

No. 24-5785

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IN THE SUPREME COURT OF THE UNITED STATES

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BERNARD ROSS HANSEN AND DIANE RENEE ERDMANN, PETITIONERS

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend (Pet. 8-9) that their misrepresentations about their ability to fulfill bullion orders and their use of customer money to pay for their own personal expenses instead did not constitute "a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses" within the meaning of the mail- and wire-fraud statutes, 18 U.S.C. 1341, 1343, because petitioners "intended ultimately to fulfill the customers' orders or issue refunds," Pet. 8. They request that this Court hold their petition for a writ of certiorari pending a decision in Kousisis v. United States, cert. granted, No. 23-909 (oral argument scheduled for Dec. 9, 2024), in which this Court

will address whether the federal fraud statutes apply to a scheme to fraudulently induce a transaction if the scheme does not (or is not designed to) impose a net pecuniary loss on the victim.

The petition in this case should not be held pending Kousisis. The jury found, based on the evidence, that petitioners both deprived their customers of money and property and intended to do so. See Pet. App. 17-18. In essence, petitioners ran a Ponzi scheme, in which they used customer accounts to pay off other customers -- or for their own expenses -- rather than using the accounts in the manner that they advertised. As the district court explained, "there was ample evidence that [petitioners] not only deceived customers but also cheated them, by depriving them of their money or property." Pet. App. 17. Among other things, petitioners "misled customers into believing that their money would be used to fulfill their bullion orders, when in fact the money was commingled to pay company expenses and fill past metal orders." Ibid. "[T]hese misrepresentations caused an enormous deprivation: at the time of [petitioners' business's] bankruptcy, there were more than \$25 million worth of outstanding bullion orders" that petitioners were unable to fulfill. Id. at 18.

The court of appeals likewise explained that to find guilt, the jury had to "find that [petitioners] had 'the intent to deceive and cheat -- in other words, to deprive the victim of money or property by means of deception.'" Id. at 2 (citation omitted). The court found "sufficient evidence to support [petitioners']

convictions” under that standard, including because petitioners “used customer money for various expenses, such as \* \* \* legal fees, business expansion, refunds to other customers, and [petitioners’] personal expenses,” which “left them with very little cash flow to fulfill customer orders.” Id. at 3. And the court explained that other circuits would likewise recognize that petitioners’ conduct violated the fraud statutes. See id. at 4-5.

Accordingly, petitioners’ fraudulent scheme was designed to -- and in fact did -- inflict a net pecuniary harm on their victims. The resolution of the question presented in Kousisis thus would not affect the outcome here, making a hold for Kousisis inappropriate. The petition for a writ of certiorari should therefore be denied.\*

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Solicitor General

NOVEMBER 2024

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\* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.