No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a misrepresentation that does not concern the price or fundamental characteristics of property can give rise to a violation of the federal mail-fraud and wire-fraud statutes, 18 U.S.C. 1341 and 1343.

2. 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.

RELATED PROCEEDINGS

United States District Court (N.D. Ga.):

United States of America v. *Rhame*, Crim. No. 16-67 (Aug. 10, 2022)

United States Court of Appeals (11th Cir.):

United States of America v. *Bell*, No. 22-12750 (Aug. 14, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Frank Bell, Tyson Rhame, and James Shaw respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 112 F.4th 1318. The opinions of the district court denying the motions for a new trial (App., *infra*, 38a-54a) and motions for judgment of acquittal (App., *infra*, 55a-76a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2024. App., *infra*, 1a-36a. The petition for rehearing was denied on November 8, 2024. *Id.* at 37a. On January 27, 2025, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 8, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1341 of Title 18 of the United States Code 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, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, * * * shall be fined under this title or imprisoned not more than 20 years, or both.

Section 1343 of Title 18 of the United States Code 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.

Section 1001 of Title 18 of the United States Code provides in relevant part:

> (a) * * * [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> > (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> >
> > (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> >
> > (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years * * * , or both.

STATEMENT

This case presents two important questions concerning the interpretation of the federal criminal fraud and false-statements statutes. This Court has repeatedly held that "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests," *Ciminelli* v. *United States*, 598 U.S. 306, 309 (2023), and do not extend to protect against the deprivation of "intangible rights," see *Skilling* v. *United States*, 561 U.S. 358, 400 (2010); 18 U.S.C. 1341, 1343. Consistent with that understanding, several courts of appeals have held that a person does not commit criminal fraud by deceiving someone into entering a transaction unless the person misrepresented the price or a fundamental characteristic of the good or service at issue. Absent such a misrepresentation, those courts hold, the purchaser has not been deprived of any traditional property interest, because he received exactly

the goods or services he paid for. In the decision below, however, the court of appeals cast aside that requirement, holding instead that even "collateral" misrepresentations can support a fraud prosecution. The court of appeals separately held that a defendant can be convicted of making a false statement in violation of 18 U.S.C. 1001 even if the statement is ambiguous as to its truth or falsity. The questions presented are, *first*, whether a misrepresentation that does not concern the price or fundamental characteristics of property can give rise to a violation of the federal mail-fraud and wire-fraud statutes; and *second*, 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.

Petitioners are former executives of a currency-exchange business that sold Iraqi currency, called the dinar. The value of the dinar is set by the Iraqi government. Petitioners' business advertised on an online forum that discussed rumors that the Iraqi government would increase the value of the currency, and the business's website stated that the business could establish currency exchanges at airport locations in the event of a revaluation. Every customer that purchased Iraqi dinars from petitioners' business received the dinars for the price they were quoted.

Petitioners were indicted in federal court for committing (and conspiring to commit) mail and wire fraud under 18 U.S.C. 1341 and 1343; two of the petitioners were also indicted for making false statements to a government agent under 18 U.S.C. 1001. At trial, the government argued that petitioners committed fraud by misrepresenting the likelihood that the dinar would revalue and that their business would establish currency exchanges near airports. A jury found all of the petitioners guilty of the

fraud charges and two of the petitioners guilty of the false-statements charges.

The court of appeals affirmed. In so doing, the court rejected petitioners' argument that a misrepresentation cannot constitute a scheme to defraud under the federal fraud statutes unless it concerns the price or a fundamental characteristic of the good or service at issue. The court also held that the ambiguous nature of a defendant's response to a question from a government agent is irrelevant to whether the response violated Section 1001.

The court of appeals' decision was incorrect and conflicts with decisions of other circuits. With respect to the federal fraud statutes, at least four other courts of appeals have held that a misrepresentation cannot support a fraud conviction if it does not concern the price or fundamental characteristics of the property at issue. The decision below cannot be reconciled with those decisions and squarely contradicts this Court's recent decisions emphasizing that the fraud statutes are limited to the protection of traditional property rights. Notably, in reaching its decision, the court of appeals expressly embraced the theory that fraudulent inducement alone can violate the federal fraud statutes, a question currently pending before this Court in *Kousisis* v. *United States*, No. 23-909.

With respect to Section 1001, the court of appeals' holding is in serious tension with decisions from other courts of appeals that consider the ambiguity of a defendant's statements in assessing whether there is sufficient evidence of falsity, as well as this Court's decision in *Bronston* v. *United States*, 409 U.S. 352 (1973), in the analogous context of perjury.

Both questions presented are exceptionally important and warrant the Court's review in this case. If allowed to stand, the decision below will undercut this Court's re-

peated efforts to rein in overly expansive theories of criminal fraud and to limit the fraud statutes to the protection of traditional property rights. It will also dramatically expand the risk of liability for anyone who participates in a government interview or responds to a reporting requirement. Because this case is an ideal vehicle for resolving the questions presented, the petition for a writ of certiorari should be granted. At a minimum, the petition should be held pending this Court's decision in *Kousisis* and then disposed of as appropriate.

A. Background

1. The federal fraud statutes create criminal penalties for those who commit "any scheme or artifice to defraud." 18 U.S.C. 1341 (mail fraud); see 18 U.S.C. 1343 (wire fraud). That language incorporates the "common understanding" of fraud at the time of the enactment of the mail-fraud statute. *McNally* v. *United States*, 483 U.S. 350, 359 (1987). Based on that historical understanding, "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,'" *id.* at 358 (citation omitted), such that the fraud statutes "protect[] property rights only," *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000). For that reason, a "scheme to defraud" "must be one to deceive the [victim] *and* deprive it of something of value." *Shaw* v. *United States*, 580 U.S. 63, 72 (2016).

This Court has repeatedly applied those principles to reject applications of the fraud statutes that impermissibly expanded their scope beyond the historical understanding of fraud. For example, in *McNally*, the Court rejected the government's use of the fraud statutes to prosecute schemes that deprive individuals of "intangible rights to honest and impartial government." 483 U.S. at

355. After Congress responded by enacting a statute proscribing deprivations of "the intangible right of honest services," 18 U.S.C. 1346, the Court interpreted the statute to proscribe only bribe or kickback schemes, in order to avoid potential vagueness problems. See *Skilling*, 561 U.S. at 404. More recently, the Court held that deceptive schemes to interfere with a government's regulatory interests, even where property loss was an "incidental byproduct" of that scheme, did not violate the fraud statutes. *Kelly* v. *United States*, 590 U.S. 391, 402 (2020); see *Cleveland*, 531 U.S. at 20-22, 26-27. And in *Ciminelli*, *supra*, the Court invalidated the so-called right-to-control theory of fraud liability, because a deprivation of "potentially valuable economic information necessary to make discretionary economic decisions" does not affect a "traditional property interest." 598 U.S. at 309 (internal quotation marks and citation omitted).

2. Section 1001 of Title 18 imposes criminal liability on anyone who "knowingly and willfully" "makes any materially false, fictitious, or fraudulent statement or representation" in any matter within the jurisdiction of the federal government. 18 U.S.C. 1001(a)(2). In interpreting Section 1001, the Court has considered the law governing "the analogous crime of perjury." *Brogan* v. *United States*, 522 U.S. 398, 402 (1998); see *United States* v. *Gaudin*, 515 U.S. 506, 515-519 (1995). Of particular relevance here, in *Bronston*, *supra*, the Court held that a witness may not be convicted of perjury for a statement that is "literally true but not responsive to the question asked and arguably misleading by negative implication." 522 U.S. at 353. Even if an unresponsive statement might be misleading or "untrue only by 'negative implication,'" the Court explained, a questioner could "press another question or reframe his initial question with greater precision." *Id.* at 361-362.

B. Facts And Procedural History

1. Petitioners Tyson Rhame and James Shaw were the founders and owners of Sterling Currency Group, a currency-exchange business that bought and sold Iraqi dinars at agreed-upon prices from 2004 until 2015. Petitioner Frank Bell joined the company in 2010 and later became its chief operating officer. App., *infra*, 2a.

At all relevant times, the purchase and sale of Iraqi dinars has been lawful, with banks and other companies participating in the market. App., *infra*, 3a; see also Trial Tr. 1073-1074, 3643, 3676.[1] The Iraqi government sets the dinar's value. App., *infra*, 3a; Trial Tr. 3391. Although Sterling, like other currency exchanges, charged modest fees for the service of providing an exchange, the value of the dinar—and, in particular, any prospect of a change in its value—has been controlled by the Iraqi government. See Trial Tr. 1597. Sterling also offered layaway programs, in which customers paid a deposit in return for the right to secure future delivery of dinars at the then-current exchange rate. *Id.* at 1309-1311. Every customer who paid or fulfilled the terms of a layaway program received the dinars that the customer paid for. App., *infra*, 8a.

Sterling also advertised on an independent online forum that hosted a website, public conference calls, and chatrooms discussing the Iraqi dinar. Trial Tr. 1270-1273, 1580. The forum's moderator shared what he and others characterized as "rumors" concerning the likelihood that the Iraqi government would revalue the dinar, making it significantly more valuable. See, *e.g.*, *id.* at 1195-1207, 1272-1273. Like other dinar brokers, Sterling paid a fixed fee in exchange for a banner advertisement on the forum's

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[1] Transcripts of the trial proceedings are located at entries 522-548 of the district court's docket.

website and for joining conference calls as a sponsor. *Id.* at 1580; Gov't Ex. 52-1, at 20. At the same time, Sterling's website stated that layaway purchasers of Iraqi dinars should not purchase dinars "as a 'gamble' on a rapid increase in value" and that "[n]o one knows when or if a change in value in the Iraqi Dinar is going to occur." Def. Ex. 556, at 3.

Sterling stated on its website that it had the ability to establish currency exchanges at "numerous airport locations nationwide," which would allow customers and non-customers alike to exchange dinars for dollars. Gov't Ex. 825, at 2. No contracts with customers granted any rights to access a currency exchange at or near an airport. See App., *infra*, 8a. At one point, Sterling's website indicated that exchanges would be available within 24 hours of a revaluation, but the company later removed any reference to a fixed timeframe and instead stated that Sterling would establish exchanges in a city with an airport served by at least two major carriers for individuals with a threshold volume of dinars to exchange. Trial Tr. 1519-1520, 1729-1730, 2648-2652, 2657.

2. In 2015, agents of the Federal Bureau of Investigation (FBI) interviewed Bell and Rhame. In Bell's first interview, he stated that Sterling "maintain[ed] a firewall" between itself and dinar promoters, and added that he had told the dinar promoters that "[their] job is not to drive business to [Sterling's] website." Gov't Ex. 50-1, at 10. The agents did not ask questions to clarify the meaning of that statement. Several days later, the FBI searched Bell's house and asked him about communications with the online forum about "what they're doing in these chat rooms to direct business to Sterling." Bell responded that he told the moderator that "I don't want him doing it and I don't want to hear about it." Gov't Ex. 52-1,

at 18-19. Again, the agents did not clarify the meaning of Bell's statement.

Rhame similarly spoke with FBI agents after they searched his house. Rhame stated, "[W]e don't incentivize any—you know, if we advertise with somebody, there's no way in a million years we incentivized them to do that or anything else like that." Rhame also answered in the negative when the agent asked whether Sterling paid a "commission" to third parties, without defining what was meant by the term, and whether he "personally or on [his] website or anything like that have ever said promoting [dinar] as a good investment." Finally, he denied "promot[ing] or talk[ing] about [the revaluation] on [his] website." Gov't Ex. 51-1, at 8-14.

3. Petitioners and one other individual were indicted in the United States District Court for the Northern District of Georgia. The superseding indictment charged petitioners with conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. 1349; mail and wire fraud, in violation of 18 U.S.C. 2, 1341, 1343, and 1349; and conspiracy to launder money, in violation of 18 U.S.C. 1956(h). See App., *infra*, 7a. Bell and Rhame were also charged with making false statements, in violation of 18 U.S.C. 1001(a)(2), and Rhame and Shaw were charged with money laundering, in violation of 18 U.S.C. 2 and 1957. See *ibid*. The district court denied petitioners' motions to dismiss the indictment but later dismissed several of the fraud and money-laundering charges on the government's motion. See D. Ct. Dkt. 264, 500.

At trial, the government argued that petitioners misrepresented the likelihood of an imminent revaluation and falsely stated that Sterling would establish currency exchanges at airports when a revaluation did occur. See App., *infra*, 5a-6a, 17a-18a. But the government introduced no evidence of a misrepresentation concerning the

value or characteristics of the dinars that customers purchased; to the contrary, it conceded that customers "got the dinar [they] paid for." Trial Tr. 4671. The government further argued that Bell's and Rhame's statements to FBI investigators violated Section 1001. See *id.* at 4695-4696, 4704-4708.

At the close of the evidence, petitioners requested jury instructions stating that "[p]roving intent to deceive alone, meaning deception without the intent to cause loss or injury, is not sufficient to prove intent to defraud," and that petitioners could not be found guilty if they "gave the person exactly what they asked for and charged that person exactly what he or she agreed to pay." D. Ct. Dkt. 427, at 23. But the district court rejected petitioners' proposed instruction; instead, it instructed the jury that "[acting] with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else." D. Ct. Dkt. 510, at 23.

The jury returned guilty verdicts for petitioners on the fraud and false-statements counts. App., *infra*, 9a. Petitioners moved for judgments of acquittal and a new trial, arguing in relevant part that the government had failed to prove intent to harm; that the jury instruction on the fraud counts was incorrect because it did not require a finding of intent to harm; and that the alleged false statements were fundamentally ambiguous and thus could not support a conviction under Section 1001. *Id.* at 40a-44a, 48a, 63a, 69a-71a.

The district court denied the motions. App., *infra*, 54a, 74a-75a. As to the fraud counts, the court determined that the evidence was sufficient because petitioners had participated in a scheme to lead customers to believe that a revaluation would occur and that Sterling would provide

airport exchanges. *Id.* at 61a-64a. It additionally reaffirmed the refusal to issue petitioners' proposed jury instruction, reasoning that "the totality of the proposed language concerning giving the victims what they paid for (and the absence of fraud) would not have applied here" on the ground that, *inter alia*, "this is a fraud in the inducement case." *Id.* at 43a. As to the false-statements counts, the court declined to hold that the ambiguity of an answer would render the evidence insufficient to demonstrate a false-statements offense. *Id.* at 71a-72a.

The district court sentenced Rhame to 180 months of imprisonment; Shaw to 95 months of imprisonment; and Bell to 84 months of imprisonment. App., *infra*, 10a.

4. The court of appeals affirmed. App., *infra*, 1a-36a.

As to the fraud counts, petitioners contended that, because statements about a potential revaluation of the dinar or plans for airport exchanges did not concern the price or fundamental characteristics of the dinar, the evidence was insufficient to show that the statements concerned an essential element of the bargain. App., *infra*, 12a. Addressing that contention, the court of appeals purported to acknowledge that, in order to support a fraud conviction, a "deception must go to the 'nature of the bargain itself.'" *Ibid.* (quoting *United States* v. *Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016)). But it proceeded to hold that "a deception need not have a calculable price difference or result in a different tangible good or service being received to constitute fraud" and that "fraudulent inducements about a collateral but still material matter are punishable under the federal statutes." *Id.* at 13a, 16a. Applying that holding, the court determined that the potential revaluation of the dinar and Sterling's advertised plans for airport exchanges went to "essential characteristic[s]" or "core attribute[s] of the dinar." *Id.* at 14a-16a.

As to the false-statements counts, the court of appeals rejected Bell's and Rhame's arguments that the record lacked sufficient evidence to support their convictions because their statements were fundamentally ambiguous. App., *infra*, 23a. The court held that Section 1001 barred "only prosecutions 'based on fundamentally ambiguous *questions*,'" not ambiguous answers. *Id.* at 27a (citation omitted). It therefore concluded that petitioners' arguments, "premised on the ambiguity of their answers, fail[] as a matter of law." *Ibid.*[2]

5. The court of appeals denied a petition for rehearing without recorded dissent. App., *infra*, 37a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision interpreting the federal criminal fraud and false-statements statutes conflicts with the decisions of other courts of appeals and is incorrect under this Court's precedents. The proper interpretation of those statutes is exceedingly important, and the Court's plenary review is warranted. In the alternative, because the first question presented overlaps with the question currently pending before the Court in *Kousisis* v. *United States*, No. 23-909, the Court may wish to hold the petition and dispose of it as appropriate in light of the decision in *Kousisis*.

I. REVIEW IS WARRANTED ON THE QUESTION CONCERNING THE FEDERAL FRAUD STATUTES

The first question presented is whether a misrepresentation that does not concern the price or fundamental

[2] After holding that a defendant may be convicted of a false-statements offense based on an answer that is ambiguous as to its truth or falsity, the court of appeals concluded that "[t]here was nothing 'fundamentally ambiguous' about Rhame's and Bell's statements or the agents' questions." App., *infra*, 27a. However, it did not explain its reasons for concluding that the answers were not ambiguous.

characteristics of property can give rise to a violation of the federal mail-fraud and wire-fraud statutes. In the decision below, the court of appeals held that a collateral misrepresentation that induces a transaction in property can constitute criminal fraud, even if the misrepresentation does not concern the price or fundamental characteristics of the property at issue. That decision cannot be reconciled with the decisions of other courts of appeals, and it is wrong under this Court's precedent. The question is exceedingly important, and plenary review on the question is warranted in this case.

A. The Decision Below On The Scope Of The Federal Fraud Statutes Conflicts With The Decisions Of Other Circuits

Although the court of appeals purported to acknowledge that a misrepresentation must concern the "nature of the bargain itself" in order to support conviction under the federal fraud statutes, the court reasoned that it was no defense that Sterling's customers undisputably "received exactly [the dinars] they paid for." App., *infra*, 12a (citation omitted). The court instead held 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 13a. That decision conflicts with the decisions of four courts of appeals, which have held that a deception that concerns a collateral aspect of the transaction—that is, one not related to either the price or fundamental characteristics of the relevant good or service—cannot violate of the federal fraud statutes.

1. The Second, Sixth, Ninth, and District of Columbia Circuits have all held that a scheme to defraud requires a misrepresentation about the essence of the bargain, meaning the price or fundamental characteristics of the property at issue.

a. The Second Circuit has long "drawn a fine line" between "schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain." *United States* v. *Shellef*, 507 F.3d 82, 108 (2007).

In *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (1970), the Second Circuit held that "false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain," did not constitute federal mail fraud. *Id.* at 1179. There, the defendants' sales personnel lied about their identities in order to sell stationery supplies, but they unquestionably provided their customers with the goods they had purchased. See *id.* at 1176-1177. The Second Circuit rejected "the government's theory that fraud may exist in a commercial transaction even when the customer gets exactly what he expected and at the price he expected to pay." *Id.* at 1180. The court reasoned that such misleading sales practices "did not go to the nature of the bargain itself" and thus did not demonstrate an intent to cause "actual injury" to customers. *Id.* at 1182.

Subsequent decisions from the Second Circuit are to the same effect. In *United States* v. *Starr*, 816 F.2d 94 (1987), the Second Circuit reaffirmed that representations that are "only collateral to the sale and did not concern the quality or nature" of the goods or services sold do not support a criminal fraud prosecution. *Id.* at 98. There, the court determined that because the "basis of the bargain" for the defendants' mailing business was "the timely shipment and handling of bulk mail," and because it delivered that service as purchased by customers, the defendants' misrepresentations about the percentage of payments used for postage fees did not rise to the level of

fraud; rather, the customers "received exactly what they paid for." *Id.* at 99. And in *Shellef*, the Second Circuit concluded that a fraud charge was insufficient if it was based on a deception that merely "induced" the counterparty to "enter into a transaction it would otherwise have avoided," because the jury "might have erroneously convicted [the defendants] even though it concluded that the defendants did not misrepresent an 'essential element' of the bargain." *Id.* at 109 (citation omitted). Again, the Second Circuit explained that the federal fraud statutes do not extend to situations where there is no " 'discrepancy between benefits reasonably anticipated' and actual benefits received." *Ibid.* (citation omitted).

b. The D.C. Circuit joined the Second Circuit in *United States* v. *Guertin*, 67 F.4th 445 (2023). There, it affirmed the dismissal of the indictment of a State Department officer who had allegedly failed to disclose information about his relationships, finances, and gambling activities in order to maintain his security clearance. See *id.* at 447-448. The court explained that, if there was "no difference between the honest employee and dishonest employee in terms of performance or pay," then "the employer receives the benefit of its bargain," and no liability for criminal fraud exists. *Id.* at 451-452. In that situation, the court explained, "the employer is not meaningfully defrauded of 'money or property' when it pays the employee." *Id.* at 451. As the court recognized, a contrary holding "would sweep a large swath of everyday workplace misconduct within the ambit of the federal fraud statutes." *Ibid.*

c. The Ninth Circuit recently reached a similar conclusion in *United States* v. *Milheiser*, 98 F.4th 935 (2024). In *Milheiser*, sales employees of companies selling printer toner had misrepresented their identities to customers and falsely stated that toner prices would increase

in the future. See *id.* at 939. The Ninth Circuit vacated the sales employees' convictions on the ground that, in order to support a fraud conviction, a misrepresentation must "go to the nature of the bargain"—that is, "to price or quality, or otherwise to essential aspects of the transaction." *Id.* at 944. Because the theory of prosecution there required only a false statement that "would be expected to and did cause someone to turn over money," the defendants' conviction could not stand. *Id.* at 945.

d. The Sixth Circuit has likewise held that a customer who is tricked into "paying the going rate for a product" is not defrauded. *United States* v. *Sadler*, 750 F.3d 585, 590 (2014). In that decision, the Sixth Circuit vacated the wire-fraud conviction of a defendant who ordered pain medications from pharmaceutical distributors using a fake name and a false explanation that the drugs would be used to serve indigent patients. See *id.* at 590-592. The court held that the defendant did not "deprive the distributors of property" through that deception; rather, she "paid full price for all the drugs she purchased and did so on time." *Id.* at 590. The Sixth Circuit explained that, even if the lies deprived the companies of "accurate information" to convince them to sell the drugs, the federal statutes did not "cover the right to accurate information before making an otherwise fair exchange." *Id.* at 591.

e. Until recently, the Eleventh Circuit appeared to follow the same approach. In *United States* v. *Takhalov*, 827 F.3d 1307 (2016), the Eleventh Circuit reversed the convictions of club owners who hired women to pose as tourists, concealing their employment by the clubs and coaxing patrons to enter the clubs. See *id.* at 1310-1311. Sitting by designation and writing for the court, Judge Thapar reasoned that a conviction under the wire-fraud statute requires "intent to harm," with the harm occurring when a counterparty is deprived of "something of

value" through deceit. *Id.* at 1313 (citation omitted). A criminal scheme to defraud thus "refers only to those schemes in which a defendant lies about the nature of the bargain itself." *Ibid.* The "primary forms" of such deception are a misrepresentation either "about the price" or "about the characteristics of the good"; a misrepresentation in which "the alleged victims received exactly what they paid for" does not suffice. *Id.* at 1313-1314 (internal quotation marks and citation omitted).

2. By contrast, the Eighth Circuit has suggested that a defendant can violate the fraud statutes by making a misrepresentation that is intended to induce a transaction in property but does not concern the price or essential characteristics of the property. In *United States* v. *Ruzicka*, 988 F.3d 997 (2021), the defendant argued that he did not commit wire fraud by obtaining a discount from a supplier through a misrepresentation, because the supplier received "the full economic benefit of its bargain." *Id.* at 1009. On plain-error review, the court reasoned that it was not clear in the Eighth Circuit that "one who receives the full economic benefit of his bargain cannot be the victim of wire fraud," and the court declined to adopt the reasoning of the Second Circuit or the Eleventh Circuit in *Takhalov*. *Ibid.*

3. The decision below squarely conflicts with the decisions of the Second, Sixth, Ninth, and D.C. Circuits and constitutes an effective abrogation of the Eleventh Circuit's pathmarking decision in *Takhalov*. Although the Eleventh Circuit purported to apply the principle that a "deception must go to the 'nature of the bargain itself,' " it proceeded to hold that "[a] deception need not have a calculable price difference or result in a different tangible good or service being received to constitute fraud." App., *infra*, 12a-13a (citation omitted). The court explained that a misrepresentation about a "collateral but still material

matter"—meaning one that does not affect the price or fundamental characteristics of the good at issue in the transaction—can support a fraud conviction. *Id.* at 16a.

That expansive conception of the "nature of the bargain" unquestionably creates criminal fraud liability where it does not exist in other circuits. According to the decision below, the possibility of the dinars appreciating through reevaluation constituted a "core attribute" of the bargain accepted by petitioners' customers—even though the Iraqi government set the currency's value—because that possibility induced purchasers to buy dinars. App., *infra*, 14a. So too, misrepresentations regarding the future availability of airport kiosks "went to the core of the bargain," on the theory that buyers purchased their dinars "because of [Sterling's] promised airport exchanges." *Id.* at 15a (emphasis omitted). The court did not disagree, however, that Sterling's customers received the dinars they paid for at the agreed-upon exchange rate. The misrepresentations did not concern the price of the dinars or a fundamental characteristic of them (*e.g.*, whether they were genuine), so petitioners would not have violated the fraud statutes in the Second, Sixth, Ninth, or D.C. Circuits.

B. The Decision Below On The Scope Of The Federal Fraud Statutes Is Incorrect

By holding that a criminal scheme to defraud can exist where a misrepresentation induced a transaction but concerned neither the price nor a fundamental characteristic of the property at issue, the court of appeals severed fraud liability from the traditional property interests that the fraud statutes are designed to protect, and thereby effectively created free-floating fraud liability for simply lying. The court of appeals' decision is irreconcilable with this

Court's precedents and the common-law understanding of fraud.

1. The court of appeals' reasoning cannot be squared with this Court's decisions establishing that the federal fraud statutes are "limited in scope to the protection of property rights." *Ciminelli* v. *United States*, 598 U.S. 306, 314 (2023) (citation omitted).

a. The term "defraud" in the fraud statutes "commonly refer[s] 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signif[ies] the deprivation of something of value.'" *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (citation omitted). Under that definition, a purchaser is not deprived of something of value unless the purchaser has lost an interest recognized by "traditional concepts of property." *Cleveland* v. *United States*, 531 U.S. 12, 24 (2000). And there is no scheme to defraud unless the defendant intended "to deceive" the victim and "deprive it of something of value." *Shaw* v. *United States*, 580 U.S. 63, 72 (2016). Accordingly, this Court has repeatedly cautioned lower courts not to endorse theories of fraud liability that would punish defendants for "harms to intangible interests unconnected to property." *Ciminelli*, 598 U.S. at 313. For example, no fraud occurs when a defendant uses deception to deprive people of "potentially valuable economic information," even when that information is "necessary to make discretionary economic decisions." *Id.* at 309 (citation omitted). Nor is there fraud where a defendant uses deception to affect a "regulatory decision," even if the government incidentally lost property. *Kelly* v. *United States*, 590 U.S. 391, 401-402 (2020).

It follows from those precedents that a defendant has not committed criminal fraud unless he made a misrepresentation going to the true essence of the bargain—that

is, the price or fundamental characteristics of the property at issue. By contrast, a purchaser who obtains "exactly what he paid for" does not lose any "property" through the exchange. *United States* v. *Porat*, 76 F.4th 213, 227 (3d Cir. 2023) (Krause, J., concurring), petition for cert. pending (No. 23-832). Put another way, absent a deception that affects the price or a fundamental characteristic of the property at issue, a purchaser receives nothing less than what the purchaser paid for; a conviction where a purchaser is deceived but receives what he paid for would risk criminal penalties for a defendant who deprives a purchaser not of property, but merely of information about the property being purchased. See *Sadler*, 750 F.3d at 591. But a theory of liability premised on a deprivation of information merely presents the right-to-control theory, which this Court has rejected, by another name. See *Ciminelli*, 598 U.S. at 316. The court of appeals' approach thus amounts to an end-run around this Court's precedents.

b. Common-law doctrines also support limiting a scheme to defraud to situations where a misrepresentation concerns the price or a fundamental characteristic of the property at issue. See *Neder* v. *United States*, 527 U.S. 1, 22-23 (1999). For example, a misrepresentation that went "to the essence of the contract" could avoid the contract for fraud, but a misstatement about the object of the contract that did not "affect the essence or value of the purchase" would not avoid the contract, on the ground that "[the] difference must be treated as wholly inconsequential." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 195, at 197-198 (10th ed. 1870).

Similarly, under the common law of false pretenses, a purchaser is defrauded only "when he parts with his property or money and fails to receive in exchange that for

which he bargained"; the fraud occurs when the purchaser "receives another and entirely different thing" from what he thought he was purchasing. *Ex parte Rudebeck*, 163 P. 930, 933 (Wash. 1917). As the government put it during the recent oral argument in *Kousisis*, the cases applying that doctrine address "not getting what you want," such as receiving "coal instead of * * * the gold" that was bargained for. Tr. at 72, *Kousisis* v. *United States*, No. 23-909 (Dec. 9, 2024) (citing *Rudebeck*).

2. In addition to contravening this Court's decisions and the longstanding understanding of fraud, the decision below risks "vastly expand[ing] federal jurisdiction without statutory authorization." *Ciminelli*, 598 U.S. at 315. Under the court of appeals' decision, any misrepresentation that is material, even if it involves a matter collateral to the price or fundamental characteristics of the property in question, could give rise to a federal fraud conviction. Because a deceptive scheme would encompass any statement that makes a counterparty more likely to transact, it would include an employee who lies on a resume, see *Guertin*, 67 F.4th at 451; a salesperson who lies about relationships with clients in order to secure new business, see *Regent Office Supply*, 421 F.2d at 1176; or a retailer that misrepresents to customers how it cuts corners to save money from third parties, see *Starr*, 816 F.2d at 99-100. Such run-of-the-mill deceit may occasionally lead to workplace discipline or civil liability, but reading the criminal fraud statutes to cover deceit without harm to property interests would "convert the fraud statutes—and the lengthy prison sentences they can trigger—into tools to regulate good morals and business ethics." *Porat*, 76 F.4th at 223-224 (Krause, J., concurring).

What is more, by converting even "collateral" misrepresentations related to a transaction into a fraudulent scheme, see App., *infra*, 16a, the court of appeals' decision

fails clearly to inform individuals about which statements are prohibited. That "raise[s] the due process concerns underlying the vagueness doctrine," *Skilling* v. *United States*, 561 U.S. 358, 408 (2010)—yet another reason why the court of appeals' interpretation should be rejected.

C. The Question On The Scope Of The Federal Fraud Statutes Is Exceptionally Important And Warrants The Court's Review In This Case

The first question presented is exceptionally important. Ensuring that the limits of the fraud statutes remain clear and tethered to property interests serves critical functions. Permitting convictions based on misrepresentations that do not concern the price or fundamental characteristics of property would risk federalizing "a vast array of conduct traditionally policed by the States." *Cleveland*, 531 U.S. at 27; see *Ciminelli*, 598 U.S. at 316. And where the government's preferred construction of the federal fraud statutes "leaves [their] outer boundaries ambiguous," the Court has concluded that those boundaries must be clearly demarcated around "the protection of property rights," and that, "[i]f Congress desires to go further, it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

This case is an ideal vehicle for the Court further to clarify the scope of the federal fraud statutes. The first question presented was pressed and passed upon below, and the court of appeals thoroughly addressed the question in its decision. In light of the conflict on the first question presented, the error in the Eleventh Circuit's decision, and the importance of the issue, plenary review of that question is warranted.

II. REVIEW IS ALSO WARRANTED 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. In the decision below, the court of appeals rejected the argument of petitioners Bell and Rhame that an individual cannot violate Section 1001 by responding to a government agent's question with an answer that is ambiguous as to its truth or falsity. Instead, the court held that only the ambiguous nature of the government agent's question is relevant. That holding also warrants the Court's review.

A. The decision below is in tension with decisions of other courts of appeals that have considered the ambiguity of answers when reviewing convictions under Section 1001 or similar provisions.

In *United States* v. *Rahman*, 805 F.3d 822 (2015), the Seventh Circuit considered the ambiguity of a defendant's answer in assessing the validity of a conviction under Section 1001. There, the court concluded that a conviction for an "ambiguous statement" would have been a "drastic sanction" when "no questioner pinned [the defendant] down" (and when the admissible evidence could have supported the conclusion that his statement was true). *Id.* at 839; see also *United States* v. *Diogo*, 320 F.2d 898, 906-907 (2d Cir. 1963) (explaining that, under Section 1001, "a person does not answer official questions at his peril," and reversing convictions where the government failed to negate ambiguity in answers).

The Eighth Circuit has similarly considered the ambiguity of a defendant's statement in assessing the validity of a conviction for making false or misleading statements. In *United States* v. *Parker*, 364 F.3d 934 (2004), the

Eighth Circuit explained that "the government bears the burden of negating literally truthful interpretations of statements in a fraud case when the statements (1) are ambiguous and (2) are subject to *reasonable* interpretations." *Id.* at 945 (discussing *United States* v. *Anderson*, 579 F.2d 455, 460 (8th Cir. 1978), which involved a conviction under Section 1001). The court explicitly looked to the defendant's statements and affirmed the denial of a motion for a new trial only after determining the statements were unambiguous. *Id.* at 945; see also *United States* v. *Hirsch*, 360 F.3d 860, 863 (8th Cir. 2004) (affirming a perjury conviction only after concluding that the defendant's testimony was not "fundamentally vague or ambiguous"); *United States* v. *Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004) (noting, in an appeal from a Section 1001 conviction, that "[a] fundamentally ambiguous statement cannot, as a matter of law, support a perjury conviction").

By determining as a matter of law that the ambiguity of a defendant's answer cannot defeat a charge under Section 1001, the Eleventh Circuit contradicted the approaches of multiple courts of appeals, which consider whether ambiguity is present in a defendant's answer.

B. The decision below is also inconsistent with this Court's seminal decision in *Bronston* v. *United States*, 409 U.S. 352 (1973), on "the analogous crime of perjury," *Brogan* v. *United States*, 522 U.S. 398, 402 (1998). In *Bronston*, the Court held that the federal perjury statute does not criminalize a witness's literally true but unresponsive answer. See 409 U.S. at 360-362. The Court declined to reach the issue of the ambiguity of the question, because, "[e]ven assuming" that the question was unambiguous, "the federal perjury statute cannot be construed to sustain a conviction based on petitioner's answer." *Id.* at 357. The Court explained that prosecution for an unrespon-

sive, misleading answer would be a "drastic sanction," because the examiner could have asked "a single additional question" to clarify the answer. *Id.* at 358. As the Court put it, criminal liability should not be "invoked simply because a wily witness succeeds in derailing the questioner," as long as the answer is not false. *Id.* at 360.

Insofar as the decision below is rooted in a purportedly "crucial" difference between an ambiguous question and an ambiguous answer, its reasoning squarely contradicts *Bronston*. App., *infra*, 27a. The court of appeals suggested that "a criminal defendant escapes a perjury charge only if the federal agents asked an ambiguous question; he cannot wriggle out of the same charge through an evasive answer." *Ibid.* That reasoning directly contravenes *Bronston* and should not stand.

C. The second question presented, like the first, is of significant importance. By holding that the ambiguous nature of a defendant's answer to a question cannot preclude a Section 1001 conviction, the court of appeals would effectively eliminate any requirement that a questioner "pin the witness down to the specific object of the questioner's inquiry," opening the door to expansive liability and making it possible for a defendant to be convicted even when his statement was not false. *Bronston*, 409 U.S. at 360. The second question presented was pressed and passed upon below, and the court of appeals addressed the question in its decision. Plenary review is warranted on that question presented as well.

III. IN THE ALTERNATIVE, THE PETITION SHOULD BE HELD PENDING A DECISION IN *KOUSISIS*

In the alternative to plenary review, the Court may wish to hold this petition pending its forthcoming decision in *Kousisis*. As the Court is aware, the question pre-

sented in *Kousisis* is whether a scheme to induce a transaction through deception, but which contemplates no harm to any property interest, qualifies as a scheme to defraud under the criminal fraud statutes. See Pet. Br. at i, *Kousisis*, *supra*. In that case, the petitioners misrepresented their compliance with a term in a government contract to make good-faith efforts to use "disadvantaged business enterprise" subcontractors for a percentage of a project's work; the government, however, received the work it paid for, with uncontested quality, at the price it wished to pay. See *id*. at 5-7. *Kousisis* therefore provides the Court with an opportunity to assess whether an individual can be convicted under the fraud statutes based on a fraudulent-inducement theory, under which liability attaches when a defendant induces a transaction through deception, even when the counterparty experiences no net pecuniary loss. See *id*. at 2-3; U.S. Br. at 9-10.

In the decision below, the court of appeals expressly relied on a fraudulent-inducement theory of fraud liability. It stated that it had "never held that the federal fraud statutes are categorically inapplicable to fraudulent inducement schemes"; instead, according to the court, its earlier decisions "establish that fraudulent inducements about a collateral but still material matter are punishable under the federal statutes." App., *infra*, 16a. The court of appeals thus affirmed petitioners' convictions based on a fraudulent-inducement theory, even though their alleged misrepresentations did not result in "a calculable price difference" or "a different tangible good or service being received." *Id*. at 13a.

To the extent this Court's decision in *Kousisis* passes upon the viability or scope of the fraudulent-inducement theory, it may "change[] or clarif[y] 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). Under those circumstances, an order granting the petition, vacating the decision below, and remanding for further consideration in light of *Kousisis* may be appropriate as an alternative to plenary review. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). In the meantime, the Court may wish to hold the petition pending the decision in *Kousisis* before deciding how to proceed.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's decision in *Kousisis* v. *United States*, No. 23-909, and then disposed of as appropriate.

Respectfully submitted.

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