No. 21-1170

In the

Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

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

REPLY BRIEF FOR RESPONDENTS STEVEN AIELLO AND JOSEPH GERARDI IN SUPPORT OF PETITIONER

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Respondents Steven Aiello and Joseph Gerardi

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INTRODUCTION

The government's merits brief exemplifies why this Court "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 579 U.S. 550, 576 (2016). The government has abandoned the legal theory it charged, tried, and defended to the Second Circuit. Instead, it hopes to salvage these convictions—and its ability to prosecute virtually any misrepresentation in any transaction—under an untested legal theory not considered by the grand jury, the trial jury, or the courts below. But its new argument fares no better than the theory this Court granted certiorari to review.

The government has imprisoned numerous people, including these defendants, based on the "right to control" theory. It has procured and defended these convictions and many others by arguing that "obtaining money or property" does not have its ordinary or common-law meaning, and that, notwithstanding their plain text, the mail and wire fraud statutes do not have any "obtaining money or property" element.[1]

And that was the government's position at every stage of this prosecution—until now. This case was charged, tried, and affirmed on a single theory—that defendants schemed to deprive Fort Schuyler of its "right to control" assets by depriving it of "potentially valuable economic information." In opposing certiorari, the government defended that theory. It said the

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[1] *E.g.*, *Gatto v. United States*, No. 21-169, BIO.10-11; *Baker v. United States*, No. 19-667, BIO.6.

fraud statutes "are not limited to property interests 'that can be transferred from the alleged victim to the defendant.'" BIO.24. It downplayed *Skilling*'s statement contradicting its position. BIO.24. And it dismissed the "obtain property" holdings of *Sekhar* and *Scheidler* because "[t]hose cases concerned [the] Hobbs Act … not mail or wire fraud." BIO.25.

Now, however, the government suddenly admits what it heretofore repeatedly denied—that the statutes "require[] the government to show that the fraudulent scheme was designed to obtain money or property." Govt.Br.16. And it concedes that "obtain" should be given its "plain meaning"—the "acquisition" of property from another. *Id.*

Unwilling or unable to defend its previous positions, the government now switches course and proposes a new legal theory that would vastly expand federal criminal fraud. It argues that a defendant satisfies the *obtaining* element when he receives any consideration in an exchange—"even fair value." The government says material deception in a transaction constitutes fraud "whether or not the victims got fair value." Govt.Br.23. In other words, any deceptive inducement in an otherwise fair exchange is fraud.

That novel theory would dramatically broaden the fraud statutes, enabling federal prosecutors to police virtually any transaction, no matter how trivial. Aware of this untoward result, the government tentatively suggests (without actually endorsing) several potential limiting principles. But its refusal to commit to these supposed limits exposes them for what they really are—a plea to trust its discretion. This

Court should reject that plea, as it has before. Instead, this Court should adopt a simple limitation grounded in the traditional understanding of fraud: There is no fraud unless the scheme, if completed, would cause loss—in other words, harm a traditional property interest.

At the very least, the Court should reverse these convictions, because this Court's precedents squarely foreclose affirmance on a theory not charged in the indictment, presented to the jury, or passed on by the Second Circuit.

ARGUMENT

I. THE OBJECT OF FRAUD MUST BE CAUSING LOSS OR HARM

1a. The government's novel legal theory—that a defendant is guilty of fraud even if the victim gets full and fair value in the exchange—is inconsistent with historical notions of fraud. At early common law, there was no crime of fraud or false pretenses. As the government correctly notes, the law of fraud was initially developed in tort law. The government selectively cites Prosser in a strained attempt to suggest that the tort did not require proof of loss. Govt.Br.19. That is simply false. "[T]here can be no recovery if the plaintiff is none the worse off for the misrepresentation, however flagrant it may have been, as where for example he receives all the value that he has been promised and has paid for …." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 110, at 765 (5th ed. 1984) (Prosser on Torts).

The government's other authorities simply hold that *intent to harm* was not an element of *the tort*. That is of course true—as it is for many torts, including negligence, because the historical dividing line between tort and criminal liability is the requirement of intent. *See* Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 Colum. L. Rev. 753, 756-58 (1943) (discussing historical distinction between compensating private harms in tort law and punishing evildoers in criminal law). In *Morissette v. United States*, for example, this Court noted that "an injury can amount to a crime only when inflicted by intention," whereas "[i]n the civil tort, except for recovery of exemplary damages, the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant." 342 U.S. 246, 250, 270 (1952). Thus, that intent to cause harm was not an element of misrepresentation has no bearing on whether the modern *crime* has such an element.

And the question of intent is not the same as the question of loss. It was hornbook law that no damages action would lie where the plaintiff received full and fair value in the exchange. *See* Prosser on Torts, § 110, at 765 ("Since the modern action of deceit is a descendant of the older action on the case, it carries over the requirement that the plaintiff must have suffered substantial damage before the cause of action can arise."). That requirement was deeply rooted in the common law. The government notes that the common-law tort did not require intent to injure—which is true—but then from that suggests the tort did not require damage *at all*. That is false.

b. The government tries to rescue this dubious proposition by relying on the doctrine of rescission. As Petitioner demonstrates, the government misrepresents that doctrine. Regardless, as the government's own cited sources clearly state, rescission was an *equitable* remedy, outside the scope of the common-law tort. *See* Prosser on Torts, § 94, at 672-75. For example, the government cites *J.I. Case Threshing Machine Company v. Webb*, 181 S.W. 853 (Tex. Civ. App. 1915), for the proposition that no showing of loss is needed. Govt.Br.19. But the court there, while recognizing the equitable remedy, *also* recognized the underlying common-law rule: "It is elementary that fraud, in order to be the basis for the recovery of damages, must have resulted in pecuniary injury to the party complaining …." *Id.* at 855.[2]

The availability of rescission in courts of equity, in narrow circumstances, did not alter the general common-law rule that there was no action for fraud where the plaintiff received full and fair value. Indeed, the entire purpose of equitable remedies was "to afford discretionary relief" where it would not have been available under the "'rigors of the common law.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring). Even if the government were correct about rescission—which it isn't—it would not change the fact that the "rigors of the common law" required proof of damage. This Court construes common-law-derived statutes in accordance with the

[2] The court was likely wrong about the equitable remedy anyway. *See Russell v. Indus. Transp. Co.*, 113 Tex. 441, 454 (1924) (holding that "some pecuniary injury is essential to an action to rescind a contract for fraud, as announced by Mr. Pomeroy and as has been uniformly held by this and the other courts of Texas").

common law, not the ad-hoc discretionary tools of equity.

It remains hornbook law today that, in an action for misrepresentation and deceit, a defendant is only "subject to liability to the other in deceit *for pecuniary loss* caused to him." Restatement (Second) of Torts § 525 (1977) (emphasis added). Damage is measured primarily by "the difference between the value of what he has received in the transaction and its purchase price or other value given for it." *Id.* § 549(1)(a). Where the deceived party receives the full value of what she was promised, there is no action for fraudulent misrepresentation. That is and has always been a limit on the tort action.

2a. Those principles, borrowed from tort law, have also animated criminal fraud doctrine. The first English statute defining the offense of false pretenses required obtaining money or property "with intent to cheat or defraud any person or persons of the same." 30 Geo. II, ch. 24 (1757); *see* 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.7(a) (3d ed. 2018).

These words carried with them a well-understood meaning. The first edition of Black's Law Dictionary—published shortly after the earliest enactment of the federal mail fraud statute—defined "defraud" as "To practice fraud; to cheat or trick; to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice." Black's Law Dictionary 347 (1st ed. 1891). That definition reflected the traditional, common-law understanding: Fraud requires the deprivation of a property interest.

b. This Court has long defined fraud this way, consistent with the traditional understanding, explaining that mail fraud requires the "wrongful purpose of injuring one in his property rights." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). Indeed, in *Hammerschmidt*, this Court distinguished the broader scope of 18 U.S.C. § 371, which punishes conspiracies to defraud the federal government, from the narrower scope of mail fraud. The former covers "interfer[ing] with or obstruct[ing] … lawful governmental functions by deceit, craft or trickery," while the latter covers only traditional fraud—"cheat[ing] the [victim] out of property or money." 265 U.S. at 188-89; *see Durland v. United States*, 161 U.S. 306, 314 (1896) (the mail fraud statute was designed to combat "intentional efforts to despoil"). Exchanging fair consideration with another neither cheats the counterparty nor injures its property.

This understanding runs through this Court's modern fraud cases too. *McNally v. United States*, for example, "read § 1341 as limited in scope to the protection of property rights" and held that fraud ordinarily requires property "deprivation." 483 U.S. 350, 358-60 (1987). And it reversed the convictions because "the jury was not required to find that the [victim] was defrauded of any money or property." *Id.* at 360.

In dissent, Justice Stevens argued that § 1341 and § 371 should be interpreted the same way, such that proof of fraud does not require "any evidence that [the victim] has suffered any property or pecuniary loss." *Id.* at 369; *see also id.* at 370 ("Congress' use of the term showed no intent to limit the statute to property

loss."). He argued that receipt of salary for work performed under deceptive pretenses should satisfy the property element. *Id*. at 377 n.10. If that view had carried the day, of course, the convictions would have been affirmed. After all, the defendants included a state official, and it was undisputed that all of them had received consideration—hundreds of thousands of dollars of kickbacks and salary—through the scheme. *Id*. at 352-53. The government here seeks to resurrect the arguments in Justice Stevens's dissent that this Court has already rejected.

The Court's reasoning in *Pasquantino v. United States*, 544 U.S. 349 (2005), confirms that the object of a property fraud scheme must be causing economic loss. The Court held that a smuggling scheme to evade Canadian liquor taxes could constitute mail fraud, in part because the scheme "deprived Canada of money, *inflicting an economic injury* no less than had they embezzled funds from the Canadian treasury." *Id*. at 356 (emphasis added).

In *Skilling v. United States*, 561 U.S. 358 (2010), this Court reaffirmed that a fraud scheme's object must be causing loss. It explained that ordinary property fraud involves a situation where "the victim's *loss* of money or property supplied the defendant's gain, with one the mirror image of the other." *Id.* at 400 (emphasis added).

Most recently, in *Kelly* this Court reiterated that actual or intended *loss* is an essential component of fraud. It held that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Kelly v. United States*, 140

S. Ct. 1565, 1573 (2020). If a fraud conviction cannot stand when loss is merely incidental, then it cannot stand when there is no loss (or contemplated loss) *at all*. Quoting Judge Easterbrook, this Court reaffirmed a central tenet of fraud liability: "[T]he victim's loss must be an objective of the [deceitful] scheme …." *Id.* at 1573 n.2 (quoting *United States v. Walters*, 997 F.2d 1219, 1226 (7th Cir. 1993)).

All these cases hewed to the traditional understanding that the object of a fraud must be harming the victim in its property rights by causing some loss. The government's proposal would abandon that understanding entirely, replacing it with an understanding of fraud premised on inducement alone.[3]

c. Of course, a defendant need not *succeed* in causing loss, but that is because the statutes contain inchoate liability. They punish schemes to defraud, regardless of whether those schemes are successful. But the object of the scheme must be to cheat, harm, and cause loss.

Many lower courts, including the Second Circuit, have recognized that loss is not irrelevant even though the statute creates inchoate liability. "Although the government is not required to prove actual injury, it must, at a minimum, prove that defendants

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[3] The government erroneously claims this Court has "recognized" mere "fraudulent inducement" as a basis for property fraud. Govt.Br.40. Neither of the cases it cites uses that phrase, and both involved classic pecuniary harm. *See Durland*, 161 U.S. at 314 (sale of worthless bonds); *United States v. Sampson*, 371 U.S. 75, 77 (1962) (defendants made false promises about loans and services they "did not intend to and in fact did not" provide).

contemplated some actual harm or injury to their victims." *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987); *see also United States v. Turner*, 465 F.3d 667, 680-81 (6th Cir. 2006) ("[T]he mail fraud statute does not require an actual loss of property because success of the scheme is not an element of the offense.… But if the scheme is successful, its effect must be to deprive the victim of money or property."). Consequently, fraudulent inducement in an otherwise fair exchange is insufficient, because the scheme, if completed, will not harm property interests.

In arguing the contrary, the government relies heavily on *United States v. Rowe*, 56 F.2d 747 (2d Cir. 1932). But in *Starr*, the Second Circuit disavowed *Rowe*'s dicta, noting that it had been "deprived of much of its vitality." 816 F.2d at 101. Rejecting *Rowe*, the court held in *Starr* that a fraud scheme, if completed, must cause "a corresponding loss or injury to the victim of the fraud." *Id.*

Starr had it right. Indeed, in *Skilling*, this Court cited this very portion of *Starr* with approval. *See* 561 U.S. at 400. The problem in the Second Circuit arose a few years later when *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), was decided. There, the court held that the so-called "right to control" is *itself* a property interest, the deprivation of which is a cognizable injury. As Petitioner has demonstrated beyond peradventure, and as the government now concedes,[4] *Wallach*'s holding is indefensible.

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[4] At points the government half-heartedly tries to defend right-to-control. It suggests *Buchanan v. Warley*, 245 U.S. 60, 74 (1917), provides "doctrinal footing" for the theory. Govt.Br.25.

Other circuits have stuck with the traditional understanding, unsullied by the right-to-control doctrine. "[E]ven if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims 'received exactly what they paid for.'" *United States v. Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016). The mere fact that a defendant receives money or property as consideration in a fairly priced exchange does not satisfy fraud's property element, because no harm or loss is caused by the scheme. As Judge Sutton explained in *United States v. Sadler*, "paying the going rate for a product does not square with the conventional understanding of 'deprive.'" 750 F.3d 585, 590-92 (6th Cir. 2014).

Although the fraud statutes criminalize inchoate schemes, fraud nonetheless requires proof that the scheme, if completed, would injure a traditionally protected property interest. The "right to control" is not such an interest. Those two propositions resolve this case.

That argument is bizarre. *Buchanan* held that a Louisville's ordinance preventing sale of white-owned property to black people violated a landowner's rights. The Court relied on the Blackstonian trilogy of rights—including the right to alienation. Nothing in *Buchanan* suggests mere informational deprivation violates a property right.

II. THE GOVERNMENT'S NOVEL INTERPRETATION WOULD VASTLY EXPAND THE SCOPE OF MAIL AND WIRE FRAUD

1a. The government's proposal, in addition to being inconsistent with well-settled law regarding the meaning of fraud, would create enormous problems of vagueness and overbreadth. If merely seeking consideration in an otherwise fair exchange constitutes a fraud scheme for "obtaining property," then a vast range of conduct would be swept within the ambit of mail and wire fraud.

Consider, for starters, the employment context. The government's position is this: "An applicant who obtains a job (and the accompanying salary) by materially misrepresenting her qualifications commits fraud even if she intends to, and does, perform the required work." Govt.Br.23. That is an extraordinary interpretation of the statutes. Under the government's position, moreover, an applicant who merely submits an embellished résumé would be guilty of fraud even if she did not get the job (since guilt does not depend on the scheme's success). According to the government, obtaining or even attempting to obtain a salary based on deception is federal criminal fraud—even if the employee performs all required work.

And it would not stop there. Under the government's theory of the law, an employee who deceives an employer to *maintain* her salary would also be guilty of fraud. Suppose, for example, an employee violates the employer's computer use policy, say, by using computers for personal purposes. And suppose she deceives her employer about it—including by omission,

since employees owe fiduciary duties to their employers. If that deception were material to the employer in deciding which employees to keep and which to fire, then the employee would be guilty of a federal felony, punishable by years in prison.

b. That interpretation would undermine this Court's recent decision in *Van Buren v. United States*, 141 S. Ct. 1648 (2021). There, this Court limited the scope of the Computer Fraud and Abuse Act to crimes of hacking, in part because a broader interpretation would have swept in a "breathtaking amount of commonplace computer activity." *Id.* at 1661. If the CFAA had been interpreted according to the government's wishes, then "millions of otherwise law-abiding citizens are criminals" for relatively innocuous conduct such as violating common workplace policies "stat[ing] that computers and electronic devices can be used only for business purposes." *Id.*

If the government's interpretation of § 1341 and § 1343 is correct, however, then *Van Buren* is a dead letter, since the same conduct is covered by the mail and wire fraud statutes (on a salary maintenance theory) even if it is not covered by the CFAA.

The government's interpretation would also undermine *Skilling*'s limitations on § 1346. The defendant in *Skilling* deceived his employer and "profited … through the receipt of salary and bonuses" worth millions. 561 U.S. at 413. But this Court held that there was no fraud under § 1346, since that statute is limited to bribes and kickbacks. The receipt of employee compensation alone, moreover, did not give rise to

fraud. In part based on the rationale of *Skilling*, numerous lower courts have held that merely maintaining a salary cannot satisfy the "obtaining money or property" element of fraud. *United States v. Yates*, 16 F.4th 256, 266-67 (9th Cir. 2021); *see also United States v. Goodrich*, 871 F.2d 1011, 1013-14 (11th Cir. 1989).

But the government's theory of § 1341 and § 1343 is now that merely receiving consideration in a fair exchange suffices to prove fraud. And as the government *admits*, such a theory would cover an employee's receipt of salary. That would render *Skilling*'s limits on § 1346 meaningless, since defendants (including Skilling himself) would be guilty of property fraud anyway. It would also place the federal government in the position of policing a vast amount of routine workplace misconduct.

c. Nor is the government's theory limited to the workplace. It would stretch, as the government admits, to the education system: "A student who obtains scholarship funds by materially misrepresenting his qualifications commits fraud even though the grantor pays no more than it would have if the scholarship had gone to someone else." Govt.Br.23. And for that matter, a prospective student who embellished his qualifications would also commit fraud, since even being admitted to college entitles a student to various forms of money and property. On the flip side, universities would be guilty of fraud if they deceived students—including, for example, by submitting false data to rankings organizations. *Cf. Columbia Won't Participate in the Next U.S. News Rankings*, N.Y. Times

(June 30, 2022). The government's proposed interpretation would permit it to police the college admissions process.

Or consider housing. If a seller fibbed about the last time the garage flooded, or whether she kept cats, she would be guilty of fraud—even if the house were sold at fair market price. Worse yet, if a buyer misrepresented her race or political affiliation to a seller who only wanted to sell to the "right" kind of people, the buyer would be guilty of fraud—even if she paid the full and fair price. So too for innumerable other commercial exchanges. Suppose a customer pretended to be a Republican, knowing that the business owner would not serve Democrats, in order to get served. According to the government, that's a federal felony too.

The government's new theory of fraud eliminates any requirement that the object of a fraud scheme must be causing injury to a property interest. It eliminates any requirement of deprivation. It eliminates any requirement of *cheating*. In so doing, the government's proposed theory extends the reach of the fraud statutes to any sort of exchange induced by deception. That is a radical departure from existing law.

It would also convert the mail and wire fraud statutes into a new basis for a general federal police power over numerous areas traditionally covered by state regulation, criminal and civil. This Court has regularly held that, in addition to principles of lenity, principles of federalism counsel narrow interpretations of federal criminal statutes. "[W]e can insist on a clear indication that Congress meant to reach purely local

crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 860 (2014). It should follow the same path here.

2a. The government seems aware that its new theory of fraud would criminalize an extraordinary range of conduct. Thus, at various points in its brief, it nods in the direction of limiting principles that would cabin the reach of criminal fraud liability. But these supposed limitations would be either ineffectual or would insert an impermissible amount of vagueness and post-hoc subjectivity into determinations of guilt.

Moreover, throughout its brief, the government—no doubt unwilling to make concessions that would endanger past or future prosecutions—stops short of actually endorsing these limiting principles. The government, in short, is cagey. It says that other common-law doctrines "may further contain" the application of the fraud statutes. Govt.Br.44. It says that statements of opinion "generally" will not be material. Govt.Br.45. It says that there are "various limitations on fraud"—but it does not set forth what those limitations are because they "are not relevant here." Govt.Br.47. In one of its few attempts at specificity, it says some types of deceptive nondisclosure "may well not be fraudulent"—but stops short of directly asserting that they are, in fact, not fraudulent. *Id.*

This is the same strategy the government tried in *Van Buren*. In response to concerns about overbreadth, "the Government posit[ed] that other terms in the statute—specifically 'authorization' and 'use'—'may well' serve to cabin its prosecutorial power." 141

S. Ct. at 1661. "Yet the Government stop[ped] far short of endorsing such limitations," and as this Court noted, the government could cite no prior prosecution where it had conceded such limitations—and indeed, there were several instances where it had argued against them. *Id.* This Court rejected the government's arguments and indicated that it did not trust the government to respect these half-proposed limitations in future prosecutions. *See also Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (refusing "to rely upon prosecutorial discretion" to narrow "highly abstract general statutory language" because doing so "places great power in the hands of the prosecutor").

The same skepticism is warranted here. As in *Van Buren*, the government argues for a broad interpretation of the statute. It suggests there *may* be limiting principles, but refuses to *commit* to any such limitations, and tells this Court it shouldn't actually address those limits because they are not directly applicable here. And everyone knows what happens next, if this Court sides with the government: Federal prosecutors around the country would argue against any limiting principles that would imperil their prosecutions.

Just as in *Van Buren*, the government's mere suggestions that its power "may well" be limited should reassure no one.

b. The only potential limitation the government discusses in any detail is materiality—and that very discussion illustrates the problem. Citing *Universal Health Services*, the government describes the materiality standard as "'demanding' and 'rigorous' in the

contracting context." Govt.Br.18 (quoting *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192, 194 (2016)). (Notably, the government does not say whether some less demanding and rigorous standard applies in other contexts.) It says that "under one pertinent articulation of the standard," misrepresentations are material if they go to "the very essence of the bargain." *Id.* (quoting *Universal Health Servs.*, 579 U.S. at 193 n.5).

That is not and has never been the standard for materiality under § 1341 and § 1343. This Court has held that "a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Neder v. United States*, 527 U.S. 1, 16 (1999) (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). That is the standard on which juries are instructed in federal fraud prosecutions. *See*, *e.g.*, First Circuit Pattern Instruction 4.18.1341 ("A 'material' fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed."); Ninth Circuit Pattern Instruction 15.32 (requiring showing that misrepresentations "had a natural tendency to influence, or were capable of influencing, a person to part with money or property").

Is the government now endorsing a stringent new standard? In all future cases, will the government consent to jury instructions that statements are material only if they "go to the very essence of the bargain"? For that matter, will AUSAs prosecuting fraud cases concede to juries and reviewing judges that the

standard governing the materiality element is "demanding" and "rigorous"? These questions are rhetorical because the only rational response to them would be laughter.

c. The actual materiality standard is not a particularly demanding or rigorous standard to meet. Nearly any deception in a transaction can be said to be "capable of influencing" the other party.

The government brushes off one of Petitioner's examples—that of an attorney who failed to disclose a conflict of interest. Govt.Br.47. But undoubtedly, such an omission would be capable of influencing a client. So would an attorney's embellishments on his website. A college applicant's exaggeration about her extracurricular activities would be capable of influencing the admissions department. A prospective employee's lies about previous work experience would be capable of influencing the HR director. And so on.

The materiality standard as it operates in practice does not sufficiently limit the reach of criminal fraud liability to avoid serious vagueness and federalism problems.

d. Nor is it clear that the government's half-proposed standard would fare differently. The government suggests that "one … articulation" of the materiality standard would require proof that a deceptive statement affected "the very essence of the bargain." But it is difficult for juries, viewing the matter from the perspective of hindsight, to determine what that means.

And in contracting cases such as this one, the government has taken the remarkable position that even terms excluded from the contract can go to the essence of the bargain. The alleged deceptions here did not affect any terms in the contracts—indeed, it was undisputed that both developers performed exactly as contracted.[5] But the government argued, and the Second Circuit agreed, that the deceptions were nonetheless essential to the bargain. "The bargain at issue was not the terms of the contracts ultimately negotiated, but instead Fort Schuyler's ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process. Depriving Fort Schuyler of that information was precisely the object of defendants' fraudulent scheme, and for Fort Schuyler, it was an essential element of the bargain." Pet.App.21a-22a.

This passage (and similar holdings in other Second Circuit right-to-control decisions[6]) shows that, after the fact, nearly anything can be classified as an essential element of the bargain. As a practical reality, what happens at trials is that prosecutors call a victim-witness who affirms that the deception mattered

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[5] The Ciminelli and COR contracts contained *no* representations about the RFP process. *See* JA133-77; 2d Cir. Dkt. 270 at 14 n.11. The government cites only *other*, earlier documents, not those encapsulating the actual bargain. Govt.Br.7-8.

[6] *See*, *e.g.*, *United States v. Johnson*, 945 F.3d 606, 613 (2d Cir. 2019) (holding that even where "the victim received the benefit of its bargain under the terms of the parties' contract," misrepresentations not contained in the contract can "implicate[] an essential element of the bargain") (citing *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015)).

to them—that it influenced them, that they might not have done the transaction had they known, that knowledge of the truth was essential. The government's new materiality standard—even if it were adopted—would remain vague and malleable enough that, viewed post hoc, nearly anything could qualify.

The end result is the same. Materiality alone does not adequately limit the scope of federal fraud. A sensible construction, consistent with the traditional understanding of fraud, is that the mail and wire fraud statutes require proof that the scheme, if completed, would harm a traditional property interest.

III. THE CONVICTIONS MUST BE REVERSED

1. Ultimately, the Court need not decide whether to adopt the government's novel theory, because the convictions cannot survive anyway. The government's about-face itself requires reversal.

Conceding that the Second Circuit applied an "incorrect" and "overbroad" theory of wire fraud, the government urges this Court to analyze this case "absent the right-to-control lens" that was the sole basis for the defendants' convictions. Govt.Br.12, 24, 32. The government says the convictions should be affirmed because the "contract funds" paid by Fort Schuyler satisfy the statutory "money or property" element even though the "right to control" does not. Govt.Br.11-12, 32-33. This is nothing more than a bait-and-switch. Affirming on this new theory would violate defendants' Sixth Amendment rights to fair notice and trial by jury and their Fifth Amendment rights to due process and indictment by grand jury.

To justify its maneuver, the government argues that the sufficiency of the evidence can be evaluated under any valid legal theory. Govt.Br.31. But in the case it cites, the government's theory did not metamorphose on appeal. "[T]he indictment … properly charged [the defendant] with the statutory elements," and the jury was "instructed on all elements of the charged crime plus one more element" that was not required. *Musacchio v. United States*, 577 U.S. 237, 243-44 (2016). The Court held that the "Government's failure to introduce evidence of [that erroneous] additional element" did not warrant reversal for insufficiency. *Id.* at 244. Nowhere did it hold that, on appeal, the government can shift to an entirely different theory that was not the basis for conviction.

To the contrary, the Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *accord Rewis v. United States*, 401 U.S. 808, 814 (1971). A "defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). "This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury." *Id.*

Here, not only did the government fail to present its new theory to the trial jury—it deliberately removed the theory from the grand jury's consideration and declined to charge it in the indictment. *See* Kaloyeros.Reply.I.A.1. "To uphold [the] conviction[s] on a

charge that was neither alleged in an indictment nor presented to a jury at trial [would] offend[] the most basic notions of due process" by depriving the defendants of the "right to be heard on the specific charges of which [they are] accused." *Dunn v. United States*, 442 U.S. 100, 106 (1979).

Moreover, in addition to sufficiency, Respondents challenge the indictment and the jury instructions, which relied solely on the invalid right-to-control theory. *E.g.*, Aiello-Gerardi.Br.9-10, 40-42; Aiello-Gerardi.Cert.Reply.8-9. The instructional error would ordinarily require a new trial. *See*, *e.g.*, *McDonnell*, 579 U.S. at 579-80. But the government *cannot* retry the defendants on its new, uncharged theory, because that would constructively amend the indictment in violation of the Fifth Amendment. *See Stirone v. United States*, 361 U.S. 212, 215-19 (1960). The indictment was based exclusively on the invalid right-to-control theory, and consequently, it must be dismissed. *See Sanabria v. United States*, 437 U.S. 54, 77 (1978); *Dunn*, 442 U.S. at 113 n.14.

2. If the Court does reach the merits, it should reverse the convictions for insufficient evidence.

Respondents were convicted of defrauding Fort Schuyler in connection with its RFP for a Syracuse preferred developer. Although the scheme was allegedly successful, there was no evidence that it caused any loss to Fort Schuyler, let alone that the object of the alleged scheme was to cause any such loss. Instead, Fort Schuyler got exactly what it paid for, and continued to work with Aiello and Gerardi's company,

and pay it millions more, despite the criminal charges. *See* Aiello-Gerardi.Br.5-14.

The government claims the defendants sought to exclude competition, Govt.Br.41-42, but it points to no evidence that the Syracuse RFP excluded any developer or made it more difficult for Fort Schuyler to obtain the best deal possible. No witness testified that the Syracuse RFP's requirements were unreasonable or anticompetitive. No witness testified that the Syracuse RFP's requirements discouraged him or her from submitting a bid. In other words, there was no proof of an increased risk of loss, let alone the *actual* loss that one would expect to see once a fraudulent scheme succeeds in its object. The evidence on this element of property fraud was entirely lacking. Accordingly, "'[t]he government's case … should not have even been submitted to the jury.'" *Musacchio*, 577 U.S. at 243.

CONCLUSION

This Court should reverse and remand with instructions to enter a judgment of acquittal.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
TED SAMPSELL-JONES
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Respondents Steven Aiello and Joseph Gerardi

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