No. 24-949

IN THE

Supreme Court of the United States

NAVELLIER & ASSOCIATES, INC. *et al.*,

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

PETITION FOR REHEARING

SAMUEL KORNHAUSER
Counsel of Record
LAW OFFICES OF
SAMUEL KORNHAUSER
155 Jackson Street,
Suite 1807
San Francisco, CA 94111
(415) 981-6281
samuel.kornhauser@gmail.com

Attorney for Petitioners

131326

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutes and Rules

Other Authorities

Cited Authorities

Page

PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioners Louis Navellier ("Navellier") and Navellier and Associates, Inc. ("NAI"), petition for re-hearing of this Court's June 6, 2025 denial of their Petition for Writ of Certiorari. This Court's intervening decision of *Kousisis v. United States* 145 U.S. 1382 (2025), which was filed after Petitioners' petition for certiorari was sent to conference, left open for a future case the issue of the proper standard for determining the materiality of an alleged misrepresentation in government enforcement cases alleging violation of federal fraud in the inducement. This is that case. It presents the Court with a perfect opportunity to establish that crucial materiality standard.

In *Kousisis*, the Court, including Justices Thomas, Gorsuch and Sotomayor, highlighted the need for a revision of the "reasonable man" standard for determining the "materiality" of an alleged misrepresentation or omission in federal fraud cases, especially in fraud-in-the-inducement cases. (Thomas, J. concurring Id. at p. 1404; Gorsuch, J. concurring Id. at 1407; Sotomayor, J. concurring Id. at p. 1412)

In this case and in this Petition for Writ of Certiorari, the Navellier Petitioners have vigorously disputed the erroneous allegation that their alleged misrepresentation and/or omission was "material" and have argued that the "reasonable man" standard for determining the "materiality" of the alleged misrepresentation or omission, set forth in *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438, 450 (1976) and *Basic, Inc. v. Levinson* 485 U.S. 224, 243-245 (1988), should be abrogated.

THE COURT SHOULD RE-HEAR THIS CASE BECAUSE THE INTERVENING *KOUSISIS* DECISION HIGHLIGHTS THE NEED FOR THIS COURT TO ABROGATE THE "REASONABLE INVESTOR" STANDARD FOR DETERMINING MATERIALITY IN SECURITIES FRAUD CASES

Justices Thomas, Gorsuch, and Sotomayor, in their concurring opinions in *Kousisis*, seem to agree that the "reasonable man" standard for determining the materiality (or immateriality) of an alleged misrepresentation or omission in fraud in the inducement cases (including securities anti-fraud violations) where, as here, it is alleged that the recipient of the misrepresentation was induced to enter into the transaction by the alleged misrepresentation—needs to be abrogated and replaced with a "benefit of the bargain" standard where the recipient of the misrepresentation obtains the "essence" of what he/she/it bargained to receive. In that situation, the misrepresentation is *not* material and is therefore not a statutory fraud violation.

In *TSC Industries* supra 426 U.S. 438 at 449, this Court held that, in the context of an alleged Rule 14a-9 proxy solicitation violation—whether a misrepresentation or omission is a material misrepresentation or omission is determined by whether there is a substantial likelihood that a reasonable shareholder would have considered the misrepresentation or omission important (in the total mix of information) in deliberating on how to vote, but misrepresentations or omissions "so trivial or so unrelated to the subject transaction are not deemed to be material."

As noted by Justice Thomas in his concurrence in *Kousisis* supra 145 S. Ct. at 1400-1401, 1404, the standard for determining materiality, especially in a contractual fraud in the inducement case, should be the standard articulated in *Universal Health Services, Inc. v. United States ex rel. Escobar* 579 U.S. 176, 194, n. 5 (2016)—whether the misrepresentation goes to the very "essence of the bargain", i.e., "touches the fundamental purpose of the contract." If the misrepresentation does not alter what the "defrauded" recipient bargained for and received, then the alleged misrepresentation is not material and consequently, there is no violation of the federal fraud statute.

The "essence-of-the-bargain" materiality standard is "rigorous and context-specific." *Id.* at 1404. In fact, the Government argued in *Kousisis*, that—the essence of the bargain standard for materiality will ensure that federal fraud prosecutions cannot be used to target benign, everyday misstatements. *Id.* at 1404. A demanding essence-of-the-bargain materiality standard is needed to prevent an extraordinarily expansive view of liability from rendering federal fraud statutes nearly limitless in scope. *Id.*

Justice Gorsuch's concurrence in *Kousisis* supra 145 S. Ct. at 1407 also highlighted the need to abrogate the "reasonable man" materiality standard, in favor of a benefit-of-the-bargain standard, along with the injury element, where there is no "discrepancy between benefits 'reasonably anticipated' and actual benefits received", citing *United States v. Regent Office Supply Co.* 421 F.2d 1174, 1179-1180 (2nd Cir. 1970). There is no federal fraud

violation where "untruths do not deprive the recipient [of the untruth] of the benefit of its bargain."

"[I]f a putative victim of a [federal] fraud violation got exactly what he paid for, how exactly is he a [federal fraud] victim at all?" *Id.* at 1407. Thus, in determining whether there has been a violation of a federal fraud statute—requiring a "scheme or artifice to defraud"—the inquiry should be whether the victim received what he/she/it bargained for. *Kousisis* (J. Gorsuch, concurrence) supra 145 S. Ct. at 1409.

Justice Sotomayor's concurrence in the judgment in *Kousisis* noted that—the Court must await future federal fraud cases in which a defendant provides exactly the services that they promised to deliver but lies in other ways to induce the transaction—to set a materiality standard for whether such other lies constitute federal fraud violations. *Kousisis* supra 145 S. Ct. at 1412. This is that case.

A REHEARING IS NECESSARY

This Court should rehear and grant this Petition for Writ of Certiorari in light of the intervening *Kousisis* decision, which was issued after the Navellier Petition for Writ of Certiorari was sent to conference.

In this case, the District Court and a panel of the First Circuit Court of Appeals applied an incorrect, now questionable, "reasonable man" standard of materiality based on their and the SEC's blatant mischaracterization and disregard of the actual facts, in order to uphold a summary judgment that NAI and Mr. Navellier each

engaged in a scheme to defraud their clients in violation of §§206(1) and (2), by supposedly fraudulently inducing 6,000 different persons to become clients of NAI and to pay NAI quarterly investment advisory fees for NAI's various Vireo investment strategies by disseminating an allegedly "materially" "false" representation—that each of NAI's nine (9) different Vireo investment strategies was based on another unidentified investment advisor's [Jay Morton's] investment strategy, which Jay Morton had live traded for some of his investment advisory clients since 2001. The lower courts also held that NAI materially falsely omitted to *tell* its prospective clients that NAI had asked to see [Morton's] trade confirmations of the live trades but had been denied[1].

More importantly, and *what was material,* was the fact that NAI represented to its clients and prospective clients that the essence of the services it was offering were investment strategies that divided the stock market into nine sectors, that it would invest in exchange-traded funds ("ETF"s) for each of the nine sectors, that it would track the performance of those sector ETFs according to its formula, and if the performance of a given sector ETF

1. The evidence (from Jay Morton himself) established that NAI's statement—about NAI's Vireo strategies being based on strategies which, in turn, were based on Morton's strategy—was true. (Appendix N, p. 176a; Appendix M, p. 174a)

The SEC also falsely alleged that those graphs (of F-Squared's hypothetical index performance) were NAI's actual performance record for its Vireo clients. They clearly were not. The performance graphs themselves and the Important Disclosures section of the marketing materials clearly identified the performance as F-Squared's hypothetical performance of its index strategy—not the performance record of NAI's Vireo strategy which was separately provided in the marketing brochures.

or ETFs declined over a trading period, the ETFs would be liquidated and held in cash equivalents until the sector ETFs' performance improved.

NAI also presented its clients and prospective clients with a quarterly updated chart of *its actual* performance of each of *its* Vireo strategies, for its clients' accounts since 2010, the time when NAI began investing for its Vireo clients in the Vireo investment strategies it was offering. (Appendix T, pp. 200a – 208a)

NAI invested its clients' assets exactly according to the investment strategy NAI had promised them and, as a result, returned to those clients *$221 Million in net profits* (after return of the investment advisory fees they had paid to NAI) after receiving the benefit of their bargain. (Appendix I, pp. 143a – 144a; Docket No. 277, Exhibit 1; Appendix Q, p. 192a

The SEC conceded that NAI did not lie about how its Vireo strategies would invest. Nor did it lie about investing clients' monies according to its Vireo strategies. It did so invest. NAI's Vireo clients got exactly the investment advice they were contractually promised.

Nonetheless, the SEC based its securities fraud claim on its assertion that NAI lied to its clients about Morton's investment strategy being live traded and omitted to tell its clients it had no trade confirmations for Morton's trades.

However, the SEC presented no evidence from any NAI clients that they considered NAI's based-on-[Morton]-live traded strategy statement or omission of

trade confirmations important, or that that statement or omission induced them to become and remain NAI Vireo clients[2].

On the contrary, NAI produced the SEC's own notes from its investigative interview of an independent, highly sophisticated investment advisor (Ken Zanonni) who had referred hundreds of his clients to NAI who hired NAI to invest over $100 million of their monies according to NAI's Vireo strategies. Mr. Zanonni testified that he and his clients did not rely on the supposedly false statement about Morton's live traded strategy being the "basis" for NAI's Vireo strategies, or that NAI had requested but had not received trade confirmations for Morton's investment strategy. Mr. Zanonni also testified that *F-Squared's* hypothetical performance was irrelevant and not what induced them to hire NAI as their investment advisor and

---

2. In *SEC v. Commonwealth* 133 F.4th 152, 170 (1st Cir. 2025), a different panel of the First Circuit vacated a summary judgment decision that a failure to disclose an alleged conflict of interest was a *per se* material omission, without any investor client testimony that such alleged omitted conflict of interest information was important to them or would have caused them not to invest. ["The SEC did not provide testimony from Commonwealth clients or representatives describing the significance they attributed to the omitted information.]

The lower courts flinderated the summary judgment standards by fabricating "facts" that did not exist, mischaracterized what NAI actually said to make its true statement appear to be an untrue statement (*Oklahoma Firefighters Pension & Ret. Sys. v. Biogen, Inc.* 665 F. Supp.3rd 125, 131-132 (D. Mass. 2023)) and created a *per se* standard for determining materiality by summary judgment that does not exist. *SEC v. Commonwealth* 133 F.4th at 169.

pay for its investment advisory services. He testified that what he and his clients considered important, and why they hired NAI, was NAI's *actual performance record for its Vireo clients*[3].

This Court should rehear and grant certiorari in this case so that it can correct and establish a proper materiality standard for determining the [im]materiality of misrepresentations in government enforcement actions of federal fraud statutes like §206 [15 U.S.C. §80b-6(1) or (2)].

THE CIRCUIT SPLIT ON DISGORGEMENT SHOULD BE RESOLVED

The Court should also grant this Petition for Rehearing and Petition for Certiorari to resolve the encompassed issue of the conflict between the Second Circuit in *Govil v. SEC* 86 F.4th 89, 94, 98 (2nd Cir. (2023) and the First Circuit in this case *SEC v. Navellier & Associates, Inc.* 108 F.4th 19, 41 n. 14 as to whether the SEC can even seek

---

3. Here there was no evidence that any NAI clients were induced to become clients because of the allegedly false statement about the strategy being based on Morton's strategy, or on Morton's strategy being live-traded, or on any hypothetical performance. Those are all highly disputed issues of fact, which cannot be determined by a judge by summary judgment, where materiality is disputed by conflicting evidence. A defendant has a constitutional right to have a jury decide materiality, not a judge by summary judgment (*SEC v. Commonwealth Equity Services, LLC* 133 F. 4th 152, 167-168 (1st Cir. 2025) citing *SEC v. Jarkesy* 603 U.S. 109, 140 [a defendant facing a fraud suit has a right to be tried by a jury]) because there is no *per se* rule of materiality that substitutes for the summary judgment standards. *SEC v. Commonwealth* supra at 168-170.

disgorgement, and whether district courts have authority to, award disgorgement where the investors suffered no pecuniary harm as a result of the defendants' alleged violation of §§206(1) or (2) of the Investment Advisors Act of 1940 [15 U.S.C. §80b-6(1) or (2)].

Several articles in the legal media, published after this Court denied Navellier's Petition for Writ of Certiorari, have highlighted that "the issue of whether the SEC may obtain disgorgement without a showing of pecuniary harm remains unresolved" . . . "Resolution of this issue likely will require a ruling by the Supreme Court. But until that ruling arrives, it appears the SEC's ability to obtain disgorgement in cases without pecuniary harm may continue to vary from circuit to circuit." *Eye on Enforcement, Government Investigation, and Enforcement Trends* https://www.eyeonenforcement.com/ See also SEC Disgorgement Stuck in Circuit Split After Supreme Court Declines to Intervene article at https://natlawreview.com/article/sec-disgorgement-stuck-circuit-split-after-supreme-court-declines-intervene; Bloomberg News Article, June 5, 2025 Investment Firm Seeking High Court Review Cites Fraud Ruling https://news.bloomberglaw.com/securities-law/investment-firm-seeking-high-court-review-cites-fraud-ruling

Petitioners' Petition for Writ of Certiorari as to both the disgorgement issue and the materiality issue raise profound issues vital to the investment advisory community, which should be resolved by the grant of Petitioners' Petition for Rehearing and Petition for Writ of Certiorari, so that investment advisors, their clients, and the SEC have clarity and guidance as to how to proceed.

GRANT, VACATE AND REMAND

In the alternative, even if the Court does not grant certiorari to decide these issues (it absolutely should), the Court should at least grant certiorari, vacate the judgment, and remand this case for a proper determination of the issue of materiality, according to a benefit-of-the-bargain analysis indicated in the concurring opinions in the *Kousisis* case, and to decide (eliminate) the disgorgement award, by applying the correct "no pecuniary harm" decision in *Govil v. SEC* supra 86 F.4th at 94, 98, because the First Circuit and the District Court's disregarded the law set forth by this Court in *Liu v. SEC* 591 U.S. 71 and in Govil *Id.* making clear that disgorgement cannot be awarded if "victims" suffered no pecuniary harm, and can only be for net profits causally connected to (obtained directly as a result of) a defendant's wrongful conduct[4].

4. Profits earned on supposed "ill-gotten gains", such as the $14 Million NAI earned for the sale of its Vireo goodwill. That $14 Million was *not* derived from defrauding a "client" as required by §206 of the Investment Advisors Act. F-Squared was not a client and was not defrauded in any way by NAI or Mr. Navellier. At worst, the $14 Million for the sale of goodwill was profit earned on the allegedly "ill-gotten" gains, which is not disgorgeable (*SEC v. Manor Nursing Center, Inc.* 458 F.2d. 1082, 1104 (2nd Cir. 1972) and would constitute an invalid penalty. In any event, NAI's profit for the sale of its goodwill was far "too attenuated" to be disgorgeable. *SEC v. Commonwealth Equity Services* supra 133 F.4th at 171; Restatement (third) of Restitution and Unjust Enrichment, §51, comment f.

CONCLUSION

In light of the recent intervening decision in *Kousisis v. United States* 145 S. Ct. 1382- Petitioners' Petition for Rehearing and Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Samuel Kornhauser
Counsel of Record
Law Offices of
Samuel Kornhauser
155 Jackson Street,
Suite 1807
San Francisco, CA 94111
(415) 981-6281
samuel.kornhauser@gmail.com

Attorney for Petitioners

July 1, 2025

CERTIFICATE OF COUNSEL

I, Samuel Kornhauser, certify that I am counsel of record for Petitioners herein, that I prepared the accompanying Petition for Rehearing, and that it is restricted to the grounds specified in Supreme Court Rule 44.2, i.e., that it is based on the effect of the intervening May 22, 2025 decision in *Kousisis v. United States* 145 S. Ct. 1382, which was issued after May 19, 2025, when Petitioners' Petition for Writ of Certiorari was presented for the June 5, 2025 conference. Therefore, I could not adequately and fully brief the effect of the materiality issue reserved by the *Kousisis* decision, which supports the materiality issue raised by Petitioners' Petition for Writ of Certiorari in this case. I do not believe that the Justices had a fair and adequate time, from June 4, 2025 to June 5, 2025, to analyze and fully and fairly consider, on the merits, how the *Kousisis* decision created a need to grant certification here, so that the reserved issue of the proper standard for determining materiality in federal fraud cases could be decided.

The undersigned hereby certifies that this Petition for Rehearing is presented in good faith, restricted to the grounds set forth in Rule 44.2 and is not presented for the purpose of delay.

Respectfully submitted,

/s/ Samuel Kornhauser

SAMUEL KORNHAUSER
Counsel of Record
LAW OFFICES OF
SAMUEL KORNHAUSER
155 Jackson Street,
Suite 1807
San Francisco, CA 94111
(415) 981-6281
samuel.kornhauser@gmail.com

Attorney for Petitioners

July 1, 2025