No. 21-1170

In the Supreme Court of the United States

LOUIS CIMINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals, which applied a "right to control" theory of property fraud, correctly found sufficient evidence to support petitioner's convictions for wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit wire fraud, in violation of 18 U.S.C. 1349.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 13 F.4th 158.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2021. A petition for rehearing was denied on November 1, 2021 (Pet. App. 57a-58a). On January 7, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 1, 2022. The petition was filed on February 18, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire-fraud statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money

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

18 U.S.C. 1343.

The fraud-specific conspiracy statute further provides that "[a]ny person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 18 U.S.C. 1349.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. Pet. App. 42a. The court of appeals affirmed. *Id.* at 1a-37a.

1. Petitioner was the owner of a Buffalo-based construction company, LPCiminelli. Pet. App. 6a-7a, 9a. Beginning in 2013, petitioner engaged in a scheme to take advantage of then-Governor Andrew Cuomo's "Buffalo Billion" initiative, under which the State of New York aimed to invest one billion dollars of public money for development projects in the Buffalo area. *Id.* at 5a-9a; see C.A. App. 1175.*

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* Respondents Kaloyeros, Aiello, and Gerardi were convicted at the same trial for crimes stemming from a similar scheme involving

The scheme was run through Alain Kaloyeros, the head of an economic and research organization at the University of Albany, which is part of the State University of New York (SUNY). Pet. App. 5a. Because of restrictions on state agencies engaging directly in public-private partnerships, Kaloyeros used a nonprofit corporation—Fort Schuyler Management Corporation (Fort Schuyler)—to purchase land and develop the facilities for the Buffalo Billion project. *Id.* at 5a-6a. Fort Schuyler was controlled by a board of directors whose members (including Kaloyeros) were appointed by SUNY and the SUNY Research Foundation. *Id.* at 6a. Kaloyeros was "in charge of developing proposals for projects under the Buffalo Billion initiative." *Id.* at 5a.

Petitioner forged his connection with Kaloyeros by hiring Todd Howe, "a consultant and lobbyist with a longstanding relationship with the Cuomo administration." Pet. App. 5a. Kaloyeros had himself been paying Howe $25,000 per month of state funds to improve Kaloyeros's standing with the governor's office, efforts that had helped Kaloyeros to secure his prominent role in the disbursement of Buffalo Billion funds. *Ibid.* LPCiminelli, for its part, began paying Howe to help the company "obtain[] state-funded work." *Id.* at 7a; see *id.* at 6a-7a. LPCiminelli initially paid Howe's firm $100,000 per year, but later increased the payments to $180,000 per year. C.A. App. 1178-1179; C.A. Supp. App. 872-873.

In the summer of 2013, Kaloyeros and Howe began formulating a scheme to award the state contracts for projects in Buffalo to LPCiminelli. Pet. App. 6a-8a; see

funds for development projects in Syracuse. See Pet. App. 5a-13a. Although the property-fraud convictions from that scheme are sufficiently analogous to petitioner's that they should be treated similarly, they are not directly at issue.

C.A. Supp. App. 877-881. Although Kaloyeros lacked unilateral control over the selection of contractors, he was able to manipulate the request-for-proposals process through which Fort Schuyler solicited bids. Pet. App. 7a. Kaloyeros convinced the Fort Schuyler board to select a "preferred developer" through a process that was intended to help ensure that state funds were "spent in a transparent and competitive way," with the chosen developer then given the first opportunity to noncompetitively come to terms on all future Buffalo projects. *Id.* at 7a-8a (capitalization and citations omitted). Then, taking advantage of his involvement in drafting the requests, Kaloyeros collaborated with petitioner and Howe to transform the purportedly competitive process for selecting the preferred developer into one that was steered toward LPCiminelli's selection. *Id.* at 7a-11a.

More specifically, petitioner and others at LPCiminelli collaborated with Kaloyeros and Howe to develop a set of requirements, to be inserted into a request for applications to be the preferred provider, that would be distinct to LPCiminelli. Pet. App. 8a. In response to Howe's initial request for a list of qualifications to help ensure LPCiminelli's selection, the company recommended that the process focus on factors other than price and sent a list that emphasized experience in western New York. See C.A. App. 1183-1184, 1192, 1575-1577, 1619; C.A. Supp. App. 877. Howe forwarded LPCiminelli's list to Kaloyeros, who pushed back on it because the proposed qualifications were "not unique to [petitioner]'s company." C.A. App. 1578. Kaloyeros insisted that, instead, they "need[ed] more definite specs, like minimum X years in Y, Z number of projects in high tech, etc, etc." *Ibid.*

Howe accordingly brainstormed with an LPCiminelli executive to come up with qualifications "unique to LPC[iminelli]" that would "[p]revent [other firms] from competing," such as a requirement of a minimum number of years working in Buffalo. C.A. App. 1193-1994; see *id.* at 1619-1620. Kaloyeros, meanwhile, shared nonpublic information about development plans with petitioner's company, e-mailed petitioner a draft of a preferred-provider request from a parallel state venture in Syracuse, and solicited petitioner's feedback on "replac[ing] Syracuse with Buffalo and fine tun[ing] the developer requirements to fit." *Id.* at 1593; see *id.* at 1036-1039, 1196-1197, 1579-1589. Kaloyeros later sent petitioner a request for "company statistics (years in business, some key projects, including the latest at Buffalo state, etc)." *Id.* at 1613; see C.A. Supp. App. 879. LPCiminelli supplied the requested information, including the data point that LPCiminelli had "over 50 years of experience." C.A. App. 1603; see *id.* at 1602-1613; C.A. Supp. App. 879.

Those efforts ultimately resulted in Fort Schuyler's board of directors passing a resolution authorizing the issuance of a request for proposals for preferred-developer status in Buffalo that included LPCiminelli-specific requirements. J.A. 105-108. The resolution stated that the board was attempting to select a preferred developer "[u]pon completion of a competitive RFP [request for proposals] process." J.A. 107. But as a result of the conspirators' scheme, the request indicated that a bidder "must demonstrate its ability to meet" various "requirements" that were tailored to LPCiminelli, including:

- "Over 50 years of proven experience and successful track record in the construction and operation

of mixed-use facilities and buildings * * * in the Greater Buffalo Area";

- "Location of headquarters and major operations in the Greater Buffalo Area, with extensive knowledge and demonstrated know how of the local real estate market and business and financial drivers in the Greater Buffalo area"; and
- "Fully integrated and comprehensive in-house skills and services, including design, architecture, legal, financial, leasing, construction, and facility management/lease services, with sophisticated tools and advanced capabilities."

C.A. App. 1914-1915.

Petitioner was "very hot" when he learned about Kaloyeros's inclusion of the 50-year requirement in the request, commenting, "[t]hat's the type of thing that will get a[n] RFP thrown out." C.A. App. 1207; see *id.* at 1206. And after the 50-year requirement caught the attention of a news reporter, Kaloyeros claimed that it was a typographical error and that the requirement was intended to be 15 years. Pet. App. 10a-11a; see C.A. App. 1348-1349, 1052-1053. Meanwhile, although the Buffalo request for proposals imposed a "blackout period" during which all communications between interested developers and Fort Schuyler were to be conducted through designated channels to avoid any unfair competition, LPCiminelli continued to communicate with Howe (and through him, Kaloyeros) about its application. Pet. App. 9a; see *id.* at 9a-10a; C.A. App. 1080-1081, 1217.

When LPCiminelli informed Howe that another company was representing itself as a "gatekeep[er]" for the Buffalo request for proposals, Kaloyeros e-mailed that

competitor—copying Fort Schuyler personnel, including a member of the board—and insisted that the selection process would be "merit based" and must not be "pre-cooked" or "single[] out anyone." C.A. App. 1208-1209; C.A. Supp. App. 738, 748; Pet. App. 10a (citation omitted); see C.A. App. 1048, 1050; 6/19/18 Trial. Tr. 398-399. "Presumably * * * to combat any perception that the RFP was tailored to a particular bidder," Kaloyeros ultimately determined that Fort Schuyler should in fact select two preferred developers for Buffalo. Pet. App. 11a. But Howe communicated to LPCiminelli that it would receive the largest contract and invited its input on which company should be selected as the second developer. C.A. App. 1216-1217; see C.A. Supp. App. 737.

The application that LPCiminelli submitted included the express representation that no person or organization had been "retained, employed or designated * * * to attempt to influence the procurement process." C.A. App. 1884. And while Kaloyeros recused himself from the final selection process for the Buffalo project, his stated ground was his involvement with the governor's office, not his (hidden) relationship with LPCiminelli. *Id.* at 1082. In January 2014, the Fort Schuyler board selected LPCiminelli and McGuire Development Company, LLC—the company that LPCiminelli had recommended—as the preferred developers for Buffalo. J.A. 109-112; C.A. App. 1217. The board's resolution stated that Fort Schuyler's evaluation committee had recommended the two companies "as part of a competitive procurement process that included the RFP." J.A. 111.

Following its selection as a preferred developer, LPCiminelli entered into a memorandum of under-

standing with Fort Schuyler for construction of the venture's marquee project, a large manufacturing facility in Riverbend. See J.A. 113-124; C.A. App. 1084. The memorandum represented that LPCiminelli had been selected as a preferred developer "after a competitive process including the RFP." J.A. 115. A subsequent "notice to proceed" for the Riverbend project, J.A. 125-132 (capitalization and emphasis omitted), similarly represented that the parties had entered into an agreement following "a competitive bidding process under the RFP," J.A. 125. LPCiminelli later entered a final contract for the Riverbend project, see J.A. 133-177, under which it would receive $750 million, Pet. App. 12a; C.A. App. 1172.

2. Based on the Buffalo development scheme, a grand jury in the Southern District of New York charged petitioner, Kaloyeros, and others with crimes including wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. J.A. 31-34.

At trial, the district court instructed the jury that it could find petitioner guilty of those wire-fraud charges only if it found beyond a reasonable doubt that "the alleged scheme contemplated depriving Fort Schuyler of money or property." J.A. 41. The court stated that "[p]roperty includes intangible interests such as the right to control the use of one's assets" and that "[t]he victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Ibid.* The court defined "potentially valuable economic information" as "information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of

goods or services received or the economic risks of the transaction." *Ibid.*

The district court's instructions emphasized, however, that "[i]f all the Government proves is that the [d]efendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the Government will not have met its burden of proof." J.A. 41-42. Instead, the government had to show that petitioner exposed Fort Schuyler to "tangible economic harm," such as "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." J.A. 42.

The jury found petitioner (as well as Kaloyeros) guilty on both counts. Pet. App. 14a, 42a-43a. The district court sentenced him to 28 months of imprisonment, to be followed by two years of supervised release. *Id.* at 14a, 44a, 46a.

3. The court of appeals affirmed. Pet. App. 1a-37a.

Petitioner challenged the sufficiency of the evidence, contending that a "right-to-control theory of wire fraud" is "invalid" because "the right to control one's own assets is not 'property' within the meaning of the wire fraud statute." Pet. App. 4a n.2. The court, however, noted that a "right-to-control theory of wire fraud is well-established in Circuit precedent." *Ibid.* (citing *United States* v. *Finazzo*, 850 F.3d 94, 105-109 (2d Cir. 2017)). And it found petitioner's alternative, record-based, sufficiency claims to be meritless. *Id.* at 14a-23a.

The court of appeals emphasized that the evidence, viewed in the light most favorable to the government, Pet. App. 15a, showed that "Fort Schuyler employed

the RFP process precisely because of its desire for free and open competition, and that the * * * Board relied on this aspect of the process to achieve its economic objective—selecting the lowest-priced or best-qualified vendor," *id.* at 18a; see *id.* at 15a. The court observed that, "in rigging the RFP[] to favor [his] compan[y], [petitioner] deprived Fort Schuyler of 'potentially valuable economic information'" that "would have resulted from a truly fair and competitive RFP process." *Id.* at 18a (citation omitted). And the court found that the evidence supported the finding that petitioner "knew about the scheme to rig the RFP[], and that it was at least foreseeable to [him] that doing so would deprive Fort Schuyler of its ability to award contracts that were the result of a fair and competitive bidding process." *Id.* at 23a.

The court of appeals rejected petitioner's claim that the rigged process could not have harmed Fort Schuyler because it only gave his company "the right to negotiate with Fort Schuyler for work that would be forthcoming." Pet. App. 18a (citation omitted). The court observed that although preferred developers were "not guaranteed any project * * * , they indisputably had 'a leg up because they had been preselected.'" *Id.* at 19a (citation omitted). The court likewise rejected petitioner's claim that the government had failed to show that Fort Schuyler would have obtained a better deal in the absence of the fraud. *Id.* at 18a-19a. The court observed that the wire-fraud statute, which prohibits a "scheme" to defraud, 18 U.S.C. 1343, does not require that the contemplated harm actually occur, Pet. App. 20a-21a; see *id.* at 29a. And the court highlighted evidence showing that, "absent the fraud, Fort Schuyler

would have considered more, and perhaps stronger, applications in response to the RFP[ ]," as well as testimony from representatives of companies with "construction management fees [that] were typically lower than those of * * * LPCiminelli." *Id.* at 20a n.8.

SUMMARY OF ARGUMENT

Petitioner successfully schemed to obtain hundreds of millions of dollars in public-development funding, charging prices higher than a competitor's might have been, by lying about the manipulation of the process through which his company was selected as the best-qualified developer. That scheme was property fraud.

A. A defendant commits property fraud by engaging in a "scheme * * * for obtaining money or property," "by means of" material misrepresentations, with intent to defraud. 18 U.S.C. 1343. The ordinary meaning of "money or property" "extend[s] to every species of valuable right and interest," *Pasquantino* v. *United States*, 544 U.S. 349, 355 (2005)—a definition that can clearly encompass contract funds. And a defendant "obtains" that property even if he provides consideration in return. In the contracting context, the materiality requirement requires the government to prove that a reasonable person would attach, or it was evident that the victim did attach, critical importance to the existence or nonexistence of a misrepresented fact in determining his choice of action in the transaction—that is, that the misrepresentation went to the essence of the contract. And the intent-to-defraud element requires proof that the defendant intended to induce reliance on his misrepresentation. Although financial harm to the victim commonly arises from fraudulent schemes, the fraud statute does not require proof that the defendant caused or intended to cause such harm.

B. In assessing whether the government proved property fraud here, the Second Circuit applied a "right to control" theory recognized by circuit precedent. The Second Circuit has usually described that theory as reflecting that "money or property" can include a victim's right to control the disposition of its assets. But without further limitation, that conception could lead to overbroad results that would expand property fraud beyond its definition at common law and as Congress would have understood it.

In contexts like this one, however, the Second Circuit has applied the right-to-control theory in a more limited manner to identify cases that satisfy all of the property-fraud elements. The core set of cases in which the Second Circuit applies the theory are those in which a defendant fraudulently induces a victim to enter into a transaction. In that situation, the object of the scheme is obtaining money or other consideration in the transaction that indisputably qualifies as "money or property." And the Second Circuit has made clear that a conviction under the right-to-control theory requires a scheme that "contemplated" a "risk of tangible economic harm" by depriving the victim of " 'potentially valuable economic information' " concerning its decision to enter into a transaction. *United States* v. *Finazzo*, 850 F.3d 94, 107 n.15, 111-112 (2017) (citation omitted).

Although proof of actual or intended economic harm is not a necessary element of fraud, requiring such proof in a fraudulent-inducement case generally identifies schemes that satisfy the traditional elements of property fraud. The amount that the victim may be overpaying is part of the money or property that the defendant seeks to obtain from the contract; a tangible economic

effect is typically the sort of essential aspect of a bargain that is considered material; and a defendant who deliberately contemplates economic harm acts with intent to induce the victim's reliance on the material misrepresentations.

C. In this Court, petitioner has disclaimed any challenge to the district court's right-to-control instructions and instead contests only the evidence supporting his convictions. Whether viewed through the lens of the right-to-control theory or through a straightforward application of the statutory elements, petitioner's scheme satisfies every element of property fraud. The scheme sought to obtain contract funding ultimately worth $750 million. The misrepresentations about the nature of the process through which LPCiminelli had been named a preferred developer met the "demanding" standard for materiality in the fraudulent-inducement context, *Universal Health Servs., Inc.* v. *United States*, 579 U.S. 176, 194 (2016), because the process's fairness was critical for Fort Schuyler, whose finances and proper functioning as a state agent both depended on it. Petitioner's deception was also intentionally designed to induce reliance. In addition, as the Second Circuit concluded, petitioner's scheme contemplated causing economic harm: The whole point of the scheme was to insulate LPCiminelli from competition with other developers who might have offered lower fees or a better balance of price and performance.

D. Petitioner's policy concerns about overcriminalization do not provide a basis for setting aside his convictions or adding elements that have no basis in the statutory text or common-law principles that the statute incorporates. Any such concerns can instead be addressed through the traditional elements of property

fraud—such as the limitations on actionable omissions and the strict context-specific application of the materiality standard—as well as by various other statutory and common-law limitations. A proper application of those limitations would eliminate any concern that property fraud will supplant honest-services fraud or allow for conviction solely on the basis of undisclosed self-dealing. And in any event, those concerns are not implicated by petitioner's convictions, which rest on a scheme to use affirmative material misrepresentations to obtain hundreds of millions of dollars directly from the victim.

ARGUMENT

PETITIONER'S SCHEME TO OBTAIN HUNDREDS OF MILLIONS OF DOLLARS BY MEANS OF MATERIAL MISREPRESENTATIONS VIOLATED 18 U.S.C. 1343 AND 1349

The wire-fraud statute requires the government to show that a defendant, intending to defraud his victim, made material misrepresentations with the object of obtaining money or property. Petitioner contends that the Second Circuit's right-to-control theory is invalid because the right to control one's assets does not constitute "property" covered by the fraud statutes. The Second Circuit has not always been consistent about the requirements of the right-to-control theory or how those requirements map onto the elements of the statute. But the theory has typically been applied to fraudulent-inducement cases like this one, in which the object of the deceptive scheme—the funds or other property the defendant will gain from the transaction that he seeks to mislead the victim into entering—plainly qualifies as "money or property."

As a matter of first principles, therefore, the fraudulent-inducement cases that the Second Circuit

has analyzed as involving the right to control can also be analyzed as straightforward property fraud aimed at obtaining money or other traditional assets. This case illustrates the point: Whether viewed through the lens of the right-to-control theory or not, the evidence was plainly sufficient to satisfy each of the elements of wire fraud. Petitioner's scheme sought and obtained hundreds of millions of dollars; it did so by materially misrepresenting that a rigged selection process had been open, fair, and competitive; and it did so with intent to defraud—that is, with intent that those misrepresentations would induce Fort Schuyler to enter into the contract. Neither petitioner nor respondents and amici supporting him identify any element of the wire-fraud statute that his conduct failed to satisfy. Petitioner's convictions should be affirmed.

A. A Defendant Commits Property Fraud By Scheming To Obtain Money Or Property, Using A Material Misrepresentation, With Intent To Defraud

The wire-fraud statute prohibits using the wires to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343. The mail and bank fraud statutes use similar language. 18 U.S.C. 1341, 1344. This Court has long construed the parallel language in those statutes *in pari materia* and in light of the common law. See, *e.g.*, *Neder* v. *United States,* 527 U.S. 1, 20, 22-23, 25 (1999). Thus, as petitioner acknowledges (Br. 38), the federal fraud statutes require the government to prove three basic elements grounded in the common law: a scheme to obtain money or property; material misrepresentations or actionable omissions; and an intent to defraud.

1. Scheme to obtain money or property

The wire-fraud statute requires the government to show that a fraudulent scheme was designed to obtain money or property. Although the statute refers to a scheme or artifice "to defraud, *or* for obtaining money or property," 18 U.S.C. 1343 (emphasis added), this Court has construed the statute's "disjunctive language as a unitary whole," *Kelly* v. *United States*, 140 S. Ct. 1565, 1571 (2020); see *McNally* v. *United States*, 483 U.S. 350, 358-360 (1987). As a result, to sustain a conviction for property fraud, money or property "must be an 'object of the fraud.'" *Kelly*, 140 S. Ct. at 1573 (quoting *Pasquantino* v. *United States,* 544 U.S. 349, 355 (2005)).

In interpreting the phrase "money or property," this Court has relied on the "ordinary or natural meaning" of those terms. *Pasquantino,* 544 U.S. at 356 (citation omitted). That ordinary meaning "extend[s] to every species of valuable right and interest." *Ibid.* (quoting *Black's Law Dictionary* 1382 (4th ed. 1951) (*Black's*)). Thus, while the phrase does not include the right to an employee's "honest services," *Skilling* v. *United States,* 561 U.S. 358, 402 (2010) (citation omitted); see *id.* at 399-402, or "purely regulatory" government decisionmaking, *Cleveland* v. *United States*, 531 U.S. 12, 22 (2000) (citation omitted), it encompasses "'property rights'" both "tangible" and "'intangible,'" *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (citations omitted). Such rights include, for example, the right to "confidential business information," *ibid.*, and "[t]he right to be paid money," *Pasquantino,* 544 U.S. at 356.

The plain meaning of "obtain[]," 18 U.S.C. 1343, in turn, includes the acquisition or retention of property that would otherwise be in someone else's hands. See

Pasquantino, 544 U.S. at 355-356; *Carpenter*, 484 U.S. at 25-26; see also *Black's* 1228 (defining "obtain" as "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way"). The plain meaning of that term establishes that a defendant "obtains" property even if he provides some consideration—or even fair value—in exchange. A worker who has received a paycheck has indisputably "obtained" the funds therein, even though it is remuneration for his labor. The whole point of a contract is to exchange one thing for another, because each party views the trade as beneficial. But that does not make the two (or more) things that are exchanged equivalent in the sense of canceling each other out; instead, each party "obtains" what the other has agreed to provide. Thus, if a defendant induces a victim to enter into a transaction through material misrepresentations, his performance of his end of the bargain does not alter the fact that he "obtained" the victim's funds.

2. By means of material misrepresentation

Conviction under Section 1343 also requires that the scheme seek to obtain money or property "by means of" misrepresentations (or, in certain limited circumstances, actionable omissions, see *Chiarella* v. *United States*, 445 U.S. 222, 235 (1980)). 18 U.S.C. 1343. That requirement is satisfied when the false statement or omission "is the mechanism naturally inducing [the victim] to part with money [or property]." *Loughrin* v. *United States,* 573 U.S. 351, 363 (2014). This Court has further held that the fraud statutes incorporate the common-law requirement that the misrepresentation or actionable omission must concern a "*material* fact." *Neder*, 527 U.S. at 22. A fact is material if "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the

transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action." *Id.* at 22 n.5 (quoting Restatement (Second) of Torts § 538 (1977) (Torts Restatement)); see Pet. Br. 39 (relying on this definition).

a. As this Court has recognized in addressing fraud under the False Claims Act, ch. 67, 12 Stat. 696, the context-dependent materiality standard is "demanding" and "rigorous" in the contracting context. *Universal Health Servs., Inc.* v. *United States*, 579 U.S. 176, 192, 194 (2016). A misrepresentation that is "of too frivolous a nature, or of too small a thing[,] * * * will not be sufficient." 2 Joel Prentiss Bishop, *Commentaries on The Criminal Law* § 458, at 252 (6th ed. 1877) (Bishop); see 1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 195, at 197-198 (10th ed. 1870) (Story). Instead, under one pertinent articulation of the standard, "a misrepresentation is material if it 'went to the very essence of the bargain.'" *Universal Health Servs.,* 579 U.S. at 193 n.5 (quoting *Junius Constr. Co.* v. *Cohen*, 178 N.E. 672, 674 (N.Y. 1931)); see, *e.g.*, 1 Story § 195, at 197 (similarly describing misrepresentations that "go to the essence of the contract").

b. Although a misrepresentation may be more likely to influence a person's "choice of action" if it pertains to an economic aspect of a transaction, that is not an invariable requirement. A range of noneconomic misrepresentations might have a similar effect depending on the nature of the transaction.

That range includes misrepresentations as to "more-or-less sentimental considerations that the ordinary man regards as important," even if the consideration is

not "one that a reasonable man would regard as affecting the pecuniary advantages of the transaction." Torts Restatement § 538, cmt. d. For example, because it is "natural that a person should wish to possess portraits of his ancestors even though they have no value as works of art," a "fraudulent misrepresentation that a particular picture is a portrait of the purchaser's great-grandfather is a misrepresentation of a material fact." *Ibid.* The range of potential non-economic but material matters also includes victim-specific considerations that are obviously of special importance to him, even if not to "a reasonable man." *Id.* § 538(2)(b). Someone may make clear, for example, that he wants to sell his pet horse to a horse enthusiast, rather than to a glue factory, even if a "reasonable man" might care only about getting the best price.

The understanding that certain noneconomic misrepresentations can qualify as material is deeply rooted in the common law. In the nearly two-century-old case of *State* v. *Mills*, 17 Me. 211 (1840), for example, "the owner of a horse pretended it was a particular one called Charley, knowing it was not," and "the court held this to be a sufficient false pretence, even if the horse were as good and as valuable as the Charley." 2 Bishop § 451, at 247-248; see *Mills*, 17 Me. at 216; see also, *e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 108, at 753-754 (5th ed. 1984) (Prosser on Torts); *J.I. Case Threshing Mach. Co.* v. *Webb*, 181 S.W. 853, 855 (Tex. Civ. App. 1915) (misrepresentation to buyer that his wife wanted to own particular automobile); *Washington Post Co.* v. *Sorrells*, 68 S.E. 337, 337-338 (Ga. Ct. App. 1910) (similar, as to portraits); *Janes* v. *Trustees of Mercer Univ.*, 17 Ga. 515, 519-520 (1855) (misrepresentation to donor that school taught manual

labor). In more modern times, courts have recognized that a defendant commits fraud by, for example, making misrepresentations to secure a government contract intended only for small or disadvantaged businesses. See, *e.g.*, *United States* v. *Maxwell*, 579 F.3d 1282, 1302-1303 (11th Cir. 2009).

3. Intent to defraud

Finally, the fraud statutes incorporate the common-law requirement of intent to defraud—that is, intent to induce reliance. *Carpenter*, 484 U.S. at 28. "At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent." *Chiarella*, 445 U.S. at 227-228; see Torts Restatement § 525 ("One who fraudulently makes a misrepresentation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."); 2 C.G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* § 1174, at 1004 (4th English ed. 1876) (Addison on Torts) ("[I]f a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, * * * the party telling the falsehood is responsible in damages in an action for deceit."); 3 Dan B. Dobbs et al., *The Law of Torts* § 664 (2d ed. 2011) (Dobbs) (similar). The mens rea for the crime of false pretenses—which petitioner characterizes as "consistent" with the federal fraud statutes, Br. 34 n.23—is accordingly satisfied when the defendant "intend[s] the victim to rely upon his misrepresentation." 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.7(f)(2) (3d ed. 2018) (LaFave).

4. No requirement of actual or intended financial harm

Financial harm to the victim is a common feature of fraudulent schemes. Indeed, the Second Circuit's right-to-control cases have long required the government to show such harm, which serves to cabin the reach of the right-to-control theory. See pp. 27-29, *infra*. But this Court has rejected the contention that the federal fraud statutes include any requirement of actual or contemplated financial harm.

As this Court has long recognized, proof of actual harm is not required because the federal fraud statutes "prohibit[] the 'scheme to defraud,' rather than the completed fraud." *Neder*, 527 U.S. at 25. And because even a failed scheme violates the statute, the government need not prove that the victim *actually* relied on the defendant's misrepresentations, much less that the victim suffered harm. *Id.* at 24-25. Nor is such a requirement a necessary feature of "obtain[ing]" property. Providing a good or service in exchange for money does not alter the fact that the money was "obtained."

This Court has likewise rejected the suggestion that the fraud statutes require a showing of intended or contemplated financial harm. In *Shaw* v. *United States*, 580 U.S. 63 (2016), a defendant charged with bank fraud argued that he could not be convicted because "he did not intend to cause the bank financial harm." *Id.* at 67. This Court disagreed, emphasizing that the statute "demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Ibid.* The Court instead endorsed Judge Learned Hand's observation that "'a man is nonetheless cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.'" *Ibid.* (quoting *United States* v. *Rowe*, 56 F.2d 747, 749 (2d

Cir.) (Hand, J.), cert. denied, 286 U.S. 554 (1932)); see *Loughrin*, 573 U.S. at 366 n.9 (rejecting the argument that the bank-fraud statute "requires the Government to prove that the defendant's scheme created a risk of financial loss to the bank"); *Carpenter*, 484 U.S. at 26 (rejecting any requirement of actual or intended "monetary loss").

The Court's decision in *Shaw* accords with the settled rule at common law. For example, "it is generally held that the lack of financial loss is no defense" to the common-law crime of "false pretenses." 3 LaFave § 19.7(i)(3). And even if a plaintiff in a common-law civil action for fraud could not obtain damages in the absence of financial harm, she might be able to obtain rescission. See 3 Dobbs § 664 n.6 ("If the plaintiff bargained for a Titian but got a Giorgione of equal value, she would have no pecuniary damages, but should be permitted to get rescission.").

To the extent that a fraudster's intent to harm the victim was ever relevant at common law, it was relevant only to whether punitive damages were warranted, not to whether the defendant had "culpab[le]" intent. Prosser on Torts § 107, at 741; see, *e.g.*, 2 *Addison on Torts* § 1175, at 1005 ("In order to maintain an action for deceit, * * * it is not necessary to prove that the false representation was made from * * * a wicked motive of injury to the plaintiff."); 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* 538 (1888) ("[I]t is not necessary, even in an action for damages, for the plaintiff to prove that the defendant intended to injure him."); Henry T. Terry, *Intent to Defraud*, 25 Yale L.J. 87, 99 (1915) (explaining that "the maker of the representation * * * need not intend to cause any actual harm or loss").

Of course, financial harm to the victim is a common—perhaps even typical—feature of fraud. And as the Second Circuit's right-to-control cases illustrate, the presence of intent to cause such harm can be a useful indicator of fraud. See pp. 29-31, *infra*. But it is not required: An applicant who obtains a job (and the accompanying salary) by materially misrepresenting her qualifications commits fraud even if she intends to, and does, perform the required work. A student who obtains scholarship funds by materially misrepresenting his qualifications commits fraud even though the grantor pays no more than it would have if the scholarship had gone to someone else. And a contractor commits fraud if it obtains a lucrative contract by materially misrepresenting its qualifications, whether or not the client can prove that she could have secured better or cheaper work had the fraud not occurred. See, *e.g.*, *United States* v. *Leahy*, 464 F.3d 773, 787-789 (7th Cir. 2006) (rejecting challenge to sufficiency of indictment where defendants falsely represented critical qualifications in order to obtain government contracts, despite defendants' argument that the victim received "a service worth every dime in the contracts"). In these examples, whether or not the victims got fair value in a pocketbook sense, they have been cheated out of a fundamental aspect of what they sought to acquire.

B. The Right-To-Control Theory, Appropriately Limited, Identifies Cases Of Property Fraud Involving Fraudulent Inducement To Enter Into A Transaction

Over several decades, the Second Circuit has developed what it calls the "right to control" theory of fraud. Petitioner (and respondents and amici supporting him) criticize that theory by asserting that it "cannot be

squared with what the wire fraud statute requires: deprivation of a traditional property interest." Pet. Br. 15 (emphasis omitted). They maintain, in particular, that the right to control property is not itself the sort of "property" protected by the fraud statutes. The Second Circuit has not always been consistent in its articulation of the requirements of the right-to-control theory, or in its efforts to ground those requirements in the elements of fraud. And to the extent that language in the court's opinions might suggest that depriving a victim of economically valuable information, without more, necessarily qualifies as "obtaining money or property" within the meaning of the fraud statutes, that is incorrect. Those statements do not, however, reflect the core of the cases in which the Second Circuit has applied the right-to-control theory.

Instead, the theory is typically applied in cases like this one, where the defendant obtains money or other consideration that indisputably fits any definition of "property," by fraudulently inducing the victim to enter into a transaction. In such cases, the money or other consideration in the transaction ordinarily satisfies the "obtaining money or property" element because the whole point of the scheme is to obtain that consideration. See, *e.g.*, *United States* v. *Binday*, 804 F.3d 558, 585 (2d Cir. 2015) (noting that "commission payments" "'were the 'money or property' implicated by the scheme'") (citation omitted), cert. denied, 579 U.S. 917 and 579 U.S. 918 (2016). And although the Second Circuit has most often described the right to control one's assets as a form of property, the requirements of the right-to-control theory are best understood as identifying those fraudulent inducements that satisfy the other elements of the fraud statutes—chiefly, materiality.

Understood in that way, the right-to-control theory, when appropriately limited, serves to identify fraudulent inducements that violate the federal fraud statutes.

1. The money or other consideration in the transaction at issue in a right-to-control case ordinarily satisfies the statute's "money or property" element

Petitioner contends (Br. 12) that the Second Circuit's right-to-control theory "depart[s] from traditional concepts of fraud," principally focusing on the Second Circuit's description of that theory as resting on a "property" right to "control" the disposition of one's assets, see Pet. Br. 12-35. Petitioner asserts that "the federal fraud statutes reach only schemes to deprive a victim of a *traditional* property interest," Br. 10, and that neither "the deprivation of a right to make informed economic decisions" nor the "purported deprivation of a property interest in controlling one's assets," Br. 15, qualifies as such an interest.

This Court's decisions provided a doctrinal footing for the Second Circuit's view that "property interests * * * include the interest of a victim in controlling his or her own assets." *Binday*, 804 F.3d at 570 (citation omitted). The Court has explained, for example, that it is "elementary" that "[p]roperty is more than the mere thing which a person owns," but also "consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917) (citing 1 William Blackstone, *Commentaries* 134 (1765)). If, however, the right to make informed decisions about the disposition of one's assets, without more, were treated as the sort of "property" giving rise to wire fraud, it would risk expanding the federal fraud

statutes beyond property fraud as defined at common law and as Congress would have understood it.

But petitioner errs in suggesting that the intangible right to control one's assets is the only form of property implicated in cases covered by the right-to-control theory. The theory is typically applied when the defendant fraudulently induces the victim to enter into a contract or other transaction. Indeed, the Second Circuit has made clear that the theory requires a showing that the defendant's misrepresentations deprived the victim " 'of potentially valuable economic information' " in the context of a victim's decision to "enter[] into a discretionary economic transaction." *Binday*, 804 F.3d at 570 (citation omitted); see J.A. 41 (jury instructions focusing on the "transaction" in this case). And when such misrepresentations are intended to cause a victim to enter into a transaction in which money is paid or other property is provided to the defendant or his coconspirators, the scheme satisfies the "obtaining money or property" element wholly apart from any intangible right of control: The very object of the scheme is to obtain the money paid under the contract.

2. *The right-to-control theory seeks to identify actionable fraudulent inducements by requiring a showing of tangible economic harm*

Although the Second Circuit has treated the "right to control" as a form of property, the court has explained the ultimate function and purpose of the right-to-control theory in a manner distinct from the need to ensure that a fraud involves "money or property." For the Second Circuit, the theory serves to distinguish "between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—

and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes." *Binday*, 804 F.3d at 570 (citation omitted).

As the theory has developed through its application to particular cases, the Second Circuit has identified the risk of tangible economic harm as a key distinction between the two scenarios. The Second Circuit's requirement of actual or contemplated tangible economic harm goes beyond what the fraud statutes require. But applied in combination with the theory's other requirements, it enables the right-to-control theory to reach only conduct that satisfies the required elements of a property interest, material misrepresentations, and fraudulent intent.

a. In a recent synthesis of its caselaw, the Second Circuit made clear that the "common thread of [its] decisions is that misrepresentations or non-disclosure of information cannot support a conviction under the 'right to control' theory unless those misrepresentations or non-disclosures can or do result in tangible economic harm." *United States* v. *Finazzo*, 850 F.3d 94, 111 (2017). In other words, the scheme must "contemplate[ ] some actual, cognizable harm or injury to the[ ] victims." *Id.* at 107 n.15.

Addressing its earlier, less specific descriptions of the right-to-control theory, the Second Circuit explained that the previously articulated requirement to "[d]epriv[e] a victim of 'potentially valuable' information" that is "'economic'" in nature is best understood to encompass only conduct that "*necessarily* creates a risk of tangible economic harm." *Finazzo*, 850 F.3d at 111 (citation omitted). And the court explicated

how an economic-harm requirement limits the theory's application overall. *Ibid.*

Petitioner contends (Br. 40) that "tangible harm under the right-to-control theory" is nothing more than "the deprivation of information that could influence economic decisionmaking." Accord Aiello Br. 28. But the theory does not consider "the information *itself*" to be property. *United States* v. *Viloski*, 557 Fed. Appx. 28, 33 (2d Cir. 2014) (finding jury instruction consistent with theory because it did not define property that way), cert. denied, 575 U.S. 935 (2015); see *United States* v. *Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994) (holding that "lack of information that might have an impact on the decision regarding where government money is spent, without more, is not a tangible harm"), cert. denied, 513 U.S. 1084 (1995). Instead, the "deprivation of information" must "*lead* to tangible harm." *Viloski*, 557 Fed. Appx. at 34 (emphasis added).

Citing scenarios in which the victim is clearly deprived of the benefit of its bargain, the Second Circuit has explained that the requisite "economic harm can be manifested directly—such as by increasing the price the victim paid for a good—or indirectly—such as by providing the victim with lower-quality goods than it otherwise could have received." *Finazzo*, 850 F.3d at 111. Accordingly, the court has suggested that, for example, "the 'right to control' theory would not be applicable" to a retail supplier who falsifies his identity merely to avoid "inter-personal animus" that would otherwise preclude a sale. *Id.* at 111 n.18. Instead, the Second Circuit has suggested such identity falsification would allow for fraud liability under the right-to-control theory only, for example, if the misrepresentation enabled the supplier "to charge the retailer higher prices,"

or concealed a fact that would "anger[] * * * customers" of the retailer, cause "reputational harm," and "could lead or did lead to economic losses." *Ibid.*

b. Limited in that manner, the "tangible economic harm" requirement enables the right-to-control theory to capture fraudulent-inducement cases that meet all of the elements of property fraud.

First, although the Second Circuit has not itself generally described its approach this way, a showing of "tangible economic harm" will typically focus attention on a particular subcomponent of the "money or property" that is the object of the scheme. For example, in many cases involving tangible economic harm, the defendant's scheme to obtain money in the form of a contract payment will necessarily encompass a scheme to obtain *extra* payment—namely, the delta between a fair price and the one that was charged. See, *e.g.*, *Black's Law Dictionary* 649 (11th ed. 2019) (defining "economic loss" as "[a] monetary loss"). Such overcharging cases are a classic form of property fraud. See, *e.g.*, *Schmuck* v. *United States*, 489 U.S. 705, 707 (1989) (describing sale of cars "for prices artificially inflated because of [falsified] low-mileage readings" as "a common and straightforward" fraud); *United States* v. *New S. Farm & Home Co.*, 241 U.S. 64, 71 (1916) (recognizing that "assign[ing] to [an] article qualities which it does not possess," including "the use to which it may be put, the purpose it may serve," is fraudulent).

Second, focusing on the potential for economic harm also helps to confine the right-to-control theory to schemes that satisfy the materiality requirement. The Second Circuit has described the right-to-control inquiry as turning on "whether the defendant's deception 'affect[ed] the very nature of the bargain.'" *United*

States v. *Johnson*, 945 F.3d 606, 612 (2019) (describing that inquiry as part of the intent-to-defraud element) (citation omitted; brackets in original), cert. denied, 141 S. Ct. 687 (2020); see *ibid.* (citing other Second Circuit decisions). That formulation is consistent with a traditional definition of materiality in the contracting context as assessing whether the misrepresentation "went to the very essence of the bargain." *Universal Health Servs.,* 579 U.S. at 193 n.5 (citation omitted).

The Second Circuit has accordingly recognized at times that the right-to-control theory functions as an application of property fraud's materiality requirement. See, *e.g.*, *United States* v. *Jabar*, 19 F.4th 66, 82 n.60 (2d Cir. 2021) (observing that the "right to control theory" "turns on the materiality of the misrepresentations"), cert. denied, 142 S. Ct. 1396 (2022); see also Pet. Br. 39 (noting that "some of the early right-to-control cases" focus on "the deprivation of 'economically material information'") (citation omitted). And petitioner himself endorses the view (Br. 39) that "a false statement that could affect economic decisions will always satisfy th[e] standard" for materiality. Accord Chamber of Commerce Amicus Br. 2 (asserting that the right-to-control theory "is indistinguishable from the materiality requirement").

Finally, the Second Circuit's focus on tangible economic harm has informed its articulation of the fraudulent-intent element of property fraud, which the court has described as requiring "'that defendants contemplated some actual, cognizable harm or injury to their victims' by deceiving them." *Johnson*, 945 F.3d at 614 (quoting *Finazzo*, 850 F.3d at 107 n.15). That articulation, although narrower than what this Court's precedents require, plainly identifies one way of satisfying

the fraud statutes' more general intent-to-defraud element. Petitioner's contention (Br. 40) that, under the right-to-control theory, "an economically relevant deception will always establish fraudulent intent" is misplaced. The intent element in such cases imposes an additional *mens rea* requirement beyond a harmful deception: the deception must be intentional, not accidental. See *Johnson*, 945 F.3d at 614 (defendant must "contemplate[ ]" harm to victim) (citation omitted); see also *Finazzo*, 850 F.3d at 108 (approving jury instructions stating that "To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive.") (citation omitted). The intent element therefore plays the same role under the right-to-control theory that it plays in other fraud cases, separating deliberate wrongdoers from those who may innocently utter falsehoods.

C. Petitioner Committed Property Fraud By Scheming To Obtain Money Through Lies About Key Features Of The Process That Positioned His Company To Receive That Money

In seeking this Court's review, petitioner explicitly disclaimed any challenge to "the adequacy of the jury instructions" and emphasized that his sole claim in this Court is that the evidence was insufficient to support his wire fraud convictions. Cert. Reply Br. 3 ("This petition focuses on the sufficiency issue alone."). In assessing sufficiency challenges, this Court does not consider the jury instructions, but instead simply asks whether the evidence was sufficient to carry the government's burden on each of the "elements of the charged crime." *Musacchio* v. *United States*, 577 U.S. 237, 243 (2016).

Petitioner does not dispute that the evidence was sufficient under the Second Circuit's right-to-control theory, instead arguing only that the theory is invalid. But even absent the right-to-control lens, the evidence readily supports petitioner's convictions on a straightforward application of the elements of property fraud. The use of the interstate wires in petitioner's scheme satisfied every element of property fraud: It was a scheme to obtain money or property, employing material misrepresentations, with an intent to defraud. In addition, although the wire-fraud statute does not require it, the evidence was also sufficient to show that petitioner's scheme contemplated tangible economic harm to Fort Schuyler.

1. Petitioner schemed to obtain Fort Schuyler's property by securing hundreds of millions of dollars in contract funds

Petitioner's scheme sought to "obtain[]" Fort Schuyler's "money or property," 18 U.S.C. 1343. The fundamental "object of the fraud," *Kelly*, 140 S. Ct. at 1573 (quoting *Pasquantino*, 544 U.S. at 355), was obtaining the contract funds for petitioner's company. And the direct result of the scheme's design was that Fort Schuyler literally paid "money," 18 U.S.C. 1343, to petitioner's company. Petitioner thereby sought to obtain, and succeeded in obtaining, a contract that was ultimately worth $750 million. C.A. App. 1038, 1172. And he personally received a portion of that payment as profits. See Consent Prelim. Order of Forfeiture as to Specific Property/Money Judgment, D. Ct. Doc. 980, at 2 (Feb. 11, 2019).

The three quarters of a billion dollars in contract funding, including the portion of it that petitioner per-

sonally received, readily qualify as "money or property." 18 U.S.C. 1343. They were "'property' in the victim's hands," *Pasquantino*, 544 U.S. at 355 (quoting *Cleveland*, 531 U.S. at 26), as well as in petitioner's hands, see, *e.g.*, *id.* at 356 ("The right to be paid money has long been thought to be a species of property.") (citing Founding-era treatises). And as previously discussed, see pp. 16-17, *supra*, whether paid out under a contract or otherwise, the "obtaining" of "money," 18 U.S.C. 1343, unambiguously satisfies the relevant statutory requirement. Here, "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." Pet. Br. 32 (quoting *Skilling*, 561 U.S. at 400).

2. *Petitioner's scheme relied on material misrepresentations, essential to the bargain, that his company was competitively and fairly identified as the best*

a. Petitioner did not obtain the $750 million contract honestly. Instead, he worked extensively with Kaloyeros to turn the process of selecting a preferred developer for Buffalo into a sham procedure that would result in LPCiminelli's selection. See, *e.g.*, Pet. App. 8a-9a. Meanwhile, Kaloyeros falsely assured others involved in the request for proposals that the process was competitive, stating that Fort Schuyler could neither "endorse nor support a pre-cooked process or any process that singles out anyone * * * for business before the RFP process has been completed." C.A. Supp. App. 738.

LPCiminelli's bid for preferred-developer status, in turn, represented that LPCiminelli had not "retained, employed or designated" anyone "to attempt to influence the procurement process." C.A. App. 1884. And when nailing down the details of the Riverbend project,

LPCiminelli signed both a memorandum of understanding and a subsequent notice to proceed with Fort Schuyler, each of which stated that LPCiminelli had been selected as a preferred provider after "a competitive bidding process." J.A. 125; see J.A. 115 ("competitive process").

All of those statements were false because the bidding process was not, in fact, competitive. The entire purpose of tailoring the request for proposals to LPCiminelli's qualifications was to "[p]revent [others] from competing," an approach that was obviously not "consistent with a fair and competitive RFP process." J.A. 69-70 (testimony of LPCiminelli employee); see C.A. App. 1209.

b. The coconspirators' misrepresentations did not concern a low-stakes matter, but were instead material to Fort Schuyler's decision to award funds to LPCiminelli, as well as the means by which LPCiminelli obtained those funds. A fair bidding process "was an essential element of the bargain," Pet. App. 22a, because it was critical to Fort Schuyler's economic interest in obtaining a bid that provided the best performance at the lowest cost.

As the court of appeals found, Fort Schuyler "relied on [the request for proposals] process to achieve its economic objective—selecting the lowest-priced or best-qualified vendor." Pet. App. 18a. The claim that LPCiminelli had already been competitively identified as the best developer was an essential aspect of Fort Schuyler's agreement with LPCiminelli for the Riverbend project, on what appeared in isolation to be reasonable contract terms, without assessing whether other contractors might have provided better or lower-cost services for that project.

The thrust of petitioner's deception was thus akin to a scheme in which a hired recruiter and his hand-picked candidate falsely assure a would-be employer that the candidate has been competitively identified as the most suitable, when in fact they colluded to select the candidate without actual consideration of her suitability. Insofar as the process to identify the best candidate was critical to the employer's willingness to negotiate to hire her, without comparing her to others, the agreed-upon wages (even if in themselves reasonable) were obtained by means of a material misrepresentation.

The analogous misrepresentation here was plainly critical to Fort Schuyler. As a preferred developer, LPCiminelli (along with its handpicked partner) received the exclusive ability to noncompetitively agree to a contract with Fort Schuyler on what might appear to be reasonable terms, even if they were not actually the best balance of price and performance. See Pet. App. 19a; J.A. 111-112; C.A. App. 1215-1216 (noting that there was no second request for proposals specific to the Riverbend project), 1231 (testifying that winning the request for proposals "guaranteed you the right to negotiate"). Fort Schuyler's willingness to hand LPCiminelli a contract without shopping around for better Riverbend bids turned on Fort Schuyler's wholly mistaken belief that LPCiminelli had already been competitively vetted and selected as the best potential partner for the project. In reality, however, the preferred-developer designation had been gift-wrapped for LPCiminelli, without the meaningful competition that was the linchpin of forgoing a traditional bid-solicitation process in contracting for the Riverbend development.

From the very beginning of its resolution authorizing a request for proposals, Fort Schuyler made clear

that a competitive process was vital to its selection of a preferred developer. See J.A. 107 (stating that the preferred developer would be selected "[u]pon completion of a competitive RFP process"). Multiple witnesses—including several Fort Schuyler board members—testified about the importance of a competitive process "[t]o obtain the most qualified vendor to do the work at the most reasonable price." J.A. 57-58 (former chair of Fort Schuyler board); see, *e.g.*, J.A. 50 (testimony of different former board chair that "a competition" would "allow[] for comparing various aspects of an RFP, whether it's price or history or financial stability or innovation or technological expertise"), 63 (testimony of LPCiminelli employee that "the competition will give you the best people on the job, the opportunity to kind of see what company can actually provide you in the manner that you want the best service and potentially the best price"), 85 (testimony of former Fort Schuyler board member that competition "is important" because it "brings quality and value to a RFP"). The misrepresentations about that process were accordingly essential to the bargain—and therefore material.

c. Notwithstanding the uncontested evidence of the central importance of a competitive process, petitioner suggests (Br. 8) that his misrepresentations were too attenuated to be material, because they concerned the process for selecting the preferred developer rather than the specific details of the Riverbend contract. The court of appeals correctly rejected that argument, which is refuted by the record. The competitive nature of the selection of a preferred developer was an essential feature of the Riverbend contract itself, expressly specified in both the memorandum of understanding and the notice to proceed for that project. J.A. 115, 125.

The competitive-vetting qualification was the essential prerequisite for Fort Schuyler's willingness to come to terms with LPCiminelli on the Riverbend contract without soliciting other bids. Fort Schuyler did not seek other Riverbend bids because LPCiminelli's proposal appeared to be a reasonable one and because Fort Schuyler believed it was securing the participation of the developer who had already been competitively identified as the one best-suited to meet its needs. As the court of appeals explained (Pet. App. 19a), walking away and incurring the considerable cost of effectively starting over at the point of the exclusive negotiation was highly unlikely. The trial testimony accordingly showed that both parties viewed the request-for-proposals process as the principal tool for awarding the Riverbend contract. See, *e.g.*, J.A. 48 (Q. "What type of process was used to select a builder for Riverbend?" A. "In this case it was the selection of a preferred developer."); C.A. App. 1208 (characterizing the "[B]uffalo developer R/P" as the "Riverbend procurement"), 1216 ("Riverbend was part of" the request for proposals). Moreover, any clear distinction between the request-for-proposals process and the subsequent contracting stage is untenable given Kaloyeros's personal oversight of contract negotiations. See C.A. App. 1020. The jury's evident rejection of petitioner's proffered distinction should be respected.

d. Because the right-to-control theory required a showing that the scheme contemplated tangible economic harm, the court of appeals did not address whether the misrepresentations were material to any noneconomic aspects of the transaction. But the definition of materiality, outside the specialized lens of the

right-to-control theory, can also encompass noneconomic considerations. See pp. 18-20, *supra*; see also Torts Restatement § 538 cmt. d. And here, the trial evidence made clear that petitioner's deception about the competitiveness of the process was material not only to Fort Schuyler's willingness to forgo solicitation of potentially lower Riverbend bids, but also to another fundamental aspect of what Fort Schuyler was paying for.

Independent of the economic advantages of a competitive process, Fort Schuyler—as an agent of the public—had a strong interest in a fair, transparent process. See, *e.g.*, J.A. 49 (testimony of state official that a "competitive and open process" was to "ensure public funds * * * are spent in a transparent and a competitive way"), 59 (testimony of former chair of Fort Schuyler board that tailoring the process "would be contrary to free and open competition, which is the basis of the policy for procurement"), 86 (testimony of former Fort Schuyler board member that "I wouldn't want a process that was in any way unfair or advantaged to any one person"). The existence of that process was critical to Fort Schuyler's willingness to hand over hundreds of millions of dollars in public funds.

To the extent that petitioner suggests (Br. 46) that such a noneconomic consideration is insufficient to support materiality in this context, that suggestion is misplaced. The critical materiality issue in cases that rely on noneconomic preferences is not, as petitioner would have it, whether a misrepresentation affects cost or functionality, see *ibid.*, but instead whether the victim receives something with the essential features of what he wanted. A brand-new Toyota Corolla may be the same in respect to cost and functionality irrespective of its color, but a buyer may care very deeply that she is

purchasing a blue one—and a seller would plainly commit fraud if he assured such a buyer that the car in question was blue when in fact it was red. See Torts Restatement § 538(2)(a)-(b) & cmt. d. Similarly, if a nonprofit university had a strong interest in supporting and being seen to support local businesses, an out-of-town supplier that secured a contract by falsely pretending to be local would commit fraud even if its products and price were as good as—or better than—what the university could have secured locally.

Here, Fort Schuyler had an analogous community-relationship interest, separate and apart from its direct financial interest, in ensuring a fair, "transparent" process. J.A. 49; see, *e.g.*, J.A. 59, 86. Among other things, that process allowed for public observation of a state agent's handling of a considerable amount of public funds. See, *e.g.*, J.A. 49, 59. Under black-letter materiality principles, the existence of that reasonable and evident interest would be sufficient even without the separate evidence of economic materiality.

3. Petitioner's scheme was intended to defraud by inducing reliance on the false representations about the nature of his company's preferred status

Finally, the evidence demonstrated that the participants in the scheme, including petitioner, acted with fraudulent intent. That evidence included e-mails "introduced at trial" showing petitioner and Kaloyeros "communicating with Howe on how to rig the RFP process." Pet. App. 22a. For example, Kaloyeros explicitly sought petitioner's input on how to "fine tune" the specifications for a preferred developer "to fit" LPCiminelli. C.A. App. 1593. To assist in tailoring those specifications, Kaloyeros asked petitioner for "company statistics (years in business, some key projects, including the

latest at Buffalo state, etc)," which LPCiminelli subsequently provided. C.A. Supp. App. 879; C.A. App. 1602-1613. The company then made multiple written representations that it had been selected in a competitive process—representations that were plainly intended to induce Fort Schuyler to enter into a $750 million contract. See J.A. 115, 125.

Nothing about that scheme, and what it accomplished, was inadvertent or accidental. Instead, it was fraudulent inducement of the sort that this Court has recognized for well over a century as a valid basis for a federal property-fraud conviction. See, *e.g.*, *Durland* v. *United States*, 161 U.S. 306, 313 (1896) (affirming mail-fraud conviction based on fraudulent inducement); *United States* v. *Sampson*, 371 U.S. 75, 77 (1962) (similar).

4. Petitioner's scheme contemplated economic harm to Fort Schuyler

Petitioner asserts (Br. 5) that "[t]he government offered no proof that * * * Fort Schuyler was deprived of a fair price, fair terms, or quality workmanship." "Nor," he asserts (Br. 5-6), "was there any evidence that Fort Schuyler could have obtained the same quality or a better price for the work from any other provider." See Pet. Br. 50; see also Kaloyeros Br. 5, 10; Aiello Br. 10-11, 35-36. But, again, this Court has emphasized that a victim " 'is none the less cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.' " *Shaw*, 580 U.S. at 67 (quoting *Rowe,* 56 F.2d at 749 (Hand, J.)). The Second Circuit's right-to-control precedents demand proof of economic harm, but a showing of actual or intended financial loss is not required under the wire-fraud statute. See pp. 21-23, 27-29, *supra*. And in any event, the

Second Circuit correctly held that petitioner's scheme satisfied an economic-harm requirement.

Petitioner's scheme contemplated inflicting "tangible economic harm" on Fort Schuyler. *Finazzo*, 850 F.3d at 111. A central goal of the process for identifying a preferred developer was to ensure that Fort Schuyler secured the most competitive bid, balancing price and qualifications. See pp. 34-36, *supra*. And the entire purpose of petitioner's bid-rigging scheme was to "[p]revent [others] from competing," J.A. 69, such that LPCiminelli could obtain for itself an economic benefit that included the delta between its contract with Fort Schuyler and the contract that might have resulted from a competitive process.

The jury here was instructed that it had to find a "tangible economic harm," such as "an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received," J.A. 42, and the jury's finding on that point was amply supported by the trial record. The government presented evidence that developers competed over the fees that they would charge for managing a construction project, and that it was "better for [LPCiminelli] to battle on qualifications rather than quantitative things like price" because it was "not always the low cost," J.A. 66-67; see Pet. App. 21a n.8; J.A. 81-82, 94-95, 102. That evidence "demonstrated that [the] defendants contemplated economic harm by preventing Fort Schuyler from fairly considering bids in a marketplace where lower prices might have been available." Pet. App. 34a.

The government also presented evidence that, "absent the fraud, Fort Schuyler would have considered more, and perhaps stronger, applications in response" to its solicitation of applications for preferred-developer

status. Pet. App. 20a n.8. "One representative from a rival company testified that he considered submitting a bid for the Buffalo RFP but decided not to because aspects of the RFP * * * left him with the impression that the project 'was being steered towards a local competitor.'" *Ibid.* (quoting J.A. 78). Had petitioner and his coconspirators not fraudulently rendered the process noncompetitive, Fort Schuyler "might have selected a preferred developer who could offer more favorable economic terms for development contracts than Fort Schuyler eventually negotiated." *Ibid.* Similarly, had they not falsely claimed that the process was in fact competitive, Fort Schuyler would not have bound itself to provide LPCiminelli (and its handpicked partner) with the ability to come to terms on a final contract without competing bids that might have offered acceptable services at lower cost.

Petitioner asserts (Br. 9 n.3) that this evidence "was not admitted to show that [other] firms would have offered lower fees on the Buffalo project." But actual damages are not an element under the wire-fraud statute. See *Neder,* 527 U.S. at 24-25. And even in the absence of direct evidence on the fees that other developers would have charged on the Riverbend project specifically, the jury could have inferred that the *object* of the scheme in this case was for LPCiminelli to profit at Fort Schuyler's expense by insulating itself from economic competition. See C.A. App. 1183-1184, 1192, 1575-1577, 1619; C.A. Supp. App. 877.

Petitioner also asserts (Br. 50) that "[t]he charged scheme did not depend on a showing that the defendants schemed to cause Fort Schuyler harm by deceiving it about * * * any * * * feature of their performance of their end of the bargain." But petitioner did not need

to tell lies about discrete aspects of LPCiminelli's performance, because the scheme had already deceived Fort Schuyler into believing that LPCiminelli offered the best all-around package as a "strategic development partner," vetted by a competitive bidding process. Pet. App. 7a. At that point, the outcome of the bargaining process was "pre-cooked," C.A. Supp. App. 738, such that petitioner could secure a payment that looked reasonable in a vacuum, rather than one that reflected true market competition.

D. Petitioner's Policy Concerns Are Misplaced

Petitioner, the respondents supporting him, and their amici raise a variety of policy concerns centered on perceived overcriminalization. *E.g.*, Pet. Br. 47. But such policy concerns could not justify the atextual and ahistorical limits that petitioner seeks to read into the fraud statutes. And in any event, the concerns that petitioner raises are overstated.

1. Traditional property-fraud doctrine already includes a number of principles that limit the scope of the federal fraud statutes. As an initial matter, petitioner's concern that the federal fraud statutes have become untethered from "traditional interests," and "inherently vague," Pet. Br. 26-27, is misplaced. No vagueness concern would arise from the recognition that a defendant schemes to "obtain[] money or property," 18 U.S.C. 1343, when he tries to secure contract funds. And in the context of the right-to-control theory, the "tangible economic harm" requirement, strictly applied, see *Finazzo*, 850 F.3d at 111, will identify classic instances of fraud, such as cases in which the defendant overcharged the victim.

A "demanding" and "rigorous" materiality standard, *Universal Health Servs.*, 579 U.S. at 192, 194, also limits

the property-fraud statutes' reach in this context. Where, for example, materiality turns on a particular victim's idiosyncratic preference, such as a preference to sell only to those who will treat the purchased item in a particular manner, that preference must be evident up front. See Torts Restatement § 538(2)(b). In addition, not every misrepresentation can be deemed to concern "the very essence of the bargain." *Universal Health Servs.,* 579 U.S. at 193 n.5 (citation omitted). For example, falsely claiming to share an alma mater, or a favorite professional hockey team, with the contracting agent may grease the skids for a vendor's selection, but would not likely be material to the bargain. Similarly, a contracting party's false agreement to comply with a contractual requirement, if it did not disturb the core of the bargain, likely would not be material. See *id.* at 195.

Application of the materiality standard will, of course, depend on the facts of specific cases, but the lengthy historical pedigree of factual findings on materiality illustrates that the concept is not unduly amorphous, incapable of consistent application, or substantively uncabined. See, *e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 512 (1995) (describing fraud precedents as having "recognized * * * that the materiality inquiry * * * 'is peculiarly one for the trier of fact'") (brackets and citation omitted). And the intent-to-defraud element of the statute serves to ensure that the statute does not serve as a trap for the unwary or the innocent. See *United States* v. *Williams*, 553 U.S. 285, 294 (2008).

In addition, given "the presumption that Congress intended to incorporate the common-law meaning of the term 'fraud' in the" federal fraud statutes, *Neder*, 527 U.S. at 23 n.7, common-law doctrines not at issue here may further constrain the application of those statutes.

For example, petitioner suggests that the government's theory would permit prosecution of "[t]ough negotiations." Pet. Br. 11; see Aiello Br. 36-39. But information about a party's negotiating position, such as what price the party is willing to pay or accept, has traditionally been excluded from the definition of fraud. See, *e.g.*, 1 Story § 199, at 201-203 (quoting *Vernon* v. *Keys*, (1810) 104 Eng. Rep. 246, 249 (K.B.)).

Similarly, statements of opinion (as opposed to fact) generally do not constitute material misrepresentations, with few exceptions. See, *e.g.*, 1 Story § 197, at 199-200; see also *Omnicare, Inc.* v. *Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 197-199 (2015) (Scalia, J., concurring in part and concurring in the judgment) (discussing the limited circumstances in which an opinion was actionable at common law). And "[p]uffery"—"exaggerated and vague statements * * * praising" a product or service—also typically do not qualify. 3 Dobbs § 676; see *New S. Farm & Home Co.*, 241 U.S. at 71.

2. Petitioner's portrayal (Br. 43-47) of the court of appeals' "right to control" theory as inconsistent or overbroad does not meaningfully account for the court's requirement that misrepresentations "cannot support a conviction under the 'right to control' theory unless those misrepresentations * * * can or do result in tangible economic harm." *Finazzo*, 850 F.3d at 111; see pp. 27-31, *supra*. To the extent that the economic-harm component was insufficiently described in the earlier circuit precedent on which petitioner primarily relies, the court's more recent decisions in *Binday* v. *United States* and *Finazzo* v. *United States* clarify the landscape. In any event, because petitioner's own conduct

was illegal under longstanding, uncontested fraud doctrine, upholding his convictions would neither violate the rule of lenity nor threaten to federalize "a wide range of conduct traditionally regulated by state and local authorities." *Cleveland*, 531 U.S. at 24; contra, *e.g.*, Pet. Br. 47-49; Aiello Br. 1; Law Professors Amicus Br. 16-24.

Petitioner also errs in asserting (*e.g.*, Pet. Br. 36-37) that affirmance here would enable the government to "circumvent" this Court's holdings in *McNally* v. *United States* and *Skilling* v. *United States*, which bar prosecutions for honest-services fraud, including under the honest-services statute, 18 U.S.C. 1346, in the absence of bribes or kickbacks. Accord Kaloyeros Br. 16-35. As respondent Kaloyeros acknowledges (Br. 26), those cases did not involve a property theory (as opposed to an honest-services theory) of fraud, and the Court did not foreclose application of a property theory in a particular case where the requisite facts are proved. See *McNally*, 483 U.S. at 360-361; see also *Skilling*, 561 U.S. at 367-368.

Contrary to petitioner's suggestion (Br. 36), moreover, nothing in this case implies that the government could "reframe virtually any undisclosed conflict of interest as a money-or-property fraud." This case does not involve an "undisclosed conflict of interest." *Ibid.* Instead, it involves repeated affirmative misrepresentations that the preferred-developer selection process was competitive, when in fact it was not. Those misrepresentations were included in written agreements between the parties and concerned a component of the transaction that was built into the contracting procedure and indispensable to Fort Schuyler. See, *e.g.*, J.A. 107, 115, 125; C.A. Supp. App. 738. Those circumstances

are far afield of the omission-based cases in petitioner's parade of horribles, see, *e.g.*, Pet. Br. 37 (hypothesizing, for example, "an attorney who fails to disclose a potential conflict of interest to a prospective client"), which implicate various limitations on fraud that are not relevant here.

Without a "duty to speak," a "nondisclosure" may well not be fraudulent in the first place. *Chiarella*, 445 U.S. at 235. In addition, while the misrepresentations in this case were material, it is unclear that the alleged omissions in many of petitioner's hypotheticals would be. In many cases where a victim receives fair value in a transaction, as was assumed to be the case in *McNally*, a misrepresentation will not have gone to an essential element of the bargain. Furthermore, the structure of many honest-services frauds also differs from the fraud here. *Skilling*, for example, involved a scheme that "was not 'prototypical,'" in which the defendant schemed to increase the value of his own portfolio by deceptively inflating his employer's stock price. 561 U.S. at 413 (citation omitted). Here, in contrast, "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." *Id.* at 400. Fort Schuyler paid hundreds of millions of dollars, and LPCiminelli obtained those funds.

The statutory "by means of" requirement, 18 U.S.C. 1343, provides another "significant textual limitation" that would be relevant to convoluted self-dealing schemes. *Loughrin,* 573 U.S. at 362 (emphasis omitted). That textual limitation requires more than "but-for caus[ation]"; it "demands that the defendant's false statement is the mechanism naturally inducing a [victim] to part with its money." *Id.* at 364-365; see *id.* at 363 (observing that the requirement is satisfied "most

clearly" when "the defendant seeks to obtain bank property by means of presenting the forgery directly to a bank employee"). If the relationship between an omission (or affirmative misrepresentation) and obtaining the property that is the object of a fraud is "too 'tangential,'" *id.* at 363 (brackets and citation omitted)—as it may well be in self-dealing cases, particularly those not already prosecutable as honest-services fraud—then it will not support a property-fraud prosecution.

At all events, any well-founded concerns about the reach of the fraud statutes are best addressed in a case that, unlike this one, actually presents them. Far from approaching the edges of the statute, this case concerns a successful scheme by petitioner to obtain $750 million in contract funding, charging more than a competitor might have, by lying about his manipulation of the bidding process to reduce competition for that contract. Because petitioner's fraud convictions satisfy every element of property fraud, they can and should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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