

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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STAMATIOS KOUSISIS AND ALPHA )  
PAINTING AND CONSTRUCTION CO., INC., )  
Petitioners, )  
v. ) No. 23-909  
UNITED STATES, )  
Respondent. )  
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Pages: 1 through 101  
Place: Washington, D.C.  
Date: December 9, 2024

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## HERITAGE REPORTING CORPORATION

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4   PAINTING AND CONSTRUCTION CO., INC.,         )  
5                                    Petitioners,             )  
6                                    v.                             ) No. 23-909  
7   UNITED STATES,                                    )  
8                                    Respondent.                )  
9   - - - - -

10  
11                                    Washington, D.C.  
12                                    Monday, December 9, 2024

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14                    The above-entitled matter came on for  
15   oral argument before the Supreme Court of the  
16   United States at 10:05 a.m.

17  
18   APPEARANCES:  
19   JEFFREY L. FISHER, ESQUIRE, Stanford, California, on  
20                    behalf of the Petitioners.  
21   ERICJ. FEIGIN, Deputy Solicitor General, Department of  
22                    Justice, Washington, D.C.; on behalf of the  
23                    Respondent.

24  
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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

10 I would welcome the Court's questions.

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

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

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

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

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

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

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

23 JUSTICE SOTOMAYOR: But I don't --

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

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

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

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

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

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

17 MR. FISHER: Right. So --

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

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



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

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

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

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

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

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

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

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

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

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

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

16 JUSTICE JACKSON: Oh. Go ahead.

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

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

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

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

7 JUSTICE BARRETT: Yeah.

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

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

23 JUSTICE GORSUCH: Well --

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

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

7           That's a special problem in the law.  
8 And you find it even beyond the property  
9 statutes. Things like specific performance  
10 doctrine and other things bleed into that. But,  
11 when you don't have uniqueness -- and --

12           JUSTICE GORSUCH: Well --

13           MR. FISHER: -- and this does get me  
14 back -- you want to ask --

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

24           Why -- I think -- I think we all agree  
25 on that. Is that right?

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

4                   JUSTICE GORSUCH: No, but we agree  
5 that --

6                   MR. FISHER: -- the treatises  
7 generally say that.

8                   JUSTICE GORSUCH: -- that is generally  
9 true --

10                  MR. FISHER: Yeah.

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

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

23                  MR. FISHER: Well, I think -- I -- for  
24 the granular example under this contract,  
25 remember, the contract itself didn't even,

1 strictly speaking, require DBE subcontractors.  
2 It required our clients to make best efforts to  
3 procure certain supplies with the income they  
4 received from the contract from DBEs.

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

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

19 MR. FISHER: Well, Justice Gorsuch, I  
20 think --

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

25 MR. FISHER: Well, I think that if you

1 want to follow the common law, the common law  
2 did distinguish that. And, of course, you know,  
3 even if every answer I give you today isn't  
4 satisfying, I would still tell you that what --  
5 what the Court has held in Neder and other cases  
6 is these statutes incorporate the common law,  
7 and the common law did draw this line.

8 JUSTICE JACKSON: Mr. --

9 MR. FISHER: And so I'll do my best to  
10 explain it.

11 JUSTICE JACKSON: Oh. Go ahead.

12 JUSTICE GORSUCH: All right. One  
13 more -- one more question.

14 I take your point that there's got to  
15 be an injury requirement. There certainly was  
16 at common law fraud, but the government says  
17 that's not necessary, materiality will do all  
18 the work.

19 What's the problem with that?

20 MR. FISHER: Well -- well, there's two  
21 problems.

22 One is that's just not the way the  
23 common law did it. The injury requirement is --  
24 is tied to specific harm to property interests.

25 JUSTICE GORSUCH: I understand that.

1           MR. FISHER: Now materiality goes --  
2 materiality is much broader than just harm to a  
3 property interest. So you'd have to mangle the  
4 materiality requirement to do the work that the  
5 traditional property fraud harm requirement  
6 does.

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

15           JUSTICE JACKSON: Mr. Fisher, I guess  
16 I'm struggling with the idea that there has to  
17 be a harm requirement in this context because I  
18 don't see it in the statute, and this is a  
19 criminal action. This is a criminal case.

20           I would think that Congress was  
21 focusing on the harms that arise from the  
22 wrongful conduct of the defendant. It named  
23 certain elements: These are things that you are  
24 prohibited from doing or else you will incur  
25 criminal liability. And many of the common law



1 cases that you point to are in the civil  
2 context, where you would need a harm, obviously,  
3 in order to sustain a claim for damages.

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

7 MR. FISHER: Sure. Let me answer  
8 first in terms of the statute itself and then  
9 the common law.

10 In terms of the statute itself, the  
11 easiest way to understand the case before you  
12 today is that it's about what the meaning of  
13 "defraud" is. So this is a textual argument  
14 we're making about the meaning of "defraud," and  
15 I'm just making the classic argument that the  
16 word brings the old soil with it, and so --

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

19 MR. FISHER: So -- so let's get to  
20 that.

21 JUSTICE JACKSON: Yes, thank you.

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

24 So then the old soil, as the Court  
25 itself said in *Neder*, both involves civil

1 private fraud, like deceit, and criminal fraud  
2 false pretenses.

3 So, if you look at either of those  
4 things, you find the injury requirement. And we  
5 cite treatise after treatise, case after case --  
6 the reason why we look to civil law, if that's  
7 part of what's hanging you up, is because,  
8 historically, criminal fraud dealt just with the  
9 government. And so civil fraud gets you --

10 JUSTICE JACKSON: Yes, but what's  
11 hanging --

12 MR. FISHER: -- gets you private  
13 injury.

14 JUSTICE JACKSON: -- what's hanging me  
15 up -- what's hanging me up is kind of the facts  
16 of this case because, to the extent that you're  
17 talking about what you appear to concede is a  
18 material term in an agreement, which is PennDOT  
19 says: We want contractors who are engaged with  
20 subcontractors who qualify as DBEs, and you have  
21 these folks, your clients, understanding the  
22 materiality of this so much so that they concoct  
23 a scheme whereby they misrepresent the extent to  
24 which they really are relying on such DBE  
25 subcontractors, I don't understand why, given

1 our just classic understanding of fraud being  
2 deceit with the object of obtaining money or  
3 property, why this doesn't count.

4           You -- you've switched it to -- I --  
5 I -- I noted from your introduction that you  
6 said a scheme to defraud is a scheme to harm a  
7 traditional property interest.

8           I had understood it to be a scheme to  
9 obtain a traditional property interest, that all  
10 of those cases that you cite, the Ciminellis,  
11 et cetera --

12           MR. FISHER: Yeah.

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

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

19           MR. FISHER: So I think there was a  
20 lot there. Let -- let me try to break it down  
21 into two parts. First, let me explain why it's  
22 not classic fraud and then explain the  
23 implications if you were to say it's within the  
24 statute.

25           So, first, the reason why it's not

1 classic fraud is classic fraud does require more  
2 than simply obtaining money by  
3 misrepresentation. Look at the Kansas Supreme  
4 Court's decision in Palmer. Look at the  
5 Arkansas Supreme Court's decision in Morgan.  
6 Those are both criminal cases even if you want  
7 to stick with just criminal cases, as we  
8 suggest.

9 JUSTICE JACKSON: What about this  
10 Court? Have we ever -- we've never interpreted  
11 the wire fraud statute?

12 MR. FISHER: This Court -- of course,  
13 you have. This Court time and again, from its  
14 earliest days, said: This statute involves harm  
15 to property. It involves loss to property.

16 Those are the words this Court has  
17 used both near -- near the enactment of the  
18 statute and more recently in cases like Kelly  
19 and -- and in Skilling, where the Court said:  
20 The way the statute works is that the  
21 defendant's gain -- I'm sorry, the defendant's  
22 loss --

23 JUSTICE JACKSON: It's not about the  
24 scheme?

25 MR. FISHER: -- mirrors the gain.

1 JUSTICE JACKSON: It's not about the  
2 scheme? I had understood that scheme has  
3 something to do with it.

4 MR. FISHER: Scheme does have  
5 something to do with it. You have to scheme to  
6 obtain the property. And -- and --

7 JUSTICE JACKSON: Correct. And why  
8 isn't that here?

9 MR. FISHER: -- and that -- yes. And  
10 because you have to scheme to harm the property  
11 as well. There has to be harm that follows.

12 And so what the -- what the Kansas  
13 Supreme Court said in Palmer was there might be  
14 lots of deceit and untoward behavior out there  
15 in the world. In fact, that's the problem.  
16 It's everywhere. But, to cabin criminal fraud  
17 in any meaningful way, you have to cabin it to  
18 where there's actually injury that follows.

19 And so the exact argument you make was  
20 made in the --

21 JUSTICE JACKSON: And it's not  
22 enough -- and it's -- the wrongfulness of the  
23 defendant's behavior in a criminal context is  
24 not injury, you're saying, for the purpose --

25 MR. FISHER: Correct.

1 JUSTICE JACKSON: -- of the criminal  
2 law?

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

7 In Palmer, what happened is the  
8 defendant went in and lied about how his  
9 business worked for -- and what his business was  
10 for purposes of getting a loan. It induced the  
11 person to give the loan, but he put up proper  
12 collateral, and the Kansas Supreme Court said:  
13 Even though he lied to obtain money, not fraud.

14 In -- in the Arkansas Supreme Court  
15 case, in Palmer, the defendant lied to the  
16 person wanting a hotel room and said: Your  
17 friend stayed here recently, so you'll like the  
18 room.

19 JUSTICE JACKSON: Right. Those are  
20 all fraudulent inducement in the sense that  
21 they're -- the lie is not about the service.

22 MR. FISHER: Yeah.

23 JUSTICE JACKSON: It's not about --  
24 you know, Justice Sotomayor brings up the  
25 example, you know, this is a material term of

1 the contract. The service that I want is a  
2 plumber who is certified or a plumber who is a  
3 DBE, for example, bringing it closer to this  
4 case.

5 MR. FISHER: Yeah, yeah.

6 JUSTICE JACKSON: I don't understand  
7 why, when someone schemes to get around that  
8 term not only breaches it but also then lies  
9 about having fulfilled it, that doesn't qualify  
10 as a material misrepresentation that triggers  
11 this statute.

12 MR. FISHER: It could be material, but  
13 there's no economic harm or other property harm,  
14 and that's what's missing.

15 JUSTICE JACKSON: What do you do about  
16 the donation --

17 MR. FISHER: If you take --

18 JUSTICE JACKSON: -- cases? What do  
19 you do -- so -- fine. What do you do about  
20 charity? All right? I'm in a -- the government  
21 raises this in their brief.

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

25 When it turns out that the charity to

1 which I donate has concocted an entire scheme to  
2 get me to give them the money and they're not  
3 actually giving it to cancer patients, they have  
4 nothing to do with that, but they made all this  
5 up and I give them the money, does that qualify  
6 for wire fraud in your view? There was no harm  
7 to me economically.

8 MR. FISHER: Sure there was. You  
9 got -- you gave money and you got nothing in  
10 exchange. This case --

11 JUSTICE JACKSON: Oh, I got  
12 something --

13 MR. FISHER: -- is totally different.

14 JUSTICE JACKSON: Well, I did get  
15 something in exchange, didn't I?

16 MR. FISHER: No, I don't think so. I  
17 think, there, it's not very different than  
18 stealing. I mean, they just lied to you to  
19 obtain your money, just like they took it  
20 against your will.

21 Here, there's an economic exchange.  
22 And, Justice Jackson, it cannot be that every  
23 material provision of this 1100-page contract  
24 would -- would give rise to a property fraud  
25 prosecution.



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

16                 Just take a babysitter who -- who --  
17          there's two babysitters on the block, and one  
18          says: I'm going to use the money I earn to take  
19          my sick brother out to dinner next week, and so  
20          that's why they pick Babysitter A versus  
21          Babysitter B.

22                 JUSTICE JACKSON: What about the  
23          family --

24                 MR. FISHER: That's no different than  
25          this case.

1                   JUSTICE JACKSON:  What -- what -- what  
2    about the family that says:  I -- it's very  
3    important to me to have a Christian babysitter.  
4    We are devout.  We want this.  This is a  
5    characteristic that we're telling everybody this  
6    is what we're looking for.  And someone comes  
7    and they purport to have this characteristic,  
8    but they don't ultimately.

9                   MR. FISHER:  I think that's egregious  
10   behavior, but it's not property fraud if the --  
11   if the -- if the babysitter is otherwise fully  
12   qualified and performs the services.

13                   Now there may well be a very serious  
14   civil suit.  If you're dealing with the  
15   government in that kind of a situation, there  
16   can be a 1001 prosecution or maybe a 371 charge.  
17   So I'm not saying these things are okay, and I'm  
18   not saying the law doesn't provide a remedy.

19                   But what I am saying is that this is  
20   an age-old -- this is an age-old problem when it  
21   comes to fraud.  Justice Story talked about it  
22   in his treatise.  The Kansas Supreme Court talks  
23   about it in the Palmer case I've talked about,  
24   which is it is tempting to use criminal fraud to  
25   cover lots of forms of dishonesty -- dishonesty

1 or deceit. But the problem is you end up in a  
2 world where everything ends up being covered.

3 JUSTICE ALITO: Mr. Fisher, I --

4 MR. FISHER: And so you have to draw a  
5 line.

6 JUSTICE ALITO: -- I don't really  
7 understand the limits of your argument. So a  
8 party enters into a contract to get a particular  
9 good or service, and the party does not get the  
10 particular good or service that the party wants,  
11 but he gets something that's worth even more.

12 Would you say that whenever that is  
13 the situation, there is no fraud?

14 MR. FISHER: I think the answer is  
15 yes, with a possible proviso of the unique-item  
16 situation. But I think that, Justice Alito,  
17 kind of brings the government's theory to light  
18 in an odd way, which is imagine somebody wants  
19 a -- a Ford and he gets delivered a Ferrari, and  
20 the government puts that person on the stand and  
21 says, gosh, it's like I hit the lottery, I got  
22 something 10 times more valuable than the thing  
23 I wanted to buy. Under the government's theory,  
24 that is property fraud. And that seems like a  
25 very odd result.

1                   And the thing is there may be other  
2 situations where the thing you get is less  
3 valuable, and that's a classic --

4                   JUSTICE ALITO: Well, I --

5                   MR. FISHER: -- situation for fraud.

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

19                   Have I not been defrauded there? I  
20 didn't get what I wanted.

21                   MR. FISHER: I think you might have  
22 been harmed there with the property of your tree  
23 being taken away. I mean, I think just with --  
24 I think that's just an odd hypothetical, but  
25 with a normal service --

1 JUSTICE ALITO: Well I could give you  
2 a --

3 MR. FISHER: -- I think it would just  
4 be --

5 (Laughter.)

6 JUSTICE ALITO: -- I could give you a  
7 million of them. I -- I hire somebody to paint  
8 the dining room of my house. And when I come  
9 back, the dining room has not been painted, but  
10 the living room has been painted. And the  
11 living room is bigger. And he says, look, I  
12 gave you a bargain, the same price, I painted  
13 more, plus the living room really needed it more  
14 than the dining room.

15 MR. FISHER: I think we're still in  
16 this difficult situation of there's actually --  
17 your -- your -- your home is your property and  
18 so some of the things that are happening to your  
19 property, but -- but I think --

20 JUSTICE KAGAN: Well, suppose --

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

23 JUSTICE KAGAN: -- suppose you enter  
24 into a contract and you think you're going to  
25 get -- you pay for gold bars that are worth a

1 million dollars, and, instead, you get lots of  
2 coal that's worth a million dollars.

3 Have you -- is -- is that -- have you  
4 been defrauded?

5 MR. FISHER: So I don't think you've  
6 been defrauded under the property fraud  
7 statutes. You may have been defrauded if you  
8 were dealing with the government under Section  
9 371, which doesn't have an injury requirement.  
10 It may be --

11 JUSTICE KAGAN: But you really have  
12 totally not gotten what you wanted. I mean,  
13 you're creating a world where, because I have a  
14 dollar's worth of loss, it falls within the  
15 statute.

16 MR. FISHER: Yeah.

17 JUSTICE KAGAN: But, rather than a  
18 dollar's worth of loss, I -- I've gotten  
19 something that I have no use for, that I never  
20 wanted, that I made clear I never wanted or had  
21 use for. It happens to be the same in a  
22 marketplace out there, but it sure isn't the  
23 same for me. I think that this is a terrible  
24 deal that I've gotten --

25 MR. FISHER: Well --

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

3 MR. FISHER: So let me say a few  
4 important things about that.

5 I mean, my -- my core submission is  
6 that subjective disappointment when you get  
7 something different is not enough. But  
8 here's -- here's a couple things you could say  
9 about that.

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

12 JUSTICE KAGAN: But it goes directly  
13 to your theory. Your theory is a dollar's worth  
14 of loss makes all the difference, as opposed to  
15 the government's theory is were you defrauded  
16 out of something that you thought you were going  
17 to get.

18 MR. FISHER: Right. So I understand,  
19 Justice Kagan, that every legal rule is going to  
20 seem perhaps arbitrary at the margins. So, if  
21 you want to tell me a dollar or a penny, I have  
22 to give you the answer yes because that is loss.

23 On the other hand, the problem with  
24 the government's theory, which is subjectively I  
25 didn't get what I want, is it has no -- it has

1 no limitations. So the coal versus the gold,  
2 what if they wanted gold from somebody who was  
3 producing it within the local county and not  
4 from outside county lines? What if it was I  
5 want some coal from somebody who's a friend of  
6 the family? All those things you could  
7 characterize with word play as the same  
8 argument: I didn't get what I wanted.

9           And the other thing about those  
10 hypotheticals, Justice Kagan, I understand  
11 they're -- believe me, I've been through the  
12 moots, they're very -- they're very hard and  
13 they -- they seem odd, but it doesn't happen in  
14 the real world. The real frauds in the real  
15 world are when somebody's giving you something  
16 less valuable. That's the whole point of an  
17 ordinary property fraud.

18           Mistakes happen in terms of the wrong  
19 item being delivered every day in the  
20 marketplace, but we don't ask ourselves whether  
21 there should be a fraud prosecution. We ask  
22 ourselves whether we can turn -- take it back to  
23 Amazon. I mean, these things happen, but unless  
24 there's actual less value involved in the  
25 alternative item or the parties have agreed to



1 some premium for one thing versus the other,  
2 there's not really any reason for somebody to  
3 come up with a scheme to give somebody coal, you  
4 know, instead of gold.

5 JUSTICE BARRETT: Mr. --

6 MR. FISHER: If the coal is worth the  
7 same amount, you could just sell it to somebody  
8 else who wants coal.

9 JUSTICE BARRETT: Mr. Fisher, is the  
10 government's theory really unbounded? Don't --  
11 I mean, they don't quite advocate for a  
12 materiality requirement, but let's say  
13 materiality could be a limiting principle. Why  
14 doesn't that work? Then that -- that means that  
15 every white lie is not going to count as  
16 something that would fraudulently induce you to  
17 enter into a contract.

18 MR. FISHER: I guess white lie, you're  
19 right, Justice Barrett, but the test for  
20 materiality in the Restatement, which is what  
21 the Court looks to in Neder, is any important  
22 fact that induces somebody to enter in a  
23 transaction.

24 In the babysitter hypothetical I gave  
25 you, imagine somebody selling their house

1 because one couple says they want to raise a  
2 family and somebody else says they don't and I  
3 want to support the block -- there are  
4 innumerable -- and we cite so many in our  
5 brief -- examples where that ordinary  
6 materiality requirement is met, which is -- if I  
7 can just add one thing, which is --

8 CHIEF JUSTICE ROBERTS: Sure.

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

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Does it matter at all to the limits of  
17 your theory whether or not there's an  
18 alternative avenue of relief, or is that  
19 irrelevant?

20 MR. FISHER: I don't think, strictly  
21 speaking, it matters, but I think, in almost all  
22 the difficult hypotheticals where we'd feel like  
23 somebody has been harmed or injured in a  
24 subjective way or -- or just cheated, there  
25 would be alternative remedies. So there's tort,

1 contract. And that's what the Court has said  
2 time and again in cases like Skilling and Kelly  
3 and so many others.

4 Look, the -- the Court should construe  
5 these statutes not to run roughshod over state  
6 contract and tort law, not to mention other --  
7 other remedies that are available.

8 CHIEF JUSTICE ROBERTS: Do you  
9 recognize the availability of an alternative  
10 remedy in this case?

11 MR. FISHER: Well, the government  
12 prosecuted these same clients under Section  
13 1001, and so I think, if they prove the elements  
14 of that offense, yes, they can procure a  
15 conviction.

16 CHIEF JUSTICE ROBERTS: Thank you.  
17 Justice Thomas?

18 JUSTICE THOMAS: In your research,  
19 have you found that there have been quite a few  
20 of these fraud cases in this context brought by  
21 the government?

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

24 JUSTICE THOMAS: Yes.

25 MR. FISHER: I think there are --

1 there are some. I don't -- I don't think  
2 they're tremendously frequent, but there are  
3 others -- there are others that are out there.

4 JUSTICE THOMAS: So what distinguishes  
5 this case from the others? It would seem that  
6 with that many contracts, the -- the broad use  
7 or wide use of these contracts, that you would  
8 have a history of some fraud litigation.

9 MR. FISHER: Well, as I say, I think  
10 there are occasional breaches of these promises  
11 that give rise to prosecutions. I think the  
12 thing that distinguishes these from legitimate  
13 prosecutions, Justice Thomas, is that there's no  
14 economic harm here. Remember, at JA 96, the  
15 prosecutor said this is a non-financial interest  
16 about our program. So just imagine all -- if I  
17 could say one thing?

18 JUSTICE THOMAS: Well, let me -- let  
19 me --

20 MR. FISHER: Yeah.

21 JUSTICE THOMAS: -- give you a  
22 different version just to be clear about what  
23 your argument is. Let's say that someone -- a  
24 company says that we will build your patio for a  
25 certain price, but every third -- every month we

1 will give a patio to a veteran.

2 MR. FISHER: Mm-hmm.

3 JUSTICE THOMAS: And you make a  
4 decision to allow them to build your patio with  
5 the understanding that they contribute every  
6 quarter or every month --

7 MR. FISHER: Right.

8 JUSTICE THOMAS: -- a patio to a  
9 veteran. And then you find out afterwards that  
10 they never -- that they did not provide patios  
11 to veterans. Is that fraud?

12 MR. FISHER: It's not property fraud,  
13 Justice Thomas, and the reason why is because  
14 the homeowners would not have been defrauded in  
15 their property interest. They wouldn't have  
16 suffered any property or economic loss in that  
17 transaction.

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

23 JUSTICE THOMAS: Is there any amount  
24 of deceit that would amount to fraud if there's  
25 no property loss involved?

1           MR. FISHER: No. And this is exactly  
2 the problem Justice Story talked about, it's  
3 exactly the problem the Kansas Supreme Court  
4 talks about in Palmer, is there can be  
5 extravagant lies and -- and whopping tales that  
6 are told. And so it can be tempting to want to  
7 punish that person, but, unless there's harm to  
8 the property interest involved, there's no case.

9           Let me just make clear, you know, this  
10 is an 1100-page contract, and what the Court has  
11 said time and again is mere regulatory interests  
12 cannot give rise to a property fraud  
13 prosecution. If the government is right, every  
14 regulatory interest written into a contract --  
15 imagine during COVID somebody said: You know,  
16 we want you to perform this project, but you  
17 have to use masks when they're indoors. It's a  
18 very important -- a very important governmental  
19 interest right now these days. And the person  
20 didn't wear a mask indoors.

21           That would give rise to a property  
22 fraud prosecution punishable by 20 years in  
23 prison even though it was just a regulatory  
24 violation.

25           CHIEF JUSTICE ROBERTS: Justice --

1 Justice Sotomayor?

2 Justice Kagan?

3 JUSTICE KAGAN: Suppose the government  
4 has a program and it sets aside money for  
5 veterans and somebody comes in and creates a  
6 whole set of lies to prove that he's a veteran,  
7 but he's not a veteran. Is that fraud?

8 MR. FISHER: I think it is under the  
9 exchange I had with Justice Jackson, which is,  
10 if you just take something for nothing, that's  
11 just stealing.

12 Now, here, what the Court --

13 JUSTICE KAGAN: So -- so suppose --

14 MR. FISHER: -- is dealing with here  
15 is an exchange.

16 JUSTICE KAGAN: -- suppose that  
17 instead of setting up a benefits program of that  
18 kind, there's a contracting program that says:  
19 You know, we want to give these contracts of a  
20 particular kind to veterans, and somebody comes  
21 in and delivers the same set of lies in order  
22 now not to get just the assistance check but to  
23 get the contract. Is that fraud too?

24 MR. FISHER: So my answer there and  
25 that -- where I would draw the line -- would be

1 no if the person performs the full economic  
2 value of what was wanted in that project.

3 And that's what Section 370 --

4 JUSTICE KAGAN: I mean, what --  
5 what's --

6 MR. FISHER: -- that's what Section  
7 370 --

8 JUSTICE KAGAN: -- what's the  
9 difference, Mr. Fisher? You're -- you're going  
10 to tell me that one is fraud if, like, there's a  
11 benefits program for veterans, but the other is  
12 not fraud if there's a contracting program  
13 for -- for veterans? Why should that matter?

14 MR. FISHER: Because the common law  
15 made clear that there has to be harm to a  
16 property interest. And merely -- merely giving  
17 money and getting full economic value back is  
18 not harm to a property interest.

19 And I think, Justice Kagan, that is  
20 very serious --

21 JUSTICE KAGAN: Even though the whole  
22 program, if -- if I may, has been set up in  
23 order to provide contracts to veterans --

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

25 JUSTICE KAGAN: -- not in order to get



1 the paint job of your dreams?

2 MR. FISHER: That's right. And let me  
3 say two things.

4 One is I think that's precisely why  
5 you have Section 371, which is fraud --  
6 defrauding the government in its programs and  
7 frustrating its programs is a crime punishable  
8 with five years in prison. That is a classic  
9 Section 371 case. That's probably why we have  
10 that statute, because the property fraud  
11 statutes, the mail fraud statute and the wire  
12 fraud statute, don't cover that conduct as a  
13 matter of common law understanding of fraud.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch?

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

21 The tricky part for the government,  
22 though, is, if there is no injury requirement,  
23 then every material misrepresentation that  
24 results in no injury to anyone becomes a federal  
25 crime.

1                   And I -- I want you to talk a little  
2 bit about that, your babysitter hypothetical  
3 and the essence of the bargain, which -- which  
4 language they try to put into the materiality  
5 requirement, which just seems to me benefit of  
6 the bargain, which seems to me an argument  
7 really that there is injury here because we  
8 contracted for a specific horse, a specific  
9 thing.

10                   MR. FISHER: Yeah. So --

11                   JUSTICE GORSUCH: What -- what am I  
12 missing there?

13                   MR. FISHER: -- the injury needs to be  
14 to your property interest. So, when you -- when  
15 you're dealing with money and you get full  
16 economic value back, at least as a general rule,  
17 there's no harm to that property interest.

18                   Now we can set aside the unique-item  
19 situation. And maybe I would just -- I hope  
20 this is responsive, Justice Gorsuch.

21                   JUSTICE GORSUCH: I want you to focus  
22 on the materiality argument that the  
23 government's pressing and how it -- it may or  
24 may not smuggle in a benefit-of-the-bargain  
25 injury requirement.

1                   MR. FISHER: Well, if I'm being  
2 honest, I don't quite know what the government's  
3 essence-of-the-bargain test means. If you take  
4 it to mean what the Restatement means, it's much  
5 more than materiality because what the  
6 Restatement says is there are lots of things  
7 that are important inducements to enter into a  
8 transaction. And the Restatement is clear,  
9 those do not necessarily go to the essence.

10                   So the only thing that goes to the  
11 essence under the Restatement is something that  
12 would destroy the value of the entire  
13 transaction.

14                   Applying that to this case, this whole  
15 transaction was about painting bridges and doing  
16 repairs with quality workmanship. How we used  
17 our proceeds doesn't remotely go to the essence  
18 of the bargain. So I don't quite know what the  
19 government is arguing when it talks about  
20 essence of the bargain.

21                   And I think, Justice Gorsuch -- I hope  
22 it's responsive to your question -- let me just  
23 say one other thing, which is I understand this  
24 little corner of uniqueness is tricky, but the  
25 government has this much bigger problem.

1                   What the Court's cases teach time and  
2                   again is the federalism concerns and the  
3                   overcriminalization concerns make this even more  
4                   than an ordinary -- ordinary lenity situation.  
5                   These statutes, as the Court did in Skilling,  
6                   they have to be cabined. Otherwise, they sweep  
7                   in everything.

8                   CHIEF JUSTICE ROBERTS: Justice  
9                   Kavanaugh?

10                   JUSTICE KAVANAUGH: You encouraged us  
11                   to focus on the real world. And I agree with  
12                   that. The government says, in the real world,  
13                   your position, however, would be, in their  
14                   words, highly destabilizing. And I want you to  
15                   respond to that.

16                   And also, in doing so, a question of,  
17                   as you survey all the cases out there, is the  
18                   government regularly prosecuting cases under  
19                   this theory that you think cannot be prosecuted  
20                   as you see the law?

21                   MR. FISHER: Well, Justice Kavanaugh,  
22                   it's a little tricky because, when the  
23                   government makes those statements, there was  
24                   very few citations in its brief, so I'm going to  
25                   do my best, which is I -- as I said to Justice

1 Thomas, my understanding is the government  
2 sometimes brings prosecutions like this for  
3 frustrating DBE requirements. There are other  
4 fraudulent inducement-type cases -- the Court's  
5 holding another one right now -- that get  
6 brought.

7 It's not the predominant government  
8 theory in the property fraud statutes. Again,  
9 classic fraud, as I was explaining to Justice  
10 Kagan, involves somebody who schemes to take  
11 money and gives something of less valuable.  
12 That's usually the whole point of a scheme, not  
13 to give something of equal value. And so I  
14 think it's an odd situation.

15 But, when you get into, you know,  
16 perhaps government officials that the government  
17 thinks is -- are corrupt, you get into other,  
18 you know, programs that are important to the  
19 government. I don't deny that the DBE program  
20 is quite important to the government, just as a  
21 mask mandate might be very important to the  
22 government a few years ago, and other regulatory  
23 interests like the one in Kelly are very  
24 important to the government. And so sometimes  
25 the government does get sufficiently frustrated

1 that it brings these cases.

2 I don't think it's highly  
3 destabilizing to just lop off these things that  
4 are outside of ordinary understanding of common  
5 law fraud and still leave the government with  
6 Section 1001, Section 371, and any number of  
7 other civil remedies that private parties might  
8 have available to them in these situations where  
9 somebody is subjectively frustrated but not  
10 harmed in their property.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 JUSTICE BARRETT: Mr. Fisher, I want  
15 to give you a chance to respond to the  
16 government's argument on page 47 of its brief.  
17 It says that even under your own pecuniary loss  
18 theory, you lose because PennDOT paid more for  
19 the contract because it's more expensive to use  
20 DBEs, and so it did lose money.

21 Do you have anything you want to say  
22 about that?

23 MR. FISHER: Sure. I have two -- two  
24 things.

25 One is the government's waived that

1 argument twice over. It didn't make it at  
2 trial, and it didn't even make it in the brief  
3 in opposition in this Court.

4 And there's a good reason why the  
5 government never made it earlier. In the Third  
6 Circuit, the government said -- and I'm going  
7 to -- I think I can quote from the government's  
8 brief here: We do not know whether PennDOT  
9 would have paid more for a contractor that used  
10 DBEs.

11 So the government's theory in this  
12 case -- and this is laid out at JA 96 -- was  
13 that this is a non-financial interest. It  
14 didn't have anything to do with dollars and  
15 cents.

16 And so that's the theory the  
17 government ran in this case, not that we paid  
18 something and got something -- paid money and  
19 got something less valuable. But we paid, we  
20 got everything we wanted.

21 And -- and this brings me back to  
22 the -- Justice Gorsuch's question. The  
23 prosecutor at closing said: This is like a  
24 frustration of a Buy America provision in a  
25 contract.

1                   That's exactly what the Court has said  
2 isn't usually good enough. It doesn't satisfy  
3 the essence of the bargain, and it's certainly  
4 not financial in nature. But that's what the  
5 government said this case was like.

6                   JUSTICE BARRETT: Thank you.

7                   CHIEF JUSTICE ROBERTS: Justice  
8 Jackson?

9                   JUSTICE JACKSON: So how do we square  
10 your argument with how the Court has treated  
11 bank fraud cases?

12                   I -- I understood, and as the  
13 government highlights, that the bank fraud  
14 statute, we've said, is modeled on the mail and  
15 wire fraud statute. And the Court in Shaw, I  
16 think, looked at the very argument that you're  
17 making and held that bank fraud does not require  
18 ultimate financial loss or an intent to cause  
19 financial loss.

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

25                   So it seems that with respect to bank



1 fraud at least, we have rejected your theory,  
2 and we say the statutes are modeled after each  
3 other. So how do we reconcile this?

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

6 JUSTICE JACKSON: Yes.

7 MR. FISHER: -- because a lot of the  
8 government's brief hangs on Shaw and this  
9 related theory.

10 You're right that Shaw -- that the  
11 bank fraud statutes at least in the states we're  
12 talking about today are like the property fraud  
13 statutes. But Shaw poses no problem for us.

14 All Shaw recognizes is that if the  
15 victim is later made whole by, like, insurance  
16 proceeds or a third party or even if the  
17 defendant himself later pays the victim back,  
18 it's still fraud. It's still criminal fraud,  
19 just like if you steal something from somebody's  
20 living room and then -- and then bring it back  
21 next week, or you bring them back a new TV that  
22 you've stolen.

23 All Shaw holds is that what the common  
24 law called the collateral source doctrine, which  
25 is the defendant's made whole some other way on

1 the back end, doesn't -- doesn't cure the fraud.

2 You asked --

3 JUSTICE JACKSON: But what about the  
4 quid pro quo of equal value concept?

5 MR. FISHER: Right. Okay. So --  
6 yeah, so -- so I think --

7 JUSTICE JACKSON: Yeah.

8 MR. FISHER: -- understood in the  
9 context of that's the holding of Shaw --

10 JUSTICE JACKSON: Mm-hmm.

11 MR. FISHER: -- which poses no problem  
12 for us -- and I -- and I -- I'm going to get to  
13 that, but I think it might be helpful before the  
14 government stands up for me to say one other  
15 thing, which is the other thing the government  
16 quotes again and again is no harm has to occur  
17 in certain cases. All that means is that the  
18 property fraud statutes are an inchoate offense,  
19 which, again, we don't disagree.

20 So now let me -- let me talk about  
21 quid pro quo of equal value. In the context of  
22 Shaw, I think all the Court is saying when it  
23 uses that language is that -- what I just said,  
24 which is, if you later get something that makes  
25 you whole --

1 JUSTICE JACKSON: All right. Let me  
2 just ask one final question.

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

4 JUSTICE JACKSON: I -- I guess I'm  
5 just trying to understand why this is all being  
6 funneled through the lens of injury to the  
7 plaintiff -- or not the plaintiff -- injury to  
8 the victim in a situation like this. Again,  
9 this is a criminal statute.

10 Is it your view that Congress cannot  
11 identify certain conduct related to property and  
12 money that is -- it believes wrongful if you do  
13 it with a certain intent, you create a scheme,  
14 and there not be any harm? I mean, there's no  
15 completed harm element here. I know you say  
16 you're supposed to intend for it to happen, but  
17 I don't understand why that's necessarily the  
18 case. That element is not in the text --

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

20 JUSTICE JACKSON: -- of the statute.

21 MR. FISHER: One is, again, the word  
22 "defraud" is in the text, and that brings the  
23 soil of that element. And 100 percent, Justice  
24 Jackson, Congress can legislate to have the  
25 criminal law be broader, and it has, in fact,

1 done so with honest services fraud. That is the  
2 one area in response to McNally that Congress  
3 has, in fact, expanded the fraud statutes. And  
4 as Judge Sutton has said and as this Court  
5 quoted for itself later from that opinion,  
6 that -- that one singular extension actually is  
7 quite significant because it shows Congress  
8 said, in this situation, we want it to be fraud  
9 but not in other situations.

10 JUSTICE JACKSON: Thank you.

11 MR. FISHER: So you had this whole  
12 argument in McNally, and Congress responded just  
13 with honest services fraud.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Mr. Feigin.

17 ORAL ARGUMENT OF ERIC J. FEIGIN  
18 ON BEHALF OF THE RESPONDENT

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

21 Petitioners are asking this Court to  
22 engraft a financial loss element onto the  
23 property fraud statutes that's nowhere to be  
24 found in their text, that this Court has  
25 rejected no fewer than three different times,

1 not just in Shaw, but in Loughrin, in Carpenter,  
2 and, frankly, in Neder too when it rejected a  
3 requirement of damages, and that would cut out  
4 paradigmatic frauds, like charity fraud,  
5 co-religionist fraud, veterans preference fraud,  
6 or basically any fraud that preys on a victim's  
7 idiosyncratic preferences.

8           And I think the more that we hear  
9 about this theory, I think the more incoherent  
10 it becomes, and I think -- I mean, frankly,  
11 that's become clearer or less clear, as the case  
12 may be, this morning.

13           So charity fraud, they acknowledge  
14 both here and in their reply brief that charity  
15 fraud is fraud. But the only mis- -- the  
16 misrepresentation in a charity fraud case just  
17 goes to a non-pecuniary aspect of the  
18 transaction.

19           Then you have something like the  
20 Grover Cleveland fraud, which is an example  
21 drawn straight from the Restatement, although it  
22 doesn't mention Grover Cleveland, and the --  
23 then we have a uniqueness exception that I --  
24 I -- I don't think I saw in their briefs, and  
25 I'm not sure how far it extends. Does it extend

1 to Monet versus Manet? I -- I don't know -- I  
2 don't know where that extends.

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

16 And then we have the you get coal  
17 instead of gold bars, which they concede  
18 wouldn't be fraud under their theory. I don't  
19 think this makes sense, and I think the Court  
20 should reject it. I'm sorry.

21 JUSTICE THOMAS: What exactly was the  
22 harm to the government here?

23 MR. FEIGIN: The harm to PennDOT, I  
24 mean, we actually had evidence in this case, and  
25 we have maintained this theory -- you can look

1 at pages 11 to 12 of our brief in opp and page  
2 42 of our reply brief -- there was harm in that  
3 they were willing to pay more for this  
4 regulatory program to be satisfied because they  
5 were required by the legal requirements to do  
6 it. They were actually willing to pay more for  
7 it.

8 But, in addition, Your -- in addition,  
9 Your Honor, I mean, I -- the government was  
10 harmed because it made very clear that this was  
11 a service -- this was the type of service that  
12 it wanted to contract for and that it did not  
13 receive that particular service. It's the exact  
14 same theory that would be the case in veterans  
15 preference fraud. If they'd contracted to have  
16 a veteran do this and someone lied and said they  
17 were a veteran, I -- I believe they're saying  
18 that's out now, unless it's under -- I wasn't  
19 sure whether they were accepting the idea of a  
20 specific performance exception that Justice  
21 Gorsuch mentioned --

22 JUSTICE GORSUCH: Mr. Feigin --

23 MR. FEIGIN: -- and how far that would  
24 extend.

25 JUSTICE GORSUCH: -- you -- you say

1 that the government was willing to pay more for  
2 DBEs. Did you preserve that argument?

3 MR. FEIGIN: Yes. You can look at  
4 page 42 of our court of appeals brief. You can  
5 look at the closing argument the government made  
6 in --

7 JUSTICE GORSUCH: Mr. -- Mr. Fisher  
8 says that's not in the case. Why do you  
9 disagree?

10 MR. FEIGIN: I disagree because we  
11 both presented evidence on it and preserved it.  
12 I mean, the Court can -- the Court is free to  
13 look at the record yourself.

14 JUSTICE GORSUCH: So, if that's the  
15 case, why are we here? I mean, if -- if -- if,  
16 in fact, there is an injury and it's economic,  
17 can't we resolve the case on that ground?

18 MR. FEIGIN: I think the Court could  
19 do that, and we urged the Court to deny  
20 certiorari on that basis --

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

23 MR. FEIGIN: -- at pages 11 -- pages  
24 11 and 12 of our brief in opposition.

25 JUSTICE GORSUCH: -- if there is an



1 injury requirement, it was satisfied here?

2 MR. FEIGIN: Yes.

3 JUSTICE GORSUCH: Okay.

4 MR. FEIGIN: We have made that  
5 argument. I mean, we introduced that section by  
6 citing the portion of the brief in opp where we  
7 made that argument. I'm happy to, you know,  
8 point the Court again toward it --

9 JUSTICE GORSUCH: And let me -- let me  
10 ask --

11 MR. FEIGIN: -- but the -- I mean,  
12 based -- I -- I still --

13 JUSTICE GORSUCH: That's fine. That's  
14 fine.

15 MR. FEIGIN: Yeah.

16 JUSTICE GORSUCH: That answers my  
17 question completely.

18 MR. FEIGIN: Okay.

19 JUSTICE GORSUCH: Did you agree that  
20 at common law, fraud, completed fraud, required  
21 injury?

22 MR. FEIGIN: I -- I -- it depends what  
23 you mean by "injury," Your Honor. I think they  
24 get a lot of mileage out of confusion in the  
25 cases about what phrases like "harm," "injury,"

1 and "loss" mean. I mean, I agree that it  
2 requires harm in the sense that you have to  
3 obtain the victim's property, but, here, that's  
4 satisfied. They got tens of millions of dollars  
5 of PennDOT's money. So, in that sense, yes.

6 JUSTICE GORSUCH: Loss?

7 MR. FEIGIN: I -- I do -- I do not  
8 agree that the common law required the kind of  
9 net financial loss that they have here.

10 First of all, I think that's  
11 essentially -- they essentially concede -- and  
12 this is at page 9 of --

13 JUSTICE GORSUCH: Not net loss --

14 MR. FEIGIN: Oh.

15 JUSTICE GORSUCH: -- but that there's  
16 some -- some deprivation of property, some  
17 damages.

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

21 And on page 9 of their reply brief,  
22 they acknowledge that the common law was  
23 established in our favor at least by 1952. And  
24 Pasquantino, page 360 of that opinion, tells us  
25 that 1952 is the relevant date for wire fraud.

1 And I would submit that this --

2 JUSTICE BARRETT: Mr. Feigin --

3 MR. FEIGIN: I'm sorry.

4 JUSTICE BARRETT: -- I -- I -- I just  
5 wanted to ask you, kind of following up, Justice  
6 Gorsuch was asking whether we could decide the  
7 case on a narrower theory, and I wanted to  
8 return to -- kind of related to that, I wanted  
9 to return to, you know, Justice Kavanaugh asked  
10 about whether this would destabilize the law.  
11 He asked Mr. Fisher that question. Justice  
12 Thomas asked how many of these prosecutions are  
13 there on this DBE theory.

14 How often does the government -- it  
15 doesn't have to be just DBEs, but how often does  
16 the government bring prosecutions that might fit  
17 this kind of category? Is this an outlier, or  
18 is this something common?

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

24 But we definitely prosecute cases of  
25 charity fraud. We definitely prosecute cases of

1 veterans fraud. And there are other types of  
2 fraud that we prosecute under -- under this  
3 theory.

4 JUSTICE KAVANAUGH: Well, if you can't  
5 give a number, how could it be highly  
6 destabilizing, or if you're not --

7 MR. FEIGIN: Well, one reason I think  
8 it would be very highly destabilizing, to get  
9 back to what I was just saying, is I don't  
10 really understand the limits of this theory that  
11 they're espousing. It's one the Court's  
12 rejected numerous times. And I don't even  
13 understand where it's coming from.

14 I guess, although all they objected to  
15 below was the property element, I take them  
16 today to be locating it in the defraud element.  
17 But, of course, you know, in Shaw, the Court  
18 rejected the idea that intent to defraud  
19 requires intent to cause financial loss.

20 So -- but just taking it on -- on its  
21 own terms, I mean, I -- I -- I guess there  
22 appear -- they appear to draw this from the  
23 common law, but they concede the common law was  
24 established in our favor by 1952. And I think  
25 it was well-established long before then.

1                   If you look at the Story treatise from  
2 1870, at -- Section 203(e), page 207 of the 1870  
3 Story treatise, Story says that you're entitled  
4 to a rescission remedy if either you pay a  
5 higher price or you were tricked into making an  
6 exchange that you otherwise wouldn't.

7                   And that's --

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

10                  MR. FEIGIN: I'm sorry. And that's  
11 exactly the case here.

12                  It's the same for false pretenses. If  
13 you look at the 1865 version of the Bishop  
14 treatise that we cite in our brief, we cite the  
15 1883 version, it cites the horse cases and  
16 points out exactly our rule.

17                  I'm sorry, Mr. Chief Justice.

18                  CHIEF JUSTICE ROBERTS: No. No. No.  
19 It -- it seems to me this case has a lot of the  
20 air of a pot calling the kettle black. I mean,  
21 if we took the phrase "there are no limits to  
22 their theory," I -- I don't know which side  
23 would have more statements like that, but there  
24 would certainly be a lot in either -- in -- in  
25 either one.

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

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

12                   Can you bring that prosecution? You  
13 know, maybe -- maybe you wouldn't normally, but  
14 you may well have reasons that you don't like  
15 what happened, so you're looking for anything  
16 you can get your hands on to throw -- throw it  
17 out or get some destabiling aspect to it. And if  
18 it's 1100 pages, there are going to be a lot of  
19 things in there that they, you know, didn't dot  
20 every I or cross every T.

21                   So what are -- what are the limits to  
22 your theory?

23                   MR. FEIGIN: Well, Your Honor, there  
24 are -- there are other limits in the statute  
25 that we may get to later, but the principal way

1 that this has been dealt with and the way this  
2 Court dealt with it quite recently in Universal  
3 Health Services, where it begins the discussion  
4 with the Neder standard, is through materiality.

5 And the Court makes clear in Neder --  
6 sorry, in Universal Health Services that this --  
7 this exact problem, there in the context of  
8 conditions on payment, but I think equally  
9 translatable to other types of contract  
10 conditions, the Court makes clear that the  
11 standard's the same in criminal law, tort law,  
12 contract law, and that that standard is familiar  
13 and rigorous and that the standard excludes  
14 these kinds of sort of, you know, you might call  
15 them ticky-tack things, unless -- and this is at  
16 Footnote 5 of Neder, where it cites the  
17 Restatement -- there is a subjective preference  
18 that this particular victim happens to have, of  
19 which the defendant has constructive knowledge.

20 CHIEF JUSTICE ROBERTS: What about  
21 the -- the point that a lot of these things  
22 could be dealt with under state law, and you  
23 don't have to federalize every jot and tittle in  
24 a -- in a large contract and that it's a matter  
25 of concern that we've expressed in many

1 precedents that the federalization of something  
2 as simple as nuances of contract law, it's a  
3 very serious matter?

4 MR. FEIGIN: Well, let me emphasize  
5 again that this would not, for the same reasons  
6 as in Universal Health, that the Court explained  
7 there, federalize every jot and tittle of -- of  
8 a contract.

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

14 Number one, I think it's always been a  
15 supporting rationale, not a freestanding reason  
16 just to impose a limit in the statutes. For  
17 example, small-bore private frauds, the justice  
18 manual advises prosecutors not to bring those  
19 types of prosecutions.

20 But I don't think you'd say -- and  
21 this goes to my friend's colloquy with Justice  
22 Kagan. I don't think anyone would say that  
23 that's a justification for writing such an  
24 exception actually into the statute.

25 And by the same token here, I -- I



1 don't think there's a reason why if -- just a  
2 freestanding reason why to do that. Congress  
3 wrote these statutes because it wanted to  
4 criminalize frauds when they used the mails and  
5 the wires. And that's what we have here.

6 As I was just explaining, this is a  
7 very traditional theory of fraud. I think it's  
8 common ground that it's at least been the law of  
9 fraud for the 72 years that the --

10 JUSTICE GORSUCH: Mr. -- Mr. Feigin,  
11 I'm sorry to interrupt, but I -- I just want to  
12 circle back to the Chief Justice's first  
13 question.

14 And materiality has never been that  
15 high of a bar. You seem to be try -- trying to  
16 make it a little higher here by really  
17 importing, it seems to me, the benefit-of-the-  
18 bargain idea with respect to individual items  
19 that can sometimes give rise to injury even when  
20 you're given a thing of equal value. The horse  
21 example. The -- the -- the -- the penny  
22 example.

23 On your theory, though, of  
24 materiality, if materiality is the only thing  
25 required, what about the babysitter who says:

1 I'm going to -- and it's in the briefs -- you  
2 know, take the money that you give me for  
3 college, and -- and, therefore, I hire her. She  
4 provides excellent babysitting services and  
5 proceeds to blow the money on a trip to Cancun.

6 Now is that mail fraud? I mean, could  
7 that be prosecuted as mail fraud because I had  
8 some subjective wish that she use it for one  
9 purpose rather than another, even without any  
10 economic injury to me?

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

15 JUSTICE GORSUCH: Everybody's --

16 MR. FEIGIN: -- victim had  
17 constructive knowledge. So --

18 JUSTICE GORSUCH: Yeah. Spot me that.  
19 We got that here.

20 MR. FEIGIN: So, Your Honor, if the --  
21 if the hypothetical babysitter says -- like,  
22 knows that this couple --

23 JUSTICE GORSUCH: Yes, that's  
24 important to them. Yeah.

25 MR. FEIGIN: -- is choosing -- is

1 choosing between babysitters --

2 JUSTICE GORSUCH: Yeah. It's a  
3 material misrepresentation.

4 MR. FEIGIN: -- considers it a form of  
5 charity, essentially, that we choose this  
6 babysitter over this babysitter, she knows  
7 that --

8 JUSTICE GORSUCH: Yep.

9 MR. FEIGIN: -- or he knows that, and  
10 he lies about it --

11 JUSTICE GORSUCH: Yep. Yep.

12 MR. FEIGIN: -- and that's why they  
13 hired the babysitter --

14 JUSTICE GORSUCH: You're repeating my  
15 hypothetical.

16 (Laughter.)

17 MR. FEIGIN: -- and there's  
18 involvement of the --

19 JUSTICE GORSUCH: I think the answer  
20 you're -- you're reluctantly --

21 MR. FEIGIN: Yes.

22 JUSTICE GORSUCH: -- getting to is  
23 yes.

24 MR. FEIGIN: No, I'm just -- I'm just  
25 pointing -- this is the exact same theory, Your

1 Honor, under which --

2 JUSTICE GORSUCH: Now I -- I would  
3 acknowledge --

4 JUSTICE KAGAN: Well, Mr. --

5 MR. FEIGIN: Yeah.

6 JUSTICE GORSUCH: -- I would  
7 acknowledge, if I paid more for the babysitter  
8 who's using her money for good things, rather  
9 than the babysitter secretly planning a trip to  
10 Cancun, that might be -- I might have been  
11 injured.

12 But, on your theory, that's not  
13 required.

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

16 JUSTICE GORSUCH: That's --

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

18 JUSTICE GORSUCH: -- federal mail  
19 fraud.

20 MR. FEIGIN: I think that's exactly  
21 the same theory as charity fraud. I think it's  
22 exactly the same theory as if there's a  
23 misrepresentation about a criminal background  
24 and turns out to have been a serial child  
25 abuser. I think you can imagine this --

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

4 MR. FEIGIN: Well --

5 JUSTICE GORSUCH: But you're -- you  
6 would have us say that doesn't matter so long as  
7 I'm -- the victim's aware of the subjective  
8 wishes, that that --

9 MR. FEIGIN: You might have --

10 JUSTICE GORSUCH: -- is mail fraud.

11 MR. FEIGIN: Sorry, Your Honor.

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

13 So this is an actual case from the  
14 Tenth Circuit, a case called Richter, where  
15 the -- there's a company that represents that  
16 it's going to dispose of your electronics in  
17 some kind of environmentally sound way rather  
18 than simply to dispose of them overseas, as  
19 other companies do, and they charge about the  
20 same rates as other companies. And people say:  
21 Oh, this is a great deal. And it turns out  
22 they're taking them overseas too.

23 Or to make this a little bit more like  
24 the babysitter example, you could imagine a  
25 babysitting company doing this sort of thing on

1 a systematic basis. Or take an actual company.  
2 They're not doing what I'm about to  
3 hypothesize --

4 JUSTICE GORSUCH: I take your point.

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

6 JUSTICE GORSUCH: I think Justice  
7 Kagan had another question.

8 MR. FEIGIN: I'm sorry.

9 JUSTICE KAGAN: Well, it -- it really  
10 comes off of Justice Gorsuch's example, and he  
11 beat me to the punch a little bit because he  
12 said: You know, if this exact same lie, I'm  
13 going to use the money I make -- this babysitter  
14 says -- in order to go to college, on the -- on  
15 the one hand, that gets her the job. On the  
16 other hand, it gets her the job plus 25 cents  
17 more an hour.

18 The question is whether that should be  
19 the difference between wire/mail fraud and not.  
20 Now, hopefully, the wire/mail fraud statutes are  
21 not being used to prosecute the babysitter  
22 regardless.

23 But what sense would it make -- if I  
24 understand Mr. Fisher's theory, it makes all the  
25 difference between somebody saying: You know,

1 this is such a wonderful person, she's using  
2 this to go to college. They give her the job on  
3 that basis. But, because they also say: We'll  
4 throw in an extra 5 bucks, that that's what's  
5 going to make the difference between fraud and  
6 not?

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

10 If you're paying the same amount, but  
11 you really want a veteran to do it, it's the  
12 exact same -- Your Honor, if -- I know, like,  
13 there's always an instinct to want the advocate  
14 to give up these hypotheticals. That -- that is  
15 the exact theory of charity fraud, veterans  
16 fraud, co-religionist fraud. I hire somebody to  
17 build my pews and it turns out they're a Nazi.

18 There are every -- that is our basic  
19 theory of fraud. It's not required. And, in  
20 fact, Universal Health Services uses an  
21 example -- one of the examples of a common law  
22 fraud case that they cite involves employment  
23 fraud where somebody misrepresents their  
24 qualifications on their resume, says they're  
25 retired, and it turns out they were -- they were

1 actually in jail during that period.

2 JUSTICE KAGAN: If I could, though --

3 JUSTICE SOTOMAYOR: Mr. Feigin --

4 JUSTICE KAGAN: -- Mr. -- Mr. -- you  
5 know, Mr. Fisher has -- has said a lot of these  
6 cases use the language of harm, use the language  
7 of injury. I mean, some of them do, some of  
8 them don't. They're a little bit all over the  
9 map as far as I understand them, but there are  
10 definitely some that use that language.

11 What do you take them to be referring  
12 to, or what's the range of things that they  
13 might be referring to? In other words, some of  
14 them are using them one way; some of them might  
15 be using them another way.

16 MR. FEIGIN: So, Justice Kagan, let me  
17 make -- let me make very clear just a couple of  
18 points before I address your question. They --  
19 they're very quick.

20 Number one is the Court made clear in  
21 Pasquantino and also in Neder that the burden's  
22 on them to show the common law, and they have to  
23 show a well-established common law rule.

24 The second thing I'd tell you -- and  
25 this goes straight to your question -- is we're



1 not claiming every single case has to be read  
2 our way. We acknowledge -- for example, we cite  
3 the LaFave treatise that points out that the law  
4 on false pretenses was more in our direction but  
5 that there were some other cases about this.

6           And then the third thing I would say  
7 is a lot of these cases do talk about loss,  
8 harm -- loss and harm in terms of just actually  
9 get -- not getting what you want, like, getting  
10 the coal instead of getting the gold would be  
11 the loss or harm.

12           If you want to see a more  
13 close-in-time discussion of that, there's the  
14 Washington Supreme Court opinion in Rudebeck  
15 that we cite in our brief, and I don't think  
16 they really have a response to that. In fact,  
17 there are a number of sources, contemporaneous  
18 sources, that they don't respond to in our  
19 brief.

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

25           And, again, finding a couple of

1 outlier cases or a couple of cases like the ones  
2 that Mr. Fisher has focused on this morning,  
3 that I could talk about specifically, but even  
4 spotting him that those favor his rule, just a  
5 couple of cases lined up against all the  
6 treatises, you know, Story, Bishop, this Court  
7 cites Bishop for all sorts of things all the  
8 time --

9 JUSTICE SOTOMAYOR: Counselor, the  
10 fraudulent inducement cases are difficult. As  
11 the babysitter one, one doesn't think of the  
12 contract as including what the person's going to  
13 do with the money later. But, presumably, if I  
14 am a parent and I really want them to spend the  
15 money on college, I could make it a part of the  
16 contract, couldn't I, explicitly?

17 MR. FEIGIN: Yes, you could, Your  
18 Honor, make it -- make it explicit in -- in the  
19 contract.

20 JUSTICE SOTOMAYOR: Now this case --

21 MR. FEIGN: I -- I --

22 JUSTICE SOTOMAYOR: -- this is not  
23 fraudulent inducement in the sense of those  
24 examples of my reasons for entering the  
25 contract. The use of the DBEs was part of the

1 contract, correct, written part of the contract?

2 MR. FEIGIN: Yes, Your Honor, and let  
3 me be clear that it doesn't -- it's neither a  
4 necessary nor a sufficient condition for it to  
5 be part of the contract. This goes back to my  
6 discussion with the Chief Justice.

7 JUSTICE SOTOMAYOR: On the materiality  
8 question?

9 MR. FEIGIN: On -- on materiality.  
10 You -- you could have lots of things in a  
11 contract. This came up exactly in Universal  
12 Health Services. Even if they're specified as  
13 important or material or conditions of payment  
14 that aren't such because they're either not --  
15 it's either not reasonable -- this is under the  
16 standard that Neder employs; it's in Footnote 5  
17 of Neder -- because either a reasonable person  
18 wouldn't attach importance to it or there isn't  
19 the kind of subjective importance that the  
20 victim had reason to know about.

21 JUSTICE SOTOMAYOR: I'm just getting  
22 to the point that this is a much narrower case  
23 than the broader fraudulent inducement cases,  
24 correct?

25 MR. FEIGIN: The -- it's narrower than

1 a case where there's, like, 7,000 requirements  
2 and they're all material and, in theory, we're  
3 trying to prosecute for one. I'm not sure we  
4 could do that unless it were --

5 JUSTICE SOTOMAYOR: But it's not --  
6 it's not --

7 MR. FEIGIN: -- obviously an important  
8 one.

9 JUSTICE SOTOMAYOR: -- it's not a  
10 contract of the contract that's not specified in  
11 the contract?

12 MR. FEIGIN: It is not only specified  
13 here in the contract, yes.

14 JUSTICE SOTOMAYOR: Counselor, just  
15 answer my question.

16 MR. FEIGIN: Yes, it is --

17 JUSTICE SOTOMAYOR: This is  
18 different --

19 MR. REIGN: This is not that case.

20 JUSTICE SOTOMAYOR: This is not the  
21 case of the babysitter?

22 MR. FEIGIN: That is absolutely  
23 correct, Your Honor.

24 JUSTICE SOTOMAYOR: All right. Thank  
25 you.

1 MR. FEIGIN: This is not a --

2 JUSTICE SOTOMAYOR: Why are you  
3 fighting me so hard?

4 (Laughter.)

5 JUSTICE KAVANAUGH: Well, you're --

6 MR. FEIGIN: I -- I was not trying to.  
7 I -- I apologize for giving the impression I was  
8 trying to fight you.

9 JUSTICE KAVANAUGH: Now, when  
10 you're --

11 MR. FEIGIN: I was going to amp up  
12 your point actually.

13 JUSTICE KAVANAUGH: When you were  
14 answering or discussing this issue with Justice  
15 Gorsuch, he said, I think your answer is yes  
16 ultimately. But you never actually said yes.  
17 Was your answer yes to --

18 MR. FEIGIN: Yes, Your Honor. I -- I  
19 will -- I will accept that under -- under the  
20 theory that we have, which is necessary to get  
21 charity fraud, veterans fraud, co-religionist  
22 fraud --

23 JUSTICE KAVANAUGH: I got -- I got the  
24 reasons. I just wanted to make sure there's  
25 no --

1                   MR. FEIGIN: I'll -- I'll accept that  
2 if the mails and wires were used and all the  
3 elements of the statute were satisfied, yep,  
4 that would be wire fraud. I think the  
5 sentencing guidelines would be pretty low.

6                   JUSTICE KAVANAUGH: Right. And then,  
7 on materiality, which you emphasize as --

8                   JUSTICE GORSUCH: That's comforting.

9                   JUSTICE KAVANAUGH: -- being a  
10 critical limit here, what's the -- what should  
11 the jury instruction look like there? What is  
12 the standard jury instruction there? Because  
13 you refer to "essence of the bargain," which I  
14 think is probably not giving a huge amount of  
15 guidance. So?

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

20                   They've identified a couple of  
21 instances in their brief where the government  
22 opposed an essence-of-the-bargain instruction.  
23 The government should not be doing that. And we  
24 filed a corrective letter in one case, and the  
25 other case is post-verdict and we intend to

1 confess error in that case as well.

2           So essence -- I think, in Footnote 5  
3 of Universal Health Services, the Court offers  
4 just a number of different formulations, some of  
5 which might be useful in certain cases, some of  
6 which might not. I don't think it's error just  
7 to use the standard materiality instruction  
8 because, of course, that's what Universal Health  
9 Services is interpreting.

10           But something like "essence of the  
11 bargain," or what was done in this case, I think  
12 it's page 98 to 99 of the Joint Appendix, you  
13 have "fundamental basis of the bargain." That  
14 might be another way to put it.

15           I think what's important is that the  
16 jury gets the idea of -- of the actual  
17 materiality standard, like, that really the  
18 government -- if it's not something to which a  
19 reasonable person would attach importance, like  
20 the size of the paper, Mr. Chief Justice, then  
21 we're not going to be able to satisfy that. And  
22 then I think you're really going to have to  
23 show, and the burden's always on us to show --  
24 this is even beyond Universal Health Services,  
25 which is -- brings this up in a civil context.

1                   JUSTICE KAVANAUGH: I think the  
2 concern or one concern -- and I don't think  
3 there's a great solution to this, but I'll just  
4 throw it out there -- is that obviously, it's  
5 pretty vague and different juries are going to  
6 have very different reactions to something like  
7 "essence of the bargain." But I don't know that  
8 there's a great solution to that. That's why I  
9 was asking the question about how it's spelled  
10 out.

11                   MR. FEIGIN: So, Your Honor, I think  
12 this -- I think courts have a lot experience  
13 crafting proper jury instructions. This is  
14 exactly what they have to do under Universal  
15 Health Services. Unlike Universal Health  
16 Services, we have to prove this beyond a  
17 reasonable doubt.

18                   And I think any kind of reasonable  
19 explanation -- and, again, this has been the law  
20 for a long time, a long time, so there's a lot  
21 of experience with this. But I think any  
22 explanation that the Court comes up with that's  
23 a reasonable explanation of the concept of this  
24 has to be something that was really important,  
25 like here, where the contract only occupies



1 seven pages of the JA, which are smaller pages,  
2 Mr. Chief Justice, than 8-and-a-half-by-11, only  
3 occupy seven pages of the JA, they only have 17  
4 warranties, and this is the only one designated  
5 as material, that's going to be easier to prove.

6 One other thing I'd say about  
7 materiality is, of course, net pecuniary loss or  
8 the lack thereof is something that could be a  
9 factor in whether something is material. People  
10 care more if they're losing money. They care  
11 less if they are not losing money as a general  
12 matter.

13 There are cases -- and the Restatement  
14 recognizes this, Neder recognizes this, the law  
15 has always recognized this, the uniqueness  
16 exception recognizes this if there is such an  
17 exception rather than that just being the  
18 general rule -- that there are cases where  
19 someone has a subjective preference that may  
20 even cut against their economic interests.

21 I would like to pay more -- there are  
22 going to be cases -- and this goes back to my  
23 discussion with Justice Gorsuch. There are  
24 going to be cases where I'm willing to pay more  
25 for something that somebody else thinks is

1 valueless.

2 JUSTICE BARRETT: Mr. Feigin, do you  
3 understand -- I just want to be sure that I have  
4 the nub of your argument on essence of the  
5 bargain. Do you understand that to be ratcheted  
6 up for materiality or a synonym for materiality?

7 MR. FEIGIN: I understand it to be a  
8 way of expressing materiality that is useful in  
9 the contracting context, Your Honor. And what  
10 it expresses is this idea that it has to be a  
11 but-for reason why the contract was entered into  
12 and that you have to show it's either  
13 something -- a reasonable --

14 JUSTICE BARRETT: But -- but is that  
15 more than materiality?

16 MR. FEIGN: I --

17 JUSTICE BARRETT: And does -- and does  
18 it -- well, two questions. I mean, is that -- I  
19 mean, Mr. Fisher said that essence of the  
20 bargain is an effort to ratchet it up. So do  
21 you agree or disagree?

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

25 JUSTICE BARRETT: Okay.

1                   MR. FEIGIN: -- it's a three-page  
2 discussion, but it's clearly equating these  
3 things as synonymous.

4                   I think it's a context-specific  
5 application. And the -- the thing that you're  
6 getting -- the -- the essence of the materiality  
7 here is whether or not it's going to influence  
8 the person to enter the contract.

9                   JUSTICE BARRETT: Does this idea,  
10 essence of the bargain, have any grounding in  
11 the common law of fraud?

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

13                  JUSTICE BARRETT: That phrase.

14                  MR. FEIGIN: I mean, where the  
15 essence-of-the-bargain standard comes from is a  
16 citation to Story, I believe, who mentioned --  
17 who mentioned essence of the bargain.

18                  I think the Court -- but that's not --  
19 I wouldn't get -- I mean, that's the formulation  
20 that we've found most useful.

21                  But I think, as I was explaining  
22 with -- to Justice Kavanaugh, if -- in  
23 Footnote 5 of Universal Health Services --  
24 and -- and -- and my apologies if I'm  
25 misremembering that that comes from Justice

1 Story. Obviously, that's an objective fact you  
2 could check.

3 But the -- the -- there are a number  
4 of different formulations, and the common --  
5 which I think show that the -- the common law  
6 has kind of incorporated this requirement. But  
7 it's the basic materiality -- it is the basic  
8 materiality standard.

9 But, as applied in this context, if  
10 you're going to talk about something that the --  
11 these kinds of very small-bore things that  
12 aren't obviously important to any reasonable  
13 person, there's going to have to be some  
14 evidence of, like, enforcement.

15 We rejected contracts for failure to  
16 do this. We have that kind of evidence -- we --  
17 we have that kind of evidence here and that your  
18 real -- the government's really going to have to  
19 prove up its case, particularly in the context  
20 of a criminal prosecution, where the proof is  
21 required to be beyond a reasonable doubt.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. If you're --

24 MR. FEIGIN: I -- I mean, I think  
25 the -- the other things I'd emphasize are that

1 this just -- the requirement they're trying to  
2 impose -- well, I ran out of time, so --

3 (Laughter.)

4 MR. FEIGIN: -- there you go.

5 CHIEF JUSTICE ROBERTS: But -- but we  
6 haven't.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: On the question  
10 whether we could affirm the decision of the  
11 Third Circuit on the ground that PennDOT  
12 actually paid more here because of the DBE  
13 requirement, did the jury instructions say that  
14 proof of that was essential?

15 MR. FEIGIN: The jury instructions  
16 didn't say that proof of that was essential, no,  
17 Your Honor.

18 JUSTICE ALITO: It would -- they  
19 permitted a conviction without proof of that?

20 MR. FEIGIN: I -- I believe that the  
21 jury could have found on either theory. I think  
22 this would be, essentially, a harmless error  
23 argument.

24 JUSTICE ALITO: Right. It would be a  
25 harmless error argument. So we would have to

1 find that it was harmless or send it back --  
2 well, we couldn't -- we wouldn't -- couldn't  
3 reach the issue of whether it was harmless  
4 unless we accepted Mr. Fisher's general theory,  
5 right?

6 MR. FEIGIN: Yeah, I --

7 JUSTICE ALITO: Because, otherwise,  
8 there would be no error.

9 MR. FEIGIN: -- I -- I -- I mean, I  
10 think the Court could potentially assume error  
11 and remand for harmlessness. But I would urge  
12 the Court not to do this. There's going to be  
13 some other case -- there have been other cases  
14 raising this question.

15 You know, I -- I don't know why this  
16 is necessarily the -- obviously, you all would  
17 know more than I do about why this is the one  
18 that the Court selected.

19 (Laughter.)

20 MR. FEIGIN: So I don't want to have a  
21 Marshall McLuhan moment here. But, if the Court  
22 thought that this case best presented the  
23 question, I would urge the Court just to decide  
24 it, or it's going to keep being an argument  
25 that -- that is being raised.

1 JUSTICE ALITO: Well, I'm going to ask  
2 you a question that I really would like to ask  
3 Mr. Fisher, but I can't ask Mr. Fisher any more  
4 argument. So perhaps, if I ask you, he will see  
5 fit to address it in --

6 (Laughter.)

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

9 (Laughter.)

10 JUSTICE ALITO: Whichever you want.

11 (Laughter.)

12 JUSTICE ALITO: Assuming his persona  
13 and answering for him might be --

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

16 JUSTICE ALITO: It might be --

17 (Laughter.)

18 JUSTICE ALITO: It -- it might be a  
19 thrilling moment for you.

20 But what do you understand to be his  
21 argument about the exception to the general net  
22 benefit rule for the situation in which what --  
23 the thing that is involved is something unique?

24 MR. FEIGIN: I mean, I -- I don't  
25 really understand it because I took this to be

1 the general rule. Again, the grandfather  
2 example minus Grover Cleveland is drawn straight  
3 from the Restatement.

4 I -- I -- I don't really -- you know,  
5 I'm not quite sure what's unique. We've got a  
6 Jets/Giants riff on that in our brief, where you  
7 want Giants tickets and you get Jets tickets. I  
8 mean, I --

9 JUSTICE SOTOMAYOR: The Jets --

10 MR. FEIGIN: -- is that unique?

11 JUSTICE KAVANAUGH: Equal.

12 MR. FEIGIN: Well, particularly  
13 with -- with the -- their --

14 CHIEF JUSTICE ROBERTS: Please  
15 continue.

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

23 So I'm trying to wear his hat and  
24 mine, but he may be better able to address that  
25 on rebuttal.



1 JUSTICE ALITO: Now let me ask you  
2 about the argument that I think is kind of  
3 hanging over this case like a -- a cloud or a  
4 fog, and that is the suggestion that when you  
5 take a line of cases that the Court has handed  
6 down in recent years, all of -- all of which I  
7 think I have joined -- Skilling and Ciminelli  
8 and Kelly, and maybe you could throw in  
9 McDonnell, and maybe there are a few others --  
10 what they really stand for is that the Court  
11 really doesn't like the federalization of  
12 white-collar prosecutions and wants that to be  
13 done in state court and is really hostile to  
14 this whole enterprise.

15 MR. FEIGIN: Well, can I just say two  
16 things about that?

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

24 MR. FEIGIN: Well, two things about  
25 that, Your Honor.

1                   One, as I said earlier, I mean, I --  
2                   I -- I take the sentiment, but I don't think  
3                   it's a reason -- I think it's always been a  
4                   supporting reason. I don't think it's a  
5                   freestanding reason to carve an exception into  
6                   the statute.

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

16                  I think that pretty much settles this  
17                  question. The Court can resolve this case on  
18                  that line of cases rather than the kind of more  
19                  amorphous sentiment expressed by some of the  
20                  others.

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

1           It wrote them broadly because frauds  
2 are very inventive. There are any number of  
3 ways you can defraud people. And the  
4 government -- the federal government had a  
5 separate sovereign interest in that when they  
6 implicate the mails and the wires.

7           JUSTICE ALITO: When we -- wouldn't  
8 you agree that, in the end, this turns on our  
9 understanding of the common law of fraud?

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

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

24           And -- and, in order to cut against  
25 that, I mean, I don't even think the Court needs

1 to get to the common law. And, if it did, it's  
2 got to be well-established. And if it -- if --  
3 and it certainly wasn't by 1952. Even they  
4 acknowledge that.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Sotomayor?

8 JUSTICE SOTOMAYOR: I thought that the  
9 only thing you wanted us to do was to say that  
10 we reject Petitioners' net pecuniary loss  
11 requirement, correct?

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

13 JUSTICE SOTOMAYOR: But do you want me  
14 to go -- do you want us to go further? When you  
15 were responding to Justice Alito, what more do  
16 you want us to say?

17 MR. FEIGIN: I -- I -- I don't need  
18 the --

19 JUSTICE SOTOMAYOR: You would want the  
20 world?

21 MR. FEIGIN: -- I don't need the Court  
22 to say -- I mean, I'm not asking the Court to  
23 say anything more than to reject Petitioners'  
24 theory in this case and affirm the prosecution.

25 JUSTICE SOTOMAYOR: Okay.

1 MR. FEIGIN: Or affirm the conviction.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 JUSTICE BARRETT: Just one question.

7 Picking up on Justice Alito, you know, talking  
8 about the line of cases that we've had recently,  
9 I mean, it seems to me another theme in  
10 Mr. Fisher's brief and that kind of what makes  
11 it a little bit hard for you is to say, like,  
12 what is the point of Ciminelli, what is the  
13 point of these other cases, if the government  
14 can just get around it through this theory?

15 MR. FEIGIN: Okay. So I -- I -- I  
16 think, if you'd like a full answer to that, I --  
17 I -- I think I could walk through the actual  
18 cases.

19 JUSTICE BARRETT: Well, you don't have  
20 to give a full --

21 MR. FEIGIN: Okay. We were --

22 JUSTICE BARRETT: -- answer at this  
23 point. You can give a close enough.

24 MR. FEIGIN: -- we were very -- we  
25 were very up front about this in Ciminelli, that

1 this was the theory we were running, and the  
2 Court remanded for the more traditional theory,  
3 its words, traditional theory of -- of property  
4 fraud. So I think, you know, we were very up  
5 front about that.

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

15 The property that McNally wanted was  
16 the property that -- was the kickbacks which  
17 were coming from the person receiving the  
18 government contracts. So it was their money  
19 that they were kicking back to McNally. That's  
20 why he wanted to keep his job.

21 And in Skilling, he wanted to keep  
22 doing his -- he wanted to keep doing his stock  
23 fraud. So I'm not really sure that this would  
24 cover -- cover either of those cases.

25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: Isn't Neder and the  
4 old soil concept really relying on assumptions  
5 about congressional intent? I sort of -- it has  
6 to be well-settled because, I thought, the logic  
7 was, if these are well-settled common law  
8 concepts, then, when Congress uses the language  
9 in a statute, they intended to incorporate that  
10 concept.

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

1                   And if the law on our point was  
2 getting more clearly established by that time, I  
3 think that destroys any ability they'd have to  
4 show that it was well-established in the mail  
5 fraud statute, let alone by 1952.

6                   JUSTICE JACKSON: Thank you.

7                   CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9                   Rebuttal, Mr. Fisher?

10                  REBUTTAL ARGUMENT OF JEFFREY L. FISHER

11                                 ON BEHALF OF THE PETITIONERS

12                  MR. FISHER: Thank you. I have five  
13 points I hope I can get through.

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

23                  Second of all, in the Joint Appendix,  
24 the prosecutor says this obligation was  
25 non-financial in nature. It was not about



1 dollars and cents. In the Third Circuit, here's  
2 what the government told the Court: We do not  
3 know whether PennDOT would have been willing to  
4 pay more for these same repairs. And there's  
5 also potentially equal protection implications  
6 to the notion that it would pay more simply for  
7 DBE participation.

8 So this is the babysitter case. This  
9 is a case where the defendant made a promise to  
10 use the proceeds in a particular way that was  
11 frustrated, and it was non-financial in nature.

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

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

1           And I would just refer the Court back  
2 to our briefs. The government cites lots of  
3 quotes out of -- out of cases and treatises, and  
4 I, just like Mr. Feigin, encourage the Court to  
5 look back at those. What you'll find is all --  
6 they say things like, if somebody else, a third  
7 party, covers the loss, that's not fraud or that  
8 fraud doesn't have to be completed. It's about  
9 the scheme as devised if it were completed.  
10 That's all those things say, and that's all that  
11 Shaw says.

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

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

24           And, Justice Kagan, you -- I'm sorry,  
25 Justice Barrett, you asked about the common law.

1 Look at the Restatement. The Restatement is  
2 crystal-clear that essence of the bargain is  
3 higher than regular materiality. And Justice  
4 Story doesn't say anything to the contrary. And  
5 we cite that in our reply brief.

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

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

22 In McNally, the prosecutor could  
23 have -- and Justice Stevens noted this in  
24 dissent. The prosecution could have just said  
25 they hired a person that would conduct his

1 services honestly, and that's the kind of  
2 employee they wanted, not somebody else, and  
3 when they paid him that money for his services,  
4 they were defrauded. That theory would have  
5 been available.

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

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

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

1           The Court in Durland and its early  
2 cases where it said here's what the ordinary  
3 meaning -- ordinary meaning of fraud is, it's  
4 harm to a property interest. There has to be  
5 loss. And so, when you understand that and you  
6 look at cases like the Kansas Supreme Court case  
7 in Palmer, the Arkansas Supreme Court case in  
8 Morgan, there aren't a ton of cases like this  
9 because the government didn't actually charge  
10 this back in the old days, but when they did,  
11 they were rejected, except for in the horse-  
12 called-Charlie situation. Otherwise, it was  
13 rejected, and the Court's own cases reject it.

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

25           We don't think we have to meet the

1 Neder test, like, for materiality, where you're  
2 just inventing an element that isn't in the  
3 statute. The word "defraud" is there. And so  
4 we have the better reading just under ordinary  
5 principles, but even if we had to satisfy Neder,  
6 we could.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 The case is submitted.

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

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## Official - Subject to Final Review

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