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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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.

C O N T E N T S

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

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

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 The government superseded the indictment to drop that theory.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

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

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

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

I welcome the Court's questions.

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

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

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

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

through a fraudulent scheme.

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

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

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

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

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

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

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

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

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

MR. DREEBEN: So, Justice Kagan, I

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

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

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

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

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

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

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

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

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

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

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

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

order to sustain the prosecution.

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

JUSTICE BARRETT: But can't we just --

JUSTICE JACKSON: Well --

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

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

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

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

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

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

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

And that is the same, I think, result

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: I -- I know --

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

JUSTICE ALITO: Go ahead.

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

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

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

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

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

Did you waive here?

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

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

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

We've gotten --

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

MR. DREEBEN: That's preserved.

JUSTICE SOTOMAYOR: -- preserved your jury instruction?

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

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

And the government's --

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

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

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

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

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

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

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

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

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

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

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

Is there not fraud there?

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

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

MR. DREEBEN: Yes. Yes.

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

MR. DREEBEN: Well --

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

Why isn't that fraud?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Thomas, anything further?

Justice Sotomayor?

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

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

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

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

JUSTICE SOTOMAYOR: Why isn't that false pretenses?

MR. DREEBEN: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh? No?

Justice Barrett?

Justice Jackson? Okay.

Thank you, counsel.

MR. DREEBEN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Feigin.

ORAL ARGUMENT OF ERIC J. FEIGIN

ON BEHALF OF THE RESPONDENT

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

If I could just start with two main points, one about the scope of property fraud generally and the other about how the right-to-control doctrine fits into that.

It's always been property fraud to have fraudulent inducement like in this case, where the victim is tricked into paying for something fundamentally different from what he bargained for.

Both in their reply brief at Footnote 2 and just now, Petitioner acknowledges that receiving specific property different from what the victim expected, like a horse with a different name, even if it has equal value, can be fraud.

To the extent there's daylight between the parties about the substance of what property fraud covers, I think it goes to cases of what I might call pedigree fraud, where there's a lie about the certification of property or important

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

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

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

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

I think --

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Counsel, given

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Counsel, you --

MR. FEIGIN: Yeah.

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

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

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

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

And --

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

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

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

And then what you have is a species of

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

I think the best examples are at pages --

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

MR. FEIGIN: I'm sorry.

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: I think we're all --

MR. FEIGIN: Yeah.

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

MR. FEIGIN: Okay.

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

appears is in merits briefing before this Court.

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

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

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

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

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

MR. FEIGIN: Well, Your Honor --

JUSTICE GORSUCH: In this case?

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

JUSTICE GORSUCH: I guess I'm --

MR. FEIGIN: -- Mustacchio or Free --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But what we would very much object to

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

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

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

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

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

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

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

particular item.

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

Now we could argue --

JUSTICE SOTOMAYOR: Mr. Feigin --

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

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

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

You've disavowed that, correct?

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

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

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

JUSTICE SOTOMAYOR: Would you --
MR. FEIGIN: -- what we --
JUSTICE SOTOMAYOR: -- would you --
MR. FEIGIN: -- on what we're defending and what we're not?
JUSTICE SOTOMAYOR: No, no, no. Just answer --
MR. FEIGIN: Okay.
JUSTICE SOTOMAYOR: -- my questions, okay, because -- are you defending the Second Circuit's view that a deprivation of economically valuable information is enough to prove fraud?
MR. FEIGIN: Your Honor, if the definition started and stopped there, we do think that is an overbroad definition of property fraud.
JUSTICE SOTOMAYOR: Okay. So you're saying that definition by the Second Circuit you're not defending?
MR. FEIGIN: We are not defending that in all of its possible permutations. What we are defending here is how that has been applied and limited by the Second Circuit, in particular, with its tangible harm requirement

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

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

Is that an accurate statement of the law?

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

JUSTICE SOTOMAYOR: Don't give me a context.

MR. FEIGIN: Okay.

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

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

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

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

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

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

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

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

The -- I think, really, there are two

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

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

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

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

theory, and they convicted on that theory.

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

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

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

was invalid?

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

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

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

CHIEF JUSTICE ROBERTS: You can finish.

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

Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Justice Thomas?

Justice Sotomayor, anything further?

Justice Kagan?

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

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

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

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

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

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

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

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

MR. FEIGIN: I don't think that was

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

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

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

JUSTICE KAGAN: Okay.

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

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

MR. FEIGIN: Yeah.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

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

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

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

is not -- not an ideal scenario.

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

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

(Laughter.)

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

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

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

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

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

JUSTICE KAVANAUGH: I -- I --

MR. FEIGIN: -- funds -- yeah.

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: And -- and I --

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

JUSTICE KAVANAUGH: That's fair.

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

JUSTICE KAVANAUGH: You gave a good answer there.

MR. FEIGIN: Okay.

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

understand that. So I'll stop there.

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

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

MR. FEIGIN: You --

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

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

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

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

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

JUSTICE KAGAN: Thank you.

MR. FEIGIN: And -- yeah. Sorry.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

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

JUSTICE BARRETT: Defraud.

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

of materiality, which has deep roots --

JUSTICE BARRETT: Yeah.

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

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

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

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

the government's long-term problem?

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

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

JUSTICE BARRETT: Fair enough. Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

case?

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

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

JUSTICE JACKSON: So you're --

MR. FEIGIN: -- property fraud.

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

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

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

JUSTICE JACKSON: But isn't that the --

MR. FEIGIN: -- sufficiency challenge.

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

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

speaking to it.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Dreeben?

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

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

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

Now, as for Mr. Feigin's contention

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

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

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

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

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

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

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

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

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

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

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

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

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

because of right to control.

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

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

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

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

the entry of a judgment of acquittal.

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

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

Y