

No. 26-349

IN THE
Supreme Court of the United States

SAMUEL BANKMAN-FRIED,
Petitioner,
v.
UNITED STATES,
Respondent.

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

**BRIEF OF JOHN J. DONOHUE, IAN AYRES,
AND ERIC TALLEY AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE

Amici curiae John J. Donohue, Ian Ayres, and Eric Talley are law professors with Ph.D.s in economics whose research addresses the intersection of law, economics, and empirical legal studies.¹

Professor Donohue is the C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School, a Research Associate of the National Bureau of Economic Research, and a Senior Fellow at the Stanford Institute for Economic Policy Research. Professor Ayres is the Oscar M. Ruebhausen Professor of Law at Yale Law School, as well as a professor in Yale's School of Management and School of Public Health. They have both spent the past several years following the FTX bankruptcy and the criminal prosecution of petitioner and have each previously written about this case. See John J. Donohue, *The American Legal System Indicted: The Troubling Story of the FTX Bankruptcy and Prosecution of Sam Bankman-Fried* (May 22, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6815418; John J. Donohue & Ian Ayres, *A Tale of Two Financial Collapses* (Stanford Pub. L. Working Paper, Oct. 11, 2025), <https://ssrn.com/abstract=5676142>; Ian Ayres & John J. Donohue, *FTX Was Never Really*

¹ No counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or person other than amici curiae, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici Donohue and Ayres are friends and colleagues of the parents of Bankman-Fried. Amici notified counsel for the United States and for Bankman-Fried of their intent to file this memorandum on October 5, 2026, in compliance with Rule 37.2.

Bankrupt, Project Syndicate (Jan. 26, 2024), <https://www.project-syndicate.org/commentary/ftx-never-really-bankrupt-can-make-creditors-and-customers-whole-by-ian-ayres-and-john-donohue-2024-01>; Ian Ayres, *A Miscarriage of Justice?*, Balkinization (May 7, 2026), <https://balkin.blogspot.com/2026/05/a-miscarriage-of-justice.html>.

Professor Talley is the Marc & Eva Stern Professor of Law and Business at Columbia Law School, Co-Director of the Ira M. Millstein Center for Global Markets and Corporate Ownership, and a Research Member of the European Corporate Governance Institute.

Amici's analysis in this case rests on their independent professional judgment — grounded collectively in years of research and teaching in contracts, corporate finance, and criminal law, and in familiarity with the record in the FTX case — which leads to two conclusions.

First, the proceedings below reflect exactly the kind of evidentiary distortion that Question 1 of the petition asks this Court to address. Second, the real-world stakes of getting that question right in this case are enormous. Among the critical points lost in the government's blizzard of false assertions that petitioner lost billions of dollars of customer money — assertions petitioner was prohibited from refuting with evidence — was petitioner's claim that the loans in question were contractually permitted under FTX's Terms of Service, to which all customers assented as a precondition for using the exchange. This claim, if credited, would defeat the government's allegation that the funds were misappropriated.

Petitioner is not challenging the Second Circuit’s construction of the wire fraud statute, 18 U.S.C. § 1343, or this Court’s holding in *Kousisis v. United States*, 605 U.S. 114 (2025), that economic loss is not an element of the offense of fraudulent inducement. Amici write instead for a more limited purpose. Drawing collectively on their expertise in contract law, corporate finance, and criminal law, amici believe, based on the trial record and their own familiarity with the operation of margin exchanges, the standard terms of service such exchanges use, and the payment-processing arrangement that accounted for most of the IOU that Alameda accumulated to FTX in this case, that petitioner is likely correct that the transfers of funds at the core of the government’s fraud prosecution were lawful. At a minimum, their legality was sufficiently ambiguous that petitioner, not a lawyer himself and relying on advice of counsel, could well have believed in good faith that they were legal. In considering whether to grant review, amici urge the Court to weigh the very real possibility that a 25-year prison sentence, with an \$11 billion forfeiture order on top of it, has been imposed on an innocent defendant.

SUMMARY OF ARGUMENT

Amici write in support of Question 1 of the petition and urge the Court to grant review for two purposes. The first is to underscore petitioner’s argument that the false narrative of massive losses that dominated the trial overwhelmed the jury’s deliberations, obscuring the central weakness of the government’s case. This argument does not merely

raise an abstract concern about what evidence is relevant to prove a criminal fraud charge and what causes “unfair prejudice,” but instead rests on solid empirical ground. Decades of research on juror decision-making — most powerfully synthesized in the scholarship of Professor Dan Simon of the University of Southern California on coherence-based reasoning — demonstrate that jurors facing complex, technical evidence resolve their uncertainty by constructing a single, emotionally and narratively coherent account of what happened, and then reinterpret ambiguous or conflicting evidence to fit that account. Feeding jurors a one-sided false narrative of multi-billion-dollar losses is close to a textbook illustration of the mechanism Professor Simon’s research identifies as most likely to produce an inaccurate verdict.

The second is to bring to the Court’s attention the fatal weakness in the government’s case, which was swept under the rug in the blizzard of false claims about massive losses. That fatal weakness materially raises the stakes of getting Question 1 right for this defendant.

The Second Circuit decision below, written after *Kousisis* was decided, relied on *Kousisis* to affirm the government’s argument and trial court’s ruling that the alleged fraud was complete the moment the defendant “misappropriated” customer funds. *United States v. Bankman-Fried*, 179 F.4th 104, 117 (2d Cir. 2026). Under this view, everything that happened after that moment, including whether customers were made whole, was legally irrelevant to establishing guilt. But the principal “evidence” put before the jury to support the allegation of misappropriation over the

course of a four-week trial consisted of statements elicited from eight government witnesses that in their subjective opinions the loans in question seemed “wrong,” “inappropriate,” or must constitute “theft,” because the money “belongs to other customers of FTX.”² None of them could recall ever having read the Terms of Service that governed the rights of FTX to lend out funds that had been deposited by customers on the FTX exchange.³

Whether the funds in question *were* misappropriated is not appropriately addressed by such lay opinions; rather, the answer lies in the first instance in the contract between FTX and its customers — the Terms of Service to which every customer had to assent before opening an account on the exchange. The only government witness who testified concerning the meaning of the Terms of Service — Can Sun, the General Counsel of FTX International who had helped draft them — conceded that Section 16.4 of the Terms of Service allowed FTX to claw back funds from margin customers to cover losses in other margin customers’ accounts if necessary.⁴

² “Tr.” refers to the trial transcript in *United States v. Bankman-Fried*, No. 22-cr-673 (LAK) (S.D.N.Y.); “GX” and “DX” refer to the government’s and the defense’s trial exhibits, respectively. *See, e.g.*, Tr. 159, 186, 351, 354–55, 376, 381, 438, 502–03, 654, 658, 848, 850, 1366–67.

³ *Id.*

⁴ Tr. 1917–18, 1922. Sun, who was testifying under a non-prosecution agreement, went on to volunteer his lay opinion, “based on, you know, my conversations with Sam, conversations with other management, conversations with the finance team, FTX’s general standing in the industry, our regulatory

The trial court dismissed the Terms of Service as an “idle communication” not relevant to a criminal wire fraud case, and declined to instruct the jury on their legal significance in resolving the misappropriation charge.⁵ As discussed below, its conclusion that the Terms of Service were irrelevant to the allegation of fraud is based on a fundamental legal misunderstanding of the law of fraud. Had the narrative of this case not been completely dominated by false assertions of gargantuan losses, amici believe it is unlikely that the jury would have convicted petitioner on seven counts of fraud and conspiracy carrying a potential sentence of 110 years, without at a minimum receiving clarifying instructions on the legal requirements for misappropriation.

Every fraudulent-inducement case in the wake of *Kousisis* poses the risk that representations the government makes about losses, whether true or (as in this case) false, will overwhelm the jury’s assessment of evidence that — unlike losses — is actually relevant to the determination of guilt under a fraudulent-inducement theory.

Amici are not experts in English law, which governed the FTX exchange as set forth in the Expert Disclosure of Petitioner’s expert on English law,⁶ Lawrence Akka. They are experts in the fundamental principles of contract law in the U.S., which do not

requirements, Sam’s public statements,” that the loans in question were wrong. Tr. 1904.

⁵ Tr. 2853–54.

⁶ Expert Disclosure of Lawrence Akka, *United States v. Bankman-Fried*, No. 22-cr-673 (LAK) (S.D.N.Y. Aug. 28, 2023), ECF No. 236-1 (“Akka Disclosure”).

differ in relevant respects from Akka’s assessment of English law concerning the proper interpretation of the Terms of Service. On the basis of their expert knowledge and familiarity with the record in this case, amici conclude that there is a very substantial probability that the loans in this case were authorized — that is, that no crime of misappropriation was committed here. If that is true, an innocent young man is serving a 25-year sentence and, because of the \$11 billion forfeiture order against him, will be consigned to poverty for the rest of his natural life after his release.

ARGUMENT

I. The Psychological Science of Juror Decision-Making Confirms Why Admitting Loss Evidence in a Fraudulent Inducement Case Is Likely to Result in Extreme Prejudice, Especially When the Defendant Is Barred from Rebutting It.

Once the government elects to proceed on a fraudulent-inducement theory, the offense is complete the moment the defendant induces the deprivation of money or property under materially false pretenses, *see Kousisis*, 605 U.S. at 127 n.5 (a fraud “is complete when the defendant has induced the deprivation of money or property under materially false pretenses”). The petition explains why, in such prosecutions, evidence of a scheme’s ultimate financial consequences should not be allowed to distort the jury’s assessment of whether that inducement occurred. Here the government itself embraced that

principle, telling the jury that petitioner “completed the fraud when he secretly moved funds from FTX to Alameda, regardless of whether Alameda was solvent, insolvent, or merely illiquid.”⁷ Despite this, over the four-week trial, the government hammered home to the jury that FTX’s customers suffered billions of dollars in losses. Indeed, references to the billions in losses figure prominently in the government’s filings defending the convictions in this case.⁸ Amici write to

⁷ Brief for the United States of America at 29–30, *United States v. Bankman-Fried*, No. 24-961 (2d Cir. Dec. 13, 2024), Dkt. No. 50.1 (“Gov’t CA2 Br.”).

⁸ For example, the opening sentence of the Statement of Facts in the government’s brief in the Second Circuit emphasizes the loss of billions: “Bankman-Fried was convicted of orchestrating one of the largest frauds in history, stealing more than \$8 billion from the customers of his cryptocurrency exchange, FTX.com.” Gov’t CA2 Br. at 2. The brief continues to hammer this point, saying “Alameda had borrowed approximately \$8 billion of customer money from the exchange that could not be repaid.” *Id.* at 5. Of course, it is now known that under FTX’s confirmed chapter 11 plan, customers have recovered more than the full petition-date value of their allowed claims. See PR Newswire, *FTX Recovery Trust to Distribute More than \$5 Billion to Creditors in Second Distribution on May 30, 2025* (May 15, 2025), <https://www.prnewswire.com/news-releases/ftx-recovery-trust-to-distribute-more-than-5-billion-to-creditors-in-second-distribution-on-may-30-2025-302456976.html>; PR Newswire, *FTX Recovery Trust to Distribute Approximately \$1.6 Billion to Creditors in Third Distribution on September 30, 2025* (Sept. 19, 2025), <https://www.prnewswire.com/news-releases/ftx-recovery-trust-to-distribute-approximately-1-6-billion-to-creditors-in-third-distribution-on-september-30--2025--302561856.html>; PR Newswire, *FTX Recovery Trust to Distribute Approximately \$2.2 Billion to Creditors in Fourth Distribution on March 31, 2026* (Mar. 18, 2026), <https://www.prnewswire.com/news-releases/ftx-recovery-trust-to-distribute-approximately-2-2-billion-to->

explain why this framing may well have caused a wrongful conviction.

For more than two decades, Professor Dan Simon has studied how legal fact-finders — including jurors — actually process evidence. Professor Simon’s foundational work, together with his recent theoretical synthesis with Professor Stephen Read, describes and empirically documents coherence-based reasoning: rather than weighing each piece of evidence independently, decision-makers confronting a complex and ambiguous record unconsciously construct a single, internally coherent narrative that “makes sense” of the evidence as a whole, through a process of parallel constraint satisfaction. Dan Simon & Stephen J. Read, *Toward a General Framework of Biased Reasoning: Coherence-Based Reasoning*, 20 Persp. on Psychol. Sci. 421, 424–30 (2025). Once that narrative begins to cohere, it distorts how the fact-finder perceives every other piece of evidence that follows: evidence consistent with the emerging narrative is inflated in perceived strength, while evidence inconsistent with it is discounted or disregarded. *Id.*; Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. Chi. L. Rev. 511, 519–25 (2004). This dynamic operates most powerfully — and most invisibly to the fact-finder — precisely when the underlying facts are technical, ambiguous, or difficult to evaluate on their own terms. Dan Simon, *In Doubt:*

creditors-in-fourth-distribution-on-march-31--2026--302717707.html; PR Newswire, *FTX Announces Fifth Distribution of Approximately \$900 Million to Creditors on July 31, 2026* (July 17, 2026), <https://www.prnewswire.com/news-releases/ftx-announces-fifth-distribution-of-approximately-900-million-to-creditors-on-july-31-2026-302828726.html>.

The Psychology of the Criminal Justice Process 33–49, 174–77 (Harvard Univ. Press 2012). Few fact patterns fit that description better than a multi-billion-dollar cryptocurrency margin-lending case.⁹

II. If FTX’s Conduct Was Contractually Authorized, Then No Crime Occurred.

A. FTX’s Terms of Service, properly understood, likely supplied a complete defense to the charge that petitioner misappropriated customer funds.

The debt Alameda owed to FTX came from two unrelated sources. The two present different but equally serious challenges to the government’s misappropriation theory.

The first source was loans FTX made to Alameda from funds customers had deposited on the exchange. Although the government’s case focused almost exclusively on these loans, they represented only a small fraction of the debt Alameda owed to FTX at the end, and none of the liquidity shortfall.

The second source was an unintended consequence of a payment-processing arrangement FTX entered into with Alameda before FTX was able

⁹ We asked Professor Simon whether Part I of our amicus brief correctly captures the nature of his important work on jury decision-making and its relevance to this case, and he concurred with our assessment, stating that the problem of prejudice in this case was particularly acute with the prosecution blanketing the jury with evidence of losses that were effectively irrelevant under the decision in *Kousisis*.

to open its own bank accounts. The liability that accrued as a result of that arrangement accounted for the bulk of the funds Alameda owed to FTX in the last year of its existence, and *all* of the liquidity shortfall.

The government essentially presented no evidence or legal argument that either source of funds constituted a misappropriation of customer assets, beyond its own assertions and the lay opinions elicited from its witnesses, five of them testifying pursuant to cooperation and other agreements with the government, that the arrangements just seemed “inappropriate” or “wrong” to them.¹⁰ Based on amici’s knowledge of the facts and familiarity with conventional industry practice and the relevant law, amici believe it is overwhelmingly likely that neither arrangement constituted a misappropriation of funds. Although the dollar amounts were large in this case, arrangements of this kind are unremarkable by the standards of margin exchanges and payment-processing agreements. Judging these arrangements under U.S. law, amici believe that both were authorized under FTX’s Terms of Service. Lawrence Akka, the defense’s expert on English law, reached the same conclusion under English law with respect to fiat currency.¹¹ Given that petitioner could have had, at a minimum, a reasonable belief that this was so, amici also believe that the weak circumstantial evidence the government offered on *mens rea* — all of it from witnesses with their own self-interest in aiding the

¹⁰ Tr. 186, 1366-67.

¹¹ Akka Disclosure ¶¶ 26-27.

government — did not come close to satisfying the government’s burden of proof.

1. Borrowing funds from the FTX margin customers.

Alameda borrowed on-exchange funds through its user account (*info@*) using two different legal forms. The first were loans through FTX’s margin lending program, which was used by all FTX margin customers. The second were loans extended under a Letter of Credit, an accommodation FTX made for its largest customers. In both cases, the loans were funded from the pooled assets FTX margin customers had deposited on the exchange and recorded as liabilities on Alameda’s balance sheets.

Despite the government’s sensationalist trumpeting of Alameda’s \$65 billion (nominal) credit limit (a number arbitrarily picked to avoid a technical problem¹²), the total Alameda borrowed from both sources combined averaged \$2.4 billion over the course of 2022, and was never higher than \$5 billion.¹³ The loans were overcollateralized with on-exchange assets (that is, Alameda’s user account never went negative), with an average surplus of \$2 to \$3 billion

¹² Tr. 397–98.

¹³ DX-1617; *see also* Appendix Volume 5 of 5 at A-1297, *United States v. Bankman-Fried*, No. 24-961 (2d Cir. Dec. 13, 2024), Dkt. No. 34.1; Tr. 397 (Gary Wang estimated total borrowing through Alameda’s user account at \$3 billion). The “credit limit” was never intended to — and was never used to — increase Alameda’s borrowing.

on top of that.¹⁴ When the liquidity crisis hit the first week of November 2022, Alameda was able to repay those loans in full out of its liquid assets.¹⁵

FTX's treatment of the on-exchange loans to Alameda from pooled customer deposits on the exchange was consistent with FTX's Terms of Service. FTX was not a conventional brokerage like Vanguard or Fidelity that held all customer assets in segregated, non-margin accounts. For customers who opted into its margin-trading program, it operated as a margin exchange. The core commercial function of a margin exchange is to let margin customers finance transactions in significant part with assets contributed by other customers. Such margin lending programs are a standard feature on non-U.S.-based crypto exchanges.¹⁶

For these purposes, FTX's Terms of Service defined "assets" to include both digital assets and fiat currency.¹⁷ To allow FTX to perform that function,

¹⁴ Affidavit of Daniel C. Chapsky, Former Head of Data Science at FTX, ¶¶ 24–30, *United States v. Bankman-Fried*, No. 22-cr-673 (LAK) (S.D.N.Y.), ECF No. 583-1.

¹⁵ Gary Wang, testifying for the government, acknowledged that none of Alameda's liquidity shortfall was attributable to its on-exchange borrowing. Tr. 527–32.

¹⁶ ECOS, *Crypto Margin Trading Explained: Leverage, Risks, and Strategies* (Mar. 16, 2026), <https://ecos.am/en/blog/crypto-margin-trading-explained-leverage-risks-and-strategies>.

¹⁷ FTX Terms of Service §§ 2.4.1, 16 (May 13, 2022), https://downloads.coindesk.com/cd3/FTX_Terms_of_Service.pdf. Under the Terms of Service, FTX was also permitted to lend out *spot customers'* fiat deposits. *See id.* § 8.3; Akka Disclosure ¶ 28(g). In fact, the *only* customer assets FTX was not permitted to lend out under the Terms of Service were spot customers'

margin customers all agreed to the margin provisions of FTX's Terms of Service, which disclosed in plain English that a customer's account balance "may be subject to clawback due to losses suffered by other Users" — and that this could occur even absent any liquidation or loss in that customer's own account.¹⁸ As amicus Ayres has explained in a detailed legal analysis,¹⁹ that clawback provision is coherent only if margin customers' assets could be, and were, made available to other account holders, including Alameda; a customer cannot be exposed to losses suffered by others unless those others were using pooled assets with the customer's contractual consent. Petitioner testified that he understood § 16.4 and other provisions of FTX's Terms of Service to permit Alameda to borrow pooled assets from other margin customers.²⁰

None of this is unusual. Section 16.4's pooled-clawback structure is precisely what distinguishes a margin exchange — where margin customers agree to put assets at one another's disposal in exchange for the ability to borrow — from a simple custodial account, and it is why other cryptocurrency margin exchanges have similar clawback provisions.

FTX's Terms of Service were expressly governed by English law.²¹ Lawrence Akka — an

digital assets. See FTX Terms of Service § 8.2.6. The government introduced no evidence that such assets were ever lent out.

¹⁸ FTX Terms of Service § 16.4.

¹⁹ Ayres, *A Miscarriage of Justice?*, *supra*.

²⁰ Tr. 2195.

²¹ FTX Terms of Service § 38.11.

English barrister and commercial arbitrator — offered his expert opinion that FTX’s treatment of fiat currency deposits was permissible. As Akka was prepared to testify, the Terms of Service “did not contain a declaration of trust over any fiat currency, but gave rise only to a contractual creditor-debtor relationship.”²² In other words, FTX was required to repay all debts owed to its customers, but nothing in the contractual relationship constrained FTX’s interim use of deposited fiat funds. Donohue & Ayres, *A Tale of Two Financial Collapses*, *supra*, at 4 (quoting Akka Disclosure ¶ 12). As Akka stated unequivocally, “There is no provision [in the Terms of Service] requiring a customer’s fiat currency to be ring-fenced, or held in a separate account.”²³ As noted above, under FTX’s Terms of Service, margin customers’ *digital* assets were treated in the identical fashion.²⁴ That understanding of margin customers’ deposits tracks the ordinary treatment of banks and similarly structured intermediaries under American law: a bank does not hold a depositor’s specific dollars in a vault but lends and invests them while remaining obligated to return equivalent value on demand. Donohue, *American Legal System Indicted*, *supra*, at 4.

A pooled-loss structure — referred to as socialized losses or clawbacks — is a common feature of cryptocurrency derivatives exchanges. Where a trader’s losses exceed the collateral posted and neither

²² Akka Disclosure ¶ 12.

²³ Akka Disclosure ¶ 28(h).

²⁴ FTX Terms of Service §§ 2.4.1, 16.

liquidation nor the insurance fund covers the resulting deficit, such exchanges allocate the shortfall to profitable traders, whether by reducing their session gains or by closing their positions. In traditional futures markets, by contrast, a futures commission merchant holds an enforceable claim against a defaulting customer and can pursue that customer's other assets. That option is far less available to a crypto exchange, both because the collateral is a bearer asset and because the user base is dispersed and largely offshore. Consequently, as a practical matter, the exchange cannot recover beyond the margin already posted, and the deficit must be absorbed somewhere else within the system.

For example, Deribit has maintained a “socialised-loss mechanism” as a required feature since it launched its crypto derivatives exchange in 2016.²⁵ Similarly, Crypto.com provides that when its insurance fund is depleted, any uncovered loss will be socialized among the winning traders.²⁶ OKEx (now OKX) operated a “full account clawback” system that

²⁵ Deribit Support, *Deribit Exchange Rulebook — Deribit FZE* (Applicable as of Aug. 13, 2026), <https://support.deribit.com/hc/en-us/articles/25944555524125-Deribit-Exchange-Rulebook-Deribit-FZE> (socialised loss mechanism is “a fundamental, non-negotiable feature of the Exchange,” to which members agree as a condition of membership).

²⁶ Crypto.com, *Insurance Fund and Socialised Loss Mechanism* (Jul. 7, 2022), <https://help.crypto.com/en/articles/4894442-insurance-fund-and-socialised-loss-mechanism> (“[w]hen the Insurance Fund is depleted, any uncovered loss will be socialized among the winning traders at the end of the trading session,” pro rata to the size of their profit).

in July 2018 reduced profitable futures traders' weekly gains to absorb an unfilled liquidation.²⁷ It characterized the outcome as its socialized-loss mechanism working as intended.²⁸

The trial court dismissed FTX's Terms of Service as irrelevant to whether the funds in question were misappropriated, characterizing the agreement as "some idle communication that was headed terms of service," and declined to instruct the jury on their legal significance in resolving the misappropriation charge.²⁹ In fact, under either English or American law, whether FTX's Terms of Service authorized the transfers to Alameda is *the* central legal question in the case.

The governing terms of the relevant contractual arrangement between the parties ordinarily determine whether a defendant's use of another's funds is authorized. *See United States v. Gil*, 297 F.3d 93, 98, 107–08 (2d Cir. 2002) (treating whether the defendant was contractually or otherwise authorized to engage in the challenged billing practice as central to mail-fraud liability); *United States v. Sullivan*, 118 F.4th 170, 199–200 (2d Cir. 2024) ("[T]here can, of course, be no interference with the owner's rights to the property if the owner has given permission to the act in question." (quoting *Bascuñán v. Elsaca*, 927

²⁷ OKX, *Regarding the Forced Liquidation Incident on Jul 31, 2018* (Aug. 3, 2018), <https://www.okx.com/support/hc/en-us/articles/360011941512-Regarding-the-Forced-Liquidation-Incident-on-Jul-31-2018>.

²⁸ *Id.* ("When the insurance fund cannot cover the total margin call losses, a full account clawback occurs.").

²⁹ Tr. 2853–54.

F.3d 108, 119 (2d Cir. 2019))). Notably, the prosecution moved unsuccessfully before trial to bar admission of § 16.4 altogether, a choice suggesting that it viewed the terms-of-service defense as a genuine threat to its case. Donohue, *American Legal System Indicted*, *supra*, at 5; Gov’t Motion in Limine at 40–41, *United States v. Bankman-Fried*, No. 22-cr-673 (LAK) (S.D.N.Y. Aug. 14, 2023), ECF No. 204.

2. Payment-processing arrangement.

The bulk of Alameda’s liability to FTX that accrued over the last year of its existence, as well as the entire \$8 billion liquidity shortfall at the end, had nothing to do with Alameda’s borrowing off of the exchange through its user account, notwithstanding that the government spent virtually all of its time on that at trial. It was rather the unintended consequence of an unrelated payment-processing arrangement that FTX set up with Alameda in the early years of its existence.³⁰

When FTX was formed in 2020, because of regulatory uncertainty surrounding crypto in the US, it was unable to obtain bank accounts in its own name to process customer fiat deposits.³¹ As a stop-gap measure until it could get its own accounts, at the suggestion of Daniel Friedberg, the chief regulatory officer of FTX International, FTX contracted with a number of third-party payment agents, including Alameda, to process FTX customers’ fiat deposits and

³⁰ Tr. 527-32 (testimony of Gary Wang).

³¹ Tr. 2186-87.

withdrawals on FTX's behalf.³² The payment processing arrangement between FTX and Alameda mirrored the function that PayPal, Stripe, and countless other third-party payment agents perform every day for merchants who cannot or do not hold customer funds directly. Friedberg, along with Fenwick & West, FTX's principal outside law firm, incorporated a subsidiary of Alameda, North Dimension, to serve as payment processor, corresponded with banks about opening accounts for it, and drafted the payment agent agreement.³³ Tellingly, it was FTX — not Alameda — that the agreement protected: as a creditor, FTX had a claim on all of Alameda's assets sufficient to cover any balance Alameda owed under the arrangement, callable at any time. In addition, Alameda was required to pay interest to FTX on the positive balance of funds that it held for FTX's benefit.

The substantial paper liability this arrangement generated for Alameda by the end was not the product of any loan Alameda drew down from exchange funds, and no one at FTX or Alameda ever made a decision to “borrow” those funds. It was the automatic byproduct of the individual decisions made by FTX customers about how much cash to deposit or withdraw from the exchange, using Alameda as an intermediary. Each time a customer deposited additional funds to be credited to their account on FTX, it automatically generated an IOU from Alameda to FTX, reflecting the incremental cash

³² Tr. 2187.

³³ Tr. 2184-86.

Alameda was holding for FTX. Conversely, each time Alameda fronted a customer's cash withdrawal on FTX's behalf, the IOU ran the other way, reducing what Alameda owed.³⁴ So long as deposits and withdrawals processed through the arrangement roughly offset one another, the net balance stayed close to zero. That was true for the first two years of the arrangement. Indeed, the balance was actually *net negative* for a time in 2021 because withdrawals substantially outpaced deposits, with the consequence that Alameda was advancing customer withdrawals on behalf of FTX. That is to say, *Alameda* was loaning money to *FTX*, not the other way around. That is hardly the state of affairs one would expect if this arrangement had been set up to siphon off customer funds for the benefit of Alameda.

But as the crypto market took off and FTX's customer base grew dramatically in the second half of 2021, the net flow tipped decisively toward deposits, increasing the paper balance Alameda owed FTX — not because Alameda was taking out loans from FTX, but because more cash was flowing in through the payment-processing channel than was flowing out. The trajectory of the balance sheet bears this out: the balance rose from under \$1 billion in early 2021, to roughly \$4 billion by the summer of 2021, to approximately \$9 billion by early 2022 — growth that tracks FTX's rapid expansion in customer deposits over that period, not any change in Alameda's borrowing conduct.³⁵ That is precisely how a payment

³⁴ Tr.656 (Ellison).

³⁵ GX-1004.

processor's ledger works: when Stripe or PayPal has not yet settled accounts with a merchant, its books reflect a running balance owed, not a loan either side elected to take out.

When the run on the exchange occurred in November 2022, it was the balance in the payment-processing account, *not* funds Alameda had borrowed off the exchange, that caused the \$8 billion liquidity shortfall. This was confirmed by Gary Wang, the FTX co-founder whose cooperation agreement gave him every incentive to assist the prosecution. He conceded on cross-examination that the payment-processing arrangement and FTX's borrowing off the exchange "had nothing to do with each other," and that the liquidity shortfall that consumed FTX in November 2022 was attributable solely to the former, not the latter.³⁶ In other words, on the government's own proof, the conduct that actually produced the shortfall was not the conduct the prosecution devoted most of its case to portraying as theft — that is, on-exchange loans to Alameda through its user account.

That concession never reached the jury as anything more than a passing exchange buried in a four-week trial. On a fair reading of this record, it should have been the headline. But one presumes the government was not eager to surface it, and with good reason. There was nothing secret, nor unusual, about the payment-processing arrangement. None of the many FTXers who were aware of the arrangement, including the lawyers who drafted the payment-processing agreement, ever raised questions about its legality.

³⁶ Tr. 527–32.

The government offered no argument — based in opinion, fact or law — that Alameda “misappropriated” customer funds via the payment-processing arrangement, and it is hard to imagine what argument it could have offered, based on its stated position that petitioner “completed the fraud when he secretly moved funds from FTX to Alameda.” The funds at issue in the payment-processing arrangement were voluntarily deposited by customers into an Alameda bank account clearly identified as such on FTX’s payment portal. There was no requirement under the payment agent agreement that the funds in question be sequestered from Alameda’s other funds and no restriction on Alameda’s right to invest them. Alameda’s sole obligation was to turn over assets equal to the paper liability owed to FTX whenever FTX requested them. FTX requested them as soon as the run on the exchange began, and Alameda immediately complied. When, in this sequence of events, did Alameda “misappropriate” customer funds, and by virtue of what actions? The government was silent on all these questions.

None of this forecloses the possibility that FTX’s margin-lending and payment-processing practices, even if contractually authorized, exposed the company to civil liability — for example, if Alameda borrowed excessive amounts off the exchange relative to the margin program’s terms, or if the accumulated payment-processing balance should have been reconciled sooner. The government never made either claim. Here, it is worth noting that FTX was founded and managed by four inexperienced young people under the age of 30 and grew at an

exponential rate. It is a fair surmise that they were overextended on a number of fronts. Petitioner was not a lawyer and relied on FTX's sizable legal staff to draft these agreements and interpret them. He took responsibility from the start for failing to monitor the accumulating balance in the payment-processing account or put adequate risk management safeguards in place. Perhaps those failures gave rise to a civil claim for negligence against petitioner and other top leadership at FTX. But civil liability for negligence and criminal culpability are not the same thing. In a criminal system that requires proof of a guilty mind and factual guilt beyond a reasonable doubt, that distinction is decisive.

B. The government's false and misleading evidence of loss in all likelihood erroneously swayed the jury in this case.

Understood against the body of research set forth in Part I, the trial court's rulings that petitioner challenges did not merely create a generic risk of "unfair prejudice" of the kind that arises in the ordinary case. They handed the jury a simple, emotionally powerful, false and legally irrelevant narrative — that customers were promised safety, that petitioner secretly moved their money, and that customers consequently lost billions of dollars — while forbidding petitioner from introducing evidence that would have disproved it. Coherence-based reasoning predicts precisely what this record suggests occurred: once jurors accepted the "billions lost" narrative supplied by the government's evidence, that

narrative would predictably have colored how jurors assessed every other piece of evidence in the case, including the technical, contested, and highly relevant evidence concerning FTX’s right to loan pooled margin customer assets to other customers under the Terms of Service, as discussed in Part II.A above. A jury operating under a false but internally coherent belief that petitioner’s conduct caused billions of dollars in real losses is not well positioned to carefully parse whether that conduct was, in fact, authorized by contract.

In amici’s legal judgment, the government’s failure to prove that the transactions in question misappropriated customer assets gave the jury no legal basis for concluding that the petitioner misappropriated customer assets. Something filled that void. It is overwhelmingly likely that that “something” was the blizzard of one-sided, false, legally irrelevant assertions of billions of dollars in customer losses.

Amici believe that the prejudice introduced in this case resulted in the conviction of a defendant who is very likely innocent. But the danger that the government will have it both ways on the issue of losses — claiming massive losses without having to prove them — is a general one opened by this Court’s decision in *Kousisis*, and it calls for clarification from this Court. Amici therefore support review of Question 1 of the petition both to clarify the law and to cure an injustice.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, amici curiae respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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