No. 24-949

IN THE

Supreme Court of the United States

NAVELLIER & ASSOCIATES, INC.
AND LOUIS NAVELLIER,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners have filed this Petition for Writ of Certiorari to resolve the federal circuit courts of appeals conflict regarding whether the Securities and Exchange Commission ("SEC") can seek, and federal courts are authorized to award, the equitable remedy of disgorgement for an alleged securities law fraud violation under 15 U.S.C. §§80b-6(1) or (2) ["§206 violation"] when the clients suffered no pecuniary harm from the alleged falsehood. Certiorari is necessary to resolve that circuit conflict.

Petitioners have also petitioned to clarify or correct the standard to be applied in determining whether an alleged falsehood is a *material* falsehood actionable by the SEC under 15 U.S.C. §80b-6(1) or (2).

Petitioners submit this supplemental brief because this Court's recent May 22, 2025 decision in *Kousisis v. United States* 2025 WL 1459593 (U.S. May 22, 2025), May 22, 2025 Slip Opinion ("Slip Op.") and the concurrences filed by Justices Thomas (Thomas, J. concurrence, Slip Op. at pp. 4-9. 11-12), Justice Gorsuch (Gorsuch, J. opinion, Slip Op. at pp. 9-12) and Justice Sotomayor (Sotomayor, J. concurring in judgment, Slip Op. at pp. 3, 8), issued after Petitioners filed their May 19, 2025 Reply Brief, which discusses several standards for determining whether an alleged falsehood is a "material" falsehood and therefore, a violation of federal fraud statutes or a non-actionable "victimless lie" (Thomas, J. concurrence, Slip Op. at p. 6-7, 12; Gorsuch, J. opinion, Slip Op. at pp. 2, 5, 6, 8, 11, 12), supports the grant of certiorari in this case.

Petitioners submit this supplemental brief to discuss how the recent *Kousisis* decision makes clear that certiorari in this case is needed to establish a proper standard of materiality in federal statutory fraud cases.

In *Kousisis*, the Court discussed three possible standards for determining "materiality - as the principal basis for distinguishing everyday misstatements from actionable fraud". (Slip Op., p. 15) The Court noted that "materiality look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." (Id.) The standard of materiality "[r]esembl[es] a *but-for* standard" (emphasis added) which asks whether the misrepresentation constituted an *inducement* . . . to enter into a transaction." (emphasis added) (Id.)

"Reasonable Investor" Standard of Materiality

The Court in *Kousisis* discussed the "reasonable investor" standard for determining materiality - a misrepresentation is material if a reasonable person would attach importance to it in deciding how to proceed" (citing *Universal Health Services, Inc. v. United States ex rel. Escobar* 579 U.S. 176 at 193).

The "Very Essence of the Contract" Standard of Materiality

The Government, in *Kousisis*, advocated for an essence-of-the-bargain standard for determining if the alleged falsehood is material, "under which a misrepresentation is material only if it goes 'to the very essence' of the party's bargain". *Universal Health Services* 579 U.S. at 194, n. 5 (*Kousisis* Slip Op., p. 16).

The "Benefit of the Bargain" Standard of Materiality

Justice Gorsuch suggested a benefit-of-the-bargain test for materiality – if the "victim" receives exactly the benefits he/she bargained for then there has been no actionable fraud. (Gorsuch [2025 WL1459593 at *19]["Just ask yourself, if a "putative victim of wire fraud got exactly what he paid for, how exactly is he a victim at all?"]

That standard, as a practical matter, avoids the factual resolution of speculating what is in the mind of a reasonable investor, what motivated him/her, whether "but for" the alleged misrepresentation the investor would have made the investment decision, whether the alleged misrepresentation was even relied on, i.e., whether it induced the investor to make the decision, etc. The materiality inquiry becomes relatively straightforward – did the recipient of the "misrepresentation" receive exactly what he/she contracted to receive? If so, then the misrepresentation was of not an actionable "fraud" because it did not materially "affect" the "victim" who received exactly what he/she contracted to receive.

In Justice Thomas' concurring opinion in *Kousisis* 605 U.S. ___ (2025), (Slip Op. Thomas, J. concurring at p. 5), he explained that - in fraudulent inducement prosecutions, for the contractual misrepresentation to be material, it must go to "the very essence of the bargain" (quoting *Universal Health Services* supra 579 U.S. at 194). In Justice Thomas' view, the essence of the *Kousisis* contract with PennDOT was for "bridge repairs, not minority hiring" so, the *Kousisis* defendants' lies - that they would use supplies from "disadvantaged" contractors (a required term of the contract) - were not material and therefore, not an actionable fraud, because the lies did not go to the very essence of the contract, which was bridge repairs, not minority hiring. (Thomas, J. concurring opinion, Slip Op. pp. 6-7)

A term that goes to the essence of the agreement is one which, if not met, would destroy the contract's value. (Id.) The breach [of the contractual promise] must be so serious as to destroy the essential object of the agreement. (Id.)

The Court reserved for another case, which of those standards should be applied to determine the materiality of an alleged falsehood in deciding whether a federal fraud statute has been violated, because the *Kousisis* defendants had conceded that their misrepresentations were material. (Barrett, J. opinion, Slip Op. at p. 16) That "other" case for - "settl[ing] the debate" about which standard is the appropriate materiality standard – is the petition in this case.

Who Should Decide the Issue of Materiality

Just because a standard for determining materiality is labeled an "objective" standard, does not mean that conflicting evidence as to whether that standard has been met can be decided by a judge, rather than a jury, particularly where materiality is contested. (Gorsuch, J. Slip Op., p. 10, n. 4) (Thomas, J. Slip Op. p. 9, n. 2) As the *Kousisis* case demonstrates, Justice Thomas viewed the defendant's false representation - promising to use "disadvantaged" contractor supplies - as immaterial to the essence of the contract, and therefore, not a material misrepresentation. (Thomas, J. concurring, Slip Op., p. 6)

Justice Sotomayor, using the same "objective" essence of the contract standard, viewed the defendants' lies (about using disadvantaged contractor supplies) as going to the very essence of the contract to repair bridges with supplies provided by disadvantaged companies, and therefore, as material misrepresentations. (See Sotomayor, *Kousisis* concurrence in judgment, Slip Op., p. 3 and examples of insignificant lies that do not go to the essence of the contract, where all other representations are true and the recipient receives exactly the services provided.)

The Navellier Petition here demonstrates the troubling abusive possibilities of the "obviously important to a reasonable investor standard" of materiality adopted in *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438, 450 (1976).

The "reasonable investor" standard is not an objective standard at all. It is too fact-intensive for a judge, rather than a jury, to determine what a reasonable investor would consider important. Allowing a judge to make that materiality determination by summary judgment on disputed evidence, including affirmative investor evidence of non-reliance on the alleged falsehood[1], takes resolution

1. Here, the SEC alleged, but did not prove, that NAI or Mr. Navellier "defrauded" NAI's clients and prospective clients by "fraudulently" inducing them to become clients by means of displaying another investment adviser's hypothetical performance record of his index investment strategy (hypothetical performance of how the strategy hypothetically would have performed if real trades with real money had been made according to that index's investment strategy), and supposedly claiming it as NAI's Vireo actual performance record. Contrary to the First Circuit's confusion, NAI's Vireo marketing material never made such a

of that disputed fact away from a jury and allows a judge to resolve the factual dispute.

In the present case, the SEC did not produce a single client or potential client that said he/she was misled by NAI Vireo marketing into believing the other adviser's index hypothetical performance record was NAI's performance record. Nor did the SEC produce a single NAI client or potential client who said that he/she was induced to become an NAI Vireo Client because of the supposed hypothetical performance.

NAI produced the *SEC's* own notes from its investigative interview of Ken Zannoni (an independent, experienced investment adviser) who recommended to several hundred of his investment clients (with over $100 Million collectively) to hire NAI to invest that money with NAI's Vireo investment strategy. He testified that he and his clients did not hire NAI because of any hypothetical

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claim. NAI's marketing clearly and repeatedly indicated that the other adviser's index performance record was of hypothetical trades, not real trades, and was *not* NAI's Vireo performance record. NAI also provided a separate page with graphs and disclosures providing Vireo's *actual* performance record using real money for its actual Vireo clients by calculating how each Vireo client's investment account had performed and calculated that performance according to GIPS rigorous standards for calculating an investment strategy performance. (Appendix T)

In any event, the NAI Vireo clients received the benefit of their bargain, i.e. they received exactly what they had been promised and contracted for, i.e. their moneys were invested exactly according to NAI's Vireo investment strategy, and they received $221 Million in net profits from NAI's Vireo investment advice.

performance records, but rather hired NAI because of its actual real-life Vireo performance record that was displayed in NAI's Vireo marketing material. (Appendices O and T).

The First Circuit disregarded the Zannoni affirmative evidence of non-reliance on the supposed misrepresentation (*SEC v. Navellier* 108 F.4th at 37 ["The standard for materiality is thus not actual reliance and "the SEC [is] not required to prove that any investor actually relied on [Appellants'] misrepresentation.)

Instead, the First Circuit applied the "substantial likelihood" "reasonable investor" materiality standard established in *Basic v. Levinson* 483 U.S. 224, 231-232 applied to the supposed misrepresentation (Id) and did so by summary judgment because it could under the *TSC Inds., Inc. v. Northway, Inc.* 426 U.S. 438, 450 materiality standard ["So obviously important to an investor, that reasonable minds cannot differ on the question of materiality"].

Thus, the "reasonable investor" "so obviously important" standards give courts the fig leaf to disregard affirmative investor testimony that investors did *not* consider the alleged misrepresentation important, did not consider, let alone rely on, the alleged misrepresentation in making the investment decision to hire NAI as their investment adviser.

The "reasonable investor" "so obviously important" standards allow judges to disregard compelling evidence from actual investors that the alleged misrepresentation was not important to them in making their investment decision and allows judges to determine that the misrepresentation *was* obviously important to them and that reasonable minds (such as the actual investors who made the investment decision and knew what was important to them) did not matter, despite what the actual investors actually thought and did in making their investment decision.

The use, or rather judicial abuse, of that "reasonable investor" "so obvious" materiality standard turns government regulatory enforcement officials, like the SEC, into "morality police" bringing enforcement actions, and allows judges to make investment "fraud" decisions based on their own personal views rather than a jury deciding the fraud issues based on the evidence from those investors of whether the misrepresentation was material.

As the *Kausisis* decision and this Petition make clear the existing "reasonable investor" "so obvious" material standards for federal fraud violations, including §206 investment adviser violations, must be abrogated or clarified so that federal "fraud" cases, where materiality is contested, are decided fairly by juries, based on the evidence.

June 5, 2025 Conference

Since the recent May 22, 2025 *Kousisis* case informs the issue of the proper "materiality" standard in federal fraud cases, Petitioners request that the June 5, 2025 conference for this Petition be continued to the Court's next conference after June 5, 2025, so the Court and parties have sufficient time to consider and fully analyze the implications of *Kousisis* in connection with the materiality portion of this Petition.

CONCLUSION

Certiorari should be granted in this case so the circuit conflict regarding disgorgement for pecuniarily *unharmed* "victims" can be resolved and, in addition, so that the fraud "materiality" standards can be revised to a "benefit-of-the-bargain" standard suggested by Justice Gorsuch.

The government has "no business" being in the business of "enforcing" inconsequential, "victimless fraud" violations, where investment advisers could lose their entire careers and livelihoods for irrelevant, victimless lies. "Lies without injury that do not go to the essence of the investment adviser contract are not material and therefore, are not actionable frauds or deceits under §§206(1) or 206(2)". "Lies without injury are not criminal frauds." (*Kousisis,* Gorsuch concurring opinion, p. 6)

This Petition presents the perfect case for the Court to establish the proper standard for determining materiality of a misrepresentation or omission in a putative federal fraud case, which issue the Court reserved in *Kousisis*.

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Respectfully submitted,

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