No. _____

In the
Supreme Court of the United States

Tamaz Pasternak,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a scheme to induce a transaction in property through deception, but which contemplates no harm to any property interest, constitutes a scheme to defraud under the federal wire fraud statute, 18 U.S.C. § 1343, the question presented in *Kousisis v. United States*, No. 23–909 (U.S.) (cert. granted June 17, 2024; argued Dec. 9, 2024).

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OPINIONS AND ORDERS BELOW

The summary order of the United States Court of Appeals for the Second Circuit appears at Pet. App. 1a–12a and is reported at 2024 WL 4763986. The rulings of the District Court appear at Pet. App. 13a–19a (charge conference) and Pet. App. 20a–21a (jury charge).

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered a judgment of conviction on March 30, 2023. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and affirmed the judgment on November 13, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 1343 provides, in relevant 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. § 1349 provides:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

This petition is controlled by *Kousisis v. United States*, No. 23–909 (U.S.) (cert. granted June 17, 2024; argued Dec. 9, 2024). Petitioner was convicted of wire fraud and conspiracy to commit wire fraud. At trial, he sought a jury instruction to the effect that a scheme to defraud must contemplate inflicting "tangible economic harm" on its victims. Pet. App. 14a; Pet. App. 16a–17a; Pet. App. 18a–19a. The District Court refused, and the Court of Appeals affirmed, holding that "[t]he 'scheme to defraud' language in the wire fraud statute 'demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss.'" Pet. App. 8a (quoting *Shaw v. United States*, 580 U.S. 63, 67 (2016)). *Kousisis* presents the question "[w]hether a scheme to induce a transaction in property through deception, but which contemplates no harm to any property interest, constitutes a scheme to defraud under" § 1343. Br. for Pet'r i, *Kousisis v. United States*, No. 23–909 (U.S. Aug. 19, 2024). Resolution of that question will, in turn, decide whether the holding of the Court of Appeals below was correct. Accordingly, this petition should be held for *Kousisis* and then disposed of as appropriate in light of that decision.

1. Following a jury trial in the United States District Court of the Eastern District of New York, Petitioner was convicted of one count of conspiracy to commit wire fraud, § 1349, and three counts of substantive wire fraud, § 1343. Pet. App. 2a–3a. The District Court sentenced him to concurrent terms of 18 months' imprisonment and two years' supervised release on each count. C.A. Doc. 23.1 (App'x), at 859–60. The Court of Appeals affirmed. Pet. App. 1a–12a.

Petitioner sold "salvage" cars, that is, cars that insurance companies have taken in settlement of total loss claims, most often following accident, flood, or theft. C.A. Doc. 24.1 (Br.), at 3. A salvage designation does not mean that a car has sustained irreparable damage or become unsafe to drive. Rather, a salvage designation reflects an economic calculation: An insurer has determined that it will be more cost-effective to declare a car a total loss, pay off the policy, take the car, and sell it at auction, than it will be to repair the car. *Id.* at 3–4. A car's salvage status is often branded on its title. Pet. App. 3a. In New York State, where Petitioner did business, a car with a salvage brand cannot be registered to drive. *Ibid.* But a salvage-branded car can be registered to drive if it is repaired, inspected, and branded "rebuilt" on its title. *Ibid.* Just as a salvage designation does not indicate that a car is unsafe, a New York salvage inspection is not a safety inspection. C.A. Doc. 24.1 (Br.), at 6. The inspection regime aims to prevent auto theft by verifying that a car has not been rebuilt using stolen parts. *Ibid.*; Pet. App. 3a. In Indiana, in contrast to New York, one need not present a salvage car for inspection in order to receive a rebuilt-branded title. Pet. App. 3a. Instead, one can submit a certificate attesting that a law enforcement officer has physically inspected and approved the car. *Ibid.* (citing Ind. Code § 9–22–3–15(a)(1)).

Petitioner bought salvage cars at insurance auctions, repaired them, and resold them as rebuilt cars. However, he engaged in deception to conceal the cars' salvage histories. "First, in the 'Indiana Title Scheme'—the basis for the conspiracy count—the government adduced evidence that [Petitioner] mailed money and

salvage titles to co-conspirators, who returned Indiana rebuilt titles that were procured by fabricating law enforcement inspection certificates." Pet. App. 3a–4a. "Second, in the 'Title Altering Scheme'—the basis for the substantive wire fraud counts—trial evidence established that [Petitioner] physically altered the 'salvage' or 'rebuilt' brands on the titles of cars he sold to customers." Pet. App. 4a. Specifically, "[b]y covering the brand with a sticker or scratching it off, [Petitioner] made it look like the cars had clean titles. He also posted Craigslist ads for cars he said had clean titles; in reality, those cars were salvage vehicles." *Ibid.* Finally, people who bought cars from Petitioner testified that he "misrepresented the salvage histories of the cars they ultimately bought." *Ibid.*

The defense asserted, among other things, that notwithstanding any *deception* regarding the cars' salvage histories, the buyers were not *defrauded*, within the meaning of § 1343, because got what they paid for—working, registrable cars at fair-market prices. C.A. Doc. 24.1 (Br.) at 13. As relevant to that defense, the government did not prove that any buyer paid more than fair market value for a car with the make, model, year, and mileage of the car that he purchased. *Ibid*; *see also id.* at 13–14; C.A. Doc. 39.1 (Reply Br.) at 15–17. The government's only evidence on this point was expert opinion testimony that, in general, a rebuilt car sells for 25%–30% less than a car with no salvage history. However, the government did not introduce evidence of the baseline value of clean cars similar to those that Petitioner sold—evidence that, if presented, would have permitted an inference that Petitioner overcharged his customers. On the contrary, one witness who purchased

a 2012 Chevrolet Volt for $10,000 testified that Petitioner's price was "about 2 or $3,000 lower than" comparable cars he saw advertised at the same time, which was in line with the expert's opinion. C.A. Doc. 24.1 (Br.) at 13–14; C.A. Doc. 39.1 (Reply Br.) at 15–16. The government introduced no other evidence proving that the buyers paid more than the cars were worth, instead eliciting testimony from the buyer-witnesses that they would not have purchased the cars at all if they had known of the cars' salvage histories. C.A. Doc. 24.1 (Br.) at 11–13.

2. At trial, Petitioner sought a jury instruction reflecting this defense, to wit: "If all the government proves is that under the scheme the customers would enter into transactions that they otherwise would not have entered into without proving that the ostensible victims would thereby have suffered some tangible economic harm, then the government will not have met its burden of proof." Pet. App. 14a. The District Court (Vitaliano, J.) refused, instead instructing the jury: "[T]he Government must prove that the alleged scheme contemplated depriving another of money or property. Property includes intangible interests such as right to control the use of one's assets. Therefore, a scheme contemplates [depriving] purchasers of property if it contemplates depriving them of potentially valuable economic information such as information about the quality and adequacy of goods for sale." Pet. App. 20a–21a.[1] Petitioner was convicted on all counts.

[1] Petitioner was tried before *Ciminelli v. United States*, 598 U.S. 306, 309 (2023), which held that "the right-to-control theory is not a valid basis for liability under § 1343." Below, the Court of Appeals rejected Petitioner's claim that the right-to-control instruction was plain error requiring reversal, concluding: "Given the government's overwhelming evidence on the deprivation-of-money theory, it was

3. On appeal, Petitioner argued, among other things, that the District Court erred in "refus[ing] to require the jury to find that [he] intended to inflict tangible economic harm, not just to cause the buyers to enter into transactions that they would not have otherwise." C.A. Doc. 24.1 (Br.) at 19; *see also id.* at 26 (District Court erred by "refus[ing] [Petitioner's] request to charge the jury that his scheme must have contemplated 'tangible economic harm' to the buyers"); Pet. App. 7a–8a ("[Petitioner] contends that the deprivation-of-money instruction was defective. Specifically, [he] argues that because he sold the salvaged cars for what they were actually worth, the district court committed error by failing to instruct the jury that it could convict only if it found beyond a reasonable doubt that he intended to sell the cars for [more] money than they were actually worth.").

The Court of Appeals (Parker and Robinson, JJ.; Oliver, J., by designation) affirmed. Pet. App. 1a–12a. At the threshold, the Court of Appeals dismissed the government's argument that the claim was unpreserved, finding that Petitioner "raised this argument during the charge conference." Pet. App. 8a n.3. However, the Court rejected the claim on the merits, explaining: "The 'scheme to defraud' language in the wire fraud statute 'demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss.'" Pet. App. 8a (quoting *Shaw*, 580 U.S. at 67, and citing *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)). "Rather," the Court of Appeals held, "it is enough for the defendant to have

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highly improbable that [Petitioner] was convicted solely on the legally insufficient right-to-control theory." Pet. App. 7a.

contemplated a scheme 'to injure another to [the defendant's] own advantage by withholding or misrepresenting material facts.'" *Ibid.* (quoting *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970)). Petitioner's conduct met that standard, the Court determined, because he "misrepresent[ed] the titles and inspection history of the vehicles he sold." *Ibid.*

REASONS FOR GRANTING THE WRIT

Kousisis controls this petition. *Kousisis* presents the question whether a scheme to induce a transaction in property through deception, but which contemplates no harm to any property interest, constitutes a scheme to defraud under § 1343. If *Kousisis* answers that question in the negative, then the holding of the Court of Appeals below would be wrong: A scheme to defraud would indeed require proof of contemplated "tangible economic harm"—not just the withholding of "material facts"—such that the failure to give Petitioner's requested jury instruction was legal error. Accordingly, this petition should be held for *Kousisis*.

I. The Petition Should Be Held For *Kousisis*.

1. Section 1343 requires proof of a "scheme or artifice to defraud." Below, the Court of Appeals held that this language does not require proof of contemplated "economic harm," just proof that the defendant caused others to enter into a transaction, during which money changed hands, by withholding "material facts." That is, in essence, the "fraudulent inducement" theory whose validity is presented in *Kousisis*. *See, e.g.*, Br. for United States 8, *Kousisis v. United States*, No. 23–909 (U.S. Oct. 2, 2024) ("Petitioners' scheme—tricking a victim into handing over money

by lying about an essential aspect of what petitioners would provide in return—was classic property fraud, in violation of 18 U.S.C. § 1343."); Br. for Pet'r 15, *ibid.* ("The government, under this theory, need only prove (as relevant on facts like these) that the transaction involved the payment of money and that the misrepresentation was material."). Moreover, the Court of Appeals relied for its holding on this Court's decision in *Shaw* construing the federal bank fraud statute, 18 U.S.C. § 1344, and the parties in *Kousisis* have joined issue on the proper interpretation of that precedent as well. *Compare* Br. for United States 24–26, *Kousisis* (arguing that *Shaw* "appl[ies] with full force to the mail- and wire-fraud statutes") *with* Br. for Pet'r 34–37, *ibid.* (arguing that this language from *Shaw* is dictum inapplicable to §§ 1341 and 1343). Because *Kousisis* appears likely to resolve the correctness of the approach followed by the Court of Appeals below, a hold is proper.

2. The Court of Appeals gave no alternative basis for its decision. The Court rejected the government's argument that the claim was unpreserved (Pet. App. 8a n.3), and did not address the government's argument that the error was harmless. *See* C.A. Doc. 34.1 (Resp. Br.) at 27–31. On the contrary, the error was prejudicial. As shown above, the government adduced no evidence that Petitioner sought to inflict economic harm on his customers by charging them more than their cars were worth. The government's principal theory was that Petitioner concealed the cars' salvage histories not to charge a markup, but to induce via deception sales that would not otherwise have occurred. That is why the government repeatedly

elicited testimony that the buyers would not have bought the cars at all had they known of their salvage histories. *See supra* Statement § 1.

Moreover, the jury instructions nowhere conveyed the requirement of contemplated harm to a traditional property interest. To convict, all that the jury had to find was that Petitioner inflicted informational harm, by withholding "potentially valuable economic information," namely, "information about the quality and adequacy of goods for sale." Pet. App. 20a–21a. *But see Ciminelli*, 598 U.S. at 309 (holding that "'potentially valuable economic information' 'necessary to make discretionary economic decisions' is not a traditional property interest" (quoting *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021)). Although the Court of Appeals rejected Petitioner's *Ciminelli* claim in a plain-error posture for want of effect on substantial rights (*see supra* n.1), the Court did not rely on the evidentiary record or the remainder of the jury charge to resolve Petitioner's tangible-economic-harm claim. Instead, the Court ruled, as a matter of law, that contemplated economic harm is not necessary to prove a scheme to defraud because the withholding of facts material to a transaction suffices.

3. On the merits, the Court of Appeals was wrong. A scheme to defraud under § 1343 requires proof of contemplated economic harm and the District Court committed reversible error by failing so to instruct the jury. As the petitioner in *Kousisis* has explained, a scheme to "defraud" is a scheme to commit fraud as that term was commonly understood when the mail fraud statute was enacted. And as this Court has recognized on multiple occasions, the common understanding of

fraud required harm to a traditional property interest as an indispensable requirement. *See, e.g.*, *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (ordinary meaning of "defraud" is "wronging one in his property rights by dishonest methods or schemes"); *United States v. Cohn*, 270 U.S. 339, 346–47 (1926) ("defrauding," in its "usual and primary sense," means "the fraudulent causing of pecuniary or property loss"); *Kelly v. United States*, 590 U.S. 391, 401–02 (2020) (property fraud contemplates "taking of property"—that is, a scheme to "convert[]" it to a defendant's benefit—causing "economic loss"); *Ciminelli*, 598 U.S. at 312 ("defraud" means "wrong[] one in his property rights"); *see also id.* at 316 ("[T]he wire fraud statute reaches only traditional property interests."). That understanding is confirmed by historical sources. Br. for Pet'r 19–23, *Kousisis*.

Granted, a wire fraud conviction doesn't require actual harm to a traditional property interest because § 1343 criminalizes the inchoate "scheme," not the actual fraud. But by prohibiting "schemes to defraud," Congress did criminalize schemes that, if completed, would have constituted fraud. A "fundamental characteristic" of inchoate criminal liability is an "endeavor which, if completed, would satisfy all of the elements of the underlying substantive ... offense." *Ocasio v. United States*, 578 U.S. 282, 287 (2016). Here, the underlying substantive offense is scheming to "defraud," and a scheme that, if completed as devised, would not cause property harm cannot be described as a scheme to "defraud." *Shaw*, on which the Court of Appeals relied, is inapposite: It dealt with a different statute with a different mens rea and, as the *Kousisis* petitioner has explained, the quoted language was dictum.

The Court of Appeals's alternative to contemplated harm—"injur[ing] another to [the defendant's] own advantage by withholding or misrepresenting material facts," Pet. App. 8a—is not an injury to the "traditional property rights" that § 1343 protects. That conclusion is all but compelled by *Ciminelli*, which specifically holds that "the right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest." 598 U.S. at 316. The authority relied on by the Court of Appeals, *Regent Office Supply Co.*, does not support the rule. *Regent* specifically cautioned that "the government can[not] escape the burden of showing that some actual harm or injury was contemplated by the schemer," adding that "[i]f there is no proof that the defendants ... intended to get more for their merchandise than it was worth to the average customer, it is difficult to see any intent to injure or defraud." 421 F.2d at 1180–81.

Because the District Court erred in refusing to instruct the jury that a scheme to defraud requires proof of contemplated economic harm—and because there was no evidence that Petitioner's scheme did contemplate such harm—Petitioner is entitled to vacatur of his convictions. At this juncture, however, the correct course is more modest, and straightforward: Because Petitioner challenges a legal conclusion that is cleanly presented in *Kousisis*, and presses the same merits argument as that defendant, this petition should be held for *Kousisis*. If the defendant there prevails, that would establish that Petitioner's jury had been incorrectly instructed, and that the decision of the Court of Appeals rested on legal

error. This Court should then grant this petition, vacate the order of the Court of Appeals affirming the conviction, and remand this case for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be held for *Kousisis*.

Respectfully submitted,

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