No. 21-1170

In the Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government has abandoned the right-to-control theory on which petitioner's conviction rests and substituted a new, sweeping, and equally flawed theory of fraud—one that it never voiced below. The government can cite no case of this Court embracing its theory in the 150 years since the enactment of the mail fraud statute. This Court should reverse.

The government indicted, tried, and convicted petitioner under the right-to-control theory. J.A. 31-34, 41-42. At the government's urging, the Second Circuit sustained petitioner's conviction under that theory, Pet. App. 16a-23a, and this Court granted certiorari to decide whether "the Second Circuit's

right-to-control theory of fraud … states a valid basis for liability under the" fraud statutes, Pet. i.

The government no longer defends that theory. Instead, it offers a novel interpretation of fraud and insists that the right-to-control doctrine is best understood as satisfying its new requirements—even though the court of appeals never heard those arguments or agreed with their premises. The government's litigation tactic flouts multiple bedrock principles. It treats this Court as one of first view, ignores the government's forfeiture, and asks the Court to affirm a conviction on a theory that neither the grand nor petit jury considered. This Court should enforce its rules, decide the question it granted review to resolve, and reverse.

The government's new theory is just as flawed as its old. Federal fraud law builds on the common law and thus requires a scheme that, if completed as intended, would amount to fraud at common law, which requires harm to a traditional property interest. The government's version of a fraudulent-inducement crime fails that test. It misreads common-law sources; requires multiple caveats, qualifications, and patches; creates vagueness and federalism concerns; and would nullify careful limits on honest-services crimes. Going down this path will produce a litigation quagmire for years to come and sweep countless garden-variety cases into federal court.

Measured against the theory of indictment, trial, and appeal, the evidence in this case is insufficient.

The Court should reverse and remand for entry of a judgment of acquittal.

ARGUMENT

I. PETITIONER WAS CONVICTED ON A THEORY THE GOVERNMENT DOES NOT DEFEND

The government concedes that the Second Circuit's right-to-control theory "is incorrect." Gov't Br. ("GB") 24. Treating "the right to make informed decisions about the disposition of one's assets … as the sort of 'property' giving rise to wire fraud," the government acknowledges, "would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." GB25-26. Yet "the Second Circuit has"—at the government's urging— "treated the 'right to control' as a form of property" for decades. GB26; Pet. App. 16a.

Instead of confessing error and admitting that it wrongfully convicted petitioner and countless others on a theory it now disavows, the government asks this Court to replace the flawed right-to-control theory with an even *broader* theory of property fraud. While the government's new theory is vague and untested, *see* Part II.C, at its core it asks the Court to view applications of the right-to-control theory through a "fraudulent inducement" lens, GB14. In the government's new framework, contract proceeds "ordinarily" satisfy "the 'obtaining money or property' element," GB24; any "harm" requirement vanishes, GB21-23; and "materiality" and "intent" are cross-pollinated and redefined, GB17-20. When the dust settles, the government suggests that the right-to-control theory sometimes proves *more* than fraud requires—but in other cases, less. *Compare* GB25 (theory works), *with* GB12 ("overbroad"). The

government does not locate this reconfigured theory in Second Circuit right-to-control cases, which the government admits to rewriting. *See* GB29.

The Court should not entertain this newly minted theory for at least three reasons. First, this Court is one of "review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The government did not press this theory below, and the court of appeals did not address it. The new theory is vague, untested, and dangerous. *See* Part II.C. To shore it up, the government suggests multiple equally vague and novel limits that it is unwilling to fully endorse and that often contradict hornbook law. This Court should not be the first in the land to adopt such a sweeping and destabilizing revision of important criminal laws.

Second, the government has forfeited its new argument that the federal fraud statutes cover all cases of fraudulent inducement and that the property at issue here is the contract funds. The government "never presented" that argument "to any lower court." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015). Rather, it argued that "the right to control assets—that is, to transact without being denied potentially valuable economic information—*is* the property" at issue here. Gov't C.A. Br. 162. In the absence of "unusual circumstances—none of which is present here"—the failure to present an argument in a lower court precludes resurrecting it on appeal. *Sachs*, 577 U.S. at 38; *see also California v. Texas*, 141 S. Ct. 2104, 2116 (2021) ("declin[ing] to consider" "novel alternative theory" offered by federal respondents that was not argued below); *United States v. Jones*, 565 U.S. 400, 413 (2012) (applying traditional forfeiture rule to the government in criminal case).

Finally—and critically important—this Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *see also McCormick v. United States*, 500 U.S. 257, 270 & n.8 (1991); *Dunn v. United States*, 442 U.S. 100, 106-07 (1979). Nor can it affirm on a theory not charged. *Stirone v. United States*, 361 U.S. 212, 216-19 (1960). The government's "contract funds are property" theory was not charged in the indictment. Nor was the jury instructed in line with its new understanding. *See* J.A. 31-34, 41-42; Kaloyeros Reply Br. 3-6, 11-12.

This Court should enforce its procedural rules and reverse. The government has the right to abandon the right-to-control theory it used to convict petitioner. It does not have the right to debut a *new* theory in this Court or in this case. "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

The government cannot evade these principles by arguing that petitioner raises a sufficiency challenge. GB31. The petition challenged the *legal theory* the court of appeals used to evaluate sufficiency: "This case squarely presents the question whether the right-to-control theory is a viable theory of fraud." Pet. 33; *see also* Pet'r Reply 3. The government now would demolish the court of appeals' reasoning and reconstruct a new framework of its own. The government's sole authority is *Musacchio v. United States*, 577 U.S. 237 (2016), which considered a procedural issue: how to conduct sufficiency analysis when "a jury instruction sets forth all the elements of

the charged crime but incorrectly adds one more element," *id.* at 243. *Musacchio* does nothing to support the government's wholesale revision of its substantive analysis of fraud and its attempt to fit the facts here into its new theory for the first time in this Court. Having granted review to address the right-to-control theory, the Court should resolve that issue by holding it invalid. The theory neither defines a traditional property right nor satisfies the statutory obtaining requirement. Pet. Br. ("PB") 15-35. That should be the end of the case.

II. THE GOVERNMENT'S NOVEL THEORY OF FRAUD IS WRONG

The essence of the government's new position is that all fraudulent inducements amount to criminal fraud, even where the scheme would produce no harm to a traditional property interest. The federal fraud statutes, however, criminalize only schemes *to defraud*—that is, schemes that, if completed as intended, would satisfy the common-law elements of fraud. At common law, harm to a traditional property interest was an essential element of fraud. A scheme to achieve a fair-value exchange without any harm to a traditional property interest was not fraud.

In enacting statutes penalizing an inchoate crime, Congress did not render the property-harm element irrelevant. While the government need not prove *actual* injury because the fraud statutes criminalize the scheme, not the completed act, the government still must show that the defendant devised a scheme that would harm a traditional property interest if completed. The government's theory dispenses with that element, with breathtakingly broad results. This

is at odds with federalism, vagueness principles, and this Court's decisions.

A. The Fraud Statutes Require A Scheme That, If Completed As Intended, Would Harm A Traditional Property Interest

1. The federal fraud statutes codify "common-law fraud," except where common-law rules are "clearly … inconsistent with the statutes Congress enacted." *Neder v. United States*, 527 U.S. 1, 25 (1999); *see* PB19; GB15. Because the common law made injury an essential element of fraud, that element is indispensable to assessing whether an individual has devised a *scheme to defraud*.

"[A]n ancient and well established legal principle" of the common law is "that fraud without damage or damage without fraud gives no cause of action." *Randall v. Hazelton*, 94 Mass. (12 Allen) 412, 414 (1866); *accord Sonnesyn v. Akin*, 104 N.W. 1026, 1028 (N.D. 1905) ("It is a well-settled maxim that fraud without injury is not actionable."); *People v. Cook*, 8 N.Y. 67, 79 (1853); *Pasley v. Freeman* (1789) 100 Eng. Rep. 450, 457 (KB); 1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 203, at 205 (10th ed. 1870).

Well before Congress's 1872 enactment of the mail fraud statute, the Court similarly recognized that "[i]n equity, as in law, fraud and injury must concur to furnish ground for judicial action." *Clarke v. White*, 37 U.S. (12 Pet.) 178, 178 (1838). More recently, the Court explained that "the common law has long insisted that a plaintiff" seeking damages for deceit prove "that he suffered actual economic loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005) (citing *Pasley*, 100 Eng. Rep. at 457). Although the

government omits the damages element by ellipsis, all of its cited sources agree that fraud requires harm.[1]

The injury requirement equally applied in equitable actions for rescission. *See Clarke*, 37 U.S. at 196; William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* 12, 51 (1868) ("Fraud without damage is not sufficient to support an action or to be a ground for relief in equity."); 2 John Norton Pomeroy, *Treatise on Equity Jurisprudence, as Administered in the United States of America* § 899, at 1264-65 (2d ed. 1892); Story § 203, at 205; George Tucker Bispham, *Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery* § 217, at 215 (1st ed. 1874). As this Court has explained, an equity court's "power" to "[cancel] an executed contract" for fraud "ought not to be exercised except in a clear case, and never … unless the complainant has been deceived and injured." *Atl. Delaine Co. v. James*, 94 U.S. 207, 214 (1876); *see also S. Dev. Co. of Nev. v. Silva*, 125 U.S. 247, 250 (1888).[2]

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[1] GB20 (citing 2 C.G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* § 1174, at 1004 (4th Eng. ed. 1876) ("thereby suffers damage"); Restatement (Second) of Torts § 525 (1977) ("liability … in deceit for pecuniary loss"); 3 Dan B. Dobbs et al., *The Law of Torts* § 664, at 643 & n.2 (2d ed. 2011) ("the harm typically must be pecuniary in nature")).

[2] A traditional property interest can be injured when a buyer receives property she did not bargain for, effectively denying her use and possession of specific property—for example, receiving a "Giorgione" instead of a "Titian." GB22 (quoting Dobbs, § 664 n.6); *see* PB20-23 (describing "Blackstonian trilogy" of property rights). This may explain cases like *State v. Mills*, 17 Me. 211

Although the fraud statutes are not limited to false pretenses, *Neder*, 527 U.S. at 24, the government also errs in excising (GB22) injury from that common-law crime. Courts recognized that if the victim "sustains no injury the offense is not committed." Hascal R. Brill, *Cyclopedia of Criminal Law* § 1271 (1923); *State v. Palmer*, 32 P. 29, 30 (Kan. 1893) ("Though money is obtained by misrepresentation, if no injury follows, no crime is accomplished."); *State v. Casperson*, 262 P. 294, 296 (Utah 1927). The government's lone cited source acknowledges "cases both ways," stating only that *financial* loss was not required for false pretenses—which is true so long as the government can show a different type of harm to a traditional property interest (*e.g.*, deprivation of the right to use). 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.7(i)(3) n.106 (3d ed. 2018).

2. Given the common-law pedigree of the injury requirement, the government's burden is to show that the fraud statutes clearly disclose Congress's intent to do away with this element in defining *the type of scheme* that violates the statute. *See Neder*, 527 U.S. at 24-25. The government contends that *Neder* does this (GB15, 42), but the government overreads that case.

Neder explained that "[b]y prohibiting the 'scheme to defraud,' rather than the completed fraud," Congress made clear that the government need not prove that the victim actually relied on the defendant's

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(1840), involving the sale of a horse not named *"Charley*." GB19. *Mills* noted that the "party injured" possibly desired *Charley*'s particular "qualities" (17 Me. at 218)—giving rise to a traditional property harm.

misrepresentation and was thereby injured. 527 U.S. at 24-25. But it does not follow that in prohibiting a scheme to defraud, Congress criminalized a scheme that, if completed as intended, would not amount to fraud at common law. Congress's use of the term "defraud" compels the opposite conclusion: the statutes punish only schemes that, if completed, constitute frauds. *See Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (the words "to defraud" in the fraud statutes refer "to wronging one in his property rights"); *accord McNally v. United States*, 483 U.S. 350, 358 (1987). And the wrong that the common law required was harm to a traditional property interest. *Kelly v. United States*, 140 S. Ct. 1565 (2020), suggests as much by holding that "a property fraud conviction cannot stand when loss to the victim is only an incidental byproduct of the scheme," *id.* at 1573. If a scheme resulting in *incidental loss* is insufficient, then a scheme that would result in *no loss* (or other injury to a traditional property interest) must be insufficient as well.

3. Congress had good reason to criminalize only schemes that, when completed, would satisfy the common-law elements of fraud, including injury. The common-law injury requirement ensured that fraud was not an all-purpose tool to enforce morality: "courts of justice do not act as *mere* tribunals of conscience to enforce duties which are *purely* moral." Pomeroy § 899, at 1264-65; *see also* Story § 203, at 205 ("[C]ourts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage.").

Federal fraud law likewise does not enforce morality. The property fraud statutes do not authorize the government to police generalized "wrongdoing—deception, corruption, abuse of power"—or "to enforce (its view of) integrity." *Kelly*, 140 S. Ct. at 1568, 1574. Congress enacted them to "protect[] property rights only." *Cleveland v. United States*, 531 U.S. 12, 19 (2000). Yet under the government's view, the criminal fraud statutes would allow federal prosecutors to police morality in contracting. That sweeping expansion of federal criminal law cannot be justified. If Congress "desires" such a result, "it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

4. None of the government's cases holds otherwise. *See* GB21-22. In *Carpenter v. United States*, 484 U.S. 19 (1987), and *Shaw v. United States*, 137 S. Ct. 462 (2016), the government proved harm to a traditional property interest. In *Carpenter*, the victim was deprived of its right to "exclusive use" of its property—its confidential business information. 484 U.S. at 26. In *Shaw,* the defendant's scheme to obtain bank-held funds deprived the bank of its "right to use the funds" and the "bailee's right in a bailment." 137 S. Ct. at 466 (citing 2 W. Blackstone, Commentaries on the Laws of England 452-54 (1766)). The government thus was not required in these cases to prove an *additional* property harm in the form of "monetary loss," *Carpenter*, 484 U.S. at 26, or "ultimate financial loss," *Shaw*, 137 S. Ct. at 467. And *Shaw*'s comment that a defendant

need not *intend* "financial loss," *id.*, does not bear on what kind of a *scheme* is required.[3]

Nor does Learned Hand's dictum in *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932), quoted in *Shaw*, 137 S. Ct. at 467, erase the harm-if-completed requirement of criminal fraud. In *Rowe*, the scheme, if completed as intended, unquestionably would have harmed traditional property interests: the defendants falsely represented the value of the property they were exchanging. *Id.* at 748. *Rowe* observed, however, that "[a] man is none the less cheated out of his property" even if "he gets a quid pro quo of equal value" because "he has suffered a wrong; he has lost his chance to bargain with the facts before him." *Id.* That dictum cited no authority, was later repudiated, *see United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987), and cannot displace centuries of common-law reasoning that requires more to establish fraud.[4]

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[3] Similarly unhelpful is *Loughrin v. United States*, 573 U.S. 351 (2014)—construing 18 U.S.C. § 1344(2), which punishes obtaining funds in the bank's custody through a false representation. *Loughrin*'s holding that risk of loss to a bank is not required under § 1344(2) rested on congressional intent "to avoid entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *Id.* at 366 n.9.

[4] Nor do the government's purported "fraudulent inducement" cases (GB40) reflect its current theory: *Durland v. United States*, 161 U.S. 306, 314 (1896), and *United States v. Sampson*, 371 U.S. 75, 77 (1962), involved conventional deceptive schemes to obtain something for nothing.

B. The Government's Reformulation Of The Right-To-Control Theory Violates Core Requirements Of Fraud

The government acknowledges that the right-to-control theory is "incorrect" and could lead to "overbroad results" but argues that, as applied in a supposed "core set of cases," it proves the elements the government now says are required. GB12, 24. The "set" is defined as cases where "a defendant fraudulently induces a victim to enter into a transaction." *Id.* at 12. To arrive at this conclusion, the government rewrites the elements of Second Circuit doctrine to fit its new theory. GB24-31. Not only is this procedurally impermissible, *see* Part I, it cannot overcome a central flaw in the right-to-control theory: the absence of a requirement of *harm to property if the scheme were completed as intended.*

The Second Circuit's "risk of tangible economic harm" requirement does not save the right-to-control theory. *See* GB27 (citing *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017)). First, a *risk* of harm does not establish harm to a traditional property interest. At common law, a fraud plaintiff was required to prove "that damage [wa]s actually incurred." Addison § 1175, at 1005. Even where "there are strong grounds of suspicion," an "injurious act … must be proved, and expressly found." *Clarke*, 37 U.S. at 196; *see* Story § 190, at 191. This rule ran throughout tort law: "traditionally, injury needed to be manifest before it could be compensable." *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850 (3d Cir. 1990); *Mauro v. Raymark Indus., Inc.*, 561 A.2d 257, 260-65 (N.J. 1989); *cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2212 (2021) (risk of future harm that does not

materialize is not a concrete injury). While the government need not prove that *actual* harm resulted, it must show that the scheme would have caused harm if completed as the schemers intended.

Second, the Second Circuit dilutes even the risk of harm by equating it with the deprivation of information. Here, the court said that it is enough to prove harm if "the scheme affected the victim's economic calculus." Pet. App. 17a (citation omitted). That is the essence of the right-to-control theory. The government's selective quotation from *Finazzo*, emphasizing that "economic harm can be manifested" by increasing price or decreasing quality, GB28 (quoting 850 F.3d at 111), overlooks that on the same page, *Finazzo* holds that "[d]epriving a victim of potentially valuable information *necessarily* creates a risk of tangible economic harm," 850 F.3d at 111. *Finazzo* therefore found a jury instruction requiring that the victim was "deprived of potentially valuable economic information" sufficient to show a scheme "capable of creating tangible economic harm." *Id.* at 111-12.

The government states that many right-to-control cases involve "overcharging" (GB29), but such cases can be prosecuted without the right-to-control theory; the theory's entire purpose is to reach cases where overcharging cannot be proved. The government's new theory cannot paper over that flaw. Exposure to the *risk* of economic harm by deprivation of information is not the harm required to establish fraud at common law, and a scheme that does no more does not violate the wire fraud statute.

C. The Government's Novel Theory Has An Unbounded And Untenable Sweep

Not only does the government's theory depart from the common law, but it also has sweeping consequences that would turn commonplace state disputes into federal crimes. Every dispute over a contract where one party asserts "fraud" would become grist for a federal prosecution. Racketeering Influenced and Corrupt Organizations Act ("RICO") suits would soon follow. To curb the damage, the government proposes a series of ad hoc limits, which it is unwilling to fully endorse and which do not work. Nor can the government prevent its theory from overrunning constitutional limits that this Court announced in honest-services cases. The Court should avoid this result by rejecting the government's theory—or by requiring it to raise its new arguments in another case so that this Court has the usual benefit of the lower courts' views.

1. *The government's theory would have untenably expansive consequences*

Under the government's theory, federal fraud law would become an all-purpose remedy for everyday deception. An applicant who submits an embellished résumé could be charged with a scheme to defraud. Likewise for a fashion model who is dishonest about her weight in seeking a contract for a photoshoot. Or a couple who lies about having a dog when applying for a lease. *See* Aiello/Gerardi Reply Br. 12. The overcriminalization problems inherent in the right-to-control theory would expand exponentially under the government's sweeping reformulation. It is no answer for the government to say that it would exercise restraint. The Court "cannot construe a criminal

statute on the assumption that the Government will use it responsibly." *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (citation omitted). Pressing broad statutes to their outer limits "places great power in the hands of the prosecutor," which "could result in the nonuniform execution of that power across time and geographic location." *Marinello v. United States*, 138 S. Ct. 1101, 1108-09 (2018).

Beyond that, mail and wire fraud are RICO predicates. The government's new theory could lead to an explosion in civil RICO cases. *See Cleveland*, 531 U.S. at 25 (application of lenity "is especially appropriate in construing § 1341 because … mail fraud is a predicate offense under RICO").

All this would come at the expense of legal clarity and federalism. Vagueness concerns abound in the government's novel approach—from defining "the very essence of the bargain" in the government's newfound view of materiality (GB30) to the government's tepid invocation of common-law limiting principles, *see* Part II.C.2. What's more, state court reports are replete with "fraudulent inducement" claims made in run-of-the-mill contract disputes. The government's theory would transform each of these disputes into federal crimes, thus effecting a massive federalization of disputes routinely litigated under state law. Such a "sweeping expansion of federal criminal jurisdiction" into an area "traditionally regulated by state and local authorities" calls for "a clear statement by Congress," which is absent here. *Cleveland*, 531 U.S. at 24.

2. *The government's proffered limiting principles are insufficient*

Recognizing that its theory is unacceptably broad, the government suggests an array of ad hoc limiting principles, many of which it treats only as possibilities for future consideration. This will not do. The government "stops far short of endorsing such limitations" or "cit[ing] any prior instance in which it has read the statute to contain" them. *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). A theory that "would attach criminal penalties to a breathtaking amount of commonplace … activity," *id.*, cannot be rescued by such half-hearted reassurances.

Materiality. To limit its new theory, the government relies on a new, more onerous version of materiality that it has never before embraced. GB18. For its preferred formulation, the government plucks a quotation from a parenthetical in a footnote in a False Claims Act case. *Universal Health Servs., Inc. v. United States*, 579 U.S. 176 (2016). In that footnote, the Court cited a New York decision that described a particular material representation as having gone "to the very essence of the bargain." *Id.* at 193 n.5 (quoting *Junius Constr. Corp. v. Cohen*, 257 N.Y. 393, 400 (1931)). While the government seizes on that phrasing as a standard for materiality in this case, the Court has never suggested that it applies to "an all-purpose antifraud statute." *Id.* at 194 (citation omitted). On the contrary, the Court repeatedly has held that to be material under the fraud statutes, a statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder*, 527 U.S. at 16 (quoting *United States v.*

Gaudin, 515 U.S. 506, 509 (1999)). The jury was instructed in accordance with that test, not the new "essence" standard. J.A. 41. Federal courts and prosecutors will be astounded by the government's new approach.

The Court should take this about-face with a grain of salt. The government has previously distinguished *Universal Health* because it arose in the FCA context, *see* Gov't Br. 15, *Raza v. United States*, No. 17-1314 (U.S. May 18, 2018), and courts have doubted its applicability beyond that context, *see*, *e.g.*, *United States v. Palin*, 874 F.3d 418, 423 (4th Cir. 2017); *United States v. Lindsey*, 850 F.3d 1009, 1017 (9th Cir. 2017). The government reaches for a new materiality requirement *in this case* only to limit the damage that would be inflicted by its overbroad theory. The ticket is good for this train only. Likewise, the Court is entitled to skepticism about the government's careful hedging on what kinds of "idiosyncratic preference" will count as material, and what inducements go to the "core of the bargain." GB43-44. These are good reasons for this Court to steer clear of revolutionizing fraud law based on claims that emerged only in the government's merits brief.

Other common-law doctrines. The government gestures toward possible limitations from "common-law doctrines not at issue here." GB44. Not only does the government equivocate by suggesting only that they "*may* further constrain" its theory, *id.* (emphasis added), but the doctrines themselves do not work as the government suggests.

For instance, the government asserts that "statements of opinion (as opposed to fact) generally do

not constitute material misrepresentations." GB45. That contention overlooks the multitude of circumstances in which statements of opinion can be the basis for fraud. *See, e.g.*, *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1094 (1991) ("An opinion is a fact … When the parties are so situated that the buyer may reasonably rely upon the expression of the seller's opinion, it is no excuse to give a false one[.]" (citation omitted)); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 109, 760-62 (5th ed. 1984) (detailing "numerous" circumstances in which statements of opinion could constitute material misrepresentations); Story § 198, at 200-01 (same). Similarly, the government's assurance that "a party's negotiating position" is "traditionally excluded from the definition of fraud" (GB45) rests on a single citation to an 1810 English decision. This does not prevent the government from charging that theory or changing its mind.

Common-law defenses. Finally, the government ignores important common-law doctrines that could defeat its theory of fraud in this very case. For example, a plaintiff cannot base a fraudulent-inducement claim on pre-contract representations where the contract contains an integration clause stating that the contract represents the entirety of the parties' agreement. *See*, *e.g.*, *One-O-One Enters. v. Caruso*, 848 F.2d 1283, 1286-87 (D.C. Cir. 1988) (R.B. Ginsburg, J.). "[S]ilence in a final agreement containing an integration clause—in the face of prior explicit representations—must be deemed an abandonment or excision of those earlier representations," and thus reliance on pre-contract representations is unreasonable and such

representations are "immaterial." *Id.* The government's theory here suffers from exactly this flaw. It is based entirely on pre-contract representations, *see* GB7-8, 33-34, yet the contract between petitioner and Fort Schuyler did not contain those representations and did contain an integration clause, J.A. 177. Had the government presented its novel fraudulent-inducement theory at trial, petitioner would have responded that the theory was foreclosed by the integration clause.

3. *The government's theory would end-run* McNally *and* Skilling

If the government's theory were correct, *McNally* was a fruitless gesture. On the government's view, McNally—and any self-dealing government employee—would still be guilty of fraud. To circumvent *McNally*, the government would just allege that the employee deceived his employer by breaching a fiduciary duty to disclose a self-dealing transaction. The government could describe that as a fraudulent scheme to obtain money, rather than to deprive the employer of honest services. It is difficult to believe that the Court's concerns about the federal government "setting standards of disclosure and good government for local and state officials" could be so easily evaded. 483 U.S. at 360.

Worse yet, the government's new theory would impermissibly end-run *Skilling v. United States*, 561 U.S. 358 (2010), and revive the "vagueness" concerns the Court sought to lay to rest in undisclosed conflict-of-interest cases, *id.* at 409-11 & nn.43-44. A classic honest-services theory—barred by *Skilling*—would involve a city official who purchased property from the

city without disclosing her self-dealing, or a lawyer who took fees from a client without disclosing a conflict of interest. These cases and countless others can be reframed as fraudulent-inducement cases that lack proof of harm to a traditional property interest, but that involve a handover of money under a contract. The government's new theory would permit the same fraud convictions that *Skilling* rejected to avoid "the due process concerns underlying the vagueness doctrine." *Id.* at 408-12.

Each of the government's responses fails. The government first notes that *Skilling* "did not involve a property theory" of fraud (GB46), but giving the conflict-of-interest theory a new name raises no fewer vagueness problems. Next, the government observes that *this* case "does not involve an 'undisclosed conflict of interest.'" *Id.* But this Court must look beyond the facts of this case before handing the government a powerful new prosecutorial weapon.

The government points to a hodgepodge of purported limits on the reach of its theory in the conflict-of-interest context, but each limit fails to assuage *Skilling*'s vagueness concerns. The government's hedging language—suggesting that a nondisclosure "*may well* not be fraudulent" absent a duty to speak and that a nondisclosure may not be material "[i]n *many* cases," such as when "a victim receives fair value in a transaction"—betrays the weakness of these suggestions. GB47 (emphases added). Beyond that, most conflict-of-interest cases involve fiduciaries—who *are* subject to a duty to disclose. And the government frequently charges omissions as "half-truths—representations that state the truth only so far as it goes, while omitting critical

qualifying information," which "can be actionable misrepresentations." *Universal Health*, 579 U.S. at 188; s*ee id.* at 188 n.3 (collecting common-law sources). The ultimate irony is the government's reliance (GB47) on the possibility that fraud may be negated when a victim receives "fair value in a transaction"—directly undercutting the core of its new theory that fair value is *irrelevant* to a fraudulent-inducement theory (GB23). This contradiction makes manifest the indeterminate character of the government's theory. It is an unmistakable warning sign that the Court should decline to entertain that never-before-raised theory here.

III. THE JUDGMENT BELOW SHOULD BE REVERSED AND PETITIONER ACQUITTED

On either of two bases, the Court should reverse the judgment in this case. The most straightforward path is for the Court to resolve the legal question on which it granted certiorari—whether the right-to-control theory states a valid basis for a wire fraud conviction. The government has answered that question: It concedes that the right-to-control theory "risk[s] expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." GB25-36. On this point, the government is correct: the right to control is not a traditional property interest protected by the federal fraud statutes. That is all this Court needs to decide to resolve this case, and it requires reversal and entry of an acquittal, as petitioner's opening brief explained.

The same result is required if the Court does entertain the government's new position. Contrary to the government's contentions, the federal fraud

statutes require a scheme that would harm a traditional property interest if completed as intended. Here, the scheme was completed as intended, so the Court need not speculate about whether the evidence proved that the scheme would injure a traditional property interest held by Fort Schuyler. At trial, the government offered no evidence that the completed scheme caused injury. *See* PB5-6, 50. The government does not dispute that it failed to make this showing. *See* GB40-41. It offered no evidence that Fort Schuyler would have paid less or received more but for petitioner's representations; the evidence shows only a fair-value exchange. *See* PB49-50. All the government can do is speculate that another bidder "might have offered acceptable services at lower cost." GB42. But a theoretical possibility of harm is not sufficient evidence that the scheme, completed as intended, would harm a traditional property interest. *See* Part II.B.[5]

The government cannot rescue the conviction by arguing that Fort Schuyler's asserted inability to contract based on a competitive bidding process is itself an injury to the government's "property" in the contract funds. An impairment of Fort Schuyler's ability to make an informed decision about the disposition of its assets, *cf.* GB36-37, just repackages

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[5] To the extent the government relies on evidence of what other contractors sometimes bid, or speculates about what the jury could have inferred, GB41-42, its position is unfounded and unfair. The contractor evidence was not admitted to show what a bid for the project at issue would be, and prosecutors used the right-to-control theory to preclude petitioner from offering evidence negating any inference that the transaction was not for fair value. *See* PB50; Pet'r Reply 11.

the right-to-control theory, which the government elsewhere disavows. If, instead, the government relies on its new *noneconomic* materiality argument (GB18-19, 37-38)—*i.e.*, that "Fort Schuyler, as an agent of the public," sustained harm to its governmental "interest in a fair, transparent process," GB38—that is a regulatory interest, not a property interest. This new argument, which is procedurally forfeited, founders on *Kelly* and *Cleveland*, both of which hold that an injury "implicat[ing] the Government's role as sovereign" is "not property fraud," *Kelly*, 140 S. Ct. at 1572 (quoting *Cleveland*, 531 U.S. at 23-24).

CONCLUSION

The judgment should be reversed, and the case remanded with instructions to enter a judgment of acquittal.

Respectfully submitted.

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