

No._____

IN THE SUPREME COURT OF THE UNITED STATES

LESLIE ROBERT BURK, PETITIONER

V.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

Leslie Burk owned a business that turned cargo containers into buildings. The company maintained a website on which it advertised its services and achievements. Not every statement that appeared on the website over time was entirely accurate. The business, however, manufactured and shipped buildings for use as homes, offices, and storage facilities.

Out of all the contracts Burk's business had, a handful of customers had bad experiences with the business. Their homes were delayed or never finished, because of the circumstances of the particular contracting parties, ranging from site selection issues to permitting problems. On these troubled contracts, disputes arose between the customer and Burk's business over performance and refunds.

The government used those disputes to accuse Burk and his partner of wire fraud, claiming that the two had concocted a scheme, meant to defraud people, of "purporting to be builders of container homes[.]" The evidence, however, showed an ongoing business that constructed homes and buildings out of cargo containers. Burk was nonetheless convicted. The Fifth Circuit affirmed his convictions, pointing to evidence of statements that might have induced a person to contract with Burk.

The case presents an issue about the scope of the wire-fraud statute similar to those under consideration in *Kousisis v. United States*, No. 23-909, and a question of how fraudulent intent can be proved in the context of a legitimate, on-going business that experiences a handful of failed contracts. The questions presented for review are

1. Whether the wire-fraud statutes criminalize a deceptive statement that induces an ordinary commercial contract that the party who made the statement intends to fulfill.
2. Whether the specific intent necessary to prove charges of wire fraud under 18 U.S.C. § 1343 and 1349 can be shown by evidence that a handful of contracts entered into by an ongoing business failed while the vast majority of the business's contracts were fulfilled.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	ii
PARTIES TO THE PROCEEDINGS	1
OPINION BELOW	2
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES	2
CONSTITUTIONAL PROVISION INVOLVED	2
STAUTORY PROVISION INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	16
APPENDIX A <i>United States v. Burk,</i>	
	No. 23-50602 (5th Cir. Nov. 14, 2024)
APPENDIX B Order Denying Rehearing	
	(Dec. 9, 2024)
APPENDIX C 18 U.S.C. § 1343	
APPENDIX D 18 U.S.C. § 1349	

TABLE OF AUTHORITIES

Cases	Page
<i>Ciminelli v. United States</i> , 598 U.S. (2023)	12,13, 14
<i>DIRECTV, Inc. v. Imburgia</i> , 577 U.S.47 (2015)	15
<i>Durland v. United States</i> , 161 U.S. 306 (1896)	12
<i>Hammerschmidt v. United States</i> , 265 U.S. 182 (1924)	7
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	12, 15
<i>Kelly v. United States</i> , 590 U.S. 391 (2020)	12
<i>McNally v. United States</i> , 483 S. Ct. 350 (1987)	11, 12, 13
Constitutional Provision	
U.S. Const. amend. V	2
Statutes	
18 U.S.C. § 1343	2, 5, 9, 11
18 U.S.C. §1349	2, 9
18 U.S.C. § 3231	3
28 U.S.C. § 1254(1).....	2
Rule	
Supreme Court Rule 13.3	2

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Leslie Robert Burk asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on November 14, 2024.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of the case, Ethan Day was a party to the proceedings in the district court.

RELATED PROCEEDINGS

United States v. Leslie Robert Burk, U.S. District Court for the Western District of Texas, Number 3:19 CR 1019-FM-1, Judgment entered August 16, 2023.

United States v. Leslie Robert Burk, U.S. Court of Appeals for the Fifth Circuit, Number 23-50602, Judgment entered November 14, 2024, petition for rehearing denied December 9, 2024.

OPINION BELOW

The opinion of the court of appeals is attached as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on November 14, 2024. A timely petition for panel rehearing was denied on December 9, 2024. This petition is filed within 90 days after entry denial of a petition for rehearing. *See* Supreme Court Rule 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part that “No person shall be . . . deprived of life, liberty, or property without due process of law.”

STATUTORY PROVISION INVOLVED

Title 18 U.S.C. § 1343 criminalizes devising a scheme to defraud another of money or property by use of interstate wire. Section 1349 criminalizes conspiring to devise such a scheme. The texts of the statute are attached to this petition as Appendix C and D.

STATEMENT

Petitioner Les Burk operated a business, Atomic Container Homes, that turned cargo-shipping containers into homes and buildings.¹ Ethan Day, who was based in California, operated a separate business, Atomic Home Designs, and handled sales leads that might result in business for Atomic Container. He emailed, texted, telephoned, and met with prospective clients, often visiting with them on their home sites to evaluate them. *See, e.g.*, EROA.12890-91, 12905.²

Burk handled the manufacturing portion of the job from a facility in El Paso, Texas. Though his building process could be slow, he completed and shipped the projects that Atomic contracted for. The evidence was consistent, from defense and government witnesses, that the manufacturing facility was operational, and that Burk ran it and that he fulfilled contracts. The evidence at trial showed how things worked at the Atomic manufacturing facility, how sales were handled, and how and why some customers came to be unhappy with Atomic. The evidence also suggested that Burk's aspirations, like that of many entrepreneurs, were sometimes bigger than his capabilities. He puffed up his past and the firm's website was not always accurate in a detailed sense, but Burk was there, working to build container homes and buildings.

Oscar Garcia hired on at Atomic Container in August 2016, and he worked there until late 2017 or early 2018. EROA.13507-09. Garcia worked on containers, welding frames by cutting them with grinders, torches, and plasma tools.

¹ The district court exercised jurisdiction under 18 U.S.C. § 3231.

² EROA cites refer to the pagination of the electronic record on appeal in Burk's case in the Fifth Circuit.

EROA.13509-10. He also did painting and wood-framing. EROA.13511-12. He was paid \$500 a week in cash and received a Form-1099 for his wages. EROA.13509-10, 13518.

When Garcia began, Atomic had four or five other employees, but, as the number of the company's projects increased, so did the number of employees. Garcia became a foreman, supervising 12 people and coordinating manufacturing deadlines. EROA.13511-12. Garcia did not remember the company hiring employees who were licensed plumbers or electricians. EROA.13521-22. During his time at Atomic, Garcia, following design plans provided to him, personally worked on 10 to 12 projects. EROA.13512, 13135.

Government witness Robert Britton joined Atomic after finishing welding school in El Paso. EROA.12598-602. Britton testified that Atomic provided its workers with the tools needed to do the work: "we had welders, plasma cutters, torch kits—I mean, really, just about any tool you could think of related to the construction industry—squares, plumbs, stuff for plumbing, a good bit of tools." EROA.12605. Atomic's warehouse also had a scissor lift as well as two forklifts for moving containers. EROA.12606-07. Burk had lunch brought in for the employees every day. EROA.12632-33.

Atomic was busy. Britton remember that "we were working 40 hours, maybe a little bit more, a week." EROA.12636. The employees worked diligently under Burk's supervision. Britton testified that "really, everybody that worked there, I mean, we

did—we did good work. We showed up on time. We did what we were supposed to do.” EROA.12618, 12636-37, 12647-48.

Britton was not entirely happy at Atomic. He did not like that Burk paid his employees in cash. EROA.12602-03. He was also unsure of some of Atomic’s construction choices, including that he was asked to do plumbing on a project Atomic had with Orange County, California. He and his plumbing partner “tried our best. We even spent our own time trying to learn more about this and stuff,” but he did not feel confident about the work. EROA.12614.

Dawn Clayton, a designer at the Tucson, Arizona, engineering firm Caruso, Turley, and Scott prepared homes plans for Atomic. EROA.13419-20. Clayton met Day in 2015, and he hired her for a container-home project in Sedona, Arizona. EROA.13420. Clayton then worked with Atomic, having contact with both Burk and Day, for three or four years on 15 to 20 projects. EROA.13334, 13351. Atomic would contact her and give her the information on the new client’s needs and the project’s location. EROA.13458. Clayton explained that back-and-forth discussions with clients about design plans were often months-long. EROA.13423-27, 13433-34. After the designs were done, she would submit them to the structural engineers for review and an engineering stamp. EROA.13460-63.

Clayton was paid \$800 a week when working for Atomic. The payment generally came through Day by Venmo or a cash app. EROA.13557, 13568. In 2017 and 2018, Atomic was sometimes late paying her. EROA.13481-82. Clayton twice visited Atomic’s El Paso facility, where she saw projects in various stages of

construction. EROA.13443-44, 51. She also attended the 2019 El Paso Home show where Atomic was displaying two models. EROA.13453-54.

Alfredo Paez was general manager for Twin Cities Services, a container depot that stored inactive shipping containers. EROA.12933-37. He testified that in 2016 Burk came to the lot to buy containers. Burk initially bought on credit, but when he missed payments, Twin Cities put him on a cash basis, a common occurrence in the industry. EROA.12938-43, 12948. Paez estimated that Burk bought 25 containers from Twin Cities. EROA.12944-48. He also knew that Burk had purchased containers from other vendors. EROA.12940, 12949.

Luis Saenz, the owner of an El Paso fork-lift shop, moved roughly 50 finished containers for Atomic beginning in 2016. EROA.13530-31. Saenz would load the containers at Atomic and deliver them to the specified location. Saenz required his customers to pay his three-dollar-a-mile charge in advance. Burk paid for the deliveries in cash. EROA.13533-34.

Hallelujah Blessing had worked as a builder his whole life. EROA.13395-96. In the mid-2010s, he started Energistix Technologies to sell buildings made from containers. EROA.13395-96. Blessing learned of Atomic. He and Burk talked, and Blessing visited Atomic's facility, where he saw on-going construction. EROA. 13396-97, 14011-12. Blessing "very much" believed in what Burk and his company were doing. EROA.14011.

The evidence was plentiful that Burk paid cash for most things. Cash was how he paid his employees' wages, EROA.12602-03, 13509-10, how he paid his

transporters, EROA.13533-34, how he paid his rent to on the facility to his landlord and friend Gary Crossland, EROA.12524, and how he paid suppliers such as Lowe's and Area Iron. ROA.12442-43, 13212-13, 13135-36. The evidence also showed that not infrequently Burk had trouble staying in front of his costs. In part, this was because Atomic did not ask for the construction cost up front but rather took a deposit and later asked for materials costs. Crossland testified that he often helped stake particular jobs. EROA.12518-20. Blessing told of how his girlfriend had helped stake a project. EROA.14001-02. Customer Laurie Olson testified that Burk had told her he was borrowing to stake projects. EROA.11508-09.

Burk's cash flow and slowness issues caught up with him when one displeased customer, Cody Carbone, took his dissatisfaction out personally. He created a vulgar ad on Craigslist soliciting calls to Burk's and Day's phone numbers. EROA.13013-14, 13021-23. He put up a fake website in Atomic's name. EROA.13010. He contacted a few other people who had experienced problems with Atomic and talked negatively to them about Atomic until the FBI told him to stop doing so. EROA.13015-17, 13031-32. And he complained to the U.S. Attorney in El Paso, who referred him to the FBI. EROA.13013.

The FBI talked to a few dissatisfied customers, some of them people Carbone had already inveighed against Burk to. EROA.12183-84. It subpoenaed bank records from accounts belonging to Atomic, some in Burk's name, some in Day's name. EROA.12185-88. Agent Claudia Saxton went by to take a look at Atomic's yard, where

she saw containers and a forklift. EROA.12199-200. The FBI raided the facility in September 2018. It seized a bank account containing \$266,000. EROA.12433-34

Despite the raid and the loss of operating money, Burk pressed on with his manufacturing, partnering with Iliana Velasquez to help run a renamed container-home business, Universal. Velasquez would find customers for container homes and Burk and his team would build them. EROA.13119-32. Velasquez was the only signatory on the company's bank account at Wells Fargo. EROA.13121, 13125, 1129-30. As money came into Universal's account from clients, Burk would ask her to withdraw money for him, telling her what project the money was for. EROA.13125-26. For most of these requests, he would give her receipts; for most of the requests, she recorded them in QuickBooks. EROA.13126. Velasquez knew Burk had an account at Lowe's and used it regularly. ROA.13135-36.

The FBI returned with more warrants in April 2019, seizing cash they found at the business, as well as several used vehicles, and tools found in the facility. EROA.12433-38, 12925-26. Agent Mallory Nebrich testified that, at the time of 2019 raid, there were a few dozen containers in the yard, some of which were under construction. EROA.12456, 12460.

The government charged Burk and Day with conspiracy to commit wire fraud, alleging that the two had concocted a scheme, meant to defraud people, of "purporting to be builders of container homes[.]" EROA.61; *see* 18 U.S.C. §§ 1343, 1349. The government also charged the men with numerous counts of substantive wire fraud because they had received payments from contracted customers. EROA.63-65; *see* 18

U.S.C. § 1343. Finally, the government alleged that, when the men sent money received from those dissatisfied customers between company bank accounts, they had committed money laundering. EROA.65-66; *see* 18 U.S.C. § 1957.³

Burk and Day went to trial. At trial, the dissatisfied customers testified. Many of the customers had found Atomic through its website, which mentioned government contracts; a number of them had visited the manufacturing facility personally or had a trusted friend or family member do so. *See, e.g.*, EROA.11460-62, 11494-95, 11523, 12720. Each customer's plans had run into problems that were not of Atomic's making. Among the problems that led to delays and eventually contractual disputes were poor site selection that caused foundation or support problems, financing difficulties, permitting delays, and problems with Homeowner's Associations unsure of metal-box houses. EROA.11474-83, 11503-04, 12132-33, 12151, 12160-85, 12892-99. The difficulties led to disputes about performance, materials costs and refunds.

Christine Wade's situation is illustrative. Wade and her wife had purchased land in the hills of Sonoma County, California, but the rugged terrain made supporting a house difficult. EROA.12857-59. That led to a situation where Wade felt Atomic was delaying and Day and Wade were disputing who the costs of the

³ California attorney William Cumming had been hired by Atomic in 2017 to evaluate the home-design and home-manufacturing contracts it was using. EROA.13348-50. He revised them to spell out the responsibilities of home buyers for surveys, permits, and soil reports. EROA.13354-55. He also combined the two contracts into a single document. EROA.13372.

foundation and support fell on. All this occurred after Wade had wired money to Day to begin the process of designing and constructing the cargo-container building.

At trial, Wade acknowledged that the foundation issue, in “terms, kind of what everyone was operating off of, I think was fairly dynamic in nature. Like, we were trying to figure out what made the most sense in terms of the height of the foundation from a cost perspective.” EROA.12892-93. The contract only allotted \$20,000 for foundation building. That turned out to be inadequate. The parties differed as to who that fell on, EROA.12878-79, 12885, but Wade conceded at trial that the contract provided the homebuyer was responsible for “[a]ll costs associated with differing site conditions[.]” EROA.12896. The couple did not ask for their money back until summer 2018. They received a settlement proposal from Atomic; however, in September 2018, the government raid seized Atomic’s accounts. The government never contacted Wade to see if any money seized was hers. EROA.12902-03.

The jury found Burk and Day guilty of one count of wire-fraud conspiracy, 12 counts of wire fraud, and 10 counts of money-laundering.

Burk appealed. Among other issues, he challenged the jury verdicts. He argued that the evidence was insufficient to support the convictions for wire fraud because it did not show a scheme with specific intent to defraud, that is, to take property from another. The evidence showed only that a few of Atomic’s many contracts did not work out and that, in those cases, there were reasons related to the customers’ responsibilities that caused the contracts to falter. Because the money-laundering convictions rested on the theory that wire-fraud had occurred, Burk argued that the

failure to prove specific intent to defraud required that all of the convictions be reversed. The Fifth Circuit disagreed. It affirmed Burk's convictions. Appendix A.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE REACH OF THE WIRE-FRAUD STATUTE AND WHETHER INTENT TO DEFRAUD CAN BE PROVED BY EVIDENCE OF CONTRACTUAL DISPUTES.

This case presents the Court with the opportunity to again limn the reach of the wire-fraud statute, 18 U.S.C. § 1343. The government used the statute in this case to criminalize the arguable breach of a few commercial contracts among the many that a company entered into and fulfilled. The court of appeals affirmed the convictions obtained, reasoning that some evidence suggested that not every statement made by the business' website or its principles in seeking business was entirely accurate. See App. A at 7. In approving the application of the wire-fraud statute in this context, the court of appeals made statements about intent to defraud that appear to conflict with principles in the Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), *Kelly v. United States*, 590 U.S. 391 (2020), and *Ciminelli v. United States*, 598 U.S. 306 (2023). The approach of the court of appeals to the proof needed for intent to defraud also raises questions under *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court should grant certiorari to resolve these apparent inconsistencies. Alternatively, as a related issue concerning the scope of the wire-fraud statute is pending in *Kousisis v. United States*, No. 23-909, the Court should stay this case pending the decision in *Kousisis* and, if that case is resolved in the

defendant's favor, the Court should grant Burk a writ of certiorari, vacate the judgment below, and remand the case for further consideration

The wire-fraud statute "prohibits only deceptive 'schemes to deprive [the victim of] money or property." *Kelly*, 590 U.S. at 398 (quoting *McNally v. United States*, 483 U.S. at 356) (brackets in *Kelly*). This rule obtains because, without it, all misstatements might give rise to a federal wire-fraud prosecution. *Kelly*, 590 U.S. at 402 & n.2. Thus, it is not misstatements that determine whether a matter falls within the statute but whether the object of the misstatements was to defraud a person out of their property. The purpose of the statute is to "protect[] the public against all such intentional efforts to despoil" and defraud. *McNally*, 483 U.S. at 357 (citing *Durland v. United States*, 161 U.S. 306, 314 (1896)). To defraud is to "wrong[] one in his property rights by dishonest methods or schemes[.] *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)); *see also Ciminelli*, 598 U.S. at 312.

The government has sought in the past to use the mail and wire fraud statutes for broader purposes. The Court has rejected many of those attempts and has repeatedly explained that the statutes do not exist to allow the government to address broader purposes. *See, e.g., McNally*, 483 U.S. at 356-60. Most recently, the Court in *Ciminelli* rejected the idea that a misstatement that merely hampered or denied a person's "right to control [his] assets by depriving [him] of information necessary to make discretionary economic decisions" was a proper object of a wire-fraud prosecution. 598 U.S. at 314.

Ciminelli explained that this “right-to-control” theory was contrary to the text of the federal fraud statutes because the theory encompassed rights that were not recognized as property rights when the wire-fraud statute was enacted. *Id.* at 315-16. Indeed, the government eventually conceded, in *litigating* Ciminelli, that if the right “to make informed decisions about the disposition of one's assets, without more, were treated as the sort of ‘property’ giving rise to wire fraud, it would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it.” 598 U.S. at 315 (citing Brief for United States 25–26).

Despite that, in affirming Burk's convictions, the Fifth Circuit relied on a theory that seems to incorporate the repudiated right-to-control theory. In explaining why the evidence was sufficient to support the convictions, the court of appeals stated that “Burk did not disclose that ACH's personnel were not qualified to install basic necessities like plumbing, despite advertising those capabilities.” App. A at 7. That misapprehended the evidence. What the evidence showed was that Atomic did the plumbing, but that one of the employees who worked on the plumbing felt that, despite trying their best, the employees lacked the kind of expertise a certified plumber would have. EROA.12614. But the important point is that, under the Fifth Circuit's view of the evidence, the evidence rests on a right-to-control theory, on the idea that a statement not made at all would have affected a contracting party's decision to engage in discretionary economic activity, here contracting for a container home. Cf. *Ciminelli*, 598 U.S. at 314-16. Similarly, the Fifth Circuit cited matters

involving advertisements on the website that caught the attention of the eventually unsatisfied customers and affected their right to decide. App. A at 7. Again, that appears to be an application of the right-to-control theory.

At best, the Fifth Circuit's statements appear to be based on the theory that the website statements about government contracts and the plumbing non-statement were false inducements to enter into a contract that Burk and Atomic intended to fulfill. Whether that theory can support the application of the wire-fraud statute to the breach of an ordinary commercial contract is likely to be determined by decision in *Kousisis*. Good reasons exist to think that false inducements not aimed at property but merely at obtaining a contract to fulfill do not fall within the wire-fraud statute. The false-inducement theory would permit any inducement to contract to become the basis of a federal criminal fraud case, so long as the mail or wires are used, a broader theory of reach than that rejected in *Ciminelli*. Such a theory would also raise federalism concerns, as the enforcement of contracts is traditionally a matter left to the states. *Cf. DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) ("[T]he interpretation of a contract is ordinarily a matter of state law to which we defer.").

Burk's case presents a compelling example of what will happen if the wire-fraud statute is allowed to reach inducements for contracts that were intended to be fulfilled. From the evidence in Burk's case, no reasonable jury could conclude that there was an intent to defraud and cheat the dissatisfied handful of customers named in the indictment. The evidence showed an ongoing business that honored its other contracts, built other buildings, and shipped those buildings. No evidence suggested

that these handful of customers were singled out or treated differently in any way. Unsatisfied customers, even sympathetic ones, are not evidence of specific intent to defraud. To allow the use of the wire-fraud statute in this case and to affirm the verdicts in this case on the wire-fraud and money-laundering counts risks making a federal crime of every business deal that goes awry, even when, as here, much of the fault for the contract not working out was the result of facts beyond Burk's control or facts falling within the responsibility of the other contracting party.

The verdicts in this case also appear contrary to the command in *Jackson* that the record must show that the government proved every element of the offense beyond a reasonable doubt. 443 U.S. at 313-18. No evidence supported a finding that, in only those few contracts that went unfulfilled, Burk intended to deceive and cheat his customers. No reasonable jury could have found that a handful of contracts, all of which had problems particular to the home buyer, all of which went bad for the reasons particular to the specific deal were entered into by Burk, in the context of his larger business, with intent to defraud. A reasonable jury could only conclude from the evidence that those few contracts were troubled by particular circumstances and went unfulfilled because of those particular circumstances. No evidence allowed a reasonable jury to find Burk had an intent to defraud all his customers, and no evidence allowed a reasonable jury to find that Burk intended to defraud the customers named in the indictment counts.

Much evidence supported the fact that the contracts that formed the indictment counts were troubled ones. Burk and his company may not have handled

those contracts and problems as well as they might have, but those troubled contracts were just that, troubled contracts. They were not crimes by Burk because they were not entered into with the specific intent to defraud, that it, to obtain money or property falsely. Burk's business was a legitimate one. He entered into all the contracts with the intent to fulfill them, and all who came to his company saw the same website and claims.

Conclusion

FOR THESE REASONS, Petitioner asks that the Court grant a writ of certiorari and review the judgment of the court of appeals. Alternatively, Petitioner asks that the Court grant a writ of certiorari, vacate the judgment below, and remand for further review of the legal basis on which the convictions rest and the sufficiency of the evidence supporting the convictions.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: January 31, 2025.