

24-6170 ORIGINAL

No. _____

In The
Supreme Court of the United States

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROBERT E. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI BEFORE JUDGMENT TO
THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH
CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Appeals Courts are split on whether fraudulent inducement of a commercial contract violates the federal fraud statutes and whether deprivation of property is a required element that the government must prove under the federal fraud statutes. The Questions Presented therefore are:

Whether fraudulent inducement of a commercial contract violates the federal wire fraud statute when neither loss of property nor economic harm to the property are the object of the transaction.

Whether the government may sustain a federal wire fraud conviction for fraudulent inducement of a commercial contract when the victim demands and receives something of value in exchange for the property subject to the transaction.

Whether the federal wire fraud statute requires the government to charge in the indictment and prove to the jury beyond a reasonable doubt the deprivation of property.

LIST OF PARTIES

The petitioner is Robert E. Carter, the defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

Carter Transportation Group, LLC and Carter Industries, LLC were the entities listed in the indictment but who were not charged in the case.

CORPORATE DISCLOSURE STATEMENT

Carter Transportation Group, LLC and Carter Industries, LLC are not public companies, were privately held and indirectly controlled by the Petitioner.

RELATED PROCEEDINGS

United States v. Carter, No. 24-2950, United States District Court for the Western District of Wisconsin, Notice of Appeal entered (docketed) October 30, 2024.

United States v. Carter, No. 22-cr-124, United States District Court Western District of Wisconsin, Order entered (denying motion for reconsideration for release amongst other relief based on grant of certiorari in *Kousisis*) October 25, 2024.

United States v Carter, No. 22-cr-124, United States District Court Western District of Wisconsin, Judgment entered (conviction and sentence) October 23, 2024.

United States v. Carter, No. 22-cr-124, United States District Court for the Western District of Wisconsin, Text Order entered (denying release pending appeal) October 17, 2024.

United States District Court, No. 22-cr-124, United States District Court for the Western District of Wisconsin, Order entered (denying motion for new trial) October 16, 2024.

United States District Court, No. 22-cr-124, United States District Court for the Western District of Wisconsin, Order entered (denying motion to dismiss superseding indictment) June 7, 2024.

United States District Court, No. 22-cr-124, United States District Court for the Western District of Wisconsin, Order entered (granting in part and denying in part motion to dismiss indictment) March 26, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Robert E. Carter respectfully petitions this court for a writ of certiorari for review before judgment to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The United States District Court for the Western District of Wisconsin did not publish its Opinion & Order on October 25, 2024, on the motion for reconsideration, but the opinion is listed in the Appendix.

The United States District Court for the Western District of Wisconsin issued a Text Order on October 17, 2024, which appears on the public docket in the district court at Docket Number 417.

The United States District Court for the Western District of Wisconsin did not publish its Opinion & Order on October 16, 2023, on the motion for a new trial, but the opinion is listed in the Appendix.

The United States District Court for the Western District of Wisconsin did not publish its Opinion & Order on June 7, 2024, on the motion to dismiss the superseding indictment, but the opinion is listed in the Appendix.

The United States District Court for the Western District of Wisconsin did not publish its Opinion & Order on March 23, 2024, on the motion to dismiss the original indictment, but the opinion is listed in the Appendix.

JURISDICTION

The judgment of the district court was entered on October 23, 2024. The notice of appeal was originally filed on October 17, 2024, and refiled on October 29, 2024. The case was docketed in the court of appeals on October 30, 2024, as No. 24-2950. The opinions

and orders of the district court were entered on October 25th, 17th, and 16th 2024, respectively and on June 7, 2024, and March 26, 2024.

Pursuant to this Court's Rules 11, 13.1, 13.3, and 13.5, this petition is timely filed on or before the due date.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and § 2101(e) and Rule 11 of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute provides in pertinent part:

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

18 U.S.C. §1343.

The federal wire fraud attempt statute, *18 U.S.C. §1349*, subjects "any person who . . . attempts to commit" that offense to the same penalties.

INTRODUCTION

Since this Court's decision in *Ciminelli v United States*, 598 U.S. 306 (2023) the government has impermissibly expanded the wire fraud statute through its use of the "fraudulent inducement theory." This theory of prosecution has placed a little less than half the country at risk of prosecution for criminal acts that the other half of the country does not face. That is because the five circuits who do not

embrace the fraudulent inducement theory cover some of the most populous states. United States v. Regent Office Supply Co., 421 F.2d 1174, 1181 (2d Cir. 1970); United States v. Sadler, 750 F.3d 585 (6th Cir. 2014); United States v. Bruchhause, 977 F.2d 464 (9th Cir. 1992); United States v. Takhalou, 827 F.3d 1307, 1310 (11th Cir. 2016); United States v. Guertin, 67 F.4th 445, 451 (D.C. Cir. 2023). But there is a more serious risk that this theory poses to the country, it allows the government to essentially transform virtually every breach of contract claim into a federal criminal act.

This Court has diligently attempted to curtail the government's actions and restrain its expansion of the wire fraud statute. First, in Skilling v. United States, 561 U.S. 358 (2010) this Court found the honest services statute (*18 U.S.C. § 1346*) unconstitutionally vague and narrowed its reach to only those schemes that involve bribes and kickbacks. In McDonnell v. United States, 579 U.S. 550 (2016) this Court narrowed the definition of "official acts" and held that erroneous jury instructions permitted the wrongful conviction of the former Governor of Virginia. Then, in Kelly v. United States, 140 S. Ct. 1565 (2020) this Court reversed the convictions of defendants charged with wire fraud holding that the object of a scheme to defraud under the wire fraud statute must be aimed at property in the hands of the victim. Emphatically, this Court said that "incidental losses" in a scheme to defraud cannot justify a wire fraud prosecution.

Finally, over a year ago, this Court invalidated the long used "right to control" theory of prosecution reversing convictions that relied upon the "ethereal right to accurate information" which this Court held is not a traditional property interest. What has become abundantly clear is that this Court continues to demonstrate to the government that most criminal fraud prosecutions are to be covered by the states as the principles of federalism have always required.

Also, more than thirty years ago, this Court decided that “deprivation of property” is essential in a prosecution for wire fraud. Indeed, it held that the government cannot prosecute a crime under the wire fraud statute without demonstrating that some property interest was targeted for harm. McNally v. United States, 483 U.S. 350 (1987)

Despite this Court’s obvious preference for the narrowing of the government’s ever-expanding use of the wire fraud statute, the Seventh Circuit Court of Appeals and the district court below do not accept that Kousisis v. United States, now before this court, presents a substantial question of imperative importance for the nation. (S. Ct. Rule 11)

Indeed, the Seventh Circuit denied all the relief sought by the Petitioner’s appeal for bail pending appeal pursuant to *18 U.S.C. § 3143(b)*, rehearing and rehearing en banc and motion for stay of order and mandate (rejecting the view that a similar question posed by the Petitioner is substantial). (Pet. App. 3-5) The district court went even further, concluding that *Kousisis* “concerns a question of honest services to a government entity, not loss by fraud on a private entity.” It relied on this Court’s holding in Shaw v. United States, 137 S. Ct. 462 (2016) and Schmuck v. United States, 489 U.S. 705 (1989) for the proposition that the Petitioner’s convictions were valid because neither net pecuniary loss of property nor intent to cause “financial loss” are required. (Pet. App. 7-12)

But *Kousisis* does indeed address an issue that is of imperative public importance. It will decide whether federal prosecutors, who wield an enormous amount of prosecutorial power can establish a federal crime simply by identifying a misrepresentation or false pretense that results in a contract.

This petition bolsters and illuminates the underlying imperative important question that *Kousisis* raises because it requires consideration of not only what happens when a contract is induced

by fraud and there is no economic loss, but what happens when a victim receives something of value in exchange for the property that was obtained by the inducement. (Pet. App. 27-46) This is an important aspect of the current circuit split now pending in this court. The Eleventh Circuit Court of Appeals decision in United States v. Takhalov, 827 F.3d 1307, 1310 (11th Cir. 2016) and the Ninth Circuit Court of Appeals recent decision in United States v. Milheiser, 98 F.4th 935 (9th Cir. 2024) illustrate the point.

Granting the petition in this case further bolsters the *Kousisis* questions because it presents specific conduct that this Court can examine in explaining why it must adhere to the principles of federalism in restraining the government's expansive use of the federal fraud statutes.

Petitioner, Robert E. Carter was the president of a small business trucking company, Carter Transportation Group, LLC ("CTG") and he obtained semi-tractors from Ryder Transportation Services ("RTS") and discussed leasing ten more semi-tractors from Nuss Transportation Equipment ("NTE").

The issue for the government was how these semi-tractors were obtained. The government contended that the Petitioner obtained the semi-tractors by fraudulent misrepresenting the financial status of CTG and another of his companies Carter Industries, LLC ("CIL"). (Pet. App. 31-46)

The government's evidence established that the Petitioner paid a security deposit as security against future non-payment, entered into an agreement allowing RTS to automatically withdraw funds from the Petitioner's bank account, provided RTS with insurance covering the full economic value of the semi-tractors, paid for the use of the semi-tractors and voluntarily returned the semi-tractors upon request. (Pet. App. 22-31)

Still, the government argued that the Petitioner nevertheless committed property fraud because RTS would not have leased Petitioner the semi-tractors had it known the truth. (Pet. App. 41-46) Reyling on United States v. Leahy, 464 F.3d 773 (7th Cir. 2006) the district court agreed that pecuniary loss of the property was not required if the semi-tractors were obtained by fraud. The fact that the property identified by the government as the object of the scheme was not targeted for harm is irrelevant held the district court. (Pet. App. 36-41) It would later hold that *Kousisis* is not applicable because RTS suffered a loss. (Pet. App. 2-6) But as *Kelly* demonstrated, incidental losses do not satisfy the requirement to justify property fraud.

These facts demonstrate exactly how broad and expansive the fraudulent inducement theory really is. Under this theory, benefits given in exchange for property and even conditions precedent that are required to be met before a contract can be signed would constitute property. The only requirement that the government would have to show to bring the contract within purview of the federal fraud statutes is a simple misrepresentation or false pretense. Neither Congress nor the Founders could have intended that federal jurisdiction would sweep so broadly.

The Seventh Circuit's holdings in *Leahy* and *United States v. Kelerchian*, 937 F.3d 895 (7th Cir. 2019) which *Kousisis* cites as cases joining those circuits validating the fraudulent inducement theory, illustrate why the question raised by the Petitioner must be resolved along with those raised by *Kousisis*.

These holdings clearly relieve the government of an essential requirement to sustain a property fraud conviction under *McNally*, the deprivation of property. They conflict with this Court's reasoning in *Kelly* that an incidental loss is not sufficient to support a property fraud conviction. As shown by the

Petitioner's conviction, in the Seventh Circuit, giving something of equal or greater value in exchange for the victim's property does not prevent a prosecution for property fraud under the federal fraud statutes.

Another fundamental problem raised by the questions proposed by the Petitioner is that giving something of value in exchange for receipt of property, especially prior to receipt of the property, is inconsistent with the intent to defraud. (Pet. App. 31-46) The fraudulent inducement theory would carve out an exception for the government to prosecute as fraud, a commercial transaction where the parties have fully considered the risks and rewards of the transaction. That is exactly what occurred in the Petitioner's case. RTS secured itself against property loss, but the government obtained a conviction merely because there was a misrepresentation. (Pet. App. 36-46) Yet these prosecutions were allowed to go forward on the government's view that merely lying or deceiving to obtain property is a violation of the federal fraud statutes.

The government's expansive use of the fraudulent inducement theory threatens the mens rea requirement under the federal fraud statutes. If a party gives something in exchange of equal or greater value to obtain another's property and leaves that party in a more favorable position than it was before the transaction, the principles of federalism and due process simply do not permit prosecution under the federal fraud statutes simply because a misrepresentation results in a contract. This case is the exact avenue through which this court can further clarify that the federal fraud statutes do not reach all frauds. *McNally*, 483 U.S. 350.

STATEMENT OF THE CASE

A. Factual Background

1. Contract Negotiations

RTS. RTS is a provider of semi-tractors and dry-van trailers. RTS entered negotiations with CTG to lease three semi-tractors and two 52' foot dry van trailers. A new business is required to complete a "new business questionnaire" prior to a determination about suitability for business. As a new business, CTG completed the questionnaire and qualified to move to the next review stage. (Pet. App. 27-36)

That stage required a review by RTS, and it requested internal financial information from CTG. The initial review determined that a third-party guarantor was required. RTS requested and received fraudulent financial information from CTG's third-party guarantor, CIL. RTS entered a leasing contract with CTG on condition that CIL executed a Third-Party Payment Guarantee. A proposed contract was circulated amongst the parties.

While the contract was being reviewed, RTS requested additional conditions before it would execute the lease contracts. First, CTG would have to pay a security deposit of \$17,500 and sign a security agreement. Second, CTG would have to execute an unconditionally automatic clearing house withdrawal agreement permitting RTS to withdraw funds for invoices from its business bank account. Third, CTG had to secure, at its expense, a commercial-grade insurance policy securing all RTS's property for its full economic value. RTS stressed that no agreement could be signed, nor the property delivered without these conditions being met first. CTG met all the conditions. Upon verifying that these conditions were met, RTS executed the contracts and delivered the semi-tractors and trailers to CTG. (Pet. App. 22-31)

During the contract, RTS withdrew \$7,200 from CTG's bank account before it started receiving ACH rejection

notices. RTS contacted Petitioner and requested payment of the rejected ACHs. Petitioner sent an electronic wire transfer payment for \$27,927. A second ACH rejection notice was provided to the Petitioner for \$11,675 which was also paid. During the contract, Petitioner paid RTS a total of \$64,302.

NTE. The petitioner contacted NTE and requested a proposal for the cost of leasing and buying ten semi-tractors. NTE prepared the proposal and met with the Petitioner to discuss the proposal. After the meeting, NTE requested application and financial information. NTE also received fraudulent financial information. However, NTE's president was skeptical of the information and asked employees to conduct a further background check on Petitioner. The background check revealed adverse information and NTE terminated negotiations. After both transactions had long ended, the government decided to investigate the transactions as potential federal crimes.

At trial, it was shown that RTS entered a contract with Petitioner, and that Petitioner had paid the required amounts of money before and during the contract. It was no dispute that NTE provided no semi-tractors. The government's theory was that Petitioner had obtained the semi-tractors from RTS by fraud and attempted to do the same with NTE. It was stated that if NTE and RTS had known that the financial statements were fraudulent, neither would have done business with Petitioner. In essence, the government argued that NTE and RTS had a right to accurate information before it decided how it would distribute its assets. (An invalid theory under *Ciminelli*)

B. District Court Proceedings

A grand jury charged the Petitioner on October 12, 2022, with 17 counts of wire fraud and attempt to commit wire fraud (*18 U.S.C. 1343 and 1349*); six counts of promotion money laundering; (*18 U.S.C. 1956(a)(1)(A)(i)*); and two counts of aggravated identity theft (*18 U.S.C. 1028A*). The indictment alleged various acts of financial fraud and that the Petitioner executed

the fraud schemes to obtain money or property. It also contained a forfeiture allegation for \$511,117.

Petitioner moved to dismiss the indictment on several bases, including that *Ciminelli* barred prosecution of all business-related fraud, lack of jurisdiction, and that commercial negotiations do not constitute fraud if they are not designed to defraud and deprive a victim of property. (Pet. App. 47-65) The government filed responses with no opposition to dismissal of the money laundering charges and the wire fraud charges based on lack of jurisdiction. In a letter, the government informed the district court that it intended to remove the forfeiture allegation and narrow the remaining charges. (Pet. App. 55-65)

On April 24, 2024, the government obtained a superseding indictment charging one count of wire fraud based on the contract with RTS and a second count based on the NTE negotiations. The district court dismissed the original indictment in its entirety and the Petitioner proceeded to trial. (Pet. App. 55) The district court rejected the Petitioner's arguments that no violation of the wire fraud occurred because there was no deprivation of property. (Pet. App. 31-46)

A two-day trial began on July 15, 2024. The government's theory was that the Petitioner wanted semi-tractors, and he lied to get them. It presented evidence of the fraudulent statements which the Petitioner had admitted were false. The government's evidence established that RTS entered the contract because of the third-party fraudulent financial statements. (Pet. App. 22-30) But it's evidence also established that RTS placed specific financial and security burdens upon the Petitioner which had to be met before the semi-tractors were delivered. ("Robert, he gave us all the things we needed, to get the contract started.") (Pet. App. 22-30)

One government witness testified that he wanted "extra security" and "protection" for RTS. *Id* at 28 He also admitted that he would not approve the release of any property until the required conditions were met,

specifically, the security deposit. (Pet. App. 22-30) Another witness testified that she reviewed the payment record of CTG and confirmed that RTS had received multiple payments from Petitioner.

Petitioner sought to advance the theory of defense that he acted in good faith and there could not have been a deprivation of property because RTS received something of value and placed financial and security burdens upon the Petitioner. (Pet. App. 31-40) These conditions altered the benefits and burdens of the transaction in RTS's favor. The district court ruled that the Petitioner could not advance such a defense and held that, "there is no such thing as a good faith defense in the Seventh Circuit." (Pet. App. 31-46) It further held that, deprivation of property and benefits of the bargain defenses "smacks of legal argument." It barred the Petitioner from presenting evidence or even mentioning those theories to the jury.¹

The petitioner requested that the jury be charged on a no deprivation of property theory and that a scheme to deceive does not amount to a scheme to defraud if the victim is not harmed. He also sought a version of the good faith instruction which would have advised the jury that "under the antifraud statutes, even false or fraudulent pretense, representation, promise, omission, or concealment do not amount to fraud unless done with fraudulent intent." (Dist. Ct. Dkt. #255, 283, 28, 321) The district court denied all jury instruction requests and charged the jury that "A person acts with intent to defraud when he acts knowingly and with intent to deceive or defraud another person by causing

¹ The Solicitor General has now confessed error in admitting that the government should not be arguing against a benefit of the bargain instruction. Kousis v. United States, 23-909, Oral Argument, at 77, 6-25 December 9, 2024.

"So, Your Honor, I don't think there's a one size fits all approach to this, and let me just get the difficult part out first. They've identified a couple of instances in their brief where the government opposed the essence of the bargain instruction. The government should not be doing that. And we filed a corrective letter in one case, and the other case is post-verdict and we intend to confess error in that case as well." Solicitor General, United States

gain to himself and potential loss of money or property to another." (Pet. App. 36-46)

After 45 minutes of deliberation, the jury returned a verdict of guilty. The petitioner moved for a new trial again arguing that there was no wire fraud proven because NTE never entered into a contract or agreement and never was in danger of a property loss. RTS received something of value in exchange for its property before parting with it and the benefits of property protection along with being paid a substantial amount of money benefited RTS. (Dist. Ct. Dkt. #377-380) The district court denied the motion concluding that the government proved that the property was "obtained" property by fraud and that was sufficient to sustain the convictions. (Pet. App. 2-6)

At sentencing, the district court found a \$162,590 "intended loss" amount based upon Petitioner's probability of success in negotiating with NTE. It found a \$29,056 actual loss related to RTS based on billed invoices. It denied all but one adjustment based on the lesser harm adjustment and sentenced the Petitioner to three years imprisonment and restitution in the amount of \$29,056. (Pet. App. 7-15) It also denied the motion for bail pending appeal. (Pet. 16-17)

The Petitioner was not aware of *Kousisis* prior to trial. After learning of the grant of certiorari in *Kousisis*, Petitioner moved for reconsideration of his motion for bail pending appeal. The district court denied the motion holding that (1) *Kousisis* concerned a question of honest services fraud; (2) Seventh Circuit and Supreme Court precedent supported the convictions because neither pecuniary loss nor intended financial loss are required for conviction under the wire fraud statute; and (3) even if the attempted wire fraud count was reversed based on *Kousisis*, the substantial wire fraud count would remain because there was an actual monetary loss. (Pet. App. 2-6)

C. Seventh Circuit Proceedings

The Petitioner filed a Notice of Appeal on October 30, 2024, in the district court and shortly after appealed

the district court's decision denying bail pending appeal. Dist. Ct. Dkt. 431) Petitioner argued that he had raised in the district court essentially the same argument as present to this Court in *Kousisis*. Further that the Seventh Circuit's precedent validating the fraudulent inducement theory was in jeopardy and that the convictions of the Petitioner are likely to be reversed if there is favorable ruling in *Kousisis*. A three-judge motion panel denied the motion.

The Petitioner sought review of that decision by filing a motion for rehearing and rehearing en banc arguing that the Seventh Circuit was overlooking the circuit split, that its precedent conflicted with other circuits and that bail pending appeal was justified. The same three-judge panel denied that motion.

Petitioner then filed an emergency motion pursuant to *Fed. R. App. P. 41(d)(2)* asking the Seventh Circuit to stay its order and mandate pending application to this Court for writ of certiorari and bail pending appeal. The motion argued that the writ of certiorari was likely to be granted because the issues raised by the Petitioner were already before this Court as a substantial question. Further that five justices will likely vote in favor of reversal based on its recent history in federal fraud cases. Finally, that a stay was for good cause and maintained the status quo while this Court considers the petition, bail application, and the decision in *Kousisis*. The same three-judge panel denied that motion too.²

REASONS FOR GRANTING THE PETITION

I. This Case is of Imperative Importance

A. Companion to Ordinary Certiorari Petition

1. Providing Equal or Greater Value in Exchange for Property.

² Petitioner does not seek review of the Seventh Circuit summary orders because they were issued without opinion.

The questions presented by this petition warrants this Court exercising its discretion to grant this petition based on a companion case. This Court has already granted certiorari.³ *Kousisis v. United States* 23-909 already presents an issue of imperative importance. The Court will resolve whether the government's fraudulent inducement theory of prosecution is valid. There is no question that the Court's ruling in *Kousisis* will have a profound effect upon current prosecutions and future prosecutions. The Seventh Circuit embraces the fraudulent inducement theory so it would be futile to await a decision from the circuit.

Regardless, this case presents facts that bolster and underscores the relief sought by *Kousisis*. (Pet. App. 22-54) On the questions presented by this case, the court can now point specifically to what "deprivation of property" means in the context of a wire fraud prosecution. The district court below specifically ordered that the Petitioner could not present or offer evidence that he did not deprive the victims of their property or that they received the benefit of their bargain. Yet, the focus of the wire fraud statute is the "obtaining" of property. Thus, it is necessary to evaluate "how" the property was "obtained." The government's fraudulent inducement theory says that merely lying, misrepresenting, or use of a false pretense is sufficient for establishing the "how." Below in the district court, Petitioner was told that it is irrelevant.

However, if there is no ability to determine "how" the property was "obtained" it follows that there can be no determination of whether the victim was "deprived" of the property. The critical factual circumstances here make the "how" very clear. Although the Petitioner provided fraudulent statements, that is not "how" he "obtained" the property. The fraudulent statements demonstrate "how" the Petitioner induced the contract. But what

³ See *United States v. Booker* and *United States v. Fanfan* consolidating criminal cases that presented the same/similar issues of imperative importance.

happens next is quite different than what happened in *Kousisis*. *Kousisis* shows that the fraudulent inducement resulted in superior contract services being performed. The deception was about "how" the services were being performed. Here, the fraudulent inducement of the contract prompted a demand. RTS agreed to enter the contract, but it altered the benefits and burdens of the contract in its favor by requesting something of value in exchange.

RTS demanded (1) payment of a specific amount of cash for security against future non-payment; (2) the ability to unconditionally withdraw cash; and (3) commercial grade insurance securing its property for the full economic value during the entire term of the lease. It wanted these demands met before it would deliver the property. The property here is undisputedly, the semi-tractors. Thus, if the Petitioner must give RTS something of substantial value before receiving the semi-tractors, it follows that there cannot be deprivation of property. RTS has received something of value. This fact pattern illuminates the problem with the fraudulent inducement theory.

Under these very straightforward facts, the government obtained the Petitioner's conviction simply by alleging a deceptive act. But RTS received all the benefit. Plainly, the wire fraud statute was not designed to cover this kind of conduct, but the fraudulent inducement theory sweeps so broadly that it blurs the line between innocent conduct and criminal acts. This Court must make that line much clearer now.

2. The Intent to Defraud Flows from Actual Deprivation of Property.

If this Court permits the fraudulent inducement theory to remain valid, then the intent to defraud will be read completely out of the wire fraud statute. If a victim is deprived of property through fraudulent means and receives nothing of equal or greater value in exchange, it follows that the perpetrator "intended" the harm that results.

Consider the facts below. Only after RTS received the benefits that it sought did it deliver the property. RTS exercised those benefits by withdrawing money from the Petitioner's bank account. When those efforts failed, the Petitioner voluntarily wired the requested funds to RTS on several occasions. The government argued below, and the district court agreed that these payment responses were irrelevant because the Petitioner made fraudulent misrepresentations to get the property in the first place. But that position ignores what the Petitioner did to "obtain" the property, he gave something of value in exchange. So, what the Petitioner did before and after he received the property directly impacts the mens rea requirement of the wire fraud statute. It solidifies the rationale of this Court in *Schmuck*, "what matters is what was in the mind of the [Petitioner] at the time he sent the wire."

The fraudulent inducement theory, therefore, gives the government the inherent power to determine the mens rea element without regard to innocent conduct. The theory concerns itself only with misrepresentations, fraudulent statements, or false pretenses. This is why too, the government's fact intensive circuit by circuit benefit of the bargain theory makes the fraudulent inducement theory so dangerous. This approach would continue to expand the reach of the wire fraud statute. Here, the government was allowed to obtain a conviction on the fraudulent inducement theory even though the Petitioner's conduct demonstrated that there plainly was no intent to defraud. That is why this Court cannot rely upon the government's empty promise that it will exercise prosecutorial discretion fairly, this case shows that it will not.⁴

Another reason that this Court should grant certiorari in petitioner's case is that without a determination regarding the deprivation of

⁴ These facts demonstrate that the DOJ's claim of not using the fraudulent inducement theory to prosecute crimes is cabined by materiality does not limit the wire fraud statute's reach of conduct that is clearly covered by the state law common fraud provisions.

property, the federal fraud statutes are vague, and it is difficult to discern what conduct is criminal when the government applies an overly broad theory of prosecution like the fraudulent inducement theory. The government's use of the fraudulent inducement theory without deprivation of property is contrary to this Court's teachings about how to construe vague criminal fraud statutes. It departs from at least two basic principles this Court has set forth.

First, "an ambiguous criminal statute is to be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); see also *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). This rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Thus, as this Court explained in invalidating the original "honest services" fraud theory, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. 350, 359-60 (1987).

The federal fraud statutes do not clearly establish that deprivation of property is an element of the offense. This is why the district court below and the government relied on the legal refrain that neither economic loss nor the intent to cause financial harm are relevant. That is also why the government is advancing this argument in *Kousisis*, that this Court has never held that economic loss or loss of property is a requirement under the federal fraud statutes. The government escapes through the broad window of ambiguity because it does not have to prove what should be an important requirement under the fraud statutes, that the victim's property was targeted and that it was deprived of or lost because of a defendant's criminal acts. The time has come for this Court to say so explicitly.

Second, criminal statutes should be read narrowly. But this court reinforced that notion just last term

in *Fischer v. United States*, 603 U.S. ____ (2024) when interpreting the obstruction of justice statute. There, this Court narrowed the reach of subsection (c)(2) of the statute and prescribed exactly what the government must prove to initiate and sustain a prosecution under that subsection. Justifying the limited reach of the subsection, this Court held that, it would be “improper to substitute for those fine-grained statutory distinctions the charging discretion of prosecutors and the sentencing discretion of district courts.” *Fischer v. United*, 603 U.S. ____ 12, n.2 Further, it reasoned that, when interpreting congressional intent of the meaning of words in a statute “the Court must decide how it is linked to its surrounding words, and give effect, if possible, to every clause and word of the statute.” *Yates v. United States* 574 U.S. 528, 536 (plurality opinion) see also *Williams v. Taylor*, 529 U.S. 362, 404 quoting *United States v. Menasche*, 348 U.S. 528, 538-539

Because the government’s theory of prosecution under the fraudulent inducement theory sweeps so broadly, it is necessary for the Court to interpret what conduct can be reached by deciding whether Congress intended that “deprivation of property” be a required element under the federal fraud statutes. A determination on this important issue informs the accused of exactly what conduct is prohibited and the government will know what conduct it can charge when exercising its prosecutorial discretion. The petitioner’s questions give this Court that avenue. Here, the government’s fraudulent inducement theory dramatically upsets the balance of power between the federal government and the states. Most fraudulently induced contracts are covered by state common law fraud. That is because the terms of a contract are often governed by state law. Thus, the remedy for an aggrieved party is a civil breach of contract claim, not a federal criminal prosecution.

3. Protection and Receipt of Property

The fraudulent inducement theory must fall for

another reason demonstrated by the facts of this case. It demonstrates further the reasons that *Kousisis* should prevail. When a claimed victim of a fraudulent scheme acts in a manner to protect its property interests and ensure its return in an acceptable condition, a prosecution under the fraudulent inducement theory cannot be allowed to stand.

RTS required the Petitioner to insure the semi-tractors' full economic value. Thus, RTS had once again secured a benefit exclusively ensuring protection of its property. When the Petitioner made no additional payments to RTS upon demand, RTS terminated the lease agreement and requested that the Petitioner voluntarily return its property. The petitioner complied. As a result, RTS was in no less favorable position than it was prior to its transaction with the Petitioner.

Yet, the fraudulent inducement theory allowed the government to claim these protections of the property were irrelevant and mattered not under the wire fraud statute. This case is therefore of imperative importance alongside *Kousisis* because it demonstrates exactly what will happen in many more cases across the country if this court does not reign in the government's use of the fraudulent inducement theory. Innocent conduct will become criminal, and convictions will be obtained on the slightest and most arbitrary of misstatements, misrepresentations, fraudulent statements or false pretenses.

B. The Federal Circuit Courts of Appeal Are Split

1. Seventh Circuit and Sixth Circuit

Kousisis has laid out the clear circuit split on the general applicability of the fraudulent inducement theory and why this Court must invalidate that theory, and the Petitioner agrees with that position. But the federal appeals courts remain split on what is required under this theory to meet the demands of the federal fraud statutes. The Seventh Circuit

and the Sixth Circuit demonstrate that split.

First, while *Kousisis* cites *Leahy* as being the case embraced by the Seventh Circuit creating the 6-5 circuit split that this court will consider in that case, it is *Kelerchian*, that has the most implications here. In that case, the Seventh Circuit considered the reach of the wire fraud statute where a fraudulently induced contract produced the sale of machineguns. *Kelerchian* paid the full price required for the machineguns, thus there was no deprivation of property. But the Seventh Circuit upheld the fraud convictions based on the "benefit of the bargain" theory. The government now urges in this Court that a fact intensive case by case review involving the fraudulent inducement theory is all that is required. Far from it. The Seventh Circuit was guided by the Second Circuit's decision in *Schwartz*, which focused on the heart of the bargain.

The Seventh Circuit also held that the property interest challenge (that the government had an interest in regulating the sale of machineguns) raised by *Kelerchian* was his strongest argument. However, because *Kelerchian* had exposed the seller to risks that the seller was not otherwise exposed to, the wire fraud statute was applicable. The court reasoned,

"The Second Circuit opinions and our opinion in *Leahy* show that schemes to defraud a party into entering a contract that it would not enter, if it had been told truth, but where the fraudsters deliver the agreed money, goods, or services are close to the edge of the reach of the wire fraud statute."

This Court is faced with that very question now in this petition, whether a fraudulently induced contract violates the wire fraud statute when the accused has given the victim something of value in exchange for the property that is sought. The district court below, relying on *Kelerchian*, held that regardless of the Petitioner's performance, he was liable to stand trial for wire fraud. This is why the Seventh Circuit refused to grant any relief below, it

stands by its precedent making a crime of conduct that is innocent, and which directly negates any intent to defraud. It is now time for this Court to say exactly what conduct is beyond the reach of the wire fraud statute, not just in the Seventh Circuit, but for the entire country.

The Sixth Circuit has recently made a similar holding deviating from the path it took in United States v. Sadler, 750 F.3d 585 (6th Cir. 2014) when it held that the purchase of pills based on fraudulent representations did not violate the wire fraud statute. The defendant paid exactly what was required to be paid, so a wire fraud prosecution could not be sustained. The Sixth Circuit now says that under similar circumstances, where a third party has been contracted to perform services, misrepresentations, false pretenses, and false statements may serve as a basis for sustaining mail fraud conviction. In United States v. Bolos, No. 22-5486 (6th Cir. 2024) the Sixth Circuit upheld a mail fraud conviction reasoning that the “bargain” that Bolos claimed to have secured was fraudulent and induced insurers to part with their money. Bolos had argued that because the third-party contractors were paid for their services and the prescriptions were paid for and delivered to the patients, Sadler and Ciminelli barred his prosecution. However, the Sixth Circuit held that the third-party contracts were not the object of the scheme but rather the money that the insurers had paid.

The district court below here made a similar finding when denying the Petitioner’s motion to dismiss. It concluded that the lease contracts that RTS had signed with the Petitioner were not the object of the scheme, but rather the semi-tractors. This sufficed to require the Petitioner to stand trial. But these holdings ignore a key requirement under the wire fraud statute, “deprivation of a property right.” An exchange of something of value had been given to RTS before it signed the contracts. This is the difficulty in Bolos. The Sixth Circuit says that the insurers were deprived of their money because they

paid for prescriptions generated by the recipient of the money. Yet, the prescriptions were real, the patients were real, and they received the medications as legally insureds. There is fraudulent inducement of the payments, but who was deprived of a property right?⁵

2. The Fifth Circuit and the Ninth Circuit

Two recent decisions by the Fifth and Ninth Circuits which come to conclusions different than the Seventh and Sixth Circuits illustrate why this court should grant certiorari and decide Petitioner's question alongside *Kousisis*. In *United States v. Milheiser* 98 F.4th 935 (9th Cir. 2024), the Ninth Circuit Court of Appeals revered wire fraud convictions holding that the fraudulent inducement of a contract cannot sustain a wire fraud prosecution if the victim receives exactly what they paid for. In *Milheiser*, a group of third-party print toner sellers contacted various customers. Once contacted, the customers were told that they were customers of these third parties, that print toner prices were increasing, and that purchasing toner now would ensure a lower price. All these statements were false. The customers believed them and purchased the toner. The government, using the fraudulent inducement theory, charged and convicted the defendants at trial. On appeal, the Ninth Circuit reversed, holding that because the object of the scheme was the print toner, and the victims received the exact toner that they agreed to pay for, there was no deprivation of property. The Ninth Circuit reasoned:

“We agree with the Second, Eleventh, and D.C. Circuits that not just any lie that secures a sale constitutes fraud, and that the lie must instead go to the nature of the bargain. That rule is consistent with our holding in *Yates* that the right to accurate information or to make an informed business decision does not constitute something of value under

⁵ *Bolos* has filed a petition for certiorari which is pending.

the federal criminal fraud statutes, 16 F.4th at 265, and with our holding in *Bruchhausen* that deception does not amount to fraud simply because it results in money changing hands, 977 F.2d at 467-68. The nature of the bargain requirement properly excludes from liability cases in which a defendant's misrepresentations about collateral matters may have led to the transaction, but the buyer still got the product that she expected at the price she expected."

The Ninth Circuit concluded that liability under the wire fraud statute could only be sustained if the misrepresentation went to the price, quality, or other key aspects of the deal.

Thus, the Petitioner's question permits this Court to clarify amongst the lower courts the standard that must be applied when determining what constitutes deprivation of property. This is important because the government would be required to identify and charge, the price, quality, or other key bargains of the deal which affected the victim's decision resulting in the deprivation of their property. That is a logical conclusion to be drawn from this Court's precedent in *McNally*, *Skilling*, *McDonnell*, *Kelly* and *Ciminelli*.

In prosecuting the Petitioner below, the government did not identify price or quality or any other key bargain of the transaction for RTS. But we may conclude from the record that it was payment. So, because payment was a key issue in the transaction for RTS, it requested and received a cash security deposit. It requested and received automatic withdrawal authority. RTS also cared about damage or loss of its property. It therefore requested and received commercial insurance coverage for the full economic value of its property. The insurance protected RTS property from loss. In the Seventh Circuit, under these circumstances, the Petitioner is guilty of wire fraud. In the Ninth Circuit, under these circumstances, the Petitioner can't be charged

with wire fraud.

The Fifth Circuit Court of Appeals recently stayed a securities fraud prosecution pending the decision of this Court in *Kousisis*. The court agreed, unlike the Seventh Circuit, that the decision in *Kousisis* will have a direct impact upon the prosecutions based on fraudulent inducement. In *United States v. Constantinescu*, No. 24-20143 (Oct. 22, 2024, 5th Cir. 2024) the government charged a pump and dump fraud scheme alleging that the defendant's used social media accounts to fraudulently induce the purchase of stock, depriving the eventual purchasers of their money. The defendants moved to dismiss, arguing that *Ciminelli* barred their prosecution because the government failed to identify a property right for which any purchaser had been deprived. The government replied that money was the object of the pump and dump scheme. The district court dismissed the indictment holding that *Ciminelli* "squarely applied" to the case. The government appealed to the Fifth Circuit arguing that the district court was wrong. The appellants responded that the public tweets were not traditional property, and the money was not obtained from the public, it was the property of the defendants who were either buying or selling the stock. Both the appellants and the government agreed that *Kousisis* will have a profound impact upon the case even though it involves securities fraud.

The government's fraudulent inducement theory is on display in this case. It could not escape the claws of *Ciminelli*, so it piggybacked to the fraudulent inducement theory by claiming that the money that any purchaser spent to buy the stock that the defendants were tweeting about was fraudulently induced to make the purchase and therefore was deprived of their property. Yet, the defendants received no property. These are the contortions that the government is twisting itself into to bring all types of conduct within the reach of the federal fraud statutes based on the fraudulent inducement theory.

This will continue unless this Court puts a stop to it.

Like the Petitioner's prosecution below, there is simply no mens rea component to this prosecution because there is plainly no property deprivation. So, what fraudulent intent is there to prove? Fraudulent or criminal intent are essential elements of a prosecution under the federal fraud statutes. In *Constantinescu*, the defendants are using their own money and no doubt influencing the purchase of shares, but the individuals purchasing those shares are getting something in return for them (the government doesn't allege that there isn't a legitimate company selling these shares). Here, the Petitioner responded to RTS demands for several layers of security before delivering any property. Thus, while RTS may have been deceived into entering the contract with Petitioner, it was not defrauded. This court should grant certiorari and decide Petitioner's question because they bolster the basis on which *Kousisis* should be granted relief.

C. Clarification of *Shaw* and *Ciminelli*

1. *Shaw*

Shaw features prominently in *Kousisis* as the government attempts to use its reasoning to cabin the far-reaching arms of its fraudulent inducement theory. The district court made the same attempt in justifying why Petitioner's case did not raise a substantial question of law or fact. The Seventh Circuit avoided the issue altogether in denying all the motions before it. The district court below also reasoned that *Shaw* is a basis for sustaining the wire fraud convictions because pecuniary loss or intended financial loss are not required for a fraud conviction under the wire fraud statute. But, deprivation of property is required, without it, there is no fraudulent or criminal intent that can be shown. The Petitioner's question raises that issue for resolution.

Shaw's holding that the bank fraud statute does not require pecuniary loss or intended financial loss does not sweep as broad as the government in

Kousisis and the district court below suggest. First, *Shaw* dealt with an actual loss and deprivation of property (money stolen from a bank depositors account held by the bank). This Court addressed whether the defendant's target of a bank depositor's account rather than the bank itself was sufficient to constitute the bank's property under the bank fraud statute. This Court reasoned that a customer's bank deposits become the bank's property when accounts held by the customer entrusts the bank with custody of their money. Second, the court applied the pecuniary loss and intended financial loss reasoning to *Shaw*'s argument that he didn't directly target the bank.

As *Kousisis* suggest in his reply brief for certiorari, *Shaw*'s holding is limited to the bank fraud statute in a factual circumstance substantially different than those posed (1) under a fraudulent inducement prosecution theory and (2) where there is an exchange of property and benefits provided prior to receipt of the victim's property. Thus, both the government and the district court below are incorrect that *Shaw* supports validating the fraudulent inducement theory. It plainly does not. More specifically, to say that *Shaw* supports a conviction in which the facts make clear that the victim chose to eliminate its risks even before parting with its property and receives its property back, demonstrates how far beyond the wire fraud statute's reach the fraudulent inducement theory can take a case. Those tentacles will continue to grow unless this Court clearly draws distinctive boundaries by granting certiorari on the Petitioner's question and answering them alongside *Kousisis*. If there is an exchange of something of value for the property, there is no deprivation, and thus no intent.

This court should clarify the limits of its rationale in *Shaw* to ensure that the lower courts do not misinterpret its holding to justify an expansive reach of the wire fraud statute under the government's fraudulent inducement theory.

2. *Ciminelli*

Ciminelli clearly eviscerated the "right to control" theory of fraud. That has not stopped the government nor the lower courts from seeking to obtain and allow prosecutions that skirt the spirit of the holding. The time has come for this Court to prevent that action by speaking clearly and decisively to the government, an American citizen cannot be prosecuted under the wire fraud statute on the theory of a fraudulent inducement. To sustain a conviction under the wire fraud statute, the government must charge in the indictment a specific deprivation of property and it must prove that deprivation of property to a jury beyond a reasonable doubt. The principles of federalism and due process require nothing less.

The Petitioner's prosecution below illustrates the point. The government charged that the Petitioner entered a contract with RTS for semi-tractors and that those semi-tractors were provided to the Petitioner based on false statements, misrepresentations, and false pretenses. But it does not allege that RTS was neither deprived of nor lost its property. The district court below specifically ordered the Petitioner to exclude any mention of deprivation of property, benefit of the bargain or that he acted in good faith as defenses. Embracing the government's fraudulent inducement theory, the district court below allowed the government to escape the argument that *Ciminelli* rejected, the right to accurate information is not a property right.

That would have been particularly true here because the fraudulent acts relied upon by the government to obtain the convictions were false financial information. This is the exact argument that the defendant's in *Constantinescu* prevailed on. The government below did exactly what the government has done now in *Constantinescu*, claiming another form of property.

But as *Kousisis* argues, a government repackaging of the property interest via the fraudulent inducement

theory still fails to address the deprivation of property required for a wire fraud conviction. The government failed that test below, and it failed it in both *Kousisis* and *Constantinescu*.

D. Incidental Loss as A Byproduct of the Scheme

The district court below held that any decision by this Court in *Kousisis* would not affect the Petitioner's RTS wire fraud conviction. It is wrong on two fronts (1) a wire fraud conviction cannot be sustained if there is no deprivation of property, particularly where the victim here received something of value in exchange for providing the property, eliminated any risks to its property and then received its property back; and (2) incidental losses do not support a wire fraud conviction.

Only the second point requires further discussion. The government below identified the property as semi-tractors. For the loss to support a conviction under the wire fraud statute, the semi-tractors must be the property that is lost or targeted for harm. The government never proved that the semi-tractors were harmed nor lost. Indeed, the district court below barred the Petitioner from defending against the charges based on no deprivation of property.

RTS billed the Petitioner for use of the tractors while they were in Petitioner's possession. RTS had received a security deposit against future non-payment (the \$17,500 it required before even delivering the semi-tractors) any billing for use of the semi-tractors was a by-product of the scheme and incidental. Thus, the loss that the district court cited does not support the RTS wire fraud conviction, RTS both secured and protected its property and ultimately voluntarily received the property back.

This court long ago held that incidental losses do not support wire fraud convictions. It emphasized that holding in *Kelly* and that remains the law of the land today.

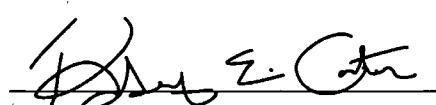
II. Consolidation of this Case and Kousisis

Consolidation of this case is important and imperative because it provides the exact factual circumstances which Kousisis and other cases such as Bolos and Constantinescu raise in demonstrating exactly how dangerous and expansive the fraudulent inducement theory really is.⁶ It bolsters the arguments of Kousisis and shows why this Court must act now to make clear the limits that the principles of federalism and due process place upon the reach of the wire fraud statute. As laid out above, this Court has a recent and historical basis on which to rely for consolidating this case and treating it as companion to Kousisis. The country can no longer wait, the government's appetite to further intrude upon the province of conduct generally covered by the states is expanding, only this Court can repeal that appetite.

CONCLUSION

The Court should grant the petition and consolidate this case with *Kousisis*.

Respectfully submitted,



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DATED: December 13, 2024

⁶ See *Students for Fair Admissions v. University of North Carolina*; *Gratz v. Bollinger*; *Trump v. NAACP*; *McAleenan v. Vidal*; *Ross v.*

California (collection of consolidation cases)

No. _____

In The
Supreme Court of the United States

ROBERT E. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**CERTIFICATE OF WORD
COMPLIANCE**

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI in the above-entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 8,821 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: December 13, 2024

Robert E. Carter

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