No. 23-909

IN THE

Supreme Court of the United States

STAMATIOS KOUSISIS AND ALPHA PAINTING
& CONSTRUCTION CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Using deception to induce another party to enter into a transaction can give rise to contract, consumer-protection, or false-advertising claims. *See Ciminelli v. United States*, 598 U.S. 306, 315-16 (2023). In serious cases, misrepresentations of that sort can also subject someone to state criminal charges or (when federal interests are implicated) up to five years in federal prison. *See* Petr. Br. 12-13 (discussing 18 U.S.C. §§ 371 and 1001); U.S. Br. 45. The question in this case is whether such a misrepresentation can also subject someone to *twenty years* in federal prison under the mail and wire fraud statutes, even where the scheme did not contemplate harm to any traditional property interest.

The government says yes. It does not dispute that this "fraudulent inducement" theory would transform decades of this Court's jurisprudence limiting the reach of property fraud into a series of cases about nothing more than the wording used to frame allegations in otherwise legitimate prosecutions. *See* Petr. Br. 29-33. And if that were not startling enough, every hour of every day in this country, countless individuals use all sorts of untruths and harmless fibs to induce others to transact with them. The government's theory would expose all such people to property fraud charges—from homebuyers who persuade owners to sell to them over other prospective buyers, to employees who tell white lies to skip a day of work. *Id.* 41-43.

For these reasons and others below, this Court should reject the government's latest attempt to stretch the property fraud statutes beyond recognition. The government is obviously correct when it says money is property. U.S. Br. 14. And where the government can show that a victim was tricked into parting with money in exchange for something of lesser pecuniary value than the defendant promised (or for nothing at all), there may well be grounds for convicting. But there is a reason why the government never before *Ciminelli* claimed in this Court that facts like the ones here constitute "classic" property fraud as well. U.S. Br. 12. Text, structure, history, and precedent make clear that the property fraud statutes require not just an inducement to part with property but also a scheme to harm a "traditional property interest[]." *Ciminelli*, 598 U.S. at 309. And no such harm occurs where, as here, an entity pays money for something and receives the full economic value of the purchase.

ARGUMENT

Because the government's brief attempts to muddy the record, we first clarify that petitioners' convictions depend on the fraudulent inducement theory. We then turn to the issue at hand: whether that theory, which would allow a conviction for property fraud absent a scheme to harm a traditional property interest, is valid. It is not.

I. Petitioners' convictions depend on the fraudulent inducement theory of property fraud.

The government maintained at trial that petitioners won the contracts here through a deceptive inducement—namely, a promise to purchase supplies from a DBE. That promise was "non-financial" in nature; it "had nothing to do with dollars and cents." J.A. 96 (government's closing argument); *see* Petr. Br. 7-8. Rather, PennDOT wanted DBE participation simply "for its own program, its own desires." J.A. 96. Yet even though PennDOT "received the repairs it paid for" with unquestioned workmanship, the Third Circuit upheld petitioners' convictions on the theory that "obtaining" PennDOT's money partly through the inducement of DBE participation was itself a scheme to defraud. Pet. App. 18, 29.

The government, however, now suggests that petitioners' scheme caused PennDOT to suffer an economic loss. U.S. Br. 6, 47-48. It is too late, though, to shift prosecutorial theories away from its non-financial inducement rationale. In any event, neither of the government's new arguments has merit.

1. The government recycles the contention from its brief in opposition that petitioners charged PennDOT an extra $170,000 to cover the 2.25% fee it paid Markias. U.S. Br. 48; *see also* BIO 11-12. This Court implicitly rejected this contention when granting certiorari, and it has no more force now. The government never advanced any surcharge theory at trial, and 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).

Anyhow, the government's assertion (Br. 6, 48) that PennDOT "paid" the 2.25% fee is simply false. PennDOT accepted lump-sum bids from groups including petitioners, leaving the contractors to cover their own internal costs. *See* Cert. Reply 12-13; Petr. Br. 4. There is no evidence that PennDOT would have paid less if petitioners had not bothered with Markias at all. *Compare United States v. Davis*, 2017 WL 3328240, at *18 (S.D.N.Y. 2017) ("impossible" to identify any "pecuniary harm" where defendants submitted "lump-sum" bids, and payments to DBEs "would have come out of Defendants' pockets").

2. The government also asserts that PennDOT was "willing to pay *more*" for petitioners to use a DBE subcontractor for the supplies at issue here, such that petitioners misrepresented "the monetary value of their services." U.S. Br. 47. This argument is waived twice over. The government never mentioned it in its brief in opposition. *See* Sup. Ct. Rule 15.2. Nor did the government present it at trial. Instead, the government summarized the evidence as follows: "We do *not* know whether PennDOT would have been willing to pay more to receive the same repairs with legitimate DBE participation." U.S. CA3 Br. 90 (emphasis added). That is because the government's trial theory was that any additional cost of using a DBE would have reduced petitioners' profits, which assumes no change to the winning lump-sum contract price. *See, e.g.*, CA3 J.A. 3170.

Besides, the only evidence the government cites for its new argument is a single contractor's comment that he once re-bid a project at a higher price after including more DBE participation. J.A. 79 (testimony of William Fetters of Buckley & Company). This comment hardly shows that DBE participation "costs more" as a general matter (U.S. Br. 47), much less that it raises bids as a general matter, or that PennDOT would have paid more for such participation here. After all, a governmental entity cannot pay more for a product or service for no other reason than the race or sex of the business owner. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

II. The government's inducement theory is invalid.

The property fraud statutes require a scheme to harm a "traditional property interest[]." *Ciminelli*, 598 U.S. at 309. Because the inducement theory allows for conviction absent monetary or any other property harm, it is invalid.

A. The inducement theory flouts the text and history of the property fraud statutes.

1. The statutes require a scheme to "defraud" the victim.

The property fraud statutes prohibit "a scheme or artifice to defraud, or for obtaining money or property." 18 U.S.C. §§ 1341, 1343. The government recognizes that this Court has long construed this ostensibly "disjunctive language" as a "unitary whole." U.S. Br. 13-14 (quoting *Kelly v. United States*, 509 U.S. 391, 398 (2020)). The government, however, begins its defense of its inducement theory by arguing that "obtain[ing]" money or other property is sufficient to establish a scheme covered by the property fraud statutes. U.S. Br. 20-21.

This argument focuses on the wrong clause of the statutes. This Court has long read the statutes' clauses jointly to require the prosecution to always prove a scheme to "defraud" the victim of the money or property obtained. *See* Petr. Br. 16 (citing *McNally v. United States*, 483 U.S. 350, 359 (1987)). The government does not ask the Court to reconsider this precedent. Consequently, the only real question here is whether a scheme that contemplates no harm to any traditional property interest is one to "defraud."

2. Obtaining property through deceit does not alone establish a scheme to "defraud."

The government appears at times to argue that a scheme to "defraud" does not require any contemplated harm to a traditional property interest. *See* U.S. Br. 13-20 (resisting an "additional requirement" of harm). At other times, the government appears to accept that an injury requirement exists but suggests that any scheme to induce someone to hand over money or property through deceit automatically harms a traditional property interest. *See* U.S. Br. 27, 37-38. We honestly do not know which argument the government is making. But either way, the government is wrong.[1]

a. *The statutes contain a harm requirement.* The property fraud statutes cannot be violated without a scheme to harm a traditional property interest.

i. This Court's precedent demonstrates that the ordinary legal meaning of "defraud" requires scheming to harm a traditional property interest. *See* Petr. Br. 17-19.

Pushing back, the government first attempts to distinguish *Durland v. United States*, 161 U.S. 306 (1896). There, the Court explained that a scheme "to defraud" is a scheme to "cheat" the victim out of

[1] Whatever exactly the government is arguing, it does not defend the Third Circuit's suggestion that all contract rights are "property," such that breach of any material contract term can support a property fraud conviction. *See* Petr. Br. 15 n.4. Accordingly, reversal is required if for no other reason than that the jury instructions permitted conviction on this basis. Pet. App. 24-25; *cf. Smith v. Arizona*, 602 U.S. 779, 792 n.3 (2024).

property. 161 U.S. at 313 (citation omitted). The government notes that the defendant there made "misrepresentations about future earnings" to induce the victim to purchase fake bonds. U.S. Br. 22. Exactly. The lies about promised payouts tricked the victims into buying bonds with no economic value. Or, to use this Court's language defining property fraud in another case, the defendant's scheme inflicted "pecuniary or property injury." *Hammerschmidt v. United States*, 265 U.S. 182, 189 (1924).

The government next cites a batch of cases (Br. 22-23) purportedly demonstrating that a property fraud scheme need not contemplate harm to a traditional property interest. These cases demonstrate no such thing. Taking money in exchange for "valuable services" that the defendant will never perform inflicts a monetary loss. *See United States v. Sampson*, 371 U.S. 75, 78 (1962); *see also United States v. Comyns*, 248 U.S. 349, 353 (1919) (similar). Procuring a loan for a business and hotel that never existed does the same. *Pereira v. United States*, 347 U.S. 1, 4-5 (1954). Selling farm plots worth less than promised does too. *United States v. New South Farm & Home Co.,* 241 U.S. 64, 72 (1916).

Cases involving non-monetary harm are no help to the government either. *See* U.S. Br. 23-26. The property fraud statutes can be violated by harming traditional property interests in non-monetary ways, *see* Petr. Br. 35, such as depriving a victim of the right to exclude others from her land. The victim in *Carpenter v. United States*, 484 U.S. 19 (1987), was similarly deprived of "exclusive use" (and thus the commercial value) of "confidential business information" that was its "stock-in-trade." *Id.* at 26-27 (citations omitted). That is a form of traditionally recognized property harm. *Id.* The schemes in *Shaw v. United States*, 580 U.S. 63, 66-67 (2016), and *Loughrin v. United States*, 573 U.S. 351, 354 (2014), also contemplated harm to traditional property interests: the banks' property interests as owners or bailees in the funds. *See* Petr. Br. 35, 37.

The government's only response is that depriving the banks in *Shaw* and *Loughrin* of the right to "use" their funds is analogous to what happened here. U.S. Br. 26. Not so. The defendant in *Shaw* stole money from the bank, preventing it from using the funds to earn profits or make loans. 580 U.S. at 66. Had the scheme in *Loughrin* succeeded, the same would have occurred. 573 U.S. at 364. PennDOT, by contrast, received the full economic benefit of its money; it used the funds to repair bridges but simply did so without complete information. That does not establish harm to a property interest. *See Ciminelli*, 598 U.S. at 314-15.

ii. Relevant historical authorities confirm that the word "defraud" requires a scheme to harm a traditional property interest.

Deceit. The tort of deceit was the historic core of fraud. Petr. Br. 19-20. And the government admits that, in an action for deceit at common law, plaintiffs could not prevail without showing a "pecuniary loss." U.S. Br. 37. Yet the government claims that this is "a rule about remedy—not about what constitutes fraud." *Id.* Wrong. A claim for deceit without an allegation of harm to a traditional property interest would have been dismissed for failure to state "a cause of action." *Pasley v. Freeman* (1789) 100 Eng. Rep. 450, 453 (KB) (Buller, J.); *see also id.* at 457 (Kenyon, C.J.) ("not actionable"). The case would never reach the remedy stage.

Rescission. Pertinent rescission jurisprudence supports petitioners too. When the mail fraud statute was enacted in 1872, rescission was unavailable absent a showing of harm to a traditional property interest. *See* Petr. Br. 22. The government cites two cases decided around that time, but neither of them contradicts the clear rule that existed then.[2]

Faced with that clear rule, the government instead points to authority "as of 1952" to argue that rescission did not require any showing of harm. U.S. Br. 29. It is true that rescission law *by that time* had no harm requirement, having started to move away from it in *Stuart v. Lester*, 1 N.Y.S. 699 (N.Y. Gen. Term 1888). *See* Glenn A. McCleary, *Damage As Requisite to Recission for Misrepresentation*, 36 Mich. L. Rev. 1, 24-25 (1937). But statutory terms are interpreted according to their meaning when "Congress enacted the statute." *Wisc. Central, Ltd. v. United States*, 585 U.S. 274, 277 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). As just noted, the mail fraud statute was enacted in 1872, sixteen years before *Stuart*. And when the wire fraud statute was enacted decades later, Congress used, in relevant part, the same words. Consequently, this Court has interpreted the wire fraud statute *in pari*

[2] *Phillips v. Conklin*, 58 N.Y. 682 (1874), held merely that damages were not required for "avoidance of a contract on the ground of *mistake*"; it did not involve rescission on the ground of *fraud*. *Id.* at 683 (emphasis added). And in *Janes v. Trustees of Mercer University*, 17 Ga. 515 (1855), the plaintiff donated funds to support an educational program that was subsequently abolished; he was thus "deprived of his money." *Id.* at 519-20.

materia with the mail fraud statute, looking to the history and meaning of the latter when deciding cases about the former. *See, e.g.*, *Ciminelli*, 598 U.S. at 312 n.2; Petr Br. 16.

False Pretenses. Contrary to the government's contention, the offense of false pretenses required more than simply showing a misrepresentation and that "money was obtained." U.S. Br. 30 (citation omitted). The prosecution also had to show a scheme to harm a traditional property interest.

The government first points to *Regina v. Kenrick* (1843) 114 Eng. Rep. 1166 (QB), where the defendant was convicted for deceit in selling certain horses to a buyer. The government suggests the agreed price may have been fair. U.S. Br. 30. But the defendant's misrepresentations were "to the great damage" of the victim. *Kenrick*, 114 Eng. Rep. at 1167. The defendant promised horses that were "quiet to ride and drive" but provided horses that were "vicious," and therefore less valuable. *Id.*

The government also cites several cases that state or apply the principle that the offense of false pretenses could "not be purged by subsequent restoration or repayment." *Commonwealth v. Coe*, 115 Mass. 481, 502-03 (1874); *see also* U.S. Br. 31-32 (citing *In re Rudebeck*, 163 P. 930, 934 (Wash. 1917); *Commonwealth v. Ferguson*, 121 S.W. 967, 968 (Ky. 1909); *State v. Switser*, 22 A. 724, 725 (Vt. 1891)). But as explained, that principle is fully consistent with requiring a scheme to harm a traditional property interest; the principle just underscores that harm is assessed when the scheme is executed, not later. *See* Petr. Br. 35.

In *Switser*, for example, the defendant lied about having promises from others to guarantee a loan that he procured. The court held merely that it did not matter whether any of those other people—even if later asked to cover the debt—would have done so. *See Switser*, 22 A. at 725. If the victim had known the defendant had no guarantees, he would have charged more for the loan.

The government's remaining case, *Bargie v. United States*, 30 F. Cas. 958 (C.C.D.D.C. 1861), simply holds that conviction is warranted where harm is contemplated but the defendant's scheme fails. "It is enough" that the scheme, if completed, would have harmed a traditional property interest. *Id.* at 959. Again, petitioners agree. *See* Petr. Br. 24. And the language the government quotes from the Byrne treatise—saying "it is not necessary that an actual loss or injury should be sustained"—says the same thing. *See* U.S. Br. 33 (citing Francis J. Byrne, False Pretenses and Cheats § II(7), in 12 The American and English Encyclopedia of Law 835 (2d ed. 1899) (D.S. Garland & L.P. McGehee, eds.)).

b. *The harm requirement is not met by fraudulent inducement.* The government also errs in alternatively suggesting that obtaining the victim's property through deceit necessarily supplies the requisite harm to property. U.S. Br. 27, 38.

i. For one thing, this argument just repackages the right to control theory. That theory posited that depriving someone of "valuable economic information necessary to make discretionary economic decisions"—that is, decisions whether to part with property—constituted property fraud. *Ciminelli*, 598 U.S. at 310. That is no different from saying that an individual commits property fraud whenever he uses deceit to "induce[] the victim to part with money or property." U.S. Br. 27. Either way, the government is arguing that "us[ing] falsehoods to induce a victim to enter into a transaction" always constitutes property fraud. BIO 9. Yet in *Ciminelli*, the Court unanimously held that casting the property fraud net this widely "expands federal jurisdiction without statutory authorization," making "a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law." 598 U.S. at 315-16.

Even before *Ciminelli*, the Court implicitly rejected the argument that obtaining the victim's money through deceit necessarily supplies the requisite harm to property. In *Skilling v. United States*, 561 U.S. 358, 400 (2010), the Court cited *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), as properly conceptualizing property fraud's harm requirement. And in *Starr*, the Second Circuit explained that the requirement was not satisfied where purchasers, though deceived into spending their money, "received the service for which they had paid" and lost out only on an interest in a "use to which the money [they spent] would be put." *Id.* at 99-100.

ii. History confirms what this Court has already held. *State v. Palmer*, 32 P. 29 (Kan. 1893), explained that "the mere obtaining of money under false pretenses does not alone constitute a crime." *Id.* at 30; *see also* Petr. Br. 23. The government responds that the collateral put up by the defendant there was "genuine." U.S. Br. 33-34. But that only reinforces petitioners' point. The genuineness of the defendant's collateral meant that the lender was never at risk of suffering any pecuniary loss, even though the defendant deceptively induced the victim to loan her money. *Palmer*, 32 P. at 30.

Other decisions are in accord. In *Morgan v. State*, 42 Ark. 131 (1883), the court overturned a conviction for false pretenses where a customer was induced into booking a stay in a hotel based on a representation that his friend had recently stayed there. *Id.* at 133-34. According to the court, "[n]o injury was alleged" even though the customer paid thirty dollars for the room. *Id.* at 139. The key was that he was not cheated "out of any property or thing of value," only of "sentimental gratification." *Id.*

Likewise, in *United States v. Rush*, 196 F. 579 (E.D. Wash. 1912), the court threw out an indictment for impersonating a federal employee to sell books "with intent to defraud." *Id.* at 580. Drawing on state false-pretense cases, the court held that someone is not defrauded "when he gets out of a transaction just what he bargained for simply because his vendor misrepresented the character or capacity in which he acted in making the sale." *Id.* at 581 (citation omitted). This holding is also flatly inconsistent with the government's position.

Nor does any other authority the government cites aid its cause. In *Smith v. Kay* (1859) 11 Eng. Rep. 299, the defendant persuaded the victim to issue securities without providing the "valuable consideration" promised. *Id.* at 309. The resulting pecuniary harm was so obvious that the appellate court focused only on "one thing": whether the defendant's deceit "really led" the victim to issue the securities. *Id.* at 310. The government's suggestion (Br. 40) that the court treated the defendant's misrepresentation alone as sufficient for rescission simply plucks two snippets of language out of context.

Finally, neither of the cases the government references in the Bigelow treatise supports the notion that the "damage" the common law required for fraud was nothing more than obtaining money pursuant to a misrepresentation. U.S. Br. 39 (citing Melville M. Bigelow, *The Law of Fraud*, ch. XI, § 3, at 403-04). In *Allen v. Hartfield*, 76 Ill. 358 (1875), the defendant paid for horses with notes promising future payment rather than the money required by the contract. *See id.* at 361. Even if the notes were for the amount promised, the riskiness and delay of future payment made them worth less than the same amount in cash. In the second case, a cable company was "deprived" of its engineer's "services." *Panama Tel. Co. v. India Rubber Co.* (1875) 10 L.R. Ch. App. 515, 533. And an employer's right to an employee's services is a classic property right. *See Kelly*, 590 U.S. at 401-02.

iii. That leaves the government's reliance (Br. 25) on a few statements, including Judge Hand's dictum in *United States v. Rowe*, 56 F.2d 747 (2d Cir. 1932), that victims who are induced by a misrepresentation to part with their property are defrauded even if they receive "a quid pro quo of equal value" in return. *Id.* at 749; *see also* U.S. Br. 32-33 (citing 2 Hascal R. Brill, Cyclopedia of Criminal Law § 1271, at 1932 (1923); 1 Emlin McClain, A Treatise on the Criminal Law as Now Administered in the United States § 680, at 686 (1897)).

As petitioners have explained, Judge Hand's dictum rests upon the subsequently repudiated right-to-control theory. *See* Petr. Br. 36-37. Judge Hand stated that a victim in the situation he posited "los[es] his chance to bargain with the facts before him." *Rowe*, 56 F.2d at 749. Yet *Ciminelli* holds that such a loss is "unconnected to traditional property rights." 598 U.S. at 312.

In any event, the dictum has no application here. This is not a case where someone delivered something different from what was promised (say, apples instead of oranges). This is not even a case involving an item with unique qualities, such as a specified plot of land, painting, or horse. In those settings, failing to deliver as promised might constitute property fraud even if the alternative thing the defendant delivered had equal market value. For example, in *State v. Mills*, 17 Me. 211 (1840), the horse named Charley that the defendant promised to sell (but replaced with a different horse) had particular qualities that "rendered it desirable for the party injured to become the owner of him." *Id.* at 218. Accordingly, while being careful to stress that it was not "lay[ing] down any general rule," the court upheld a conviction for false pretenses. *Id.*

But this case is not at all like *Mills*. PennDOT received exactly "the repairs it paid for," not something else. Pet. App. 18. Petitioners simply frustrated PennDOT's non-financial interest in DBE participation. *See supra* at 2-4. Put another way, this case is not *Mills* but *Morgan*, where the defendant delivered the very hotel room he promised, and he simply lied about an aspect of the room having no economic value. *See supra* at 13. There, as here, no property fraud occurred.

B. The inducement theory flouts established limitations on the property fraud statutes.

The government largely ignores petitioners' explanations of why its inducement theory contravenes precedent limiting the reach of the property fraud statutes. *See* Petr. Br. 24-29.

Because the inducement theory captures schemes "to obtain *money*," the government asserts that the theory comports with the principle that schemes to thwart "regulatory" interests do not constitute property fraud. U.S. Br. 14-15; *see Kelly*, 590 U.S. at 400. But, as petitioners have explained, any time a government contract requires abiding by a federal or state regulation, the theory would allow the government to prosecute any regulatory violation as property fraud. *See* Petr. Br. 25. That would enable end-runs around the limitations established in *Kelly* and *Cleveland v. United States*, 531 U.S. 12 (2000). The government does not deny this. *See* U.S. Br. 44.

Nor does the government dispute that the inducement theory would allow prosecutors to repackage the sort of "intangible rights" indictments that *McNally* prohibited, merely by adjusting the language of their allegations. Instead, the government just asserts that *McNally* does not "foreclose[]" such maneuvers. U.S. Br. 46. That is quite striking. The Court's landmark decision represents a fundamental limitation on "the reach" of the property fraud statutes. *McNally*, 483 U.S. at 361. It should not be reduced to a historical footnote identifying nothing more than a pleading error. *See* Petr. Br. 31-32.

The inducement theory would likewise neuter *Ciminelli* and *Skilling*. The government concedes that, under the inducement theory, "it could have prosecuted the bid-rigging scheme" in *Ciminelli*. U.S. Br. 46-47. And the government never denies that the inducement theory could be used to prosecute the conflict-of-interest schemes that *Skilling* walled off. *See* Pet. Br. 32-33. Those cases forbidding prosecutions "without statutory authorization," *Ciminelli*, 598 U.S. at 315, should not be so easily evaded.

C. The inducement theory would have unacceptable consequences.

The government suggests that rejecting the inducement theory would harm prosecutorial interests. U.S. Br. 41-43. But in reality, adopting the theory would produce intolerable consequences.

1. The inducement theory would sweep in a wide array of ordinary conduct, criminalizing any transaction in which money or property changes hands in part because of a misrepresentation. The government responds to this massive problem with several arguments, but none is persuasive.

a. The government starts by asserting that petitioners point to mere "hypotheticals." U.S. Br. 44-45. But prosecutions along the lines petitioners posit have been, and continue to be, brought. *See* Petr. Br. 41-42 (citing cases).

Even with respect to hypotheticals, this Court has time and again refused to construe opaque language in federal criminal statutes to have a "staggering breadth" that criminalizes vast amounts of ordinary conduct. *Dubin v. United States*, 599 U.S. 110, 129 (2023); *see also, e.g.*, *Marinello v. United States*, 584 U.S. 1, 9-11 (2018); *Van Buren v. United States*, 593 U.S. 374, 393-94 (2021). All the more so where, as here, state law already regulates much of that conduct. *See* Petr. Br. 39. Prosecutorial discretion is no answer to this problem. As this Court has repeatedly declared, it "cannot construe a criminal statute on the assumption that the Government will use it responsibly." *Dubin*, 599 U.S. at 131 (citation omitted).

b. The government also argues that its theory's breathtaking consequences are cabined by the property fraud statutes' materiality requirement. According to the government, that requirement requires proof that a deceptive inducement went to the "essence of the bargain"—a test the government suggests will weed out ordinary conduct that ought to be beyond the reach of the property fraud statutes. U.S. Br. 43-45. This argument fails for two reasons.

First, the "essence of the bargain" test is not the standard for materiality that applies under the relevant statutes. *Neder v. United States*, 527 U.S. 1 (1999), holds that the property fraud statutes incorporate the traditional materiality test in the Restatement of Torts. *Id.* at 22-23. And the Restatement makes clear that facts that serve "important and persuasive inducements to enter into the transaction" can be "material" but still "*not* go to its essence." Restatement (Second) of Torts § 551(2)(e), cmt. *j* (1977) (emphasis added). The two inquiries are different.

The government nevertheless insists that *Universal Health Services, Inc. v. United States*, 579 U.S. 176 (2016), and a treatise by Justice Story support importing the "essence" test here. U.S. Br. 44-45 (citing 1 Joseph Story, Commentaries on Equity Jurisprudence § 195, at 197 (10th ed. 1870)). But

Universal Health concerned *qui tam* actions under a different statute, the False Claims Act, and the Court emphasized that the FCA "is not 'an all-purpose antifraud statute.'" 579 U.S. at 194 (citation omitted). The property fraud statutes, by contrast, cover fraud in all sorts of settings—not just government contracts or even contracts at all. Accordingly, lower courts have rejected attempts to supplant *Neder*'s test for materiality with an "essence of the bargain" test, explaining that it would "stretch *Universal Health* too far." *See, e.g.*, *United States v. Raza*, 876 F.3d 604, 620 (4th Cir. 2017) (citation omitted).

The Story treatise is similarly unavailing for the government. That treatise comments that a misrepresentation that an estate contained a "valuable mine" could support an allegation of fraud because "the representation would go to the essence of the contract." Story, *supra*, § 195, at 197. This passage indicates simply that "essence of the contract" was sufficient to establish materiality. The treatise never says such a showing was necessary. To the contrary, the treatise states that a misrepresentation is material whenever it provides "an inducement or motive" to enter the transaction. *Id.*

Second, the "essence of the bargain" test puts the government in a double-bind.

For one thing, the test, if applied correctly, would not cover petitioners' conduct. The case that *Universal Health* cites for the test characterizes "essence" as something whose absence would "destroy the value" of the entire bargain. *Junius Const. Co. v. Cohen*, 178 N.E. 672, 674 (N.Y. 1931). Yet here, petitioners' failure to use a DBE subcontractor did not destroy the value of the transaction. As the Third Circuit recognized, petitioners "delivered the requested work, and the quality of the workmanship and materials is uncontested." Pet. App. 29. And by the prosecution's own telling, the contractual requirement to use good-faith efforts to subcontract with a DBE was akin to the contract's "Buy American" provision. J.A. 96. That is precisely the kind of obligation *Universal Health* makes clear does *not* go to the "essence" of a government contract. *See* 579 U.S. at 195-96.

The government responds that the DBE requirement here was one of only "17 warranties" in the contract and the only one that was expressly labeled "material." U.S. Br. 17-18.[3] But the "essence of the bargain" test does not turn on such formalities. Otherwise, a government bureaucrat drafting a contract could make breaching any regulatory or other non-economic interest into wire fraud. *See Universal Health*, 579 U.S. at 194. Indeed, the only reason the contract here explicitly denotes DBE participation as "material" is because a federal regulation—49 C.F.R. § 26.13(b)—requires it. Obviously that provision is not more important to PennDOT than myriad other provisions of the 1100-page contract.[4]

[3] The government also suggests that "PennDOT risked legal sanction if it did not administer its DBE program in accordance with [federal] regulations." U.S. Br. 18. Yet PennDOT faced no "legal risk," *id.*, here. Once a contract includes the DBE provision, a state agency "cannot be penalized" if, unbeknownst to the agency, the contractor breaches the promise to try to use DBE subcontractors. J.A. 11.

[4] The difficulty of satisfying the "essence of the bargain" test—as opposed to *Neder*'s test for materiality—is presumably why line prosecutors continue to resist the test even when made

On the other side of the bind, if the "essence of the bargain" test were watered down to meet the government's needs here, then it would do nothing to tame the sweeping consequences of the government's theory. While emphasizing the "rigor[]" of the "essence" test elsewhere in its brief (Br. 17, 44), the government also suggests that the test covers any fact to which "a reasonable man would attach importance" or that someone "knows or has reason to know" would be regarded as important by the person with whom he is dealing. U.S. Br. 17-18 (citation omitted).

Under this test, there is no way to brush aside the examples of overbreadth in petitioners' opening brief. The government says that the ordinary misrepresentations petitioners describe would satisfy its "essence" test only in "idiosyncratic[]" circumstances. U.S. Br. 44. Hardly. To take but a couple of examples: It's easy to imagine a couple choosing to sell their home to one buyer over another because of the buyer's purported plans in future years. *See* Petr. Br. 42-43. Employees also often hold onto their jobs—and thus continue to obtain money from their employers—by lying about why they missed work (a concocted family emergency, for instance, when they really went to the beach), or put work-issued devices to personal use. *See id.* 41. The list goes on and on. *See id.* 40-43, 48.

What's more, a fuzzy "essence" test would give the government enormous power in plea negotiations. Even where defendants might have a chance at

aware of the Solicitor General's briefs in *Ciminelli* and this case. *See* U.S. Reply Concerning Fraud Jury Instruction at 6-7, *United States v. Mokbel*, No. H-4-21-cr-103-S4 (S.D. Tex. Oct. 13, 2024) (ECF No. 310); Petr. Br. 45 n.9; U.S. Br. 44 n.*.

acquittal under a faithful application of the "essence" test, few would take the chance when facing up to twenty years in prison.

2. The government counters that forbidding property fraud prosecutions where schemes contemplated no harm to any traditional property interest would bar prosecutions in settings such as charitable donations and false advertising. U.S. Br. 42-43. This is incorrect.

The government has long prosecuted donor fraud cases without resort to the fraudulent inducement theory. *See, e.g.*, *United States v. Henningsen*, 387 F.3d 585, 590-91 (7th Cir. 2004). When someone obtains a charitable donation under false pretenses, the donor gets nothing at all for parting with his money. In cases like petitioners', by contrast, the person who pays money bargains to get something in exchange: the property the counterparty agrees to deliver.

Or take a buyer's desire to purchase products that are "union-made." U.S. Br. 42. The government can prosecute a seller who falsely represents its products are union-made if it demonstrates that the union-made product has a higher market price (as many do) and the defendant charged that higher price. Additionally, even where a union-made product doesn't have a higher market price, falsely claiming the product was union-made might constitute property fraud where—unlike this case—the parties agreed that the victim was paying a quantified premium for that attribute. In that circumstance, obtaining that premium via deceit could be tantamount to giving the victim an item with a lower market value than promised.

Other scenarios the government imagines might fall outside the property fraud statutes. But if so, other legal tools are readily available to address any misdeeds. For example, private individuals can always bring actions for breach of contract or for consumer-protection violations. Other civil and criminal remedies also exist in the context of government contracting and the like. *See* Petr. Br. 25-26. But the wallop of the property fraud statutes is unavailable when a scheme contemplated no harm to any traditional property interest. This Court should reject the government's latest attempt to argue otherwise.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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