No. 24-972

In the Supreme Court of the United States

FRANK BELL; TYSON RHAME; JAMES SHAW,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONERS

JEFFREY S. BUCHOLTZ
PAUL ALESSIO MEZZINA
ALEXANDER KAZAM
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006

DONALD F. SAMUEL
AMANDA R. CLARK PALMER
GARLAND, SAMUEL & LOEB P.C.
3151 Maple Drive, N.E.
Atlanta, GA 30305

KANNON K. SHANMUGAM
Counsel of Record
WILLIAM T. MARKS
MATTHEW J. DISLER
EMMA R. WHITE
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

DAVID OSCAR MARKUS
MONA E. MARKUS
MARKUS/MOSS PLLC
40 N.W. Third Street, Penthouse One
Miami, FL 33128

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After this Court's recent decision in *Kousisis* v. *United States*, 145 S. Ct. 1382 (2025), this case is a paradigmatic candidate for an order granting the petition, vacating the judgment below, and remanding for reconsideration. The first question presented here is whether a misrepresentation that does not go to the price or fundamental characteristics of property is sufficient to sustain a conviction under the federal fraud statutes. Although the Court held in *Kousisis* that an individual can have an intent to "obtai[n] money or property" from another without intending to cause net pecuniary loss, 18 U.S.C. 1343, the Court proceeded to explain that the question whether

a misrepresentation is sufficiently related to the core attributes of the bargain at issue goes to the element of materiality. And as the Court noted, the government's view of materiality is that criminal fraud liability cannot arise unless a misrepresentation "goes to the very essence of the parties' bargain." 145 S. Ct. at 1396 (internal quotation marks and citation omitted). Petitioners' argument here is that the misrepresentations at issue did not. Because the court of appeals has not had an opportunity to assess petitioners' argument through the lens of materiality, the judgment below should be vacated and the case remanded for reconsideration in light of *Kousisis*.

In the alternative, the petition should be granted. This case provides the Court with a vehicle to decide the open question of whether the government's proposed standard for materiality is correct. And the second question presented—concerning the level of clarity necessary for an answer to a question to give rise to a violation of 18 U.S.C. 1001—warrants review as well. With respect to that question, the government asserts that the court of appeals followed *Bronston* v. *United States*, 409 U.S. 352 (1973). That is incorrect: the court of appeals selectively quoted *Bronston* without heeding its fundamental teaching. Accordingly, if the Court does not grant, vacate and remand, it should grant the petition outright and set the case for plenary review.

A. The Court Should GVR In Light Of *Kousisis* v. *United States*

This Court's decision in *Kousisis* "(1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Flowers* v. *Mississippi*, 579 U.S. 913, 913 (2016) (Alito, J., dissenting). An order granting the petition, vacating the judgment below, and

remanding for reconsideration in light of *Kousisis* is consistent with the Court's "longstanding" practice to "leave[] it to the lower courts to revisit their judgments * * * in the first instance," particularly "where an intervening decision of this Court bears on the reasoning below." *Grzegorczyk* v. *United States*, 142 S. Ct. 2580, 2585, 2586 n.6 (2022) (Sotomayor, J., dissenting); see *Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996). The Court should GVR here.

1. In *Kousisis*, the Court held that a party can "devise[] or intend[] to devise [a] scheme" to "obtain[] money or property" from another for purposes of the federal wire-fraud statute, 18 U.S.C. 1343, without intending to cause the victim a net pecuniary loss. See 145 S. Ct. at 1391-1392. Instead, criminal liability can arise any time a party uses a material misrepresentation to induce another person to part with money or property, even when that person receives equal value in return. See *ibid.*

At the same time, the Court underscored that "[t]he 'demanding' materiality requirement substantially narrows the universe of actionable misrepresentations" under the federal wire-fraud statute. *Kousisis*, 145 S. Ct. at 1398 (citation omitted). As the Court noted, the government had argued that, under the proper standard for materiality, "a misrepresentation is material only if it goes to the very essence of the parties' bargain." *Id.* at 1396 (internal quotation marks and citation omitted). The government had offered that "demanding and rigorous" materiality standard as an answer to the petitioner's argument that the government's position would turn everyday misrepresentations, such as a babysitter's lie about his or her intended use of wages, into federal crimes. U.S. Br. at 44-45 (No. 23-909). In other words, although the government viewed the issue through the lens of materiality, it essen-

tially conceded that the federal fraud statutes require distinguishing between misrepresentations that go to the essence of the parties' bargain and those that are merely ancillary to that bargain.

The Court ultimately declined to decide whether the essence-of-the-bargain standard was the correct standard for assessing materiality. See *Kousisis*, 145 S. Ct. at 1398. But as Justice Thomas explained, "hold[ing] the [g]overment to its word" on the essence-of-the-bargain standard would "ensure that federal wire-fraud prosecutions cannot be used to target benign, everyday misstatements" and is necessary to prevent the wire-fraud statute from becoming "nearly limitless in scope." *Id.* at 1404-1405 (concurring opinion).

2. In *Kousisis*, the Court "changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Flowers*, 579 U.S. at 913 (Alito, J., dissenting); see *Lawrence*, 516 U.S. at 167. In the proceedings below, petitioners argued that "the prosecution's theory of fraud fail[ed] as a matter of law" because petitioners' customers "received exactly the dinar they paid for." Pet. App. 12a. Petitioners thus argued that the alleged misrepresentations—namely, that a reevaluation of the dinar was likely to occur and that petitioners would establish airport exchanges after the revaluation—did not go to the essence of the bargain between petitioners and their customers. See *ibid.*

The court of appeals rejected that argument, holding that a misrepresentation that does not concern either the price or a fundamental characteristic of the property at issue can still create federal criminal liability for fraud. See Pet. 18-19. But rather than applying the essence-of-the-bargain test to determine whether such a misstatement was material, the court analyzed the issue in terms of petitioners' "intent to harm victims." Pet. App. 12a

(emphasis omitted). Although the court of appeals paid lip service to the principle that a misrepresentation must concern the "nature of the bargain itself," it swiftly retreated from that position by declaring that "[a] deception need not have a calculable price difference or result in a different tangible good or service being received to constitute fraud." *Id.* at 12a-13a (citation omitted).

There is a "reasonable probability" that the court of appeals would alter its analysis in light of *Kousisis*. *Lawrence*, 516 U.S. at 167. *Kousisis* makes clear that whether a misrepresentation goes to the core aspects of a bargain is a question of materiality, not intent. And under the government's essence-of-the-bargain test, petitioners' misstatements were not material, because they did not go to the price or fundamental characteristics of the Iraqi dinars that petitioners sold. At a minimum, a reasonable jury could reach that conclusion on remand from the court of appeals; for example, just as the contracts in *Kousisis* were for "bridge repairs, not minority hiring," 145 S. Ct. at 1401 (Thomas, J., concurring), a jury could conclude that the essence of the bargain here was for Iraqi dinars, not airport exchanges that were advertised as being open to everyone (not just defendants' customers) and for which no customer was alleged to have paid a premium. Because *Kousisis* clarifies the appropriate way to analyze the principal argument petitioners have raised for overturning their fraud convictions, a GVR order is appropriate.

3. The government acknowledges the centrality of *Kousisis* to the first question presented but argues that remand is inappropriate because "petitioners' fraudulent scheme was designed to—and in fact did—inflict a net pecuniary loss on their victims." Br. in Opp. 9 & n.*. That misses the point. Whether or not proof of net pecuniary loss is required to prove criminal intent, petitioners and

the government agree that proof that the relevant misrepresentations *went to the essence of the bargain* is necessary to establish materiality.

The distinction between the intended effect of a fraudulent scheme and the materiality of the associated misrepresentation is a meaningful one. For example, in the context of the False Claims Act, a misrepresentation about a party's "compliance with a particular statutory, regulatory, or contractual requirement" is not material "merely because the [g]overnment designates compliance * * * as a condition of payment," even if that misrepresentation was intended to obtain the government's property through deceit. *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 194 (2016). *Kousisis* thus does not resolve this case, and the court of appeals should have the opportunity to assess materiality in light of *Kousisis* in the first instance.

4. If the Court does not grant, vacate, and remand, the petition should be granted outright as to the first question presented. In *Kousisis*, the Court did not resolve the question of the appropriate standard for materiality under the federal wire-fraud statute. It should take the opportunity to do so in this case if it does not wish to allow the court of appeals to address the question of materiality in the first instance.

B. The Court Should Grant Review On The Question Concerning The False-Statements Statute

The second question presented is whether a defendant may be convicted for making a false statement under 18 U.S.C. 1001 by answering a question posed by a government agent in a way that is ambiguous as to its truth or falsity. The government does not disagree that this question is of significant importance. Instead, it contends that

the decision below is consistent with this Court's precedents on this score. That argument is unconvincing.

1. The government argues (Br. 9) that the court of appeals simply applied *Bronston* in upholding Rhame's and Bell's convictions under Section 1001. To be sure, the court of appeals quoted this Court's statement in *Bronston* that "[p]recise questioning is imperative as a predicate" for perjury liability. Pet. App. 27a (emphasis omitted) (quoting *Bronston*, 409 U.S. at 362). But the court of appeals proceeded to ignore the thrust of the Court's reasoning, which was that a questioner must bear the burden of "press[ing] on for the information he desires" after receiving an "unresponsive answer" in order to avoid imposing the "drastic sanction of a perjury prosecution" for mere unresponsiveness. *Bronston*, 409 U.S. at 358, 362. Indeed, the Court in *Bronston* assumed that the question prompting the testimony at issue was unambiguous; its analysis focused on whether the unclear formulation of the "petitioner's answer" led to his conviction. *Id.* at 356-358.

Accordingly, while the court of appeals quoted *Bronston*, it missed the point of that decision entirely. And contrary to the government's suggestion, the specter of conviction under Section 1001 creates precisely the "prospect of criminalizing 'an unresponsive answer, true and complete on its face,'" leaving individuals "'unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners.'" Br. in Opp. 9 (quoting *Bronston*, 409 U.S. at 359). The decision below is thus plainly inconsistent with *Bronston*.

2. The government does not dispute that other courts have "looked to ambiguity in a defendant's answers in assessing falsity." Br. in Opp. 10. Yet it insists that the decision below did so as well. See *ibid.* The court of appeals, however, squarely stated that a challenge to a Section

1001 conviction "premised on the ambiguity of [a defendant's] answers," as opposed to ambiguity in the questions asked, "fails as a matter of law." Pet. App. 27a. Although the court did state that "[t]here was nothing 'fundamentally ambiguous' about Rhame's and Bell's statements or the agents' questions," *ibid.*, it provided no explanation for why Rhame's and Bell's answers were sufficiently clear. Nor could it: their answers were ambiguous. See Pet. 9-10. The Court should grant review to hold both that ambiguity in a defendant's answers is critically important when assessing liability under Section 1001 and that Rhame's and Bell's answers cannot support their convictions under that statute.

* * * * *

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of *Kousisis*. In the alternative, the petition should be granted and the case set for plenary review.

Respectfully submitted.

JEFFREY S. BUCHOLTZ
PAUL ALESSIO MEZZINA
ALEXANDER KAZAM
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006

DONALD F. SAMUEL
AMANDA R. CLARK PALMER
GARLAND, SAMUEL & LOEB P.C.
3151 Maple Drive, N.E.
Atlanta, GA 30305

Counsel for Petitioner James Shaw

KANNON K. SHANMUGAM
WILLIAM T. MARKS
MATTHEW J. DISLER
EMMA R. WHITE
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

Counsel for Petitioner Frank Bell

DAVID OSCAR MARKUS
MONA E. MARKUS
MARKUS/MOSS PLLC
40 N.W. Third Street, Penthouse One
Miami, FL 33128

Counsel for Petitioner Tyson Rhame

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