fraud to

11

have fraudulent inducement like in this case,

12

where the victim is tricked into paying for

13

something fundamentally different from what he

14

bargained for.

15

Both in their reply brief at Footnote

16

2 and just now, Petitioner acknowledges that

17

receiving specific property different from what

18

the victim expected, like a horse with a

19

different name, even if it has equal value, can

20

be fraud.

21

To the extent there's daylight between

22

the parties about the substance of what property

23

fraud covers, I think it goes to cases of what I

24

might call pedigree fraud, where there's a lie

25

about the certification of property or important



1 to us would be a case where, for example,  
2 someone lies about their eligibility for a  
3 veterans' preference in contracting.

4 And we would say that that's fraud,  
5 and it's always been fraud at common law. And  
6 that's exactly the paradigm that this case in  
7 which Petitioner and the other defendants  
8 schemed to obtain \$750 million in Fort  
9 Schuyler's funds by rigging the bidding process  
10 and lying about it fits.

11 In maintaining that it fits, we're not  
12 abandoning the jury's instruct -- findings under  
13 the right-to-control theory. We're explaining  
14 how they map on to the more straightforward and  
15 traditional elements of property fraud as they  
16 have always been understood.

17 And that's, I think, sufficient to  
18 confirm -- affirm, I'm sorry -- to confirm that  
19 the conviction should be affirmed because I  
20 don't really understand on the facts of this  
21 case and on the indictment that was submitted  
22 and went to the jury how the jury found any  
23 difference between the right to control the  
24 \$750 million and the \$750 million itself.

25 I think --

1 JUSTICE THOMAS: Mr. Feigin, are you  
2 abandoning the Second Circuit's control theory?

3 MR. FEIGIN: Well, Your Honor, we do  
4 think it -- let me make a few points about that.

5 Just to directly answer your question,  
6 we would be fine with the Court explaining that  
7 that's not the right way for the Second Circuit  
8 to be going about thinking about these cases.

9 The -- the second point I would make  
10 is I think the Second Circuit has gotten a  
11 little bit of a bad rap here. I think it's  
12 understandable how it got here.

13 Petitioner at pages 22 to 23 of his  
14 brief and pages 8 to 9 of his reply brief  
15 acknowledges that the use of property can be  
16 property. This Court in recent cases like Kelly  
17 and Shaw has referred to it as property. And  
18 the -- this Court nodded to the idea of a  
19 right-to-control theory, admittedly, without  
20 endorsing it, in both McNally and Cleveland.

21 And I think the Second Circuit had a  
22 defensible way of doing this at -- at the  
23 beginning, but it's become clear that it's an  
24 awkward fit with property fraud as it's been  
25 traditionally understood.

1                   In particular, what we think the  
2                   Second Circuit has done that's really its sort  
3                   of fundamental conceptual mistake is, instead of  
4                   housing the -- its idea that there needs to be  
5                   some way in which the victim is not getting what  
6                   it's bargained for in materiality, where we  
7                   think it properly belongs and where the Court  
8                   put it in, for example, Universal Health  
9                   Services, interpreting the standard definition  
10                  of materiality in the particular context of  
11                  contracting, it has added this tangible harm  
12                  requirement that goes into the property element.

13                  Now I think, if you asked Congress  
14                  when it implemented the mail fraud statute: Is  
15                  use of property property? They would have said:  
16                  Yeah, you know, Blackstone says that it is for  
17                  -- for those learned in Blackstone.

18                  And -- but I think, if you ask them:  
19                  Is use of property that result -- that is  
20                  influenced by information about an economic  
21                  decision that leads to tangible harm property?  
22                  You're starting to gerrymander the definition of  
23                  property beyond something that Congress would  
24                  have understood.

25                  CHIEF JUSTICE ROBERTS: Counsel, given

1 what you said about the right to control as,  
2 whatever you want to say, properly understood  
3 or, you know, the Second Circuit has gotten a  
4 bum rap, but there's something here, we should  
5 go on and decide the question presented, which  
6 is whether or not the right-to-control theory is  
7 valid, right?

8 MR. FEIGIN: Yeah, I -- I agree that  
9 the Court should obviously decide the question  
10 presented. I -- I would urge the Court that in  
11 doing so -- I -- I guess I would say a couple  
12 things about that.

13 First, as we explain in our brief, we  
14 think the right-to-control theory properly  
15 cabined and as it was applied in this case does  
16 identify cases that are traditional property  
17 fraud, and I can get to why I think this  
18 particular conviction should be affirmed under  
19 the doctrine in a second.

20 But I -- I take great issue with the  
21 idea that cases like this are categorically out  
22 of the scope of property fraud, which, again,  
23 I -- I don't really see much difference between  
24 this and a veteran's benefit -- veterans'  
25 contracting preference benefits type case, where

1       there's just a misrepresentation, not about the  
2       services you're going to receive, not about how  
3       good they are, not about the price you're  
4       getting, but about the fact that somebody who  
5       owns a business is, in fact, a veteran of this  
6       nation's armed forces.

7                   CHIEF JUSTICE ROBERTS: Counsel, you  
8       --

9                   MR. FEIGIN: Yeah.

10                   CHIEF JUSTICE ROBERTS: -- you said  
11       that you're -- you think the theory is still  
12       valid properly cabined. Was the theory properly  
13       cabined in the jury instructions?

14                   MR. FEIGIN: Your Honor, I think, if  
15       you took the jury instructions outside the  
16       context of this case, the jury instructions  
17       encapsulate a view of the right-to-control  
18       theory that could in some cases lead to  
19       overbroad results.

20                   However, the jury received the -- a  
21       copy of the indictment in this case. If you  
22       look at Joint Appendix 27, paragraph 14 of the  
23       indictment, it makes clear that what the goal of  
24       the scheme here was was exactly what I said at  
25       the beginning, which was to get \$750 million in

1 government funds by rigging the bidding process  
2 and lying about it.

3 And --

4 CHIEF JUSTICE ROBERTS: So the -- so  
5 the theory would be properly cabined because the  
6 jury would, of course, not simply rely on the  
7 instructions but would -- but also read the  
8 indictment and would properly resolve any  
9 difference between the two?

10 MR. FEIGIN: Well, Your Honor, I think  
11 the instructions told the jury that it had to  
12 find that there -- that what property here was  
13 the right-to-control assets. And I think, in  
14 certain cases -- and it all -- the jury also had  
15 to find tangible harm. And I think that  
16 perhaps, in certain cases, even that might still  
17 go too far.

18 But, in the context of nearly every  
19 fraudulent-inducement case and certainly in this  
20 case, what the jury's going to find when it  
21 finds that the property was aimed at the use of  
22 control of assets in the context of two parties  
23 that are bargaining for a contract, the assets  
24 are going to be the contract funds.

25 And then what you have is a species of

1 fraud that has long existed at common law.  
2 Again, I -- I -- I take the -- I take them to  
3 acknowledge the horse of a different name case,  
4 where what you want is a horse named James and  
5 you get a horse named Henry. But there -- it  
6 also covers cases of pedigree fraud.

7 I think the best examples are at pages  
8 --

9 JUSTICE GORSUCH: Mr. Feigin, I'm  
10 sorry to interrupt, but --

11 MR. FEIGIN: I'm sorry.

12 JUSTICE GORSUCH: -- I -- I -- I do  
13 admire the government's concession of -- of  
14 error here, and I appreciate the candor with  
15 which you -- you've made it.

16 But given that we just took the case  
17 to resolve the right-to-control issue and not  
18 this other theory that you're attempting to  
19 develop about fraudulent inducement of even  
20 matters of equal value, why isn't the proper  
21 result here to reverse?

22 Maybe you have an argument for vacate,  
23 but your -- your very able friend on the other  
24 side makes a strong point that there was a  
25 superseding indictment here that seemed to rely

1 expressly on the right-to-control theory. And  
2 the government didn't present this alternative  
3 view until the merits briefing in this Court.

4 MR. FEIGIN: Two answers to that, Your  
5 Honor.

6 Just first -- and this actually sort  
7 of is -- is an additional answer to the Chief  
8 Justice's question -- I do think it's important  
9 if this Court does decide to send this back or  
10 -- or even reverse how it reverses, and it is  
11 critically important to us for kinds of fraud  
12 that we prosecute all the time that the Court  
13 not reach too broadly and impugn, for example,  
14 the veterans example I was giving --

15 JUSTICE GORSUCH: So how would you  
16 have us write that is my question.

17 MR. FEIGIN: So I think what the Court  
18 could say is that the kind of -- some sort of  
19 what I was saying to the Chief Justice, that the  
20 kind of property that is now at issue in these  
21 right-to-control cases, which is the right to  
22 control assets without assets necessarily in all  
23 cases, as they would have been here, confined to  
24 something that's properly understood as  
25 property, the right to control assets in a



1 manner that doesn't expose the victim to  
2 tangible harm isn't itself something that  
3 Congress would have conceived of as property and  
4 can be prone potentially to abuses.

5 We don't think it was abused in this  
6 case. And that -- that'll go to the second part  
7 of your question. But I think that's really all  
8 that the Court needs to say here. I wouldn't  
9 cast any question on --

10 JUSTICE GORSUCH: I think we're all --

11 MR. FEIGIN: Yeah.

12 JUSTICE GORSUCH: -- in -- in radical  
13 agreement about that. I think the question that  
14 I'm -- I'm trying to pin -- put my finger on is  
15 what -- what we should do with this case.

16 MR. FEIGIN: Okay.

17 JUSTICE GORSUCH: And Mr. Dreeben  
18 suggests that the appropriate judgment line is  
19 reversed and -- and that the government  
20 shouldn't get another chance to reintroduce what  
21 it believes now to be the correct theory,  
22 fraudulent inducement I'll use as shorthand,  
23 because it took that out of the case in a  
24 superseding indictment, and here we are many  
25 years later and it's the first -- first time it

1 appears is in merits briefing before this Court.

2 So why isn't -- or maybe you agree  
3 that the proper remedy in this case is reversal?

4 MR. FEIGIN: No, I -- I -- I don't  
5 agree with that, Your Honor. So, if we -- if we  
6 take the government's -- if -- if we're all  
7 agreed on the broader interests of this case,  
8 and it's -- the Court's not going to relitigate  
9 Shaw and Neder and introduce some sort of harm  
10 concept that it firmly rejected on page 467 of  
11 Shaw -- and I can -- I can get to why that is --  
12 then, in this particular case, I think it's  
13 different from the kinds of cases that Mr.  
14 Dreeben is citing.

15 First of all, all they have made here  
16 is a sufficiency of the evidence challenge. And  
17 in a sufficiency of the evidence challenge, the  
18 question is we compare --

19 JUSTICE GORSUCH: Well, I think that  
20 might be, Mr. Dreeben would tell us, because of  
21 the way the government litigated this case up  
22 until its merits brief in this Court. And,  
23 again, just if -- if we all agree and are in  
24 radical agreement that the Second Circuit  
25 misinterpreted the law and if we're all in

1 radical agreement that that's all -- that the  
2 only indictment before the jury was a  
3 right-to-control theory, why should the  
4 government have yet another chance to start all  
5 over again -- this stage?

6 MR. FEIGIN: Well, Your Honor --

7 JUSTICE GORSUCH: In this case?

8 MR. FEIGIN: -- first of all, I think  
9 that this error could be con -- analogized, all  
10 -- although I will acknowledge that it's  
11 somewhat broader than the errors in those cases  
12 like the errors in Neder or --

13 JUSTICE GORSUCH: I guess I'm --

14 MR. FEIGIN: -- Mustacchio or Free --

15 JUSTICE GORSUCH: I'm sorry to  
16 interrupt, but just -- and I'll -- and I'll  
17 stop. This will be my last shot at it. But  
18 just take that superseding indictment, right.  
19 Why isn't that a firm waiver of the -- of the  
20 theories that you wish now to pursue?

21 MR. FEIGIN: Your Honor, I think we  
22 clarified that we're proceeding under a  
23 right-to-control theory in order to comply with  
24 Second Circuit law. But I think, if you read  
25 the indictment as a whole, the jury had it in

1 front of it, and in the context of the only  
2 thing the jury could have found to satisfy the  
3 instructions and to find guilt on the relevant  
4 charges in this case, I don't think there has  
5 been anything close to some sort of switch of  
6 horses, to continue the horse metaphors,  
7 midstream here.

8 And if I could get back to try and  
9 answer your question --

10 JUSTICE KAVANAUGH: What about  
11 Chiarella? Mr. Dreeben relied on that. How --  
12 how would you say that's different from what is  
13 going on here?

14 MR. FEIGIN: Well, Your Honor, I think  
15 what's fundamentally different about that and  
16 every other case that they cite is, first of  
17 all, we think that the findings the jury made in  
18 this case, under the right-to-control theory,  
19 even without really looking at the rest of the  
20 evidence, except for things that are obvious and  
21 undisputed, is enough to show that this was  
22 actually property fraud.

23 But we're not switching -- for the  
24 reasons I've been stating about what the assets  
25 at issue as to the right to control actually

1 were, I think that there's no way to read this  
2 case as introducing the kind of new theory you  
3 had in Chiarella, where all of a sudden the  
4 victim of the fraud was different, or something  
5 like in Dunn, where the --

6 JUSTICE JACKSON: Well, Mr. Feigin, I  
7 -- with respect, the assets that the Second  
8 Circuit pointed to were not the assets that the  
9 government now seems to be wanting to have this  
10 Court recognize with respect to the  
11 right-to-control theory.

12 I'm looking at the actual opinion in  
13 this case, where I guess it was Judge Chin maybe  
14 wrote the opinion in the Second Circuit, and it  
15 says: "This Court has endorsed a  
16 'right-to-control theory' of wire fraud that  
17 allows for conviction on 'a showing that the  
18 defendant, through the withholding or inaccurate  
19 reporting of information that could impact on  
20 economic decisions, deprived some person or  
21 entity of potentially valuable economic  
22 information.'"

23 So it seems as though the asset that  
24 the Second Circuit was focused on was  
25 potentially valuable economic information. Am I

1 wrong that that's what they thought the  
2 right-to-control theory was about?

3 MR. FEIGIN: Well, Your Honor, I  
4 think, if one looks at the entire opinion, which  
5 I -- I -- I know we -- we all have, it's -- it's  
6 hard to come away from that -- I mean, maybe you  
7 can pick out a specific sentence, but it's hard  
8 to come away from the opinion with any  
9 impression that the Second Circuit thought this  
10 case was about something fundamentally different  
11 than what I described. This --

12 JUSTICE JACKSON: But -- but you --  
13 you're describing the asset as the actual  
14 contract, as the money that was tendered in this  
15 transaction, and I didn't understand that to be  
16 what the right-to-control theory was about from  
17 the Second Circuit's perspective.

18 So I guess I just don't understand.  
19 You -- it seems as though you have reinterpreted  
20 right to control to be the new theory of  
21 fraudulent inducement in a way that the Second  
22 Circuit did not seem to put that theory forward,  
23 and -- and that's what we thought we were taking  
24 in the context of this question presented.

25 MR. FEIGIN: Well, Your Honor, I -- I

1 fully acknowledge that we're not thinking about  
2 this the same way as the Second Circuit. And  
3 for the reasons I was explaining to Justice  
4 Thomas, we do think the Second Circuit has  
5 developed a way of thinking about this that puts  
6 everything in the property element, that's not  
7 the right way to think about it.

8 JUSTICE JACKSON: And Mr. Dreeben says  
9 that's the way you argued the case below. So,  
10 suddenly, now we're at this stage with a  
11 reinterpretation by the government of what right  
12 to control means. And why isn't that a sort of  
13 a forfeiture from the standpoint of, if the  
14 Court disagrees with you that right to control  
15 equals this transaction or even if we don't,  
16 haven't you put forward a case that was based on  
17 the Second Circuit's conception, and that's how  
18 it was argued to the jury, that's how the jury  
19 decided it? So why -- why isn't Mr. Dreeben  
20 right that if we disagree with that conception  
21 of the theory, then we have to reverse?

22 MR. FEIGIN: Well, Your Honor, the  
23 jury was instructed on the language of right to  
24 control assets, and both the jury's instructions  
25 and deliberations, as well as the Second

1 Circuit's consideration of the case, occurred  
2 against a backdrop factual context where  
3 everyone understood the undisputed fact that  
4 what was really at issue here were lucrative  
5 government contracts.

6 And that's why the Second Circuit goes  
7 on to reject the idea that there's any dichotomy  
8 between the bid-rigging process and the award of  
9 the actual contracts. If the theory were as  
10 broad as the sentence that Your Honor read  
11 suggested, there'd really be no need to do that  
12 because you deprived it of economic information  
13 simply by rigging the bid-rigging process.

14 Instead, the court makes clear -- and  
15 this is at Footnote 9 on page 22a of the  
16 Petition Appendix -- that one of the reasons why  
17 this is fraud is because it was an essential  
18 element of the bargain, which I think maps  
19 directly onto what materiality would require in  
20 this context, and that's because it was  
21 incorporated into the notice to proceed that the  
22 parties entered into, which is a contract that  
23 committed LP Ciminelli to spend 3 million in  
24 funds and the state to repay those funds. And  
25 then the notice to proceed was later



1 incorporated into the final contract itself.  
2 Those are at Joint Appendix 125 and 134  
3 respectively.

4 So I -- I don't -- I think, in the  
5 particular context of this case and fraudulent  
6 inducement cases generally, there's not going to  
7 be a lot of argument over whether there is  
8 underlying property at issue.

9 I think where the Second Circuit's  
10 theory is -- is problematic is both, as -- as I  
11 said, in moving what really is part of the  
12 materiality inquiry in the particular context of  
13 contracting and moving that into the property  
14 element. And then, potentially, outside the  
15 context of fraudulent-inducement cases, you  
16 could get circumstances where the Second  
17 Circuit's theory could be applied too broadly if  
18 you take loosely language like Just -- Justice  
19 Jackson appropriately just pointed out.

20 So we don't object if what the Court  
21 wants to do and, frankly, what we'd urge the  
22 Court to do is to explain that the Second  
23 Circuit may not be thinking about this in the  
24 most precise way and the most traditional way.

25 But what we would very much object to

1 is something that gets -- that suddenly erects  
2 the harm requirement that the Court firmly  
3 dispensed with in Shaw, where it not only  
4 rejected the harm requirement in that case, it  
5 adopted Judge Learned Hand's quid -- formulation  
6 that fraud can exist even where there's a quid  
7 pro quo. It pointed to Carpenter as an example  
8 of not requiring harm, and Carpenter is a case  
9 in which the victim, The Wall Street Journal,  
10 wasn't economically harmed at all.

11 And, third, it actually definitively  
12 resolved the false pretenses debate that  
13 Petitioner wants to have once again when it  
14 interprets false pretenses not to require this  
15 kind of harm.

16 And if you want to look at examples of  
17 how the kind of thing I described as pedigree  
18 fraud was covered at common law, I'd encourage  
19 the Court to look at some of the  
20 turn-of-the-century cases at pages 753 to 754 of  
21 the Prosser treatise, which is cited in our  
22 brief.

23 One of those cases, Hedden against  
24 Griffin, is a case by the Supreme Judicial Court  
25 of Massachusetts at the time when I believe

1 Justice Holmes was on that Court, although he  
2 didn't write the opinion, and in that case, the  
3 victim was tricked by the defendant into  
4 thinking that a bunch of his friends had bought  
5 a particular type of insurance and, in fact,  
6 they liked it so much, they didn't quite buy the  
7 company, but they became members of the board of  
8 directors of the company.

9 He himself bought the insurance,  
10 realized he'd been tricked, and the Court  
11 acknowledged it was a perfectly valid insurance  
12 policy. He just didn't want it anymore because  
13 now he'd been tricked. It wasn't what he  
14 actually wanted. He was really depending, and  
15 it was an essential element to him, that the  
16 friends have bought it and that the friends had  
17 -- were on the board of directors.

18 And that was -- the only measure of  
19 damages in that case was the small premium that  
20 he had already paid, and he got a full refund  
21 and a rescission remedy. There are other  
22 examples of it, like the cases at pages -- page  
23 19 and 20 of our brief, where, for example,  
24 there's a misrepresentation to a buyer that a  
25 family member wanted the buyer to buy this

1 particular item.

2 That is not harm in a property  
3 interest, or if Petitioner would recharacterize  
4 it as such, I really think that we're slicing  
5 the conceptual baloney so thinly that it's  
6 transparent.

7 Now we could argue --

8 JUSTICE SOTOMAYOR: Mr. Feigin --

9 JUSTICE KAVANAUGH: Hasn't the -- go  
10 ahead.

11 JUSTICE SOTOMAYOR: -- I -- I totally  
12 remain confused, okay?

13 The core of the right-to-control  
14 theory is that a prosecution is allowed to show  
15 a deprivation of property simply by showing a  
16 deprivation of economically valuable  
17 information.

18 You've disavowed that, correct?

19 MR. FEIGIN: Your Honor, read simply  
20 that broadly, yes. We are not --

21 JUSTICE SOTOMAYOR: All right. But  
22 that's how the Second Circuit has read it, and  
23 you're not defending that, correct?

24 MR. FEIGIN: We're not defend -- if I  
25 could just be clear on --

1 JUSTICE SOTOMAYOR: Would you --

2 MR. FEIGIN: -- what we --

3 JUSTICE SOTOMAYOR: -- would you --

4 MR. FEIGIN: -- on what we're

5 defending and what we're not?

6 JUSTICE SOTOMAYOR: No, no, no. Just

7 answer --

8 MR. FEIGIN: Okay.

9 JUSTICE SOTOMAYOR: -- my questions,

10 okay, because -- are you defending the Second

11 Circuit's view that a deprivation of

12 economically valuable information is enough to

13 prove fraud?

14 MR. FEIGIN: Your Honor, if the

15 definition started and stopped there, we do

16 think that is an overbroad definition of

17 property fraud.

18 JUSTICE SOTOMAYOR: Okay. So you're

19 saying that definition by the Second Circuit

20 you're not defending?

21 MR. FEIGIN: We are not defending that

22 in all of its possible permutations. What we

23 are defending here is how that has been applied

24 and limited by the Second Circuit, in

25 particular, with its tangible harm requirement

1 and by its application in the context of  
2 fraudulent-inducement cases like this one where  
3 there is --

4 JUSTICE SOTOMAYOR: The -- the -- the  
5 charge here was -- I'm reading directly from the  
6 charge -- "the victim's right to control the use  
7 of his assets is injured when it is deprived of  
8 potentially valuable economic information that  
9 it would consider valuable in deciding how to  
10 use his assets."

11 Is that an accurate statement of the  
12 law?

13 MR. FEIGIN: Your Honor, I think, in  
14 the context of this --

15 JUSTICE SOTOMAYOR: Don't give me a  
16 context.

17 MR. FEIGIN: Okay.

18 JUSTICE SOTOMAYOR: Is that an  
19 accurate statement of the law?

20 MR. FEIGIN: That is not how we would  
21 -- our -- first of all, it did go on to talk  
22 about the tangible harm requirement. But --

23 JUSTICE SOTOMAYOR: It says  
24 potentially valuable economic -- I'm reading the  
25 charge -- information is -- how to use his

1 assets -- is "information that affects the  
2 victim's assessment of the benefits or burdens  
3 of a" -- "of a transaction or relates to the  
4 quality of goods or services received or the  
5 economic risks of the transaction."

6 Is that an accurate statement of the  
7 law? This is a jury charge.

8 MR. FEIGIN: Your Honor, I -- I -- I  
9 -- the reason I -- I mean, I think, if you're  
10 taking some of these statements in isolation, I  
11 agree with you. I acknowledge to this Court --  
12 I believe I've been acknowledging throughout --  
13 that is not the way that we would formulate it.

14 If you're asking me instead whether we  
15 think it can identify cases that do meet the  
16 paradigm of property fraud, and if you're asking  
17 me whether I think the jury could have convicted  
18 without finding traditional property fraud, then  
19 I'm going to -- I'm going to defend both the  
20 instructions and the conviction.

21 If you're asking me whether we would  
22 think that this is the kind of first principles  
23 right way to articulate it, I'm going to agree  
24 with Your Honor that the answer is no.

25 The -- I think, really, there are two

1 main points I just want to -- I just want to  
2 emphasize here. One is that I do not think the  
3 Court should cast any doubt on pedigree fraud or  
4 relitigate whether there is some harm  
5 requirement for property fraud generally, and  
6 then, in the specific context of this case, I  
7 think, if the Court wants to do anything other  
8 than affirm, it should remand and let the Second  
9 Circuit sort out where we might be now.

10 But if the -- we do think that this  
11 conviction can be affirmed because the findings  
12 under the right-to-control theory were -- do map  
13 on to property fraud in this context because  
14 there were no other assets we could be thinking  
15 about other than the 750 million that --

16 JUSTICE JACKSON: But, Mr. Feigin,  
17 that's not how it works. I mean, the fact that  
18 it might map on to another theory of fraud isn't  
19 sufficient in a criminal case because doesn't  
20 the jury have to be actually instructed  
21 concerning the other theory?

22 What worries me is the thought that  
23 the jury was instructed -- and -- and -- and  
24 Justice Sotomayor just read the instruction --  
25 the jury was instructed on this right-to-control



1 theory, and they convicted on that theory.

2           If we determine that that theory is  
3 not consistent with the law in some way, I don't  
4 know that we can look at the evidence that was  
5 presented, especially given the fact that, as  
6 Mr. Dreeben says, the evidence was presented  
7 tailored to that theory, but even so, you seem  
8 to be suggesting that we can go back now and  
9 look at the evidence that was presented and say:  
10 Oh, but there was enough for another theory that  
11 the jury wasn't instructed on, and so we can  
12 sustain the conviction on that basis.

13           MR. FEIGIN: Well, two points, Your  
14 Honor. One, as the case comes to this Court,  
15 and -- and without prejudice to whether they may  
16 have preserved the challenge -- other challenges  
17 below, as the case comes to this Court, it's  
18 just a pure sufficiency of the evidence  
19 challenge, and what that looks at is here are  
20 the elements of the statute properly construed,  
21 and here are the facts of the case, and do they  
22 map on to each other.

23           JUSTICE JACKSON: But, wait. How can  
24 you say that when they have charged throughout  
25 that the actual law that was being instructed

1 was invalid?

2 MR. FEIGIN: So, if what the Court  
3 wants to say is that the jury instructions were,  
4 in fact, invalid, I think they forfeited a  
5 challenge like that at -- right at the beginning  
6 of their petition cert stage reply brief.

7 But, again, the Court could send this  
8 case back to the Second Circuit to sort out  
9 where we are now, but our submission in this  
10 Court and the reason we think this Court can  
11 affirm is that if the jury instructions could be  
12 characterized as essentially just misdescribing  
13 the elements of the crime but in a way that  
14 wouldn't have allowed for the jury to find guilt  
15 without finding the properly understood from  
16 first principles elements of the crime, I don't  
17 think that the defendant has been deprived of  
18 anything.

19 They point to evidence they would have  
20 introduced, but if you look at Joint -- if you  
21 look at page 1002 of the court of appeals  
22 appendix, the district court judge made clear --  
23 I'm sorry, Your Honor.

24 CHIEF JUSTICE ROBERTS: You can  
25 finish.

1           MR. FEIGIN: The district court made  
2 clear that it was open to evidence that  
3 Ciminelli actually could have done this better  
4 than anybody else. What it wasn't open to was  
5 evidence that Ciminelli just gave it a quid pro  
6 quo, which is exactly the kind of thing that we  
7 don't think fits, even under traditional  
8 property concepts.

9           Thank you, Mr. Chief Justice.

10          CHIEF JUSTICE ROBERTS: Justice  
11 Thomas?

12          Justice Sotomayor, anything further?

13          Justice Kagan?

14          JUSTICE KAGAN: So this is just a  
15 matter of curiosity, but -- if -- let's -- let's  
16 take two things to be true. One is that the  
17 right to control one's own assets is not itself  
18 a property interest, a sufficient property  
19 interest, under this statute. And the second is  
20 that in a case like this, the \$750 million is a  
21 property interest under the statute.

22          I guess what I'm curious about is how  
23 did the Second Circuit -- and I presume also the  
24 government, you know, must have argued these  
25 things to the Second Circuit. Why did they go

1 down this road? What did -- how did it benefit  
2 anybody to conceive of the property in the case  
3 as the right to control assets rather than to  
4 conceive of the property in the case as the  
5 contract monies?

6 MR. FEIGIN: Well, Your Honor, I can't  
7 quite speak to what everyone might have been  
8 thinking back when this originally began, but,  
9 as I suggested, I think the Second Circuit might  
10 have gotten a little bit of a bad rap.

11 The phrase "right to control" does  
12 appear in McNally, where the Court distinguishes  
13 the theory in that case from a --

14 JUSTICE KAGAN: So there's no set of  
15 --

16 MR. FEIGIN: -- right-to-control  
17 theory.

18 JUSTICE KAGAN: I mean, whether it's a  
19 bad rap or -- there's no set of cases that  
20 people thought, oh, if we define the property  
21 interest this way, we can get to a certain set  
22 of cases that we couldn't get to if we defined  
23 the property interest as the -- the contract  
24 monies?

25 MR. FEIGIN: I don't think that was

1 the original conception of it, Your Honor. I --  
2 I do think the -- I don't want to suggest the  
3 right-to-control theory only appeared after  
4 McNally. It -- it does have its genesis in some  
5 pre-McNally cases.

6 And I think it's, to be perfectly  
7 candid, Your Honor, an -- an easier way for  
8 courts or potentially prosecutors just to get at  
9 -- at some of these things because, if you just  
10 say right to control or deprivation of economic  
11 information is enough, maybe it's a slightly  
12 easier route to prove to a jury, for example, or  
13 -- or to affirm on those grounds.

14 But we -- and it is possible for that  
15 theory to encompass too much. And I don't know  
16 that it's really actually been subject to very  
17 much abuse. I -- I -- I won't suggest that it  
18 hasn't been subject to abuse in some isolated  
19 cases, but I wouldn't submit that we would  
20 expect --

21 JUSTICE KAGAN: Okay.

22 MR. FEIGIN: -- a lot of defendants  
23 to --

24 JUSTICE KAGAN: Thank you. You've  
25 answered the question.

1 MR. FEIGIN: Yeah.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Gorsuch?

4 JUSTICE KAVANAUGH: Can I just pick up  
5 on Justice Kagan and Justice Jackson's question?  
6 Because my understanding is the government's  
7 been pushing this theory, and it's not you  
8 personally, but the government has been pushing  
9 this theory for several decades, and lots of  
10 people have been convicted under it.

11 And I think the reason is, you just  
12 said, it's easier to convict people under this  
13 incorrect articulation of the theory than under  
14 the correct articulation of the law. I think  
15 you just said that. And that's -- that's very  
16 problematic to -- to think back on the various  
17 cases that have been there over the years.

18 Now I think you said to Justice Kagan  
19 you acknowledge that there are -- there are some  
20 cases like that. And then to, you know, come  
21 here in the bright light of this Court, for the  
22 government to then say, actually, you know, that  
23 theory doesn't hold up, it's -- again,  
24 appreciate the candor, but looking back on the  
25 government pushing this theory all those years

1 is not -- not an ideal scenario.

2 MR. FEIGIN: Well, let me just make  
3 absolutely clear what I'm saying. I think this  
4 might have been an easier way in some cases to  
5 explain things to the jury.

6 I am not suggesting that -- and,  
7 frankly, I have a lot of sympathy for the  
8 government -- well, I suppose I should, but --

9 (Laughter.)

10 MR. FEIGIN: -- I have a lot of  
11 sympathy for the government where you are faced  
12 with Second Circuit law, for example, that  
13 just thoroughly --

14 JUSTICE KAVANAUGH: But like in the  
15 Wallach case, going back --

16 MR. FEIGIN: -- insists on thinking  
17 about it this way.

18 JUSTICE KAVANAUGH: -- the Wallach  
19 case, and, you know, there -- we can name the  
20 names. There -- the government was not just  
21 some bystander here. Again, it's not you  
22 personally. So I'm just looking back at the  
23 scenario, and then it finally gets to this  
24 Court, like, oh, actually, that theory doesn't  
25 work.

1           MR. FEIGIN: Your Honor, I suppose we  
2 could debate particular facts of particular  
3 cases, but Wallach in particular is a case in  
4 which the --

5           JUSTICE KAVANAUGH: I -- I --

6           MR. FEIGIN: -- funds -- yeah.

7           JUSTICE KAVANAUGH: -- I didn't mean  
8 to get into particulars.

9           MR. FEIGIN: There are various cases  
10 that we -- and, as we've explained in our brief,  
11 the core set of cases to which this has been  
12 applied and the -- the overwhelming set of cases  
13 in which we found Second Circuit decisions on it  
14 have been fraudulent-inducement cases like this  
15 that we could have brought on another theory.

16           I think it's asking a lot of federal  
17 prosecutors to go to the Second Circuit, say:  
18 Here's some language that this court has -- that  
19 this court has endorsed a couple of times, that  
20 they've never explicitly overruled, but we're  
21 going to tell you that this is wrong. We're  
22 going to start thinking about this case in a  
23 different way than you, Judges, have been  
24 thinking about these kinds of cases, and we  
25 still think that it fundamentally covers all the



1 cases that you, Judges, think it covers, but  
2 here is a different way of thinking about it.

3 JUSTICE KAVANAUGH: So, on -- on the  
4 word "all" in what you just said, I thought you  
5 had said to Justice Kagan you were acknowledging  
6 that it actually is not all.

7 MR. FEIGIN: I -- I apologize. I  
8 forget what I used "all" to modify in that  
9 sentence.

10 JUSTICE KAVANAUGH: That all the cases  
11 would have come out the same way if it had been  
12 properly charged.

13 MR. FEIGIN: Oh, I -- I'm --

14 JUSTICE KAVANAUGH: And -- and I --

15 MR. FEIGIN: I apologize, Your Honor.  
16 I -- I -- I think we haven't found many cases,  
17 if any --

18 JUSTICE KAVANAUGH: That's fair.

19 MR. FEIGIN: -- that we think are  
20 really problematic.

21 JUSTICE KAVANAUGH: You gave a good  
22 answer there.

23 MR. FEIGIN: Okay.

24 JUSTICE KAVANAUGH: It's fair, you  
25 know, the Second Circuit. So that's -- I

1 understand that. So I'll stop there.

2 JUSTICE KAGAN: Truth be told, I mean,  
3 I guess I was a little bit surprised to hear you  
4 say it's easier to convince a jury. I would  
5 have thought it's very easy to convince a jury  
6 that \$750 million is property and not very easy  
7 to convince a jury that something called the  
8 right to control one's own assets is property.

9 I -- I mean, I find it a little bit of  
10 a sort of weird way to think about property, and  
11 I suspect most juries would too.

12 MR. FEIGIN: You --

13 JUSTICE KAGAN: So I guess, again,  
14 it's like why did anybody go down this road?

15 MR. FEIGIN: Well, Your Honor, I -- I  
16 think my answer to you -- and I appreciate the  
17 chance to clarify it -- is that -- was that it  
18 was an easier way to go with courts and juries.

19 I think courts started to think of it  
20 this way first. And then, once you have court  
21 instruction on this, it is a lot easier to  
22 simply, as I was suggesting to Justice  
23 Kavanaugh, go along with circuit law and --  
24 rather than to ask for a whole new, de novo set  
25 of instructions. And so the indictment in this

1 case, the instructions in this case follow along  
2 with what the Second Circuit has been doing for  
3 35 years.

4 And I think, as to how I suggested  
5 this might have been an easier way to think  
6 about it, I think, to judges who articulated  
7 this theory first -- I don't think it was juries  
8 or prosecutors necessarily -- if you look at  
9 judicial opinions articulating this theory,  
10 they're taking language that was used in this  
11 Court's own opinions in flagging a potentially  
12 still valid theory of fraud.

13 JUSTICE KAGAN: Thank you.

14 MR. FEIGIN: And -- yeah. Sorry.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett?

17 JUSTICE BARRETT: Mr. Feigin, my  
18 question is very practical. Coming to the end  
19 of your argument here, let's say that you lose  
20 on right to control, meaning, as stated by the  
21 Second Circuit on the question presented, you  
22 lose that. Then you have two interests. One is  
23 to salvage the conviction in this case, and the  
24 other is to make sure that whatever we say about  
25 the right to control doesn't harm the

1 government's long-term interest in prosecuting  
2 cases that might come around the edges of it.

3           If we write the opinion this way and  
4 say the right-to-control theory is invalid  
5 because the right to control one's assets --  
6 being deprived of economically valuable  
7 information deprives one of the right to control  
8 one's assets, and that's not a traditional  
9 property interest, or that it conflates the  
10 materiality and intent to defraud one of  
11 property elements, period, does that solve the  
12 government's problem about cases coming down the  
13 pike and are writing this too broadly?

14           MR. FEIGIN: So, Your Honor, I think  
15 -- if -- if I'm understanding correctly, I  
16 think, if you write an opinion that suggests --  
17 I wouldn't say it so much conflates the intent  
18 to harm necessarily -- sorry, there is no intent  
19 to harm element. The intent to defraud --

20           JUSTICE BARRETT: Defraud.

21           MR. FEIGIN: -- element and the  
22 materiality element. I would say it conflates  
23 the materiality element and the -- and the  
24 property element. It takes what's properly  
25 understood as the essential element requirement

1 of materiality, which has deep roots --

2 JUSTICE BARRETT: Yeah.

3 MR. FEIGIN: -- starting with Justice  
4 Story, in this -- in the particular context of  
5 fraudulent inducement and transmutes it into a  
6 tangible harm requirement that's attached to the  
7 property.

8 I think, if the Court makes clear that  
9 that's not the right way to go about this and  
10 that that's the way the Second Circuit has been  
11 going about this, as long as the Court makes  
12 clear that in doing so the Second Circuit has  
13 been identifying a set of cases that may well  
14 meet the traditional elements of property fraud,  
15 I -- I -- you know, that's not the --

16 JUSTICE BARRETT: We don't even have  
17 to say that. We're just resolving this case,  
18 this QP. But, if we resolve it the way -- I  
19 mean, I don't think you and I are really far off  
20 in your description of the conflation here.

21 But, if we describe it that way and  
22 just say period and don't talk about alternate  
23 theories that might sustain the conviction in  
24 this case or any of the others that you're  
25 discussing with Justice Kavanaugh, that solves

1 the government's long-term problem?

2 I mean, when I say long-term problem,  
3 I mean concern about what harm precedent from  
4 this Court might do down the road.

5 MR. FEIGIN: Well, I would -- perhaps  
6 I could make a more modest request for an  
7 additional sentence there that would say we are  
8 not expressing any view as to whether, through  
9 application of those requirements, the Second  
10 Circuit has identified cases that do meet the  
11 traditional elements of property fraud as  
12 traditionally understood, without expressing an  
13 opinion on that one way or another, just to make  
14 sure the Court's not misunderstood as expressing  
15 some sort of negative opinion about that.

16 JUSTICE BARRETT: Fair enough.  
17 Thanks.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Jackson?

20 JUSTICE JACKSON: Can I just follow up  
21 by asking, if we had that additional sentence,  
22 would it be the government's position that it  
23 could then go back to the Second Circuit and  
24 perhaps even to the district court and seek a  
25 conviction on the traditional basis in this

1 case?

2 MR. FEIGIN: We do think that that  
3 would be open to us, Your Honor, although, if  
4 they have preserved jury instruction issues that  
5 the Second Circuit believes are still open,  
6 which may well be the case, then I think, if  
7 this Court were to remand, that would present  
8 different issues than the sufficiency issue that  
9 I was discussing with Your Honor earlier.

10 But I -- you know, our -- our  
11 submission to this Court is that on pure  
12 sufficiency grounds, the facts that are not only  
13 in the record but under the findings that the  
14 jury necessarily made in this context do fit the  
15 traditional elements of --

16 JUSTICE JACKSON: So you're --

17 MR. FEIGIN: -- property fraud.

18 JUSTICE JACKSON: -- saying you would  
19 not have to retry Mr. Ciminelli. You could make  
20 the argument that, on Justice Barrett's  
21 formulation, with the additional sentence that  
22 we're not touching traditional property, you  
23 could go back in this case and ask the lower  
24 courts for a conviction on the record that  
25 currently exists?

1                   MR. FEIGIN: Your Honor, let me make  
2 -- I think that argument would -- I think we  
3 would make that argument, and it would encompass  
4 two pieces. And you might disagree with us more  
5 on the second than on the first.

6                   The first is on a pure sufficiency of  
7 the evidence challenge, we do not think that  
8 there has been anything established if the Court  
9 says what Justice Barrett and I were just  
10 discussing, that it has been established that  
11 these defendants did not commit property fraud,  
12 which is the essence of the --

13                   JUSTICE JACKSON: But isn't that the  
14 --

15                   MR. FEIGIN: -- sufficiency challenge.

16                   JUSTICE JACKSON: -- role of the jury?  
17 Doesn't the law need to be settled before it  
18 goes to the jury so that the jury then makes a  
19 determination of whether or not the person is  
20 guilty?

21                   What I'm worried about is the  
22 suggestion that we can come now to this Court,  
23 essentially change what the legal requirements  
24 are, and then send it back and have you convict  
25 somebody under the new law without a jury



1 speaking to it.

2 MR. FEIGIN: So I'd suggest that if  
3 that's Your Honor's instinct, that is -- the way  
4 to encapsulate that would be in the requirement  
5 of a new trial with new jury instructions if  
6 these jury instructions weren't harmless error  
7 on these facts, not by saying that the  
8 sufficiency challenge succeeds and what these  
9 defendants did, which would always have been  
10 considered fraud, is not, in fact, fraud.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Rebuttal, Mr. Dreeben?

14 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN  
15 ON BEHALF OF THE PETITIONER

16 MR. DREEBEN: Thank you, Mr. Chief  
17 Justice.

18 What Mr. Feigin just said is that we  
19 raised a sufficiency case, but it should be  
20 turned into a jury instruction error case. I  
21 don't see how the government can maintain  
22 simultaneously that the right-to-control theory  
23 is invalid and that somehow this case gets to be  
24 retried under its new legal theory.

25 Now, as for Mr. Feigin's contention

1 that the jury actually decided the elements of  
2 its new fraud theory, all the Court has to do is  
3 look at the jury instructions on pages 60A to  
4 62A of the Petition Appendix.

5 First of all, the scheme was not  
6 described as one to obtain contract assets,  
7 which is what my friend now would have the  
8 scheme constitute.

9 On page 60A, the scheme is described  
10 as a scheme to slant the development contract so  
11 that Mr. Ciminelli would be selected as  
12 preferred developers. This was a transaction in  
13 which the first stage was selection of a  
14 developer, the second stage was the negotiation  
15 of the actual River Bend contracts under which  
16 money would be paid.

17 There was no money paid under the  
18 preferred developer contracts. They do not  
19 identify the kind of fraud in property proceeds  
20 that my friend now says is required.

21 Then, when you come to the jury  
22 instructions themselves, as Justice Sotomayor  
23 read, they identify a different property  
24 interest. They identify the right to control  
25 rather than the contract proceeds as the assets.

1                   They omit the new essence of the  
2 bargain requirement, which the government  
3 submits is the correct materiality standard.  
4 Had that been the standard at trial, we would  
5 have been permitted to argue that the River Bend  
6 contract is the only contract at issue, this  
7 preferred developer status and the competitive  
8 landscape that led to it was not part of that  
9 contract, it's barred by an integration clause,  
10 and it cannot be the basis for saying that it's  
11 the essence of the contract.

12                   The government also has a new "by  
13 means of" requirement that the acquisition of  
14 the money has to be by means of the false  
15 statement.

16                   Here, there's a break in the causal  
17 chain between the competitive situation to  
18 become a preferred developer and the  
19 hard-fought, arm's length negotiation of the  
20 contract.

21                   And the government itself says that we  
22 would have that defense. At page 47 of the  
23 government's merits brief, it says that, "In  
24 many cases," and I'm quoting, "where a victim  
25 receives fair value in a transaction [...], a

1 misrepresentation will not have gone to an  
2 essential element of the bargain."

3           It also seems it will not have been  
4 the circumstance by means of which the money was  
5 acquired. And the government relied on that  
6 theory of right to control really answering the  
7 question that came up in the dialogue with  
8 Justices Kagan and Kavanaugh.

9           It makes the government's ability to  
10 get a conviction much easier. This isn't an  
11 abstract question of whether the evidence looked  
12 at from hindsight years later in this Court  
13 could conceivably have supported a valid theory  
14 of property fraud. We were denied again and  
15 again the right to admit evidence because the  
16 government relied on the right-to-control  
17 theory.

18           We detailed this at the petition reply  
19 brief at page 11, the Kaloyeros reply brief at  
20 page 9, and you can look at the Petition  
21 Appendix at 33A, where the Second Circuit says  
22 the defendants wanted to introduce evidence that  
23 this transaction was entirely fair as a way of  
24 refuting that it was designed to inflict a  
25 property harm. The Court says can't do that

1 because of right to control.

2           So I think that when you add all of  
3 those things together, this is not a case in  
4 which the government can revive an abstract  
5 theory that it has come to this Court for the  
6 first time and says, if you look at the Second  
7 Circuit's doctrine differently, it really would  
8 satisfy the elements of a proper property fraud  
9 theory.

10           They waived that. They waived it, as  
11 Justice Gorsuch pointed out, when they  
12 superseded the indictment to get rid of it, and  
13 they litigated this case throughout  
14 strategically to make their burden lighter to  
15 convict on right to control.

16           I think, at this point, the only  
17 proper judgment is a judgment of acquittal.  
18 This is not an abstract sufficiency of the  
19 evidence case. This is whether the evidence was  
20 sufficient to support the charges made in this  
21 indictment. That is the only legal basis on  
22 which the conviction could be sustained.

23           If the right-to-control theory falls,  
24 so does the conviction. The Court should  
25 reverse, should not remand. It should direct

1 the entry of a judgment of acquittal.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel. The case is submitted.

4 (Whereupon, at 12:38 p.m., the case  
5 was submitted.)

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<p style="text-align: center;"><b>\$</b></p> <p><b>\$750</b> [6] 32:8,24,24 36:25 58:20 65:6</p> <hr/> <p style="text-align: center;"><b>1</b></p> <p><b>1002</b> [1] 57:21 <b>103</b> [1] 17:20 <b>11</b> [1] 75:19 <b>11:11</b> [2] 1:15 3:2 <b>12:38</b> [1] 77:4 <b>125</b> [1] 48:2 <b>134</b> [1] 48:2 <b>1346</b> [2] 25:15,18 <b>14</b> [1] 36:22 <b>150</b> [1] 3:21 <b>19</b> [1] 50:23</p> <hr/> <p style="text-align: center;"><b>2</b></p> <p><b>2</b> [1] 31:16 <b>20</b> [2] 29:14 50:23 <b>2022</b> [1] 1:11 <b>21-1170</b> [1] 3:4 <b>22</b> [1] 33:13 <b>22a</b> [1] 47:15 <b>23</b> [1] 33:13 <b>27</b> [1] 36:22 <b>28</b> [1] 1:11</p> <hr/> <p style="text-align: center;"><b>3</b></p> <p><b>3</b> [2] 2:4 47:23 <b>31</b> [1] 2:7 <b>319-2</b> [1] 13:21 <b>33A</b> [1] 75:21 <b>35</b> [1] 66:3</p> <hr/> <p style="text-align: center;"><b>4</b></p> <p><b>467</b> [1] 41:10 <b>47</b> [2] 20:20 74:22</p> <hr/> <p style="text-align: center;"><b>6</b></p> <p><b>60A</b> [2] 73:3,9 <b>62A</b> [1] 73:4</p> 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