

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

STAMATIOS KOUSISIS AND ALPHA)
PAINTING AND CONSTRUCTION CO., INC.,)
Petitioners,)
v.) No. 23-909
UNITED STATES,)
Respondent.)

Pages: 1 through 102
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23-909, Kousisis versus United States.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONERS

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The property fraud statutes require a scheme to defraud as understood at the common law, and such traditional fraud requires a scheme, if completed as devised, to harm a traditional property interest. And our position is no such harm occurs if -- if somebody pays money in exchange for something and gets the full economic value of that bargain.

The government asks this Court to chart a different path. It argues that a property interest is -- is harmed in a property fraud case whenever somebody gives money pursuant to a fraudulent -- a misrepresentation.

That would cause three major problems. First, it would flout decades of this Court's

1 precedent. Indeed, it would allow prosecutions
2 just like McNally, Ciminelli, the hypothetical
3 in Skilling, and others that the Court has said
4 are beyond the reach of the fraud statutes.

5 Second, the theory is incompatible
6 with the historical origins of fraud. In an
7 1893 case that's representative of the time, the
8 Kansas Supreme Court said: Even "though money
9 is obtained by misrepresentation, if no injury
10 occurs, no crime is [committed]." That sentence
11 is incomprehensible under the rule that the
12 government argues today, which says that anytime
13 there's misrepresentation that procures money,
14 that itself is injury.

15 And, thirdly and -- perhaps most
16 decisively, the government's theory knows no
17 bounds. Every day across the country, people
18 use white lies, puffery, and other fraudulent
19 promises to induce people to enter into
20 transactions. But, if there's no harm that
21 occurs in those transactions, there is no fraud.

22 That's what the government -- I'm
23 sorry. That's what this Court has said time and
24 again in this Court's cases as the government
25 has tried to concoct one theory after the other

1 to work around that. Such misrepresentations
2 might be a civil violation, they might be a tort
3 violation, a contract violation, they might even
4 be a low-level criminal violation. But the one
5 thing this Court has said time and again is that
6 they do not constitute property fraud because
7 property fraud requires harm to a property
8 interest. And no such harm occurs in a case
9 like this.

10 I would welcome the Court's questions.

11 JUSTICE THOMAS: Beginning with the --
12 the facts in this case, what would -- give me an
13 example of what would constitute fraud.

14 MR. FISHER: Well, it would have
15 constituted fraud if we had delivered bridge --
16 bridge -- bridge painting and repair services
17 worth less than we promised, so if we hadn't
18 painted the full bridge, if we'd used less --
19 products of a less higher quality to deliver the
20 project, that sort of thing, Justice Thomas. So
21 that would be a -- that would be a violation.

22 But, here, you don't have anything
23 like that. The government's theory -- and this
24 is at JA 96 -- was that the promise here was
25 non-financial in nature, and what the government

1 argued to the jury is this case is not about
2 dollars and cents. This case is about PennDOT's
3 programmatic interest. And I think, in the
4 Court's terms, that means this case is about
5 regulatory interests, and that's what the Court
6 taught in Kelly and other cases, that mere
7 regulatory interests do not supply the basis for
8 property loss.

9 JUSTICE SOTOMAYOR: I'm sorry,
10 counselor. Let's assume the example that I
11 contract to have a certified plumber fix
12 whatever, all right, and I don't use a certified
13 plumber, I just use a handyman, but the toilet
14 is fixed.

15 Under your theory, even if I didn't
16 use a certified plumber, because the toilet was
17 fixed, I got money from -- I got value under the
18 contract?

19 MR. FISHER: No, I don't think so,
20 Justice Sotomayor. There, the fraud would be
21 promising services that were more valuable. Now
22 the certified plumber presumably --

23 JUSTICE SOTOMAYOR: But I don't --

24 MR. FISHER: -- would charge more per
25 hour.

1 JUSTICE SOTOMAYOR: But I don't
2 understand what the difference between that and
3 this case is. The services the government
4 contracted for was to have a particular type of
5 vendor sell me something.

6 MR. FISHER: But a -- well, that's not
7 precisely right. I think what happened -- the
8 contract here was with Alpha Construction, and
9 Alpha Construction then got to choose its own
10 subsidiaries.

11 JUSTICE SOTOMAYOR: But, if a
12 particular --

13 MR. FISHER: Now, if the government
14 had an interest --

15 JUSTICE SOTOMAYOR: But someone who
16 was certified --

17 MR. FISHER: Right. So --

18 JUSTICE SOTOMAYOR: -- someone who had
19 a certain composition.

20 MR. FISHER: But -- but I think the --
21 so -- so I think you're right about the word
22 "certified" in a sense, but the certification in
23 your plumber hypothetical deals with somebody
24 who has greater expertise or experience and,
25 therefore, charges more.

1 JUSTICE SOTOMAYOR: So what difference
2 does it make it --

3 MR. FISHER: That's how I understand
4 it at least.

5 JUSTICE SOTOMAYOR: -- if I want
6 someone of a particular quality? When I hire a
7 portrait artist, I want that person. I can get
8 a portrait artist from anybody. Here, the
9 government wanted a particular person to provide
10 the service. That's unique, what they wanted.

11 MR. FISHER: I don't think it's unique
12 in -- in the -- in the sense that some of the
13 cases talk about uniqueness, and I'm happy to
14 get to that. But I think, Justice Sotomayor,
15 the key question -- the key question would be
16 was the thing that was promised and not
17 delivered more valuable in the marketplace than
18 the thing that was delivered.

19 JUSTICE SOTOMAYOR: Isn't the key
20 the -- I -- I always thought the key question
21 was that term, material to the transaction. Did
22 I get what I paid for?

23 MR. FISHER: So there is a materiality
24 requirement, yes, at the end of the statute,
25 which -- which -- I don't think that's exactly

1 the way materiality is analyzed. In *Neder*, the
2 Court said what the materiality test is: Was it
3 important to inducing the person to enter into
4 the transaction? That's what materiality is.

5 What this case is about here is
6 whether you need to have a harm to a property
7 interest. And what our position is, is where
8 you get full economic value of the exchange --
9 and that means not just the end product --

10 JUSTICE JACKSON: Well, where do you
11 get -- where do you --

12 MR. FISHER: -- and maybe I can give
13 you --

14 JUSTICE BARRETT: Mr. Fisher, what
15 about --

16 JUSTICE JACKSON: Oh. Go ahead.

17 JUSTICE BARRETT: Mr. Fisher, what
18 about this uniqueness thing? Let me kind of
19 bring you back. You -- you mentioned to Justice
20 Sotomayor that uniqueness matters.

21 What about your Grover Cleveland
22 example, the one about, if you contract for a
23 painting of your grandfather and you wind up
24 with one, say, of Grover Cleveland, that's not
25 exactly what you wanted, but let's say it's of

1 equal value. So you've suffered no economic
2 loss, so why, you know, or would that qualify as
3 an injury?

4 MR. FISHER: So I think that's the one
5 hard case in the corner of the law. So, as
6 it -- can I just state the general rule and --

7 JUSTICE BARRETT: Yeah.

8 MR. FISHER: -- then go to the
9 exception? So the general rule would be
10 frustration of subjective economic interests,
11 that if they're subjective, it's not enough to
12 trigger the property fraud statutes.

13 Now I think the one possible exception
14 that might have a foothold in the case law is
15 this uniqueness consideration, and I think the
16 reason why, whether it's a painting, a horse,
17 maybe it's a particular piece of land, is that
18 when you deal with something that's truly one of
19 a kind, economic value there is so subjective in
20 nature that it really doesn't necessarily work
21 so well to say the other thing was of equal
22 value.

23 JUSTICE GORSUCH: Well --

24 JUSTICE BARRETT: How do you know if
25 it's so subjective? What's -- what's the --

1 MR. FISHER: Well, when you have a
2 one-of-a-kind item. I think the grandfather
3 portrait or a piece of land is often talked
4 about as being unique to another piece of land,
5 like I wanted that house on that plot of land as
6 opposed to another.

7 That's a special problem in the law.
8 And you find it even beyond the property
9 statutes. Things like specific performance
10 doctrine and other things --

11 JUSTICE GORSUCH: Yeah.

12 MR. FISHER: -- bleed into that. But,
13 when you don't have uniqueness -- and --

14 JUSTICE GORSUCH: Well --

15 MR. FISHER: -- and this does get me
16 back -- you wanted to ask --

17 JUSTICE GORSUCH: -- Mr. Fisher, let
18 me just pause you there. I'm sorry to
19 interrupt. But specific performance, you've
20 referenced that concept. And, yes, and you --
21 you admit sometimes when I contract for that
22 horse or that painting, I want that thing. Even
23 if you provide me with something of equal value,
24 that injury is satisfied there in traditional
25 fraud law.

1 Why -- I -- I think -- I think we all
2 agree on that. Is that right?

3 MR. FISHER: Well, I think that's a --
4 you don't have to decide that in this case, and
5 I think --

6 JUSTICE GORSUCH: No, but we agree
7 that --

8 MR. FISHER: -- the treatises
9 generally say that.

10 JUSTICE GORSUCH: -- that is generally
11 true --

12 MR. FISHER: Yeah.

13 JUSTICE GORSUCH: -- under common law
14 fraud doctrine, right? So, if we accept that,
15 why isn't that this case, I think is what --
16 where I struggle, where the contract
17 specifically says we want DBEs. Now maybe you
18 should have them, maybe you shouldn't have them,
19 but that was -- that was an essential part of
20 the contract and what was provide -- what was
21 sought, and it wasn't provided.

22 So why isn't that like the horse or
23 the painting or any other specific performance
24 case?

25 MR. FISHER: Well, I think -- I -- for

1 the granular example under this contract,
2 remember, the contract itself didn't even,
3 strictly speaking, require DBE subcontractors.
4 It required our clients to make best efforts to
5 procure certain supplies with the income they
6 received from the contract from DBEs.

7 So, even under this contract, it's not
8 so much an insistence that you use DBEs in the
9 way you would have in the painting or the horse.
10 But, even more generally, I think there's a
11 distinction that runs through the law between
12 something that is truly one of a kind and
13 something that is of a class. And if you deal
14 with something of a class --

15 JUSTICE GORSUCH: Well, horses are of
16 a class, property is of a class, paintings are
17 of a class. It's -- it -- it turns on what was
18 contracted for and whether it was specifically
19 sought, a specific -- a specific item, whether
20 unique or not, whether that was sought.

21 MR. FISHER: Well, Justice Gorsuch, I
22 think --

23 JUSTICE GORSUCH: I want the horse
24 named Charlie. You know, there are 15 other
25 horses in the corral that are every bit as good,

1 but I want that one.

2 MR. FISHER: Well, I think that if you
3 want to follow the common law, the common law
4 did distinguish that. And, of course, you know,
5 even if every answer I give you today isn't
6 satisfying --

7 JUSTICE GORSUCH: Mm-hmm.

8 MR. FISHER: -- I would still tell you
9 that what -- what the Court has held in Neder
10 and other cases is these statutes incorporate
11 the common law, and the common law did draw this
12 line.

13 JUSTICE JACKSON: Mr. --

14 MR. FISHER: And so I'll do my best to
15 explain it.

16 JUSTICE JACKSON: Oh. Go ahead.

17 JUSTICE GORSUCH: All right. One
18 more -- one more question.

19 I take your point that there's got to
20 be an injury requirement. There certainly was
21 at common law fraud, but the government says
22 that's not necessary, materiality will do all
23 the work.

24 What's the problem with that?

25 MR. FISHER: Well -- well, there's two

1 problems.

2 One is that's just not the way the
3 common law did it. The injury requirement is --
4 is too tied to specific harm to property
5 interests.

6 JUSTICE GORSUCH: I understand that.

7 MR. FISHER: Now materiality goes --
8 materiality is much broader than just harm to a
9 property interest. So you'd have to mangle the
10 materiality requirement to do the work that the
11 traditional property fraud harm requirement
12 does.

13 Now the government, I think,
14 recognizes that when it looks at the materiality
15 requirement in Neder and says: Oh, gosh, this
16 is crazy broad. This doesn't do the work we
17 need it to do. So they invent this essence-of-
18 the-bargain test. But, even that, for all the
19 reasons we say in our brief, doesn't do the same
20 work that the traditional requirement does.

21 JUSTICE JACKSON: Mr. Fisher, I guess
22 I'm struggling with the idea that there has to
23 be a harm requirement in this context because I
24 don't see it in the statute, and this is a
25 criminal action. This is a criminal case.

1 I would think that Congress was
2 focusing on the harms that arise from the
3 wrongful conduct of the defendant. It named
4 certain elements: These are things that you are
5 prohibited from doing or else you will incur
6 criminal liability. And many of the common law
7 cases that you point to are in the civil
8 context, where you would need a harm, obviously,
9 in order to sustain a claim for damages.

10 So can you help me understand where
11 you're coming from with the need to have some
12 sort of other harm in this context?

13 MR. FISHER: Sure. Let me answer
14 first in terms of the statute itself and then
15 the common law.

16 In terms of the statute itself, the
17 easiest way to understand the case before you
18 today is that it's about what the meaning of
19 "defraud" is. So this is a textual argument
20 we're making about the meaning of "defraud," and
21 I'm just making the classic argument that the
22 word brings the old soil with it, and so --

23 JUSTICE JACKSON: But it depends on
24 what the old soil is. And my other part --

25 MR. FISHER: So -- so let's get to

1 that.

2 JUSTICE JACKSON: Yes, thank you.

3 MR. FISHER: So -- so -- so that's
4 where it is in the statute.

5 So then the old soil, as the Court
6 itself said in Neder, both involves civil
7 private fraud, like deceit, and criminal fraud
8 false pretenses.

9 So, if you look at either of those
10 things, you find the injury requirement. And we
11 cite treatise after treatise, case after case --
12 the reason why we look to civil law, if that's
13 part of what's hanging you up, is because,
14 historically, criminal fraud dealt just with the
15 government. And so civil fraud gets you --

16 JUSTICE JACKSON: Yes, but what's
17 hanging --

18 MR. FISHER: -- gets you private
19 injury.

20 JUSTICE JACKSON: -- what's hanging me
21 up -- what's hanging me up is kind of the facts
22 of this case because, to the extent that you're
23 talking about what you appear to concede is a
24 material term in an agreement, which is PennDOT
25 says: We want contractors who are engaged with

1 subcontractors who are qualify as DBEs, and you
2 have these folks, your clients, understanding
3 the materiality of this so much so that they
4 concoct a scheme whereby they misrepresent the
5 extent to which they really are relying on such
6 DBE subcontractors, I don't understand why,
7 given our just classic understanding of fraud
8 being deceit with the object of obtaining money
9 or property, why this doesn't count.

10 You -- you've switched it to -- I --
11 I -- I noted from your introduction that you
12 said a scheme to defraud is a scheme to harm a
13 traditional property interest.

14 I had understood it to be a scheme to
15 obtain a traditional property interest, that all
16 of those cases that you cite, the Ciminellis,
17 et cetera --

18 MR. FISHER: Yeah.

19 JUSTICE JACKSON: -- were about the
20 person's intent to obtain money or property, and
21 I think that is what's going on here.

22 So why don't we just have the sort of
23 classic fraudulent scheme to obtain property
24 under false pretenses in this way?

25 MR. FISHER: So I think there was a

1 lot there. Let -- let me try to break it down
2 into two parts. First, let me explain why it's
3 not classic fraud and then explain the
4 implications if you were to say it's within the
5 statute.

6 So, first, the reason why it's not
7 classic fraud is classic fraud does require more
8 than simply obtaining money by
9 misrepresentation. Look at the Kansas Supreme
10 Court's decision in Palmer. Look at the
11 Arkansas Supreme Court's decision in Morgan.
12 Those are both criminal cases even if you want
13 to stick with just criminal cases, as we
14 suggest.

15 JUSTICE JACKSON: What about this
16 Court? Have we ever -- we've never interpreted
17 the wire fraud statute?

18 MR. FISHER: The -- this Court -- of
19 course, you have. This Court time and again,
20 from its earliest days, said: This statute
21 involves harm to property. It involves loss to
22 property.

23 Those are the words this Court has
24 used both near -- near the enactment of the
25 statute and more recently in cases like Kelly

1 and the -- and in Skilling, where the Court
2 said: The way the statute works is that the
3 defendant's gain -- I'm sorry, the defendant's
4 loss --

5 JUSTICE JACKSON: It's not about the
6 scheme?

7 MR. FISHER: -- mirrors the gain.

8 JUSTICE JACKSON: It's not about the
9 scheme? I had understood that scheme has
10 something to do with it.

11 MR. FISHER: Scheme does have
12 something to do with it. You have to scheme to
13 obtain the property. And -- and --

14 JUSTICE JACKSON: Correct. And why
15 isn't that here?

16 MR. FISHER: -- and that -- yes. And
17 because you have to scheme to harm the property
18 as well. There has to be harm that follows.

19 And so what the -- what the Kansas
20 Supreme Court said in Palmer was there might be
21 lots of deceit and untoward behavior out there
22 in the world. In fact, that's the problem.
23 It's everywhere. But, to cabin criminal fraud
24 in any meaningful way, you have to cabin it to
25 where there's actually injury that follows.

1 And so the exact argument you make was
2 made in the --

3 JUSTICE JACKSON: And it's not
4 enough -- and it's -- the wrongfulness of the
5 defendant's behavior in a criminal context is
6 not injury, you're saying, for the purpose --

7 MR. FISHER: Correct.

8 JUSTICE JACKSON: -- of the criminal
9 law?

10 MR. FISHER: Exactly. That's what
11 Palmer says. That's what the Arkansas Supreme
12 Court said in Morgan. So let me give you
13 those -- a couple of examples, Justice Jackson.

14 In Palmer, what happened is the
15 defendant went in and lied about how his
16 business worked for -- and what his business was
17 for purposes of getting a loan. It induced the
18 person to give the loan, but he put up proper
19 collateral, and the Kansas Supreme Court said:
20 Even though he lied to obtain money, not fraud.

21 In -- in the Arkansas Supreme Court
22 case, in Palmer, the defendant lied to the
23 person wanting a hotel room and said: Your
24 friend stayed here recently, so you'll like the
25 room.

1 JUSTICE JACKSON: Right. Those are
2 all fraudulent inducement in the sense that
3 they're -- the -- the lie is not about the
4 service.

5 MR. FISHER: Yeah.

6 JUSTICE JACKSON: It's not about --
7 you know, Justice Sotomayor brings up the
8 example, it -- you know, this is a material term
9 of the contract. The service that I want is a
10 plumber who is certified or a plumber who is a
11 DBE, for example, bringing it closer to this
12 case.

13 MR. FISHER: Yeah, yeah.

14 JUSTICE JACKSON: I don't understand
15 why, when someone schemes to get around that
16 term not only breaches it but also then lies
17 about having fulfilled it, that doesn't qualify
18 as a material misrepresentation that triggers
19 this statute.

20 MR. FISHER: It could be material, but
21 there's no economic harm or other property harm,
22 and that's what's missing.

23 JUSTICE JACKSON: What do you do about
24 the donation --

25 MR. FISHER: If you take --

1 JUSTICE JACKSON: -- cases? What do
2 you do -- so -- fine. What do you do about
3 charity? All right? I'm in a -- the government
4 raises this in their brief.

5 I am, you know, wanting to donate my
6 money to a cancer charity and I'm not receiving
7 anything in return. I am giving the money away.

8 When it turns out that the charity to
9 which I donate has concocted an entire scheme to
10 get me to give them the money and they're not
11 actually giving it to cancer patients, they have
12 nothing to do with that, but they made all this
13 up and I give them the money, is -- does that
14 qualify for wire fraud in your view? There was
15 no harm to me economically.

16 MR. FISHER: Sure there was. You
17 got -- you gave money and you got nothing in
18 exchange. This case --

19 JUSTICE JACKSON: Oh, I got
20 something --

21 MR. FISHER: -- is totally different.

22 JUSTICE JACKSON: Well, I did get
23 something in exchange, didn't I?

24 MR. FISHER: No, I don't think so. I
25 think, there, it's not very different than

1 stealing. I mean, they just lied to you to
2 obtain your money, just like they took it
3 against your will.

4 Here, there's an economic exchange.
5 And, Justice Jackson, it cannot be that every
6 material provision of this 1100-page contract
7 would -- would give rise to a property fraud
8 prosecution.

9 Only the terms that deal with economic
10 or other property interests can give rise
11 because, otherwise, this theory knows no bounds.
12 There are all kinds of promises. Even if you
13 want to keep it more cabined than the examples
14 I'm giving you, look at the Second Circuit's
15 more recent decision in Regent Supply, where
16 there's aggressive salesmanship techniques. The
17 person says things like your -- your friend
18 referred me to -- referred you to me, he says
19 things like there's only so many left in our
20 warehouse, all these things that might induce
21 somebody to buy a product or -- or -- or --
22 or -- or take on a service that don't have any
23 value.

24 Just take in a babysitter who --
25 who -- there's two babysitters on the block, and

1 one says: I'm going to use the money I earn to
2 take my sick brother out to dinner next week,
3 and so that's why they pick Babysitter A versus
4 Babysitter B.

5 JUSTICE JACKSON: What about the
6 family --

7 MR. FISHER: That's no different than
8 this case.

9 JUSTICE JACKSON: What -- what -- what
10 about the family that says: I -- it's very
11 important to me to have a Christian babysitter.
12 We are devout. We want this. This is a
13 characteristic that we're telling everybody this
14 is what we're looking for. And someone comes
15 and they purport to have this characteristic,
16 but they don't ultimately.

17 MR. FISHER: I think that's egregious
18 behavior, but it's not property fraud if the --
19 if the -- if the babysitter is otherwise fully
20 qualified and performs the services.

21 Now there may well be a very serious
22 civil suit. If you're dealing with the
23 government in that kind of a situation, there
24 can be a 1001 prosecution or maybe a 371 charge.
25 So I'm not saying these things are okay, and I'm

1 not saying the law doesn't provide a remedy.

2 But what I am saying is that this is
3 an age-old -- this is an age-old problem when it
4 comes to fraud. Justice Story talked about it
5 in his treatise. The Kansas Supreme Court talks
6 about it in the Palmer case I've talked about,
7 which is it is tempting to use criminal fraud to
8 cover lots of forms of dishonesty -- dishonesty
9 or deceit. But the problem is you end up in a
10 world where everything ends up being covered.

11 JUSTICE ALITO: Mr. Fisher, I --

12 MR. FISHER: And so you have to draw a
13 line.

14 JUSTICE ALITO: -- I don't really
15 understand the limits of your argument. So a
16 party enters into a contract to get a particular
17 good or service, and the party does not get the
18 particular good or service that the party wants,
19 but he gets something that's worth even more.

20 Would you say that whenever that is
21 the situation, there is no fraud?

22 MR. FISHER: I think the answer is
23 yes, with a possible proviso of the unique-item
24 situation. But I think that, Justice Alito,
25 kind of brings the government's theory to light

1 in an odd way, which is imagine somebody wants
2 a -- a Ford and he gets delivered a Ferrari, and
3 the government puts that person on the stand and
4 says, gosh, it's like I hit the lottery, I got
5 something 10 times more valuable than the thing
6 I wanted to buy. Under the government's theory,
7 that is property fraud. And that seems like a
8 very odd result.

9 And the thing is there may be other
10 situations where the thing you get is less
11 valuable, and that's a classic --

12 JUSTICE ALITO: Well, I --

13 MR. FISHER: -- situation for fraud.

14 JUSTICE ALITO: -- I don't know
15 whether that's a -- whether that's a very odd
16 result. Suppose I -- I have two trees in my
17 yard. One is an oak and one's a weeping willow,
18 and I hate the oak because I'm tired of
19 sweeping -- of raking up the acorns, so I hire
20 somebody to cut down the oak tree. And when I
21 come home from work that night, the oak tree is
22 still standing, but the weeping willow is gone.
23 And he says, well, the oak is a healthy tree,
24 it's got deep roots. The willow is -- has
25 shallow roots, and any storm could knock it over

1 and it could damage the house.

2 Have I not been defrauded there? I
3 didn't get what I wanted.

4 MR. FISHER: I think you might have
5 been harmed there with the property of your tree
6 being taken away. I mean, I think just with --
7 I think that's just an odd hypothetical, but
8 with a normal service --

9 JUSTICE ALITO: Well I could give you
10 a --

11 MR. FISHER: -- I think it would just
12 be --

13 (Laughter.)

14 JUSTICE ALITO: -- I could give you a
15 million of them. I -- I -- I hire somebody to
16 paint the dining room of my house. And when I
17 come back, the dining room has not been painted,
18 but the living room has been painted. And the
19 living room is bigger. And he says, look, I --
20 I gave you a bargain, the same price, I painted
21 more, plus the living room really needed it more
22 than the dining room.

23 MR. FISHER: I think we're still in
24 this difficult situation of there's actually --
25 your -- your -- your home is your property and

1 so some of the things that are happening to your
2 property, but -- but I think --

3 JUSTICE KAGAN: Well, suppose --

4 MR. FISHER: -- what you're trying to
5 get at, Justice Alito --

6 JUSTICE KAGAN: -- suppose you enter
7 into a contract and you think you're going to
8 get -- you pay for gold bars that are worth a
9 million dollars, and, instead, you get lots of
10 coal that's worth a million dollars.

11 Have you -- is -- is that -- have you
12 been defrauded?

13 MR. FISHER: So I don't think you've
14 been defrauded under the property fraud
15 statutes. You may have been defrauded if you
16 were dealing with the government under Section
17 371, which doesn't have an injury requirement.
18 It may be --

19 JUSTICE KAGAN: But you really have
20 totally not gotten what you wanted. I mean,
21 you're creating a world where, because I have a
22 dollar's worth of loss, it falls within the
23 statute.

24 MR. FISHER: Yeah.

25 JUSTICE KAGAN: But, rather than a

1 dollar's worth of loss, I -- I've gotten
2 something that I have no use for, that I never
3 wanted, that I made clear I never wanted or had
4 use for. It happens to be the same in a
5 marketplace out there, but it sure isn't the
6 same for me. I think that this is a terrible
7 deal that I've gotten --

8 MR. FISHER: So let --

9 JUSTICE KAGAN: -- and it's not the
10 one that I signed up for.

11 MR. FISHER: So let me say a few
12 important things about that.

13 I mean, my -- my core submission is
14 that subjective disappointment when you get
15 something different is not enough. But
16 here's -- here's a couple things you could say
17 about that.

18 One is that is not this case. Here,
19 in the Third Circuit's own understanding --

20 JUSTICE KAGAN: But it goes directly
21 to your theory. Your theory is a dollar's worth
22 of loss makes all the difference, as opposed to
23 the government's theory is were you defrauded
24 out of something that you thought you were going
25 to get.

1 MR. FISHER: Right. So I understand,
2 Justice Kagan, that every legal rule is going to
3 seem perhaps arbitrary at the margins. So, if
4 you want to tell me a dollar or a penny, I have
5 to give you the answer yes because that is loss.

6 On the other hand, the problem with
7 the government's theory, which is subjectively I
8 didn't get what I want, is it has no -- it has
9 no limitations. So the coal versus the gold,
10 what if they wanted gold from somebody who was
11 producing it within the local county and not
12 from outside county lines? What if it was I
13 want some coal from somebody who's a friend of
14 the family? All those things you could
15 characterize with word play as the same
16 argument: I didn't get what I wanted.

17 And the other thing about those
18 hypotheticals, Justice Kagan, I understand
19 they're -- believe me, I've been through the
20 moots, they're very -- they're very hard and
21 they -- they seem odd, but it doesn't happen in
22 the real world. The real frauds in the real
23 world are when somebody's giving you something
24 less valuable. That's the whole point of an
25 ordinary property fraud.

1 Mistakes happen in terms of the wrong
2 item being delivered every day in the
3 marketplace, but we don't ask ourselves whether
4 there should be a fraud prosecution. We ask
5 ourselves whether we can turn -- take it back to
6 Amazon. I mean, these things happen, but unless
7 there's actual less value involved in the
8 alternative item or the parties have agreed to
9 some premium for one thing versus the other,
10 there's not really any reason for somebody to
11 come up with a scheme to give somebody coal, you
12 know, instead of gold.

13 JUSTICE BARRETT: Mr. --

14 MR. FISHER: If the coal is worth the
15 same amount, you could just sell it to somebody
16 else who wants coal.

17 JUSTICE BARRETT: Mr. Fisher, is the
18 government's theory really unbounded? Don't --
19 I mean, they don't quite advocate for a
20 materiality requirement, but let's say
21 materiality could be a limiting principle. Why
22 doesn't that work? Then that -- that means that
23 every white lie is not going to count as
24 something that would fraudulently induce you to
25 enter into a contract.

1 MR. FISHER: I guess white lie, you're
2 right, Justice Barrett, but the test for
3 materiality in the Restatement, which is what
4 the Court looks to in Neder, is any important
5 fact that induces somebody to enter in a
6 transaction.

7 In the babysitter hypothetical I gave
8 you, imagine somebody selling their house
9 because one couple says they want to raise a
10 family and somebody else says they don't and I
11 want to support the block -- there are
12 innumerable -- and we cite so many in our
13 brief -- examples where that ordinary
14 materiality requirement is met, which is -- if I
15 can just add one thing, which is --

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. FISHER: -- why I think the
18 government tries to monkey with the materiality
19 requirement and ratchet it all up. But, for all
20 the reasons we give in our brief, that just
21 doesn't work either and creates more problems.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Does it matter at all to the limits of
25 your theory whether or not there's an

1 alternative avenue of relief, or is that
2 irrelevant?

3 MR. FISHER: I don't think, strictly
4 speaking, it matters, but I think, in almost all
5 the difficult hypotheticals where we'd feel like
6 somebody has been harmed or injured in a
7 subjective way or -- or just cheated, there
8 would be alternative remedies. So there's tort,
9 contract. And that's what the Court has said
10 time and again in cases like Skilling and Kelly
11 and so many others.

12 Look, the -- the Court should construe
13 these statutes not to run roughshod over state
14 contract and tort law, not to mention other --
15 other remedies that are available.

16 CHIEF JUSTICE ROBERTS: Do you
17 recognize the availability of an alternative
18 remedy in this case?

19 MR. FISHER: Well, the government
20 prosecuted these same clients under Section
21 1001, and so I think, if they prove the elements
22 of that offense, yes, they can procure a
23 conviction.

24 CHIEF JUSTICE ROBERTS: Thank you.
25 Justice Thomas?

1 JUSTICE THOMAS: In your research,
2 have you found that there have been quite a few
3 of these fraud cases in this context brought by
4 the government?

5 MR. FISHER: In the -- what do you
6 mean by "this context?" Do you mean DBEs?

7 JUSTICE THOMAS: Yes.

8 MR. FISHER: I think there are --
9 there are some. I don't -- I don't think
10 they're tremendously frequent, but there are
11 others -- there are others that are out there.

12 JUSTICE THOMAS: So what distinguishes
13 this case from the others? It would seem that
14 with that many contracts, that the -- the broad
15 use or wide use of these contracts, that you
16 would have a history of some fraud litigation.

17 MR. FISHER: Well, as I say, I think
18 there are occasional breaches of these promises
19 that give rise to prosecutions. I think the
20 thing that distinguishes these from legitimate
21 prosecutions --

22 JUSTICE THOMAS: Mm-hmm.

23 MR. FISHER: -- Justice Thomas, is
24 that there's no economic harm here. Remember,
25 at JA 96, the prosecutor said this is a

1 non-financial interest about our program. So
2 just imagine all -- if I could say one thing.

3 JUSTICE THOMAS: Well, let me -- let
4 me --

5 MR. FISHER: Yeah.

6 JUSTICE THOMAS: -- give you a
7 different version just to be clear about what
8 your argument is. Let's say that someone -- a
9 company says that we will build your patio for a
10 certain price, but every third -- every month we
11 will give a patio to a veteran.

12 MR. FISHER: Mm-hmm.

13 JUSTICE THOMAS: And you make a
14 decision to allow them to build your patio with
15 the understanding that they contribute every
16 quarter or every month --

17 MR. FISHER: Right.

18 JUSTICE THOMAS: -- a patio to a
19 veteran. And then you find out afterwards that
20 they never -- that they did not provide patios
21 to veterans. Is that fraud?

22 MR. FISHER: It's not property fraud,
23 Justice Thomas, and the reason why is because
24 the homeowners would not have been defrauded in
25 their property interest. They wouldn't have

1 suffered any property or economic loss in that
2 transaction.

3 So it's no different, Justice Thomas,
4 than if somebody said: You know, my mother is
5 sick and having cancer treatments, and I'm going
6 to use these -- use these proceeds to help pay
7 for those doctor's bills or any other --

8 JUSTICE THOMAS: Is there any amount
9 of deceit that would amount to fraud if there's
10 no property loss involved?

11 MR. FISHER: No. And this is exactly
12 the problem Justice Story talked about, it's
13 exactly the problem the Kansas Supreme Court
14 talks about in Palmer, is there can be
15 extravagant lies and -- and whopping tales that
16 are told. And so it can be tempting to want to
17 punish that person, but, unless there's harm to
18 the property interest involved, there's no case.

19 Let me just make clear, you know, this
20 is an 1100-page contract, and what the Court has
21 said time and again is mere regulatory interests
22 cannot give rise to a property fraud
23 prosecution. If the government is right, every
24 regulatory interest written into a contract --
25 imagine during COVID somebody said: You know,

1 we want you to perform this project, but you
2 have to use masks when they're indoors. It's a
3 very important -- a very important governmental
4 interest right now these days. And the person
5 didn't wear a mask indoors.

6 That would give rise to a property
7 fraud prosecution punishable by 20 years in
8 prison even though it was just a regulatory
9 violation.

10 CHIEF JUSTICE ROBERTS: Justice --
11 Justice Sotomayor?

12 Justice Kagan?

13 JUSTICE KAGAN: Suppose the government
14 has a program and it sets aside money for
15 veterans and somebody comes in and creates a
16 whole set of lies to prove that he's a veteran,
17 but he's not a veteran. Is that fraud?

18 MR. FISHER: I think it is under the
19 exchange I had with Justice Jackson, which is,
20 if you just take something for nothing, that's
21 just stealing.

22 Now, here, what the Court --

23 JUSTICE KAGAN: So -- so suppose --

24 MR. FISHER: -- is dealing with here
25 is an exchange.

1 JUSTICE KAGAN: -- suppose that
2 instead of setting up a benefits program of that
3 kind, there's a contracting program that says:
4 You know, we want to give these contracts of a
5 particular kind to veterans, and somebody comes
6 in and delivers the same set of lies in order
7 now not to get just the assistance check but to
8 get the contract. Is that fraud too?

9 MR. FISHER: So my answer there and
10 that -- where I would draw the line -- would be
11 no if the person performs the full economic
12 value of what was wanted in that project.

13 And that's what Section 370 --

14 JUSTICE KAGAN: I mean, what --
15 what's --

16 MR. FISHER: -- that's what Section
17 370 --

18 JUSTICE KAGAN: -- what's the
19 difference, Mr. Fisher? You're -- you're going
20 to tell me that one is fraud if, like, there's a
21 benefits program for veterans, but the other is
22 not fraud if there's a contracting program
23 for -- for veterans? Why should that matter?

24 MR. FISHER: Because the common law
25 made clear that there has to be harm to a

1 property interest. And merely -- merely giving
2 money and getting full economic value back is
3 not harm to a property interest.

4 And I think, Justice Kagan, that is
5 very serious --

6 JUSTICE KAGAN: Even though the whole
7 program, if -- if I may, has been set up in
8 order to provide contracts to veterans --

9 MR. FISHER: I think that's exact --

10 JUSTICE KAGAN: -- not in order to get
11 the paint job of your dreams?

12 MR. FISHER: That's right. And let me
13 say two things.

14 One is I think that's precisely why
15 you have Section 371, which is fraud --
16 defrauding the government in its programs and
17 frustrating its programs is a crime punishable
18 with five years in prison. That is a classic
19 Section 371 case. That's probably why we have
20 that statute, because the property fraud
21 statutes, the mail fraud statute and the wire
22 fraud statute, don't cover that conduct as a
23 matter of common law understanding of fraud.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 JUSTICE GORSUCH: Mr. Fisher, it seems
2 to me the tricky part of your case is that at
3 common law, an injury could be if I didn't get a
4 particular thing, the horse, even if I got
5 something else of value.

6 The tricky part for the government,
7 though, is, if there is no injury requirement,
8 then every material misrepresentation that
9 results in no injury to anyone becomes a federal
10 crime.

11 And I -- I want you to talk a little
12 bit about that, your babysitter hypothetical
13 and the essence of the bargain, which -- which
14 language they try to put into the materiality
15 requirement, which just seems to me benefit of
16 the bargain, which seems to me an argument
17 really that there is injury here because we
18 contracted for a specific horse, a specific
19 thing.

20 MR. FISHER: Yeah. So --

21 JUSTICE GORSUCH: What -- what am I
22 missing there?

23 MR. FISHER: -- the injury needs to be
24 to your property interest. So, when you -- when
25 you're dealing with money and you get full

1 economic value back, at least as a general rule,
2 there's no harm to that property interest.

3 Now we can set aside the unique-item
4 situation. And maybe I would just -- I hope
5 this is responsive, Justice Gorsuch.

6 JUSTICE GORSUCH: I want you to focus
7 on the materiality argument that the
8 government's pressing and how it -- it may or
9 may not smuggle in a benefit-of-the-bargain
10 injury requirement.

11 MR. FISHER: Well, if I'm being
12 honest, I don't quite know what the government's
13 essence-of-the-bargain test means. If you take
14 it to mean what the Restatement means, it's much
15 more than materiality because what the
16 Restatement says is there are lots of things
17 that are important inducements to enter into a
18 transaction. And the Restatement is clear,
19 those do not necessarily go to the essence.

20 So the only thing that goes to the
21 essence under the Restatement is something that
22 would destroy the -- value of the entire
23 transaction.

24 Applying that to this case, this whole
25 transaction was about painting bridges and doing

1 repairs with quality workmanship. How we used
2 our proceeds doesn't remotely go to the essence
3 of the bargain. So I don't quite know what the
4 government is arguing when it talks about
5 essence of the bargain.

6 And I think, Justice Gorsuch -- I hope
7 it's responsive to your question -- let me just
8 say one other thing, which is I understand this
9 little corner of uniqueness is tricky, but the
10 government has this much bigger problem.

11 What the Court's cases teach time and
12 again is the federalism concerns and the
13 overcriminalization concerns make this even more
14 than an ordinary -- ordinary lenity situation.
15 These statutes, as the Court did in Skilling,
16 they have to be cabined. Otherwise, they sweep
17 in everything.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: You encouraged us
21 to focus on the real world. And I agree with
22 that. The government says, in the real world,
23 your position, however, would be, in their
24 words, highly destabilizing. And I want you to
25 respond to that.

1 And also, in doing so, a question of,
2 as you survey all the cases out there, is the
3 government regularly prosecuting cases under
4 this theory that you think cannot be prosecuted
5 as you see the law?

6 MR. FISHER: Well, Justice Kavanaugh,
7 it's a little tricky because, when the
8 government makes those statements, there was
9 very few citations in its brief, so I'm going to
10 do my best, which is I -- as I said to Justice
11 Thomas, my understanding is the government
12 sometimes brings prosecutions like this for
13 frustrating DBE requirements. There are other
14 fraudulent inducement-type cases -- the Court's
15 holding another one right now -- that get
16 brought.

17 It's not the predominant government
18 theory in the property fraud statutes. Again,
19 classic fraud, as I was explaining to Justice
20 Kagan, involves somebody who schemes to take
21 money and gives something of less valuable.
22 That's usually the whole point of a scheme, not
23 to give something of equal value. And so I
24 think it's an odd situation.

25 But, when you get into, you know,

1 perhaps government officials that the government
2 thinks is -- are corrupt, you get into other,
3 you know, programs that are important to the
4 government. I don't deny that the DBE program
5 is quite important to the government, just as a
6 mask mandate might be very important to the
7 government a few years ago, and other regulatory
8 interests like the one in Kelly are very
9 important to the government. And so sometimes
10 the government does get sufficiently frustrated
11 that it brings these cases.

12 I don't think it's highly
13 destabilizing to just lop off these things that
14 are outside of ordinary understanding of common
15 law fraud and still leave the government with
16 Section 1001, Section 371, and any number of
17 other civil remedies that private parties might
18 have available to them in these situations where
19 somebody is subjectively frustrated but not
20 harmed in their property.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: Mr. Fisher, I want
25 to give you a chance to respond to the

1 government's argument on page 47 of its brief.
2 It says that even under your own pecuniary loss
3 theory, you lose because PennDOT paid more for
4 the contract because it's more expensive to use
5 DBEs, and so it did lose money.

6 Do you have anything you want to say
7 about that?

8 MR. FISHER: Sure. I have two -- two
9 things.

10 One is the government's waived that
11 argument twice over. It didn't make it at
12 trial, and it didn't even make it in the brief
13 in opposition in this Court.

14 And there's a good reason why the
15 government never made it earlier. In the Third
16 Circuit, the government said -- and I'm going
17 to -- I think I can quote from the government's
18 brief here: We do not know whether PennDOT
19 would have paid more for a contractor that used
20 DBEs.

21 So the government's theory in this
22 case -- and this is laid out at JA 96 -- was
23 that this is a non-financial interest. It
24 didn't have anything to do with dollars and
25 cents.

1 And so that's the theory the
2 government ran in this case, not that we paid
3 something and got something -- paid money and
4 got something less valuable. But we paid, we
5 got everything we wanted.

6 And -- and -- and this brings me back
7 to the -- Justice Gorsuch's question. The
8 prosecutor at closing said: This is like a
9 frustration of a Buy America provision in a
10 contract.

11 That's exactly what the Court has said
12 isn't usually good enough. It doesn't satisfy
13 the essence of the bargain, and it's certainly
14 not financial in nature. But that's what the
15 government said this case was like.

16 JUSTICE BARRETT: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: So how do we square
20 your argument with how the Court has treated
21 bank fraud cases?

22 I -- I understood, and as the
23 government highlights, that the bank fraud
24 statute, we've said, is modeled on the mail and
25 wire fraud statute. And the Court in Shaw, I

1 think, looked at the very argument that you're
2 making and held that bank fraud does not require
3 ultimate financial loss or an intent to cause
4 financial loss.

5 And I thought, very notably, the Court
6 quoted Judge Learned Hand as saying: "A man is
7 nonetheless cheated out of his property when he
8 is induced to part with it by fraud even if he
9 gets a quid pro quo of equal value."

10 So it seems that with respect to bank
11 fraud at least, we have rejected your theory,
12 and we say the statutes are modeled after each
13 other. So how do we reconcile this?

14 MR. FISHER: Well, I -- I'm very glad
15 you asked me this question --

16 JUSTICE JACKSON: Yes.

17 MR. FISHER: -- because a lot of the
18 government's brief hangs on Shaw and this
19 related theory.

20 You're right that Shaw -- that the
21 bank fraud statutes at least in the states we're
22 talking about today are like the property fraud
23 statutes. But Shaw poses no problem for us.

24 All Shaw recognizes is that if the
25 victim is later made whole by, like, insurance

1 proceeds or a third party or even if the
2 defendant himself later pays the victim back,
3 it's still fraud. It's still criminal fraud,
4 just like if you steal something from somebody's
5 living room and then -- and then bring it back
6 next week, or you bring them back a new TV that
7 you've stolen.

8 All Shaw holds is that what the common
9 law called the collateral source doctrine, which
10 is the defendant's made whole some other way on
11 the back end, doesn't -- doesn't cure the fraud.
12 You asked --

13 JUSTICE JACKSON: But what about the
14 quid pro quo of equal value concept?

15 MR. FISHER: Right. Okay. So --
16 yeah, so -- so I think --

17 JUSTICE JACKSON: Yeah.

18 MR. FISHER: -- understood in the
19 context of that's the holding of Shaw --

20 JUSTICE JACKSON: Mm-hmm.

21 MR. FISHER: -- which poses no problem
22 for us -- and I -- and I -- I'm going to get to
23 that, but I think it might be helpful before the
24 government stands up for me to say one other
25 thing, which is the other thing the government

1 quotes again and again is no harm has to occur
2 in certain cases. All that means is that the
3 property fraud statutes are an inchoate offense,
4 which, again, we don't disagree.

5 So now me -- let me talk about quid
6 pro quo of equal value. In the context of Shaw,
7 I think all the Court is saying when it uses
8 that language is that -- what I just said, which
9 is, if you later get something that makes you
10 whole --

11 JUSTICE JACKSON: All right. Let me
12 just ask one final question.

13 MR. FISHER: -- there's no problem.

14 JUSTICE JACKSON: I -- I guess I'm
15 just trying to understand why this is all being
16 funneled through the lens of injury to the
17 plaintiff -- or not the plaintiff -- injury to
18 the victim in a situation like this. Again,
19 this is a criminal statute.

20 Is it your view that Congress cannot
21 identify certain conduct related to property and
22 money that is -- it believes wrongful if you do
23 it with a certain intent, you create a scheme,
24 and there not be any harm? I mean, there's no
25 completed harm element here. I know you say

1 you're supposed to intend for it to happen, but
2 I don't understand why that's necessarily the
3 case. That element is not in the text --

4 MR. FISHER: So -- so two reasons.

5 JUSTICE JACKSON: -- of the statute.

6 MR. FISHER: One is, again, the word
7 "defraud" is in the text, and that brings the
8 soil of that element. And 100 percent, Justice
9 Jackson, Congress can legislate to have the
10 criminal law be broader, and it has, in fact,
11 done so with honest services fraud. That is the
12 one area in response to McNally that Congress
13 has, in fact, expanded the fraud statutes. And
14 as Judge Sutton has said and as this Court
15 quoted for itself later from that opinion,
16 that -- that one singular extension actually is
17 quite significant because it shows Congress
18 said, in this situation, we want it to be fraud
19 but not in other situations.

20 JUSTICE JACKSON: Thank you.

21 MR. FISHER: So you had this whole
22 argument in McNally, and Congress responded just
23 with honest services fraud.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Feigin.

2 ORAL ARGUMENT OF ERIC J. FEIGIN

3 ON BEHALF OF THE RESPONDENT

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

6 Petitioners are asking this Court to
7 engraft a financial loss element onto the
8 property fraud statutes that's nowhere to be
9 found in their text, that this Court has
10 rejected no fewer than three different times,
11 not just in Shaw, but in Loughrin, in Carpenter,
12 and, frankly, in Neder too when it rejected a
13 requirement of damages, and that would cut out
14 paradigmatic frauds, like charity fraud,
15 co-religionist fraud, veterans preference fraud,
16 or basically any fraud that preys on a victim's
17 idiosyncratic preferences.

18 And I think the more that we hear
19 about this theory, I think the more incoherent
20 it becomes, and I think -- I mean, frankly,
21 that's become clearer or less clear, as the case
22 may be, this morning.

23 So charity fraud, they acknowledge
24 both here and in their reply brief that charity
25 fraud is fraud. But the only -- the

1 misrepresentation in a charity fraud case just
2 goes to a non-pecuniary aspect of the
3 transaction.

4 Then you have something like the
5 Grover Cleveland fraud, which is an example
6 drawn straight from the Restatement, although it
7 doesn't mention Grover Cleveland, and the --
8 then we have a uniqueness exception that I --
9 I -- I don't think I saw in their briefs, and
10 I'm not sure how far it extends. Does it extend
11 to Monet versus Manet? I -- I don't know -- I
12 don't know where that extends.

13 And then let's take the plumber
14 example. The whole point of the plumber example
15 is I'm contracting, I'm paying the price for a
16 certified plumber to fix my toilet. I guess
17 they'd say it's not fraud if someone comes in
18 and says, yeah, the toilet was fixed just fine,
19 a certified plumber wouldn't have done any
20 better. But that's not what I contracted for.
21 I want the piece of mind of knowing that, like,
22 I had a certified plumber, or I wanted my
23 preferred provider. That's straight from the
24 Restatement that Neder cites as the materiality
25 standard in this context.

1 And then we have the you get coal
2 instead of gold bars, which they concede
3 wouldn't be fraud under their theory. I don't
4 think this makes sense, and I think the Court
5 should reject it. I'm sorry.

6 CHIEF JUSTICE ROBERTS: Alright.

7 JUSTICE THOMAS: What exactly was the
8 harm to the government here?

9 MR. FEIGIN: The harm to PennDOT, I
10 mean, we actually had evidence in this case, and
11 we have maintained this theory -- you can look
12 at pages 11 to 12 of our brief in opp and page
13 42 of our reply brief -- there was harm in that
14 they were willing to pay more for this
15 regulatory program to be satisfied because they
16 were required by the legal requirements to do
17 it. They were actually willing to pay more for
18 it.

19 But, in addition, Your -- in addition,
20 Your Honor, I mean, I -- the government was
21 harmed because it made very clear that this was
22 a service -- this was the type of service that
23 it wanted to contract for and that it did not
24 receive that particular service. It's the exact
25 same theory that would be the case in veterans

1 preference fraud. If they'd contracted to have
2 a veteran do this and someone lied and said they
3 were a veteran, I -- I believe they're saying
4 that's out now, unless it's under -- I wasn't
5 sure whether they were accepting the idea of a
6 specific performance exception that Justice
7 Gorsuch mentioned --

8 JUSTICE GORSUCH: Mr. Feigin --

9 MR. FEIGIN: -- and how far that would
10 extend.

11 JUSTICE GORSUCH: Do -- do -- you --
12 you say that the government was willing to pay
13 more for DBEs. Did you preserve that argument?

14 MR. FEIGIN: Yes. You can look at
15 page 42 of our court of appeals brief. You can
16 look at the closing argument the government made
17 in --

18 JUSTICE GORSUCH: Mr. -- Mr. Fisher
19 says that's not in the case. Why do you
20 disagree?

21 MR. FEIGIN: I disagree because we
22 both presented evidence on it and preserved it.
23 I mean, the Court can -- the Court is free to
24 look at the record yourself.

25 JUSTICE GORSUCH: So, if that's the

1 case, why are we here? I mean, if -- if -- if,
2 in fact, there is an injury and it's economic,
3 can't we resolve the case on that ground?

4 MR. FEIGIN: I think the Court could
5 do that, and we urged the Court to deny
6 certiorari on that basis --

7 JUSTICE GORSUCH: Okay. So we really
8 don't need to go beyond saying --

9 MR. FEIGIN: -- at pages 11 -- pages
10 11 and 12 of our brief in opposition.

11 JUSTICE GORSUCH: -- if there is an
12 injury requirement, it was satisfied here?

13 MR. FEIGIN: Yes.

14 JUSTICE GORSUCH: Okay.

15 MR. FEIGIN: We have made that
16 argument. I mean, we introduced that section by
17 citing the portion of the brief in opp where we
18 made that argument. I'm happy to, you know,
19 point the Court again toward it --

20 JUSTICE GORSUCH: Okay. And let me --
21 let me ask --

22 MR. FEIGIN: -- but the -- I mean,
23 based -- I -- I still --

24 JUSTICE GORSUCH: That's fine. That's
25 fine.

1 MR. FEIGIN: Yeah.

2 JUSTICE GORSUCH: That answers my
3 question completely. Did you agree that at
4 common law, fraud, completed fraud, required
5 injury?

6 MR. FEIGIN: I -- I -- it depends what
7 you mean by "injury," Your Honor. I think they
8 get a lot of mileage out of confusion in the
9 cases about what phrases like "harm," "injury,"
10 and "loss" mean. I mean, I agree that it
11 requires harm in the sense that you have to
12 obtain the victim's property, but, here, that's
13 satisfied. They got tens of millions of dollars
14 of PennDOT's money. So, in that sense, yes.

15 JUSTICE GORSUCH: Loss?

16 MR. FEIGIN: I -- I do -- I do not
17 agree that the common law required the kind of
18 net financial loss that they have here.

19 First of all, I think that's
20 essentially -- they essentially concede -- and
21 this is at page 9 of --

22 JUSTICE GORSUCH: Not net loss --

23 MR. FEIGIN: Oh.

24 JUSTICE GORSUCH: -- but that there's
25 some -- some deprivation of property, some

1 damages.

2 MR. FEIGIN: No, Your Honor. There
3 didn't have to be damages, as we point out, for
4 the -- particularly for the rescission remedy.

5 And on page 9 of their reply brief,
6 they acknowledge that the common law was
7 established in our favor at least by 1952. And
8 Pasquantino, page 360 of that opinion, tells us
9 that 1952 is the relevant date for wire fraud.
10 And I would submit that this --

11 JUSTICE BARRETT: Mr. Feigin --

12 MR. FEIGIN: I'm sorry.

13 JUSTICE BARRETT: -- I -- I -- I just
14 wanted to ask you, kind of following up, Justice
15 Gorsuch was asking whether we could decide the
16 case on a narrower theory, and I wanted to
17 return to -- kind of related to that, I wanted
18 to return to, you know, Justice Kavanaugh asked
19 about whether this would destabilize the law.
20 He asked Mr. Fisher that question. Justice
21 Thomas asked how many of these prosecutions are
22 there on this DBE theory.

23 How often does the government -- it
24 doesn't have to be just DBEs, but how often does
25 the government bring prosecutions that might fit

1 this kind of category? Is this an outlier, or
2 is this something common?

3 MR. FEIGIN: I -- I can't give you a
4 precise number, Justice Barrett. I mean, I
5 think, in a lot of cases, there -- we also would
6 be able to show some kind of economic loss of
7 the sort that we're supposing.

8 But we definitely prosecute cases of
9 charity fraud. We definitely prosecute cases of
10 veterans fraud. And there are other types of
11 fraud that we prosecute under -- under this
12 theory.

13 JUSTICE KAVANAUGH: Well, if you can't
14 give a number, how could it be highly
15 destabilizing, or if you're not --

16 MR. FEIGIN: Well, one reason I think
17 it would be very highly destabilizing, to get
18 back to what I was just saying, is I -- I don't
19 really understand the limits of this theory that
20 they're espousing. It's one the Court's
21 rejected numerous times. And I don't even
22 understand where it's coming from.

23 I guess, although all they objected to
24 below was the property element, I take them
25 today to be locating it in the defraud element.

1 But, of course, you know, in Shaw, the Court
2 rejected the idea that intent to defraud
3 requires intent to cause financial loss.

4 So -- but -- a -- a -- just taking it
5 on -- on its own terms, I mean, I -- I -- I
6 guess there appear -- they appear to draw this
7 from the common law, but they concede the common
8 law was established in our favor by 1952. And I
9 think it was well-established long before then.

10 If you look at the Story treatise from
11 1870, at -- Section 203(e), page 207 of the 1870
12 Story treatise, Story says that you're entitled
13 to a rescission remedy if either you pay a
14 higher price or you were tricked into making an
15 exchange that you otherwise wouldn't.

16 And that's --

17 CHIEF JUSTICE ROBERTS: Counsel -- I'm
18 sorry, why don't you finish your thought.

19 MR. FEIGIN: I'm sorry. And that's
20 exactly the case here.

21 It's the same for false pretenses. If
22 you look at the 1865 version of the Bishop
23 treatise that we cite in our brief, we cite the
24 1883 version, it cites the horse cases and
25 points out exactly our rule.

1 I'm sorry, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: No. No. No.
3 It -- it seems to me this case has a lot of the
4 air of a pot calling the kettle black. I mean,
5 if we took the phrase "there are no limits to
6 their theory," I -- I don't know which side
7 would have more statements like that, but there
8 would certainly be a lot in either -- in -- in
9 either one.

10 So I'll ask you the same question that
11 was asked of Mr. Fisher. What -- what is the --
12 what -- the limits to your theory?

13 That's a big part of the argument on
14 the other side, that you're taking every --
15 however minor -- okay, let's say it says -- you
16 can get as many hypotheticals as you want. The
17 contract says: And all the documents shall be
18 printed on 8-and-a-half-by-11 paper. And you
19 get three of them that happen to have
20 8-and-a-half-by -- by-13 paper.

21 Can you bring that prosecution? You
22 know, maybe -- maybe you wouldn't normally, but
23 you may well have reasons that you don't like
24 what happened, so you're looking for anything
25 you can get your hands on to throw -- throw it

1 out or get some destabiling aspect to it. And if
2 it's 1100 pages, there are going to be a lot of
3 things in there that they, you know, didn't dot
4 every I or cross every T.

5 So what are -- what are the limits to
6 your theory?

7 MR. FEIGIN: Well, Your Honor, there
8 are -- there are other limits in the statute
9 that we may get to later, but the principal way
10 that this has been dealt with and the way this
11 Court dealt with it quite recently in Universal
12 Health Services, where it begins the discussion
13 with the Neder standard, is through materiality.

14 And the Court makes clear in Neder --
15 sorry, in Universal Health Services that this --
16 this exact problem, there in the context of
17 conditions on payment, but I think equally
18 translatable to other types of contract
19 conditions, the Court makes clear that the
20 standard's the same in criminal law, tort law,
21 contract law, and that that standard is familiar
22 and rigorous and that the standard excludes
23 these kinds of sort of, you know, you might call
24 them ticky-tack things, unless -- and this is at
25 Footnote 5 of Neder, where it cites the

1 Restatement I'm -- there is a subjective
2 preference that this particular victim happens
3 to have, of which the defendant has constructive
4 knowledge.

5 CHIEF JUSTICE ROBERTS: What about
6 the -- the point that a lot of these things
7 could be dealt with under state law, and you
8 don't have to federalize every jot and tittle in
9 a -- in a large contract and that it's a matter
10 of concern that we've expressed in many
11 precedents that the federalization of something
12 as simple as nuances of contract law, it's a
13 very serious matter?

14 MR. FEIGIN: Well, let me emphasize
15 again that this would not, for the same reasons
16 as in Universal Health, that the Court explained
17 there, federalize every jot and tittle of -- of
18 a contract.

19 And I can explain why this is a very
20 different case from what you're supposing, Your
21 Honor. But just to take your question on
22 directly, I -- I -- I take the instinct -- and
23 let me say a couple of things about it.

24 Number one, I think it's always been a
25 supporting rationale, not a freestanding reason

1 just to impose a limit in the statutes. For
2 example, small-bore private frauds, the justice
3 manual advises prosecutors not to bring those
4 types of prosecutions.

5 But I don't think you'd say -- and
6 this goes to my friend's colloquy with Justice
7 Kagan. I don't think anyone would say that
8 that's a justification for writing such an
9 exception actually into the statute.

10 And by the same token here, I -- I
11 don't think there's a reason why if -- just a
12 freestanding reason why to do that. Congress
13 wrote these statutes because it wanted to
14 criminalize frauds when they used the mails and
15 the wires. And that's what we have here.

16 As I was just explaining, this is a
17 very traditional theory of fraud. I think it's
18 common ground that it's at least been the law of
19 fraud for the 72 years that the --

20 JUSTICE GORSUCH: Mr. -- Mr. Feigin,
21 I'm sorry to interrupt, but I -- I just want to
22 circle back to the Chief Justice's first
23 question.

24 And materiality has never been that
25 high of a bar. You seem to be trying -- trying

1 to make it a little higher here by really
2 importing, it seems to me, the benefit-of-the-
3 bargain idea with respect to individual items
4 that can sometimes give rise to injury even when
5 you're given a thing of equal value. The horse
6 example. The -- the -- the -- the -- the
7 painting example.

8 On your theory, though, of
9 materiality, if materiality is the only thing
10 required, what about the babysitter who says:
11 I'm going to -- and it's in the briefs -- you
12 know, take the money that you give me for
13 college, and -- and, therefore, I hire her. She
14 provides excellent babysitting services and
15 proceeds to blow the money on a trip to Cancun.

16 Now is that mail fraud? I mean, could
17 that be prosecuted as mail fraud because I had
18 some subjective wish that she use it for one
19 purpose rather than another, even without any
20 economic injury to me?

21 MR. FEIGIN: Well, Your Honor, I don't
22 think some subjective wish counts. So, if we
23 look at Footnote 5 in Neder, it has to be a
24 subjective preference about which the --

25 JUSTICE GORSUCH: Everybody's --

1 MR. FEIGIN: -- victim had
2 constructive knowledge. So --

3 JUSTICE GORSUCH: Yeah. Spot me that.
4 We got that here.

5 MR. FEIGIN: So, Your Honor, if you --
6 the -- if the hypothetical babysitter says --
7 like, knows that this couple --

8 JUSTICE GORSUCH: Yes, that's
9 important to them. Yeah.

10 MR. FEIGIN: -- is choosing -- is
11 choosing between babysitters --

12 JUSTICE GORSUCH: Yeah. It's a
13 material misrepresentation.

14 MR. FEIGIN: -- considers it a form of
15 charity, essentially, that we choose this
16 babysitter over this babysitter, she knows
17 that --

18 JUSTICE GORSUCH: Yep.

19 MR. FEIGIN: -- or he knows that, and
20 he lies about it --

21 JUSTICE GORSUCH: Yep. Yep. Yep.

22 MR. FEIGIN: -- and that's why they
23 hired the babysitter --

24 JUSTICE GORSUCH: You're -- you're
25 repeating my hypothetical.

1 (Laughter.)

2 MR. FEIGIN: -- and there's
3 involvement of the --

4 JUSTICE GORSUCH: I think the answer
5 you -- you're -- you're reluctantly --

6 MR. FEIGIN: Yes.

7 JUSTICE GORSUCH: -- getting to is
8 yes.

9 MR. FEIGIN: No, I'm just -- I'm just
10 pointing -- this is the exact same theory, Your
11 Honor, under which --

12 JUSTICE GORSUCH: Now I -- I would
13 acknowledge --

14 JUSTICE KAGAN: Well, Mr. --

15 MR. FEIGIN: Yeah.

16 JUSTICE GORSUCH: -- I -- I would
17 acknowledge, if I paid more for the babysitter
18 who's using her money for good things, rather
19 than the babysitter secretly planning a trip to
20 Cancun, that might be -- I might have been
21 injured.

22 But, on your theory, that's not
23 required.

24 MR. FEIGIN: So, Your Honor, let me
25 just say a couple of things about that.

1 JUSTICE GORSUCH: That's --

2 MR. FEIGIN: I think that's --

3 JUSTICE GORSUCH: -- federal mail
4 fraud.

5 MR. FEIGIN: I think that's exactly
6 the same theory as charity fraud. I think it's
7 exactly the same theory as if there's a
8 misrepresentation about a criminal background
9 and turns out to have been a serial child
10 abuser. I think you can imagine this --

11 JUSTICE GORSUCH: Well, no. In those
12 circumstances, I might have paid more, and if I
13 can prove that, I've certainly been injured.

14 MR. FEIGIN: Well --

15 JUSTICE GORSUCH: But you're -- you
16 would have us say that doesn't matter so long as
17 I'm -- the victim's aware of the subjective
18 wishes, that that --

19 MR. FEIGIN: You might have --

20 JUSTICE GORSUCH: -- is mail fraud.

21 MR. FEIGIN: Sorry, Your Honor.

22 You -- you might have paid more but maybe not.

23 So this is in a actual case from the
24 Tenth Circuit, a case called Richter, where
25 the -- there's a company that represents that

1 it's going to dispose of your electronics in
2 some kind of environmentally sound way rather
3 than simply to dispose of them overseas, as
4 other companies do, and they charge about the
5 same rates as other companies. And people say:
6 Oh, this is a great deal. And it turns out
7 they're taking them overseas too.

8 Or to make this a little bit more like
9 the babysitter example, you could imagine a
10 babysitting company doing this sort of thing on
11 a systematic basis. Or take an actual company.
12 They're not doing what I'm about to
13 hypothesize --

14 JUSTICE GORSUCH: I -- I take your
15 point.

16 MR. FEIGIN: -- they do, but --

17 JUSTICE GORSUCH: I -- I think Justice
18 Kagan had another question.

19 MR. FEIGIN: I'm sorry.

20 JUSTICE KAGAN: Well, it -- it really
21 comes off of Justice Gorsuch's example, and he
22 beat me to the punch a little bit because he
23 said: You know, if this exact same lie, I'm
24 going to use the money I make -- this babysitter
25 says -- in order to go to college, on the -- and

1 on the one hand, that gets her the job. On the
2 other hand, it gets her the job plus 25 cents
3 more an hour.

4 The question is whether that should be
5 the difference between wire/mail fraud and not.
6 Now, hopefully, the wire/mail frauds statutes
7 are not being used to prosecute the babysitter
8 regardless.

9 But what sense would it make -- if I
10 understand Mr. Fisher's theory, it makes all the
11 difference between somebody saying: You know,
12 this is such a wonderful person, she's using
13 this to go to college. They give her the job on
14 that basis. But, because they also say: We'll
15 throw in an extra 5 bucks, that that's what's
16 going to make the difference between fraud and
17 not?

18 MR. FEIGIN: That's not necessary,
19 Your Honor. I mean, I -- this is the exact same
20 theory as in veterans' preference fraud.

21 If you're paying the same amount, but
22 you really want a veteran to do it, I mean, it's
23 the exact same -- Your Honor, if -- I -- I know,
24 like, there's always an instinct to want the
25 advocate to give up these hypotheticals.

1 That -- that is the exact theory -- theory of
2 charity fraud, veterans fraud, co-religionist
3 fraud. I hire somebody to build my pews and it
4 turns out they're a Nazi.

5 There are every -- that is our basic
6 theory of fraud. It's not required. And, in
7 fact, Universal Health Services uses an
8 example -- one of the examples of -- of a common
9 law fraud case that they cite involves
10 employment fraud where somebody misrepresents
11 their qualifications on their resume, says
12 they're retired, and it turns out they were --
13 they were actually in jail during that period.

14 JUSTICE KAGAN: If I could, though --

15 JUSTICE SOTOMAYOR: Mr. Feigin --

16 JUSTICE ALITO: Mr. --

17 JUSTICE KAGAN: -- Mr. -- Mr. -- you
18 know, Mr. Fisher has -- has said a lot of these
19 cases use the language of harm, use the language
20 of injury. I mean, some of them do, some of
21 them don't. They're a little bit all over the
22 map as far as I understand them, but there are
23 definitely some that use that language.

24 What do you take them to be referring
25 to, or what's the range of things that they

1 might be referring to? In other words, some of
2 them are using them one way; some of them might
3 be using them another way.

4 MR. FEIGIN: So, Justice Kagan, let me
5 make -- let me make very clear just a couple of
6 points before I address your question. They --
7 they're very quick.

8 Number one is the Court made clear in
9 Pasquantino and also in Neder that the burden's
10 on them to show the common law, and they have to
11 show a well-established common law rule.

12 The second thing I'd tell you -- and
13 this goes straight to your question -- is we're
14 not claiming every single case has to be read
15 our way. We acknowledge -- for example, we cite
16 the LaFave treatise that points out that the law
17 on false pretenses was more in our direction but
18 that there were some other cases about this.

19 And then the third thing I would say
20 is a lot of these cases do talk about loss,
21 harm -- loss and harm in terms of just actually
22 get -- not getting what you want, like, getting
23 the coal instead of getting the gold would be
24 the loss or harm.

25 If you want to see a -- a more

1 close-in-time discussion of that, there's the
2 Washington Supreme Court opinion in Rudebeck
3 that we cite in our brief, and I don't think
4 they really have a -- a response to that. In
5 fact, there are a number of sources,
6 contemporaneous sources, that they don't respond
7 to in our brief.

8 I mean, for the common law, I'm
9 content to let the Court either look at it for
10 itself, or I'd encourage the Court to line up
11 our sources versus theirs and see what they're
12 not able to respond to in their reply brief.

13 And, again, finding a couple of
14 outlier cases or a couple of cases like the ones
15 that Mr. Fisher has focused on this morning,
16 that I could talk about specifically, but even
17 spotting him that those favor his rule, just a
18 couple of cases lined up against all the
19 treatises, you know, Story, Bishop, this Court
20 cites Bishop for all sorts of things all the
21 time --

22 JUSTICE KAGAN: Thank you.

23 JUSTICE SOTOMAYOR: Counselor, the
24 fraudulent inducement cases are difficult.
25 There's the babysitter one, one doesn't think of

1 the contract as including what the person's
2 going to do with the money later. But,
3 presumably, if I am a parent and I really want
4 them to spend the money on college, I could make
5 it a part of the contract, couldn't I,
6 explicitly?

7 MR. FEIGIN: Yes, you could, Your
8 Honor, make it -- make it explicit in -- in the
9 contract.

10 JUSTICE SOTOMAYOR: Now this case --

11 MR. FEIGN: I -- I --

12 JUSTICE SOTOMAYOR: -- this is not
13 fraudulent inducement in the sense of those
14 examples of my reasons for entering the
15 contract. The use of the DBEs was part of the
16 contract, correct, written part of the contract?

17 MR. FEIGIN: Yes, Your Honor, and let
18 me be clear that it doesn't -- it's not --
19 neither a necessary nor a sufficient condition
20 for it to be part of the contract. This goes
21 back to my discussion with the Chief Justice.

22 JUSTICE SOTOMAYOR: On the materiality
23 question?

24 MR. FEIGIN: On -- on materiality.
25 You -- you could have lots of things in a

1 contract. This came up exactly in Universal
2 Health Services. Even if they're specified as
3 important or material or conditions of payment
4 that aren't such because they're either not --
5 it's either not reasonable -- this is under the
6 standard that Neder employs; it's in Footnote 5
7 of Neder -- because either a reasonable person
8 wouldn't attach importance to it or there isn't
9 the kind of subjective importance that the
10 victim had reason to know about.

11 JUSTICE SOTOMAYOR: I'm just getting
12 to the point that this is a much narrower case
13 than the broader fraudulent inducement cases,
14 correct?

15 MR. FEIGIN: The -- it's narrower than
16 a case where there's, like, 7,000 requirements
17 and they're all material and, in theory, we're
18 trying to prosecute for one. I'm not sure we
19 could do that unless it were --

20 JUSTICE SOTOMAYOR: But it's not --
21 it's not --

22 MR. FEIGIN: -- obviously an important
23 one.

24 JUSTICE SOTOMAYOR: -- it's not a
25 condition of the contract that's not specified

1 in the contract?

2 MR. FEIGIN: It is not only specified
3 here in the contract, yes.

4 JUSTICE SOTOMAYOR: Counselor, just
5 answer my question.

6 MR. FEIGIN: Yes, it is that --

7 JUSTICE SOTOMAYOR: This is
8 different --

9 MR. REIGN: This is not that case.

10 JUSTICE SOTOMAYOR: This is not the
11 case of the babysitter?

12 MR. FEIGIN: That is absolutely
13 correct, Your Honor.

14 JUSTICE SOTOMAYOR: All right. Thank
15 you.

16 MR. FEIGIN: This is not -- a --

17 JUSTICE SOTOMAYOR: Why are you
18 fighting me so hard?

19 (Laughter.)

20 JUSTICE KAVANAUGH: Well, you're --

21 MR. FEIGIN: I -- I was not trying to.
22 I -- I apologize for giving the impression I was
23 trying to fight you.

24 JUSTICE KAVANAUGH: Now, when
25 you're --

1 MR. FEIGIN: I was going to amp up
2 your point actually.

3 JUSTICE KAVANAUGH: When you were
4 answering or discussing this issue with Justice
5 Gorsuch, he said, I -- I think your answer is
6 yes ultimately. But you never actually said
7 yes. Was your answer yes to --

8 MR. FEIGIN: Yes, Your Honor. I -- I
9 will --

10 JUSTICE KAVANAUGH: Okay. Thank you.

11 MR. FEIGIN: -- I will accept that
12 the -- under our -- under the theory that we
13 have, which is necessary to get charity fraud,
14 veterans fraud, co-religionist fraud --

15 JUSTICE KAVANAUGH: I got -- I got the
16 reasons. I just wanted to make sure there's
17 no --

18 MR. FEIGIN: Well, I'll -- I'll accept
19 that if the mails and wires were used and all
20 the elements of the statute were satisfied, yep,
21 that would be wire fraud. I think the
22 sentencing guidelines would be pretty low.

23 JUSTICE KAVANAUGH: Right. And then,
24 on materiality, which you emphasize as --

25 JUSTICE GORSUCH: That's comforting.

1 JUSTICE KAVANAUGH: -- being a
2 critical limit here, what's the -- what should
3 the jury instruction look like there? What is
4 the standard jury instruction there? Because
5 you refer to "essence of the bargain," which I
6 think is probably not giving a huge amount of
7 guidance. So?

8 MR. FEIGIN: So, Your Honor, I don't
9 think there's a one-size-fits-all approach to
10 this, and let me just get the difficult part out
11 first.

12 They -- they've identified a couple of
13 instances in their brief where the government
14 opposed an essence-of-the-bargain instruction.
15 The government should not be doing that. And we
16 filed a corrective letter in one case, and the
17 other case is post-verdict and we intend to
18 confess error in that case as well.

19 So essence -- I think, in Footnote 5
20 of Universal Health Services, the Court offers
21 just a number of different formulations, some of
22 which might be useful in certain cases, some of
23 which might not. I don't think it's error just
24 to use the standard materiality instruction
25 because, of course, that's what Universal Health

1 Services is interpreting.

2 But something like "essence of the
3 bargain," or what was done in this case, I think
4 it's page 98 to 99 of the Joint Appendix, you
5 have "fundamental basis of the bargain." That
6 might be another way to put it.

7 I think what's important is that the
8 jury gets the idea of -- of the actual
9 materiality standard, like, that really the
10 governments -- if it's not something to which a
11 reasonable person would attach importance, like
12 the size of the paper, Mr. Chief Justice, then
13 we're not going to be able to satisfy that. And
14 then I think you're really going to have to
15 show, and the burden's always on us to show --
16 this is even beyond Universal Health Services,
17 which is -- brings this up in a civil context.

18 JUSTICE KAVANAUGH: I think the
19 concern or one concern -- and I don't think
20 there's a great solution to this, but I'll just
21 throw it out there -- is that obviously, it's
22 pretty vague and different juries are going to
23 have very different reactions to something like
24 "essence of the bargain." But I don't know that
25 there's a great solution to that. That's why I

1 was asking the question about how it's spelled
2 out.

3 MR. FEIGIN: So, Your Honor, I think
4 this -- I think courts have a lot experience
5 crafting proper jury instructions. This is
6 exactly what they have to do under Universal
7 Health Services. Unlike Universal Health
8 Services, we have to prove this beyond a
9 reasonable doubt.

10 And I think any kind of reasonable
11 explanation -- and, again, this has been the law
12 for a long time, a long time, so there's a lot
13 of experience with this. But I think any
14 explanation that the Court comes up with that's
15 a reasonable explanation of the concept of this
16 has to be something that was really important,
17 like here, where the contracts only occupies
18 seven pages of the JA, which are smaller pages,
19 Mr. Chief Justice, than 8-and-a-half-by-11,
20 is -- only occupy seven pages of the JA, they
21 only have 17 warranties, and this is the only
22 one designated as material, that's going to be
23 easier to prove.

24 One other thing I'd say about
25 materiality is, of course, net pecuniary loss or

1 the lack thereof is something that could be a
2 factor in whether something is material. People
3 care more if they're losing money. They care
4 less if they are not losing money as a general
5 matter.

6 There are cases -- and the Restatement
7 recognizes this, Neder recognizes this, the law
8 has always recognized this, the uniqueness
9 exception recognizes this if there is such an
10 exception rather than that just being the
11 general rule -- that there are cases where
12 someone has a subjective preference that may
13 even cut against their economic interests.

14 I would like to pay more -- the --
15 there are going to be cases -- and this goes
16 back to my discussion with Justice Gorsuch.
17 There are going to be cases where I'm willing to
18 pay more for something that somebody else thinks
19 is valueless.

20 JUSTICE BARRETT: Mr. Feigin, do you
21 understand -- I just want to be sure that I have
22 the nub of your argument on essence of the
23 bargain. Do you understand that to be ratcheted
24 up for materiality or a synonym for materiality?

25 MR. FEIGIN: I understand it to be a

1 way of expressing materiality that is useful in
2 the contracting context, Your Honor. And what
3 it expresses is this idea that it has to be a
4 but-for reason why the contract was entered into
5 and that you have to show it's either
6 something -- a reasonable --

7 JUSTICE BARRETT: But -- but is that
8 more than materiality?

9 MR. FEIGN: I --

10 JUSTICE BARRETT: And does -- and does
11 it -- well, two questions. I mean, is that -- I
12 mean, Mr. Fisher said that essence of the
13 bargain is an effort to ratchet it up. So do
14 you agree or disagree?

15 MR. FEIGIN: I don't agree for --
16 because, if you -- if you look at Universal
17 Health Services, like, it's just a --

18 JUSTICE BARRETT: Okay. Okay.

19 MR. FEIGIN: -- it's a three-page
20 discussion, but it's clearly equating these
21 things as synonymous.

22 I think it's a context-specific
23 application. And the -- the thing that you're
24 getting -- the -- the -- the essence of the
25 materiality here is whether or not it's going to

1 influence the person to enter the contract.

2 JUSTICE BARRETT: Does this idea,
3 essence of the bargain, have any grounding in
4 the common law of fraud?

5 MR. FEIGIN: Well, Your Honor, yes.

6 JUSTICE BARRETT: That phrase.

7 MR. FEIGIN: I mean, where the
8 essence-of-the-bargain standard comes from is a
9 citation to Story, I believe, who mentioned --
10 who mentioned essence of the bargain.

11 I think the Court -- but that's not --
12 I wouldn't get -- I mean, that's the formulation
13 that we've found most useful.

14 But I think, as I was explaining
15 with -- to Justice Kavanaugh, if -- in
16 Footnote 5 of Universal Health Services --
17 and -- and -- and my apologies if I'm
18 misremembering that that comes from Justice
19 Story. Obviously, that's an objective fact you
20 could check.

21 But the -- the -- there are a number
22 of different formulations, and the common --
23 which I think show that the -- the common law
24 has kind of incorporated this requirement. But
25 it's the basic materiality -- it is the basic

1 materiality standard.

2 But, as applied in this context, if
3 you're going to talk about something that the --
4 these kinds of very small-bore things that
5 aren't obviously important to any reasonable
6 person, there's going to have to be some
7 evidence of, like, enforcement.

8 We rejected contracts for failure to
9 do this. We have that kind of evidence -- we --
10 we have that kind of evidence here and that
11 your -- the government's really going to have to
12 prove up its case, particularly in the context
13 of a criminal prosecution, where you -- the
14 proof is required to be beyond a reasonable
15 doubt.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. If you're --

18 MR. FEIGIN: I -- I mean, I think
19 the -- the other things I'd emphasize are that
20 this just -- the requirement they're trying to
21 impose -- well, I ran out of time, so --

22 (Laughter.)

23 MR. FEIGIN: -- there you go.

24 CHIEF JUSTICE ROBERTS: But -- but we
25 haven't.

1 Justice Thomas?

2 Justice Alito?

3 JUSTICE ALITO: On the question
4 whether we could affirm the decision of the
5 Third Circuit on the ground that PennDOT
6 actually paid more here because of the DBE
7 requirement, did the jury instructions say that
8 proof of that was essential?

9 MR. FEIGIN: The jury instructions
10 didn't say that proof of that was essential, no,
11 Your Honor.

12 JUSTICE ALITO: It would -- they
13 permitted a conviction without proof of that?

14 MR. FEIGIN: I -- I believe that the
15 jury could have found on either theory. I think
16 this would be, essentially, a harmless error
17 argument.

18 JUSTICE ALITO: Right. It would be a
19 harmless error argument. So we would have to
20 find that it was harmless or send it back --
21 well, we couldn't -- we wouldn't -- couldn't
22 reach the issue of whether it was harmless
23 unless we accepted Mr. Fisher's general theory,
24 right?

25 MR. FEIGIN: Yeah, I --

1 JUSTICE ALITO: Because, otherwise,
2 there would be no error.

3 MR. FEIGIN: -- I -- I -- I mean, I
4 think the Court could potentially assume error
5 and remand for harmlessness. But I would urge
6 the Court not to do this. There's going to be
7 some other case -- there have been other cases
8 raising this question.

9 You know, I -- I don't know why this
10 is necessarily the -- obviously, you all would
11 know more than I do about why this is the one
12 that the Court selected.

13 (Laughter.)

14 MR. FEIGIN: So I don't want to have a
15 Marshall McLuhan moment here. But, if the Court
16 thought that this case best presented the
17 question, I would urge the Court just to decide
18 it, or it's going to keep being an argument
19 that -- that is being raised.

20 JUSTICE ALITO: Well, I'm going to ask
21 you a question that I really would like to ask
22 Mr. Fisher, but I can't ask Mr. Fisher any more
23 argument. So perhaps, if I ask you, he will see
24 fit to address it in --

25 (Laughter.)

1 MR. FEIGIN: Well, would you like me
2 to answer it as him or as me?

3 (Laughter.)

4 JUSTICE ALITO: Whichever you want.

5 (Laughter.)

6 JUSTICE ALITO: Assuming his persona
7 and answering for him might be --

8 MR. FEIGIN: That might be fraud, Your
9 Honor. I should run out the door.

10 JUSTICE ALITO: It might be --

11 (Laughter.)

12 JUSTICE ALITO: It -- it might be a
13 thrilling moment for you.

14 But what do you understand to be his
15 argument about the exception to the general net
16 benefit rule for the situation in which what --
17 the thing that is involved is something unique?

18 MR. FEIGIN: I -- I mean, I -- I don't
19 really understand it because I took this to be
20 the general rule. Again, the grandfather
21 example minus Grover Cleveland is drawn straight
22 from the Restatement.

23 I -- I -- I don't really -- you know,
24 I -- I'm not quite sure what's unique. We've
25 got a Jets/Giants riff on that in our brief,

1 where you want Giants tickets and you get Jets
2 tickets. I mean, I --

3 JUSTICE SOTOMAYOR: The Jets --

4 MR. FEIGIN: -- is that unique?

5 JUSTICE KAVANAUGH: Equal.

6 MR. FEIGIN: Well, particularly
7 with -- with the -- their --

8 CHIEF JUSTICE ROBERTS: Please
9 continue -- Mr. Feigin.

10 MR. FEIGIN: -- I -- I'm really --
11 I -- I'm not sure. It at least encompasses --
12 like, I -- I would take him to be saying it at
13 least encompasses something unique like my
14 grandfather. But I -- I -- I don't know how far
15 it extends beyond that. And I don't really
16 think it was an exception. I think it was the
17 rule.

18 So I'm trying to wear his hat and
19 mine, but he may be better able to address that
20 on rebuttal.

21 JUSTICE ALITO: Now let me ask you
22 about the argument that I think is kind of
23 hanging over this case like a -- a cloud or a
24 fog, and that is the suggestion that when you
25 take a line of cases that the Court has handed

1 down in recent years, all of -- all of which I
2 think I have joined -- Skilling and Ciminelli
3 and Kelly, and maybe you could throw in
4 McDonald, and maybe there are a few others --
5 what they really stand for is that the Court
6 really doesn't like the federalization of
7 white-collar prosecutions and wants that to be
8 done in state court and is really hostile to
9 this whole enterprise.

10 MR. FEIGIN: Well, what -- can I just
11 say two things about that?

12 JUSTICE ALITO: So those decisions
13 under this -- under this fog don't have so much
14 to do with the language of the particular
15 statute or the particular situation that was
16 presented by those cases. It's just this
17 general attitude. And the Petitioner here wants
18 to take advantage of that attitude.

19 MR. FEIGIN: Well, two things about
20 that, Your Honor.

21 One, as I said earlier, I mean, I --
22 I -- I take the sentiment, but I don't think
23 it's a reason -- I think it's always been a
24 supporting reason. I don't think it's a
25 freestanding reason to carve an exception into

1 the statute.

2 Number two, this is an exception that
3 the -- or a new element that the Court has
4 already refused to create. Carpenter rejected a
5 requirement of monetary loss. Neder rejected a
6 requirement of damages. Loughrin rejected a
7 requirement of risk of financial loss. And then
8 Shaw rejected a requirement of either ultimate
9 financial loss or intent to cause financial
10 loss.

11 I think that pretty much settles this
12 question. The Court can resolve this case on
13 that line of cases rather than the kind of more
14 amorphous sentiment expressed by some of the
15 others.

16 And I don't think this Court wants to
17 send a signal to the lower courts that it's okay
18 to start making things up in a statute because
19 we disagree with Congress's policy choices about
20 how broad to write the fraud statutes.

21 It wrote them broadly because frauds
22 are very inventive. There are any number of
23 ways you can defraud people. And the
24 government -- the federal government had a
25 separate sovereign interest in that when they

1 implicate the mails and the wires.

2 JUSTICE ALITO: When we -- it -- it --
3 would you agree that, in the end, this turns on
4 our understanding of the common law of fraud?

5 MR. FEIGIN: No. I think it is -- I
6 think they have to have a well-established rule,
7 and we only look to that if the text is unclear.
8 If you just want to look at the text of the
9 statute, you've got words like "false
10 representations," "false promises." This is one
11 of these cases where it -- it's very difficult
12 to tell what element we don't meet.

13 And they're trying to incorporate a
14 very counterintuitive definition of "fraud."
15 I -- I think anyone who receives the bag of coal
16 rather than the bag of gold is going to feel
17 like they were defrauded, as in a number of the
18 other examples that have come up.

19 And -- and, in order to cut against
20 that, I mean, I don't even think the Court needs
21 to get to the common law. And, if it did, it's
22 got to be well-established. And if it -- if --
23 and it certainly wasn't by 1952. Even they
24 acknowledge that.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: I thought that the
4 only thing you wanted us to do was to say that
5 we reject Petitioners' net pecuniary loss
6 requirement, correct?

7 MR. FEIGIN: Yes. We want you to --

8 JUSTICE SOTOMAYOR: But do you want me
9 to go -- do you want us to go further? When you
10 were responding to Justice Alito, what more do
11 you want us to say?

12 MR. FEIGIN: I -- I -- I don't need
13 the --

14 JUSTICE SOTOMAYOR: You would want the
15 world?

16 MR. FEIGIN: -- I don't need the Court
17 to say -- I mean, I'm not asking the Court to
18 say anything more than to reject Petitioners'
19 theory in this case and affirm the prosecution.

20 JUSTICE SOTOMAYOR: Okay.

21 MR. FEIGIN: Or affirm the conviction.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 Justice Gorsuch?

24 Justice Kavanaugh?

25 Justice Barrett?

1 JUSTICE BARRETT: Just one question.
2 Picking up on Justice Alito, you know, talking
3 about the line of cases that we've had recently,
4 I mean, it seems to me another theme in
5 Mr. Fisher's brief and that kind of what makes
6 it a little bit hard for you is to say, like,
7 what is the point of Ciminelli, what is the
8 point of these other cases, if the government
9 can just get around it through this theory?

10 MR. FEIGIN: Okay. So I -- I -- I
11 think, if you'd like a full answer to that, I --
12 I -- I think I could walk through the actual
13 cases.

14 JUSTICE BARRETT: Well, you don't have
15 to give a full --

16 MR. FEIGIN: Okay. We were --

17 JUSTICE BARRETT: -- answer at this
18 point. You can give a close enough.

19 MR. FEIGIN: -- we were very -- we
20 were very up front about this in Ciminelli, that
21 this was the theory we were running, and the
22 Court remanded for the -- it's more traditional
23 theory, its words, traditional theory of -- of
24 property fraud. So I think, you know, we were
25 very up front about that.

1 The -- and in cases like McNally and
2 Skilling, the Court has always reserved the
3 question of whether some kind of property fraud
4 prosecution could be brought. And just to
5 preemptively address what he's about to say,
6 the -- I don't think this would cover Skilling
7 or McNally because I don't think their object
8 was property in the hands of their employer by
9 concealing their conflicts of interest.

10 The property that McNally wanted was
11 the property that -- was the kickbacks which
12 were coming from the person receiving the
13 government contracts. So it was their money
14 that they were kicking back to McNally. That's
15 why he wanted to keep his job.

16 And in Skilling, you -- he wanted to
17 keep doing his -- he wanted to keep doing his
18 stock fraud. So I'm not really sure that this
19 would cover -- cover either of those cases.

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: Isn't Neder and the
24 old soil concept really relying on assumptions
25 about congressional intent? I sort of -- it has

1 to be well-settled because, I thought, the logic
2 was, if these are well-settled common law
3 concepts, then, when Congress uses the language
4 in a statute, they intended to incorporate that
5 concept.

6 MR. FEIGIN: Yeah, I -- I think that
7 is a background presumption that this Court
8 often employs. But, here, I mean, I think that
9 cuts clearly in our favor both on the 1952
10 point, and if we want to look just at the mail
11 fraud statute, one easy thing to look at is I
12 think even they concede -- and this is in the
13 McCleary article in their reply brief -- that
14 this was getting well-established at least, you
15 know, on their view, we think it was earlier,
16 but at least shortly after 1872. And in 1909,
17 Congress amended the mail fraud statute to
18 codify this Court -- this Court's decision in
19 Durland, which makes quite clear that, like,
20 fraudulent inducement-type circumstances are
21 covered.

22 And if the law on our point was
23 getting more clearly established by that time, I
24 think that destroys any ability they'd have to
25 show that it was well-established in the mail

1 fraud statute, let alone by 1952.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Rebuttal, Mr. Fisher?

6 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

7 ON BEHALF OF THE PETITIONERS

8 MR. FISHER: Thank you. I have five
9 points I hope I can get through.

10 First, the question here is whether
11 the product or service that was bargained for in
12 a particular manner, there was assigned a
13 premium to doing it in a particular way. It's
14 not whether the victim subjectively would have
15 paid more. But, even on that basis -- Justice
16 Gorsuch, you asked a lot about this -- I'd refer
17 the Court first of all to the brief in
18 opposition. I don't see that argument anywhere.

19 Second of all, in the Joint Appendix,
20 the prosecutor says this obligation was
21 non-financial in nature. It was not about
22 dollars and cents. In the Third Circuit, here's
23 what the government told the Court: We do not
24 know whether PennDOT would have been willing to
25 pay more for these same repairs. And there's

1 also potentially equal protection implications
2 to the notion that it would pay more simply for
3 DBE participation.

4 So this is the babysitter case. This
5 is a case where the defendant made a promise to
6 use the proceeds in a particular way that was
7 frustrated, and it was non-financial in nature.

8 Second of all, Mr. Feigin talks about
9 the common law and he talks about it as of 1952.
10 What the Court has said is that the mail and
11 wire fraud statutes are the same. The mail
12 fraud statute was enacted in 1872, so the
13 question is about 1872.

14 Even in 1952, all Mr. Feigin has is
15 rescission law. That's -- that's equitable law
16 under contract. Even then, the common law
17 remained as a matter of deceit for tort
18 principles and false pretenses for criminal law
19 principles, that you needed injury and harm to a
20 property interest, and that was -- that was the
21 common law all the way through in it.

22 And I would just refer the Court back
23 to our briefs. The government cites lots of
24 quotes out of -- out of cases and treatises, and
25 I, just like Mr. Feigin, encourage the Court to

1 look back at those. What you'll find is all --
2 they say things like, if somebody else, a third
3 party, covers the loss, that's not fraud or that
4 fraud doesn't have to be completed. It's about
5 the scheme as devised if it were completed.
6 That's all those things say, and that's all that
7 Shaw says.

8 But, as to materiality, I don't mean
9 to be difficult here, but I am truly baffled at
10 the government's argument about materiality.
11 Universal Health, which Mr. Feigin refers to
12 again and again, says something that does not
13 meet the essence-of-the-bargain standard is a
14 Buy America guarantee.

15 If you look at page 96 of the JA where
16 the prosecutor explains how the DBE requirement
17 worked in this case, they say it's exactly like
18 a Buy America guarantee. So I don't understand
19 how you put those two things together.

20 And, Justice Kagan, you -- I'm sorry,
21 Justice Barrett, you asked about the common law.
22 Look at the Restatement. The Restatement is
23 crystal-clear that essence of the bargain is
24 higher than regular materiality. And Justice
25 Story doesn't say anything to the contrary. And

1 we cite that in our reply brief.

2 Justice Alito, you asked about the
3 uniqueness exception. My rule is about whether
4 the defendant -- I'm sorry, whether the victim
5 got something of less market value. And so the
6 only possible exceptions for uniqueness, where
7 market value is so subjective in that context,
8 you might say that's different. That's the
9 horse-called-Charlie case. And even that case
10 from the Maine Judicial Court said we don't lay
11 down any general rule; this is a special case.
12 So, if there's a special case, it's not the
13 rule; it's the exception.

14 And then, finally, there were several
15 questions about this, you know, what it would do
16 to the Court's old cases. It's not just
17 Ciminelli that would come out the other way.

18 In McNally, the prosecutor could
19 have -- and Justice Stevens noted this in
20 dissent. The prosecution could have just said
21 they hired a person that would conduct his
22 services honestly, and that's the kind of
23 employee they wanted, not somebody else, and
24 when they paid him that money for his services,
25 they were defrauded. That theory would have

1 been available.

2 And in Skilling, on the facts of
3 Skilling, it wouldn't come out the other way,
4 but the city manager hypothetical that Justice
5 Ginsburg describes as classic fraud would be
6 fully chargeable under the government's theory.

7 So you had this odd situation where
8 the government is here today saying, look, for
9 40 years, we ran a bunch of different theories.
10 We created honest services. We created right to
11 control. We've concocted one theory after the
12 other. And now it turns out, oh, we were wrong.
13 It's so easy. All we have to do is this
14 property law, this -- this theory.

15 And, Justice Kagan, you asked this at
16 Ciminelli, like, why not just say the property,
17 the money under the contract, is the harm?
18 Well, there's a really good reason. It's
19 because the common law was clear that wasn't
20 enough. And all the say -- all the sources we
21 cite say that's not enough.

22 The Court in Durland and its early
23 cases where it said here's what the ordinary --
24 ordinary meaning of fraud is, it's harm to a
25 property interest. There has to be loss. And

1 so, when you understand that and you look at
2 cases like the Kansas Supreme Court case in
3 Palmer, the Arkansas Supreme Court case in
4 Morgan, there aren't a ton of cases like this
5 because the government didn't actually charge
6 this back in the old days, but when they did,
7 they were rejected, except for in the horse-
8 called-Charlie situation. Otherwise, it was
9 rejected, and the Court's own cases reject it.

10 And so all the government is doing is
11 trying to basically throw up its hands and say
12 all of our other theories we tried haven't
13 worked. Now we're going to give you this
14 last-gapped effort of denying the reason we
15 created those whole theories in the first place,
16 which is that the common law requires harm to a
17 property interest. And that understanding --
18 and, Justice Jackson, this brings me to your
19 question -- that understanding is baked in the
20 statute.

21 We don't think we have to meet the
22 Neder test, like, for materiality, where you're
23 just inventing an element that isn't in the
24 statute. The word "defraud" is there. And so
25 we have the better reading just under ordinary

1 principles, but even if we had to satisfy Neder,
2 we could.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 The case is submitted.

6 (Whereupon, at 11:32 a.m., the case
7 was submitted.)

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