25-6492

ORIGINAL

VOLUME I – PETITION FOR WRIT OF CERTIORARI

IN THE
SUPREME COURT OF THE UNITED STATES

ARTHUR FAYNE, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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DECEMBER 28, 2025

QUESTIONS PRESENTED

1. **KNOWING AND INTENTIONAL MISREPRESENTATION (Kousisis).** Whether the Sixth Circuit's affirmance of wire-fraud convictions under 18 U.S.C. § 1343 conflicts with this Court's requirement that the government prove a knowing and intentional misrepresentation **at the time property is obtained**, where the alleged "fraud" rested on the **timing and sequencing** of payments later directed by the architect and owner under a financing structure that vested the developer with discretion over drawdowns and disbursements; and where the record shows the project was completed, the contractors were paid, and Petitioner's net contributions exceeded withdrawals. See *United States v. Kousisis*, 145 S.Ct.1382 (2025); *Neder v. United States*, 527 U.S. 1, 20–25 (1999).

2. **REVIVAL OF RIGHT-TO-CONTROL (Ciminelli).** Whether the Sixth Circuit effectively revived the discredited "right-to-control" theory by upholding convictions based on alleged breaches of "trust," "expectations," and "fiduciary duty," rather than a false statement obtaining money or property, in direct conflict with *Ciminelli v. United States*, 598 U.S. 306, 312–15 (2023), and *McNally v. United States*, 483 U.S. 350, 356–60 (1987).

3. **MVRA RESTITUTION WITHOUT LOSS (Lagos).** Whether the court of appeals expanded the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, contrary to *Lagos v. United States*, 584 U.S. 577 (2018), by affirming restitution exceeding $840,000 to public entities and a vendor that suffered **no direct,**

proximate, or actual pecuniary loss, where the City/County grants were **reimbursable** (pre-approved line-items only), contractors were paid, and an owner's certification attested project funds were properly used.

4. **NATIONAL IMPORTANCE.** Whether certiorari is warranted to prevent the federalization of **ordinary project-management and payment-timing judgments** in public–private developments—conduct expressly governed by contract—thereby chilling redevelopment projects nationwide and undermining this Court's recent efforts to curb federal fraud law. See *Ciminelli*, 598 U.S. at 312–15; *Kousisis*, 145 S.Ct. 1382 (2025).

United States v. Arthur Fayne, No. 24-3262

PARTIES TO THE PROCEEDINGS

Petitioner: ARTHUR FAYNE, SR., DEFENDANT – APPELLENT BELOW

Respondent: UNITED STATES OF AMERICA, PLANTIFF–APPELLEE BELOW.

There are no intervenors or additional parties in the courts below. No corporation is a party, and no Rule 29.6 statement is required.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the judgment is unpublished and appears at **No. 24-3262 (6th Cir. May 21, 2025)**. The district court's judgment and relevant orders (including the October 19, 2023 jury verdict and subsequent sentencing orders entered February 2024) appear at **No. 1:20-cr-00798 (N.D. Ohio Oct. 19, 2023 & Feb. 2024)**.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on **May 21, 2025** (6th Cir.). No petition for rehearing or rehearing en banc was filed. On application, the Circuit Justice extended the time to file this petition to **October 18, 2025**, and this petition is timely under **28 U.S.C. § 2101(c)** and **Sup. Ct. R. 13.5**. This Court has jurisdiction under **28 U.S.C. § 1254(1)** ("Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party...").

CONSTITUTIONAL PROVISIONS

STATUES & RULES

OTHER AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V. *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor be deprived of life, liberty, or property, without due process of law...* (Due Process Clause).

U.S. Const. amend. VI. *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to have the Assistance of Counsel for his defense.*

U.S. Const. amend. XIV, § 1. *No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

18 U.S.C. § 1343 (Wire Fraud). *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... for the purpose of executing such scheme or artifice, shall be* [punished as provided].

18 U.S.C. § 3663A (Mandatory Victims Restitution Act). *[T]he court shall order... that the defendant make restitution to the victim of the offense* in the full amount of the victim's actual loss, as limited by § 3663A(a)(2), (b).

28 U.S.C. § 1254(1). *Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party...*

STATEMENT OF THE CASE

A. Background and Financing Structure

This case arises from the redevelopment of the long-dormant **New Eastside Market** site in Cleveland's **Glenville** neighborhood (dormant since **2007**). Petitioner **Arthur Fayne Sr.**—a developer and project manager with decades of experience—helped initiate the revitalization effort in **2013** with a local community leader and remained involved through opening as managing director until his incarceration. The project included a full-service market, community kitchen, and health-care space, and required complex, layered financing and day-to-day coordination typical of public–private work.

Funding followed a standard reimbursable-grant chain: the **City of Cleveland** and **Cuyahoga County** approved **reimbursable** public funds (City: construction line items; County: equipment) that flowed to the nonprofit **NEON** (Northeast Ohio Neighborhood Health Services). NEON loaned funds to its subsidiary **CIS** (Community Integrated Services), and **CIS loaned to NEM (New Eastside Market, LLC)**, the project entity managed by Petitioner's company **BDC (Business Development Concepts, LLC)** with a 51% interest (Loan Agreement NEON→CIS→NEM). **Willie F. Austin**, NEON's President/CEO (and CIS's Chief Executive), signed at **all three levels** of the loan chain and personally **authorized the bank wires** to BDC after reviewing and signing invoices moving up the chain (**BDC→CIS; CIS→NEON**) (Owner's Representative Agreements: **NEON–BDC** and **NEON–CIS**; Development/Construction Administration Agreement: **CIS–BDC**). The **City's grants were strictly reimbursable** on **pre-approved expenditure line items**, with an

approval matrix and **certificate-of-payment** process that created "guardrails" against any double-payment risk; the County's equipment funds followed the same guardrails (City Pre-Approved Expenditure Matrix; City Certificate of Payment signed by Austin).

B. Owner/Architect Oversight and Payment Sequencing

Consistent with industry practice, the project **architect** certified completed work, disputed particular lines, and at times **recommended partial payments or held** pending resolution of change orders and cost-overrun items. Critically, **reimbursement wires to BDC were often received before those later architect recommendations**—i.e., **at the time funds were wired there was no directive for partial payment.** As City and architect review evolved, Petitioner and NEON chose to continue paying **smaller subcontractors** to keep work moving while larger invoice disputes were resolved (Architect Payment Recommendations; City meeting notes on change-orders/cost overruns). The Government's trial proof focused on a **six-month slice** of an **eighteen-month** cash-flow period, omitting this sequencing and the later architect-driven partials and owner-directed holds.

C. Indictment, Trial, Verdict, and Sentencing

In **December 2020** (N.D. Ohio), the United States indicted Petitioner on **nine counts of wire fraud** under **18 U.S.C. § 1343**. The theory did **not** allege falsified invoices, phantom vendors, or missing money. Instead, it framed **payment timing** and **use of funds** inside a standard developer operating account as a "scheme to defraud."

At trial in **October 2023** (N.D. Ohio), the Government presented the narrowed six-month snapshot and elicited testimony about Petitioner's **lawful gambling** activity. The court's **written jury instructions** referenced **"embezzlement"**—an offense **not charged** in the indictment—alongside "diverted" funds, permitting conviction on a non-indicted theory (see Jury Instructions at 12, ¶ 11 (N.D. Ohio)). On **October 19, 2023**, the jury returned guilty verdicts on all nine counts (N.D. Ohio). At sentencing in **February 2024**, the court later ordered more than **$840,000** in restitution to the **City of Cleveland**, **Cuyahoga County**, and **Crescent Digital**, even though no witness from the City or County testified or submitted a victim-impact statement and **Crescent Digital had been fully paid** (Sent'g Tr.; Restitution

On appeal, the **Sixth Circuit** affirmed on **May 21, 2025**.

D. Government Admissions, Exclusions of Defense Proof, and Post-Trial Materials

Before trial, the Government filed a **pre-trial brief** asking the court to **exclude** defense expert **Timothy Mayles's** analysis as "irrelevant," expressly asserting that **"The United States has not alleged that any expense reimbursements related to the Eastside Market project were submitted inappropriately or not in accordance with the grant documents,"** and warning that discussing **other funding sources** would "mislead and confuse the jury." (Gov't Pre-Trial Brief to Exclude Defense Expert (N.D. Ohio) (emphasis added)). In the same filing, the Government **acknowledged** the City funds were **"reimbursable."** (Id.). Despite this, the prosecution later sought restitution on a theory that the **City/County "stepped**

into NEON's shoes" and "paid twice." The City's **reimbursable** approval/certification process—plus **Austin's signed certificates** that funds were **properly expended**—undercut that position (City Certificate of Payment signed by Austin; City Reimbursement Matrix).

Two defense **forensic reports** were kept from the jury:

- **Forensic Report A** (prepared first) concluded **no government funds were misspent**—the very point the Government labeled "irrelevant" pre-trial; and
- **Forensic Report B** (prepared after the Government's mid-stream theory shift) showed **AM Higley was overpaid by more than $400,000** and **BDC's net contributions exceeded withdrawals** (Forensic Reports A & B).

  Counsel received Report B a week before trial but disclosed it the night before testimony, resulting in exclusion (Defense Email). The jury **never** saw the principal financial exhibits demonstrating **no loss, full contractor payment,** and **Petitioner's net capital infusion**.

After trial, **NEON** submitted a **letter** (attached with the defense sentencing memorandum) in which **Austin** affirmed that **contractors were paid** and that **NEON was not financially harmed**; he also continued to **pay Petitioner** as developer **after indictment and through self-surrender** (fourteen months after the verdict), and acknowledged that **development fees remained owing** (Austin Post-Trial Letter; post-indictment payment records). No City or County witness ever submitted a victim statement despite the Government's request for a post-verdict continuance to solicit such claims.

E. Agreements, Authority, and Wires

The **loan chain** (NEON→CIS→NEM) vested routine **payment discretion** consistent with industry practice and the project's evolving needs. Separately, the **Owner's Representative Agreements** (NEON–BDC; NEON–CIS) and the **Development/Construction Administration Agreement** (CIS–BDC) memorialized Petitioner's role to **administer construction, manage disbursements, coordinate with the architect, and stage payments. Austin**—as **NEON/CIS** chief—**signed each agreement, approved and signed** the **BDC→CIS** and **CIS→NEON** invoices, and then **personally initiated the wire transfers** to BDC. The wires typically **preceded** any later **architect partial-payment recommendations**, which were made **after** funds moved. Thus, at the **moment property was obtained** (i.e., when reimbursement funds were wired), there was **no false statement** and **no duty** to effect immediate full payment inconsistent with later architect holdbacks. The **City's reimbursable** process and **Austin's compliance certificates** confirm that public funds were approved and applied as required (City Matrix; Certificate of Payment signed by Austin). These facts negate any claim of **knowing and intentional misrepresentation** under **§ 1343** and undermine the later **MVRA** restitution theory.

F. Issues for Review (Record Orientation)

1. **Wire-Fraud Liability and Intent:** Whether the conviction rests on **contractual discretion and payment sequencing**—not a **false statement made to obtain money or property**—in conflict with this Court's decisions

narrowing federal fraud liability (see *Ciminelli v. United States*, 598 U.S. 306 (2023); cf. intent principles recognized in *Neder v. United States*, 527 U.S. 1 (1999)).

2. **Right-to-Control Repackaged:** Whether reliance on **"expectations," "trust," and "breach of fiduciary duty"**—rather than a false statement that **obtained** property—impermissibly **revives** the **right-to-control** theory rejected in *Ciminelli* (598 U.S. at 312–15 (U.S. 2023)).
3. **MVRA and Actual Loss:** Whether **restitution** to City/County/Crescent is lawful where **City and County never claimed loss, Crescent was fully paid**, and the **City's own reimbursable guardrails + Austin's certificates** foreclose any "paid twice" theory (see *Lagos v. United States*, 584 U.S. 577 (2018)).
4. **Exclusion of Core Defense Proof:** Whether excluding **Forensic Reports A & B** (no misspent public funds; contractor overpayment; Petitioner net infusion) **deprived the jury of material exculpatory context** and produced a verdict infected by **prejudice** (see *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).
5. **Jury Instructions and Prejudice:** Whether **written instructions** that referenced **"embezzlement"** (uncharged), coupled with **irrelevant gambling testimony**, created **cumulative error** and allowed conviction on a **non-indicted theory** (see *United States v. Stirone*, 361 U.S. 212, 218 (1960); *Old Chief v. United States*, 519 U.S. 172, 180–82 (1997)).

SUMMARY OF ARGUMENT

This case presents profound constitutional questions about prosecutorial overreach, due process, evidentiary exclusion, and the Sixth Amendment right to effective counsel. It arises from a prosecution that **shifted theories midstream, suppressed exculpatory evidence**, and **relied on a misrepresentation of facts it had previously disavowed**, resulting in a conviction and restitution order that cannot stand.

First, the Government **changed its core theory after the reverse proffer**, forcing the defense to confront at trial a materially different case than the one outlined before indictment. Initially, prosecutors asserted that **NEON and Crescent Digital** were the alleged victims. Only after those entities **testified that they were *not* victims** did the prosecution abandon that theory and claim instead that **the City of Cleveland and Cuyahoga County "stepped into NEON's shoes"** and "paid twice" — despite having told the district court in its **pre-trial brief** that "*the United States has not alleged that any expense reimbursements related to the Eastside Market project were submitted inappropriately or not in accordance with the grant documents*" and that such evidence would "*only serve to mislead and confuse the jury.*" (Gov't Pre-Trial Br. at 4). That admission — including acknowledgment that the City's funds were *reimbursable grants* — undercuts the Government's own "victim" theory and dismantles the restitution rationale on which the judgment rests.

Second, the district court **barred two forensic accounting reports** — one confirming that all public funds were used properly (***Forensic Report A***), and another

demonstrating that AM Higley was *overpaid* while Petitioner contributed more money to the project than he received (***Forensic Report B***). These reports would have shown the flow of funds, documented the loan agreements and ownership structure (NEON → CIS → NEM), and corroborated the **Owner's Representative Agreements** — all signed by NEON's CEO, Willie Austin — which established Petitioner's authority to make payment decisions. Their exclusion deprived the jury of exculpatory evidence and rendered the trial fundamentally unfair. See *Holmes v. South Carolina*, 547 U.S. 319, 324-26 (2006) (due process violated where rules arbitrarily exclude defense evidence central to the case).

Third, the prosecution's conduct compounded these errors. Prosecutors elicited testimony from Austin while portraying him as "old, frail, and feeble" — even though *he personally approved all wire transfers, signed the loan agreements at every level, certified to the City that funds were properly spent, and increased Petitioner's compensation after indictment.* Austin's own post-trial letter confirmed that all contractors were paid and that NEON "was not financially harmed," directly contradicting the Government's narrative. The jury, meanwhile, never heard testimony from key witnesses — including the project manager and architect — who would have refuted the allegation of fraud and explained why partial payments were necessary given the City's pre-approval requirements for reimbursable grants.

Fourth, the restitution order rests on a flawed foundation. Neither the City nor the County testified, submitted evidence, or filed a victim impact statement — even after the prosecution delayed the restitution hearing for 90 days to solicit such claims. Indeed,

the guardrails built into the reimbursable grants *prevented* double payment, and the Government itself conceded that those funds were not "at issue." This Court has long held that restitution under the MVRA requires proof of **actual loss to a victim**, not hypothetical harm. See *Lagos v. United States*, 584 U.S. 577 (2018). Finally, the ineffective assistance of counsel compounded these constitutional violations. Defense counsel failed to timely introduce critical forensic evidence, neglected to call key witnesses, and ignored Petitioner's repeated instructions to confront the Government with the victim's sworn statements. Counsel's failures prejudiced the defense and deprived Petitioner of a fair trial. See *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984). At its core, this case is not merely about disputed invoices or developer discretion. It is about **the integrity of the judicial process**: whether the Government may change theories mid-trial, exclude exculpatory evidence that contradicts its own position, and secure a conviction by redefining "victims" to include entities that never claimed harm. These questions transcend the facts of this case and bear directly on national standards of due process, prosecutorial accountability, and the proper scope of restitution under federal law.

For these reasons, and because the decision below conflicts with this Court's precedent and fundamental constitutional protections, the petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *CIMINELLI v. UNITED STATES*, 598 U.S. 306 (2023), BY REVIVING THE "RIGHT-TO-CONTROL" THEORY UNDER A DIFFERENT NAME.

The Supreme Court in *Ciminelli v. United States* unanimously held that the "right-to-control" theory — which criminalized deprivations of information or control rather than of traditional property — is **not a valid basis for federal fraud.** (598 U.S. at 314–15). This Court reaffirmed that the wire-fraud statute, 18 U.S.C. § 1343, criminalizes only schemes **"to obtain money or property"** through fraud, not breaches of trust, expectations, or misuse of funds already obtained. Here, however, the Sixth Circuit affirmed a conviction premised on precisely what *Ciminelli* rejected. The government never alleged — nor proved — that Petitioner **obtained money or property by false statements at the time of funding.** Instead, the prosecution recast the case as a "breach of trust" and "expectation" fraud, criminalizing Petitioner's discretionary decisions **after** funds were lawfully disbursed. By holding that "use of funds inconsistent with expectations" was enough to sustain a wire-fraud conviction, the Sixth Circuit's decision directly conflicts with *Ciminelli* and allows the very theory this Court condemned to persist under a different label.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH *LAGOS v. UNITED STATES*, 584 U.S. 577 (2018), BY IMPROPERLY EXPANDING THE MANDATORY VICTIMS' RESTITUTION ACT BEYOND "DIRECT AND PROXIMATE" HARM.

The Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, authorizes restitution only to persons **"directly and approximately harmed"** by the offense. In *Lagos*, this Court emphasized that restitution cannot be awarded to entities that did not

suffer an actual pecuniary loss. (584 U.S. at 577). The Sixth Circuit ignored this command. It upheld restitution to the **City of Cleveland and Cuyahoga County** — entities that were **not victims, did not testify, and did not submit any claim or victim-impact statement.** Neither suffered any actual loss: their contributions were reimbursable grants subject to strict guardrails, and payments were made **only upon submission of pre-approved expenses.** Moreover, NEON's CEO certified in writing that all contractors were paid and no loss occurred. This Court's review is necessary to prevent lower courts from expanding restitution to speculative or indirect harms beyond the MVRA's limits.

III. THE DECISION BELOW CONFLICTS WITH *KOUSISIS v. UNITED STATES* AND OTHER CASES CLARIFYING THAT FRAUD REQUIRES A KNOWING, INTENTIONAL MISREPRESENTATION TO OBTAIN PROPERTY.

Federal fraud requires a "knowing and intentional misrepresentation" made **to obtain property from another** (*Ciminelli*, 598 U.S. at 312; *United States v. Kousisis*, 2025 145 S. Cy. 1382 (3d Cir. 2025)). The Sixth Circuit, however, upheld Petitioner's conviction despite the absence of any such misrepresentation.

The evidence established that Petitioner, as project developer, lawfully exercised discretion to **delay or make partial payments** based on architectural reviews and project realities — not fraudulent intent. Indeed, the architect frequently disputed AM Higley's invoices, and the loan agreement vested Petitioner with discretion over disbursements. The prosecution's case rested on the theory that "everyone expected" immediate payment — a mere breach-of-expectation argument that *Kousisis* and *Ciminelli* make clear is legally insufficient.

IV. THE SIXTH CIRCUIT IMPROPERLY CRIMINALIZED DISCRETIONARY BUSINESS JUDGMENT IN VIOLATION OF *MCCORMICK* AND *SKEEN*.

This Court has long recognized that exercising contractual discretion, even in ways others dislike, does not constitute fraud. (*McCormick v. United States*, 500 U.S. 257, 270 (1991); *United States v. Skeen*, 114 F.3d 1241, 1243 (10th Cir. 1997)). Petitioner's conduct — weighing invoices, considering architectural recommendations, and prioritizing minor contractors — was an exercise of the discretion explicitly granted under the financing and owner-representation agreements. By holding that such discretion could itself be criminal, the Sixth Circuit invites dangerous prosecutorial overreach. Developers, fiduciaries, and business leaders risk prosecution anytime their business judgments deviate from government expectations — even when they act within contractual bounds.

V. THE EXCLUSION OF THE FORENSIC REPORTS AND EXPERT TESTIMONY DEPRIVED PETITIONER OF A MEANINGFUL DEFENSE AND VIOLATED DUE PROCESS.

Petitioner's forensic experts prepared two reports: **Report A** (certifying proper use of government funds) and **Report B** (showing AM Higley was overpaid and Petitioner invested more than he received). Both were barred from evidence. The government even admitted in its pre-trial brief that "the United States has not alleged that any expense reimbursements were submitted inappropriately or not in accordance with the grant documents," and argued that the forensic analysis was "wholly irrelevant." This exclusion denied the jury critical evidence central to Petitioner's defense — evidence that would have shown no misappropriation, no loss, and that all funds were properly disbursed. It also would have refuted the government's restitution theory that the City and County "stepped into NEON's shoes."

VI. THE GOVERNMENT'S CHANGING THEORY FROM REVERSE PROFFER TO TRIAL VIOLATED DUE PROCESS AND FUNDAMENTAL FAIRNESS.

At a reverse-proffer meeting, prosecutors outlined a theory focused on alleged misrepresentations at the time of funding. The petitioner prepared his defense accordingly. But on the eve of trial, the government pivoted — now arguing misuse of funds **after** disbursement. This surprise theory, combined with the exclusion of forensic evidence, left Petitioner without notice of the actual charges against him, violating fundamental fairness. (*Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

VII. RESTITUTION WAS AWARDED FOR PAYMENTS OUTSIDE PETITIONER'S CONTROL AND AFTER HIS MANAGEMENT ENDED.

Crescent Digital was awarded restitution for work performed **after** Petitioner's removal from project management. Likewise, the restitution award includes costs incurred **well after** the relevant period and unrelated to any alleged conduct. This Court has repeatedly held that restitution cannot encompass losses not "directly and approximately" caused by the defendant's offense. (*Lagos*, 584 U.S. 577).

VIII. THE DISTRICT COURT IMPROPERLY ALLOWED CHARACTER EVIDENCE AND IRRELEVANT GAMB--LING TESTIMONY, VIOLATING RULES 403 AND 404.

The prosecution devoted significant portions of trial to attacking Petitioner's character and introducing irrelevant gambling evidence, despite the absence of any nexus to the charged conduct. This evidence's prejudicial impact far outweighed any probative value, violating Federal Rules of Evidence 403 and 404 and undermining the jury's impartiality. (*Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

IX. THE GOVERNMENT FAILED TO PROVE "OBTAINING MONEY OR PROPERTY" UNDER § 1343.

The wire-fraud statute requires proof that the defendant obtained **money or property** by fraud. (*Kelly v. United States*, 590 U.S. 391, 399 (2020)). Petitioner neither obtained new property by falsehood nor deprived anyone of existing property. All funds were received under a signed loan agreement approved by NEON, CIS, and the City, and disbursed with full knowledge and authorization. The government's failure to meet this core element requires reversal.

X. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION OF NATIONAL SIGNIFICANCE ABOUT THE SCOPE OF FEDERAL FRAUD LAW POST-*CIMINELLI*.

Federal prosecutors across the country are testing the limits of *Ciminelli* by repackaging "right-to-control" theories as "breach of trust" or "expectation" fraud. This case — involving government-funded community redevelopment, complex financing, and developer discretion — exemplifies the risks of that prosecutorial overreach.

If left unreviewed, the Sixth Circuit's decision will chill legitimate business conduct and allow federal prosecutors to criminalize lawful, discretionary decisions — precisely what this Court sought to prevent in *Ciminelli* and *Kelly*.

XI. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH *CIMINELLI* BY UPHOLDING A CONVICTION BASED ON "BREACH OF TRUST" AND "EXPECTATION" RATHER THAN OBTAINING TRADITIONAL PROPERTY

The Supreme Court in *Ciminelli v. United States* held that federal fraud statutes "protect only property rights" and not "the intangible right to control the use of one's assets." 598 U.S. 306, 314 (2023). The decision expressly repudiated prosecutions premised on theories of "breach of trust" or "deprivation of economic information," concluding that

such theories are incompatible with the statutory text and constitutional limitations. Id. at 314–15. The Sixth Circuit's opinion squarely conflicts with *Ciminelli* by sustaining a conviction that rests not on any false statement to obtain money or property, but on the government's assertion that Petitioner's exercise of contractual discretion violated "expectations" of how funds would be used. The government repeatedly argued that the alleged fraud was "about trust," that Petitioner "abused that trust," and that recipients "expected" funds to be disbursed in a certain manner — all formulations *Ciminelli* deemed legally irrelevant. Id. at 313.

XII. THE SIXTH CIRCUIT ERRED BY IMPROPERLY EXPANDING THE SCOPE OF WIRE FRAUD BEYOND "KNOWING AND INTENTIONAL MISREPRESENTATION" REQUIRED BY *KOUSISIS* AND *CIMINELLI*

This Court has repeatedly emphasized that fraud requires a "knowing and intentional misrepresentation" made "at the time the property is obtained." *Ciminelli*, 598 U.S. at 314; see also *United States v. Kousisis*, 2025 145 S. Ct. 1382 (3d Cir. 2025) (vacating conviction where no false statement was made at the time of payment). Here, the government never alleged — and the evidence did not show — that Petitioner made any false statement when the funds were disbursed. The funds were advanced pursuant to a loan agreement and owners' representation agreements signed by both parties, including Willie Austin as CEO of NEON and CIS. These agreements granted Petitioner contractual discretion to allocate funds for project development. That lawful exercise of discretion cannot constitute wire fraud under *Kousisis*.

XIII. THE SIXTH CIRCUIT'S DECISION UNDERMINES *LAGOS* BY AFFIRMING RESTITUTION TO PARTIES WHO SUFFERED NO "ACTUAL PECUNIARY LOSS"

In *Lagos v. United States*, the Court held that restitution under the Mandatory Victims Restitution Act (MVRA) is limited to parties "directly and approximately harmed" by the offense. 584 U.S. 577 (2018). The decision expressly rejected restitution for entities not actually victimized by the charged conduct. Despite this controlling authority, restitution here was awarded to the City of Cleveland and Cuyahoga County — neither of which testified, submitted claims, or presented evidence of harm. Their funding was disbursed as **reimbursable grants**, with strict guardrails limiting reimbursement to **pre-approved expenditures only.** The City and County did not "step into NEON's shoes" or pay "twice," as the government alleged; instead, their disbursements represented new funds for new work.

XIV. THE EXCLUSION OF EXCULPATORY FORENSIC EVIDENCE VIOLATED DUE PROCESS AND RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL

The district court excluded two forensic accounting reports: Report A, which documented proper use of government funds, and Report B, which demonstrated that AM Higley was overpaid by approximately $400,000 and that BDC contributed more to the project than it received. These reports also showed that Crescent Digital was paid in full and that NEON's CEO certified that all funds were spent properly. The exclusion of this evidence — particularly after the government shifted its theory just two weeks before trial — deprived Petitioner of his right to present a complete defense, violating the Due Process Clause. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

XV. THE SIXTH CIRCUIT FAILED TO ADDRESS GOVERNMENT ADMISSIONS UNDERMINING ITS THEORY OF FRAUD

The government's pre-trial memorandum expressly stated that "the United States has not alleged that any expense reimbursements related to the Eastside Market project were submitted inappropriately or not in accordance with the grant documents." This acknowledgment undermines the government's theory that funds were misappropriated or that the City "paid twice." It also demonstrates that the prosecution knew the funds were from reimbursable grants, contradicting their post-trial narrative. A conviction cannot stand where the government's theory is inconsistent with its own representations to the court. See *Berger v. United States*, 295 U.S. 78, 88 (1935).

XVI. THE RESTITUTION AWARD VIOLATES THE MVRA BECAUSE NO PARTY SUBMITTED A CLAIM OR TESTIFIED TO LOSS

Despite the prosecution's request for a 90-day continuance to obtain victim statements, **no entity** — not the City, County, NEON, Crescent Digital, or AM Higley — submitted a victim impact statement or testified at the restitution hearing. NEON's only statement, included in the defense sentencing memorandum, confirmed that all contractors were paid and that neither NEON nor its board sustained a financial loss. Awarding restitution absent evidence of loss violates both the MVRA and fundamental due process. *Paroline v. United States*, 572 U.S. 434, 448 (2014).

XVII. THE GOVERNMENT'S FAILURE TO DISCLOSE EXCULPATORY INFORMATION VIOLATED *BRADY* AND *GIGLIO*

The prosecution failed to disclose key information, including statements by Willie Austin during government interviews that payments to contractors continued "because of Arthur," and omitted questions from those interviews that would have confirmed Petitioner's contractual role. The government also failed to disclose that Austin's counsel was "highly recommended "by prosecutors — evidence relevant to credibility

and bias. See *Giglio v. United States*, 405 U.S. 150, 154 (1972). Such omissions materially impaired Petitioner's ability to impeach key witnesses and present a complete defense, warranting reversal.

XVIII. THE GOVERNMENT'S RELIANCE ON PREJUDICIAL CHARACTER EVIDENCE AND IMPROPER ARGUMENTS VIOLATED DUE PROCESS

Rather than proving the statutory elements of fraud, the prosecution repeatedly attacked Petitioner's character — labeling him "untrustworthy," focusing on gambling evidence, and portraying the case as "about trust." The Supreme Court has repeatedly condemned convictions resting on character evidence rather than proof of criminal conduct. *Michelson v. United States*, 335 U.S. 469, 475 (1948). Such prosecutorial misconduct was compounded when the government labeled Austin "old and feeble" at sentencing while simultaneously urging the jury to rely on his testimony.

XIX. THE DISTRICT COURT'S ERRONEOUS EXCLUSION OF DEFENSE WITNESSES DENIED THE RIGHT TO A COMPLETE DEFENSE

The defense identified multiple witnesses — including a project manager who directly challenged AM Higley's overbilling practices — but trial counsel failed to call them. The exclusion of these witnesses deprived the jury of critical context and corroboration, violating Petitioner's Sixth Amendment rights. See *Washington v. Texas*, 388 U.S. 14, 19 (1967).

XX. THE CUMULATIVE EFFECT OF ERRORS WARRANTS REVIEW TO PREVENT A MISCARRIAGE OF JUSTICE

Even if no single error independently required reversal, the cumulative effect of prosecutorial misconduct, exclusion of exculpatory evidence, improper restitution, and shifting legal theories rendered Petitioner's trial fundamentally unfair. See *Taylor v.*

Kentucky, 436 U.S. 478, 487 n.15 (1978). This Court's review is necessary to enforce the limits of federal fraud statutes articulated in *Ciminelli v. United States*, *Lagos v. United States*, and *Kousisis v. United States*, and to reaffirm that due process requires more than the appearance of guilt.

XXI. PROSECUTORIAL MISCONDUCT AND SUPPRESSION OF EXCULPATORY EVIDENCE (BRADY / NAPUE)

This case presents pervasive prosecutorial misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972). The government suppressed exculpatory evidence, selectively presented the record, and shifted its theory of the case in a manner that deprived Petitioner of a fair trial.

In pretrial briefing, the government expressly acknowledged that expense reimbursements related to the Eastside Market project were submitted appropriately and in accordance with the grant documents, yet later advanced a contrary theory at trial. The district court's exclusion of forensic accounting reports prevented the jury from hearing evidence demonstrating that funds were properly accounted for, that AM Higley was overpaid, and that Crescent Digital received all amounts owed. See App. C–D.

The government further suppressed exculpatory interview statements by its key witness, Willie F. Austin, including admissions confirming Petitioner's authority over payment timing, and failed to disclose impeachment evidence concerning NEON's own financial conduct. When NEON and Crescent testified, they were not victims, the prosecution shifted mid-trial and asserted—without record support—that the City and County had

"stepped into NEON's shoes," despite neither entity claiming a loss or submitting evidence. See App. E, J, N.

Such conduct violated due process and deprived Petitioner of a fair trial. *Brady*, 373 U.S. at 87.

XXII. CUMULATIVE PREJUDICE AND STRUCTURAL ERROR

Even if individual errors were deemed harmless—which they were not—their cumulative effect rendered the trial constitutionally defective. See *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The exclusion of forensic evidence, suppression of impeachment material, mid-trial shift in victim theory, juror contamination, and misleading jury instructions collectively destroyed the adversarial balance. See App. C–F, M. Some errors "infect the entire trial process" and require reversal regardless of prejudice. *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991). This case presents such a structural breakdown.

XXIII. INEFFECTIVE ASSISTANCE OF COUNSEL AND STRUCTURAL BREAKDOWN OF THE ADVERSARIAL PROCESS

The Sixth Amendment guarantees effective and loyal representation. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648 (1984).

Here, trial counsel failed to timely present critical forensic evidence, failed to call essential witnesses, operated under conflicts of interest tied to fee demands, and failed to advance a coherent defense theory. These failures deprived the jury of evidence negating fraudulent intent and demonstrating lawful payment authority. See App. C–D, G, I.

Counsel's performance fell below constitutional standards and resulted in actual prejudice under *Strickland* and, independently, a structural collapse of the adversarial process under *Cronic*. The judgment below therefore cannot stand.

H. Conclusion

This is not a case of isolated mistakes. It is a case of **total structural failure** — a defense that never materialized, evidence that never reached the jury, and advocacy subordinated to financial pressures. If convictions can stand under such circumstances, the Sixth Amendment becomes a hollow promise.

For these reasons, the judgment below should be vacated, and the case remanded for further proceedings consistent with the Sixth Amendment's guarantee of effective assistance of counsel.

CONCLUSION

This case represents a profound miscarriage of justice — one that cannot be remedied without the intervention of this Court. Petitioner's **three decades** of public service and economic development in Cleveland were destroyed not by evidence of fraud, but by a prosecution built on **shifting theories, speculation, and prejudice**.

The record is undisputed:

- **No public funds were lost or misappropriated.**
- **The project was completed and remains operational.**
- **All contractors — including Crescent Digital — were paid in full.**
- **Crescent was awarded restitution for work performed *after* the indictment.**
- **AM Higley was overpaid by more than $400,000.**
- **NEON continued paying Petitioner after indictment — including up to the day before self-surrender (14 Months after the conviction).**
- **Petitioner remains a managing member (on record) of the development entity and is still owed development fees.**

Yet despite these facts, Petitioner was convicted of wire fraud — not for falsifying invoices, stealing money, or abandoning the project, but for **exercising discretion granted by contract and directed by the project architect and City of Cleveland.**

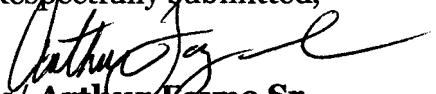
United States v. Arthur Fayne, No. 24-3262

If the decision below is allowed to stand, prosecutors nationwide will be empowered to criminalize **routine project-management decisions**, chilling participation in public-private partnerships, deterring investment in underserved communities, and undermining public trust in the justice system.

Only this Court can restore the doctrinal boundaries of federal fraud law, reaffirm the constitutional guarantees of **due process** and **effective counsel**, and make clear that **prosecutorial discretion cannot substitute for proof beyond a reasonable doubt.**

Petitioner respectfully asks that this Court grant the writ.

Respectfully submitted,



/s/ **Arthur Fayne Sr.**
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Dated: December 28, 2025

PRAYER FOR RELIEF

For the reasons set forth above — including the Sixth Circuit's conflicts with this Court's precedents in *Kousisis*, *Ciminelli*, and *Lagos*; the government's shifting theories and contradictory positions; the exclusion of critical forensic evidence; the improper resurrection of the "right-to-control" doctrine; the erroneous expansion of the MVRA; pervasive prejudicial error; and the structural breakdown of the adversarial process — **Petitioner respectfully prays that this Honorable Court:**

1. **Grant this Petition for a Writ of Certiorari** to review the judgment of the United States Court of Appeals for the Sixth Circuit entered May 21, 2025;

2. **Reverse the decision below** and clarify the proper limits of 18 U.S.C. § 1343 and the MVRA, reaffirming that contractual discretion, delayed payments, subjective expectations, or business judgments cannot be transformed into federal felonies absent proof of a knowing and intentional misrepresentation and actual property deprivation;

3. **Remand the case for further proceedings** consistent with this Court's precedents in *Kousisis*, *Ciminelli*, and *Lagos* — or, in the alternative, **dismiss the indictment outright**; and
4. **Grant such other and further relief** as this Court deems just and proper in the interests of justice and the integrity of federal criminal law.

United States v. Arthur Fayne, No. 24-3262

AFFIDAVIT OF PETITIONER

28 U.S.C. § 1746 – Unsworn Declaration Under Penalty of Perjury

I, **Arthur Fayne Sr.**, declare under penalty of perjury that:

1. I am the Petitioner in this matter and the author of the foregoing Petition for a Writ of Certiorari.
2. I have reviewed the petition and the exhibits identified in the Appendix. To the best of my knowledge, information, and belief, the facts stated herein are true and correct.
3. This petition accurately reflects the record below, including trial and sentencing transcripts, admitted and proffered exhibits, and relevant filings.
4. This petition is submitted in good faith and without any improper purpose.

Executed on **December 28, 2025**.

/s/ **Arthur Fayne Sr.**

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