No. 23-909

# In the Supreme Court of the United States

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

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES**


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## QUESTION PRESENTED

Whether petitioners' convictions for wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349, required proof of net pecuniary loss.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 82 F.4th 230. A subsequent opinion of the court of appeals (Pet. App. 42-53) is available at 2023 WL 6294144. A prior opinion and an order of the court of appeals are reported at 66 F.4th 406 and 81 F.4th 1260. Another prior order of the court of appeals is reprinted at 821 Fed. Appx. 81. The memorandum opinion of the district court (Pet. App. 76-129) is available at 2019 WL 4126484.

## JURISDICTION

The judgment of the court of appeals was entered on September 22, 2023. On December 12, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 19,

2024. On January 18, 2024, Justice Alito further extended the time to and including February 19, 2024, and the petition was filed on February 20, 2024 (Tuesday following a holiday). The petition for a writ of certiorari was granted on June 17, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The federal wire-fraud statute provides in relevant part:

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

18 U.S.C. 1343.

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

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349; three counts of wire fraud, in violation of 18 U.S.C. 1343; and seven counts of causing a false statement to a

government agency, in violation of 18 U.S.C. 1001. Pet. App. 54, 63. Petitioner Kousisis was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. *Id*. at 64, 66. Petitioner Alpha Painting and Construction Company, Inc., was sentenced to five years of probation. *Id*. at 56. The court of appeals affirmed. *Id*. at 1-41.

1. Petitioners "fraudulently caused" a state agency "to pay" them "millions of dollars" by lying about compliance with a disadvantaged-business-enterprise (DBE) program that was an "essential" condition on petitioners' receipt of that money. Pet. App. 22.

a. The funds at issue were earmarked by the Pennsylvania Department of Transportation (PennDOT) for two DBE-inclusive Philadelphia-area construction projects: repairing and repainting the Girard Point Bridge and the William H. Gray III 30th Street Station. Pet. App. 3-4, 6.

The funds for those projects included grants from the United States Department of Transportation (DOT), which were conditioned on PennDOT's setting DBE-participation goals for each project. Pet. App. 4. To be certified as a DBE, a business must be "at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged," and its "management and daily business operations [must be] controlled by one or more of the socially and economically disadvantaged individuals who own it." *Ibid.* (quoting 49 C.F.R. 26.5). PennDOT required that at least six percent of the contract amount for the Girard Point project, and at least seven percent of the contract amount for the 30th Street project, go to a DBE. *Id.* at 6.

To qualify as participating in a particular project, a DBE had to perform a "commercially useful function,"

such as being "responsible for execution of the work of the contract and * * * actually performing, managing, and supervising the work involved." Pet. App. 5 (quoting 49 C.F.R. 26.55(c)(1)). "A DBE whose 'role [wa]s limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation' does not perform a commercially useful function." *Ibid.* (quoting 49 C.F.R. 26.55(c)(2)).

The terms of the contracts for both projects specially singled out failure to comply with the DBE regulations as a material breach of the agreements. See Pet. App. 6-7. The executed contracts' specifications included 17 warranties, only one of which—compliance with the DBE requirements—was expressly specified as a "material" term whose breach could lead to "termination." J.A. 114, 175 (requiring that the "Contractor shall carry out applicable requirements of 49 C.F.R. Part 26" and stating that "[f]ailure by the Contractor to carry out these requirements is a material breach of this contract, which may result in [its] termination") (emphasis omitted); see 49 C.F.R. Pt. 26 (entitled "Participation by Disadvantaged Business Enterprises in [DOT] Financial Assistance Programs") (capitalization altered).

To obtain the contracts for the projects, and the money that came with them, petitioners and associated entities submitted bids in which petitioners committed to working with Markias, Inc., a prequalified DBE in Pennsylvania. Pet. App. 6. The winning bids were $70.3 million for the Girard Point project (to petitioners in a joint venture) and $50.8 million for the 30th Street project ($15 million of which was subcontracted to petitioners). *Ibid.* Petitioners represented that they would ob-

tain $6.4 million in paint supplies from Markias across both projects. *Ibid.*

b. Contrary to petitioners' bids and "the explicit terms of the contracts," however, Markias served "merely as a pass-through." Pet. App. 7. Notwithstanding petitioners' contrary representations, Markias did not do any work on the projects or supply any of the projects' materials. *Ibid.* At no point was Markias even equipped to carry out its putative role in the projects: according to Markias's owner (and sole employee), "the only place that [she] conducted the business * * * was in [her] living room," from which she purchased no products and maintained no outside facility at which she could have received, maintained, or sold the relevant materials. J.A. 62; see J.A. 61-67.

Kousisis sent Markias a letter detailing the procedures for implementing the scheme. Pet. App. 8; see C.A. App. 1812-1817. "The letter specified that [Alpha] would identify the actual suppliers for the products that it needed. [Alpha] would then negotiate prices and terms with those suppliers and create fraudulent purchase orders in Markias' name." Pet. App. 8. And in their own internal correspondence during the scheme, petitioners repeatedly treated the outfit as a mere pass-through for ostensible DBE compliance. See, *e.g.*, J.A. 188 (Kousisis instructing an associate to "start running purchases through Markias to meet MBE [minority business enterprise] goal"); J.A. 178 (Kousisis instructing a project manager to continue to "run invoices thru Markias"); C.A. Supp. App. 228 (instructing a supplier to remove Alpha's name from invoice and substitute Markias's name due to "state auditing for Minority").

Throughout the scheme, petitioners concealed "the fact that Markias was doing no work" by having the

"true paint suppliers send their invoices to Markias," Markias then issue its own invoices—which added a 2.25% fee—to Alpha, and Alpha submit those marked-up invoices to PennDOT. Pet. App. 7-8. In addition, when petitioners realized that they had not sent enough transactions through Markias to meet the DBE requirement, petitioners began routing invoices for projects outside of Pennsylvania through Markias, falsely making it appear that the materials were used on the Philadelphia projects. *Id.* at 8; J.A. 71-74. Meanwhile, petitioners "periodically submitted false documentation regarding Markias' role" in the projects. Pet. App. 7. Petitioners had to submit that documentation "to obtain[] credit towards the DBE goals and, therefore, to comply[] with the contracts' terms." *Ibid.*

c. In reliance on petitioners' submissions—which "falsely certified that Markias acted as a 'regular dealer' in supplying products" on the Philadelphia projects—PennDOT awarded DBE credits and paid petitioners as though they were actually complying with the DBE requirements. Pet. App. 7. A truthful "failure to certify compliance with the DBE requirements could have led to debarment, financial penalties, or withholding of progress payments." *Ibid.*

From its share of the Philadelphia projects, Alpha turned a gross profit of more than $21 million. C.A. App. 3724. Markias received more than $170,000 by adding its agreed-upon 2.25% to each transaction that petitioners passed through it. J.A. 58.

2. A federal grand jury indicted petitioners on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349; five counts of wire fraud, in violation of 18 U.S.C. 1343; and ten counts of causing a false statement to a government agency, in violation of

18 U.S.C. 1001. Pet. App. 86-86. Following a trial, a jury found petitioners guilty on all charges except for two wire-fraud counts. *Ibid.*

The district court granted in part and denied in part petitioners' postverdict motion for a judgment of acquittal. Pet. App. 76-129, 130-131. The court dismissed three false-statement counts as untimely. *Id.* at 117-126. But the court rejected petitioners' claim that they did not "defraud the government of 'money or property' within the meaning of the wire fraud statute," which had been premised on the theory that because "they completed the construction project[s]," "PennDOT and DOT * * * received the full benefit of their bargain." *Id.* at 106.

The district court observed that petitioners "deprived PennDOT of a property right" because "the agency paid for services—construction performed with materials supplied by a DBE—which it did not receive." Pet. App. 109. The court explained that petitioners "sought to be awarded money through a lucrative contract based on false representations about Markias's role." *Ibid.* And the court emphasized that the DBE requirements were "a fundamental basis of the bargain" laid out in the bidding and contract requirements. *Ibid.* (brackets and citation omitted).

3. The court of appeals affirmed. Pet. App. 1-41.

The court of appeals acknowledged that it is "well established that the federal wire fraud provision *only* extends to property rights." Pet. App. 9 (citation omitted). The court likewise acknowledged that "for the government to establish wire fraud, the property involved 'must play more than some bit part in a scheme: It must be an "object of the fraud."'" *Ibid.* (citation omitted). The court found, however, that petitioners' scheme satisfied those requirements. *Id.* at 18-24.

Like the district court, the court of appeals rejected petitioners' theory that "the government was not deprived of any property" because petitioners "fully discharged their painting and repair obligations in the Philadelphia Projects." Pet. App. 10 (emphasis omitted). The court observed that petitioners "set out to obtain millions of dollars that they would not have received but for their fraudulent misrepresentations." *Id.* at 18.

The court of appeals emphasized that "DBE participation was an essential component of the contract" and that, "[w]ithout it, the nature of the [p]arties' bargain would have been different." Pet. App. 22. The court also observed that PennDOT had paid an additional 2.25% fee in exchange for Markias's involvement in the project. *Id.* at 21. And the court explained that because petitioners "secured PennDOT's money using false pretenses," the "value PennDOT received from [petitioners'] partial performance of th[e] painting and repair services is no defense to criminal prosecution for fraud." *Id.* at 23-24.

Although the court of appeals affirmed petitioners' convictions, it reversed the district court's determination of loss amount and remanded for resentencing. Pet. App. 28-41. And in a separate decision, the court of appeals vacated the district court's forfeiture order and remanded for further proceedings. *Id.* at 42-53.

## SUMMARY OF ARGUMENT

Petitioners' scheme—tricking a victim into handing over money by lying about an essential aspect of what petitioners would provide in return—was classic property fraud, in violation of 18 U.S.C. 1343. Petitioners cannot avoid wire-fraud liability simply by asserting that they provided something equal in pecuniary value

(by some measure) to what they took. The statute's text does not require proof of net pecuniary loss; this Court has repeatedly refused to add such a requirement; and common-law criminal and civil fraud provided remedies irrespective of whether the victim suffered net pecuniary loss. This Court should reject petitioners' effort to superimpose a new element that threatens to carve out numerous paradigmatic frauds—such as obtaining funds by lying about veteran status, essential product features, or the destination of charitable donations.

A. Petitioners' scheme satisfied every element of the wire-fraud statute. They obtained PennDOT's money or property (approximately $85 million of payments), by means of materially false and fraudulent misrepresentations (about compliance with the DBE requirement), with an intent to defraud. This was not a scheme whose object was to obtain a government license or to influence some exercise of regulatory authority, with an only incidental effect on governmental property. Instead, its direct object was to obtain *money*, and it was just as fraudulent when the victim was a public agency rather than a private entity.

B. Petitioners nevertheless contend that wire fraud includes an extra element not present in the statutory text: namely, that a victim fraudulently induced to part with its money or property must additionally incur (or have been intended to incur) a net pecuniary loss at the end of the transaction. But the wire-fraud statute requires only that the scheme have the object of "obtaining" money or property from the victim, 18 U.S.C. 1343, and a defendant still fraudulently "obtain[s]" the victim's money even if he later provides the victim with goods or services that happen to have the same market value as the materially different goods or services that

the victim actually wanted and believed it was purchasing.

This Court has long recognized that the federal mail- and wire-fraud statutes encompass schemes to fraudulently induce a transaction, and it has expressly rejected the contention that those statutes require "monetary loss." *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987). It has likewise rejected a financial-loss requirement under the similarly worded bank-fraud statute. Petitioners' effort to nonetheless add such a requirement relies on the question-begging assumption that references in the case law to "injury," "harm," or "loss" necessarily mean a *net pecuniary* loss at the end of a fraudulently induced transaction, as opposed to the loss of money or property handed over at the outset, in return for something fundamentally inadequate.

C. The textual and precedential absence of a requirement for a net pecuniary loss at the end of a fraudulently induced transaction coheres with criminal and civil fraud at common law, neither of which included such a requirement. The crime of false pretenses did not require any showing of net pecuniary loss; for example, a seller who promised the buyer a particular horse was guilty of false pretenses when he fraudulently substituted a different horse, even if the two horses might have been of equal market value. See *State* v. *Mills*, 17 Me. 211, 216 (1840). And in civil law, while a plaintiff would have to show a net pecuniary loss to receive *money damages*, a plaintiff seeking to rescind the transaction did not have to make any such showing. For example, rescission of a sale of property was ordered where a straw purchaser hid the identity of the true purchaser, even though the seller may have received

market value. See *Brett* v. *Cooney*, 53 A. 729, 730-731 (Conn. 1902).

Petitioners' contrary contention incorrectly relies either on cases where the plaintiff sought money damages, or on general references to "injury" or "harm" in treatises and cases that do not necessarily use those terms to mean net pecuniary loss. In any event, while the Court has looked to common-law principles to inform its reading of the federal fraud statutes' text, it has declined to artificially curtail the statutes' scope where—as is at least the case here—the asserted common-law limitation was not well established.

D. Petitioners' engrafting of an atextual net-pecuniary-loss element onto the federal property-fraud statutes would unjustifiably preclude liability for a variety of interstate fraudulent schemes. Public entities often have preference programs for military veterans, disabled persons, or people returning from incarceration. Similarly, private persons may deem it critical to contract only with co-religionists, to purchase only ethically sourced pharmaceutical products or gemstones, or to eat locally-grown food or wear only American-made clothing. On petitioners' view, falsely representing that a product or service satisfies such a requirement is not property fraud so long as *other* people would view the victim as having paid a fair price for what was received, even though what the victim received lacked a feature essential to the victim.

Nor is it clear what the net pecuniary loss would be when a defendant misrepresents the destination of ostensibly charitable donations, or when a defendant simply substitutes a different, but similarly priced, product in place of the one the victim orders. Even petitioners appear to acknowledge (Br. 36) that it *is* prop-

erty fraud when "victims do not get what they paid for," but that ipse dixit contravenes their own net-pecuniary-loss requirement and lacks any principled reasoning.

At the same time, petitioners' own parade of horribles, supposedly stemming from the traditional definition of property fraud, disregards the demanding and rigorous materiality standard in this context. That standard precludes liability for misrepresentations that do not go to the essence of the bargain. Petitioners assert that such a standard is unworkable, but it is one that many strands of law have applied.

E. At all events, petitioners' convictions should be affirmed even under their own theory. Their scheme *did* lead to a net pecuniary loss: DBE-compliant services are more expensive, so the noncompliant services that petitioners provided were objectively worth less. Furthermore, PennDOT overpaid even for what it did receive, due to Markias's 2.5% markup for doing nothing.

## ARGUMENT

Petitioners' scheme was classic property fraud that violated the federal wire-fraud statute, 18 U.S.C. 1343. Their lies induced their victim to hand over more than $85 million for services that were—in an essential way—not what the victim wanted. And their scheme satisfied every element of wire fraud: it used the wires to obtain money or property ($85 million), through knowing material falsehoods (about compliance with the contracts' explicit and essential DBE requirements), with the intent to defraud (as shown by their internal communications).

Petitioners nonetheless attempt to evade responsibility for their criminal acts by engrafting an atextual net-pecuniary-loss requirement onto the wire-fraud

statute, which they claim to satisfy simply by declaring that they delivered repair work at a fair price. That effort cannot be squared with the statute's text, this Court's precedents, the fraud statutes' common-law antecedents, and the facts of this case. As even petitioners appear to acknowledge (Br. 36), property fraud includes situations "where victims do not get what they paid for." And petitioners' theory would inoculate not only their scheme, but other paradigmatic frauds, like lying to obtain veteran's benefits, or lying to obtain charitable donations.

### A. Petitioners' Fraudulent Scheme Satisfies Every Element Of The Wire-Fraud Statute

The federal wire-fraud statute makes it a crime to use interstate wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343. The Court has interpreted that statute *in pari materia* with the similarly worded mail- and bank-fraud statutes, see 18 U.S.C. 1341, 1344, and with reference to the common law. See, *e.g.*, *Neder* v. *United States,* 527 U.S. 1, 20, 22-23, 25 (1999). Petitioners' scheme, which undisputedly employed the interstate wires, satisfied every other statutory element as well. Its object was to obtain money or property; the scheme involved material misrepresentations; and it was intended to defraud.

#### *1. The object of petitioners' scheme was to obtain money or property, namely, $85 million in funds*

a. Although the textual reference to "obtaining money or property" appears only in the second clause of the wire-fraud statute, 18 U.S.C. 1343, this Court has construed the "disjunctive language as a unitary whole,"

*Kelly* v. *United States*, 590 U.S. 391, 398 (2020). Accordingly, the statute targets only "property fraud," in which money or property "must play more than some bit part in a scheme: It must be an 'object of the fraud.'" *Id.* at 402 (citation and emphasis omitted).

While the "object of the fraud [must] be 'money or property' in the victim's hands," the phrase "money or property" carries its "ordinary or natural meaning." *Pasquantino* v. *United States*, 544 U.S. 349, 355-356 (2005) (brackets, citations, and ellipsis omitted). And that natural meaning "'extend[s] to every species of valuable right and interest,'" including "money in hand and money legally due." *Ibid.* (citation omitted).

Here, the object of petitioners' scheme was plainly to obtain money or property in PennDOT's hands—namely, more than $85 million in infrastructure funds. The whole point of petitioners' scheme was to secure the contracts for the Girard Point and 30th Street projects, which respectively would pay out $70.3 million and $50.8 million ($15 million for petitioners). See Pet. App. 6. The $85 million in project funds that petitioners would obtain—worth the same in anyone's hands—thus played not a "bit part" in petitioners' scheme, *Kelly*, 590 U.S. at 402, but a starring role: the scheme's entire purpose was to convince PennDOT (by means of misrepresentations) to give that money to petitioners.

b. Petitioners attempt to characterize their scheme as targeting an "intangible interest a sovereign has in 'administering itself in the interests of the public.'" Br. 24-25; see *id.* at 24-29. But it was not a scheme whose object was to obtain a "purely regulatory" interest, such as a government license, *Cleveland* v. *United States*, 531 U.S. 12, 22 (2000) (citation omitted), or a scheme whose principal object was to "alter a regulatory deci-

sion," *Kelly*, 590 U.S. at 400-401. Instead, the scheme's direct object was to obtain *money*—including a contractual right to be paid that money—for the Philadelphia projects. Cf. *Ciminelli* v. *United States*, 598 U.S. 306, 318 (2023) (Alito, J., concurring) (observing that "valuable contracts" are "a traditional form of property").

Petitioners' fraud could equally have been committed against a private entity that likewise attached critical importance to the involvement of a particular service provider, such as a veteran, a co-religionist, or a local laborer. See pp. 42-43, *infra*. "The fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury." *Pasquantino*, 544 U.S. at 356. The $85.3 million that petitioners sought was no less property in a government entity's hands than it would be in private hands. And by acquiring it, petitioners' scheme "obtain[ed] money," 18 U.S.C. 1343.

***2. Petitioners' scheme sought the funds by means of material misrepresentations***

Conviction under the wire-fraud statute also requires that the scheme seek to obtain money or property "by means of," 18 U.S.C. 1343, "a misrepresentation or concealment of material fact," *Neder*, 527 U.S. at 22 (emphasis omitted). The statute encompasses not just "misrepresentation as to some existing fact," but also misrepresentations "as to the past or present, or suggestions and promises as to the future." *Durland* v. *United States*, 161 U.S. 306, 312-313 (1896). Here, petitioners repeatedly advanced affirmative lies about how they would carry out the projects that PennDOT awarded to them, making a number of key misrepresentations.

a. Petitioners told PennDOT that they would subcontract to Markias for supplies totaling approximately $4.7 million for the Girard Point project and approximately $1.7 million for the 30th Street project. J.A. 199-203, 211. They further represented that Markias would perform the work as a "regular dealer" in the products supplied, J.A. 26-28, a term defined as "a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business," 49 C.F.R. 26.55(e)(2)(ii); see also 49 C.F.R. 26.55(e)(2)(ii)(A).

When petitioners made those representations, they knew that Markias was not capable of performing the work, was not a "regular dealer," and would merely be a pass-through. See J.A. 193-195 (communications from Kousisis to Markias explaining the pass-through arrangement); J.A. 61-67 (testimony of Markias's owner and sole employee that she worked only in her living room, maintained no outside facility, and purchased no products). Petitioners nevertheless executed the contract documents, pursuant to which they pledged to "carry out applicable [DBE] requirements" on penalty of breach and termination, J.A. 114, 175.

Petitioners' lies did not stop there. They made false representations to PennDOT throughout their (partial) performance of the contracts. They submitted periodic requests to receive DBE credit for work supposedly undertaken by Markias to satisfy the work amounts they had pledged to subcontract. Each of those requests falsely claimed that Markias had supplied materials used on the projects, and each falsely claimed that

Markias had done so as a "regular dealer" in the products supplied. J.A. 7-8, 28, 206; C.A. Supp. App. 108-116, 160-164, 167-201, 205-218.

b. Those and other misrepresentations about the work that Markias would and did perform were material. Drawing from the Restatement of Torts, this Court has recognized that a fact is material if "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action." *Neder*, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts § 538 (1977)); see Restatement (First) of Torts § 538 (1938) (First Restatement) (similar). The Court has emphasized that the traditional materiality standard is "demanding" and "rigorous" in the contracting context. *Universal Health Services, Inc.* v. *United States*, 579 U.S. 176, 192, 194 (2016) (applying the False Claims Act, 31 U.S.C. 3729 *et seq.*). But it is amply satisfied here.

Petitioners' misrepresentations "went to the very essence of the bargain." *Universal Health Services*, 579 U.S. at 193 n.5 (quoting *Junius Construction Co.* v. *Cohen*, 178 N.E. 672, 674 (N.Y. 1931)); see, *e.g.*, 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 195, at 197 (10th ed. 1870) (Story) (similarly describing materiality in terms of "the essence of the contract"). While the contracts here incorporated lengthy specification documents by reference, cf. Pet. Br. 4 n.1, the signed documents themselves have 17 warranties, occupying less than two pages, and only one of those warranties—the DBE requirement—expressly provided that "[f]ailure by the Contractor to carry out

these requirements is a material breach of this contract, which may result in the termination of this contract." J.A. 114, 175.

Petitioners' misrepresentations about DBE compliance in fact satisfied both alternative ways of proving materiality. See *Neder*, 527 U.S. at 22 n.5. Because the contracts singled out the special importance of the DBE requirements, J.A. 114, 175, and identifying a DBE partner occupied a dedicated phase of the bidding process, C.A. App. 762-764, petitioners "kn[ew]" that PennDOT regarded "the matter as important"—*i.e.*, essential—to those contracts, *Neder*, 527 U.S. at 22 n.5 (citation omitted). Furthermore, a "reasonable" party in PennDOT's position would "attach importance" to a contractor's compliance with federal regulatory requirements regarding DBEs. *Ibid.* (citation omitted). Indeed, PennDOT risked legal sanction if its project did not administer its DBE program in accordance with the regulations. See, *e.g.*, J.A. 14-15, 129. Courts have routinely deemed conditions to be "material" where noncompliance would potentially expose a contracting party to legal risk. See, *e.g.*, *United States* v. *Kelerchian*, 937 F.3d 895, 913 (7th Cir. 2019), cert. denied, 140 S. Ct. 2825 (2020); *United States* v. *Schwartz*, 924 F.2d 410, 421-422 (2d Cir. 1991).

Moreover, as petitioners have acknowledged (Pet. 12 & n.3), "complying with DBE participation requirements is more expensive than doing the same job without complying," in part because "DBEs are small businesses by definition." PennDOT's willingness to pay more for a DBE-compliant project underscores the materiality of the DBE condition.

c. Petitioners also obtained the money or property "by means of" the misrepresentations. 18 U.S.C. 1343.

The "by means of" requirement is satisfied when the false statement or omission "is the mechanism naturally inducing [the victim] to part with money [or property]." *Loughrin* v. *United States,* 573 U.S. 351, 363 (2014) (interpreting bank-fraud statute). Here, petitioners were classified as an eligible bidder only because they agreed to comply with the DBE requirements. See J.A. 20-27, 43-49. And their ongoing certifications of DBE compliance successfully avoided any inquiry into their performance of the contracts, which could have resulted in corrective action like cancellation, debarment, financial penalties, or the withholding of progress payments. See J.A. 21-23, 58-59, 77-79, 114, 175; C.A. App. 2158.

***3. Petitioners intended their scheme to defraud***

Finally, the fraud statutes require proof of "specific intent to defraud." *Carpenter* v. *United States*, 484 U.S. 19, 28 (1987). Here, the fraudulent design of petitioners' scheme was clearly deliberate and intentional.

Kousisis sent Markias a letter specifying that Alpha would identify real suppliers for the necessary materials, negotiate with those suppliers, and create fictitious purchase orders in Markias's name. See J.A. 193-195. Petitioners then carried out that plan by issuing two sets of checks to Markias—one for Markias to pay off the true suppliers, and one to pay Markias itself a 2.25% fee for acting as a pass-through. C.A. App. 1833-1834.

Petitioners were even more explicit in their internal correspondence, routinely describing Markias's role in the Philadelphia projects as a pass-through. For example, Kousisis instructed a codefendant to "start running purchases through Markias to meet MBE [minority business enterprise] goal." J.A. 188. Kousisis wrote to a project manager instructing him to continue to "run invoices thru Markias." J.A. 178. And Kousisis in-

structed a true supplier to remove Alpha from its invoice and substitute Markias because of "state auditing for Minority." C.A. Supp. App. 228.

### B. Petitioners Cannot Escape Liability By Engrafting An Atextual Net-Pecuniary-Loss Element Onto The Wire-Fraud Statute

Notwithstanding the evidence on every element spelled out in the text of Section 1343, petitioners seek to overturn their convictions by positing an additional requirement. As petitioners would have it, the statute does not criminalize schemes to fraudulently induce a victim into agreeing to pay for property or services so long as, at the end of the transaction, the victim has not suffered a net pecuniary loss—presumably because the victim has received goods or services of equivalent market value in return. Petitioners provide no sound basis for such an atextual exemption from the statute. Petitioners rely on generic references in case law to "harm" or "injury" to the victim, but none of those references indicates that the harm or injury must be a net pecuniary loss, rather than paying money for something that the victim fundamentally does not want.

#### *1. Money or property can be "obtain[ed]" even if consideration is provided*

From the time Congress enacted the first mail-fraud statute in 1872, to its addition of the "obtaining money or property" language in 1909, to its enactment of the wire-fraud statute in 1952, the ordinary meaning of "obtain" has been "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way." *Black's Law Dictionary* 1228 (4th ed. 1951) (*Black's Fourth*); see *Black's Law Dictionary* 845 (2d ed. 1910) (*Black's Second*) ("To acquire; to get hold of by effort; to get and

retain possession of; as, in the offense of 'obtaining' money or property by false pretenses."); Webster et al., *A Dictionary of the English Language* 292 (acad. ed. 1874) ("To get hold of by effort; to gain possession of; to win; to earn."); see also *Skilling* v. *United States*, 561 U.S. 358, 399-400 (2010) (history of mail-fraud statute); *Pasquantino*, 544 U.S. at 356, 361 (relying on *Black's Fourth* for the ordinary meaning of the wire-fraud statute and describing its history).

That consistent definition—including the focus on expending "effort" to obtain possession—makes clear that someone "obtains" property regardless of whether he works for it or otherwise provides something of equivalent value in return. Petitioners' agreement to perform certain (deficient) services in return for the $85.3 million as part of their scheme does not vitiate the fact that petitioners literally "obtain[ed]" that money. 18 U.S.C. 1341, 1343. The whole point of a contract is to exchange one thing for another, because each party views the trade as beneficial. But that does not make the things that are exchanged equivalent in the sense of canceling each other out. Each party "obtains" what the other has agreed to provide.

That ordinary meaning of "obtain" is reflected in other statutes as well. For example, Congress has defined both interstate robbery and extortion to include the "obtaining" of property by threatened force, 18 U.S.C. 1951(b)(1) and (2). And nobody could reasonably claim that a defendant does not "obtain[]" money (*ibid.*) when he demands payment at gunpoint for an unsolicited mowing of the victim's lawn.

### 2. *"[A]ny scheme or artifice to defraud" includes schemes without intended or actual net pecuniary loss*

The phrase "any scheme or artifice to defraud," 18 U.S.C. 1343, likewise contains no net-pecuniary-loss requirement. To the contrary, the Court has made clear that it encompasses fraudulent inducement to enter a transaction, whether or not the scheme is intended to, or does, result in a net pecuniary loss.

a. Fraudulent inducement to enter a contract is a well-established type of "scheme or artifice to defraud." As far back as 1896, in *Durland* v. *United States* (the Court's earliest decision interpreting the phrase), the Court upheld mail-fraud convictions where the defendant's misrepresentations about future earnings induced the victims to buy corporate bonds. See 161 U.S. at 312, 315; see *McNally* v. *United States*, 483 U.S. 350, 356 (1987) (describing *Durland*). In doing so, the Court rejected the defendant's argument that the indictment alleged not fraud, but merely "an intention to commit a violation of a contract." *Durland*, 161 U.S. at 312-313; see *McNally*, 483 U.S. at 356.

This Court has since considered fraudulent-inducement cases many times, without any disapproval of fraudulent inducement as a basis for a federal property-fraud prosecution, including cases in which the victims were fraudulently induced to enter into contracts that the defendants did not intend to perform, either in whole or in part. See, *e.g.*, *United States* v. *Sampson*, 371 U.S. 75, 77 (1962) (fraudulent inducement to purchase services defendants did not intend to perform); *Pereira* v. *United States*, 347 U.S. 1, 8 (1954) (fraudulent inducement to enter joint venture defendant did not intend to perform); *United States* v.

*Comyns*, 248 U.S. 349, 353 (1919) (fraudulent inducement to purchase services defendants did not intend to fully perform); *United States* v. *New South Farm & Home Co.*, 241 U.S. 64, 70-71 (1916) (fraudulent inducement to buy land).

b. Although many fraudulent-inducement cases involve schemes designed to cause financial harm, the Court in *Carpenter* v. *United States* squarely rejected the proposition "that a scheme to defraud requires a monetary loss." 484 U.S. at 26. The defendants in *Carpenter* argued that their scheme to trade on a newspaper's confidential information was "not a scheme to defraud [the newspaper] within the meaning of the mail and wire fraud statutes," and that "they did not obtain any 'money or property' from" the newspaper by means of that scheme. *Id.* at 25. But the Court upheld their convictions, finding it "sufficient" that the newspaper was "deprived of its right to exclusive use of the information," with no requirement of "monetary loss." *Id.* at 26.

The Court has similarly held that a "requirement[] of * * * 'damages'" "plainly ha[s] no place in the federal fraud statutes." *Neder*, 527 U.S. at 24-25. Indeed, many material misrepresentations can result in fraud without "damages." The Restatement standard of materiality recognizes that "[t]here are many more or less sentimental considerations which the ordinary man regards as important"; thus, for example, a "fraudulent misrepresentation that a particular picture is a portrait of the purchaser's great-grandfather is a misrepresentation of a material fact." First Restatement § 538 cmt. h. But such "sentimental" considerations may defy objective measure; the value of a great-grandfather's picture is

quite personal to the victim and will vary from victim to victim.

It would also make no sense for a defendant to avoid liability for such a misrepresentation so long as the defendant provides a portrait of, say, Grover Cleveland, that has a market value equal to (or greater than) what the victim paid for a picture he thought was of his great-grandfather. By the same token, a diehard Jets fan would hardly be satisfied by receiving season tickets for the Giants instead of the Jets—even if the Giants tickets had an equivalent (or greater) face value. See First Restatement § 538 cmt. j (recognizing that materiality can be based on "known idiosyncrasies," whether or not "reasonable"). Although neither scenario would involve a net pecuniary loss, the victims would "not get what they paid for"—a scenario that even petitioner would appear to classify as fraud. Br. 36.

#### *3. This Court has repeatedly and expressly made clear that the fraud statutes do not require pecuniary loss*

*Carpenter* is not the only decision of this Court recognizing that the language of the fraud statutes does not require a net pecuniary loss. The Court has recognized the same thing in the context of the bank-fraud statute, which is "modeled on the mail and wire fraud statutes." *Neder*, 527 U.S. at 20-21.

a. In *Loughrin* v. *United States*, the Court rejected a requirement that "'a scheme or artifice * * * to obtain * * * money[]'" from a bank "'by means of false or fraudulent pretenses, representations, or promises'" involve "creat[ing] a risk of financial loss to the bank." 573 U.S. at 354, 366 n.9 (quoting 18 U.S.C. 1344(2)). Similarly, in *Shaw* v. *United States*, 580 U.S. 63 (2016), the Court held that a conviction for a "'scheme to defraud'" a bank under 18 U.S.C. 1344(1) "demands nei-

ther a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Shaw*, 580 U.S. at 67 (citation omitted); see *id.* at 66.

The holdings in *Shaw* and *Loughrin* apply with full force to the mail- and wire-fraud statutes. Although the bank-fraud statute differs to some degree in its wording and structure from the mail- and wire-fraud statutes, see *Loughrin*, 573 U.S. at 359, it does not differ in any way that is relevant here. The holdings in *Loughrin* and *Shaw* together dispense with any requirement that a "scheme or artifice" either "to obtain" bank property (*Loughrin*) or "to defraud" a bank (*Shaw*) include a net pecuniary loss. See *Shaw*, 580 U.S. at 66; *Loughrin*, 573 U.S. at 355. They thus directly address language that likewise appears in—indeed, was presumably drawn from—the wire- and mail-fraud statutes. Compare 18 U.S.C. 1341 and 1343, with 18 U.S.C. 1344; see, *e.g.*, *Neder*, 527 U.S. at 20-21.

*Shaw*, moreover, explicitly relies on an observation by Judge Learned Hand that a "'man is none the less cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.'" 580 U.S. at 67 (quoting *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554 (1932)). That principle would equally be true of every type of property fraud. And, indeed, Judge Hand made that observation in a mail-fraud case, in which he rejected the argument that an indictment was insufficient because it "did not allege that the [victims] suffered any loss." *Rowe*, 56 F.2d at 749.

b. Petitioners do not address *Carpenter*'s rejection of a monetary-loss requirement, and their efforts to disregard *Shaw* and *Loughrin* lack merit. Contrary to petitioners' suggestion (Br. 36), the relevant discussions

in *Shaw* and *Loughrin* are holdings, not "dicta." In *Loughrin*, the Court was directly addressing the defendant's "last-gasp argument" that the statute requires proof of "a risk of financial loss," 573 U.S. at 366 n.9, and in *Shaw*, the Court was directly addressing the defendant's challenge to his conviction on the theory that "he did not intend to cause the bank financial harm," 580 U.S. at 67.

Nor can *Shaw* or *Loughrin* be disregarded on the ground that the bank in each case "sustained injury to its 'property rights,'" such as "its 'right to use the funds'" on deposit. Pet. Br. 35-36 (citation omitted); see *id.* at 37. If fraudulently denying a bank the "use" of funds transferred into the possession of the defendant is property fraud, then so is fraudulently denying a victim like PennDOT the "use" of funds transferred into the possession of the defendant, irrespective of whether the victim ultimately receives something in return that the victim did not want to "use" his funds to buy.

#### *4. Petitioners' net-pecuniary-loss theory lacks meaningful support in text or precedent*

Petitioners identify no text or precedent that provides meaningful support for their assertion that the federal property-fraud statutes do in fact have an unwritten net-pecuniary-loss requirement.

a. Petitioners' reliance (Br. 17-18) on *Hammerschmidt* v. *United States*, 265 U.S. 182 (1924), is misplaced. The defendants in *Hammerschmidt* were charged not with mail, wire, or bank fraud, but instead with the separate crime of conspiring to "defraud the United States." *Id.* at 185. The Court reversed their convictions on the ground that "defraud[ing] the United States" does not include "a mere open defiance of the governmental purpose to enforce a law by urging per-

sons subject to it to disobey it." *Id.* at 189. That holding has no bearing here.

Petitioners highlight a statement in *Hammerschmidt* that "the mail fraud statute * * * is 'confined' 'to pecuniary or property injury inflicted by a scheme to use the mails for that purpose.'" Br. 17 (quoting *Hammerschmidt*, 265 U.S. at 188-189) (brackets omitted). But petitioners err in assuming that "pecuniary or property injury" means a net pecuniary loss at the end of a fraudulently induced transaction. Instead, as explained above, a victim has suffered a pecuniary or property "injury" when the defendant fraudulently induces the victim to part with money or property in the victim's hands. *Hammerschmidt* does not say anything to the contrary.

b. Petitioners are similarly mistaken in their reliance on *United States* v. *Cohn*, 270 U.S. 339 (1926), which likewise involved a different criminal statute. There, a defendant who fraudulently convinced a customs collector to release a shipment of cigars, for which the defendant owed money to the consignor (but not to the government), was charged under a statute criminalizing the making of false statements "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States." *Id.* at 343; see *id.* at 343-344.

In affirming dismissal of the charge, the Court stated that the word "defrauding" in the statute was limited to "its primary sense of cheating the Government out of property or money," and did not extend to "interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means." *Cohn*, 270 U.S. at 346. The Court relied on the neighboring statutory terms "'cheating [and] swindling,'" ex-

plaining that "those words are ordinarily used" to mean "the fraudulent causing of pecuniary or property loss." *Id.* at 346-347.

Nothing in *Cohn* indicates that "cheating the Government out of property or money" or "causing [it] pecuniary or property loss" requires a net pecuniary loss at the end of a fraudulently induced transaction, as opposed to the loss of the money or property handed over at the outset. *Cohn* did not address that issue; because the case did not involve any governmental property or money in the first place, the Court had no occasion to explore the bounds of the statute. Much less did the Court have occasion to explore the meaning of the property-fraud statutes.

c. The other cases on which petitioners rely (Br. 18-19) simply state that the mail- and wire-fraud statutes are limited to schemes involving property fraud and thus require "injury" or "harm" or a "wrong" to, or the "loss" of, property or pecuniary rights. See, *e.g.*, *McNally*, 483 U.S. at 358 ("wronging one in his property rights") (citation omitted); *Pasquantino*, 544 U.S. at 356 ("economic injury"); *Skilling*, 561 U.S. at 400 ("victim's loss of money or property"); *Kelly*, 590 U.S. at 402 ("economic loss"). None holds that the "injury," "harm," or "loss" must be a net pecuniary loss.

For example, the reference in *Skilling* v. *United States* to "fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other," 561 U.S. at 400 (cited at Pet. Br. 19), does not support petitioner. The case that the Court cited in discussing the "mirror image" reference reversed a conviction where the defendants had "in no way misrepresented to their customers the nature or quality of the service they were providing." *United*

*States* v. *Starr*, 816 F.2d 94, 99 (2d. Cir. 1987). But any "mirror image" requirement *is* satisfied by the victim's deceptively induced payment of money, and the defendant's corresponding receipt of that money, for something that the victim fundamentally does not want.

Nothing in any of the decisions on which petitioners rely—let alone the statutory text—indicates that a defendant can promise one thing to induce the victim to hand over money, yet avoid conviction simply by substituting a different thing that the victim does not want, so long as that second thing has the same (or higher) objective market value. Even petitioners do not fully endorse that proposition, see Br. 36, and as detailed above, this Court has repeatedly rejected it.

### C. Common-Law Property Fraud Has Not Required Net Pecuniary Loss

Common-law principles underscore the validity of petitioners' convictions. This Court has indicated that the wire-fraud statute can at least sometimes be informed by "common-law fraud" as of 1952, including both the "crime of 'false pretenses'" and, in some respects, tort law. *Neder*, 527 U.S. at 24 (citation omitted); see *id.* at 22-25 (excluding tort-law elements of "justifiable reliance" and "damages"). Here, the common law confirms what the statutory text already says. Both criminal and tort law have long protected a victim's interest in the money or property handed over in a fraudulently induced transaction, through the tort of "fraudulent misrepresentation" (also called "deceit") and the crime of "obtaining property by false pretenses." Neither generally required a showing that the victim of the misrepresentation had suffered a net pecuniary loss, beyond the thing of value given up in the deal, as a precondition for liability. Petitioners' argu-

ments to the contrary either mistakenly rely on the principle that a plaintiff must show a net pecuniary loss to obtain the particular *remedy of monetary damages* in a legal action, or again beg the question by treating generic references in treatises and cases to "harm" or "injury" to mean "net pecuniary loss."

***1. The crime of false pretenses punished fraudulently obtaining money or property irrespective of whether the victim suffered net pecuniary loss***

In a close parallel to modern fraud statutes, a 1757 English statute punished anyone who "knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandises, with intent to cheat or defraud any person or persons of the same." 30 Geo. II, c. 24, reprinted in 22 Danby Pickering, *The Statutes at Large* 114 (1766); see 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.1(b) (3d ed. West Oct. 2023) (LaFave) (discussing the history of the crime). Neither that crime nor its descendants has generally required a showing of net pecuniary harm.

a. The elements of an English false-pretenses offense were simply that "[t]he pretences were false" and that "the money was obtained by their means." *Regina* v. *Kenrick* (1843), 5 Q.B. 49, 65. Thus, a conviction could be sustained based on evidence that the defendant induced his victim, who was looking to purchase horses for his daughter, to buy particular horses by lying about their gentleness (among other traits). *Id.* at 63. The court did not require proof that the horses, while unsuitable for the victim's particular needs, were sold at an objectively unfair price. See *id.* at 63-65. And the court made clear that "the execution of a contract between the [transacting] parties does not secure from

punishment the obtaining of money under false pretences in conformity with that contract." *Id.* at 65.

A similar rule was "generally, but not always" applied in American jurisdictions. LaFave § 19.7(i)(3) n.106. In *State* v. *Mills*, 17 Me. 211 (1840), for example, "where the owner of a horse pretended it was a particular one called the Charley, knowing it was not, and thereby effected an exchange of it for other property, the court held this to be a sufficient false pretence, even if the horse were as good and as valuable as the Charley." 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 451, at 253-254 (7th ed. 1882); see *Mills*, 17 Me. at 216.

Similarly, in *State* v. *Switser*, 22 A. 724 (Vt. 1891), the court upheld a false-pretenses conviction based on the false representation that a defendant's debt would have six guarantors, irrespective of whether "one of the six, or all of them, or [the defendant himself] was ready to pay, and did pay." *Id.* at 725. The court explained that "[t]he *gravamen* of the offense is in making the false pretense, etc., and obtaining thereby a person's property or signature, and does not depend upon the ultimate loss of the victim, or whether, in fact, the latter sustains any pecuniary loss or not." *Ibid.*

Other early decisions took a similar approach. See, *e.g.*, *Bargie* v. *United States*, 30 F. Cas. 958, 960 (C.C.D.D.C. 1861) ("[I]t is immaterial whether [the victim] paid the money on the draft and endorsement or not."); *Commonwealth* v. *Coe*, 115 Mass. 481, 502-503 (1874) ("The offence * * * would not be purged by subsequent restoration or repayment."); *Commonwealth* v. *Ferguson*, 121 S.W. 967, 968 (Ky. 1909) ("If [the victim] should regain his property, or the person obtaining it or another should fully compensate him, it would not

lessen the offense, or prevent the commonwealth from prosecuting and convicting the offender").

Accordingly, a 1917 decision of the Supreme Court of Washington, after surveying treatises and case law, summarized false-pretenses law to establish that "[w]hen the accused falsely represents to the owner that he is to receive in exchange for the money and property obtained from him a particular thing, and instead he receives another and entirely different thing, he is, in legal contemplation, actually defrauded." *In re Rudebeck*, 95 Wash. 433, 440 (1917).

b. In arguing that the false-pretenses crime in fact supports their net-pecuniary-loss limitation, petitioners rely (Br. 23) on sources using words like "injury," "loss," and "prejudice." But as the Supreme Court of Washington noted a century ago, while "the cases frequently declare that the owner must have been actually defrauded * * * this expression does not imply that he must have suffered actual pecuniary loss." *Rudebeck*, 95 Wash. at 440.

The same cautionary note applies to treatises, which are derivative of cases. For example, petitioners cite a treatise for the proposition that if "the person from whom the money or property is obtained * * * sustains no injury the offense was not committed," Br. 23 (brackets and citation omitted). But later in the quoted paragraph, the treatise clarifies the general rule that "a person is injured and defrauded, within the meaning of the law, if by false and fraudulent pretenses he is induced to take something different from what he bargained for, even though it is of equal value." 2 Hascal R. Brill, *Cyclopedia of Criminal Law* § 1271, at 1932 (1923); see *id.* at 1933.

Petitioners' reliance (Br. 23) on other treatises is similarly flawed. See Francis J. Byrne, *False Pretenses and Cheats*, § II(7), in 12 *The American and English Encyclopedia of Law* 835 (2d ed. 1899) (D.S. Garland & L.P. McGehee, eds.) ("[O]btaining property by false pretenses is complete when the property is obtained," and "it is not necessary that an actual loss or injury should be sustained."); 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 417(5), at 341-342 (9th ed. 1923) (examples of fraudulent solicitation of charitable donations); 1 Emlin McClain, *A Treatise on the Criminal Law*, § 680, at 686 (1897) ("If fraud is perpetrated, it is not essential that actual loss shall follow" and "it is immaterial that goods given in an exchange secured by false pretenses were equal in value to those obtained.").

Nor does either of the two state-court cases cited by petitioner support a net-pecuniary-loss limitation. In *State* v. *Casperson*, 262 P. 294 (Utah 1927), the defendant, who ran a car dealership, obtained money from one of the dealer's two financing companies in exchange for signing over the proceeds from the impending sale of a car, even though formal title to the car was at the moment held by the other financing company. *Id.* at 295. The court reversed the conviction for false pretenses because the first financing company in fact received a genuine note for the proceeds from the sale of the car, and if the victim "gets what was pretended *and what he bargained for*, there is no fraud or prejudice." *Id.* at 296 (emphasis added). And in *State* v. *Palmer*, 32 P. 29 (Kan. 1893), the defendant told several "ludicrously extravagant" lies in the course of obtaining a series of loans (the outstanding balance of which was $1300), but the collateral she put up (including two notes worth at

least $2200) was genuine, and thus the lender had not been defrauded. *Id.* at 30.

***2. The common law of torts likewise generally imposed liability for fraudulent inducement without requiring a net pecuniary loss***

It has been a longstanding principle of the common law of torts that "[o]ne who fraudulently makes a misrepresentation * * * for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation." First Restatement § 525; see, *e.g.*, *Chiarella* v. *United States*, 445 U.S. 222, 227-228 (1980); 3 Dan B. Dobbs et al., *The Law of Torts* §§ 662, 664, at 638-641, 643-644 (2d ed. 2011) (Dobbs). The "harm" element, however, has not required a showing of net pecuniary loss where the plaintiff sought only to avoid the transaction, rather than to recover monetary damages. Any net-pecuniary-loss requirement is particular to a specific remedy, not to liability. As a modern treatise puts it, "[i]f the plaintiff bargained for a Titian but got a Giorgione of equal value, she would have no pecuniary damages, but should be permitted to get rescission." Dobbs § 664, at 644 n.6.

a. A plaintiff could obtain rescission of a fraudulently induced contract without showing net pecuniary loss. It has long been the case that "[i]f the representee proves that he was misled by the representation into making the contract which he seeks to avoid, it is immaterial whether it has affected, or is likely to affect, his interests prejudicially or beneficially." 20 Halsbury's Laws of England ¶ 1747, at 738 (1911). While the subset of fraudulent-misrepresentation suits that sought relief for money damages typically required a showing that

the plaintiff had in fact suffered such damages, plaintiffs seeking equitable relief—such as recission of the fraudulently induced contract—were not generally required to show that they had suffered a net pecuniary loss.

In *Stuart* v. *Lester*, 1 N.Y.S. 699 (N.Y. Gen. Term 1888), for example, a court acting in equity rescinded a contract "upon the ground of fraud and deceit" where a seller had induced a buyer to purchase land for $8500 by falsely claiming that he had never offered to sell the property for a lower price. *Id.* at 702. The court rejected the seller's argument that because the property was exactly as described and had a market value equal to the ultimate sale price, the buyer was not entitled to relief. "The rule invoked by the plaintiff," the court noted, "applies to those cases where the injured party is seeking to recover damages from the wrong-doer * * * and has no just application to a case like the one in hand, where the fraud is relied upon as a defense to the enforcement of an executory contract." *Id.* at 701.

Misrepresentations as to the identity of a contracting party—akin to petitioners' lies about Markias's role—likewise could form the basis of tort actions, independent of any net pecuniary loss. In *Brett* v. *Cooney*, 53 A. 729 (Conn. 1902), for example, the owner of a boarding house—having "tried without success to purchase [another] property" in a neighborhood where the residents were committed to "keeping their properties from uses for business"—used a straw purchaser to conceal her identity. *Id.* at 730. In determining that the sellers were entitled to rescission and restitution, the court expressly rejected the contention that "fraud without damage is insufficient to support an action," observing that "equity does not concern itself merely with

money losses." *Id.* at 730-731. The court instead explained that "[t]he violation of a legal right imports damage" even when "the plaintiff can show no substantial damage to his pecuniary interests." *Id.* at 731.

Those cases are not outliers. Around the time of the late-nineteenth-century enactment of the mail-fraud statute, other courts similarly reasoned that rescission and other equitable remedies for fraud did not require a showing of net pecuniary loss at the end of a fraudulently induced transaction. See, *e.g.*, *Nelson* v. *Carlson*, 55 N.W. 821, 821 (Minn. 1893) ("The right of the plaintiff to a rescission depended, not upon the fact that the property pointed out to him was worth more than the property which was conveyed to him, but upon the fact that he did not get the property which it was represented that he should get. Hence the question of relative values was wholly immaterial, unless it might possibly have some bearing upon the question of a motive."); *Phillips* v. *Conklin*, 58 N.Y. 682, 683 (1874) (unless money damages were sought, "it was not necessary that [the victim] should have sustained actual damage"); see also, *e.g.*, *Janes* v. *Trustees of Mercer University*, 17 Ga. 515, 519-520 (1855) (misrepresentation about donee's services warranted rescission of charitable gift).

As one treatise accordingly summarized, "[i]t has been held in a number of cases that to entitle a person to relief because of having been induced by fraud to enter into a contract, he need not show that he has actually sustained any pecuniary damages by reason of the fraud, provided he has been otherwise prejudiced." William Lawrence Clark, Jr., *Fraud and Deceit* § X(6)(c), in 14 *The American and English Encyclopedia of Law* 140 (2d ed. 1900) (D.S. Garland & L.P. McGehee, eds.). "Thus," the treatise continued, "it has been held that

* * * it is enough for him to show that he has been induced by material false and fraudulent representations to enter into a contract which he would not have entered into but for such representations." *Ibid.*; see *id.* at 140 nn. 6-7 (citing cases); see also John Adams, *The Doctrine of Equity* 364 [*177] n.2 (6th Am. ed. 1873) (explaining that a "false and fraudulent representation of a material fact, constituting an inducement to the contract, and on which the vendee relied, and had a right to rely, is a ground for rescission," and citing cases).

b. Petitioners mistakenly focus (Br. 20-22) on treatises and cases illustrating that a plaintiff must have suffered a net pecuniary loss *to recover money damages*. Those sources state a rule about remedy—not about what constitutes fraud.

When looking to the common law for the meaning of "fraud" for purposes of mail and wire fraud, this Court has not limited itself to actions for damages, but has consulted the law of equity and rescissions as well. See *Neder*, 527 U.S. at 22-23. Indeed, the Court has declined to read any damages requirement into the federal property-fraud statutes, citing the same Judge Hand decision later cited in *Shaw* for the proposition that "[c]ivilly of course the mail fraud statute would fail without proof of damage, but that has no application to criminal liability." *Id.* at 25 (brackets omitted) (quoting *Rowe*, 56 F.2d at 749).

While petitioners assert that "'[i]n equity, as at law, fraud and injury' were required to 'concur to furnish ground for judicial action,'" Br. 22 (quoting *Clarke* v. *White*, 37 U.S. 178, 196 (1838)), they again appear largely to assume that nonspecific references to "injury" and the like must mean "net pecuniary loss." That assumption is incorrect. See, *e.g.*, *Stuart*, 1 N.Y.S. at

701 ("If the false statement relates to a material fact, the law implies that the defrauded party has suffered an injury sufficient to defeat a recovery.").

The cases that petitioners cite do not address the nature of the requisite injury. They instead only mention "injury" in a rote recitation of the elements of fraud—in cases where the Court found no evidence of misrepresentations or no evidence of reliance in the first place, and thus had no occasion to explore the nature of the required injury. See *Clarke*, 37 U.S. at 196 (plaintiff creditors had not in fact been "overreached by deceitful devices"); *Southern Development Co.* v. *Silva*, 125 U.S. 247, 259 (1888) (plaintiff had not proved reliance); *Atlantic Delaine Co.* v. *James*, 94 U.S. 207, 213 (1876) (plaintiff had not proved misrepresentations); *Slaughter's Administrator* v. *Gerson*, 80 U.S. 379, 385-386 (1871) (plaintiff had not proved misrepresentations or reliance).

Common-law cases that *did* address the "injury" requirement confirm the well-established common-law principle that fraud does not require pecuniary loss. In *Williams* v. *Kerr*, 25 A. 618 (Pa. 1893), for example, a buyer induced the sale of property by misrepresenting his intentions for the land. *Id.* at 618-619. When the land was used for other purposes and the seller sued, the buyer argued that "fraud without damage is no ground for relief in either law or equity." *Id.* at 619. The court rejected that argument: "It is quite true that fraud without the concurrence of injury affords no ground for relief in equity. But it is such injury as will be redressed, to obtain from an owner, by a false representation of a fact which he deems material, property which he would not otherwise have parted with upon the terms which he is thus induced to accept." *Ibid.*

Similarly, the treatises on which petitioners rely (Br. 22-23) cannot support their net-pecuniary-loss limitation. Petitioners repeatedly, and mistakenly, assume that generic terms like "injury" or "damage" necessarily refer to net pecuniary loss at the end of a fraudulently induced transaction. For example, petitioners cite the Bigelow treatise for the proposition that rescission requires "damage," Melville M. Bigelow, *The Law of Fraud*, ch. XI, § 2, at 400 (1877). But three pages later, the treatise explains that rescission is warranted if contractual parties had "an implied understanding that payment was to be made in cash" but the purchaser uses notes (which are potentially equally valuable and transferrable) instead—without requiring net pecuniary loss from the substitution. *Id.* § 3, at 403 (citing *Allen* v. *Hartfield*, 76 Ill. 358 (1875)); see *id.* at 404 (example of fraud involving performance of contract to lay telegraph cable without allegation of pecuniary harm).

The other treatises, see Pet. Br. 22-23, regardless of how they label or characterize a harm requirement, are likewise not inconsistent with treating a victim's payment for something unwanted as the requisite harm. The Story treatise, for example, explains that misrepresenting the seller's identity warrants rescission for fraud if the victim "is induced *either* to make the purchase, which he otherwise would not have done, *or* to give a higher price than he otherwise would have done." See Story § 203e, at 206 (emphases added). The Bispham and Pomeroy treatises, in turn, state that rescission is available when a plaintiff suffers "any damage, however small," George Tucker Bispham, *The Principles of Equity* § 217, at 215 (1874) (Bispham), or when a plaintiff suffers "very slight[]" "pecuniary" as opposed to "*purely* moral" loss, 2 John Norton Pome-

roy, *A Treatise on Equity Jurisprudence*, § 898, at 1265 (2d ed. 1892) (Pomeroy). As support, each favorably cites Lord Wensleydale's opinion in *Smith* v. *Kay* (1859), 7 H.L. Cas. 750, 775, which clarifies that a requirement of "any sort of damage" as a prerequisite for fraud is satisfied in a rescission case when "only one thing is shown, namely that the fraud was the cause of the contract," *ibid.*; see *id.* at 775-776; Bispham § 217, at 215 n.2; Pomeroy § 898, at 1265 n.2. And the Kerr treatise explains that "[i]f a contract has been induced by false representations, * * * the transaction will, *even after conveyance and payment of the purchase-monies*, be set aside" or "the defrauding party will be compelled to make his representation good." William Williamson Kerr, *Treatise on the Law of Fraud and Mistake* 267 (1868) (emphasis added).

#### *3. At a minimum, petitioners have not shown a well-settled common-law requirement of net pecuniary loss*

At all events, even if a handful of courts or treatises might have looked to net pecuniary loss in either a criminal false-pretenses prosecution or a fraud suit seeking rescission, that would not support an atextual net-pecuniary-loss limitation on the federal property-fraud statutes. This Court held in *Durland* that "the mail fraud statute reaches conduct that would not have constituted 'false pretenses' at common law," *Neder*, 527 U.S. at 24, and "is to be interpreted broadly insofar as property rights are concerned," *McNally*, 483 U.S. at 356. Congress then "codified the holding of *Durland* in 1909" by adding the "'obtaining money or property'" language to the statute. *Id.* at 357 (citation omitted). Nothing in language, precedent, or history imports an

unspoken limitation based on a crabbed or minority view of the common law.

Although this Court has cited "well-settled" common-law principles in interpreting the federal property-fraud statutes, *Neder*, 527 U.S. at 23, it has declined to artificially curtail the statute's "broad reach" where the relevant "'common-law rule was not so well established,'" *Pasquantino*, 544 U.S. at 359-360 (quoting *United States* v. *Craft*, 535 U.S. 274, 288 (2002)). As discussed above, petitioners have not demonstrated any well-established requirement of a net pecuniary loss; to the contrary, cases and treatises expressly recognized the absence of a net-pecuniary-loss rule for criminal false-pretenses prosecutions and tort suits where the plaintiff was not seeking monetary damages.

**D. Petitioners' Proposed Departure From The Traditional Understanding Of Property Fraud Would Be Destabilizing And Unnecessary**

In urging the Court to engraft a net-pecuniary-loss element onto the wire-fraud statute, petitioners rely heavily on policy arguments. See Br. 37-49. Even assuming that policy considerations might ever justify an atextual and ahistorical judicial limitation on a statute, but see, *e.g.*, *Intel Corp. Investment Policy Committee* v. *Sulyma*, 589 U.S. 178, 188 (2020), the policy considerations here do not. Petitioners ignore the implications of their own theory, which would cut many common, well-recognized, and harmful forms of property fraud out of the federal fraud statutes. And petitioners substantially overstate the implications of maintaining the traditional understanding of fraud.

1. Petitioners do not grapple with the highly destabilizing effects that a decision in their favor would produce. As a threshold matter, exempting petitioners'

conduct from the wire-fraud statute would presumably also cut out fraud in *any* public preference program, whether the preference is for DBEs, military veterans, citizens returning from incarceration, disabled persons, or any other group. Thus, a contractor who obtained a valuable contract by misrepresenting his business as veteran-owned might avoid liability by arguing that he performed satisfactory work, even though he has cheated the public entity out of the essence of what it wanted—satisfactory work *by a veteran*.

Petitioners' theory would also presumably cut out analogous frauds against private entities. Private entities, like public ones, may attach exceptional importance to transacting with chosen providers. Religious organizations may prefer—or even, in some circumstances, feel theologically compelled—to hire or contract exclusively with co-religionists. A donor may wish to offer scholarship assistance only to less affluent students. But it is unclear how a religious organization suffers a net pecuniary loss so long as the undesired counterparty does the work. Nor is it apparent how a scholarship donor—who is literally giving away his money either way—suffers a net pecuniary loss when he is deceived into giving money to a tycoon's son.

The implications of petitioners' position do not stop there. Their theory would likewise appear to exempt other common forms of fraud regarding a product or service. Some purchasers care deeply about buying products that are manufactured in America, or are locally sourced or union-made. Still others strongly oppose pharmaceutical products that are developed or produced through processes they find morally objectionable, such as embryonic research or animal testing. When a victim is deceived into betraying such a deeply

held preference, a defendant should not be able to deny that he has committed property fraud simply by arguing that a foreign-manufactured product is worth more, or that a drug is "better" than what the victim wanted due to the very embryonic research that the victim objects to and tried her best to avoid.

Even more unsoundly, petitioners' theory would seem to exempt fraud as prosaic as deceiving someone who wants only a gray car into paying for a car that turns out to be pink, so long as it has equal market value. Petitioners try to hedge on at least some of the above examples, appearing to acknowledge that it would (or at least might) be property fraud when "victims do not get what they paid for," such as "a work of art by one artist instead of another." Br. 36. But that hedge just highlights the fundamental incoherence of their position.

Petitioners do not and cannot explain how the substitution of an undesired but equally (or more) valuable work of art would be property fraud, but the other examples above would not be. To the contrary, they (unwarrantedly) disparage (Br. 43-49) fraud law's principal tool—the "essence of the bargain" standard for materiality, *Universal Health Services*, 579 U.S. at 193 n.5 (citation omitted)—for identifying actionable fraud in this context. And without a coherent and principled line, petitioner's theory is just an ad hoc exemption that would replace longstanding doctrine with unnecessary and debilitating confusion.

2. On the other side of the coin, petitioners err in asserting (Br. 25) that affirmance here would result in an overbroad statute, under which if a "regulatory interest is memorialized in a contract, any regulatory violation would subject a person to federal criminal prosecution."

As discussed above, liability for fraudsters like petitioners has long been the traditional rule under the federal property-fraud statutes and their analogues, yet petitioners' argument relies on hypotheticals. That may be because, as the Court's decision in *Universal Health Services* recognized in the context of the False Claims Act, the fraud-overbreadth problem that petitioners posit is one that fraud law has already solved.

*Universal Health Services* rejected similar overbreadth concerns, explaining that the application of the "demanding" and "rigorous" materiality standard—the same one that the criminal property-fraud statutes incorporate, see *Neder*, 527 U.S. at 22 n.5—forecloses fraud liability for contract conditions that are "minor or insubstantial," even if they might be conditions on payment. *Universal Health Services*, 579 U.S. at 192, 194; see *id.* at 192-196; see also *id.* at 193, 194 n.5 (citing *Neder*). And the "essence of the bargain" standard endorsed in *Universal Health Services*, see 579 U.S. at 193 n.5 (citation omitted), addresses most of petitioners' various hypotheticals.

Those hypotheticals (see Pet. Br. 3, 41-43, 48) generally involve representations, like a babysitter's intended use of wages, that nobody reasonably (and few people idiosyncratically) would deem essential to a bargain. Petitioners also criticize the "essence of the bargain" standard as too amorphous.* But the Court's dis-

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* Petitioners attach (Br. 45 & n.9, 48) outsized importance to statements in a small number of government briefs in other cases. To the extent that such statements might be construed as expressing views inconsistent with the government's position before this Court in *Ciminelli* v. *United States* and here, those are not the views of the United States. See 9/25/24 Gov't Letter at 1-2, *United States* v. *Miller*, No. 23-3194 (9th Cir.).

cussion of materiality in *Universal Health Services* makes clear that the standard in this context has longstanding roots in tort law, is "similar" to materiality in contract law, and is sufficient in the False Claims Act context. 579 U.S. at 193; see, *e.g.*, Story § 195, at 197 ("essence of the contract"). And if the standard is sufficient in that context, which requires proof only by a preponderance of the evidence, it can function in the criminal context, where any reasonable doubt will result in acquittal.

To the extent that petitioners posit hypotheticals in which the representations might more plausibly be material—like large-scale consumer fraud, see Br. 43—those hypotheticals simply illustrate how destabilizing a net-pecuniary-loss requirement would be. If a company is using the mail or wires to misrepresent some aspect of its product or services that would have essential importance to the purchasing decision of a reasonable person, then it may be committing interstate property fraud of the sort that federal law prohibits.

It is no answer to assert (*e.g.*, Br. 25-27, 43) that such frauds should purely be the concern of States and local governments, or (when the federal government is directly victimized) federal statutes like 18 U.S.C. 371 and 1001. Irrespective of petitioners' individual preferences, Congress judged the protection of property rights from frauds carried out through the mails and wires as an important federal interest. See, *e.g.*, *McNally*, 483 U.S. at 356. That judgment should be respected. And this Court has already rejected the argument (Pet. Br. 25-27) that because other federal statutes might criminalize certain conduct, the wire-fraud statute should be narrowly read to exclude it. See *Pasquantino*, 544 U.S. at 358 & n.4. Furthermore, to

the extent that petitioners assert (Br. 19-24) common-law grounding for their artificial limitations, their argument could have implications for state protections as well.

3. Petitioners also err in asserting (Br. 29-33) that affirming their convictions would allow the government to "circumvent" some of the limitations in the federal fraud statutes by permitting prosecutions of the defendants in *McNally* v. *United States*, *Skilling* v. *United States*, and *Ciminelli* v. *United States* on different theories. *McNally* held that the then-existing federal property-fraud statutes did not allow for prosecution of a kickback scheme involving the selection of a State's insurance agent where, *inter alia*, there was no allegation that "in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance." 483 U.S. at 360; see *id.* at 352-355, 360-361. Later, after Congress responded to *McNally* by defining a scheme to defraud to include a scheme to deprive another of a right to honest services, see 18 U.S.C. 1346, *Skilling* held that the honest-services provision covers only kickbacks and bribes, see 561 U.S. at 399-411. Neither decision forecloses application of a traditional property-fraud theory in a case like this one, where the defendant fraudulently induces the victim to part with money for a product or service fundamentally different from the one it wanted.

In *Ciminelli*, the Court rejected a "right-to-control theory" of property fraud, under which "a defendant is guilty of wire fraud if he schemes to deprive the victim of 'potentially valuable economic information' 'necessary to make discretionary economic decisions.'" 598 U.S. at 308 (citation omitted). It is true that the government could have prosecuted the bid-rigging scheme

there on the ground that the defendant obtained millions of dollars and valuable contracts by means of material misrepresentations. The government did, in fact, advance a version of that "traditional property-fraud theory" in that case. *Id.* at 316-317.

The Court, while declining to apply that "traditional" theory "in the first instance," recognized that it was a "*different* wire fraud theory" from the one the Court rejected. *Ciminelli*, 598 U.S. at 316-317. The Court did not preclude the government from advancing the theory on remand, see *id.* at 317-318 (Alito, J. concurring), and certainly did not preclude the government from relying on the theory in other cases like this one.

**E. In Any Event, Petitioners' Scheme Caused A Net Pecuniary Loss To PennDOT In Multiple Ways**

At all events, as the government has explained (Br. in Opp. 11-12; Gov't C.A. Br. 39-43), affirmance is warranted even under petitioners' unduly restrictive view of the statute because their fraud caused net pecuniary losses to PennDOT.

First, is it undisputed that complying with DBE requirements costs more than ignoring them. See Pet. 12; J.A. 79-80. PennDOT was thus willing to pay *more* for a compliant contract than a noncompliant one. Petitioners emphasize (*e.g.*, Br. 4) that they were the lowest bidder, but compliant bidders were incorporating an additional cost that petitioners were not. When petitioners lied about their compliance, they misrepresented both the nature *and* the monetary value of their services. See *United States* v. *Porat*, 76 F.4th 213, 228 & n.6 (3d Cir. 2023) (Krause, J., concurring) (supporting affirmance on that ground), petition for cert. pending (No. 23-832).

Second, even setting aside that petitioners delivered a lower-value service that PennDOT did not want, PennDOT still overpaid for what it actually received. Petitioners' bid price included the 2.25% fee that they paid to Markias, which ultimately amounted to more than $170,000. See pp. 5-6, *supra*. That "fee * * * was the government's money" and it "was not an amount PennDOT would have paid" without petitioners' false certification of DBE participation. Pet. App. 21. In light of that additional—and unwarranted—expense incorporated into petitioners' bids, the court of appeals found "economic harm sufficient to sustain [petitioners'] wire fraud convictions," *ibid.*, that would satisfy any net-pecuniary-loss requirement.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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