SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS CIMINELLI,)

Petitioner,)

v.) No. 21-1170

UNITED STATES,)

Respondent.)

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Pages: 1 through 77

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9

10 Washington, D.C.

11 Monday, November 28, 2022

12

13 The above-entitled matter came on for

14 oral argument before the Supreme Court of the

15 United States at 11:11 a.m.

16

17 APPEARANCES:

18

19 MICHAEL R. DREEBEN, ESQUIRE, Washington, D.C.; on

20 behalf of the Petitioner.

21 ERIC J. FEIGIN, Deputy Solicitor General,

22 Department of Justice, Washington, D.C.; on behalf

23 of the Respondent.

24

25

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1 P R O C E E D I N G S
2 (11:11 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 21-1170, Ciminelli versus
5 United States.
6 Mr. Dreeben.
7 ORAL ARGUMENT OF MICHAEL R. DREEBEN
8 ON BEHALF OF THE PETITIONER
9 MR. DREEBEN: Thank you, Mr. Chief
10 Justice, and may it please the Court:
11 For decades, the Second Circuit has
12 applied an invalid theory of wire fraud called
13 the right-to-control doctrine. The government
14 now agrees. It concedes that the
15 right-to-control doctrine "could lead to
16 overbroad results that would expand property
17 fraud beyond the definition at common law and as
18 Congress would have understood it."
19 Instead, the government offers a new
20 and even broader theory of fraud, fraudulent
21 inducement of a transaction. Yet, in the 150
22 years since the mail fraud statute was enacted,
23 no case of this Court has embraced that theory.
24 This Court should not do so now.
25 First, the Court should not entertain

1 the theory at all. The theory was not the basis
2 for the jury verdict. This Court has held that
3 it can "not affirm a criminal conviction on the
4 basis of a theory not presented to the jury."
5 Second, the government not only
6 forfeited but intentionally abandoned a fraud
7 theory treating the contract funds as property.
8 The government superseded the indictment to drop
9 that theory. It proceeded solely on the right
10 to control. And it used that theory to exclude
11 critical defense evidence.
12 Third, the new theory is wrong. The
13 theory dispenses with a quintessential
14 requirement of common law fraud, harm to a
15 traditional property interest if the scheme
16 succeeds. It would radically expand federal
17 law, violate federalism principles, and end-run
18 limits on honest services fraud. And the
19 theory's breadth requires ad hoc patches that
20 contradict black letter law and that even the
21 government does not fully endorse.
22 Instead of wading into those issues,
23 the Court should resolve the question presented,
24 reject the right-to-control theory, and reverse.
25 And because the government has offered no other

1 theory of property fraud below, the Court should
2 direct entry of an acquittal.
3 I welcome the Court's questions.
4 To begin with the right-to-control
5 theory, which is the question presented, the
6 Second Circuit crafted that theory based on
7 non-traditional ideas drawn from a set of cases
8 that did not examine fundamental questions of
9 what property means under the property fraud
10 statutes.
11 Those statutes incorporate the common
12 law, as this Court has repeatedly held, and --
13 JUSTICE KAGAN: So, Mr. Dreeben, I
14 mean, let's say that you win this case because
15 the government presented the right to control as
16 a property interest and now is not even
17 defending that, all right? So I -- I just want
18 to -- so let's -- let's -- let's say you win.
19 But -- but you're saying that the
20 government doesn't even have it right now, and I
21 guess I wonder why that's the case. You know, a
22 billion dollars is a lot of property. And, if
23 you take what the government is now saying, you
24 know, frame it as this was an effort to obtain
25 money, the most classic form of property,

1 through a fraudulent scheme.

2 So why couldn't -- I know it didn't --

3 but why couldn't the government have framed its

4 case in that way?

5 MR. DREEBEN: So, Justice Kagan, the

6 fundamental reason why that cannot be a valid

7 basis for property fraud is it was not the

8 meaning of common law fraud at the time that

9 Congress enacted the mail fraud statute and that

10 assimilated those common law concepts.

11 Fraud requires harm to a traditional

12 property interest. It is usually, in government

13 prosecuted cases, pecuniary harm. For example,

14 the government says this could be an

15 overcharging case. It wasn't. But, if the

16 government wanted to prosecute pecuniary fraud

17 as an overcharging case, that fits within common

18 law fraud.

19 It also fits within common law fraud

20 if the victim is deprived of another --

21 JUSTICE KAGAN: So, if I -- if I

22 understand you correctly, you're saying that in

23 addition -- the government has to prove -- in

24 addition to proving that there was a scheme to

25 obtain property, a scheme to obtain money, the

1 government also has to prove that on the other
2 side there was economic loss.
3 And I guess that strikes me as just a
4 different issue, an orthogonal issue from the
5 one that really has been raised in this case,
6 which is what does obtaining property look like.
7 Is it enough to say you -- the fact that there
8 was interference with a right of control, that's
9 not property, but the fact that you're trying to
10 get contract money, that is property?
11 And then, as to all the other elements
12 of the prosecution, whether it's what's the
13 right materiality standard, whether it's --
14 whether it's do you have to show economic loss
15 to the defrauded party, as to all those
16 elements, I mean, they're just not in this case
17 at all.
18 Didn't we basically take this case to
19 decide was there a scheme to obtain property
20 here? Well, no, there wasn't, because the
21 government thought about it as the right to
22 control, but, yes, if the government had said
23 they were trying to obtain a billion dollars,
24 that would have been sufficient.
25 MR. DREEBEN: So, Justice Kagan, I

1 completely agree with the first part of what you
2 said. This case is about the right to control
3 and whether the right to control is a cognizable
4 property interest that can be obtained.
5 I would part company on whether the
6 government can just shift to a pure fraudulent
7 inducement theory either in this case or as a
8 general matter. I was answering your question
9 about whether it is a valid theory of fraud or
10 whether there does need to be some kind of
11 pecuniary harm, harm to a distinctive recognized
12 property interest of another kind.
13 We say yes. The government says no.
14 That was not an argument that the government
15 made below. It's not something on which this
16 Court can look to a wealth of mail fraud cases
17 that analyze the question. So we don't think
18 that it's in this case.
19 And I -- to that extent, I agree with
20 you. It is orthogonal. It's not presented.
21 It's an improper issue before the Court. If the
22 Court were to reach it, it would have --
23 JUSTICE KAVANAUGH: So -- can I stop
24 you there? So, if we could just write an
25 opinion saying the right-to-control theory is no

1 good for the reasons you've stated and even the
2 government acknowledges, then that's the end of
3 it?
4 MR. DREEBEN: That would be fine with
5 us, Justice Kavanaugh, so I --
6 JUSTICE KAVANAUGH: We don't have to
7 resolve anything more?
8 MR. DREEBEN: You do not, except that
9 --
10 JUSTICE KAVANAUGH: You want us to,
11 but we don't have to, correct? To pick up on
12 Justice Kagan's question.
13 MR. DREEBEN: The Court should direct
14 an entry of acquittal because the only property
15 interest that the government offered below isn't
16 a property interest. The proof that corresponds
17 to the jury instructions and the theory does not
18 establish the elements of fraud. That should be
19 the end of the case.
20 The Court could write a short opinion
21 explaining that the right to control doesn't
22 have common law provenance. It doesn't satisfy
23 the elements of the mail and wire fraud
24 statutes. In this case, that's the only theory
25 that the government can properly rely on in

1 order to sustain the prosecution.

2 There was no proof of a traditional

3 property interest. Therefore, you enter a

4 judgment of acquittal.

5 JUSTICE BARRETT: But can't we just --

6 JUSTICE JACKSON: Well --

7 JUSTICE BARRETT: -- let the Second

8 Circuit figure that out?

9 MR. DREEBEN: Well, Justice Barrett,

10 the reason why I don't think that it's an

11 appropriate issue for the Second Circuit to get

12 on remand is this Court's repeated statements in

13 cases like Dunn, McCormick, and specifically

14 Chiarella and McNally itself that the Court

15 cannot affirm a criminal conviction on the basis

16 of a theory not presented to the jury.

17 JUSTICE JACKSON: But that -- but

18 there's a -- there's a gulf between not

19 affirming and acquitting. I mean, we could not

20 affirm and send it back, and then maybe the

21 Second Circuit says there has to be a new trial

22 on whatever other theory the government has.

23 MR. DREEBEN: Well, Justice Jackson,

24 the -- that would only make sense if it were

25 permissible under the rules of procedure and the

1 Constitution for the government to get that
2 second bite at the apple.
3 And in a case like Chiarella, which is
4 pretty much on all fours like with this case,
5 the Court simply entered a -- an opinion that
6 said reverse. It didn't remand for anything
7 else. Chiarella involved the financial printer
8 who was charged and convicted of defrauding
9 innocent market traders based on information
10 that he stole from the print shop about upcoming
11 financial transactions.
12 The Court said that's not a valid
13 theory of insider trading because it doesn't
14 involve fraud. The government came back and
15 said: Yes, but he stole the information from
16 the print shop in breach of an established
17 fiduciary duty, an agency relationship, and that
18 constitutes everything you need for an insider
19 trading violation, which, by the way, this Court
20 later held in United States versus O'Hagan. But
21 the Court said we cannot affirm a criminal
22 conviction on the basis of a theory not
23 presented to the jury, and the judgment was
24 reversed and Chiarella went free.
25 And that is the same, I think, result

1 that should occur in a case like this one. The
2 government's new theory, beyond all of its other
3 flaws, was not charged in the indictment. The
4 government is actually asking the Court to
5 entertain a theory that would create a
6 constructive amendment of the right --
7 JUSTICE JACKSON: But you don't -- you
8 don't charge theories. I mean, the government
9 charged the statute, violation of the wire fraud
10 statute, and it went to trial on a particular
11 theory as to how that was accomplished. But I
12 think the indictment is not defective, is it?
13 MR. DREEBEN: Yeah, the indictment
14 actually is defective, Justice Jackson, because
15 it's not enough at least in a case like this,
16 where the government says what the property
17 interest is. There is a theory of the
18 indictment, and the government has to prove the
19 theory that it charged, not a different theory.
20 And that is particularly true in this
21 case because the indictment specifically charges
22 the right to control its assets as the property
23 interest, and that was not an accident.
24 The government originally had an
25 indictment in which it did charge that the

1 ultimate state-awarded contracts were the
2 property interest, the same thing that my friend
3 now says is the property interest.
4 But there was a case in the Southern
5 District of New York called United States versus
6 Davis in which the government had gone to trial
7 on a similar indictment that charged a contract
8 as the property interest, and then it tried to
9 save the conviction by pointing to the
10 right-to-control theory, which is very vast and
11 nebulous.
12 And the district court said you cannot
13 do that. That would be a constructive amendment
14 of the indictment. So what did the government
15 do? It went back and it changed from the first
16 superseding indictment to the second superseding
17 indictment to delete contract funds as property
18 and to substitute the right to control.
19 And you can see that most clearly in a
20 red-lined document that the government filed
21 with the Court, which is Docket Entry 319-2,
22 which contains a red line of the differences
23 between the two indictments, and you can see
24 that the government red-lined out that the
25 scheme to defraud defrauded Fort Schuyler of --

1 now I'm going to read the strick -- the stricken
2 language -- an award of significant
3 taxpayer-funded development contracts.
4 And it substituted in defrauded Fort
5 Schuyler of its right to control its assets and
6 thereby exposed Fort Schuyler to the risk of
7 economic harm. So the government didn't just
8 not charge this theory or not charge any theory.
9 It put the defendants on notice, it put the
10 Court on notice, and it repeatedly relied on
11 right to control rather than a property fraud
12 conventional theory to exclude critical defense
13 evidence.
14 And I think, when you have all of
15 those features, whether it adds up to a formal
16 waiver or as the kind of abandonment of a new
17 theory that should foreclose the government from
18 getting a second bite at the apple, I think it
19 adds up to an acquittal.
20 JUSTICE ALITO: Well, whether there
21 was a constructive amendment to the indictment
22 is a complicated question and it wasn't one that
23 I understood us to take. But put -- putting
24 that aside, if in a case there is no objection
25 to a jury instruction, it turns out that the

1 jury instruction is erroneous, maybe even omits
2 an essential element of the offense, but the
3 evidence is sufficient to support -- arguably
4 sufficient to support conviction under a proper
5 interpretation of the statute, and the argument
6 that's made on appeal is that the defendant is
7 entitled to a judgment of acquittal, is that
8 person entitled to a judgment of acquittal?
9 MR. DREEBEN: Justice Alito,
10 ordinarily not, but that would presuppose a
11 situation in which the government proceeded on
12 its theory and didn't actually abandon that
13 theory in prior litigation so that as a matter
14 of whether you call it forfeiture, waiver,
15 invited error, whatever you want to call it, the
16 government forewent the theory that it is now
17 urging upon the Court.
18 And so, once that is out of the case,
19 I think you have to ask the question whether the
20 evidence that was introduced to prove the crime
21 charged satisfied the elements of that crime.
22 And the government can't come up on appeal as it
23 has done here for the first time in this Court
24 and said: Since this is a sufficiency case, we
25 get to completely reinvent the theory, we get to

1 substitute in a new one for the defective one
2 that the Second Circuit used, and the only
3 question that we ask is whether the evidence was
4 sufficient under that theory, and we can ask the
5 Court to announce this new theory for the first
6 time in this case.
7 If that were true, the government
8 would have been able to defend the insider
9 trading conviction in Chiarella by saying decide
10 the misappropriation doctrine. After all, it
11 turned out to be a valid theory and there were a
12 couple of justices in the dissent who thought it
13 was a valid theory even in that case. But the
14 Court said no, you cannot affirm a criminal
15 conviction on a basis of a theory not given to
16 the jury.
17 And even if that doesn't hold true in
18 every single case, and I think Justice Alito,
19 Neder and cases like that suggest that there can
20 be harmless error, it should hold true in a case
21 like this, where the government's new theory
22 emerges only in its merits briefing in this
23 Court and was abandoned by amendments to the
24 indictment below.
25 JUSTICE ALITO: I -- I know --

1 JUSTICE SOTOMAYOR: Counsel, you're
2 assuming -- I'm sorry.
3 JUSTICE ALITO: Go ahead.
4 JUSTICE SOTOMAYOR: No, no, no.
5 Finish.
6 JUSTICE ALITO: Well, this was a
7 different point, but --
8 JUSTICE SOTOMAYOR: I was going to
9 follow up on this.
10 CHIEF JUSTICE ROBERTS: Why don't you
11 go ahead, Justice Sotomayor.
12 JUSTICE SOTOMAYOR: Justice Alito's
13 question assumed a jury waiver, a jury
14 instruction waiver.
15 Did you waive here?
16 MR. DREEBEN: Well, I -- I don't think
17 we've waived anything. We preserved all the way
18 through our objection that the right-to-control
19 doctrine is not a valid theory of fraud. That's
20 preserved at page 103 of the JA.
21 The Second Circuit dropped a footnote
22 and said the defendants challenge this theory.
23 We don't have to reach it because it's settled
24 Second Circuit law. And it used that theory to
25 analyze the sufficiency of the evidence. And

1 that's the theory -- the only theory on which
2 the Second Circuit found that the evidence is
3 sufficient.
4 We've gotten --
5 JUSTICE SOTOMAYOR: So you say you
6 object -- that's reserved --
7 MR. DREEBEN: That's preserved.
8 JUSTICE SOTOMAYOR: -- preserved in
9 jury instruction?
10 MR. DREEBEN: Correct. That's
11 correct. Well, I -- I want to be -- be clear,
12 Justice Sotomayor, we're not talking about the
13 jury instructions on our theory of the argument.
14 What we are talking about is the sufficiency of
15 the evidence and the legal standard that the
16 Second Circuit used to find the evidence
17 sufficient.
18 It used an incorrect standard based on
19 right to control. That's the only theory that
20 it used to examine the sufficiency of the
21 evidence. Because the evidence is not
22 sufficient to prove property under that theory,
23 an acquittal is mandated.
24 And the government's --
25 JUSTICE SOTOMAYOR: All right. Let's

1 go back to Justice Alito.
2 MR. DREEBEN: -- tangent has brought
3 up things that require me to talk about the
4 indictment and the jury instructions because
5 it's not, Justice Alito, that we're asking you
6 to resolve a constructive amendment theory.
7 It's that the government's theory would create a
8 constructive amendment. It would change the
9 language of the indictment back to the S1
10 indictment after having dropped that and put in
11 the S2 indictment a right-to-control theory.
12 And we're looking at the jury
13 instructions only to answer the question, did
14 the jury resolve the question that the
15 government is now putting to it under its
16 fraudulent inducement theory? And the answer to
17 that is clearly no. The property differs. The
18 government won't dispute that.
19 Instead of it being the
20 right-to-control assets, it migrates over to
21 become the contract funds at the end of the day.
22 The government offers a new materiality theory
23 that says that the misrepresentations have to go
24 to the essence of the bargain. There's nothing
25 in the jury instructions that contain that

1 amorphous characteristic anyway. The jury
2 didn't decide that.
3 And the government offers a slant on
4 "by means of" that the acquisition of the
5 property or the obtaining of the property has to
6 be by means of the misrepresentation. That
7 borrows from this Court's decision in Loughran
8 to say that it has the natural tendency to
9 induce the person to part with property. That
10 also was not in the jury instructions.
11 And, critically, the defense has
12 defenses on both of those issues that it was not
13 given the chance to litigate because that was
14 not the theory of the case that the government
15 went forward on below.
16 On the essence of the property, the
17 essence of the bargain requirement that the
18 government now offers, it is highly significant
19 that at page 47 of the government's brief the
20 government says that a fair exchange can negate
21 the materiality under its essence of the bargain
22 theory of a misrepresentation.
23 JUSTICE ALITO: But what -- what if
24 accurate information is the essence of the
25 bargain? Now I know you don't think we need to

1 get into this, and -- and you may be right about
2 that, but I just want to draw on your knowledge
3 of -- of criminal law and -- and your
4 understanding of common law fraud.
5 So take -- take this example. Suppose
6 someone hires an agency -- enters into a
7 contract with an agency to find, let's say, a
8 nanny for the -- the -- their children or a
9 caregiver for an older person, and the agency
10 promises that they're going to do a thorough
11 check of these individuals. They are going to
12 contact prior employers and get references and
13 do a criminal background check. And, in fact,
14 they do none of those things, but it turns out
15 that the nanny or the caregiver actually does a
16 decent job.
17 Is there not fraud there?
18 MR. DREEBEN: There may be, Justice
19 Alito, and it would turn on whether the
20 government chooses to show pecuniary loss.
21 Overcharging, overpaying for services that were
22 not performed, that is the kind of conventional
23 fraud case that the government points to in the
24 Finazzo case.
25 JUSTICE ALITO: Yeah, but what if

1 there is no -- they don't try to prove that they
2 paid -- they paid too much, but they paid for a
3 person who was unproven?
4 MR. DREEBEN: Yes. Yes.
5 JUSTICE ALITO: And they -- and what
6 they wanted was somebody who was a proven
7 commodity.
8 MR. DREEBEN: Well --
9 JUSTICE ALITO: Certainly, they're
10 going to think we were defrauded, we were
11 exposed to a risk that we didn't want to
12 undertake, and we paid money for that. That's
13 just why we paid the money.
14 Why isn't that fraud?
15 MR. DREEBEN: So they certainly were
16 deceived. And the government certainly can try
17 to show that there would be pecuniary loss
18 associated with that, that they paid for
19 services that they didn't get, which is a very
20 conventional type of fraud claim.
21 If all there is is deceit and the
22 contract actually was a fair exchange and the
23 employee was fully competent, capable,
24 certified, qualified, then it wouldn't be common
25 law fraud. It might be some other crime that

1 covers deception. It might be a civil case that
2 would entitle the victim to rescission. The
3 civil rules have different criteria and
4 requirements than the criminal law. And it
5 might be a violation of some other criminal
6 statute.
7 But the fraud law at common law always
8 looked to some kind of a loss, be it pecuniary
9 or a loss of specific property that you set out
10 to buy or something else that could be
11 monetized, because, after all, fraud law
12 originated in protecting people's property
13 rights.
14 And this Court in McNally said it
15 protected against being wronged in your property
16 rights. And it didn't mean conventional
17 fraudulent inducement, which is grist for the
18 mill in a thousand civil cases that would all
19 become fit cases for criminal fraud if the
20 government's new and vastly enlarged fraudulent
21 inducement theory is adopted.
22 So, while the victim may have a
23 subjective sense of being wronged, that does not
24 mean that it fits within the parameters of what
25 has always been required for a fraud scheme up

1 till the government's current submission, which
2 is some sort of a scheme to deceive someone for
3 the purpose of obtaining property in a way that
4 would produce a pecuniary loss or some other
5 harm to a traditional property interest.
6 JUSTICE BARRETT: Mr. Dreeben, let's
7 say that we don't want to say that this statute
8 protects just common law Blackstonian property,
9 as you propose in your brief.
10 Could we decide that the right to
11 control assets isn't a sufficient basis for the
12 prosecution another way? Maybe by saying that
13 they're conflating -- that the government is
14 conflating the materiality element with the
15 intent-to-defraud element and that way not have
16 to decide cases that aren't before us about
17 other, you know, bundles -- sticks in the bundle
18 of property?
19 MR. DREEBEN: Well, Justice Barrett, I
20 -- I think that there are a number of ways to
21 conclude that the right-to-control theory is
22 invalid. Your Honor pointed to one. It tends
23 to merge different elements, not only
24 materiality but the way that the Second Circuit
25 has described it. It also subsumes intent to

1 defraud by collapsing all the -- those elements.
2 It violates core requirements of the statute.
3 It also tends to run aground because
4 it infringes on turf of that's covered by
5 Skilling and McNally and would allow the
6 government to prosecute a variety of kinds of
7 things through the guise of calling them
8 property fraud when it cannot do so under honest
9 services.
10 And I'm not saying that the two are
11 hermetically sealed worlds, but the way the
12 government has treated right to control in the
13 Second Circuit, it fills in the blanks where the
14 right -- where the honest services doctrine got
15 cut off by McNally and not reinstated by 1346.
16 So the Court could also say Congress
17 reinstated certain intangible rights in the
18 honest services amendment, Section 1346. The
19 right to control assets is not one of them.
20 And, therefore, it does not qualify as property
21 for purposes of the property fraud statutes.
22 JUSTICE BARRETT: And you don't see
23 any problem with any of those routes?
24 MR. DREEBEN: I think they all
25 cumulatively reinforce each other, and the Court

1 may wish to take this opportunity to say what it
2 has already said in Cleveland and in Carpenter,
3 which is that the wire fraud and mail fraud
4 statutes protect traditional property interests.
5 It does not have to map what every traditional
6 property interest is today.
7 This is not a case, for example, about
8 intellectual property. It's about a made-up
9 right to information that bears on an economic
10 decision. That has no roots in the common law.
11 I think the Court can at least say that without
12 prejudicing the government in arguing for other
13 kinds of property, whether exotic or
14 traditional.
15 JUSTICE ALITO: What do you say about
16 the statement in Shaw that bank fraud requires
17 no actual loss or intent to cause loss?
18 MR. DREEBEN: So I think that
19 statement is entirely correct. And if you look
20 at the -- the facts of Shaw, it involves someone
21 who stole somebody's credentials to their
22 account and used it to extract money from the
23 bank. And the defense was: Hey, I did not want
24 to harm the bank. I was just trying to defraud
25 the customer. And beyond that, the bank isn't

1 going to lose any money because there are all
2 these banking regulations that allow it to
3 recoup money from the -- from the customer and
4 from other banks.
5 And what Justice Breyer was saying in
6 that opinion was that's not a defense. The fact
7 that you think that someday the bank will be
8 made whole is not a defense to fraud, just as it
9 would not be a defense to fraud if I went to a
10 bank, totally misrepresented my income, got a
11 loan at an interest rate that I never would have
12 gotten if I gave my true income, and I said:
13 But it doesn't really matter because I'm going
14 to come up with the money and pay them back.
15 The fact that you think everything
16 will turn out okay doesn't obviate the finding
17 of a scheme to defraud. And I don't think
18 Justice Breyer was doing anything other than
19 that in that opinion.
20 CHIEF JUSTICE ROBERTS: Justice
21 Thomas, anything further?
22 Justice Sotomayor?
23 JUSTICE SOTOMAYOR: I am a little
24 confused. Assume that I want to enter a
25 transaction, and the other side says I won't do

1 it if you have been in cahoots with someone
2 who's part of this decision-making.
3 Isn't the essence of my bargain that I
4 gave you this contract and you took my money?
5 You performed services, but I wouldn't have
6 entered this contract with you. It's very
7 clear. I've said it to you.
8 MR. DREEBEN: Mm-hmm. And you would
9 have an excellent action in breach of contract,
10 Justice Sotomayor. You would have potentially a
11 --
12 JUSTICE SOTOMAYOR: Why isn't that
13 false pretenses?
14 MR. DREEBEN: Well --
15 JUSTICE SOTOMAYOR: Which is what the
16 argument -- the --
17 MR. DREEBEN: -- I -- I --
18 JUSTICE SOTOMAYOR: You call it
19 fraudulent inducement, but the government calls
20 it a common law false pretenses case.
21 MR. DREEBEN: I think the government
22 calls it fraudulent inducement. And we and the
23 government have disagreed on what fraudulent
24 pretenses at common law require. We think that
25 it does require some form of a loss. The

1 government has countered with citations that it
2 thinks supports the opposite.
3 One of the problems with this Court
4 trying to resolve complicated issues of common
5 law when the parties only raise the issue in the
6 Respondent's brief and then reply briefs is that
7 the Court doesn't have a full foundation of the
8 literally hundreds of common law cases that
9 address this.
10 But our view would be there might be
11 some other offense, there might be some civil
12 action, almost certainly would, but the
13 requisites for a criminal conviction, and in
14 this case, one that carries 20 years in prison,
15 are not met for every misstatement in a
16 contract, every false statement that the
17 government --
18 JUSTICE SOTOMAYOR: I -- I didn't say
19 every false statement or misstatement. A
20 material one.
21 MR. DREEBEN: True. And -- and the
22 government would substitute yet a different
23 materiality standard from the one that this
24 Court has said in an effort to limit the reach
25 of its fraudulent inducement theory because,

1 taken at face value, there are hundreds of cases
2 that are litigated in state courts every year on
3 a fraudulent inducement theory, and, under the
4 government's theory, they are all federal
5 crimes, at least if the government can show its
6 new "essence of the bargain" requirement and its
7 "by means of" requirement.
8 And that has never been the way that
9 fraud prosecutions have previously proceeded.
10 Every single case in this Court is either a
11 something-for-nothing fraud or something --
12 JUSTICE SOTOMAYOR: So we're back to
13 we shouldn't get into this?
14 MR. DREEBEN: I would entirely
15 encourage the Court not to get into it and to
16 decide instead the question presented.
17 CHIEF JUSTICE ROBERTS: Justice Kagan?
18 Justice Gorsuch?
19 Justice Kavanaugh? No?
20 Justice Barrett?
21 Justice Jackson? Okay.
22 Thank you, counsel.
23 MR. DREEBEN: Thank you.
24
25

1 CHIEF JUSTICE ROBERTS: 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 If I could start with two main points,

7 one about the scope of property fraud generally

8 and the other about how the right-to-control

9 doctrine fits into that.

10 It's always been property fraud to

11 have fraudulent inducement like in this case,

12 where the victim is tricked into paying for

13 something fundamentally different from what he

14 bargained for.

15 Both in their reply brief at Footnote

16 2 and just now, Petitioner acknowledges that

17 receiving specific property different from what

18 the victim expected, like a horse with a

19 different name, even if it has equal value, can

20 be fraud.

21 To the extent there's daylight between

22 the parties about the substance of what property

23 fraud covers, I think it goes to cases of what I

24 might call pedigree fraud, where there's a lie

25 about the certification of property or important

1 to us would be a case where, for example,
2 someone lies about their eligibility for a
3 veterans preference in contracting.
4 And we would say that that's fraud,
5 and it's always been fraud at common law. And
6 that's exactly the paradigm that this case in
7 which Petitioner and the other defendants
8 schemed to obtain $750 million in Fort
9 Schuyler's funds by rigging the bidding process
10 and lying about it fits.
11 In maintaining that it fits, we're not
12 abandoning the jury's findings under the
13 right-to-control theory. We're explaining how
14 they map on to the more straightforward and
15 traditional elements of property fraud as they
16 have always been understood.
17 And that's, I think, sufficient to
18 confirm -- affirm, I'm sorry -- to confirm that
19 the conviction should be affirmed because I
20 don't really understand on the facts of this
21 case and on the indictment that was submitted
22 and went to the jury how the jury found any
23 difference between the right to control the
24 $750 million and the $750 million itself.
25 I think --

1 JUSTICE THOMAS: Mr. Feigin, are you
2 abandoning the Second Circuit's control theory?
3 MR. FEIGIN: Well, Your Honor, we do
4 think it -- let me make a few points about that.
5 Just to directly answer your question,
6 we would be fine with the Court explaining that
7 that's not the right way for the Second Circuit
8 to be going about thinking about these cases.
9 The -- the second point I would make
10 is I think the Second Circuit has gotten a
11 little bit of a bad wrap here. I think it's
12 understandable how it got here.
13 Petitioner at pages 22 to 23 of his
14 brief and pages 8 to 9 of his reply brief
15 acknowledges that the use of property can be
16 property. This Court in recent cases like Kelly
17 and Shaw has referred to it as property. And
18 this Court nodded to the idea of a
19 right-to-control theory, admittedly without
20 endorsing it, in both McNally and Cleveland.
21 And I think the Second Circuit had a
22 defensible way of doing this at the beginning,
23 but it's become clear that it's an awkward fit
24 with property fraud as it's been traditionally
25 understood.

1 In particular, what we think the
2 Second Circuit has done that's really its sort
3 of fundamental conceptual mistake is, instead of
4 housing the -- its idea that there needs to be
5 some way in which the victim is not getting what
6 it's bargained for in materiality, where we
7 think it properly belongs and where the Court
8 put it in, for example, Universal Health
9 Services, interpreting the standard definition
10 of materiality in the particular context of
11 contracting, it has added this tangible harm
12 requirement that goes into the property element.
13 Now I think, if you asked Congress
14 when it implemented the mail fraud statute is
15 use of property property, they would have said,
16 yeah, you know, Blackstone says that it is for
17 -- for those learned in Blackstone.
18 And -- but I think, if you ask them is
19 use of property that result -- that is
20 influenced by information about an economic
21 decision that leads to tangible harm property,
22 you're starting to gerrymander the definition of
23 property beyond something that Congress would
24 have understood.
25 CHIEF JUSTICE ROBERTS: Counsel, given

1 what you said about the right to control as,
2 whatever you want to say, properly understood
3 or, you know, the Second Circuit has gotten a
4 bum wrap, but there's something there, we should
5 go on and decide the question presented, which
6 is whether or not the right-to-control theory is
7 valid, right?
8 MR. FEIGIN: Yeah, I -- I agree that
9 the Court should obviously decide the question
10 presented. I -- I would urge the Court that in
11 doing so, I -- I guess I would say a couple
12 things about that.
13 First, as we explain in our brief, we
14 think the right-to-control theory properly
15 cabined and as it was applied in this case does
16 identify cases that are traditional property
17 fraud, and I can get to why I think this
18 particular conviction should be affirmed under
19 the doctrine in a second.
20 But I -- I take great issue with the
21 idea that cases like this are categorically out
22 of the scope of property fraud, which, again,
23 I -- I don't really see much difference between
24 this and a veteran's benefit -- veteran's
25 contracting preference benefits type case, where

1 there's just a misrepresentation, not about the
2 services you're going to receive, not about how
3 good they are, not about the price you're
4 getting, but about the fact that somebody who
5 owns a business is, in fact, a veteran of this
6 nation's armed forces.
7 CHIEF JUSTICE ROBERTS: Counsel, you
8 --
9 MR. FEIGIN: Yeah.
10 CHIEF JUSTICE ROBERTS: -- you said
11 that you're -- you think the theory is still
12 valid properly cabined. Was the theory properly
13 cabined in the jury instructions?
14 MR. FEIGIN: Your Honor, I think, if
15 you took the jury instructions outside the
16 context of this case, the jury instructions
17 encapsulate a view of the right-to-control
18 theory that could in some cases lead to
19 overbroad results.
20 However, the jury received the -- a
21 copy of the indictment in this case. If you
22 look at Joint Appendix 27, paragraph 14 of the
23 indictment, it makes clear that what the goal of
24 the scheme here was was exactly what I said at
25 the beginning, which was to get $750 million in

1 government funds by rigging the bidding process
2 and lying about it.
3 And the --
4 CHIEF JUSTICE ROBERTS: So the -- so
5 the theory would be properly cabined because the
6 jury would, of course, not simply rely on the
7 instructions but would also read the indictment
8 and would properly resolve any difference
9 between the two?
10 MR. FEIGIN: Well, Your Honor, I think
11 the instructions told the jury that it had to
12 find that there -- that the property here was
13 the right to control assets. And I think, in
14 certain cases -- and it all -- the jury also had
15 to find tangible harm. And I think that
16 perhaps, in certain cases, even that might still
17 go too far.
18 But, in the context of nearly every
19 fraudulent inducement case and certainly in this
20 case, what the jury's going to find when it
21 finds that the property was aimed at the use of
22 control of assets in the context of two parties
23 that are bargaining for a contract, the assets
24 are going to be the contract funds.
25 And then what you have is a species of

1 fraud that has long existed at common law.
2 Again, I -- I -- I take the -- I take them to
3 acknowledge the horse of a different name case,
4 where what you want is a horse named James and
5 you get a horse named Henry. But there -- it
6 also covers cases of pedigree fraud.
7 I think the best examples are at pages
8 --
9 JUSTICE GORSUCH: Mr. Feigin, I'm
10 sorry to interrupt, but --
11 MR. FEIGIN: I'm sorry.
12 JUSTICE GORSUCH: -- I -- I -- I do
13 admire the government's concession of -- of
14 error here, and I appreciate the candor with
15 which you -- you've made it.
16 But given that we just took the case
17 to resolve the right-to-control issue and not
18 this other theory that you're attempting to
19 develop about fraudulent inducement of even
20 matters of equal value, why isn't the proper
21 result here to reverse?
22 Maybe you have an argument for vacate,
23 but your -- your very able friend on the other
24 side makes a strong point that there was a
25 superseding indictment here that seemed to rely

1 expressly on the right-to-control theory. And
2 the government didn't present this alternative
3 view until the merits briefing in this Court.
4 MR. FEIGIN: Two answers to that, Your
5 Honor.
6 Just first -- and this actually sort
7 of is an additional answer to the Chief
8 Justice's question -- I do think it's important
9 if this Court does decide to send this back or
10 even reverse how it reverses, and it is
11 critically important to us for kinds of fraud
12 that we prosecute all the time that the Court
13 not reach too broadly and impugn, for example,
14 the veterans example I was giving --
15 JUSTICE GORSUCH: So how would you
16 have us write that is my question.
17 MR. FEIGIN: So I think what the Court
18 could say is that the kind of -- some sort of
19 what I was saying to the Chief Justice, that the
20 kind of property that is now at issue in these
21 right-to-control cases, which is the right to
22 control assets without assets necessarily in all
23 cases, as they would have been here, confined to
24 something that's properly understood as
25 property, the right to control assets in a

1 manner that doesn't expose the victim to
2 tangible harm isn't itself something that
3 Congress would have conceived of as property and
4 can be prone potentially to abuses.
5 We don't think it was abused in this
6 case. And then I'll go to the second part of
7 your question. But I think that's really all
8 that the Court needs to say here. I wouldn't
9 cast any question on --
10 JUSTICE GORSUCH: I think we're all --
11 MR. FEIGIN: Yeah.
12 JUSTICE GORSUCH: -- in radical
13 agreement about that. I think the question I'm
14 -- I'm trying to pin -- put my finger on is what
15 -- what we should do with this case.
16 MR. FEIGIN: Okay.
17 JUSTICE GORSUCH: And Mr. Dreeben
18 suggests that the appropriate judgment line is
19 reverse and -- and that the government shouldn't
20 get another chance to reintroduce what it
21 believes now to be the correct theory,
22 fraudulent inducement I'll use as shorthand,
23 because it took that out of the case in a
24 superseding indictment, and here we are many
25 years later and it's the first -- first time it

1 appears is in merits briefing before this Court.
2 So why isn't -- or maybe you agree
3 that the proper remedy in this case is reversal?
4 MR. FEIGIN: No, I -- I don't agree
5 with that, Your Honor. So, if we -- if we take
6 the government's -- if we're all agreed on the
7 broader interests of this case, and it's -- the
8 Court's not going to relitigate Shaw and Neder
9 and introduce some sort of harm concept that it
10 firmly rejected on page 467 of Shaw -- and I can
11 -- I can get to why that is -- then, in this
12 particular case, I think it's different from the
13 kinds of cases that Mr. Dreeben is citing.
14 First of all, all they have made here
15 is a sufficiency of the evidence challenge. And
16 in a sufficiency of the evidence challenge, the
17 question is we compare --
18 JUSTICE GORSUCH: Well, I think that
19 might be, Mr. Dreeben would tell us, because of
20 the way the government litigated this case up
21 until its merits brief in this Court. And,
22 again, just if -- if we all agree and are in
23 radical agreement that the Second Circuit
24 misinterpreted the law and if we're all in
25 radical agreement that that's all -- that the

1 only indictment before the jury was a
2 right-to-control theory, why should the
3 government have yet another chance to start all
4 over again at this stage?
5 MR. FEIGIN: Well, Your Honor --
6 JUSTICE GORSUCH: In this case?
7 MR. FEIGIN: -- first of all, I think
8 that this error could be analogized, although I
9 will acknowledge that it's somewhat broader than
10 the errors in those cases like the errors in
11 Neder or --
12 JUSTICE GORSUCH: I guess I'm --
13 MR. FEIGIN: -- Mustacchio or Free --
14 JUSTICE GORSUCH: I'm sorry to
15 interrupt, but just -- and I'll -- and I'll
16 stop. This will be my last shot at it. But
17 just take that superseding indictment. Why
18 isn't that a firm waiver of the -- of the
19 theories that you wish now to pursue?
20 MR. FEIGIN: Your Honor, I think we
21 clarified that we're proceeding under a
22 right-to-control theory in order to comply with
23 Second Circuit law. But I think, if you read
24 the indictment as a whole, the jury had it in
25 front of it, and in the context of the only

1 thing the jury could have found to satisfy the
2 instructions and to find guilt on the relevant
3 charges in this case, I don't think there has
4 been anything close to some sort of switch of
5 horses, to continue the horse metaphors,
6 midstream here.
7 And if I could get back to -- try and
8 answer your question --
9 JUSTICE KAVANAUGH: What about
10 Chiarella? Mr. Dreeben relied on that. How --
11 how would you say that's different from what is
12 going on here?
13 MR. FEIGIN: Well, Your Honor, I think
14 what's fundamentally different about that and
15 every other case that they cite is, first of
16 all, we think that the findings the jury made in
17 this case, under the right-to-control theory,
18 even without really looking at the rest of the
19 evidence, except for things that are obvious and
20 undisputed, is enough to show that this was
21 actually property fraud.
22 But we're not switching -- for the
23 reasons I've been stating about what the assets
24 at issue as to the right to control actually
25 were, I think that there's no way to read this

1 case as introducing the kind of new theory you
2 had in Chiarella, where all of a sudden the
3 victim of the fraud was different, or something
4 like in Dunn, where the --
5 JUSTICE JACKSON: Well, Mr. Feigin, I
6 -- with respect, the assets that the Second
7 Circuit pointed to were not the assets that the
8 government now seems to be wanting to have this
9 Court recognize with respect to the
10 right-to-control theory.
11 I'm looking at the actual opinion in
12 this case, where I guess it was Judge Chin maybe
13 wrote the opinion in the Second Circuit, and it
14 says, "This Court has endorsed a
15 'right-to-control theory' of wire fraud that
16 allows for conviction on 'a showing that the
17 defendant, through the withholding or inaccurate
18 reporting of information that could impact on
19 economic decisions, deprived some person or
20 entity of potentially valuable economic
21 information.'"
22 So it seems as though the asset that
23 the Second Circuit was focused on was
24 potentially valuable economic information. Am I
25 wrong that that's what they thought the

1 right-to-control theory was about?

2 MR. FEIGIN: Well, Your Honor, I

3 think, if one looks at the entire opinion, which

4 I -- I -- I know we -- we all have, it's hard to

5 come away from that -- I mean, maybe you can

6 pick out a specific sentence, but it's hard to

7 come away from the opinion with any impression

8 that the Second Circuit thought this case was

9 about something fundamentally different than

10 what I described. This --

11 JUSTICE JACKSON: But -- but you --

12 you're describing the asset as the actual

13 contract, as the money that was tendered in this

14 transaction, and I didn't understand that to be

15 what the right-to-control theory was about from

16 the Second Circuit's perspective.

17 So I guess I just don't understand.

18 It seems as though you have reinterpreted right

19 to control to be the new theory of fraudulent

20 inducement in a way that the Second Circuit did

21 not seem to put that theory forward, and -- and

22 that's what we thought we were taking in the

23 context of this question presented.

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

25 fully acknowledge that we're not thinking about

1 this the same way as the Second Circuit. And
2 for the reasons I was explaining to Justice
3 Thomas, we do think the Second Circuit has
4 developed a way of thinking about this that puts
5 everything in the property element, that's not
6 the right way to think about it.
7 JUSTICE JACKSON: And Mr. Dreeben says
8 that's the way you argued the case below. So,
9 suddenly, now we're at this stage with a
10 reinterpretation by the government of what right
11 to control means. And why isn't that sort of a
12 forfeiture from the standpoint of, if the Court
13 disagrees with you that right to control equals
14 this transaction or even if we don't, haven't
15 you put forward a case that was based on the
16 Second Circuit's conception and that's how it
17 was argued to the jury, that's how the jury
18 decided it? So why -- why isn't Mr. Dreeben
19 right that if we disagree with that conception
20 of the theory, then we have to reverse?
21 MR. FEIGIN: Well, Your Honor, the
22 jury was instructed on the language of right to
23 control assets, and both the jury's instructions
24 and deliberations, as well as the Second
25 Circuit's consideration of the case, occurred

1 against a backdrop factual context where
2 everyone understood the undisputed fact that
3 what was really at issue here were lucrative
4 government contracts.
5 And that's why the Second Circuit goes
6 on to reject the idea that there's any dichotomy
7 between the bid-rigging process and the award of
8 the actual contracts. If the theory were as
9 broad as the sentence that Your Honor read
10 suggested, there would really be no need to do
11 that because you deprived it of economic
12 information simply by rigging the bid-rigging
13 process.
14 Instead, the court makes clear, and
15 this is at Footnote 9 on page 22a of the
16 Petition Appendix, that one of the reasons why
17 this is fraud is because it was an essential
18 element to the bargain, which I think maps
19 directly onto what materiality would require in
20 this context, and that's because it was
21 incorporated into the notice to proceed that the
22 parties entered into, which is a contract that
23 committed LP Ciminelli to spend 3 million in
24 funds and the state to repay those funds. And
25 then the notice to proceed was later

1 incorporated into the final contract itself.
2 Those are at Joint Appendix 125 and 134
3 respectively.
4 So I -- I don't -- I think, in the
5 particular context of this case and fraudulent
6 inducement cases generally, there's not going to
7 be a lot of argument over whether there is
8 underlying property at issue.
9 I think where the Second Circuit's
10 theory is problematic is both, as I said, in
11 moving what really is part of the materiality
12 inquiry in the particular context of contracting
13 and moving that into the property element. And
14 then, potentially, outside the context of
15 fraudulent inducement cases, you could get
16 circumstances where the Second Circuit's theory
17 could be applied too broadly if you take loosely
18 language like Justice Jackson appropriately just
19 pointed out.
20 So we don't object if what the Court
21 wants to do and, frankly, what we'd urge the
22 Court to do is to explain that the Second
23 Circuit may not be thinking about this in the
24 most precise way and the most traditional way.
25 What we would very much object to is

1 something that gets -- that suddenly erects the
2 harm requirement that the Court firmly dispensed
3 with in Shaw, where it not only rejected the
4 harm requirement in that case, it adopted Judge
5 Learned Hand's formulation that fraud can exist
6 even where there's a quid pro quo. It pointed
7 to Carpenter as an example of not requiring
8 harm, and Carpenter is a case in which the
9 victim, The Wall Street Journal, wasn't
10 economically harmed at all.
11 And, third, it actually definitively
12 resolved the false pretenses debate that
13 Petitioner wants to have once again when it
14 interprets false pretenses not to require this
15 kind of harm.
16 And if you want to look at examples of
17 how the kind of thing I described as pedigree
18 fraud was covered at common law, I'd encourage
19 the Court to look at some of the
20 turn-of-the-century cases at pages 753 to 754 of
21 the Prosser treatise, which is cited in our
22 brief.
23 One of those cases, Hedden against
24 Griffin, is a case by the Supreme Judicial Court
25 of Massachusetts at the time when I believe

1 Justice Holmes was on that Court, although he
2 didn't write the opinion, and in that case, the
3 victim was tricked by the defendant into
4 thinking that a bunch of his friends had bought
5 a particular type of insurance and, in fact,
6 they liked it so much, they didn't quite buy the
7 company, but they became members of the Board of
8 Directors of the company.
9 He himself bought the insurance,
10 realized he'd been tricked, and the Court
11 acknowledged it was a perfectly valid insurance
12 policy. He just didn't want it anymore because
13 now he'd been tricked. It wasn't what he
14 actually wanted. He was really depending, and
15 it was an essential element to him, that the
16 friends have bought it and that the friends were
17 on the Board of Directors.
18 And that was -- the only measure of
19 damages in that case was the small premium that
20 he had already paid, and he got a full refund
21 and a rescission remedy. There are other
22 examples of it, like the cases at pages -- page
23 19 and 20 of our brief, where, for example,
24 there's a misrepresentation to a buyer that a
25 family member wanted the buyer to buy this

1 particular item.
2 That is not harm in a property
3 interest, or if Petitioner would recharacterize
4 it as such, I really think that we're slicing
5 the conceptual baloney so thinly that it's
6 transparent.
7 Now we could argue --
8 JUSTICE SOTOMAYOR: Mr. Feigin --
9 JUSTICE KAVANAUGH: Hasn't the -- go
10 ahead.
11 JUSTICE SOTOMAYOR: -- I -- I totally
12 remain confused, okay?
13 The core of the right-to-control
14 theory is that a prosecution is allowed to show
15 a deprivation of property simply by showing a
16 deprivation of economically valuable
17 information.
18 You've disavowed that, correct?
19 MR. FEIGIN: Your Honor, read simply
20 that broadly, yes. We are not --
21 JUSTICE SOTOMAYOR: All right. But
22 that's how the Second Circuit has read it, and
23 you're not defending that, correct?
24 MR. FEIGIN: We're not defending -- if
25 I could just be clear on --

1 JUSTICE SOTOMAYOR: Would you --
2 MR. FEIGIN: -- what we --
3 JUSTICE SOTOMAYOR: -- would you --
4 MR. FEIGIN: -- on what we're
5 defending and what we're not.
6 JUSTICE SOTOMAYOR: No, no, no. Just
7 answer --
8 MR. FEIGIN: Okay.
9 JUSTICE SOTOMAYOR: -- my questions,
10 okay, because -- are you defending the Second
11 Circuit's view that a deprivation of
12 economically valuable information is enough to
13 prove fraud?
14 MR. FEIGIN: Your Honor, if the
15 definition started and stopped there, we do
16 think that is an overbroad definition of
17 property fraud.
18 JUSTICE SOTOMAYOR: Okay. So you're
19 saying that definition by the Second Circuit
20 you're not defending?
21 MR. FEIGIN: We are not defending that
22 in all of its possible permutations. What we
23 are defending here is how that has been applied
24 and limited by the Second Circuit, in
25 particular, with its tangible harm requirement

1 and by its application in the context of
2 fraudulent inducement cases like this one where
3 there is --
4 JUSTICE SOTOMAYOR: The -- the charge
5 here was -- I'm reading directly from the charge
6 -- the victim's right to control the use of his
7 assets is injured when it is deprived of
8 potentially valuable economic information that
9 it would consider valuable in deciding how to
10 use his assets.
11 Is that an accurate statement of the
12 law?
13 MR. FEIGIN: Your Honor, I think, in
14 the context of this --
15 JUSTICE SOTOMAYOR: Don't give me a
16 context.
17 MR. FEIGIN: Okay.
18 JUSTICE SOTOMAYOR: Is that an
19 accurate statement of the law?
20 MR. FEIGIN: That is not how we would
21 -- first of all, it did go on to talk about the
22 tangible harm requirement.
23 JUSTICE SOTOMAYOR: It says
24 potentially valuable economic -- I'm reading the
25 charge -- information is how to use -- his

1 assets is information that affects the victim's
2 assessment of the benefits or burdens of a -- of
3 a transaction or relates to the quality of goods
4 or services received or the economic risks of
5 the transaction.
6 Is that an accurate statement of the
7 law? This is a jury charge.
8 MR. FEIGIN: Your Honor, I -- I -- I
9 -- the reason I -- I mean, I think, if you're
10 taking some of these statements in isolation, I
11 agree with you. I acknowledge to this Court --
12 I believe I've been acknowledging throughout --
13 that is not the way that we would formulate it.
14 If you're asking me instead whether we
15 think it can identify cases that do meet the
16 paradigm of property fraud, and if you're asking
17 me whether I think the jury could have convicted
18 without finding traditional property fraud, then
19 I'm going to -- I'm going to defend both the
20 instructions and the conviction.
21 If you're asking me whether we would
22 think that this is the kind of first principles
23 right way to articulate it, I'm going to agree
24 with Your Honor that the answer is no.
25 The -- I think really there are two

1 main points I just want to -- I just want to
2 emphasize here. One is that I do not think the
3 Court should cast any doubt on pedigree fraud or
4 relitigate whether there is some harm
5 requirement for property fraud generally, and
6 then, in the specific context of this case, I
7 think, if the Court wants to do anything other
8 than affirm, it should remand and let the Second
9 Circuit sort out where we might be now.
10 But if the -- we do think that this
11 conviction can be affirmed because the findings
12 under the right-to-control theory were -- do map
13 on to property fraud in this context because
14 there were no other assets we could be thinking
15 about other than the 750 million that's --
16 JUSTICE JACKSON: But, Mr. Feigin,
17 that's not how it work. I mean, the fact that
18 it might map on to another theory of fraud isn't
19 sufficient in a criminal case because doesn't
20 the jury have to be actually instructed
21 concerning the other theory?
22 What worries me is the thought that
23 the jury was instructed -- and -- and -- and
24 Justice Sotomayor just read the instruction --
25 the jury was instructed on this right-to-control

1 theory, and they convicted on that theory.
2 If we determined that that theory is
3 not consistent with the law in some way, I don't
4 know that we can look at the evidence that was
5 presented, especially given the fact that, as
6 Mr. Dreeben says, the evidence was presented
7 tailored to that theory, but even so, you seem
8 to be suggesting that we can go back now and
9 look at the evidence that was presented and say:
10 Oh, but there was enough for another theory that
11 the jury wasn't instructed on, and so we can
12 sustain the conviction on that basis.
13 MR. FEIGIN: Well, two points, Your
14 Honor. One, as the case comes to this Court,
15 and without prejudice to whether they may have
16 preserved the challenge -- other challenges
17 below, as the case comes to this Court, it's
18 just a pure sufficiency of the evidence
19 challenge, and what that looks at is here are
20 the elements of the statute properly construed,
21 and here are the facts of the case, and do they
22 map on to each other.
23 JUSTICE JACKSON: But, wait. How can
24 you say that when they have charged throughout
25 that the actual law that was being instructed

1 was invalid?
2 MR. FEIGIN: So, if what the Court
3 wants to say is that the jury instructions were,
4 in fact, invalid, I think they forfeited a
5 challenge like that at -- right at the beginning
6 of their petition cert stage reply brief.
7 But, again, the Court could send this
8 case back to the Second Circuit to sort out
9 where we are now, but our submission in this
10 Court and the reason we think this Court can
11 affirm is that if the jury instructions could be
12 characterized as essentially just misdescribing
13 the elements of the crime but in a way that
14 wouldn't have allowed for the jury to find guilt
15 without finding the properly understood from
16 first principles elements of the crime, I don't
17 think that the defendant has been deprived of
18 anything.
19 They point to evidence they would have
20 introduced, but if you look at Joint -- if you
21 look at page 1002 of the Court of Appeals'
22 Appendix, the district court judge made clear --
23 I'm sorry, Your Honor.
24 CHIEF JUSTICE ROBERTS: You can
25 finish.

1 MR. FEIGIN: The district court made
2 clear that it was open to evidence that
3 Ciminelli actually could have done this better
4 than anybody else. What it wasn't open to was
5 evidence that Ciminelli just gave it a quid pro
6 quo, which is exactly the kind of thing that we
7 don't think fits, even under traditional
8 property concepts.
9 Thank you, Mr. Chief Justice.
10 CHIEF JUSTICE ROBERTS: Justice
11 Thomas?
12 Justice Sotomayor, anything further?
13 Justice Kagan?
14 JUSTICE KAGAN: So this is just a
15 matter of curiosity, but if -- let's take two
16 things to be true. One is that the right to
17 control one's own assets is not itself a
18 property interest, a sufficient property
19 interest, under this statute. And the second is
20 that in a case like this, the $750 million is a
21 property interest under the statute.
22 I guess what I'm curious about is how
23 did the Second Circuit -- and I presume also the
24 government, you know, must have argued these
25 things to the Second Circuit. Why did they go

1 down this road? What did -- how did it benefit
2 anybody to conceive of the property in the case
3 as the right to control assets, rather than to
4 conceive of the property in the case as the
5 contract moneys?
6 MR. FEIGIN: Well, Your Honor, I can't
7 quite speak to what everyone might have been
8 thinking back when this originally began, but as
9 I suggested, I think the Second Circuit might
10 have gotten a little bit of a bad rap.
11 The phrase "right to control" does
12 appear in McNally, where the Court distinguishes
13 the theory in that case from --
14 JUSTICE KAGAN: So there's no set of
15 --
16 MR. FEIGIN: -- a right-to-control
17 theory.
18 JUSTICE KAGAN: I mean, whether it's a
19 bad rap or -- there's no set of cases that
20 people thought, oh, if we define the property
21 interest this way, we can get to a certain set
22 of cases that we couldn't get to if we defined
23 the property interest as the -- the contract
24 moneys?
25 MR. FEIGIN: I don't think that was

1 the original conception of it, Your Honor. I --
2 I do think the -- I don't want to suggest the
3 right-to-control theory only appeared after
4 McNally. It does have its genesis in some
5 pre-McNally cases.
6 And I think it's, to be perfectly
7 candid, Your Honor, an -- an easier way for
8 courts or potentially prosecutors just to get at
9 -- at some of these things because if you just
10 say right to control or deprivation of economic
11 information is enough, maybe it's a slightly
12 easier route to prove to a jury, for example, or
13 -- or to affirm on those grounds.
14 But we -- and it is possible for that
15 theory to encompass too much. And I don't know
16 that it's really actually been subject to very
17 much abuse. I -- I won't suggest that it hasn't
18 been subject to abuse in some isolated cases,
19 but I wouldn't submit that we would expect --
20 JUSTICE KAGAN: Okay.
21 MR. FEIGIN: -- a lot of defendants
22 to --
23 JUSTICE KAGAN: Thank you. You've
24 answered the question.
25 MR. FEIGIN: Yeah.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?
3 JUSTICE KAVANAUGH: Can I just pick up
4 on Justice Kagan and Justice Jackson's question?
5 Because my understanding is the government has
6 been pushing this theory, and it's not you
7 personally, but the government has been pushing
8 this theory for several decades, and lots of
9 people have been convicted under it.
10 And I think the reason is, you just
11 said, it's easier to convict people under this
12 incorrect articulation of the theory than under
13 the correct articulation of the law. I think
14 you just said that. And that's -- that's very
15 problematic to think back on the various cases
16 that have been there over the years. Now, I
17 think you said to Justice Kagan you acknowledge
18 that there are -- there are some cases like
19 that.
20 And then to, you know, come here in
21 the bright light of this Court, for the
22 government to then say, actually, you know, that
23 theory doesn't hold up, it's -- again,
24 appreciate the candor, but looking back on the
25 government pushing this theory all those years

1 is not -- not an ideal scenario.
2 MR. FEIGIN: Well, let me just make
3 absolutely clear what I'm saying. I think this
4 might have been an easier way in some cases to
5 explain things to the jury.
6 I am not suggesting that -- and,
7 frankly, I have a lot of sympathy for the
8 government -- well, I suppose I should, but --
9 (Laughter.)
10 MR. FEIGIN: -- I have a lot of
11 sympathy for the government where you are faced
12 with Second Circuit law, for example, that
13 just thoroughly --
14 JUSTICE KAVANAUGH: But like in the
15 Wallach case and going back --
16 MR. FEIGIN: -- insists on thinking
17 about it this way.
18 JUSTICE KAVANAUGH: -- the Wallach
19 case, and, you know, there -- we can name the
20 names. There -- the government was not just
21 some bystander here. Again, it's not you
22 personally. So I'm just looking back at the
23 scenario, and then it finally gets to this
24 Court, and, like, oh, actually, that theory
25 doesn't work.

1 MR. FEIGIN: Your Honor, I suppose we
2 could debate particular facts of particular
3 cases, but Wallach, in particular, is a case in
4 which the --
5 JUSTICE KAVANAUGH: I didn't --
6 MR. FEIGIN: -- from -- yeah.
7 JUSTICE KAVANAUGH: I didn't mean to
8 get into particulars.
9 MR. FEIGIN: There are various cases
10 that we -- and as we've explained in our brief,
11 the core set of cases to which this has been
12 applied, and the -- the overwhelming set of
13 cases in which we found Second Circuit decisions
14 on it have been fraudulent inducement cases like
15 this that we could have brought on another
16 theory.
17 I think it's asking a lot of federal
18 prosecutors to go to the Second Circuit, say
19 here's some language that this court has -- that
20 this court has endorsed a couple of times, that
21 they've never explicitly overruled, but we're
22 going to tell you that this is wrong. We're
23 going to start thinking about this case in a
24 different way than you, Judges, have been
25 thinking about these kinds of cases. And we

1 still think that it fundamentally covers all the
2 cases that you, Judges, think it covers. But
3 here's is a different way of thinking about it.
4 JUSTICE KAVANAUGH: So on -- on the
5 word "all" in what you just said, I thought you
6 had said to Justice Kagan you were acknowledging
7 that it actually is not all.
8 MR. FEIGIN: I -- I apologize. I
9 forget what I used "all" to modify in that
10 sentence.
11 JUSTICE KAVANAUGH: That all the cases
12 would have come out the same way if it had been
13 properly charged.
14 MR. FEIGIN: Oh, I -- I'm --
15 JUSTICE KAVANAUGH: And --
16 MR. FEIGIN: I apologize, Your Honor.
17 I -- I think we haven't found many cases, if
18 any --
19 JUSTICE KAVANAUGH: That's fair.
20 MR. FEIGIN: -- that we think are
21 really problematic. And --
22 JUSTICE KAVANAUGH: You gave a good
23 answer there.
24 MR. FEIGIN: Okay.
25 JUSTICE KAVANAUGH: It's fair, you

1 know, the Second Circuit. So that's -- I
2 understand that. So I'll stop there.
3 JUSTICE KAGAN: Truth be told, I mean,
4 I guess I was a little bit surprised to hear you
5 saw it's easier to convince a jury. I would
6 have thought it's very easy to convince a jury
7 that $750 million is property and not very easy
8 to convince a jury that something called the
9 right to control one's own assets is property.
10 I -- I mean, I find it a little bit of
11 a sort of weird way to think about property, and
12 I suspect most juries would too.
13 MR. FEIGIN: You --
14 JUSTICE KAGAN: So I guess, again,
15 it's like why did anybody go down this road?
16 MR. FEIGIN: Well, Your Honor, I -- I
17 think my answer to you, and I appreciate the
18 chance to clarify it, is that -- was that it was
19 an easier way to go with courts and juries.
20 I think courts started to think of it
21 this way first. And then once you have court
22 instruction on this, it is a lot easier to
23 simply, as I was suggesting to Justice
24 Kavanaugh, go along with circuit law. And --
25 rather than to ask for a whole new, de novo set

1 of instructions. And so the indictment in this
2 case, the instructions in this case follow along
3 with what the Second Circuit has been doing for
4 35 years.
5 And I think, as to how I suggested
6 this might have been an easier way to think
7 about it, I think to judges who articulated this
8 theory first -- I don't think it was juries or
9 prosecutors, necessarily. If you look at
10 judicial opinions articulating this theory,
11 they're taking language that was used in this
12 Court's own opinions in flagging a potentially
13 still valid theory of fraud.
14 JUSTICE KAGAN: Thank you.
15 MR. FEIGIN: And that -- yeah. Sorry.
16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?
18 JUSTICE BARRETT: Mr. Feigin, my
19 question is very practical. Coming to the end
20 of your argument here, let's say that you lose
21 on right to control, meaning as stated by the
22 Second Circuit on the question presented, you
23 lose that, and you have two interests, one is to
24 salvage the conviction in this case and the
25 other is to make sure that whatever we say about

1 the right to control doesn't harm the
2 government's long-term interest in prosecuting
3 cases that might come around the edges of it.
4 If we write the opinion this way and
5 say the right-to-control theory is invalid
6 because the right to control one's assets --
7 being deprived of economically valuable
8 information deprives one of the right to control
9 one's assets, and that's not a traditional
10 property interest, or that it conflates the
11 materiality and intent to defraud one of
12 property elements, period, does that solve the
13 government's problem about cases coming down the
14 pike? Am I writing this too broadly?
15 MR. FEIGIN: So, Your Honor, I think
16 -- if -- if I'm understanding correctly, I think
17 if you write an opinion that suggests -- I
18 wouldn't say it so much conflates the intent to
19 harm necessarily -- sorry, there is no intent to
20 harm element --
21 JUSTICE BARRETT: Defraud.
22 MR. FEIGIN: The intent to defraud
23 element and the materiality element. I would
24 say it conflates the materiality element and the
25 -- and the property element. It takes what's

1 properly understood as the essential element
2 requirement of materiality, which has deep roots
3 --
4 JUSTICE BARRETT: Yeah.
5 MR. FEIGIN: -- starting with Justice
6 Story, in this -- in the particular context of
7 fraudulent inducement and transmutes it into a
8 tangible harm requirement that's attached to the
9 property.
10 I think if the Court makes clear that
11 that's not the right way to go about this and
12 that that's the way the Second Circuit has been
13 going about this, as long as the Court makes
14 clear that in doing so the Second Circuit has
15 been identifying a set of cases that may well
16 meet the traditional elements of property fraud,
17 I -- I -- you know, that's not the --
18 JUSTICE BARRETT: We don't even have
19 to say that. We're just resolving this case,
20 this QP. But if we resolve it the way -- I
21 mean, I don't think you and I are really far off
22 in your description of the conflation here.
23 But if we describe it that way and
24 just say period, and don't talk about alternate
25 theories that might sustain the conviction in

1 this case or any of the others that you're
2 discussing with Justice Kavanaugh, that solves
3 the government's long-term problem?
4 I mean, when I say long-term problem,
5 I mean concern about what harm precedent from
6 this Court might do down the road.
7 MR. FEIGIN: Well, I would -- perhaps
8 I could make a more modest request for an
9 additional sentence there that would say we are
10 not expressing any view as to whether, through
11 application of those requirements, the Second
12 Circuit has identified cases that do meet the
13 traditional elements of property fraud as
14 traditionally understood, without expressing an
15 opinion on that one way or another, just to make
16 sure the Court's not misunderstood as expressing
17 some sort of negative opinion about that.
18 JUSTICE BARRETT: Fair enough, thanks.
19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?
21 JUSTICE JACKSON: Can I just follow up
22 by asking if we had that additional sentence,
23 would it be the government's position that it
24 could then go back to the Second Circuit and
25 perhaps even to the district court and seek a

1 conviction on the traditional basis in this
2 case?
3 MR. FEIGIN: We do think that that
4 would be open to us, Your Honor, although if
5 they have preserved jury instruction issues that
6 the Second Circuit believes are still open,
7 which may well be the case, then I think if this
8 Court were to remand, that would present
9 different issues than the sufficiency issue that
10 I was discussing with Your Honor earlier.
11 But I -- you know, our -- our
12 submission to this Court is that on pure
13 sufficiency grounds, the facts that are not only
14 in the record but under the findings that the
15 jury necessarily made in this context do fit the
16 traditional elements of --
17 JUSTICE JACKSON: So you're --
18 MR. FEIGIN: -- property fraud.
19 JUSTICE JACKSON: -- saying you would
20 not have to retry Mr. Ciminelli. You could make
21 the argument that, on Justice Barrett's
22 formulation, with the additional sentence that
23 we're not touching traditional property, you
24 could go back in this case and ask the lower
25 courts for a conviction on the record that

1 currently exists?

2 MR. FEIGIN: Your Honor, let me make

3 -- I think that argument would -- I think we

4 would make that argument, and it would encompass

5 two pieces. And you might disagree with us more

6 on the second than on the first.

7 The first is on a pure sufficiency of

8 the evidence challenge, we do not think that

9 there has been anything established if the Court

10 says what Justice Barrett and I were just

11 discussing, that it has been established that

12 these defendants did not commit property fraud,

13 which is the essence of the --

14 JUSTICE JACKSON: Isn't that the --

15 MR. FEIGIN: -- sufficiency challenge.

16 JUSTICE JACKSON: -- role of the jury?

17 Doesn't the law need to be settled before it

18 goes to the jury so that the jury then makes a

19 determination of whether or not the person is

20 guilty?

21 What I'm worried about is the

22 suggestion that we can come now to this Court,

23 essentially change what the legal requirements

24 are, and then send it back and have you convict

25 somebody under the new law without a jury

1 speaking to it.
2 MR. FEIGIN: So I'd suggest that if
3 that's Your Honor's instinct, that is -- the way
4 to encapsulate that would be in the requirement
5 of a new trial with new jury instructions if
6 these jury instructions weren't harmless error
7 on these facts, not by saying that the
8 sufficiency challenge succeeds and what these
9 defendants did which would always have been
10 considered fraud is not, in fact, fraud.
11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.
13 Rebuttal, Mr. Dreeben?
14 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN
15 ON BEHALF OF THE PETITIONER
16 MR. DREEBEN: Thank you, Mr. Chief
17 Justice.
18 What Mr. Feigin just said is that we
19 raised a sufficiency case but it should be
20 turned into a jury instruction error case. I
21 don't see how the government can maintain
22 simultaneously that the right-to-control theory
23 is invalid and that somehow this case gets to be
24 retried under its new legal theory.
25 Now, as for Mr. Feigin's contention

1 that the jury actually decided the elements of
2 its new fraud theory, all the Court has to do is
3 look at jury instructions on pages 60A to 62A of
4 the Petition Appendix.
5 First of all, the scheme was not
6 described as one to obtain contract assets,
7 which is what my friend now would have the
8 scheme constitute.
9 On page 60A, the scheme is described
10 as a scheme to slant the development contract so
11 that Mr. Ciminelli would be selected as
12 preferred developers. This was a transaction in
13 which the first stage was selection of a
14 developer, the second stage was the negotiation
15 of the actual River Bend contracts under which
16 money would be paid.
17 There was no money paid under the
18 preferred developer contracts. They do not
19 identify the kind of fraud in property proceeds
20 that my friend now says is required.
21 Then when you come to the jury
22 instructions themselves, as Justice Sotomayor
23 read, they identify a different property
24 interest. They identify the right to control
25 rather than the contract proceeds as the assets.

1 They omit the new essence of the
2 bargain requirement, which the government
3 submits is the correct materiality standard.
4 Had that been the standard at trial, we would
5 have been permitted to argue that the River Bend
6 contract is the only contract at issue, this
7 preferred developer status and the competitive
8 landscape that led to it was not part of that
9 contract, it's barred by an integration clause,
10 and it cannot be the basis for saying that it's
11 the essence of the contract.
12 The government also has a new "by
13 means of" requirement that the acquisition of
14 the money has to be by means of the false
15 statement.
16 Here there's a break in the causal
17 chain between the competitive situation to
18 become a preferred developer and the
19 hard-fought, arm's length negotiation of the
20 contract.
21 And the government itself says that we
22 would have that defense. At page 47 of the
23 government's merits brief, it says that, "In
24 many cases," and I'm quoting, "where a victim
25 receives fair value in a transaction, a

1 misrepresentation will not have gone to an
2 essential element of the bargain."
3 It also seems it will not have been
4 the circumstance by means of which the money was
5 acquired. And the government relied on that
6 theory of right to control really answering the
7 question that came up in the dialogue with
8 Justices Kagan and Kavanaugh.
9 It makes the government's ability to
10 get a conviction much easier. This isn't an
11 abstract question of whether the evidence looked
12 at from hindsight years later in this Court
13 could conceivably have supported a valid theory
14 of property fraud. We were denied again and
15 again the right to admit evidence because the
16 government relied on the right-to-control
17 theory.
18 We've detailed this at the petition
19 reply brief at page 11, the Kaloyeros reply
20 brief at page 9, and you can look at the
21 Petition Appendix at 33A, where the Second
22 Circuit says the defendants wanted to introduce
23 evidence that this transaction was entirely fair
24 as a way of refuting that it was designed to
25 inflict a property harm. The Court says can't

1 do that because of right to control.
2 So I think that when you add all of
3 those things together, this is not a case in
4 which the government can revive an abstract
5 theory that it has come to this Court for the
6 first time and says if you look at the Second
7 Circuit's doctrine differently, it really would
8 satisfy the elements of a proper property fraud
9 theory.
10 They waived that. They waived it as
11 Justice Gorsuch pointed out when they superseded
12 the indictment to get rid of it, and they
13 litigated this case throughout strategically to
14 make their burden lighter to convict on right to
15 control.
16 I think at this point the only proper
17 judgment is a judgment of acquittal. This is
18 not an abstract sufficiency of the evidence
19 case. This is whether the evidence was
20 sufficient to support the charges made in this
21 indictment. That is the only legal basis on
22 which the conviction could be sustained.
23 If the right-to-control theory falls,
24 so does the conviction. The Court should
25 reverse, should not remand. It should direct

1 the entry of a judgment of acquittal.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.
4 (Whereupon, at 12:38 p.m., the case
5 was submitted.)
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